

## **TOBACCO PRODUCTS CONTROL BILL 2005**

### **EXPLANATORY MEMORANDUM**

The purpose of the *Tobacco Products Control Bill 2005* (“the Bill”) is to modernise and strengthen Western Australia’s laws dealing with tobacco control and introduce a new legislative infrastructure that takes into account current market practices relating to the promotion of tobacco products and smoking generally. The Bill adopts some of the provisions contained in the *Tobacco Control Act 1990* (“TCA”) but otherwise is generally based on legislation of other jurisdictions considered nationally as best practice legislation.

New policy initiatives in relation to the sale and supply of tobacco products to underage persons are introduced in the Bill, for example controls on indirect forms of the sale of tobacco products by mail order or the Internet.

The Bill repeals the TCA, Part IXB of the *Health Act 1911* (which is incorporated in this Bill) and all associated regulations. New regulations will be made.

In particular the Bill:

- a) consolidates currently fragmented legislation regulating tobacco products and smoking;
- b) provides clear statements of the Government’s policies in the preamble and objects clauses;
- c) generally regulates the sale and supply of tobacco products and other smoking products such as herbal cigarettes, cigarette papers, pipes, confectionery and toys that are designed to resemble smoking products, but will not apply to cannabis or other illicit substances;
- d) adopts and strengthens provisions currently contained in the TCA that prohibit sales and supply to minors;
- e) contains a new requirement for evidence of age to be produced on request at point of sale;
- f) contains new provisions controlling Internet sales of tobacco products and by other means of indirect sales to further control sales to minors;
- g) contains new provisions for the licensing of tobacco retailers and wholesalers;
- h) adopts provisions contained in the TCA that prohibit the sale of cigarettes other than in a package containing 20 or more cigarettes and smokeless tobacco;
- i) restricts the availability and display of tobacco products;
- j) restricts the number and controls the location of vending machines;
- k) bans tobacco advertising including suggestive forms of advertising such as “brand stretching” and “buzz marketing”;
- l) controls information signs relating to price and product availability;

- m) adopts and amends provisions of the TCA that prohibit:
- the distribution to the public of any unsolicited object that constitutes a tobacco advertisement;
  - the sale, hire or supply of any object that constitutes a tobacco advertisement; and
  - competitions and free samples.
- n) contains new comprehensive investigation and enforcement provisions;
- o) increases existing penalties contained in the TCA from \$20,000 to \$40,000 for a body corporate and from \$5,000 to \$10,000 for an individual and harsher penalties for very serious offences such as providing false or misleading information about the health effects of smoking.
- p) phases out tobacco sponsorships for events of international significance, with 1 October 2006 as the cut-off date;
- q) adopts existing provisions in the TCA relating to the Western Australian Health Promotion Foundation but amended to suit current governance practices;
- r) provides for the current amount of funding for Healthway by way of regulation; and
- s) will be supported by a system of infringement notices by naming the new Act as a prescribed Act for the purposes of the *Criminal Procedure Act 2000*.

The Bill is divided into 8 Parts and 2 Schedules as follows:

## **Part 1 — Preliminary**

### **Clause 1. Short title**

Provides for the Act to be cited as the *Tobacco Products Control Act 2005* (“TPC Act”).

### **Clause 2. Commencement**

Subclause (1) provides that the TPC Act is to come into operation on the day it is proclaimed.

Subclause (2) allows for different dates to be set for particular provisions to commence. This is because regulations will be required to be made for some provisions in the Bill, allowing coordination of the timing of the introduction of the principal provisions and the corresponding regulations.

There will also need to be phase-in periods for such things as licensing and changes to signage and display requirements in many retail shops.

### **Clause 3. Purposes of the Act**

Provides that the purposes of the Act broadly apply to strategies that discourage people from smoking and limit the effects of and opportunity for the promotion of tobacco and smoking generally.

### **Clause 4. Meanings of terms used in this Act**

Provides for meanings of words and expressions used throughout the TPC Act to be contained in the Glossary.

### **Clause 5. Application to Crown**

Specifies that the Crown is bound by the Act.

## **Part 2 — Sale and supply**

### **Division 1 — Supply to people under 18**

#### **Clause 6.     **Supply etc. to people under 18 prohibited****

Creates an offence if a person sells, supplies or delivers any tobacco product or a smoking implement to anyone who is not 18 years of age. A smoking implement is cigarette papers, a “rolly machine” or pipe or anything else that can be used to prepare tobacco for smoking.

The TPC Act does not apply to cannabis or other prohibited substances.

#### **Clause 7.     **Purchase on behalf of people under 18 prohibited****

Creates an offence for anyone to purchase a tobacco product or smoking implement on behalf of a person under 18 years of age.

#### **Clause 8.     **Vending machines not to be operated by people under 18****

Creates an offence if a license holder or a person in charge of a mines amenity, allows a person under 18 to obtain tobacco products from a vending machine.

The intent of this provision is to ensure that at all times vending machines are strictly supervised so that minors cannot obtain tobacco products from them.

The TPC Act limits the placement of vending machines to licensed premises or a mines amenity area.

#### **Clause 9.     **Indirect sales: proof of age required****

Creates an offence if a person who sells a tobacco product by an indirect sale, does not obtain evidence that the person purchasing the tobacco product or smoking implement is at least 18 years of age.

An indirect sale is a sale by retail where the seller and the purchaser are not in the same place at the time of the sale and includes a sale made by way of the Internet, electronic mail, telephone, facsimile or mail order.

**Clause 10.    Marking of goods for delivery**

Creates an offence if a person who sells a tobacco product by indirect sale, does not clearly mark the package as being a tobacco product or smoking implement before it is sent.

