



Western Australia

## **Tobacco Products Control Act 2006**

Compare between:

[11 Sep 2010, 01-e0-02] and [23 Sep 2010, 01-f0-03]



## **Tobacco Products Control Act 2006**

**An Act to —**

- **prohibit the supply of tobacco products and smoking implements to young persons;**
  - **regulate the sale and promotion of tobacco products;**
  - **prohibit the sale of products that resemble tobacco products;**
  - **reduce the exposure of people to tobacco smoke from tobacco products that are smoked by other people,**
- and to repeal the *Tobacco Control Act 1990*<sup>2</sup> and make consequential amendments to the *Constitution Acts Amendment Act 1899*<sup>3</sup> and *Health Act 1911*<sup>3</sup> and for related purposes.**

## **Part 1 — Preliminary**

### **1. Short title**

This is the *Tobacco Products Control Act 2006*<sup>1</sup>.

### **2. Commencement**

- (1) This Act comes into operation on a day fixed by proclamation<sup>1</sup>.
- (2) Different days may be fixed under subsection (1) for different provisions.

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

The purposes of this Act are —

- (a) to reduce the incidence of illness and death related to the use of tobacco products —
    - (i) by prohibiting the supply of tobacco products and smoking implements to young persons;
    - (ii) by discouraging the use of tobacco products;
    - (iii) by restricting the promotion of tobacco products and smoking generally;
    - (iv) by reducing the exposure of people to tobacco smoke from tobacco products that are smoked by other people;
- and
- (b) to promote good health and activities which encourage healthy lifestyles.

### **4. Terms used**

The Glossary at the end of this Act defines or affects the meaning of some of the words and expressions used in this Act.

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

This Act binds the Crown.

## **Part 2 — Sale and supply**

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

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

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

Penalty: see section 115.

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

A person must not purchase a tobacco product or smoking implement on behalf of a person who has not reached 18 years of age.

Penalty: see section 115.

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

- (1) A responsible person in relation to premises that are licensed premises or a mines amenity must ensure that a tobacco product cannot be obtained from a vending machine at the premises by a person who has not reached 18 years of age.
- (2) A responsible person in relation to premises that are licensed premises or a mines amenity must ensure that a tobacco product cannot be obtained by a member of the public from a vending machine at the premises without the assistance of a responsible person or a person acting on behalf of a responsible person unless the operation of the vending machine can be supervised at all times during which the premises are open to members of the public.

Penalty applicable to subsections (1) and (2): see section 115.

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

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

Penalty: see section 115.

**10. Marking of goods for delivery**

A person who authorises a tobacco product or smoking implement to be delivered must ensure that the package is clearly marked with the words “tobacco product” unless —

- (a) the tobacco product is in the manufacturer’s original package only and is labelled in accordance with the regulations as required by section 19; or
- (b) the delivery is made to the holder of a licence.

Penalty: see section 115.

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

A person must not deliver goods that are marked as a tobacco product or might reasonably be suspected to be a tobacco product or smoking implement unless —

- (a) the person receiving the goods provides his or her full name, date of birth and signature on a delivery document to be kept by the deliverer; or
- (b) the delivery is made to the holder of a licence.

Penalty: see section 115.

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

A person who is requested —

- (a) at premises specified in a retailer's licence to sell a tobacco product or smoking implement;
- (b) to assist a person to obtain a tobacco product from a vending machine; or
- (c) to deliver goods that are marked as a tobacco product or that might reasonably be suspected to be a tobacco product or smoking implement,

may refuse to do so unless the person who is to take possession of the tobacco product or smoking implement produces evidence that he or she has reached 18 years of age.

**13. Defence: age of receiver**

- (1) In this section —

*receiver* means —

- (a) a person to whom a tobacco product or smoking implement was sold, supplied or delivered;
- (b) a person on whose behalf a tobacco product or smoking implement was purchased; or
- (c) a person who obtained a tobacco product from a vending machine,

as is relevant to the case;

*relevant time* means the time at which an offence under section 6, 7, 8(1) or 9 is alleged to have been committed.

- (2) If a person is charged with an offence under section 6, 7, 8(1) or 9 it is a defence to prove —
- (a) that at the relevant time the person charged had no reason to believe that the receiver had not reached 18 years of age;
  - (b) that at the relevant time the receiver had reached 14 years of age;

- (c) that at or before the relevant time the receiver had produced evidence that the receiver had reached 18 years of age; and
- (d) that at the relevant time there was compliance with section 25(1) or (2), as is relevant to the case.

**14. Defence: Australia Post workers**

If a person is charged with an offence under section 6 or 11 in relation to the delivery of a tobacco product or smoking implement it is a defence to prove that at the time the offence is alleged to have been committed the person was an employee of Australia Post as defined in the *Australian Postal Corporation Act 1989* of the Commonwealth —

- (a) who was not required under a law (other than section 11(a)) or under the person's contract of employment to obtain the signature of a person receiving the goods; and
- (b) who delivered the goods by way of placing the goods in a letter box at the address stated on the parcel.

**15. Proof of age**

- (1) For the purposes of sections 9, 12 and 13(2)(c) the following documents can be used as evidence that a person has reached 18 years of age —
  - (a) a current passport;
  - (b) a current Australian driver's licence;
  - (c) a prescribed document,

that bears a photograph of the person and indicates by reference to the person's date of birth or otherwise that the person has reached 18 years of age.

- (2) A person must not, for the purpose of obtaining a tobacco product or smoking implement use —
  - (a) another person's document of identification; or



- (b) a document of identification that has been forged or tampered with.

Penalty: a fine of \$100.

### **Division 2 — Sale of tobacco products**

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

- (1) A person must not sell a tobacco product by way of retail sale except under the authority of a retailer's licence.

Penalty: a fine of \$50 000.

- (2) For the purposes of subsection (1), persons who sell tobacco products by way of retail sale —

- (a) include a responsible person in relation to premises that are licensed premises or a mines amenity and at which there is a vending machine; but
- (b) do not include an owner of a vending machine that is at premises that are licensed premises or a mines amenity if the owner of the vending machine is not also a responsible person in relation to those premises.

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

A person must not sell a tobacco product by way of wholesale sale except under the authority of a wholesaler's licence.

Penalty: see section 115.

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

A person must not sell a tobacco product by way of indirect sale except under the authority of an indirect seller's licence.

Penalty: see section 115.

#### **19. Labelling of tobacco products**

The holder of a licence must not sell, or authorise or allow to be sold, a tobacco product by way of retail sale or wholesale sale

unless the tobacco product is in a package that is labelled in accordance with the regulations.

Penalty: see section 115.

**20. One retail sale point only**

- (1) The holder of a retailer's licence must ensure that tobacco products are not sold at more than one place in the premises specified in the licence.

Penalty: see section 115.

- (2) Subsection (1) does not apply to sales of tobacco products from vending machines.

**21. Retail sale of cigarettes**

The holder of a retailer's licence must not sell, or authorise or allow to be sold, a cigarette unless the cigarette is in a package that contains at least 20 cigarettes.

Penalty: see section 115.

**22. ~~Display~~Prohibition on display of tobacco products, packages, smoking implements**

- (1) The holder of a retailer's licence must ensure that a tobacco ~~products are~~ product, package or smoking implement is not displayed ~~at more than one place~~ in the premises specified in the licence.

~~(2) The holder of a retailer's licence must not display, or authorise or allow to be displayed, tobacco products or packages in such a way that the total surface area of products or packages facing customers is greater than 1 m<sup>2</sup> or such lesser area as is prescribed.~~

~~(3) The holder of a retailer's licence must not display, or authorise or allow to be displayed —~~

~~(a) a carton or a part of a carton; or~~

- ~~(b) any other kind of package that is prescribed.~~
- ~~(4) The holder of a retailer's licence must not display, or authorise or allow to be displayed, tobacco products or packages unless the display is in accordance with the regulations.~~
- ~~Penalty applicable to subsections (1), (2), (3) and (4): see section 115.~~

Penalty: see section 115.

- (2) If a person is charged with an offence under subsection (1) it is a defence to prove that the display was made to a specific customer at the customer's request.

[Section 22 inserted by No. 22 of 2009 s. 4.]

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

- (1) In this section —

- ~~**50% retailer** means a person who conducts a business selling tobacco products by way of retail sale if —~~
- ~~(a) the person or any other person had been conducting that business on 1 July 2005; and~~
- ~~(b) 50% or more of the average gross turnover of the business for the financial year 2004 to 2005 was derived from the sale of tobacco products;~~

**specialist retailer** means a person who conducts a business selling tobacco products by way of retail sale if —

- (a) the person or any other person had been conducting that business on 1 July 2005;
- (b) 80% or more of the average gross turnover of the business for the financial year 2004 to 2005 was derived from the sale of tobacco products; and
- (c) the business is conducted separately from, not in conjunction with, and not within the premises of, any other business.

~~[(2), (3) deleted]~~

(4) If a person is charged with an offence under section 22(~~2~~1) it is a defence to prove that at the time the offence is alleged to have been committed —

(a) the person was a ~~50%~~specialist retailer;

~~(b) the total surface area of products or packages facing customers was not greater than 3 m<sup>2</sup>;~~

~~(c) the display was located in an area that was separate from an area where goods other than tobacco products were available for sale; and~~

~~(d) the display could not be seen from a public place outside the premises specified in the licence.~~

~~(3) If a person is charged with an offence under section 22(1) it is a defence to prove that the person was a specialist retailer at the time the offence is alleged to have been committed.~~

~~(4) If a person is charged with an offence under section 22(2) it is a defence to prove that at the time the offence is alleged to have been committed —~~

~~(a) the person was a specialist retailer;~~

(b) the tobacco products or packages that could be seen from a public place outside the premises specified in the licence were displayed in such a way that the total surface area of the products or packages was not greater than 1 m<sup>2</sup> or such lesser area as prescribed ~~at the time for the purposes of section 22(2);~~by the regulations; and

(c) the rest of the display could not be seen from a public place outside the premises specified in the licence.

*[Section 23 amended by No. 22 of 2009 s. 5.]*

**24. Information about availability, price of tobacco products or smoking implements**

(1) The holder of a retailer's licence must not display, or authorise or allow to be displayed in, or in the vicinity of, the premises specified in the licence information about the availability or

prices of tobacco products [or smoking implements](#) unless the information is displayed in accordance with the regulations.

- (2) The holder of a retailer's licence in relation to premises that are licensed premises or a mines amenity at which there is a vending machine must not display, or authorise or allow to be displayed in, on, or in the vicinity of, the vending machine information about the availability of tobacco products from the vending machine or the prices of those products unless the information is displayed in accordance with the regulations.

Penalty applicable to subsections (1) and (2): see section 115.

[\[Section 24 amended by No. 22 of 2009 s. 6.\]](#)

## **25. Warnings**

- (1) The holder of a retailer's licence must ensure that there is displayed at the premises specified in the licence signs —
- (a) warning customers and employees that it is illegal to sell a tobacco product or smoking implement to a person who has not reached 18 years of age;
  - (b) stating the penalty for selling a tobacco product or smoking implement to a person who has not reached 18 years of age;
  - (c) advising that proof of age may be requested from purchasers of tobacco products or smoking implements; and
  - (d) that are in accordance with the regulations.
- (2) The holder of a retailer's licence in relation to premises that are licensed premises or a mines amenity at which there is a vending machine must ensure that there is displayed —
- (a) on the vending machine signs about the purchase of tobacco products that are in accordance with the regulations; and
  - (b) on the vending machine, a health warning sign that is in accordance with the regulations.

- (3) The holder of a retailer's licence must ensure that if tobacco products are displayed at the premises specified in the licence (other than in or on a vending machine) there is displayed, immediately adjacent to the tobacco products display, a health warning sign that is in accordance with the regulations.
- (4) The holder of an indirect seller's licence must ensure that customers are —
  - (a) warned that it is illegal to sell or deliver a tobacco product or smoking implement to a person who has not reached 18 years of age;
  - (b) informed of the penalty for selling or delivering a tobacco product or smoking implement to a person who has not reached 18 years of age; and
  - (c) advised that proof of age —
    - (i) will be requested before a tobacco product or smoking implement is delivered; and
    - (ii) may be requested at the time of delivery.

Penalty applicable to subsections (1), (2), (3) and (4): see section 115.

**26. Information and advice**

- (1) The CEO may, at the CEO's expense, make arrangements for the publication, in such form or forms as the CEO thinks is appropriate, of —
  - (a) information about the effects of smoking on health; and
  - (b) advice to assist persons to cease smoking.
- (2) The holder of a retailer's licence must, in accordance with the regulations —
  - (a) provide a person who purchases a tobacco product from the holder with an approved guide or guides; and
  - (b) make an approved guide or guides available to a person who purchases a tobacco product from the holder.

- (3) A tobacco wholesaler must, in accordance with the regulations, provide holders of retailer's licences with approved guides.  
Penalty applicable to subsections (2) and (3): see section 115.
- (4) Nothing in this section requires an approved guide to be provided or made available if the tobacco product is to be purchased from a vending machine.

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

- (1) A person must not place, or authorise or allow to be placed, in any premises a vending machine for operation by members of the public unless the premises are licensed premises or a mines amenity.
- (2) A person must not place, or authorise or allow to be placed, in premises that are licensed premises or a mines amenity —
  - (a) more than the prescribed number of vending machines for the premises;
  - (b) a vending machine having a size or capacity that is greater than the prescribed size or capacity; or
  - (c) a vending machine in a location on the premises that is not in accordance with the regulations.

Penalty applicable to subsections (1) and (2): see section 115.

**28. Mobile selling of tobacco products**

- (1) In this section —  
*carried by* includes carried on a tray or in a bag or other container.
- (2) A person must not, in the course of conducting a business or in the course of the person's employment, sell a tobacco product that is carried by the person.
- (3) A person must not authorise or allow another person (the *seller*) to sell a tobacco product that is carried by the seller.

