

Butane Products Control Bill 2009

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Western Australia

LEGISLATIVE ASSEMBLY

(Introduced by Mr Cook, MLA)

Butane Products Control Bill 2009

A Bill for

An Act to reduce the incidence of illness and death related to the use of butane products by prohibiting the supply of butane products to young persons, and for related purposes.

The Parliament of Western Australia enacts as follows:

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Part 1 — Preliminary

1. Short title

This is the *Butane Products Control Act 2009*.

2. Commencement

- (1) This Act comes into operation as follows on the day fixed by proclamation.
- (2) Different days may be fixed under subsection (1) for different purposes.

3. Interpretation

In this Act —

approved means approved by the CEO;

butane product means any of the following —

- (a) a butane cigarette lighter;
- (b) a canister of butane cigarette lighter refill material;
- (c) such other products or classes of products as may be prescribed by regulations;

CEO means the chief executive officer of the Department as defined in the *Health Legislation Administration Act 1984* section 3;

corresponding law means a law of another State or Territory or of the Commonwealth that corresponds, or has similar purposes, to this Act;

environmental health officer has the meaning given to that term in the *Health Act 1911* section 3;

identity card means an identity card issued to an investigator under section 15;

indirect sale means a sale by retail where the seller (or the seller's employee or agent) and the purchaser are not in the same place at the time of the sale and includes a sale made by

1 way of internet, electronic mail, telephone, facsimile or mail
2 order;

3 **investigation purposes** means any or all of the purposes for
4 which an investigation may be carried out under section 17;

5 **investigator** means a person appointed under section 11;

6 **officer**, in relation to a body corporate, has the same meaning as
7 in the Corporations Act 2001 of the Commonwealth, but does
8 not include an employee of the body unless the employee is
9 concerned in the management of the body;

10 **record** means any thing or process —

- 11 (a) upon or by which information is recorded or stored; or
12 (b) by means of which a meaning can be conveyed in a
13 visible or recoverable form,

14 whether or not the use or assistance of some electronic,
15 electrical, mechanical, chemical or other device or process is
16 required to recover or convey the information or meaning;

17 **seized thing** means a thing possession of which is taken under
18 section 18(2) or under a warrant issued under section 87 of the
19 *Tobacco Products Control Act 2006*;

20 **sell** includes any of the following —

- 21 (a) barter or exchange;
22 (b) offer or expose for sale, barter or exchange;
23 (c) supply, or offer to supply, in circumstances in which the
24 supplier derives, or would derive, a direct or indirect
25 pecuniary benefit;
26 (d) supply, or offer to supply, gratuitously but with a view
27 to gaining or maintaining custom or otherwise with a
28 view to commercial gain;
29 (e) keep or have possession for sale;
30 (f) agree to sell;
31 (g) send or deliver for sale;

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1 *supply* includes to provide, or offer to provide, whether or not
2 gratuitously or with a view to commercial gain or maintaining
3 custom.

4 **4. Application to Crown**

5 This Act binds the Crown.

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Part 2 — Sale and supply

5. Supply etc. to people under 18 prohibited

A person must not sell, supply or deliver a butane product to a person who has not reached 18 years of age.

Penalty: See section 35.

6. Purchase on behalf of people under 18 prohibited

A person must not purchase a butane product on behalf of a person who has not reached 18 years of age.

Penalty: See section 35.

7. Indirect sales: proof of age required

A person who is requested to sell a butane product by way of an indirect sale must not authorise or allow the butane product to be delivered unless the person who is to take possession of the butane product produces evidence that he or she has reached 18 years of age.

Penalty: See section 35.

8. Refusal of supply etc. if no proof of age

A person who is requested to sell a butane product may refuse to do so unless the person who is to take possession of the butane product produces evidence that he or she has reached 18 years of age.