This clause does not apply to a package if it is sent in its original packaging and is clearly identifiable as a tobacco product, or to a business-to-business transaction between persons who are to be licensed under the TPC Act.

**Clause 11.    Delivery of goods: proof of age required**

Creates an offence if a person delivering a tobacco product and which is marked in accordance with clause 10, does not obtain an adult signature on a delivery notice.

This clause does not apply to the delivery of goods to persons who are to be licensed under the TPC Act.

**Clause 12.    Refusal of supply etc. if no proof of age**

Provides authority for persons who are to be licensed to sell tobacco products by retail sale to refuse to sell or deliver if the purchaser does not produce evidence of age if requested to do so.

**Clause 13.    Defence: age of receiver**

Provides a defence to an offence relating to the sale, supply or delivery of tobacco products or smoking implements to persons who are not 18 years of age.

**Clause 14.    Defence: Australia Post workers**

Provides a defence for Australia Post workers who deliver packages in the normal course of their employment where it is not a legal requirement of their employment to obtain a signature for a package delivered and which is delivered to the letterbox of a premises.

The application of proof of age and signature requirements to Australia Post workers delivering small packages, other than where a signature is required at the time of delivery by Australia Post or at the time of collection of the package from a Post Office, would not be workable.

**Clause 15. Proof of age**

Specifies the documents that may be produced to satisfy a request by a person selling tobacco products or smoking implements, as proof of age. Documents include a passport and an Australian driver's licence or a prescribed document. A prescribed document may be any document that contains a photograph of the person or that clearly identifies the person.

This clause also creates an offence if a person uses another person's document or uses a forged document to obtain a tobacco product or smoking implement.

**Division 2 — Sale of tobacco products**

**Clause 16. Retailers of tobacco products to be licensed**

Creates an offence for anyone to sell a tobacco product by way of retail sale unless they hold a retailer's licence.

A penalty of \$50, 000 is specified. Section 40(5) of the *Sentencing Act 1995* which provides for a fine of 5 times the maximum fine that could be imposed, will apply to bodies corporate.

**Clause 17. Wholesalers of tobacco products to be licensed**

Creates an offence for anyone to sell a tobacco product by way of wholesale sale unless they hold a wholesaler's licence.

**Clause 18. Indirect sellers of tobacco products to be licensed**

Creates an offence for anyone to sell a tobacco product by way of indirect sale unless they hold an indirect seller's licence.

**Clause 19. Labelling of tobacco products**

Creates an offence for a person who is to be licensed under the TPC Act to sell a tobacco product unless it is labelled in accordance with regulations. The regulations may prescribe such matters as health warnings, tar content, images and relevant specifications consistent with Commonwealth legislation.

**Clause 20. One retail sale point only**

Creates an offence if tobacco products are sold from more than one point-of-sale in any premises specified in a licence.

**Clause 21. Retail sale of cigarettes**

Creates an offence if cigarettes are sold otherwise than in a package containing at least 20 cigarettes.

**Clause 22. Display of tobacco products**

Creates offences relating to the display of tobacco products by the holder of a retailer's licence if the display is not in accordance with the following requirements:

- the display is located in one place only on the premises;
- the display occupies an area of 1m<sup>2</sup> or less;
- the display must not contain cartons of tobacco products (i.e. single packets only of cigarettes are allowed to be displayed);
- the display complies with other requirements prescribed by regulation, for example:
  - the number of individual brands and types of a tobacco product that may be displayed;
  - the specifications of the display that will house the tobacco products; or
  - the requirement to display an image adjacent to the display similar to a graphics warning to be displayed on tobacco products under Commonwealth legislation.

**Clause 23. Defences in relation to certain display requirements**

Under the TCA a tobacco advertisement on a tobacco product was exempted from being a tobacco advertisement. Tobacco companies and some retailers have used the exemption and incorporated large displays of tobacco products in retail shops that are essentially a tobacco advertisement.

The TPC Act particularly focuses on strategies that will protect children from the influences of tobacco promotion in any form. The 1m<sup>2</sup> restriction on tobacco displays provided by clause 22 will remove the opportunity for using displays of tobacco products as tobacco advertisements.

This clause provides a defence to a prosecution under clause 22. The defence essentially provides an exemption from the 1m<sup>2</sup> restriction for two classes of retailers. This will ensure there is not financial hardship imposed on existing qualifying businesses whose gross turnover is substantially derived from tobacco products.

A condition of exemption that will apply to both classes of retailers is that the business is being conducted in accordance with this clause on 1 July 2005. This will disqualify any future businesses and over a period of time will result in a phasing out of large displays of tobacco products.

The defences provided are as follows:

1. For a person whose business derives 50% or more average gross annual turnover from tobacco sales:
  - the total area of the display is not greater than 3m<sup>2</sup>;
  - the display is separate to and cannot be seen from any other area within the premises; and
  - the display cannot be seen from a public place outside the premises.
2. For a person whose business derives 80% or more average gross annual turnover of the business from tobacco sales:
  - the display is any size;
  - the display cannot be seen from a public place outside the premises; and
  - there is no other business conducted in conjunction with the business on the same premises.

**Clause 24. Information about availability, price of tobacco products**

Creates an offence if any signs displayed in a premises where tobacco products are sold that relate to the advertising of price or from where in the premises tobacco products may be obtained, are not in accordance with regulations.

The Regulations will prescribe size specifications of the sign and wording that may be contained on the sign and the sign's location.