Penalty applicable to subsections (2) and (3): see section 115.

- (4) Subsections (2) and (3) apply whether or not the tobacco product, or the tray on which or the bag or other container in which the tobacco product is being carried, is being carried by the person at the time of the sale.

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

A person who engages in price discounting to market tobacco products must not advertise the price discounting of a tobacco product.

Penalty: see section 115.

**30. Smokeless tobacco**

- (1) A person must not manufacture or sell a tobacco product that is not a tobacco product prepared for smoking.

Penalty: see section 115.

- (2) Subsection (1) does not apply in relation to the manufacture or sale of prescribed tobacco products in prescribed circumstances.



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

**31. Tobacco advertisements restricted**

- (1) A person must not display or broadcast a tobacco advertisement in a public place.
- (2) A person must not display or broadcast a tobacco advertisement that can be seen or heard from a public place.
- (3) A person must not distribute to the public any unsolicited object that constitutes or contains a tobacco advertisement.
- (4) A person must not sell or hire an object that constitutes or contains a tobacco advertisement.

Penalty applicable to subsections (1), (2), (3) and (4): see section 115.

- (5) In proceedings for an offence under this section it is to be presumed, unless the contrary is proved, that if the thing that is alleged to constitute a tobacco advertisement contains the trade mark in respect of, or registered design or brand name of, a tobacco product or smoking implement then it promotes the tobacco product or smoking implement.

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

- (1) Section 31 does not apply in relation to any of the following —
  - (a) anything done by means of a radio or television broadcast;
  - (b) a tobacco advertisement in a publication published outside Western Australia unless the sole or main purpose of the publication is to promote a tobacco product or smoking generally;
  - (c) a tobacco advertisement in or on a package;
  - (d) a tobacco advertisement comprising only information about the availability of tobacco products [or smoking implements](#) from premises specified in a retailer's licence or a vending machine or the prices of those

products [or implements](#) if the information is displayed in accordance with regulations mentioned in section 24(1) or (2);

- (e) a tobacco advertisement comprising only information about the availability of tobacco products from premises specified in a wholesaler's licence or the prices of those products;
- (f) a tobacco advertisement that is an incidental accompaniment to the subject of a film, video tape, compact disc or digital versatile disc or live stage performance unless the sole or main purpose of the film, video tape, compact disc or digital versatile disc or live stage performance is to promote a tobacco product or smoking [implement or smoking](#) generally;
- (g) an invoice, statement, order, letterhead, business card, cheque, manual or other document that is ordinarily used in the course of business of a licence holder or tobacco company;
- (h) the appearance of the trade mark in respect of, or the registered design or brand name of, a tobacco product, or part of such a trade mark, registered design or brand name, in or on land or a building that is occupied by the tobacco company that manufactures the tobacco product;
- (i) the appearance of the trade mark in respect of, or the registered design or brand name of, a smoking implement, or part of such a trade mark, registered design or brand name, in or on land or a building that is occupied by the manufacturer of the smoking implement; or
- (j) the appearance of —
  - (i) the business name of a licence holder at the premises specified in the licence;

- (ii) a description of the business of a licence holder at the premises specified in the licence; or
  - (iii) the name of a tobacco company in or on land or a building that is occupied by the tobacco company.
- (2) Despite subsection (1)(b), section 31 applies to a tobacco advertisement that is provided in or with a publication if the advertisement comprises a separate document inserted or otherwise incorporated into or onto the publication.
- (3) Section 31 does not apply in relation to the taking of any action to prevent a tobacco product or smoking implement (a **product**) from causing injury to anyone, including action —
  - (a) to recall a product;
  - (b) to disclose a defect in, or a dangerous characteristic of, a product;
  - (c) to disclose circumstances in which the use of a product is or may be dangerous; or
  - (d) to disclose procedures for disposing of a product.

[\[Section 32 amended by No. 22 of 2009 s. 7.\]](#)

### **33. Prizes, competitions**

- (1) A person must not, in connection with the sale of a tobacco product or for the purpose of promoting a tobacco product or smoking generally, supply to any person (whether or not the purchaser) —
  - (a) a prize, gift or other benefit; or
  - (b) a stamp, coupon, token, voucher, ticket or other thing by virtue of which the purchaser or any other person may become entitled to, or may qualify for, a prize, gift or other benefit.

Penalty: see section 115.

- (2) Subsection (1) applies —

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- (a) whether or not consideration is given or required for the prize, gift or benefit;
  - (b) whether or not the prize, gift or other benefit has monetary value; and
  - (c) whether or not the entitlement or qualification is absolute or conditional.
- (3) If a person is charged with an offence under subsection (1) it is a defence to prove —
- (a) that the prize, gift or benefit supplied was only incidentally connected with the purchase of a tobacco product; and
  - (b) that equal opportunity to receive that prize, gift or benefit was afforded generally to persons who purchased products, whether or not they were tobacco products.
- (4) In the case of a sale of tobacco products to the holder of a licence, subsection (1) does not apply to a discount provided in connection with that sale as long as the discount is based on, and only on, the quantity of tobacco products the subject of that sale.

**34. Free samples**

A person must not, for the purpose of promoting a tobacco product or smoking generally, offer, give or distribute a free sample of a tobacco product to a member of the public.

Penalty: see section 115.

**35. Sponsorships**

- (1) In this section —
- sponsorship*** includes any of the following —
- (a) a scholarship, prize, gift or other like benefit;

- (b) a financial arrangement (other than bona fide contract of service or contract for services) for the direct promotion or publicising of one or more of the things mentioned in subsection (2)(a) or (b) through the medium of sporting, arts, youth, educational or other like activities.
- (2) A person must not promote, or agree to promote —
- (a) a tobacco product or smoking generally; or
  - (b) the name or interests of a licence holder or a tobacco company in association directly or indirectly with a tobacco product,

under a contract, or an arrangement (whether or not legally binding), under which a sponsorship is provided, or to be provided, by another person.

- (3) A person must not provide, or agree to provide, a sponsorship under a contract or arrangement of a kind referred to in subsection (2).

Penalty applicable to subsections (2) and (3): see section 115.

- (4) In proceedings for an offence under subsection (2)(b), it is to be presumed, unless the contrary is proved, that the name or interests of a licence holder or a tobacco company is in association directly or indirectly with the tobacco product if that name or those interests are commonly associated by members of the public with the tobacco product.

## **Part 4 — Licensing**

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

#### **36. Individuals and bodies corporate may be licensed**

- (1) The CEO may issue one or more licences to an individual or a body corporate to sell tobacco products —
  - (a) by way of retail sale;
  - (b) by way of wholesale sale;
  - (c) by way of indirect sale.
- (2) However, no more than one of each type of licence mentioned in subsection (1) is to be issued to a particular person in respect of the same premises.
- (3) A licence —
  - (a) is to be in an approved form;
  - (b) is to specify the premises to which it applies;
  - (c) is to have an identifying number; and
  - (d) may be issued in combination with other licences.

#### **37. Application for licence**

- (1) An application for the issue of a licence is to be —
  - (a) made in an approved form;
  - (b) lodged in an approved manner; and
  - (c) accompanied by —
    - (i) proof of the applicant's identity including, in the case of a body corporate, proof of incorporation;
    - (ii) other evidence of a nature or in a form that is prescribed; and
    - (iii) the prescribed application fee and the prescribed licence fee.

- (2) The applicant must also provide any other information that the CEO requires for the proper consideration of a particular application.

**38. How and when to apply for renewal**

- (1) An application for the renewal of a licence is to be —
- (a) made in an approved form;
  - (b) lodged in an approved manner; and
  - (c) accompanied by —
    - (i) other evidence of a nature or in a form that is prescribed; and
    - (ii) the prescribed licence fee.
- (2) The applicant must also provide any other information that the CEO requires for the proper consideration of a particular application.
- (3) An application for the renewal of a licence is to be made no later than 28 days before the day on which the licence is due to expire or at such later time as the CEO allows having regard to section 40(2).

**39. Issue, renewal, of licences**

- (1) The CEO is not to issue a licence if the applicant has not reached 18 years of age.
- (2) The CEO is not to issue a retailer's licence to authorise the sale or supply of tobacco products from temporary premises at an event which the CEO expects to be attended by a significant number of people who have not reached 18 years of age.
- (3) To determine the suitability of an applicant to be issued with a licence the CEO is to have regard to whether —
- (a) the applicant has been refused, or disqualified from holding, a licence under this Act or a corresponding law;

- (b) the applicant is the holder of a licence, under this Act or a corresponding law, that is suspended;
  - (c) the applicant has, at any time, been convicted of an offence under this Act, a corresponding law, or any legislation repealed by this Act;
  - (d) the applicant has, in the 10 years before the application is made, been convicted anywhere in the world of an offence involving fraud or dishonesty;
  - (e) the applicant is the subject of a pending charge anywhere in the world for an offence involving fraud or dishonesty;
  - (f) the applicant is likely to carry on the activities of a licence holder honestly and fairly;
  - (g) the applicant is a fit and proper person to hold a licence; and
  - (h) there is any other good reason for not issuing or renewing the licence.
- (4) The CEO is not to renew a licence if in the CEO's opinion there are sufficient grounds to make an allegation under section 47.
- (5) Where an application is made for the issue or renewal of a licence to be held on behalf of a body corporate, the CEO is not to issue or renew the licence unless the CEO has regard to each of the matters referred to in subsection (1), (3) or (4), as the case may be, in relation to each of the following persons who is relevant to the application —
- (a) the body corporate;
  - (b) the officers of the body corporate.
- (6) The licence fee is to be refunded if an application for the issue or renewal of a licence is refused.



**40. Notice of decisions**

- (1) If the CEO refuses to issue a licence, or amend a licence under section 44 the CEO, no later than 28 days after the decision is made, is to give written notice to the applicant setting out the decision and the reasons for the decision.
- (2) If the CEO refuses to renew a licence the CEO, no later than 14 days before the day on which the licence is due to expire, is to give written notice to the applicant setting out the decision and the reasons for the decision.
- (3) A notice under this section is also to inform the applicant of the right to apply to the State Administrative Tribunal for a review of the decision.

**41. Conditions and restrictions of general application**

- (1) It is a condition of every licence that the holder of the licence does not authorise or allow the sale of tobacco products at premises other than the premises specified in the licence.
- (2) Regulations may prescribe conditions and restrictions that are to be taken to be attached to —
  - (a) all licences; or
  - (b) all licences of a particular type,unless otherwise provided by the licence.
- (3) The conditions imposed under subsection (2) may include conditions requiring licence holders to provide staff training about the requirements of this Act.

**42. Conditions and restrictions of particular application**

- (1) The CEO may issue or renew a licence subject to conditions and restrictions set out in, or provided with, the licence.

- (2) The CEO may decide to make an existing licence subject to a new condition or restriction or to change or remove a condition or restriction to which an existing licence is subject, but in that case —
  - (a) the CEO is to give written notice of the decision to the holder of the licence no later than 14 days after the decision is made and inform the holder of the right to apply to the State Administrative Tribunal for a review of the decision; and
  - (b) the CEO is to have regard to the submissions, if any, of the holder of the licence in relation to the proposal.
- (3) A decision under subsection (2) takes effect 28 days after it is made, or at such later time as is set out in the notice unless —
  - (a) the CEO revokes the decision before that time; or
  - (b) the holder of the licence applies to the State Administrative Tribunal for a review of the decision.
- (4) Subsection (2) does not apply to conditions and restrictions mentioned in section 41.
- (5) The holder of a licence may apply in the approved form to the CEO for the removal of, or change to, a condition or restriction to which an existing licence is subject in which case subsection (2) applies to that application.

**43. Term of licence**

A licence is to have effect for 12 months from the day of issue and may be renewed for consecutive periods of 12 months.

**44. Amendment of licence to apply to different premises**

- (1) A licence —
  - (a) cannot be transferred to another person; but
  - (b) can be amended by the CEO so as to apply to different premises.

- (2) An application for the amendment of a licence is to be —
  - (a) made in an approved form;
  - (b) lodged in an approved manner; and
  - (c) accompanied by —
    - (i) other evidence of a nature or in a form that is prescribed; and
    - (ii) the prescribed application fee.
- (3) The applicant must also provide any other information that the CEO requires for the proper consideration of a particular application.
- (4) The CEO may refuse to amend a licence if the CEO is satisfied that —
  - (a) the applicant has been disqualified from holding a licence;
  - (b) the applicant is the holder of a licence that is suspended; or
  - (c) there is another good reason for not amending the licence.
- (5) If the CEO decides to amend a licence —
  - (a) the CEO is to issue an amended licence; and
  - (b) the amendment takes effect on the day of the decision or such later day as is specified by the CEO in a notice given to the applicant.

**45. Register of licences**

- (1) The CEO is to cause to be kept, in an approved form, a register of the following information in relation to each licence issued —
  - (a) the type of licence;
  - (b) the name of the holder of the licence;

- (c) the address of the premises from which tobacco products may be sold under the licence;
  - (d) the identifying number of the licence;
  - (e) the day on which the licence was issued;
  - (f) any particular condition or restriction that applies to the licence; and
  - (g) such other particulars as may be prescribed.
- (2) The CEO is to allow any person to inspect the register during business hours.
- (3) On application being made to the CEO and payment of the prescribed fee the CEO is to issue, in an approved form, an extract of the requested registered particulars.

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

**46. Review of licensing decisions**

- (1) A person aggrieved by a reviewable decision of the CEO may apply to the State Administrative Tribunal for a review of the decision.
- (2) In subsection (1) —
- person aggrieved*** means a person whose licence is affected by a reviewable decision or who applies for the grant or renewal of a licence;
- reviewable decision*** means a decision —
- (a) to refuse to issue or renew a licence;
  - (b) as to a condition or restriction which is attached to a licence (except a condition or restriction mentioned in section 41);
  - (c) to make an existing licence subject to a new condition or restriction or to change or remove a condition or

restriction to which an existing licence is subject under section 42(2);

- (d) to refuse to remove or change a condition or restriction to which an existing licence is subject under section 42(2); or
- (e) to refuse to amend a licence under section 44.

