

EXPLANATORY MEMORANDUM

Tobacco Products Control Amendment Bill 2017

Introduction

The Tobacco Products Control Amendment Bill 2017 (the Bill) amends the *Tobacco Products Control Act 2006* (the Act). In particular the Bill:

- provides various measures to protect children and young people from exposure to tobacco products;
- improves and strengthens existing provisions in relation to the retail sale of tobacco products; and
- simplifies and streamlines administrative arrangements for tobacco licences.

Clause 1: Short title

This clause provides that the short title of the Bill is the *Tobacco Products Control Amendment Act 2017*.

Clause 2: Commencement

This clause provides for the commencement of the Bill as follows:

- sections 1 and 2 commence on the day on which the Bill receives Royal Assent (***assent day***);
- section 4 commences on the day after the period of 24 months beginning on assent day; and
- the rest of the Bill commences 6 months after assent day.

The reason for delaying the commencement of clause 4 of the Bill is explained below.

Clause 3: Act amended

This clause provides that the Bill amends the Act.

Clause 4: Section 18A inserted

This clause provides for a new section 18A to be inserted into the Act.

Compliance activities by the Department of Health have demonstrated that younger sales staff are more likely to sell tobacco products to people under 18 years of age. To address this issue it is proposed to insert a new section 18A into the Act to prohibit the holder of a retailer's licence from authorising or allowing a person who

has not reached 18 years of age to sell a tobacco product. The penalties for contravention of section 18A will be as follows:

For an individual –

(a) for a first offence, a fine of \$10 000;

(b) for a second or subsequent offence, a fine of \$20 000;

For a body corporate – ;

(a) for a first offence, a fine of \$40 000;

(b) for a second or subsequent offence, a fine of \$80 000.

It is noted that clause 2 of the Bill delays the commencement of this clause until the day after the period of 24 months beginning on assent day. This will provide industry with the time required to transition to the new arrangements.

Clause 5: Sections 21A and 21B inserted

This clause provides for new sections 21A and 21B to be inserted into the Act.

Cigarette packs that can be split into portions, and fruit and confectionary flavoured cigarettes are known to be particularly appealing to children. The Government agreed to ban the sale of fruit and confectionary flavoured cigarettes at the Ministerial Council on Drug Strategy and Australian Health Ministers' Conference in May 2008. Western Australia is the only jurisdiction that has not yet banned fruit and confectionary flavoured cigarettes.

Proposed new section 21A prohibits the holder of a licence to sell, authorise or allow to be sold, cigarettes in a package that is designed or capable of being split into 2 or more portions containing fewer than 20 cigarettes. The penalties for contravention of section 21A will be as follows:

For an individual –

(a) for a first offence, a fine of \$10 000;

(b) for a second or subsequent offence, a fine of \$20 000;

For a body corporate –

(a) for a first offence, a fine of \$40 000;

(b) for a second or subsequent offence, a fine of \$80 000.

Proposed new section 21B prohibits the holder of a licence from selling, or authorising to be sold, a cigarette that has a flavour or aroma of fruit or other flavouring commonly used in confectionary. The penalties for contravention of section 21B will be as follows:

For an individual –

- (a) for a first offence, a fine of \$10 000;
- (b) for a second or subsequent offence, a fine of \$20 000;

For a body corporate –

- (a) for a first offence, a fine of \$40 000;
- (b) for a second or subsequent offence, a fine of \$80 000.

Clause 6: Section 23 amended

This clause amends section 23 of the Act.

Section 22 of the Act requires the holder of a retailer's licence to ensure that a tobacco product, package or smoking implement is not displayed. Section 23 of the Act provides a defence for a specialist retailer who displays tobacco products, packages or implements within the relevant premises. Clause 6 of the Bill amends section 23 of the Act to progressively limit then remove the defence for specialist retailers.

During the first transition period, the existing defence will continue to operate in respect of specialist retailers, though with the addition of a requirement to have a health warning sign displayed immediately adjacent to the display of tobacco products, packages or implements.

During the second transition period, a specialist retailer will be entitled to rely upon the defence only if the display of tobacco products, packages or implements could not be seen from a public place outside the premises, and if a health warning sign was displayed immediately adjacent to the display of tobacco products, packages or implements.

After the end of the second transition period, the defence for specialist retailers will no longer operate and they will be unable to display tobacco products, packages or implements. This outcome ensures that there is a consistent approach to in-store displays across all retailers.

The definition of “specialist retailer” is provided by section 23(1) of the Act. In order to be a specialist retailer a person conducting a business must have, amongst other things, derived at least 80% of the average gross turnover of the business for the financial year 2004 to 2005 from the sale of tobacco products.