**Clause 25. Warnings**

Creates an offence if there is not displayed in the premises of persons holding a retailer's licence, signs that:

- warn customers that it is illegal to sell to anyone under 18 years of age and the applicable penalty;
- that proof of age may be requested of purchasers; and
- warn customers of the health effects of smoking.

The signs will be required to comply with regulations that will specify size specifications of the sign and wording that may be contained on the sign and location of the sign.



This clause is similarly applied to persons who sell by way of indirect sale but requires the provision of information in a written or other form.

The signage requirements of clause 25 are also similarly applied to vending machines

**Clause 26. Information and advice**

Provides for the publication of an information guide by the CEO of the Department of Health (CEO), intended to provide at the point of sale, to persons who purchase tobacco products, information on the health effects of smoking and information on how to quit smoking.

It will be a requirement that wholesalers of tobacco products distribute the guides to tobacco retailers and an offence is created if they do not comply.

The regulations may specify areas of the State, times or periods as to when the guides are to be provided. This will provide flexibility to target specific population areas.

**Clause 27. Vending machines restricted to, and at certain premises**

Creates an offence if a person places a vending machine in any premises that are not licensed premises or a mines amenity area.

Regulations will prescribe the maximum number of vending machines allowed (which is proposed to be one), the location and maximum size specifications of the vending machine.

**Clause 28. Mobile selling of tobacco products**

Creates an offence for anyone to sell tobacco products from their person, such as a person employed by a tobacco company or their agent, going into hotels and selling cigarettes.

**Clause 29. Price discounting not to be advertised**

Creates an offence for a person to advertise the price discounting of tobacco products such as "special price" or discounts for bulk buys.

**Clause 30. Smokeless tobacco**

Creates an offence for a person to sell a tobacco product designed for purposes other smoking, for example chewing tobacco and nasal snuff.

Regulations under the TCA currently allow the sale of tobacco used as nasal snuff and it is anticipated that regulations will be similarly made under the TPC Act. Evidence on the health effects of nasal snuff is still being debated within the scientific community.

## **Part 3 — Advertising and promotion**

### **Clause 31. Tobacco advertisements restricted**

Creates an offence for a person to display or broadcast a tobacco advertisement in a public place, or that can be seen or heard in a public place, or to sell or hire anything that contains a tobacco advertisement.

A tobacco advertisement is anything that publicises or promotes a tobacco product, a smoking implement or smoking generally and includes brand names and logos used by tobacco companies.

The definition of tobacco advertisement extends to cover “non-branded tobacco advertising” and “brand stretching” or “buzz marketing”.

”Brand stretching” is where colours, images and props are used to create an environment consistent with a tobacco product brand’s identity or reminiscent of previous tobacco advertising. Brand stretching has occurred at dance events and fashion events in Australia.

Branded tobacco advertising is prohibited in shops that sell tobacco, however tobacco companies have replaced these advertisements with non-branded ‘suggestive’ methods to advertise tobacco products. For example, non-branded tobacco advertising may be backlit posters displayed directly above cigarette displays, depicting images of smoking paraphernalia such as matches and lighters. Although these posters don’t promote a particular brand of tobacco, they are attractive to the eye and may encourage and promote the consumption of tobacco.

### **Clause 32. Certain advertisements and information not prohibited**

Certain exemptions apply to the display etc. of tobacco advertisements under clause 31 as follows:

- a tobacco advertisement on radio or television as it is a matter of Commonwealth law under the Constitution;
- a tobacco advertisement on a packet or package of tobacco products;

- generally anything that would constitute a tobacco advertisement that is legitimately used by a tobacco company in the course of conducting business, such as the name of the company on business stationery, land or buildings.

Clause 32 also exempts anything that would constitute a tobacco advertisement if it relates to a product recall or product safety of a tobacco product. This exemption clarifies any argument that could preclude action in relation to these matters occurring.

**Clause 33. Prizes, competitions**

Creates an offence if a person supplies anything in the form of a gift, prize or benefit in connection with the sale of a tobacco product, whether or not those things have any monetary value.

**Clause 34. Free samples**

Creates an offence if a person supplies a free sample of a tobacco product to a member of the public for the purpose of promoting a tobacco product.

The definition of “promote” is broad and includes the promotion of the purchase or use of a tobacco product or smoking implement and a name, brand name or registered design etc. of a tobacco company.

**Clause 35. Sponsorships**

Creates an offence if a person provides sponsorship in any form in relation to the promotion of a tobacco product.

**Clause 36. Exemptions in relation to advertising, sponsorships**

An exemption is provided for sponsorships under clause 35 that, subject to certain conditions, will allow sponsorship of a sporting, racing or arts event of international significance, for example Formula 1 racing.

The exemption is consistent with Commonwealth legislation and will cease to apply for any event that is not completed by 1 August 2006.

## **Part 4 — Licensing**

### **Division 1 — Licensing procedures**

#### **Clause 37. Individuals and bodies corporate may be licensed**

Provides for the issuing of a licence to allow an individual or a body corporate to sell tobacco products by way of retail sale, wholesale sale or indirect sale.

A separate licence will be required for each premises operated by the licence holder.

#### **Clause 38. Application for licence**

Provides for the form and procedure for application for a licence and the requirement for a fee to be paid at the time of application.

#### **Clause 39. How and when to apply for renewal**

Provides for the form and procedure for renewal of a licence and the requirement for a fee to be paid at the time of application.

#### **Clause 40. Issue, renewal, of licences**

Subclause 1 provides that a person must be at least 18 years of age to hold a licence, and is extended by subclause 5 to include any person who is involved in the management of a body corporate.