**47. Suspension, revocation, disqualification from holding licences**

- (1) The CEO may allege to the State Administrative Tribunal that there is proper cause for disciplinary action, as mentioned in subsection (2), against a licence holder.
- (2) There is proper cause for disciplinary action against a licence holder —
  - (a) if the licence holder, or where the licence is held by a body corporate, if the body or any of the body's officers, as the case may be —
    - (i) is the subject of a pending charge for an offence under this Act;
    - (ii) has breached —
      - (I) a provision of this Act; or
      - (II) the licence or a condition or restriction to which the licence is subject;
    - (iii) has been convicted of an offence under this Act, a corresponding law, or any legislation repealed by this Act;
    - (iv) is the subject of a pending charge anywhere in the world for an offence involving fraud or dishonesty;
    - (v) is not or no longer likely to carry on the activities of a licence holder honestly and fairly; or
    - (vi) is not or no longer a fit and proper person to hold a licence;

or

- (b) if the licence was issued or renewed in error in consequence of information provided with the application for the issue or renewal of the licence being false or misleading in a material particular.
- (3) If, in a proceeding commenced by an allegation under subsection (1) against a licence holder, the State Administrative Tribunal is satisfied that proper cause exists for disciplinary action, the State Administrative Tribunal may do any of the following —
- (a) suspend a licence of any type held by the licence holder for such period, not exceeding 3 months, as the Tribunal thinks fit;
  - (b) revoke a licence of any type held by the licence holder;
  - (c) disqualify the licence holder from holding any type of licence for such period as the Tribunal thinks fit or permanently.

**48. Courts' powers on conviction**

Where the holder of a licence is convicted by any court of an offence under this Act, the court may, in addition to any penalty imposed or order made in respect of the conviction —

- (a) attach any condition or restriction to a licence of any type held by the licence holder for any period specified in the order;
- (b) suspend a licence of any type held by the licence holder for such period, not exceeding 3 months, as the court thinks fit;
- (c) revoke a licence of any type held by the licence holder;  
or
- (d) disqualify the licence holder from holding any type of licence for such period as the court thinks fit or permanently.

**49. Suspension of licence by SAT for non-compliance**

- (1) Where the State Administrative Tribunal makes an order against a licence holder and payment is not made in accordance with the order or the order is otherwise not complied with or is breached, the State Administrative Tribunal may suspend a licence of any type held by the licence holder until the payment is made, or for such period or upon such event occurring as the State Administrative Tribunal thinks fit.
- (2) The power conferred on the State Administrative Tribunal by subsection (1) is in addition to, and does not derogate from, the powers conferred on it by the *State Administrative Tribunal Act 2004*.

**50. Matters relating to court, SAT powers**

- (1) The State Administrative Tribunal may adjourn the hearing of an application made under section 46 or 47 until any charge for an offence under this Act pending in relation to a person who is a subject of the application has been determined.
- (2) When making any order under section 48 a court may, if it thinks fit, defer the operation of the order pending an appeal.
- (3) Where a court has made an order under section 48 the registrar of the court is to send to the CEO notice of the findings, penalty imposed and order made.
- (4) On the determination of an application made under section 46 or 47 the executive officer of the State Administrative Tribunal is to send to the CEO a copy of any order in relation to the determination.
- (5) A person to whom notice of suspension or revocation of a licence is given must comply with any directions of the CEO in relation to delivering up the licence issued to the person.  
Penalty: see section 115.

- (6) If a licence is suspended it is to be treated as being of no effect during the period of suspension.
- (7) A person who is disqualified from holding a licence of a type specified by a court or the State Administrative Tribunal cannot during the period of disqualification apply for a licence of that type.

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

**51. Breach of condition or restriction**

The holder of a licence must comply with each condition or restriction attached to the licence.

Penalty: see section 115.

**52. Display of retailer's licence**

- (1) The holder of a retailer's licence must display at all times the licence or a true copy of the licence —
  - (a) at the premises specified in the licence;
  - (b) at the place where tobacco products are sold at the premises; and
  - (c) so that the licence or copy is clearly visible to members of the public.

Penalty: see section 115.

- (2) A person does not commit an offence under subsection (1) if there has been compliance with section 54(1).

**53. Production of licence**

The holder of a licence must, if requested by an investigator to do so, produce the licence for inspection as soon as is practicable.

Penalty: see section 115.



**54. Replacement licences**

- (1) The holder of a licence which has been lost or destroyed must notify the CEO of the loss or destruction within 14 days of becoming aware of the loss or destruction.

Penalty: see section 115.

- (2) If the CEO is satisfied that a licence has been lost or destroyed the CEO may issue a duplicate licence on payment of the prescribed fee.

**55. Return of licence**

- (1) The holder of a licence that has not been renewed must return the expired licence to the CEO within 14 days of the expiry.

- (2) The holder of a licence that has been amended under section 44 must return the original licence to the CEO within 14 days of receiving the amended licence.

- (3) The holder of a licence who ceases to carry on the business in respect of which the licence was issued must return the licence to the CEO within 28 days of ceasing to carry on the business.

Penalty applicable to subsections (1), (2) and (3): see section 115.

- (4) The holder of a current licence may return the licence to the CEO at any time, in which case —
- (a) the licence ceases to have effect when it is received by the CEO; but
  - (b) this Act applies, for the purpose of enabling the person to be investigated or otherwise dealt with for a matter arising before the return, as if the licence had not been returned.

**56. Licence details on invoices etc.**

- (1) The holder of a retailer's licence, a wholesaler's licence or an indirect seller's licence must ensure that the particulars mentioned in subsection (3) are recorded on each invoice, order or other record of the purchase or receipt by the licence holder of a tobacco product intended for sale under the licence.
- (2) The holder of a wholesaler's licence or an indirect seller's licence must ensure that the particulars mentioned in subsection (3) are recorded on each invoice, order or other record of the sale by the licence holder of a tobacco product.  
Penalty applicable to subsections (1) and (2): see section 115.
- (3) The particulars to be recorded for the purposes of subsections (1) and (2) are as follows —
  - (a) the name of the licence holder;
  - (b) the address of the premises specified in the licence;
  - (c) the identifying number of the licence; and
  - (d) such other particulars as are prescribed.

**57. Duties of wholesalers**

- (1) The holder of a wholesaler's licence must not authorise or allow a tobacco product to be sold to a purchaser by way of wholesale sale unless the purchaser holds a licence.
- (2) If a person is charged with an offence under subsection (1) it is a defence to prove that at or before the time at which the offence is alleged to have been committed the purchaser had produced evidence that might reasonably be accepted as showing that the purchaser held a licence.
- (3) The holder of a wholesaler's licence must not authorise or allow a tobacco product to be sold to the holder of a retailer's licence by way of wholesale sale unless an invoice is issued in relation to the sale.

- (4) The CEO may require the holder of a wholesaler's licence to provide to the CEO, in the manner and within the period specified by the CEO —
- (a) the name and address of any person to whom the licence holder has sold tobacco products under the licence during a period specified by the CEO;
  - (b) information as to the chemical composition of a tobacco product sold or available for sale under the licence;
  - (c) information as to the volume of sales made under the licence during a period specified by the CEO.
- (5) The holder of a wholesaler's licence must comply with a requirement made under subsection (4).  
Penalty applicable to subsections (1), (3) and (5): a fine of \$20 000.
- (6) If a person is charged with an offence under subsection (5) 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.

**58. Records to be kept**

- (1) The holder of a licence and an individual who at any time held a licence —
- (a) must keep such records as are prescribed containing such particulars as are prescribed;
  - (b) must not knowingly make any false or misleading entry in any record; and
  - (c) must preserve any record kept under this section for a period of 3 years after the last entry was made in it and must do so at premises of which notice is given under subsection (2).

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- (2) A person mentioned in subsection (1) must notify the CEO in writing of the address of the premises —
- (a) at which records are preserved under subsection (1)(c); and
  - (b) to which records are moved.
- Penalty applicable to subsections (1) and (2): see section 115.
- (3) Premises referred to in subsection (2) must be in this State unless the CEO in writing approves otherwise.

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

### **Division 1 — The Foundation**

#### **59. Foundation established**

- (1) The Western Australian Health Promotion Foundation is established.
- (2) The Foundation —
  - (a) is a body corporate;
  - (b) has perpetual succession and a common seal; and
  - (c) may sue and be sued in its corporate name.
- (3) The Foundation may use, and operate under, one or more trading names approved by the Minister.
- (4) A trading name can be —
  - (a) an abbreviation or adaptation of the Foundation's corporate name; or
  - (b) a name other than the Foundation's corporate name.

#### **60. Agent of the Crown**

The Foundation is an agent of the Crown and enjoys the status, immunities and privileges of the Crown.

#### **61. Membership of Foundation**

- (1) The Foundation consists of 11 persons, of whom —
  - (a) one is to be appointed by the Minister on the nomination of the Premier and is to be the chairperson of the Foundation;
  - (b) one is to be appointed by the Minister on the nomination of the body known as the Australian Medical Association (WA) Inc. as a person having knowledge of,

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- or experience in, one or more functions of the Foundation;
- (c) one is to be appointed by the Minister on the nomination of the body known as the Western Australian Sports Federation Inc. as a person having knowledge of, or experience in, one or more functions of the Foundation;
  - (d) one is to be appointed by the Minister on the nomination of the body known as the Australian Council for Health, Physical Education and Recreation Inc. as a person having knowledge of, or experience in, one or more functions of the Foundation;
  - (e) one is to be appointed by the Minister on the nomination of the body known as the Western Australian Local Government Association Inc. as a person having knowledge of, or experience in, country sporting interests;
  - (f) one is to be appointed by the Minister on the nomination of the body known as the Western Australian Arts Federation Inc. as a person having knowledge of, or experience in, one or more functions of the Foundation;
  - (g) one is to be appointed by the Minister on the nomination of the body known as the Australian Council on Smoking and Health Inc. as a person having knowledge of, or experience in, one or more of the functions of the Foundation;
  - (h) one is to be the person for the time being holding or acting in the office of the CEO or the nominee of that person;
  - (i) one is to be the chief executive officer of the department principally assisting the Minister to whom the administration of the *Western Australian Sports Centre Trust Act 1986* is for the time being committed by the Governor, or that chief executive officer's nominee;

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- (j) one is to be the chief executive officer of the department principally assisting the Minister to whom the administration of the *Art Gallery Act 1959* is for the time being committed by the Governor, or that chief executive officer's nominee; and
  - (k) one is to be the chief executive officer of the department principally assisting the Minister to whom the administration of the *Children and Community Services Act 2004* is for the time being committed by the Governor, or that chief executive officer's nominee.
- (2) The Premier, before making a nomination for the purposes of subsection (1)(a), is to consult with the parliamentary leader of each party in the Parliament.
  - (3) The Premier, and each body that is to make a nomination under subsection (1)(b), (c), (d), (e), (f) or (g), are to provide to the Minister at least 2 written nominations of persons who are willing to accept appointment as a member from which the Minister is to choose the persons to be appointed under subsection (1)(a), (b), (c), (d), (e), (f) or (g) respectively.
  - (4) If, within 30 days of being requested in writing to do so, the Premier or a body has not provided at least 2 nominations, the Minister may, without the submission of those nominations, appoint a person to be a member under subsection (1)(a), (b), (c), (d), (e), (f) or (g), as is relevant to the case, in default until the first to occur of the following events —
    - (a) the relevant nominations are submitted and a member is appointed on those nominations;
    - (b) the expiry of the period (being a period not exceeding 3 years) specified in the instrument of the appointment under this subsection.
  - (5) A person appointed, and holding office as a member, under subsection (4) is to be taken to be a duly appointed member

under subsection (1)(a), (b), (c), (d), (e), (f) or (g) as is relevant to the case.

- (6) The Minister, before making an appointment under subsection (1)(a), is to consult with the parliamentary leader of each party in the Parliament.
- (7) If the Minister considers that a body referred to in subsection (1)(b), (c), (d), (e), (f) or (g) has ceased to exist or ceased to operate, the Minister may, after consultation with the Premier, by notice published in the *Gazette*, designate another body to be the nominating body for the purposes of that paragraph and, when such a notice has been published, the body so designated —
  - (a) may make any nomination subsequently required under that paragraph; and
  - (b) is to be taken to be the body referred to in that paragraph for the purposes of subsections (3) and (4).
- (8) The body designated by the Minister under subsection (7) must be a body that the Minister considers to have objects that are similar to those of the body that has ceased to exist or ceased to operate.
- (9) A person cannot be nominated by the same person or body for more than 2 consecutive terms as a member.

**62. Constitution and proceedings**

Schedule 1 has effect with respect to the Foundation, members and committees.

**63. Remuneration and allowances**

Any remuneration and allowances of a member or a member of a committee are to be those determined by the Minister on the recommendation of the Minister for Public Sector Management.



**64. Functions**

- (1) The functions of the Foundation are —
  - (a) to fund activities related to the promotion of good health in general, with particular emphasis on young people;
  - (b) to support sporting and arts activities which encourage healthy lifestyles and advance health promotion programmes;
  - (c) to provide grants to organisations engaged in health promotion programmes;
  - (d) to fund research relevant to health promotion;
  - (e) to raise funds by soliciting donations and grants and, subject to subsection (2), engaging in the production or marketing mentioned in section 65(2)(b) in order to support the work of the Foundation;
  - (f) to evaluate and report on the effectiveness of the performance of the Foundation in achieving health promotion activities; and
  - (g) generally to fulfil the purposes set out in section 3.
- (2) It is not a purpose of the Foundation to make a profit by engaging in the production or marketing mentioned in section 65(2)(b), but any surplus of revenue over expenditure arising as a result of that engagement is to be credited to the Account.
- (3) In providing funds or grants under this Act, the Foundation may impose such conditions as it considers desirable to fulfil the purposes set out in section 3.