9. Defence: age of receiver

(1) In this section —

receiver means —

- (a) a person to whom a butane product was sold, supplied or delivered; or
- (b) a person on whose behalf a butane product was purchased,

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- 1 as is relevant to the case;
- 2 **relevant time** means the time at which an offence under
- 3 section 5, 6 or 7 is alleged to have been committed.
- 4 (2) If a person is charged with an offence under section 5, 6 or 7 it
- 5 is a defence to prove —
- 6 (a) that at the relevant time the person charged had no
- 7 reason to believe that the receiver had not reached
- 8 18 years of age;
- 9 (b) that at the relevant time the receiver had reached
- 10 14 years of age; and
- 11 (c) that at or before the relevant time the receiver had
- 12 produced evidence that the receiver had reached
- 13 18 years of age.

14 **10. Proof of age**

- 15 (1) For the purposes of sections 7, 8 and 9 the following documents
- 16 can be used as evidence that a person has reached 18 years of
- 17 age —
- 18 (a) a current passport;
- 19 (b) a current Australian driver's licence;
- 20 (c) a prescribed document,
- 21 that bears a photograph of the person and indicates by reference
- 22 to the person's date of birth or otherwise that the person has
- 23 reached 18 years of age.
- 24 (2) A person must not, for the purpose of obtaining a
- 25 butane product, use —
- 26 (a) another person's document of identification; or
- 27 (b) a document of identification that has been forged or
- 28 tampered with.
- 29 Penalty: A fine of \$100.

Part 3 — Investigations

Division 1 — Investigators and investigation purposes

11. Appointment of investigators and restricted investigators

- (1) A person appointed as an investigator under section 76 of the *Tobacco Products Control Act 2006* is deemed to be an investigator for the purposes of this Act
- (2) A person appointed as a restricted investigator under section 77 of the *Tobacco Products Control Act 2006* is deemed to be a restricted investigator for the purposes of this Act.

12. Powers of restricted investigators

- (1) A restricted investigator has the functions of an investigator that are specified in the restricted investigator's instrument of appointment in respect of —
- (a) the State; or
 - (b) the area of the State for which the restricted investigator is appointed.
- (2) The performance of a function by a restricted investigator may be made subject to any condition or limitation.

13. Police to have power of investigators

- (1) For the purposes of this Act a police officer —
- (a) may exercise the powers, and perform the functions, of an investigator; and
 - (b) has the authorities of, and protections that apply under this Act to, an investigator.
- (2) The powers that a police officer may exercise under this section are in addition to, and do not derogate from, the powers that the police officer has under any other law.
- (3) Sections 15 and 16 do not apply to a police officer.

1 **14. CEO to have power of investigator**

2 In addition to performing the functions conferred on the CEO
3 under this Act, the CEO may exercise the powers, and perform
4 the functions, of an investigator.

5 **15. Identity cards**

6 An identity card issued under section 81 of the *Tobacco*
7 *Products Control Act 2006* is an identity card for the purposes
8 of this Act.

9 **16. Identity card to be shown**

- 10 (1) An investigator must show the investigator's identity card to a
11 person if —
- 12 (a) the investigator has performed, or is about to perform, a
13 function under this Act in relation to a person; and
14 (b) the person requests that the identity card be shown.
- 15 (2) A restricted investigator or an environmental health officer must
16 show the form of identification (if any) that is issued to that
17 person as evidence of the person's appointment as an
18 environmental health officer if —
- 19 (a) the restricted investigator or environmental health
20 officer has performed, or is about to perform, a function
21 under this Act in relation to a person; and
22 (b) the person requests that the identification be shown.

23 **17. Investigation purposes**

- 24 An investigation may be carried out under this Part for one of
25 more of the following purposes —
- 26 (a) to seek evidence of a suspected offence under this Act;
27 (b) to assess whether or not the provisions of this Act are
28 being complied with;
29 (c) any other purpose relevant to the administration of this
30 Act.

Division 2 — Powers of investigators

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18. Application of *Tobacco Products Control Act 2006*

- (1) Subject to subsection (2), sections 84, 85, 86, 87, 88, 89, 91, 92 and 93 of the *Tobacco Products Control Act 2006* are taken to apply to an investigator for the purposes of this Act with such amendments as are required by the context of this Act.
- (2) Section 89(1)(b) of the *Tobacco Products Control Act 2006* applies only to documents, butane products or samples of such products, advertisements or anything else relevant to the investigation.