Subclause 2 prohibits the issue of a retailer's licence that will authorise the sale of tobacco products at temporary events such as "the Big Day Out" or other musical or entertainment events targeted at youth and where young people may attend.

Subclause 3 provides general fit and proper person tests that the CEO may have regard to when considering an application for the issue or renewal of a licence.

Provides for the refund of the licence fee when a licence is refused.

**Clause 41.**    **Notice of decisions**

Provides the process that the CEO is to comply with when notifying a decision to refuse, renew or amend a licence and the time periods in which he is required to notify the decision to the licence holder or applicant, as the case may be.

**Clause 42.**    **Conditions and restrictions of general application**

Provides a general condition on all licences that the holder of a licence must only sell from the premises specified in the licence.

This clause is linked to clause 49(2)(ii), which states that if a condition or restriction on a licence is breached, it is a ground for the CEO to make an allegation to the State Administrative Tribunal (“SAT”) for suspension, revocation or disqualification of a licence.

Subclause 2 provides for regulations to prescribe other conditions on licences such as mentioned in subclause 3 relating to training of employees about their responsibilities under the TPC Act.

**Clause 43.**    **Conditions and restrictions of particular application**

Provides for the issuing of a licence subject to conditions or restrictions and for the addition or deletion of conditions or restrictions by the CEO or at the request of the licence holder.

Clause 43 does not apply to any condition applied under clause 42.

Subclauses 2 and 3 provide that any change in conditions or restrictions initiated by the CEO is subject to the licence holder being notified in writing of the change and the right of the licensee to appeal to the SAT.

**Clause 44.**    **Term of licence**

Provides for a licence to be valid for a period of 12 months from the date of issue and the subsequent renewal for ongoing periods of 12 months each.

**Clause 45.**    **Amendment of licence to apply to different premises**

Provides, subject to the licence holder not being disqualified or suspended, for a licence to be amended to take into account any change of address of the licence holder and the issue of an amended licence on payment of a prescribed fee.

A licence is not transferable.

**Clause 46. Register of licences**

Requires a register of persons licensed to be established and maintained, to be available for public inspection and extracts issued subject to the payment of a fee.

**Division 2 — Powers of courts and State Administrative Tribunal**

**Clause 47. Review of licensing decisions**

Provides for an applicant for a licence or a licence holder to appeal to the SAT, a decision of the CEO to refuse to issue or renew a licence or a matter concerning a condition attached to a licence.

**Clause 48. Suspension, revocation, disqualification from holding licences**

Provides for the CEO to make an allegation to the SAT for disciplinary action against a licence holder if the licence holder:

- has a charge pending for an offence under the TPC Act;
- has breached a provision of the TPC Act or a licence condition or restriction;
- has a charge pending anywhere in the world for an offence involving fraud or dishonesty;
- is no longer a fit and proper person to hold a licence; or
- was issued a licence in error as a result of false or misleading information provided by the licence holder in an application.

If the SAT is satisfied that the allegation has been proved, the licence may be suspended for a period not exceeding 3 months, revoked or the licence holder disqualified from holding a licence for a period determined by the SAT.

**Clause 49. Courts' powers on conviction**

Provides for a Court, on conviction of a licence holder, in addition to any penalty, to attach a condition to a licence for any period, suspend a licence for a period not exceeding 3 months, revoke the licence or disqualify the licence holder for a period determined by the Court.

**Clause 50. Suspension of licence by SAT for non-compliance**

Provides for the SAT to suspend a licence if the licence holder does not comply with a determination of the SAT.

**Clause 51. Matters relating to court, SAT powers**

Provides the general process for the SAT in relation to matters of hearing adjournments, deferring of orders made, notifications and clarifies the status of a licence during periods of suspension or disqualification.

**Division 3 — Further obligations of licence holders**

**Clause 52. Breach of condition or restriction**

Creates an offence if a licence holder breaches a condition or restriction attached to a licence.

**Clause 53. Display of retailer's licence**

Creates an offence if a licence holder does not display a licence or a copy of the licence at the point of sale of tobacco products so that it can be clearly seen by members of the public.

**Clause 54. Production of licence**

Creates an offence if a licence holder does not produce a licence to an investigator when requested.

**Clause 55. Replacement licences**

Creates an offence if a licence holder does not, within 14 days, notify the CEO when a licence has been lost or destroyed and provides for the issue of a replacement licence, subject to payment of a prescribed fee.

**Clause 56. Return of licence**

Creates an offence if a licence holder does not return to the CEO, a licence that has not been renewed, or the original licence when an amended licence has been issued.

Provides the process for the return of the licence and clarifies the status of the licence for matters that arose before its return.

**Clause 57. Licence details on invoices etc.**

Creates an offence if a licence holder does not state certain particulars relating to a licence on invoices, orders etc. produced in relation to a purchase or sale of tobacco products.

Specifies the particulars required:

- name and address;
- address of the premises specified in the licence;
- the unique identifying number of the licence; and
- other prescribed particulars, for example other particulars provided by the applicant at the time of applying for a licence.



**Clause 58. Duties of wholesalers**

Creates an offence if the holder of a wholesaler's licence sells a tobacco product to an unlicensed person or does not issue an invoice for the sale.

Provides a defence if the wholesaler proves that a person produced evidence at or before the time of sale that could reasonably have been accepted as proof that the person held a licence, for example a licence that had not been returned as required under clause 56.

A penalty of \$50,000 is specified. Section 40(5) of the *Sentencing Act 1995* will apply to bodies corporate, which provides for a fine of 5 times the maximum fine that could be imposed.