*[Section 64 amended by No. 77 of 2006 s. 17.]*

**65. Powers**

- (1) The Foundation has all the powers it needs to perform its functions.
- (2) Without limiting subsection (1), the Foundation may for the purpose of performing a function —

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- (a) make grants to any of the following —
  - (i) sporting organisations;
  - (ii) arts organisations;
  - (iii) health organisations;
  - (iv) community organisations;
  - (v) research organisations;
  - (vi) youth organisations;
  - (vii) racing organisations;
- (b) engage in the production or marketing or both of goods and services which themselves constitute or form part of health promotion activities —
  - (i) to promote the purposes of this Act and the functions of the Foundation; and
  - (ii) to cover the cost of that production or marketing or both by generating revenue;
- (c) acquire, hold, deal with and dispose of real and personal property;
- (d) acquire or incur any other rights or liabilities and do and suffer all acts and things that bodies corporate may lawfully do and suffer.

**66. Foundation may delegate**

- (1) The Foundation may, subject to this section, delegate any power or duty of the Foundation under another provision of this Act to —
  - (a) a member, the executive director or any other person appointed or employed by the Foundation; or
  - (b) a committee.
- (2) The Foundation cannot delegate its function of determining to whom or in what amounts financial support may be provided from money standing to the credit of the Account unless that function —

- (a) is delegated to the executive director or a committee;  
and
  - (b) is limited to amounts of \$5 000 or less.
- (3) The delegation must be in writing executed by the Foundation.
- (4) The delegation may expressly authorise the delegate to further delegate the power or duty unless the delegation is of a kind mentioned in subsection (2).
- (5) When a delegation is made to a committee under this section —
- (a) the instrument of delegation may regulate the procedures to be followed by the committee when acting under the delegation; and
  - (b) the committee may, if the instrument of delegation so provides, act by a majority of the members present at a meeting of the committee.
- (6) A person to whom, or a member of a committee to which, a function is delegated under this section is disqualified from acting under the delegation in relation to any matter in which that person or member of a committee has a material personal interest.
- (7) A person exercising or performing a power or duty that has been delegated to the person under, or as authorised under, this section is to be taken to do so in accordance with the terms of the delegation unless the contrary is shown.
- (8) Nothing in this section limits the ability of the Foundation to perform a function through an officer or agent.
- (9) This section does not apply to the execution of documents but authority to execute documents on behalf of the Foundation can be given under section 122.

*[Section 66 amended by No. 77 of 2006 s. 17.]*

**67. Minister may give directions**

- (1) The Minister may give written directions to the Foundation with respect to the performance of its functions, either generally or in relation to a particular matter, and the Foundation is to give effect to any such direction.
- (2) The Minister must cause the text of any direction under subsection (1) to be laid before each House of Parliament, or dealt with under subsection (3), within 14 days after the direction is given.
- (3) If —
  - (a) at the commencement of the period referred to in subsection (2) a House of Parliament is not sitting; and
  - (b) the Minister is of the opinion that that House will not sit during that period,

the Minister is to transmit a copy of the direction to the Clerk of that House.

- (4) A copy of a direction transmitted to the Clerk of a House is to be regarded as having been laid before that House.
- (5) The laying of a copy of a direction that is regarded as having occurred under subsection (4) is to be recorded in the Minutes, or Votes and Proceedings, of the House on the first sitting day of the House after the Clerk received the copy.
- (6) The text of a direction under subsection (1) is to be included in the annual report submitted by the accountable authority of the Foundation under the *Financial Management Act 2006* Part 5.

*[Section 67 amended by No. 77 of 2006 s. 17.]*

**68. Minister to have access to information**

- (1) The Minister is entitled —
  - (a) to have information in the possession of the Foundation; and

- (b) where the information is in or on a document, to have, and make and retain copies of, that document.
- (2) For the purposes of subsection (1) the Minister may —
    - (a) request the Foundation to furnish information to the Minister;
    - (b) request the Foundation to give the Minister access to information;
    - (c) for the purposes of paragraph (b) make use of the staff of the Foundation to obtain the information and furnish it to the Minister.
  - (3) The Foundation must comply with a request under subsection (2) and make its staff and facilities available to the Minister for the purposes of subsection (2)(c).
  - (4) In this section —

*document* includes any tape, disc or other device or medium on which information is recorded or stored;

*information* means information specified, or of a description specified, by the Minister that relates to the functions of the Foundation.

## **Division 2 — Staff**

### **69. Staff of Foundation**

- (1) The Foundation may, subject to any relevant industrial agreement or award, employ, either on a permanent full-time basis or otherwise and on such terms and conditions as the Foundation determines, an executive director of the Foundation and such other persons as the Foundation considers necessary to assist the executive director and to enable the Foundation to perform its functions.
- (2) The Foundation may engage under a contract for services or other arrangement any consultant or person to provide such administrative, professional, technical or other assistance as the

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Foundation considers necessary to enable it to perform its functions.

- (3) The employment or engagement of a person under subsection (1) or (2) does not —
  - (a) render the provisions of the *Public Sector Management Act 1994* Part 3 or of any Act applying to persons employed in the Public Service applicable to the person; or
  - (b) affect or prejudice the application to the person of the provisions referred to in paragraph (a) if they applied to the person at the time of the person's appointment or engagement.
- (4) This section does not detract from the power that the *Public Sector Management Act 1994* section 100 gives the Foundation to engage a person under a contract for services or appoint a person on a casual employment basis.

**70. Use of other government staff etc.**

- (1) The Foundation may by arrangement with the relevant employer make use, either full-time or part-time, of the services of any officer or employee —
  - (a) in the Public Service;
  - (b) in a State agency or instrumentality; or
  - (c) otherwise in the service of the Crown in right of the State.
- (2) The Foundation may by arrangement with —
  - (a) a department of the Public Service; or
  - (b) a State agency or instrumentality,make use of any facilities of the department, agency or instrumentality.
- (3) An arrangement under subsection (1) or (2) is to be made on the terms agreed to by the parties.

### **Division 3 — Financial provisions**

#### **71. Funds of Foundation, appropriation**

- (1) The funds available for the purpose of enabling the Foundation to perform its functions consist of —
  - (a) money paid to the Foundation under subsection (2);
  - (b) money from time to time appropriated by Parliament and paid to the Foundation; and
  - (c) any money, other than money referred to in paragraphs (a) or (b), lawfully received by, made available to or payable to the Foundation.
- (2) In respect of each financial year, the prescribed amount is to be paid to the Foundation, and the Consolidated Account is appropriated accordingly.
- (3) An agency special purpose account called the Western Australian Health Promotion Account is established under the *Financial Management Act 2006* section 16 to which the funds referred to in subsection (1) are to be credited.
- (4) The following are to be charged against the money from time to time standing to the credit of the Account —
  - (a) the remuneration and allowances payable to members, members of committees and persons employed or engaged by the Foundation;
  - (b) expenditure incurred by the Foundation in performing its functions and in complying with subsection (8); and
  - (c) all expenditure, other than expenditure referred to in paragraphs (a) and (b), lawfully incurred by the Foundation for the purposes of, and in meeting the costs and expenses of the administration of, this Act.
- (5) A publication, pamphlet or advertisement that is paid for, wholly or in part, from the money from time to time standing to the credit of the Account is not to contain any picture of,

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statement by or reference to any Member of Parliament, other than any statement or reference of that kind —

- (a) required by law; or
- (b) necessary or desirable for a proper understanding of the subject matter of that publication, pamphlet or advertisement,

and no money is to be paid under subsection (4) in such a manner that any Member of Parliament is, or appears to be, associated with that payment.

- (6) The Foundation is not to decide or announce any decision to disburse any part of the Account, under section 65(2)(a), during the period from the issue of the writ for a general election to be held within the State, whether State or Federal until the close of voting in that election.
- (7) All money standing to the credit of the Account immediately before the commencement of a financial year is, subject to subsection (4), to remain in and standing to the credit of the Account after that commencement.
- (8) The Foundation is to endeavour to ensure that, in each financial year —
  - (a) not less than 30% of the money paid under subsection (2) in any one financial year is disbursed to sporting organisations which the Foundation is satisfied are promoting, or will promote, the purposes of the Act;
  - (b) not less than 15% of the money paid under subsection (2) in any one financial year is disbursed to arts organisations which the Foundation is satisfied are promoting, or will promote, the purposes of the Act; and
  - (c) not more than 50% of the money paid under subsection (2) in any one financial year is disbursed to any one of the following kinds of organisations which the Foundation is satisfied are promoting, or will promote, the purposes of the Act —



- (i) sporting organisations;
  - (ii) arts organisations;
  - (iii) health organisations;
  - (iv) community organisations;
  - (v) research organisations;
  - (vi) racing organisations.
- (9) The Foundation is to endeavour to commit the funds received from the State by it to the purposes of the Act within the year they are received or reasonably soon thereafter and is to include in its annual report the reason for any amount of those funds remaining not so committed beyond that year.
- (10) Any amount of funds received by the Foundation from the State which have not been committed to the purposes of the Act within 4 months of the end of the financial year for which they have been allocated or 4 months of receipt if received outside the financial year are to be returned to the Consolidated Account.

*[Section 71 amended by No. 77 of 2006 s. 4 and 17.]*

**72. Temporary investment of money in Account**

All money recorded as standing to the credit of the Account may, until required by the Foundation for the purposes of this Act, be temporarily invested as the Treasurer directs in any securities in which money standing to the credit of the Public Bank Account, as constituted under the *Financial Management Act 2006*, may lawfully be invested and the Treasurer is to cause all interest derived from that investment to be paid to the credit of the Account.

*[Section 72 amended by No. 77 of 2006 s. 17.]*

**73. Application of *Financial Management Act 2006* and *Auditor General Act 2006***

Subject to this Part, the provisions of the *Financial Management Act 2006* and the *Auditor General Act 2006* regulating the financial administration, audit and reporting of statutory authorities apply to and in respect of the Foundation and its operations.

*[Section 73 amended by No. 77 of 2006 s. 17.]*

**Division 4 — The CEO**

**74. CEO may delegate**

- (1) The CEO may delegate to a person any power or duty of the CEO under another provision of this Act.
- (2) A delegation must be in writing executed by the CEO.
- (3) A person to whom a power or duty is delegated under this section cannot delegate that power or duty.
- (4) A person exercising or performing a power or duty that has been delegated to the person under this section is to be taken to do so in accordance with the terms of the delegation unless the contrary is shown.
- (5) Nothing in this section limits the ability of the CEO to perform a function through an officer or agent.

**75. CEO may carry out research etc.**

The CEO may, for the purposes of this Act or a review under section 127 —

- (a) cause to be carried out any kind of research, survey or operation, including a compliance survey under Part 6 Division 4; and
- (b) use epidemiological or any other data or information obtained from the research, survey or operation.

## Part 6 — Investigations

### Division 1 — Investigators and investigation purposes

**76. Appointment of investigators**

The CEO is to appoint by instrument in writing such persons employed in the Public Service under the *Public Sector Management Act 1994* Part 3 as the CEO considers necessary to be investigators for the purposes of this Act.

**77. Appointment of restricted investigators**

- (1) The CEO may appoint by instrument in writing ~~an environmental health officer~~ a person who belongs to a class of persons prescribed for the purpose of this section to be a restricted investigator —
  - (a) for the State during the period specified in the instrument; or
  - (b) for an area of the State, and during the period, specified in the instrument.
- (2) A person ceases to be a restricted investigator —
  - (a) when the period of the person's appointment expires; or
  - (b) if the CEO revokes the person's appointment.

*[Section 77 amended by No. 22 of 2009 s. 8.]*

**78. Powers of restricted investigators**

- (1) A restricted investigator has the functions of an investigator that are specified in the 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.

- (3) A restricted investigator is to be taken to be an investigator appointed under section 76 to the extent provided by the instrument of appointment, and subject to that instrument.
- (4) The powers that a restricted investigator may exercise are in addition to, and do not derogate from, the powers that an environmental health officer has under regulations made under section 125 or under any other written law.

**79. Police have powers of investigator**

- (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 81 and 82 do not apply to a police officer.

**80. CEO has powers of investigator**

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

**81. Identity cards**

- (1) The CEO is to issue an identity card to each investigator except a restricted investigator.
- (2) An identity card must contain —
  - (a) the investigator's name;
  - (b) a statement to the effect that the person identified by the card is an investigator for the purposes of this Act;
  - (c) a photograph of the investigator; and

- (d) the expiry date or currency of the investigator's appointment.
- (3) If a person to whom an identity card is issued ceases to be an investigator, the person must immediately return the card to the CEO or to any other person authorised by the CEO to receive it.

**82. Identity card etc. to be shown**

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

**83. Investigation purposes**

An investigation may be carried out under this Part for one or more of the following purposes —

- (a) to seek evidence of a suspected offence under this Act;
- (b) to assess whether or not the provisions of this Act are being complied with;
- (c) any other purpose relevant to the administration of this Act.

**Division 2 — Obtaining identifying information**

**84. Investigator may ask for name, address etc.**

The office of investigator is prescribed to be a public officer for the purposes of the *Criminal Investigation (Identifying People) Act 2002* and as such may exercise the powers in Part 3 of that Act for investigation purposes.

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

**85. Power to enter premises**

Subject to section 86, an investigator may, for investigation purposes, enter and remain on premises to exercise the investigator's powers of investigation.

**86. Residential premises**

An investigator may not enter residential premises unless —

- (a) the investigator enters the premises at a reasonable time with the consent of the occupier of the premises; or
- (b) the investigator enters the premises in accordance with the authorisation conferred by a warrant.