19. Offences

- (1) A person must not remove, tamper or otherwise interfere with a thing secured against interference under section 89(1)(g) of the *Tobacco Products Control Act 2006*.
- (2) A person must comply with a requirement made under section 89(1)(h) of the *Tobacco Products Control Act 2006*.
Penalty in respect of subsections (1) and (2): A fine of \$20,000.
- (3) If a person is charged with an offence under subsection (2), it is a defence to prove that the accused could not, by the exercise of reasonable diligence, have complied with the requirement to which the charge relates.

1 **Division 3 — Compliance surveys and controlled purchase**
2 **operations**

3 **20. Application of Tobacco Products Control Act 2006**

4 (1) Subject to subsection (2), sections 94, 95, 96 and 97 of the
5 *Tobacco Products Control Act 2006* are taken to apply for the
6 purposes of this Act with such amendments as are required by
7 the context of this Act.

8 (2) For the purposes of this Division —
9 *young person offence* means an offence under section 5, 6 or 7
10 of this Act.

Part 4 — Enforcement

Division 1 — Young persons

21. Terms used

In this Division —

parent, in relation to a young person, means a person who at law has responsibility for —

- (a) the long-term care, welfare and development of the young person; or
- (b) the day to day care, welfare and development of the young person;

young person means a person who an investigator suspects on reasonable grounds has not reached 18 years of age.

22. Seizing butane products from young persons

- (1) An investigator may seize any butane product from a young person.
- (2) A police officer may seize any butane product from a young person and use reasonable force in doing so.
- (3) The power under subsection (1) or (2) to seize a butane product is not to be exercised in respect of a person unless —
 - (a) the person has been requested to produce a document mentioned in section 10(1) showing that the person has reached 18 years of age; and
 - (b) the document was not produced at the time of the request.
- (4) A butane product that is seized under subsection (1) or (2) —
 - (a) is to be returned to the person from whom it was seized if, within 7 days of the seizure, the person produces to the investigator a document mentioned in section 10(1)

- 1 showing that the person had reached 18 years of age at
2 the time of the seizure; or
3 (b) if not returned under paragraph (a), is to be destroyed in
4 an approved manner.

5 **23. Young person to provide information**

- 6 (1) If an investigator finds a young person in possession of a butane
7 product the investigator may do any of the following —
8 (a) require the young person to give his or her name and
9 address;
10 (b) require the young person to give the name and address
11 of a parent of the young person;
12 (c) require the young person to give information relating to
13 the identity of any person who supplied the butane
14 product;
15 (2) A person who has reached 14 years of age —
16 (a) must comply with a requirement made under
17 subsection (1);
18 (b) must not provide false or misleading information in
19 response to a requirement.

20 Penalty: A fine of \$100.

21 **24. Parent may be informed**

22 If an investigator finds a young person in possession of a butane
23 product, or obtaining or attempting to obtain any butane
24 product, the investigator may notify a parent of the young
25 person of the finding.

26 **25. Limitation of powers of investigator**

27 An investigator is not to exercise the powers mentioned in
28 section 84 of the *Tobacco Products Control Act 2006* for the
29 purposes of performing a function under this Division.

Division 2 — Offences**26. Providing false or misleading information**

A person must not provide information under this Act to the CEO, an investigator or a police officer, knowing it to be false or misleading in material particular.

27. Obstruction

(1) A person must not, when the CEO, an investigator or police officer is performing a function under this Act, hinder or obstruct the CEO, investigator or police officer.

(2) If under this section a person is charged with an offence in relation to an investigator, it is a defence to prove —

- (a) that the investigator did not show the investigator's identity card to the person or did not otherwise identify himself or herself to the person as an investigator; and
- (b) that the person did not otherwise know that the investigator was an investigator.

28. Corporations or employers, conduct on behalf of

(1) In this section —

director of a body corporate includes a constituent member of a body corporate incorporated for a public purpose by a written law or a law of the Commonwealth, another State or a Territory;

engaging in conduct includes failing or refusing to engage in conduct;

state of mind of a person includes —

- (a) the knowledge, intention, opinion, belief or purpose of the person; and
- (b) the person's reasons for the intention, opinion, belief or purpose.