**Clause 59. Records to be kept**

Creates an offence if a licence holder:

- does not keep records as prescribed by regulation, for example invoice books and order books;
- makes a false or misleading entry in a record;
- does not keep any record for 3 years; or
- fails to notify the CEO of the place where the records are preserved or are moved to.

Subclause 2 provides that the premises where the records are preserved must be in Western Australia unless approved otherwise by the CEO.

## **Part 5 — Western Australian Health Promotion Foundation and administration**

### **Division 1 – The Foundation**

#### **Clause 60. Foundation established**

Provides for the establishment of the Foundation (already established under the *Tobacco Control Act 1990*) and authority to operate under a trading name (e.g. Healthway)

#### **Clause 61. Agent of the Crown**

Provides that the Foundation is an agent of the Crown.

#### **Clause 62. Membership of Foundation**

Provides for the appointment of 11 members of the Foundation being persons having knowledge of and experience in one or more functions of the foundation and the persons by whom they are nominated.

#### **Clause 63. Constitution and proceedings**

Provides for the constitution and proceedings of the Foundation to be as specified in Schedule 1.

#### **Clause 64. Remuneration and allowances**

Provides for remuneration of Foundation members, including committee members, to be determined by the Minister in accordance with remuneration rates as recommended by the Minister responsible for the Department of Premier and Cabinet.

#### **Clause 65. Functions**

Specifies the functions of the Foundation.

Profits made by the Foundation in relation to marketing or services authorised by clause 66(2)(b) are not a purpose of the Foundation but if made, are to be credited to the Funds of the Foundation.

Subclause 5 provides for the Foundation to apply conditions to funds or grants to fulfill any of the purposes of the TPC Act under clause 3.

**Clause 66. Powers**

Specifies the powers of the Foundation, including the making of grants to specified organisations, engaging in marketing or production of goods and services to promote the purposes of the TPC Act or Foundation functions and matters relating to property, rights and liabilities.

**Clause 67. Foundation may delegate**

Provides for the Foundation to delegate (and the processes and limitations of delegation) any of its powers to specified persons or a committee. The delegation authority does not apply to any authority of the Foundation relating to amounts of money that may be provided unless the amount is \$5,000 or less.

**Clause 68. Minister may give directions**

Provides for the Minister to direct the Foundation concerning performance of its functions and a requirement that the Minister must cause such a direction to be laid before each house of the Parliament in a specified time.

Subclauses (3) to (4) are procedural provisions concerning the laying of the direction in the Parliament and application of the *Financial and Administration Audit Act 1985* ("FAAA Act").

**Clause 69. Minister to have access to information**

Provides for the Minister to have right of access to information in possession of the Foundation

**Division 2 - Staff**

**Clause 70. Staff of Foundation**

This clause provides for the appointment by the Foundation of an Executive Director and public sector staff to assist the Executive Director and to enable the Foundation to perform its functions.

**Clause 71. Use of other government staff, etc.**

Provides for secondment etc. and other arrangements that may be made by the Foundation to use staff and resources of the Public Service, Public Sector and other Government agencies.

**Division 3 – Financial provisions**

**Clause 72. Funds of Foundation, appropriation**

Provides for a standing appropriation to be made to the Foundation as prescribed by regulation. The amount funded in the 2005/2006 budget is \$17,753,000 and is the amount to be prescribed.

Subclause (3) provides for the funds to be credited to a specified trust fund in accordance with requirements of the FAAA Act.

Subclauses (4) and (5) specify particular costs and expenditures of the Foundation that may and may not be charged against the Fund.

Subclause (6) limits disbursement of funds during State or Federal elections.

Subclause (7) provides for the continuance of remaining funds from one financial year to the next.

Subclause (8) specifies the percentages of funds that are to be made available in each year to particular interests and sectoral groups, including sports, arts, health, community and research organisations.

Subclauses (9) and (10) provide for funds received by the foundation in any financial year to be committed in the same financial year and any funds not so committed within 4 months of the end of the financial year are to be returned to the Consolidated Fund.

**Clause 73. Temporary investment of money in Fund**

Provides for the temporary investment of funds by the Foundation as directed by the Treasurer and credit of interest earned on those funds to the Fund.

**Clause 74. Application of Financial Administration and Audit Act 1985**

Provides for the FAAA Act to apply to the Foundation.

**Division 4 – The CEO**

**Clause 75. CEO may delegate**

Provides for the CEO of the Department of Health to delegate to any person, any of the CEO's functions and the conditions of delegation.

This is an administrative function of the CEO and is included in this Part as the part relates to administration generally.

**Clause 76. CEO may carry out research etc.**

Provides a lawful basis for the CEO of the Department of Health to conduct any operation or research for the purposes of the TPC Act and to use any data or information that the CEO may obtain in performing those functions, to be used for a purpose of the TPC Act other than that for which it was obtained.

This is an administrative function of the CEO and is included in this Part as the part relates to administration generally.

## **Part 6 — Investigations**

### **Division 1 — Investigators and investigation purposes**

#### **Clause 77. Appointment of investigators**

Provides for the appointment of investigators in the public service.

#### **Clause 78. Appointment of restricted investigators**

Provides for the appointment of environmental health officers (“EHO’s”) as investigators in specified circumstances.

This clause links with clause 79(4) which relates to regulations prescribing powers of EHO’s while investigating matters concerning smoking in enclosed public places.

EHO’s currently have power to investigate matters concerning smoking in enclosed public places only.

#### **Clause 79. Powers of restricted investigators**

Specifies what powers may be conferred on an EHO and any conditions that may be imposed.

#### **Clause 80. Police have powers of investigator**

Provides for a police officer to perform the functions of an investigator. Police officers in country areas currently investigate matters under the *Tobacco Control Act 1990* particularly concerning sales to minors offences.