**87. Warrants to enter premises**

- (1) If a justice or magistrate is satisfied on application supported by evidence on oath that it is reasonably necessary for an investigator to enter premises for investigation purposes, the justice or magistrate may issue a warrant authorising an investigator —

- (a) to enter the premises at a time or within a period stated in the warrant; and
- (b) to exercise such of the powers set out in section 89(1) as are specified in the warrant.

- (2) An investigator who applies to a justice or magistrate for a warrant under this section must produce the investigator's identity card to the justice or magistrate.
- (3) The authority conferred by a warrant may be exercised by the investigator who applied for the warrant or by any other investigator.

**88. Identification, warrant to be shown**

An investigator must, on first encountering the occupier of premises entered for investigation purposes or a person apparently in a position of authority at the premises, and also on the reasonable request of any other person at the premises —

- (a) display the investigator's identity card to the person or persons respectively; and
- (b) if the investigator has entered or is about to enter the premises under a warrant — display the warrant to the person or persons respectively.

**89. Powers of investigator relating to premises**

- (1) When an investigator exercises the power of entry under section 85, the investigator may do any or all of the following —
  - (a) search the premises and examine anything at the premises, opening it if necessary and, if given specific prior authorisation in writing by the CEO with respect to those premises, breaking it open;
  - (b) take possession of, and remove from the premises, documents, tobacco products or products mentioned in section 106, samples of such products, vending machines, advertisements or anything else relevant to the investigation, found in the course of exercising the investigator's powers under this Act;

- (c) take extracts from or make copies of, or download or print-out, any documents found in the course of carrying out the investigator's functions under this Act;
  - (d) mark a document that is to be retained as a document that is being retained;
  - (e) photograph or film anything at the premises;
  - (f) measure or cause to be measured anything at the premises;
  - (g) if anything at the premises that is relevant to the investigation cannot be conveniently removed — secure it against interference;
  - (h) require any person who is at the premises —
    - (i) to operate or allow the investigator to operate equipment or facilities at the premises for taking extracts or making copies of documents or for other investigation purposes;
    - (ii) to provide anything necessary for the operation of equipment or facilities at the premises for investigation purposes;
    - (iii) to give the investigator any translation into the English language, code, password or other information necessary to gain access to or to interpret and understand any document or information located or obtained by the investigator in the course of exercising the investigator's powers under this Act;
    - (iv) to give other assistance that the investigator reasonably requires to carry out the investigation.
- (2) When an investigator exercises a power of entry pursuant to a warrant, the investigator may exercise only those powers set out in subsection (1) that the warrant specifically authorises the investigator to use.



- (3) If a warrant authorises an investigator to exercise the power set out in section 89(1)(b) but limits that power to taking possession of a thing of a kind described in the warrant, the investigator may take possession of a thing of any other kind if the investigator believes, on reasonable grounds —
- (a) that the thing is of a kind that could have been included in the warrant and will afford evidence of the commission of an offence under this Act; and
  - (b) that it is necessary to take possession of the thing in order to prevent its concealment, loss or destruction or its use in the commission of an offence under this Act.

**90. Offences**

- (1) A person must not remove, tamper or otherwise interfere with a thing secured against interference under section 89(1)(g).
- (2) A person must comply with a requirement made under section 89(1)(h).
- Penalty applicable to 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.

**91. Taking things from premises**

- (1) An investigator is not authorised to take anything from premises unless the investigator believes, on reasonable grounds, that the thing will afford evidence of the commission of an offence under this Act.
- (2) If an investigator takes anything from premises and the occupier or a person apparently in a position of authority at the premises requests a receipt for the thing taken, the investigator is to give the person making the request a receipt in an approved form for the thing taken.

- (3) If an investigator takes anything from premises and the occupier or a person apparently in a position of authority at the premises is not present, the investigator is to leave a receipt in an approved form for the thing taken, in an envelope addressed to the occupier, in a prominent position at the premises.

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

- (1) The CEO must ensure that a person from whom a document or other thing is taken from premises and who would otherwise be entitled to possession of it is given a copy of it, or reasonable access to it, as appropriate.
- (2) If an investigator takes anything from premises the CEO must ensure that the thing is returned to the person entitled to possession of it as follows —
- (a) if it was taken in connection with the prosecution or possible prosecution in relation to an alleged offence under this Act —
- (i) as soon as practicable after the relevant prosecution (including any relevant appeal) is completed or discontinued (unless an order of forfeiture is made under section 119); or
- (ii) if no prosecution is commenced, as soon as practicable after the decision to not prosecute is made;
- or
- (b) in any other case — within 28 days after it was taken.

**93. Use of force**

- (1) A police officer may use reasonable force —
- (a) to enter premises under this Part; or
- (b) to exercise powers under section 89(1)(a) or (b).

- (2) However, if the use of reasonable force is likely to cause damage to property, a police officer is not entitled to use force unless the CEO has, in the particular case, given the police officer prior authorisation in writing to do so.

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

##### **94. Terms used**

In this Division —

*compliance survey* means a survey the intended purpose of which is to gather data as to the likelihood of a young person offence being committed if the opportunity to commit the offence is given;

*controlled purchase officer* means a person acting as a controlled purchase officer under this Division;

*controlled purchase operation* means an operation the intended purpose of which is to provide a person suspected of having committed a young person offence on one or more occasions with an opportunity to commit or to attempt to commit a young person offence;

*young person offence* means an offence under section 6, 7, 8(1) or 9.

##### **95. Controlled purchase officers**

- (1) The CEO may, in writing, authorise a suitable person, including a person who has not reached 18 years of age, to act as a controlled purchase officer and may in writing revoke that authority.
- (2) A controlled purchase officer who has not reached 18 years of age must deliver to the person directing the compliance survey or controlled purchase operation any tobacco product or smoking implement obtained by the officer as a result of the survey or operation.

- (3) The identity or purpose of a controlled purchase officer may, for the time being, be concealed or misrepresented for the purpose of a compliance survey or controlled purchase operation.

**96. Compliance surveys and controlled purchase operations**

- (1) A controlled purchase officer may take any action that is specified in the authorisation given by the CEO for the purpose of a compliance survey or controlled purchase operation.
- (2) If a controlled purchase officer takes any action that is specified in the authorisation given by the CEO for the purpose of a compliance survey or controlled purchase operation the controlled purchase officer, the CEO and any person directing the survey or operation do not commit an offence and are not liable as a party to an offence committed by another person.
- (3) If a controlled purchase officer takes any action that is specified in the authorisation given by the CEO for the purpose of a controlled purchase operation the controlled purchase officer's evidence in any proceedings against another person in connection with which the controlled purchase officer took the action is not the evidence of an accomplice.

**97. Reporting**

The CEO is required, whenever requested by the Minister to do so, to give the Minister a report in writing containing such particulars of compliance surveys and controlled purchase operation as the Minister requires.

## Part 7 — Enforcement

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

**98. 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.

**99. Seizing tobacco products etc. from young persons**

- (1) An investigator may seize any tobacco product or smoking implement from a young person.
- (2) A police officer may seize any tobacco product or smoking implement from a young person and use reasonable force to do so.
- (3) The power under subsection (1) or (2) to seize a tobacco product or smoking implement is not to be exercised in respect of a person unless —
  - (a) the person has been requested to produce a document mentioned in section 15(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 tobacco product or smoking implement 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 15(1) showing that the person had reached 18 years of age at the time of the seizure; or
  - (b) if not returned under paragraph (a), is to be destroyed in an approved manner.

**100. Young person to provide information**

- (1) If an investigator finds a young person smoking or in possession of a tobacco product or smoking implement the investigator may do any of the following —
- (a) require the young person to give his or her name and address;
  - (b) require the young person to give the name and address of a parent of the young person;
  - (c) require the young person to give information relating to the identity of any person who supplied the tobacco product or smoking implement to the young person.
- (2) A person who has reached 14 years of age —
- (a) must comply with a requirement made under subsection (1)(a), (b) or (c); and
  - (b) must not provide false or misleading information in response to a requirement.

Penalty: a fine of \$100.

**101. Parent may be informed, approved guide provided**

If an investigator finds a young person smoking or in possession of a tobacco product or smoking implement, or obtaining or attempting to obtain any tobacco product or smoking implement, the investigator may —

- (a) notify a parent of the young person of the finding;
- (b) provide the young person or a parent of the young person with an approved guide.

**102. Limitation of powers of investigator**

An investigator is not to exercise the powers mentioned in section 84 for the purposes of performing a function under this Division.

**Division 2 — Offences**

**103. False or misleading information: providing to CEO, investigators**

- (1) 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 a material particular.
- (2) A person must not, in relation to an application for the issue, renewal or amendment of a licence, give information orally or in writing knowing it to be false or misleading in a material particular.

Penalty: a fine of \$20 000.

**104. False information about tobacco products, tobacco control information**

A tobacco company or the holder of a licence must not provide to any person information that the tobacco company or licence holder knows to be incorrect about —

- (a) the health effects of a tobacco product or tobacco products generally; or
- (b) the legislation or enactment of any jurisdiction relating to tobacco control.

Penalty:

- (a) for an individual, a fine of \$50 000;

(b) for a body corporate, a fine of \$250 000.

**105. Offence to possess certain tobacco products**

The holder of a licence must not, without reasonable excuse, be in possession or control of any tobacco products that the licence holder knows or ought reasonably to know —

- (a) are prohibited goods as defined in the *Customs Act 1901* of the Commonwealth; or
- (b) are excisable goods as defined in the *Excise Act 1901* of the Commonwealth upon which excise duty has not been paid.

Penalty: see section 115.

**106. Products resembling tobacco products, packages**

A person must not sell any food, toy or other product that is not a tobacco product but is —

- (a) designed to resemble a tobacco product or a package; or
- (b) in packaging that is designed to resemble a tobacco product or a package.

Penalty: see section 115.

**107A. Prohibition on smoking “between the flags”**

A person must not smoke in an area that is between flags or other markers placed on a beach for the purpose of indicating a patrolled swimming area.

Penalty: a fine of \$1 000.

[Section 107A inserted by No. 22 of 2009 s. 9.]

**107B. Prohibition on smoking in outdoor eating areas**

- (1) A person must not smoke in an outdoor eating area unless the place in which the person is smoking is a smoking zone.

Penalty: a fine of \$2 000.



(2) If a person commits an offence under subsection (1) the occupier of the outdoor eating area commits an offence.

Penalty: a fine of \$2 000.

(3) If a person is charged with an offence under subsection (2) it is a defence to prove that —

(a) neither the accused nor any employee or agent of the accused was aware, or could reasonably be expected to have been aware, that the offence was occurring; or

(b) as soon as the accused or an employee or agent of the accused became aware that the offence was occurring, the accused or an employee or agent of the accused —

(i) informed the person concerned that the person was committing an offence; and

(ii) requested the person to stop smoking in the outdoor eating area and to extinguish, and properly dispose of, the tobacco product; and

(iii) if the person failed to comply with a request under subparagraph (ii), requested the person to leave the outdoor eating area until the person finished smoking the tobacco product.

(4) A responsible person in relation to licensed premises may allocate as a smoking zone for the premises one or more places in one or more outdoor eating areas to which a restaurant licence does not apply, but the total area of all the smoking zones for the premises must not exceed 50% of the total area of all the outdoor eating areas to which a restaurant licence does not apply.

(5) For the purposes of *The Criminal Code* section 338A(d) and any other written law, a person is lawfully entitled to abstain from working in a smoking zone when the smoking zone is open to, or being used by, the public or a section of the public.

*[Section 107B inserted by No. 22 of 2009 s. 9.]*

**107C. Prohibition on smoking near playground equipment**

A person must not smoke within 10 metres of children's playground equipment that —

(a) is in a public place or a part of a public place; and

(b) is not in an enclosed public place.

Penalty: a fine of \$1 000.

[Section 107C inserted by No. 22 of 2009 s. 9.]

**107D. Prohibition on smoking in or on vehicles if under 17 year old present**

(1) In this section —

*child* —

(a) means any boy or girl who has not reached 17 years of age; and

(b) in the absence of positive evidence as to age, means any boy or girl who apparently has not reached 17 years of age;

*road* means any highway, road or street open to, or used by, the public and includes every carriageway, footway, reservation, median strip and traffic island on it and any parking area in a public place;

*vehicle* means any thing used or capable of being used to transport people or goods on roads.

(2) A person must not smoke in or on a vehicle if —

(a) the vehicle is on a road; and

(b) any other person in or on the vehicle is a child.

Penalty: a fine of \$1 000.

[Section 107D inserted by No. 22 of 2009 s. 9.]

**107E. Local government legislative power not affected**

Nothing in section 107A, 107B or 107C is intended to limit the power conferred on a local government by the *Local Government Act 1995* or any other Act to make local laws about matters mentioned in those sections.

[Section 107E inserted by No. 22 of 2009 s. 9.]

**107F. Dismissal or detriment because of refusal to work in smoking zone and employee's remedy for breach**

(1) In this section —

*employee* and *employer* have the respective meanings given in the *Industrial Relations Act 1979* section 7(1).

(2) An employer must not —

(a) dismiss an employee; or

(b) alter an employee's position to the employee's disadvantage; or

(c) refuse to promote or transfer an employee; or

(d) otherwise injure an employee in relation to the employee's employment; or

(e) threaten to do any of those things.

for the reason, or for reasons that include the reason, that the employee does not consent to working in a smoking zone when the smoking zone is open to, or being used by, the public or a section of the public (the *consent*).

Penalty: see section 115.

(3) In proceedings for a contravention of subsection (2), if it is proved that an employer took any course of action mentioned in that subsection against or in relation to an employee after the employee refused to give the consent, it is for the employer to prove that the course of action was taken for some reason other than because the employee refused to give the consent.