(2) This section applies to and in relation to proceedings for an offence under this Act.

- 1 (3) If it is necessary to establish the state of mind of a body
2 corporate in relation to particular conduct, it is sufficient to
3 show:
- 4 (a) that the conduct was engaged in by a director, employee
5 or agent of the body corporate within the scope of his or
6 her actual or apparent authority; and
- 7 (b) that the director, employee or agent had the relevant
8 state of mind.
- 9 (4) Conduct engaged in on behalf of a body corporate by a director,
10 employee or agent of the body corporate within the scope of his
11 or her actual or apparent authority is taken to have been engaged
12 in also by the body corporate, unless the body corporate
13 establishes that it took reasonable precautions and exercised due
14 diligence to avoid the conduct.
- 15 (5) If it is necessary to establish the state of mind of a person other
16 than a body corporate in relation to particular conduct, it is
17 sufficient to show —
- 18 (a) that the conduct was engaged in by an employee or
19 agent of the person within the scope of his or her actual
20 or apparent authority; and
- 21 (b) that the employee or agent had the relevant state of
22 mind.
- 23 (6) Conduct engaged in on behalf of an employer other than a body
24 corporate by an employee or agent of the employer within the
25 scope of his or her actual or apparent authority is taken to have
26 been engaged in also by the employer unless the employer
27 establishes that the employer took reasonable precautions and
28 exercised due diligence to avoid the conduct.

29 **29. Liability of officers of bodies corporate**

- 30 (1) If a body corporate is charged with an offence under this Act,
31 every person who was an officer of the body at the time the
32 offence is alleged to have been committed may also be charged
33 with the offence.

- 1 (2) If a body corporate and an officer are charged as permitted by
2 subsection (1) and the body corporate is convicted of the
3 offence, the officer is to be taken to have also committed the
4 offence, subject to subsection (5).
- 5 (3) If a body corporate commits an offence under this Act then,
6 although the body corporate is not charged with the offence,
7 every person who was an officer of the body corporate at the
8 time the offence is alleged to have been committed may be
9 charged with the offence.
- 10 (4) If an officer is charged as permitted by subsection (3) and it is
11 proved that the body corporate committed the offence, the
12 officer is to be taken to have also committed the offence, subject
13 to subsection (5).
- 14 (5) If under this section an officer is charged with an offence it is a
15 defence to prove —
- 16 (a) that the offence was committed without the officer's
17 consent or connivance; and
- 18 (b) that the officer took all the measures to prevent the
19 commission of the offence that he or she could
20 reasonably be expected to have taken having regard to
21 the officer's functions and to all the circumstances.

22 **30. Liability of employers**

- 23 (1) If a person is charged with an offence under this Act, the
24 person's employer at the time the offence is alleged to have
25 been committed may also be charged with the offence.
- 26 (2) If a person and the person's employer are charged as permitted
27 by subsection (1) and the employee is convicted of the offence,
28 the employer is to be taken to have also committed the offence,
29 subject to subsection (5).
- 30 (3) If a person commits an offence under this Act then, although the
31 person is not charged with the offence, the person's employer at

- 1 the time the offence is alleged to have been committed may be
2 charged with the offence.
- 3 (4) If an employer is charged as permitted by subsection (3) and it
4 is proved that the person's employee committed the offence, the
5 employer is to be taken to have also committed the offence,
6 subject to subsection (5).
- 7 (5) If under this section an employer is charged with an offence it is
8 a defence to prove —
- 9 (a) that the offence was committed without the employer's
10 consent or connivance; and
- 11 (b) that the employer took all the measures to prevent the
12 commission of the offence that the employer could
13 reasonably be expected to have taken having regard to
14 all the circumstances.

15 **Division 3 — Prosecutions**

16 **31. When a prosecution can be commenced**

17 A prosecution of a person for an offence under this Act must be
18 commenced within 2 years after the date on which the offence
19 was allegedly committed.