#### **Clause 81. CEO has powers of investigator**

Provides that the CEO, in addition to performing a function under the TPC Act, may perform the function of an investigator and while doing so, has the same powers as an investigator.

#### **Clause 82. Identity cards**

Provides for the issuing of an identity card to an investigator and its return and the information that is to be contained on the card.

#### **Clause 83. Identity card etc. to be shown**

Provides that an investigator when performing a function under the TPC Act, must upon request, produce the identity card.

**Clause 84. Investigation purposes**

Specifies the purposes for which an investigation may be carried out.

**Division 2 — Obtaining identifying information**

**Clause 85. Investigator may ask for name, address, etc.**

An investigator is a public officer for the purposes of the *Criminal Investigation (Identifying People) Act 2002* and as such has the power to request the name and address of a person for a purpose of investigation.

**Division 3 — Powers in relation to premises**

**Clause 86. Power to enter premises**

Provides for an investigator to have the power to enter any residential or business premises for the purposes of a investigation. The power of entry to residential premises can only be exercised with the consent of the occupier or with a warrant issued under clause 88.

Clause 87((1)(b) provides a waiver to this requirement but only as provided by clause 87(2)

**Clause 87. Residential premises**

Provides the circumstances and procedure to be followed by an investigator for the purpose of entering residential premises under the power provided by clause 86.

Subclause (2) provides for the CEO to authorise entry to residential premises without a warrant to protect material that may afford evidence about the commission of an offence from destruction, but only if the investigator is accompanied by a police officer.

**Clause 88. Warrants to enter premises**

Provides for the issuing of a warrant on oath by a justice or magistrate, to allow entry to premises in accordance with the powers conferred by the warrant.

**Clause 89. Identification, warrant to be shown**

Provides that an investigator must show the identity card and the warrant to a person in charge or occupier of a premises entered under the authority of a warrant.

**Clause 90. Powers of investigator relating to premises**

Provides various powers to an investigator while on premises, consistent with powers contained in the *Health Act 1911* and tobacco control legislation of other major States.

**Clause 91. Offences**

Creates an offence if a person tampers or interferes with anything secured by an investigator or does not comply with any requirement made under the powers provided in clause 90.

This clause also provides a due diligence defence to an offence under this clause.

**Clause 92. Taking things from premises**

Provides that an investigator may only take anything from premises if it will afford evidence about the commission of an offence and requirements relating to the giving and leaving of receipts for goods taken.

**Clause 93. Access to, and return of, things taken from premises**

Provides for a person from whom anything was taken to have access to that thing and requirements for the return of that thing.

**Clause 94. Use of force**

Provides for a police officer to use force if necessary to gain entry to premises when exercising any power of investigation and only on the permission of the CEO, if the use of force is likely to cause damage to property.

**Division 4 — Compliance surveys and controlled purchase operations**

**Clause 95. Definitions**

Provides meanings for terms used in this division.



**Clause 96.    Controlled purchase officers**

The Department of Health conducts surveys of retailers to gauge the extent of compliance with sale to minors provisions of the current TCA where minors attempt to purchase or purchase a packet of cigarettes. This practice is termed a “compliance survey” and will continue with the TPC Act. Data obtained from the surveys is used to assess compliance rates and the necessity for other action.

An extension of the compliance survey is a “controlled purchase operation” (CPO) where minors (control purchase officers) attempt to purchase or purchase cigarettes with the intention of gaining evidence for prosecution, which is essentially an undercover operation.

This practice has not been used in Western Australia but is used both nationally and internationally due to the otherwise difficulty of gaining evidence of the commission of a sale to minor offence using normal investigation methods.

This clause provides for the CEO to appoint minors to carry out a CPO or compliance survey and for any tobacco products so obtained by the minor to be given to the supervisor of the CPO.

**Clause 97.    Compliance surveys and controlled purchase operations**

Provides for a controlled purchase officer to act in accordance with any authorisation given by the CEO, provides an exemption to any person involved from any criminal wrongdoing and that any evidence obtained may be accepted by the court as evidence because it is not accomplice evidence.

**Clause 98.    Reporting**

This clause provides that the Minister may require the CEO to provide certain particulars in writing concerning CPO’s and compliance surveys.

## **Part 7 — Enforcement**

### **Division 1 — Young persons with tobacco products or smoking implements**

#### **Clause 99. Definitions**

Provides meanings for terms used in this division.

#### **Clause 100. Seizing tobacco products etc from young persons**

Provides authority for an investigator and a police officer to seize tobacco products or a smoking implement from a person who is not at least 18 years of age.

Subclause (3) provides for the return of seized goods if a person produces evidence within 7 days that they were at least 18 at the time the goods were seized.

Subclause (4) provides for destruction of the goods otherwise.

#### **Clause 101. Young person to provide information**

Provides that an investigator may require a young person in possession of a smoking implement or tobacco product to provide their name and address, the name and address of a parent and information about the identity of the person who supplied the smoking implement or tobacco product.

There is no self-incrimination concern as no offence is provided.

#### **Clause 102. Parent to be informed**

Provides a discretionary power to an investigator to notify a parent (as defined) of a young person found in possession of a tobacco product or smoking implement and to provide the young person with an approved guide made under clause 26(2).

#### **Clause 103. Powers in addition to other powers under Act**

Provides that any powers exercised by an investigator in relation to this Division are in addition to the general powers of investigation under the TPC Act.

### **Division 2 — Offences**

#### **Clause 104. False or misleading information: providing to CEO, investigators**

Creates an offence if a person knowingly provides false answers or information to an investigator or the CEO.