(4) Subsection (2) is a civil penalty provision for the purposes of the *Industrial Relations Act 1979* section 83E.

(5) The *Industrial Relations Act 1979* section 97YG applies as if the reference in that section to a contravention of section 97YF of that Act includes a reference to a contravention of the *Tobacco Products Control Act 2006* section 107F(2).

[Section 107F inserted by No. 22 of 2009 s. 9.]

**107. 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.

Penalty: a fine of \$20 000.

(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.

**108. 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.
- (3) If it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is sufficient to show —
  - (a) that the conduct was engaged in by a director, employee or agent of the body corporate within the scope of his or her actual or apparent authority; and
  - (b) that the director, employee or agent had the relevant state of mind.
- (4) Conduct engaged in on behalf of a body corporate by a director, employee or agent of the body corporate within the scope of his or her actual or apparent authority is taken to have been engaged in also by the body corporate, unless the body corporate establishes that it took reasonable precautions and exercised due diligence to avoid the conduct.
- (5) If it is necessary to establish the state of mind of a person other than a body corporate in relation to particular conduct, it is sufficient to show —
  - (a) that the conduct was engaged in by an employee or agent of the person within the scope of his or her actual or apparent authority; and
  - (b) that the employee or agent had the relevant state of mind.
- (6) Conduct engaged in on behalf of an employer other than a body corporate by an employee or agent of the employer within the scope of his or her actual or apparent authority is taken to have been engaged in also by the employer unless the employer establishes that the employer took reasonable precautions and exercised due diligence to avoid the conduct.

**109. Liability of the officers of bodies corporate**

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

**110. Liability of employers**

- (1) If a person is charged with an offence under this Act, the person's employer at the time the offence is alleged to have been committed may also be charged with the offence.
- (2) If a person and the person's employer are charged as permitted by subsection (1) and the employee is convicted of the offence,

the employer is to be taken to have also committed the offence, subject to subsection (5).

- (3) If a person commits an offence under this Act then, although the person is not charged with the offence, the person's employer at the time the offence is alleged to have been committed may be charged with the offence.
- (4) If an employer is charged as permitted by subsection (3) and it is proved that the person's employee committed the offence, the employer is to be taken to have also committed the offence, subject to subsection (5).
- (5) If under this section an employer is charged with an offence it is a defence to prove —
  - (a) that the offence was committed without the employer's consent or connivance; and
  - (b) that the employer took all the measures to prevent the commission of the offence that the employer could reasonably be expected to have taken having regard to all the circumstances.

### **Division 3 — Prosecutions**

#### **111. When a prosecution can be commenced**

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

#### **112. Consent to be given for certain prosecutions**

- (1) A person who is not a police officer cannot commence a prosecution for an offence under this Act without the written consent of the CEO or a person authorised by the CEO for the purposes of this section.

- (2) A police officer who commences a prosecution for an offence under this Act is to inform the CEO in writing of that fact and of the outcome of the prosecution.

**113. Evidentiary matters**

- (1) In proceedings for an offence under this Act, an allegation in the prosecution notice of any of the following matters is, in the absence of evidence to the contrary, to be taken to be proved —
- (a) that at a specified time a person held a specified office;
  - (b) that the prosecutor is authorised, and has the CEO's consent, to commence the prosecution;
  - (c) that a specified substance is tobacco;
  - (d) that at a specified time a specified substance or article was a tobacco product;
  - (e) that at a specified time a person had not reached 18 years of age;
  - (f) that at a specified time a person had reached 14 years of age;
  - (g) that at a specified time premises were licensed premises as defined in the *Liquor Control Act 1988* section 3(1);
  - (h) that at a specified time a person was a licensee as defined in the *Liquor Control Act 1988* section 3(1);
  - (i) that at a specified time a person had the management or control, or was otherwise in charge, of a mines amenity;
  - (j) that at a specified time a person was or was not the holder of a licence of a specified type;
  - (k) that at a specified time a licence was subject to specified conditions and restrictions;
  - (l) that at a specified time a licence applied in relation to specified premises;
  - (m) that at a specified time, a licence was suspended or revoked or a person was disqualified from holding a licence.



- (2) A certificate purporting to be signed by the CEO or the CEO's delegate and stating that the person named in the certificate was, at the time or during the period specified in the certificate —
- (a) an investigator, restricted investigator or environmental health officer; or
  - (b) a person authorised under section 95 to act as a controlled purchase officer,

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

- (3) In proceedings for an offence under this Act a licence, including the conditions and restrictions applying to the licence, may be proved by tendering a copy of the licence certified by the CEO to be a true copy of the original licence.
- (4) In proceedings for an offence under this Act it is to be presumed, unless the contrary is proved, that a document purporting to have been signed or certified by the CEO, an investigator or a police officer was signed or certified by a person who at the time was the CEO, an investigator or a police officer, as the case may be.
- (5) In proceedings for an offence under this Act it is to be presumed, unless the contrary is proved, that a document purporting to have been signed by a delegate of the CEO or the Foundation was signed by a person who at the time was such a delegate and was authorised to sign it.
- (6) This section is in addition to and does not affect the operation of the *Evidence Act 1906*.

*[Section 113 amended by No. 73 of 2006 s. 114.]*

**114. Evidentiary status of copies and reproductions of documents**

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

- (a) is, if produced by or on behalf of the CEO, admissible in the same way as the original; and
  - (b) has the same evidentiary value as the original.
- (2) For the purposes of the law of evidence, if 2 or more documents are produced from the same computer data (or from computer data recording the same information), they are both or all to be regarded as originals.
- (3) A copy of a document, possession of which is taken by an investigator under section 89(1)(b) or a warrant issued under section 87, is admissible in evidence if it is certified by the investigator as having been obtained under the relevant provision.

### **Division 4 — Penalties**

#### **115. General penalties**

- (1) For an offence under a provision of this Act specified in the Table to this subsection the penalty is —
- (a) for an individual —
    - (i) for a first offence, a fine of \$10 000;
    - (ii) for a second or subsequent offence, a fine of \$20 000;
  - (b) for a body corporate —
    - (i) for a first offence, a fine of \$40 000;
    - (ii) for a second or subsequent offence, a fine of \$80 000.

#### **Table**

s. 6	s. 28(2), (3)
s. 7	s. 29
s. 8(1), (2)	s. 30(1)
s. 9	s. 31(1), (2), (3), (4)
s. 10	s. 33(1)

s. 11	s. 34
s. 15(2)	s. 35(2), (3)
s. 17	s. 50(5)
s. 18	s. 51
s. 19	s. 52(1)
s. 20	s. 53
s. 21	s. 54(1)
s. 22(1), <del>(2), (3), (4)</del>	s. 55(1), (2), (3)
s. 24(1), (2)	s. 56(1), (2)
s. 25(1), (2), (3), (4)	s. 58(1), (2)
s. 26(2), (3)	s. 105
s. 27(1), (2)	s. 106
	<a href="#">s. 107F(2)</a>

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

[\[Section 115 amended by No. 22 of 2009 s. 10.\]](#)

#### **116. Continuing offences, penalties for**

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

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

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

#### **117. Storage of seized things**

- (1) The CEO may arrange the location of, and manner in which, seized things are to be stored before they are returned under section 92(2) or forfeited to the Crown under section 119.

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

**118. Expenses of storage payable by convicted person**

- (1) A person who is convicted of an offence under this Act is liable to pay to the CEO all expenses reasonably incurred by the CEO in relation to the storage of a seized thing that was used in, the subject of, or otherwise involved in, the commission of the offence.
- (2) The CEO may recover expenses for which a person is liable under subsection (1) from that person in a court of competent jurisdiction as a debt due to the CEO.
- (3) This section applies whether or not a seized thing is forfeited to the Crown under section 119 but a person is not liable to pay storage expenses incurred on and from the day on which the thing is forfeited.

**119. Forfeiture on conviction**

- (1) On the conviction of a person for an offence under this Act, the court may order the forfeiture to the Crown of anything that was used in, the subject of, or otherwise involved in, the commission of the offence.
- (2) The court may make the order —
  - (a) whether or not the thing is a seized thing; and
  - (b) in the case of a seized thing, whether or not the thing has been returned to its owner.
- (3) The court may make any order it considers appropriate to enforce the forfeiture.

**120. Dealing with unclaimed seized things**

- (1) A seized thing is unclaimed if —

- (a) the thing is not forfeited to the Crown under section 119;  
and
  - (b) the CEO cannot return the thing in accordance with section 92(2) despite making reasonable efforts to do so.
- (2) After the expiry of the time for any relevant appeal an unclaimed seized thing —
- (a) that is a tobacco product or smoking implement is to be destroyed in such manner as the CEO directs; or
  - (b) that is not a tobacco product or smoking implement may be destroyed, sold or otherwise disposed of in such manner as the court directs, or in the absence of a court direction, as the CEO directs.

## **Part 8 — Miscellaneous**

### **121. 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, the Foundation 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 117(2).

### **122. Execution of documents by the Foundation**

- (1) A document is duly executed by the Foundation if —
  - (a) the common seal of the Foundation is affixed to it in accordance with subsections (2) and (3); or
  - (b) it is signed on behalf of the Foundation by a person or persons authorised to do so under subsection (4).
- (2) The common seal of the Foundation must not be affixed to any document except as authorised by the Foundation.

- (3) The common seal of the Foundation is to be affixed to a document in the presence of one of its members who is to sign the document to attest that the common seal was so affixed.
- (4) The Foundation may, by writing under its seal, authorise one or more of its members or the executive director or any other person appointed or employed by the Foundation to sign documents on behalf of the Foundation, either generally or subject to the conditions that are specified in the authorisation.
- (5) A document purporting to be executed in accordance with this section is to be presumed to be duly executed until the contrary is shown.
- (6) When a document is produced bearing a seal purporting to be the common seal of the Foundation, it is to be presumed that the seal is the common seal of the Foundation until the contrary is shown.

**123. 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 purpose 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;
  - (e) with the written consent of the person to whom the information relates; or
  - (f) in prescribed circumstances.

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

**s. 124A**

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

**124A. Provision of information about alleged offences of smoking near children**

- (1) If a police officer suspects on reasonable grounds that a person has committed an offence under section 107C or 107D, the Commissioner of Police is to supply the CEO with the alleged offender's name, address and date of birth and the date and details of the alleged offence, to the extent that the Commissioner has that information.
- (2) Information supplied under subsection (1) may be used in the performance of any function that the CEO or the Foundation has under this Act.
- (3) Subsection (1) applies whether or not the person is charged with having committed the alleged offence, or otherwise dealt with for the alleged offence without being prosecuted.

[Section 124A inserted by No. 22 of 2009 s. 11.]

**124. Regulations**

- (1) The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.
- (2) Without limiting subsection (1) or the *Interpretation Act 1984* Part VI, regulations may be made for all or any of the following purposes —
- (a) prescribing matters in relation to the labelling of packages, including —
    - (i) the position of labels on packages;



- (ii) the dimensions and colour of, and material constituting, labels or labelling on packages;
  - (iii) the statements or warnings that are to be the subject of labels on packages;
  - (iv) statements or other content that cannot be the subject of labels on packages;
- (b) prescribing matters in relation to the display of tobacco products at places where tobacco products are sold by way of retail sale including —
- (i) the number of packages of a particular product line that can be displayed at one time;
  - (ii) the dimensions, location and positioning of packages, and the display of warnings that are the subject of labels on packages;
- (ca) [prescribing matters in relation to the storage of tobacco products, packages and smoking implements at places where those items are sold by way of retail sale including the means to avoid or minimise attention being given to those items;](#)
- (c) prescribing matters relating to the number, location, content, dimensions, colour and positioning of, and materials constituting, signs, labels and tickets that give information about the availability or prices of tobacco products or smoking implements and the manner in which that information or content is set out or displayed;
- (d) prescribing matters relating to the location, content, dimensions, colour and positioning of, and materials constituting, signs required under section 25 and the manner in which the content of the sign is set out or displayed;
- (e) prescribing matters relating to the means by which approved guides are to be provided, or made available, for the purposes of section 26(2) or (3);

**s. 125**

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- (f) prescribing the number of vending machines that may be permitted on premises and where vending machines may or cannot be placed;
  - (g) prescribing the labelling of vending machines;
  - (h) prescribing alternative means of effecting the service of documents (other than infringement notices) in addition to the means set out in the *Interpretation Act 1984* section 76;
  - (i) creating offences and providing in respect of any such offence a penalty not exceeding a fine of \$2 000.
- (3) Regulations under this section may adopt or apply, with or without modification, any regulation made under the *Trade Practices Act 1974* of the Commonwealth in relation to consumer product information standards for tobacco products that is in force or existing at the time when the regulations under this section take effect or as in force or existing from time to time.

[\[Section 124 amended by No. 22 of 2009 s. 12.\]](#)

**125. Regulations about smoking in public places**

- (1) The Governor may make regulations for the regulation or prohibition of smoking in public places.
- (2) Without limiting subsection (1), the regulations may —
  - (a) require occupiers of public places to display signs about smoking, and may prescribe the location, content, dimensions, colour and positioning of, and materials constituting, those signs; and
  - (b) confer powers on police officers, investigators and environmental health officers in relation to persons who are smoking in public places where smoking is prohibited.
- (3) Nothing in the regulations is to be construed as creating or preserving a right of a person to smoke in a public place.

**126. Transitional and savings provisions**

Schedule 2 has effect.

**127. Review of Act**

- (1) The Minister is to carry out a review of the operation and effectiveness of this Act as soon as is practicable after —
  - (a) 4 years have elapsed since Part 5 comes into operation; and
  - (b) every fourth anniversary of that date.
- (2) Nothing in subsection (1) prevents the Minister from carrying out, at any time, a review of the operation and effectiveness of regulations made under section 125.
- (3) The Minister is to prepare a report based on each review carried out under subsection (1) or (2) and is to cause the report to be laid before each House of Parliament as soon as is practicable after the report is prepared, and in any event in relation to a review under subsection (1), not later than 12 months after the requirement for the review arose.