The Department of Health has noted that the specialist retailer exemption is increasingly being exploited as a loophole by retailers who may no longer derive 80% or more of their current business from the sale of tobacco products. This clause amends the definition of specialist retailer to include an additional requirement for the business to derive 80% of its average gross turnover from the sale of tobacco products in the most recently ended financial year.

Clause 7: Section 25 amended

This clause amends section 25 of the Act.

The penalties for each of the offences in section 25 of the Act are provided by reference to the general penalty in section 115. This clause amends section 25 of the Act to insert penalties directly into each offence provision rather than by reference to section 115.

The effect of the proposed amendment is to reduce the penalties applicable to the offences provided by section 25 of the Act from \$10,000 for a first offence and \$20,000 for a second and subsequent offence to \$1,000. The offences in section 25 of the Act are considered to be of a lower order than some of the more serious offences provided by the Act, for which a stronger deterrent is required. As such, it is considered appropriate to reduce the applicable penalties.

The prohibition of displays of tobacco products, packages and implements that is provided by section 22(1) of the Act has meant that price boards and tickets are now used extensively in supermarkets, service stations and other retail outlets as a form of promotion. The visibility and prominence given to price boards and tickets is anomalous, given the ban on the display of tobacco products, packages and implements. As a result, clause 7(3) of the Bill proposes to replace section 25(3) of the Act with a requirement to display a health warning sign in close proximity to price boards and tickets. This ensures that smokers, recent quitters and children are provided with a strong visual reminder of the health risks associated with smoking. Retailers who do not use price boards and tickets will not be required to display a health warning sign.

Clause 8: Section 33A inserted

This clause inserts a new section 33A into the Act.

Shopper loyalty reward schemes may encourage the purchase or use of tobacco products. Such schemes have been banned in the Australian Capital Territory, New South Wales, Queensland, South Australia and Victoria.

Proposed new section 33A(1) prohibits a person from establishing or conducting a programme or arrangement under which a gift or other benefit may be obtained by a purchaser of a tobacco product on the basis of the amount or type of the product purchased; or under which the purchaser of goods and services may be entitled to the gift of a tobacco product or any other benefit in relation to a tobacco product.

Proposed new section 33A(2) provides that section 33A(1)(a) does not apply in relation to a programme or arrangement under which a gift or other benefit may be obtained on the sole basis of the method of payment used to purchase a tobacco product. This is to exclude credit card rewards schemes.

Clause 9: Section 38 amended

This clause makes a technical amendment to section 38(3) of the Act. That section contains a cross-reference to section 40(2) of the Act, which is proposed to be amended by clause 11 of the Bill. As a consequence, the cross-reference to section 40(2) is no longer appropriate.

Clause 10: Section 39 amended

This clause amends section 39 of the Act which provides for the issuing and renewing of licences for the sale of tobacco products.

Section 39(2) of the Act prohibits the CEO from issuing a retailer's licence to authorise the sale or supply of tobacco products from temporary premises at an event only if the CEO expects the event to be attended by a significant number of people who have not reached 18 years of age. Events such as sporting and cultural events are of particular appeal to younger audiences, and the sale of tobacco at those events is not consistent with the objectives of the Act. As such, clause 10(1) of the Bill proposes to amend section 39(2) of the Act to prohibit the CEO from issuing a retailer's licence for the purpose of authorising the sale or supply of tobacco products at sporting, cultural and other events.

Clause 10(2) of the Bill inserts a new subsection (7) into section 39 of the Act to streamline the process for dealing with the renewal of tobacco licences. Under the proposed new provision, if an application for the renewal of a licence is made no later than 28 days before the due day (definition inserted by clause 21 of the Bill) and the CEO does not renew or refuse to renew the licence before the due day, the licence continues in force until either 21 days from the day following the due day or the beginning of the day on which the CEO renews or refuses the licence, whichever is the earlier date.

Clause 11: Section 40 amended

Clause 11 of the Bill deletes section 40(2) of the Act and inserts new subsections (2) and (2A), as a consequence of the insertion of section 39(7) by clause 10 of the Bill.

Under the current provisions, the CEO is required to provide notice of a decision to refuse an application for the renewal of a licence 14 days before the day on which the licence expires. As the effect of the insertion of section 39(7) of the Act by clause 10 of the Bill is to extend the period of the licence for up to 21 days past the date of expiry, the notice will now be required to be given within 14 days of the decision and the licence will continue to have effect during that period. These arrangements ensure that the applicant has time to apply to the State Administrative Tribunal for a review of the decision prior to the expiry of the licence.

Clause 12: Section 77 replaced

This clause replaces section 77 of the Act to expand and streamline the process for appointing restricted investigators, based on the models provided by section 122 of the *Food Act 2008* and section 24 of the *Public Health Act 2016*.

Proposed new section 77(1) provides a definition of "enforcement agency" that includes both the CEO and a local government.