A penalty of \$20,000 is specified. Section 40(5) of the *Sentencing Act 1995* will apply to bodies corporate, which provides for a fine of 5 times the maximum fine that could be imposed.

**Clause 105. False information about tobacco products, tobacco control information**

Creates an offence if a tobacco company knowingly provides false or misleading information about the health effects or legislation concerning tobacco products.

A penalty of \$50,000 is specified. Section 40(5) of the *Sentencing Act 1995* will apply to bodies corporate, which provides for a fine of 5 times the maximum fine that could be imposed.

**Clause 106. Offence to possess certain tobacco products**

Creates an offence if the holder of a licence is in possession or control of any tobacco products which are prohibited goods under the *Customs Act 1901* or goods upon which excise has not been paid under the *Excise Act 1901*.

**Clause 107. Products resembling tobacco products, packages**

Creates an offence if a person sells any product which is not a tobacco product but which is designed to, or is in packaging designed to, resemble a tobacco product.

**Clause 108. Obstruction**

Creates an offence if a person hinders or obstructs a person performing functions under the Act.

A defence is provided if the investigator did not show any identification when requested to do so.

**Clause 109. Corporations or employers, conduct on behalf of**

Provides guidance in proceedings for an offence, on the relationship between the body corporate and officers of the body corporate and the conduct and state of mind of those officers.

Similarly describes relationships between employers, other than bodies corporate, and employees and the conduct and state of mind of those employees.

**Clause 110. Liability of the officers of bodies corporate**

Provides for the charging of an officer of a body corporate whether or not the body corporate is charged with committing an offence.

If a charge is proved against a body corporate, a charge against an officer of the body corporate is also proved for the same offence.

A defence is provided to officers so charged, that the offence was committed without their consent and that the officer took all measures necessary to prevent the commission of the offence by the body corporate.

Similarly provides for the charging and conviction of a body corporate when officers of the body corporate are charged or commit an offence.

**Clause 111. Liability of employers**

Provides for the charging of an employer if an employee is charged with committing an offence and charging of the employer even if the employee commits an offence but is not charged.

A defence is provided to employers so charged that they took all measures necessary to prevent the commission of an offence by an employee and that the offence was committed without the employer's knowledge.

**Division 3 — Prosecutions**

**Clause 112. When a prosecution can be commenced**

Provides for a prosecution to be commenced no later than two years after the commission of an offence.

**Clause 113. Consent to be given for certain prosecutions**

Provides for written authority of the CEO to commence a prosecution. This clause does not apply to a police officer.

**Clause 114. Evidentiary matters**

Provides averments for general evidentiary matters.

**Clause 115. Evidentiary status of copies and reproductions of documents**

Provides for the admissibility as evidence, copies of original documents issued by the CEO.

**Division 4 — Penalties**

**Clause 116. General penalties**

Provides the penalty applicable for an offence under the TPC Act where not otherwise stated as follows:

For an individual -

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

For a body corporate -

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

**Clause 117. Continuing offences, penalties for**

Provides the penalty applicable for continuing offences as follows:

- (a) for an individual, \$10,000;
- (b) for a body corporate, \$40,000.

**Division 5 — Seized things and forfeiture**

**Clause 118. Storage of seized things**

Provides for the manner in which things seized under the TPC Act may be stored by the CEO and authority for the CEO to outsource the storage of those things.

**Clause 119. Expenses of storage payable by convicted person**

Provides for the payment of expenses incurred by the CEO in for storage of anything seized in relation to a prosecution to be paid by the person on conviction.

**Clause 120. Forfeiture on conviction**

Provides for the forfeiture of anything used in the commission of an offence to the Crown on conviction, whether or not the thing was seized.

**Clause 121. Dealing with unclaimed seized things**

Provides the process of dealing with seized things if efforts to return the things to the original owner so have not been successful.

## **Part 8 — Miscellaneous**

### **Clause 122. Protection from liability for wrongdoing**

Provides for the protection of the CEO, the Foundation, members of Foundation committees and any other persons performing functions under the Act from liability in tort for anything done or omitted in good faith in the execution of those functions.

### **Clause 123. Execution of documents by the Foundation**

Provides for the affixing of the common seal of the Foundation and the signing of documents under common seal by at least 2 members of the Foundation, including the Executive Director.

### **Clause 124. Confidentiality**

Creates an offence for a person carrying out functions under the proposed Act to breach the confidentiality of information obtained under the Act.

The penalty is \$10,000 or imprisonment for 12 months.

### **Clause 125. Regulations**

Notwithstanding the *Interpretation Act 1984*, provides power to make regulations about certain matters under the TPC Act.

### **Clause 126. Regulations about smoking in public places**

Provides for the making of regulations concerning smoking in public places. Regulations are currently made under Part IXB of the *Health Act 1911* and will be similarly made under the TPC Act.

### **Clause 127. Repeals, transitional provisions, consequential amendments to other Acts**

Provides for transitional matters to be dealt with under Schedule 2.

### **Clause 128. Review of Act**

Provides for a review of the TPC Act to be undertaken within 4 years of the commencement of Part 5 and subsequent 4 year periods thereafter. The Minister is to lay a report on the review before each house of Parliament no later than 12 months after the requirement for the review arose.

## **Schedule 1 — Constitution and proceedings of Foundation**

### **Division 1 — General provisions**

#### **Clause 1. Term of office**

Provides for Foundation members to be appointed for a term not exceeding 3 years and for their reappointment.

Provides that a member may continue in office for a period not exceeding 3 months if no-one is appointed to fill a vacancy due to the expiry of the term of appointment of the member.