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

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

[s. 62]

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

- (1) A member mentioned in section 61(1)(a), (b), (c), (d), (e), (f) or (g) holds office for the period, not exceeding 3 years, that is specified in the instrument of the member's appointment and is eligible (if otherwise qualified) for reappointment.
- (2) A member whose term of office expires by the passage of time without a person having been appointed to fill the vacancy continues in office until the first to occur of the following events —
  - (a) a person is appointed to fill the vacancy;
  - (b) the elapse of 3 months since the expiry of the period of office.

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

- (1) The office of a member becomes vacant if the member —
  - (a) resigns the office by written notice addressed to the Minister;
  - (b) becomes ineligible to hold office as a member or no longer represents the body that nominated the member;
  - (c) is an insolvent under administration as defined in the *Corporations Act 2001* of the Commonwealth; or
  - (d) is removed from office by the Minister under subclause (2).
- (2) The Minister may remove a member from office for —
  - (a) misbehaviour or incompetence;
  - (b) mental or physical incapacity, other than temporary illness, impairing the performance of the member's functions under this Act; or
  - (c) absence, without leave or reasonable excuse, from 3 consecutive meetings of the Foundation of which the member has had notice.

- (3) In this clause —
- member* means a member mentioned in section 61(1)(a), (b), (c), (d), (e), (f) or (g);
- misbehaviour* includes conduct that renders the member unfit to hold office even though the conduct does not relate to any function of the office.

### **3. Deputy chairperson**

- (1) At the first meeting of the Foundation after the office of deputy chairperson becomes vacant, the Foundation is to elect a member as deputy chairperson of the Foundation.
- (2) The Foundation may, at any time, remove a person from the office of deputy chairperson of the Foundation.
- (3) The office of deputy chairperson of the Foundation becomes vacant if the holder of the office —
- (a) resigns the office by written notice addressed to the Foundation;
  - (b) ceases to be a member; or
  - (c) is removed from the office by the Foundation under subclause (2).
- (4) The deputy chairperson is to perform the functions of the chairperson —
- (a) when the chairperson is unable to act because of illness, absence or other cause; or
  - (b) during any vacancy in the office of chairperson.

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

The Foundation may grant leave of absence to a member on the terms and conditions determined by the Foundation.

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

- (1) A member, other than the chairperson, may appoint a person to act temporarily in the place of the member when the member is unable to act because of illness, absence or other cause.

- (2) A person appointed under subclause (1) holds office until the first to occur of the following events —
  - (a) the expiry of the period that is specified in the instrument of appointment, which must be on or before the expiry of the period for which the appointing member holds office;
  - (b) the appointment is withdrawn.
- (3) An appointment and a withdrawal of appointment under this clause are to be in writing and served on the person who is the subject of the appointment or withdrawal of appointment and the chairperson.
- (4) A person appointed under subclause (1) is to be regarded as a member while acting in accordance with the appointment.

**6. Saving**

No act or omission of a person acting in place of another under clause 3 or 5 is to be questioned on the ground that the occasion for the person's appointment or acting had not arisen or had ceased.

**7. Calling of meetings**

- (1) Subject to subclause (2), meetings of the Foundation are to be held at the times and places that the Foundation determines.
- (2) A special meeting of the Foundation may at any time be convened by the chairperson.

**8. Presiding officer**

- (1) The chairperson is to preside at all meetings of the Foundation at which the chairperson is present.
- (2) If both the chairperson and the deputy chairperson are absent from a meeting the members present are to appoint one of their number to preside.

**9. General procedures**

Subject to this Act, the Foundation may determine its own procedures for the calling of meetings of the Foundation and for the conduct of business at those meetings.

**10. Quorum**

The quorum for a meeting of the Foundation is 5 members.

**11. Voting**

- (1) At any meeting of the Foundation each member present has a deliberative vote.
- (2) The person presiding at a meeting of the Foundation has a deliberative vote and, in the event of an equality of votes, has a second or casting vote.
- (3) A decision supported by a majority of the votes cast at a Foundation meeting at which a quorum is present is the decision of the Foundation.

**12. Minutes**

The Foundation is to cause accurate minutes to be kept of the proceedings at each of its meetings and each meeting of its committees.

**13. Decision without meeting**

A decision in writing has effect as if it had been passed at a meeting of the Foundation if it is —

- (a) signed by at least 8 members; or
- (b) assented to by at least 8 members by letter, facsimile transmission, electronic mail or other written means.

**14. Holding meetings remotely**

The presence of a person at a meeting of the Foundation need not be by attendance in person but may be by that person and each other person at the meeting being simultaneously in contact by telephone, or other means of instantaneous communication.

**15. Committees**

- (1) The Foundation may, from time to time, establish one or more committees to advise or assist it in the performance of its functions, and may discharge or alter any committee so established.

- (2) The Foundation is to ensure that there are sufficient country representatives appointed as committee members to advise the Foundation on matters relevant to the arts, sports and racing.
- (3) Subject to this Act and to any directions of the Foundation, a committee may determine its own procedures for the calling of meetings of the committee and for the conduct of business at those meetings.

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

**16. Term used: member**

In this Division —

*member* includes a member of a committee.

**17. Disclosure of interests**

- (1) A member who has a material personal interest in a matter being considered or about to be considered by the Foundation must, as soon as possible after the relevant facts have come to the member's knowledge, disclose the nature of the interest at a meeting of the Foundation.

Penalty: a fine of \$10 000.

- (2) A disclosure under subclause (1) is to be recorded in the minutes of the meeting.

**18. Voting by interested members**

A member who has a material personal interest in a matter that is being considered by the Foundation or a committee —

- (a) must not vote whether at a meeting or otherwise —
  - (i) on the matter; or
  - (ii) on a proposed resolution under clause 19 in respect of the matter, whether relating to that member or a different member;

and

- (b) must not be present while —
  - (i) the matter; or



- (ii) a proposed resolution of the kind referred to in paragraph (a)(ii),  
is being considered at a meeting.

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

Clause 18 does not apply if the Foundation has at any time passed a resolution that —

- (a) specifies the member, the interest and the matter; and
- (b) states that the members voting for the resolution are satisfied that the interest should not disqualify the member from considering or voting on the matter.

**20. Quorum where clause 18 applies**

- (1) Despite clause 10, if a member is disqualified under clause 18 in relation to a matter, a quorum is present during the consideration of the matter if at least 3 members are present who are entitled to vote on any motion that may be moved at the meeting in relation to the matter.
- (2) The Minister may deal with a matter in so far as the Foundation cannot deal with it because of subclause (1).

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

- (1) The Minister may by writing declare that clause 18 or 20 or both of them do not apply in relation to a specified matter either generally or in voting on particular resolutions.
- (2) The Minister must cause a copy of a declaration made under subclause (1) to be laid before each House of Parliament within 14 sitting days of that House after the declaration is made.

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

[s. 126]

[Division 1 omitted under the Reprints Act 1984 s. 7(4)(f).]

**Division 2 — Transitional and savings provisions**

**4. Terms used**

In this Division —

*commencement day* means the day on which Part 5 comes into operation;

*former Foundation* means the Western Australian Health Promotion Foundation established under the 1990 Act;

*new Foundation* means the Western Australian Health Promotion Foundation established under this Act;

*1990 Act* means the *Tobacco Control Act 1990*.

**5. Interpretation Act 1984 not affected**

The provisions of this Division do not prejudice or affect the application of the *Interpretation Act 1984* (except section 38 of that Act) to and in relation to the repeals effected by Division 1.

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

- (1) The new Foundation is the same entity as, and a continuation of, the former Foundation, and the rights and liabilities of or in relation to the former Foundation continue as rights and liabilities of or in relation to the new Foundation.
- (2) Despite the repeal of the 1990 Act and the enactment of this Act the persons who, immediately before commencement day, were members of the former Foundation under the 1990 Act section 17(a), (b), (c), (d), (e), (f), (g), (h), (i), (j) or (k) respectively continue in office as members of the new Foundation under section 61(1)(a), (b), (c), (d), (e), (f), (g), (h), (i), (j) or (k) respectively on and from commencement day.

- (3) Despite the repeal of the 1990 Act and the enactment of this Act —
  - (a) a committee established as a committee under the 1990 Act Schedule, clause 5 is to be treated, on and from commencement day, as a committee established under this Act; and
  - (b) the persons who, immediately before commencement day, were members of that committee continue in office as members of a committee of the new Foundation.
- (4) Despite the repeal of the 1990 Act and the enactment of this Act the person who, immediately before commencement day, was the Deputy Chairperson under the 1990 Act continues in office as the deputy chairperson of the new Foundation on and from commencement day.
- (5) Despite the repeal of the 1990 Act and the enactment of this Act the persons who were deputy members of the former Foundation under the 1990 Act section 17(8) continue in office as persons appointed to act in the place of the respective members of the new Foundation under Schedule 1 clause 5 on and from commencement day.
- (6) A person who, under this clause, continues in office as a member of the new Foundation on and from commencement day, continues in office for the balance of the term of office that applied to the person immediately before commencement day.

**7. Executive director**

- (1) The person who, immediately before commencement day, was employed as the Director of the former Foundation is to be treated, on and from commencement day, as the executive director of the new Foundation until the expiration of the term that applied to the person immediately before commencement day.
- (2) Except as otherwise agreed by the person referred to in subclause (1), the remuneration, existing or accrued rights, rights under a superannuation scheme or continuity of service of the person are not affected, prejudiced or interrupted by the operation of that subclause or the repeal of the 1990 Act.

**Tobacco Products Control Act 2006**

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

**Division 2** Transitional and savings provisions

**cl. 8**

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**8. Staff**

- (1) A person other than a person mentioned in clause 7 who, immediately before commencement day, was employed by the former Foundation is to be treated, on and from commencement day as having been employed by the new Foundation under section 69(1).
- (2) A person who, immediately before commencement day, was engaged under a contract for services or other arrangement by the former Foundation is to be treated, on and from commencement day as having been engaged under a contract for services or other arrangement by the new Foundation under section 69(2).
- (3) Except as otherwise agreed by a person mentioned in subclause (1) or (2), the remuneration, existing or accrued rights, rights under a superannuation scheme or continuity of service of the person are not affected, prejudiced or interrupted by the operation of subclause (1) or (2) or the repeal of the 1990 Act.

**9. Account**

- (1) The Western Australian Health Promotion Fund referred to in the 1990 Act section 26(3) is, on and from commencement day, to be regarded as the Western Australian Health Promotion Account referred to in section 71(3).
- (2) The Western Australian Health Promotion Account referred to in section 71(3) is charged with any liabilities of the Western Australian Health Promotion Fund referred to in the 1990 Act section 26(3) which arose before commencement day.

*[Clause 9 amended by No. 77 of 2006 s. 17; No. 46 of 2009 s. 17.]*

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

If there is no sufficient provision in this Division for dealing with a transitional matter the Governor may make regulations prescribing all matters that are required, necessary or convenient to be prescribed in relation to that matter.

*[Division 3 omitted under the Reprints Act 1984 s. 7(4)(e).]*

## Glossary

[s. 4]

### 1. Terms used

In this Act —

*Account* means the Western Australian Health Promotion Account referred to in section 71(3);

*approved* means approved by the CEO;

*approved guide* means a publication under section 26(1);

*carton* means a package containing, or designed to contain, packages of a tobacco product but does not include a package containing individually wrapped cigars unless the package contains a further package or packages of cigars;

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

*chairperson* means chairperson of the Foundation;

*cigar* means a roll of cut tobacco for smoking, enclosed in tobacco leaf or the leaf of another plant;

*cigarette* means a roll of cut tobacco for smoking, enclosed in paper;

*committee* means a committee established under Schedule 1 clause 15;

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

*customer* includes a prospective customer;

*enclosed public place* has the meaning given to that term in [regulations mentioned under section 125 about smoking in public places as it may be amended from time to time](#);

*environmental health officer* has the meaning given to that term in the *Health Act 1911* section 3(1);

*executive director* means the executive director of the Foundation mentioned in section 69(1);

*Foundation* means the Western Australian Health Promotion Foundation established by section 59;

**identity card** means an identity card issued to an investigator under section 81;

**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 way of internet, electronic mail, telephone, facsimile or mail order but does not include a sale made by way of a vending machine;

**indirect seller's licence** means a licence issued under section 36(1)(c);

**investigation purposes** means any or all of the purposes for which an investigation may be carried out under section 83;

**investigator** means a person appointed under section 76;

**licence** means a licence issued under this Act;

**licensed premises** has the meaning given to that term in the *Liquor Control Act 1988* section 3(1);

**member** means a member of the Foundation under section 61;

**mines amenity** means premises that are set aside as a staff amenity area at a mine as defined in the *Mines Safety and Inspection Act 1994* section 4(1);

**occupier, in relation to a public place, means a person having the management or control, or otherwise being in charge, of that place;**

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

**outdoor eating area means a public place or part of a public place —**

- (a) that is provided, on a commercial basis, as an area where food or drink may be consumed by people sitting at tables; and**
- (b) that is not an enclosed public place;**

**package** means a package containing, or designed to contain, a tobacco product and includes a box, packet, pouch, tin, carton, and a wrapping other than a transparent outer wrapping;

**premises** means —

- (a) land (whether built on or not);**
- (b) a building or structure on land; or**

- (c) a vehicle,

and includes a part of premises;

**product line** means a kind of tobacco product distinguishable from other kinds by one or more of the following characteristics —

- (a) brand name;
- (b) nicotine or tar content;
- (c) flavour;
- (d) the number of items in the package containing the tobacco product,

but not by the dimensions of the package containing the tobacco product;