20 **32. Consent to be given for certain prosecutions**

- 21 (1) A person who is not a police officer cannot commence a
22 prosecution for an offence under this Act without the written
23 consent of the CEO or a person authorised by the CEO for the
24 purposes of this section.
- 25 (2) A police officer who commences a prosecution for an offence
26 under this Act is to inform the CEO in writing of that fact and of
27 the outcome of the prosecution.

1 **33. Evidentiary matters**

2 (1) In proceedings for an offence under this Act, an allegation in the
3 prosecution notice of any of the following matters is, in the
4 absence of evidence to the contrary, to be taken to be proved —

- 5 (a) that at a specified time a person held a specified office;
6 (b) that the prosecutor is authorised, and has the CEO's
7 consent, to commence the prosecution;
8 (c) that a specified substance or article is, or was at a
9 specified time, a butane product;
10 (d) that at a specified time a person had not reached
11 18 years of age;
12 (e) that at a specified time a person had reached 14 years of
13 age.

14 (2) A certificate purporting to be signed by the CEO or the CEO's
15 delegate and stating that the person named in the certificate was,
16 at the time or during the period specified in the certificate —

- 17 (a) an investigator, restricted investigator or environmental
18 health officer; or
19 (b) a person authorised under section 95 of the Tobacco
20 Products Control Act 2006 to act as a controlled
21 purchase officer,

22 and authorised to do anything stated in the certificate is, without
23 proof of any appointment, delegation, or signature, evidence of
24 the facts stated in the certificate.

25 (3) In proceedings for an offence under this Act it is to be
26 presumed, unless the contrary is proved, that a document
27 purporting to have been signed or certified by the CEO, an
28 investigator or a police officer was signed or certified by a
29 person who was at the time the CEO, an investigator or a police
30 officer, as the case may be.

31 (4) In proceedings for an offence under this Act it is to be
32 presumed, unless the contrary is proved, that a document

1 purporting to have been signed by a delegate of the CEO was
2 signed by a person who at the time was such a delegate and was
3 authorised to sign it.

4 (5) This section is in addition to and does not affect the operation of
5 the *Evidence Act 1906*.

6 **34. Evidentiary status of copies and reproductions of documents**

7 (1) In proceedings under this Act, a copy of a notice or other
8 document issued by the CEO —

9 (a) is, if produced by or on behalf of the CEO, admissible in
10 the same way as the original; and

11 (b) has the same evidentiary value as the original.

12 (2) For the purposes of the law of evidence, if 2 or more documents
13 are produced from the same computer data (or from computer
14 date recording the same information), they are both or all to be
15 regarded as originals.

16 (3) A copy of a document, possession of which is taken by an
17 investigator under section 21(2) or under a warrant issued under
18 section 87 of the *Tobacco Products Control Act 2006*, is
19 admissible in evidence if it is certified by the investigator as
20 having been obtained under the relevant provision.

21 **Division 4 — Penalties**

22 **35. General penalties**

23 (1) For an offence under sections 5, 6, or 7 of this Act the penalty
24 is —

25 (a) for an individual —

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

27 (ii) for a second or subsequent offence, a fine of
28 \$20,000;

29 (b) for a body corporate —

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

1 (ii) for a second or subsequent offence, a fine of
2 \$80,000;

3 (2) The provision in subsection (1) of a penalty for a body corporate
4 does not affect the operation of section 40(5) of the *Sentencing*
5 *Act 1995* in relation to an offence under a provision of this Act
6 that is not specified in that subsection.

7 **36. Continuing penalties**

8 For each separate and further offence committed by a person
9 under section 71 of the *Interpretation Act 1984* the penalty is —

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

12 **Division 5 — Seized things and forfeiture**

13 **37. Storage of seized things**

14 (1) The CEO may arrange the location of, and manner in which,
15 seized things are to be stored before they are returned under
16 section 92 of the *Tobacco Products Control Act 2006* or
17 forfeited to the Crown under section 39.

18 (2) The CEO may, on behalf of the State, enter into a written
19 contract under which the contractor provides services in respect
20 of the storage of seized things.