Proposed new section 77(2) authorises an enforcement agency (including a local government) to appoint a restricted investigator by instrument in writing. At present, only the CEO can appoint restricted investigators and this is considered unduly burdensome and inefficient. It is appropriate that local governments be authorised to appoint restricted investigators for the purposes of the Act.

Proposed new section 77(3) prohibits an enforcement agency from appointing a person as a restricted investigator unless the agency considers that the person has the appropriate qualifications and experience to perform the functions of a restricted investigator. The agency must also have regard to guidelines issued under proposed new section 77(4).

Proposed new section 77(4) authorises the CEO to issue guidelines that describe the qualifications and experience that are appropriate for a person to be appointed to be a restricted investigator under subsection (2).

Proposed new section 77(5) provides that a person ceases to be a restricted investigator when the period of the person's appointment expires or when the person's appointment is revoked.

Proposed new section 77(6) requires an enforcement agency to maintain a list of restricted investigators appointed by the agency, and to give a copy of the list to the CEO if requested to do so.

Clause 13: Section 78 amended

This clause inserts a new subsection (1A) into section 78 of the Act.

The current practice is to utilise the instrument of appointment to limit the functions of restricted investigators to matters relating to offences under regulations made under section 125 of the Act (smoking in outdoor public places). As it is now proposed that restricted investigators be appointed by an enforcement agency rather than only by the CEO, it is considered appropriate to specify the functions of restricted investigators in the Act itself.

Clause 14: Section 81 amended

This clause amends section 81 of the Act to include provision for identity cards for restricted investigators.

The proposed amendment will require restricted investigators to be issued with identity cards that contain their name, a statement that they are an investigator for the purposes of the Act, a photograph and an expiry date. An obligation is also imposed on a restricted investigator who ceases to be a restricted investigator to return their identity card.

Clause 15: Section 82 amended

This clause amends section 82 of the Act as a consequence of the amendments that are proposed to be made to section 81 by clause 14 of the Bill. The effect of the proposed amendments is to impose on restricted investigators the same obligations to show their identity card as investigators.

Clause 16: Section 92 amended

This clause amends section 92 of the Act.

Amongst other things, section 92(2) of the Act requires things that were taken by an investigator from premises in connection with the prosecution or possible prosecution of an alleged offence to be returned as soon as practicable after the relevant prosecution is completed or discontinued. This aligns with the current content of section 119(1) of the Act which authorises a forfeiture order to be made at the time of conviction only.

Clause 18 of the Bill proposes to amend section 119(1) of the Act to provide a period of 3 months from the date of conviction for a forfeiture order to be made. Clause 16(1) of the Bill provides the necessary consequential amendment to section 92(2) of the Act to require those things that were taken by an investigator to be returned during the period of 3 months beginning on the day the relevant prosecution is completed, unless a forfeiture order is made under section 119 on an earlier date.

Clause 16(2) of the Bill proposes to insert a new subsection (3) into section 92 of the Act to clarify the position in circumstances where a thing was taken by an investigator in connection with more than one alleged offence.

Clause 17: Section 115 amended

This clause amends section 115(1) of the Act which provides general penalties for offences committed under the Act where not otherwise stated.

Section 115(1) is to be amended by inserting references to new sections 18A, 21A, 21B and 33A(1) and deleting the reference to sections 25(1), (2), (3) and (4).

Clause 18: Section 119 amended

This clause amends section 119(1) of the Act.

Section 119(1) of the Act provides that on conviction, the court may order the forfeiture to the Crown of anything that was used in the commission of the offence. There have been instances in which a forfeiture order has not been sought at the time of conviction. This clause amends section 119(1) of the Act to enable a court to make a forfeiture order within 3 months of the day of the conviction.

Clause 19: Section 124 amended

This clause amends section 124(2)(d) of the Act which provides power for the Governor to make regulations.

Clause 6 of the Bill amends section 23 of the Act to make reference to a health warning sign that is in accordance with the regulations. This clause amends section 124(2)(d) of the Act as a consequence of that amendment.

Clause 20: Part 9 inserted

This clause inserts a new Part 9 into the Act to provide necessary transitional provisions.

Proposed new section 128 of the Act ensures that persons who are currently appointed as restricted investigators can continue as restricted investigators for the remainder of the period of their appointment.

Proposed new section 129 clarifies that new section 119(1) of the Act that is proposed to be inserted by clause 18 of the Bill does not have retrospective effect. That is, a forfeiture order may only be sought in accordance with the provision that was in effect as at the date of the conviction.

Clause 21: Glossary amended

The Glossary provides the meanings of words and terms used in the Act. This clause amends the Glossary to include relevant definitions of "due day" and "restricted investigator" and to amend the definition of "identity card".