#### **Clause 2. Resignation, removal etc.**

Specifies when and how an office of a member becomes vacant and reasons that the Minister may remove a member from office.

#### **Clause 3. Deputy chairperson**

Specifies how and when the office of deputy chairperson of the Foundation becomes vacant and the procedure for election and the functions of the deputy chairperson.

#### **Clause 4. Leave of absence**

Provides for the Foundation to grant leave of absence to a member and any conditions that may apply.

#### **Clause 5. Member temporarily unable to act**

Provides for a member to appoint a person to temporarily act in the member's office while the member is absent due to illness or other reasons.

Specifies the process for determining the term of office of the acting person.

#### **Clause 6. Saving**

Provides for any act or omission by a person acting in an office of a member, is not invalidated by the fact that their term of office had expired, or that the cause for their appointment may have been invalid.



**Clause 7.      Calling of meetings**

Provides for the holding and scheduling of meetings as determined by the Foundation and the convening of special meetings by the chairperson.

**Clause 8.      Presiding officer**

Provides for the chairperson to preside at meetings and the appointment of a member to preside in the chairperson's or deputy chairperson's absence.

**Clause 9.      General procedures**

Provides for the Foundation to determine its own conduct at meetings and procedures for calling meetings.

**Clause 10.     Quorum**

Provides that a quorum for a meeting of the Foundation is 5 members.

**Clause 11.     Voting**

Specifies the process of voting at a meeting of the Foundation.

**Clause 12.     Minutes**

Provide for the Foundation to take and keep accurate minutes of every meeting.

**Clause 13.     Decision without meeting**

Provides for a decision of the Foundation to be made by 8 members in writing without all members being in the same place at the same time.

**Clause 14.     Holding meetings remotely**

Provides for a meeting of the Foundation to be held without the necessity of all members meeting face-to-face but they must all be simultaneously in contact with each other at the same time.

**Clause 15.     Committees**

Provides for the establishment (and ending) by the Foundation of one or more committees to assist with the performance of the Foundations functions.

A committee so established must comprise sufficient country representation to advise the Foundation on the arts, sports and racing and such committee may determine its own procedures and conduct.

**Division 2 — Disclosure of interests, etc.**

**Clause 16. Meaning of “member”**

Clarifies the word “member” to include a member of a committee.

**Clause 17. Disclosure of interests**

Creates an offence if a member of the Foundation does not advise at a meeting of the Foundation, any personal interest that the member may have in relation to a matter that is being or is to be considered by the Foundation.

Provides for the advice to be recorded in the minutes of the meeting.

**Clause 18. Voting by interested members**

Disqualifies a member who has a personal interest in a matter of consideration by the Foundation from voting or from being present at a meeting when the matter is being considered.

**Clause 19. Clause 18 may be declared inapplicable**

Provides that the disqualification of a member under clause 18 does not apply if the Foundation passes a resolution specifying the interest and the matter and that the interest should not disqualify the member.

**Clause 20. Quorum where clause 18 applies**

Provides for a quorum of at least 3 members if a disqualification under clause 18 affects the attending quorum.

**Clause 21. Minister may declare clauses 18 and 20 inapplicable**

The Minister may by declaration in writing, render clauses 18 and 20 inapplicable in specified matters and must cause a copy of the declaration to be laid before each house of the Parliament within the specified time.

## **Schedule 2 — Repeals, transitional provisions, consequential amendments to other Acts**

### **Division 1 — Repeals**

**Clause 1.     *Tobacco Control Act 1990* repealed**

Self explanatory.

**Clause 2.     Regulations under the *Tobacco Control Act 1990* repealed**

Self explanatory. New regulations to be made under the TPC Act.

**Clause 3.     Regulations under the *Health Act 1911* Part IXB repealed**

Self explanatory. New regulations to be made under the TPC Act.

### **Division 2 — Transitional and savings provisions**

**Clause 4.     Interpretation of this Division**

Provides the meaning of certain words used in this division.

**Clause 5.     *Interpretation Act 1984* not affected**

Provides that this Division does not affect operation of the *Interpretations Act 1984* except section 38 of that Act which provides for the continuance of regulations made under repealed legislation.

**Clause 6.     Foundation: transitional and savings provisions**

In relation to the former Foundation, provides for the continuance of rights and liabilities, members, committees, offices and terms of appointments of members under the TPC Act.

**Clause 7.     Executive director**

In relation to the office of Director of the former Foundation, provides for the continuance of the office, rights and entitlements of the person appointed to that position.

**Clause 8.**     **Staff**

In relation to staff employed by the former Foundation, provides for the continuance of the appointment or employment, rights and entitlements of the person appointed to that position.

**Clause 9.**     **Fund**

Provides for the continuance of the Western Australian Health Promotion Fund and any associated liabilities.

**Clause 10.**    **Powers in relation to transitional provisions**

Provides for the making of regulations to deal with other transitional matters should the need arise.

**Division 3 — Consequential amendments to other Acts**

**Clause 11.**    ***Constitution Acts Amendment Act 1899* amended**

Provides that amendments in this Division are to the *Constitution Acts Amendment Act 1899*.

**Clause 12.**    ***Health Act 1911* amended**

Repeals Part IXB of the *Health Act 1911* that is now incorporated in the TPC Act.

## **Glossary**

Provides meanings of words and terms used throughout the Bill.

Particular notice is drawn to a new definition “smoking implement” and an amended definition of “tobacco advertisement” which extends to include “brand stretching” and “buzz marketing” by including the words “a design” under (b)(ii) and prohibited under clause 31(5).