21 **38. Expenses of storage payable by convicted person**

22 (1) A person who is convicted of an offence under this Act is liable
23 to pay to the CEO all expenses reasonably incurred by the CEO
24 in relation to the storage of a seized thing that was used in, the
25 subject of, or otherwise involved in, the commission of the
26 offence.

27 (2) The CEO may recover expenses for which a person is liable
28 under subsection (1) from that person in a court of competent
29 jurisdiction as a debt due to the CEO.

1 (3) This section applies whether or not a seized thing is forfeited to
2 the Crown under section 39 but a person is not liable to pay
3 storage expenses incurred on and from the day on which the
4 thing is forfeited.

5 **39. Forfeiture on conviction**

6 (1) On the conviction of a person for an offence under this Act, the
7 court may order the forfeiture to the Crown of anything that was
8 used in, the subject of, or otherwise involved in, the commission
9 of the offence.

10 (2) The court may make the order —

11 (a) whether or not the thing is a seized thing; and

12 (b) in the case of a seized thing, whether or not the thing has
13 been returned to its owner.

14 (3) The court may make any order it considers appropriate to
15 enforce the forfeiture.

16 **40. Dealing with unclaimed seized things**

17 (1) A seized thing is unclaimed if —

18 (a) the thing is not forfeited to the Crown under section 39;
19 and

20 (b) the CEO cannot return the thing in accordance with
21 section 92(2) of the *Tobacco Products Control Act 2006*
22 despite making reasonable efforts to do so.

23 (2) After the expiry of the time for any relevant appeal an
24 unclaimed seized thing —

25 (a) that is a butane product is to be destroyed in such
26 manner as the CEO directs; or

27 (b) that is not a butane product may be destroyed, sold or
28 otherwise disposed of in such manner as the court
29 directs, or in the absence of a court direction, as the
30 CEO directs.

Part 5 — Miscellaneous

41. Protection from liability for wrongdoing

- (1) An action in tort does not lie against a person for anything that the person has done, in good faith, in the performance or purported performance of a function under this Act.
- (2) The CEO and the Crown are also relieved of any liability that either of them might otherwise have had for another person having done anything as described in subsection (1).
- (3) Subsection (1) does not relieve a contractor of any liability that the contractor might have for anything done, as described in that subsection, by the contractor or any other person.
- (4) The protection given by this section applies even though the thing done as described in subsection (1) may have been capable of being done whether or not this Act had been enacted.
- (5) In this section, a reference to the doing of anything includes a reference to an omission to do anything.
- (6) In subsection (3) —
- contractor* means a person who has entered into a contract with the CEO under section 39(2).

42. Confidentiality

- (1) A person must not record, disclose or make use of any information obtained by reason of a function that the person has, or at any time had, in the administration of this Act except —
- (a) for the purposes of performing a function under this Act;
 - (b) as required or allowed by this Act or under another written law;
 - (c) for the purposes of any legal proceedings arising out of the administration of this Act;
 - (d) for the purpose of assisting a person who is performing a function under a corresponding law;

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1 (e) with the written consent of the person to whom the
2 information relates;

3 (f) in prescribed circumstances.

4 Penalty: a fine of \$10,000 and imprisonment for 12 months.

5 (2) Subsection (1) does not apply to the recording, disclosure or use
6 of statistical or other information that could not reasonably be
7 expected to lead to the identification of any person to whom it
8 relates.

9 **43. Regulations**

10 The Governor may make regulations prescribing all matters that
11 are required or permitted by this Act to be prescribed, or are
12 necessary or convenient to be prescribed for giving effect to the
13 purposes of this Act.

14 **44. Review of Act**

15 (1) The Minister is to carry out a review of the operation and
16 effectiveness of this Act as soon as is practicable after 4 years
17 have elapsed since the Act comes into operation.

18 (2) The Minister is to prepare a report based on the review carried
19 out under subsection (1) and is to cause the report to be laid
20 before each House of Parliament as soon as is practicable after
21 the report is prepared, and in any event in relation to a review
22 under subsection (1), not later than 12 months after the
23 requirement for the review arose.

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