**promote** in relation to a tobacco product or smoking implement, includes to promote —

- (a) the purchase or use of a tobacco product or smoking implement;
- (b) a trade mark in respect of, or a registered design or brand name of, a tobacco product or smoking implement, or part of such a trade mark, registered design or brand name;
- (c) a name of a tobacco company or licence holder that appears on a tobacco product, a package, a smoking implement or the packaging of a smoking implement, or part of such a name;

**public place** means a place or vehicle that —

- (a) the public, or a section of the public, is entitled to use; or
- (b) is open to, or is being used by, the public, or a section of the public,

whether on payment of money, by virtue of membership of a club or other body, by invitation, or otherwise;

**racing** means horse racing or pacing, dog racing, motor car racing or motorcycle racing;

**record** means any thing or process —

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

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

**registered design** in relation to a tobacco product or smoking implement means a design that is registered under the *Designs Act 2003* of the Commonwealth in relation to the tobacco product or smoking implement;

**responsible person** —

- (a) in relation to licensed premises, means a licensee, as defined in the *Liquor Control Act 1988* section 3(1), in relation to those premises;
- (b) in relation to premises that are a mines amenity, means a person having the management or control, or otherwise being in charge, of the mines amenity;

**restaurant licence, in relation to a place, means —**

- (a) a restaurant licence granted under the *Liquor Control Act 1988* in relation to that place; or
- (b) a condition of any other kind of licence, order or permit under the *Liquor Control Act 1988* —
  - (i) to the effect that a provision of that Act relating to restaurant licences applies to that place; or
  - (ii) that otherwise has an effect in relation to that place that is similar to a provision of that Act relating to restaurant licences;

**retailer's licence** means a licence issued under section 36(1)(a);

**seized thing** means a thing possession of which is taken under section 89(1)(b) or a warrant issued under section 87;

**sell** includes any of the following —

- (a) barter or exchange;
- (b) offer or expose for sale, barter or exchange;
- (c) supply, or offer to supply, in circumstances in which the supplier derives, or would derive, a direct or indirect pecuniary benefit;



- (d) supply, or offer to supply, gratuitously but with a view to gaining or maintaining custom or otherwise with a view to commercial gain;
- (e) keep or have in possession for sale;
- (f) agree to sell;
- (g) send or deliver for sale;

**smoke** (when used as a verb) means smoke, hold, or otherwise have control over, an ignited tobacco product;

**smoking implement** means cigarette papers, a cigarette rolling machine, pipe, or other thing designed to be used in the process of smoking a tobacco product or preparing a tobacco product for smoking, but does not include matches or a cigarette lighter;

**smoking zone** means a place allocated under section 107B(4);

**sporting** includes recreational and other such activities but does not include racing;

**supply** includes to provide, or offer to provide, whether or not gratuitously or with a view to commercial gain or maintaining custom;

**tobacco advertisement** means —

- (a) any of the following that gives favourable publicity to, or otherwise promotes or is intended to promote, a tobacco product, a smoking implement or smoking generally —
  - (i) a word or set of words, still or moving picture, sign, symbol or other visual image (including a colour or scheme of colours) or other visual message;
  - (ii) an audible message; or
  - (iii) any combination of those things;

or

- (b) any of the following that is closely associated with a tobacco product or a smoking implement (whether or not also closely associated with another kind of product) —
  - (i) a word or set of words (for example a trade mark or brand name or part thereof);
  - (ii) a design (including a colour or scheme of colours); or

(iii) any combination of those things;

**tobacco company** means —

- (a) a public company, as defined in the *Corporations Act 2001* of the Commonwealth, that is engaged in one or both of the following activities —
  - (i) tobacco growing;
  - (ii) manufacturing tobacco products;
- (b) a proprietary company, as defined in the *Corporations Act 2001* of the Commonwealth, that is a subsidiary or related body corporate (within the meaning of that Act) of a company referred to in paragraph (a);

**tobacco product** means any of the following —

- (a) tobacco in a form prepared for human consumption or use;
- (b) a cigarette or cigar or any other product the main, or a substantial, ingredient of which is tobacco and which is designed for human consumption or use;
- (c) a product prepared for smoking that contains a herb or other plant matter, whether or not the product also contains tobacco,

but does not include —

- (d) nicotine or a product containing nicotine insofar as the *Poisons Act 1964* applies to or in relation to nicotine or a product containing nicotine; or
- (e) a prohibited plant or a prohibited drug as those terms are defined in the *Misuse of Drugs Act 1981* section 3(1) or a product containing a prohibited plant or a prohibited drug;

**trade mark** has the meaning given to that term in the *Trade Marks Act 1995* of the Commonwealth;

**vehicle** means any thing used or capable of being used to transport people or goods by air or water or on rails or roads;

**vending machine** means a device from which a tobacco product can be obtained by the inserting of money, a card or a token or similar object;

**wholesale** means a sale, other than by way of retail, in any quantity;

**wholesaler's licence** means a licence issued under section 36(1)(b).

*[Glossary amended by No. 73 of 2006 s. 114; No. 77 of 2006 s. 17;  
No. 8 of 2008 s. 21 and 23(8); No. [22 of 2009 s. 13](#); No. 19 of 2010  
s. 51.]*

**Notes**

<sup>1</sup> This is a compilation of the *Tobacco Products Control Act 2006* and includes the amendments made by the other written laws referred to in the following table <sup>1a</sup>. The table also contains information about any reprint.

**Compilation table**

<b>Short title</b>	<b>Number and year</b>	<b>Assent</b>	<b>Commencement</b>
<i>Tobacco Products Control Act 2006</i>	5 of 2006	12 Apr 2006	s. 1 and 2: 12 Apr 2006; Act other than s. 1-2, 16-25, 26(2), (3) and (4), Pt. 4 and s. 103(2), 105 and 113(3): 31 Jul 2006 (see s. 2 and <i>Gazette</i> 25 Jul 2006 p. 2701); s. 19-25, 26(2), (3) and (4), Pt. 4, s. 103(2), 105 and 113(3): 28 Feb 2007 (see s. 2 and <i>Gazette</i> 28 Feb 2007 p. 677); s. 16-18: 31 May 2007 (see s. 2 and <i>Gazette</i> 28 Feb 2007 p. 677)
<i>Liquor and Gaming Legislation Amendment Act 2006</i> s. 114	73 of 2006	13 Dec 2006	7 May 2007 (see s. 2(2) and <i>Gazette</i> 1 May 2007 p. 1893)
<i>Financial Legislation Amendment and Repeal Act 2006</i> s. 4 and 17	77 of 2006	21 Dec 2006	1 Feb 2007 (see s. 2(1) and <i>Gazette</i> 19 Jan 2007 p. 137)
<i>Police Amendment Act 2008</i> s. 21 and 23(8)	8 of 2008	31 Mar 2008	s. 21: 1 Apr 2008 (see s. 2(1)); s. 23(8): 21 Jun 2008 (see s. 2(2) and <i>Gazette</i> 20 Jun 2008 p. 2706)
<b>Reprint 1: The Tobacco Products Control Act 2006 as at 5 Dec 2008</b> (includes amendments listed above)			
<a href="#"><u><i>Tobacco Products Control Amendment Act 2009</i></u></a>	<a href="#"><u>22 of 2009</u></a>	<a href="#"><u>22 Sep 2009</u></a>	<a href="#"><u>s. 1 and 2: 22 Sep 2009 (see s. 2(a); Act other than s. 1 and 2: 23 Sep 2010 (see s. 2(b))</u></a>
<i>Statutes (Repeals and Minor Amendments) Act 2009</i> s. 17	46 of 2009	3 Dec 2009	4 Dec 2009 (see s. 2(b))

Short title	Number and year	Assent	Commencement
<i>Standardisation of Formatting Act 2010</i> s. 51	19 of 2010	28 Jun 2010	11 Sep 2010 (see s. 2(b) and <i>Gazette</i> 10 Sep 2010 p. 4341)

<sup>1a</sup> ~~On the date as at which this compilation was prepared, provisions referred to in the following table had not come into operation and were therefore not included in this compilation. For the text of the provisions see the endnotes referred to in the table.~~

**Provisions that have not come into operation**

Short title	Number and year	Assent	Commencement
<del><i>Tobacco Products Control Amendment Act 2009</i> s. 3-13<sup>4</sup></del>	<del>22 of 2009</del>	<del>22 Sep 2009</del>	<del>23 Sep 2010 (see s. 2(b))</del>

<sup>2</sup> The provision in this Act repealing the *Tobacco Control Act 1990* has been omitted under the *Reprints Act 1984* s. 7(4)(f).

<sup>3</sup> The provisions in this Act amending these Acts have been omitted under the *Reprints Act 1984* s. 7(4)(e).

<sup>4</sup> ~~On the date as at which this compilation was prepared, the *Tobacco Products Control Amendment Act 2009* s. 3-13 had not come into operation. They read as follows:~~

~~**3. Act amended**~~

~~— This Act amends the *Tobacco Products Control Act 2006*.~~

~~**4. Section 22 replaced**~~

~~— Delete section 22 and insert:~~

~~**22. Prohibition on display of tobacco products, packages, smoking implements**~~

~~(1) The holder of a retailer's licence must ensure that a tobacco product, package or smoking implement is not displayed in the premises specified in the licence.~~

~~— Penalty: see section 115.~~

~~(2) If a person is charged with an offence under subsection (1) it is a defence to prove that the display was made to a specific customer at the customer's request.~~

~~5. Section 23 amended~~

~~(1) In section 23(1) delete the definition of 50% retailer.~~

~~(2) Delete section 23(2) and (3).~~

~~(3) In section 23(4):~~

~~(a) delete "22(2)" and insert:~~

~~22(1)~~

~~(b) in paragraph (b) delete "at the time for the purposes of section 22(2); and" and insert:~~

~~by the regulations; and~~

~~6. Section 24 amended~~

~~In section 24(1) after "products" insert:~~

~~or smoking implements~~

~~7. Section 32 amended~~

~~In section 32(1):~~

~~(a) in paragraph (d) after "tobacco products" insert:~~

~~or smoking implements~~

~~(b) in paragraph (d) after "those products" insert:~~

~~or implements~~

~~(c) in paragraph (f) after "product" insert:~~

~~or smoking implement~~

~~8. Section 77 amended~~

~~In section 77(1) delete “environmental health officer” and insert:~~

~~a person who belongs to a class of persons prescribed for the purpose of this section~~

~~9. Sections 107A to 107F inserted~~

~~After section 106 insert:~~

~~107A. Prohibition on smoking “between the flags”~~

~~A person must not smoke in an area that is between flags or other markers placed on a beach for the purpose of indicating a patrolled swimming area.~~

~~Penalty: a fine of \$1 000.~~

~~107B. Prohibition on smoking in outdoor eating areas~~

~~(1) A person must not smoke in an outdoor eating area unless the place in which the person is smoking is a smoking zone.~~

~~Penalty: a fine of \$2 000.~~

~~(2) If a person commits an offence under subsection (1) the occupier of the outdoor eating area commits an offence.~~

~~Penalty: a fine of \$2 000.~~

~~(3) If a person is charged with an offence under subsection (2) it is a defence to prove that —~~

~~(a) neither the accused nor any employee or agent of the accused was aware, or could reasonably be expected to have been aware, that the offence was occurring; or~~

~~(b) as soon as the accused or an employee or agent of the accused became aware that the offence was occurring, the accused or an employee or agent of the accused —~~

~~(i) informed the person concerned that the person was committing an offence; and~~

~~(ii) requested the person to stop smoking in the outdoor eating area and to extinguish, and properly dispose of, the tobacco product; and~~

~~(iii) if the person failed to comply with a request under subparagraph (ii), requested the person to leave the outdoor eating area until the person finished smoking the tobacco product.~~

~~(4) A responsible person in relation to licensed premises may allocate as a smoking zone for the premises one or more places in one or more outdoor eating areas to which a restaurant licence does not apply, but the total area of all the smoking zones for the premises must not exceed 50% of the total area of all the outdoor eating areas to which a restaurant licence does not apply.~~

~~(5) For the purposes of *The Criminal Code* section 338A(d) and any other written law, a person is lawfully entitled to abstain from working in a smoking zone when the smoking zone is open to, or being used by, the public or a section of the public.~~

**107C. Prohibition on smoking near playground equipment**

~~A person must not smoke within 10 metres of children's playground equipment that —~~

- ~~(a) is in a public place or a part of a public place; and~~
- ~~(b) is not in an enclosed public place.~~

~~Penalty: a fine of \$1 000.~~

**107D. Prohibition on smoking in or on vehicles if under 17 year old present**

~~(1) In this section —~~

~~*child* —~~

- ~~(a) means any boy or girl who has not reached 17 years of age; and~~
- ~~(b) in the absence of positive evidence as to age, means any boy or girl who apparently has not reached 17 years of age;~~

~~*vehicle* means any thing used or capable of being used to transport people or goods on roads;~~

~~*road* means any highway, road or street open to, or used by, the public and includes every carriageway, footway, reservation, median strip and traffic island on it and any parking area in a public place.~~

~~(2) A person must not smoke in or on a vehicle if —~~

- ~~(a) the vehicle is on a road; and~~
- ~~(b) any other person in or on the vehicle is a child.~~

~~Penalty: a fine of \$1 000.~~

**107E. Local government legislative power not affected**

~~Nothing in section 107A, 107B or 107C is intended to limit the power conferred on a local government by the *Local Government*~~



~~Act 1995 or any other Act to make local laws about matters mentioned in those sections.~~

~~107F. Dismissal or detriment because of refusal to work in smoking zone and employee's remedy for breach~~

~~(1) In this section—~~

~~—employee and employer have the respective meanings given in the Industrial Relations Act 1979 section 7(1).~~

~~(2) An employer must not—~~

~~(a) dismiss an employee; or~~

~~(b) alter an employee's position to the employee's disadvantage; or~~

~~(c) refuse to promote or transfer an employee; or~~

~~(d) otherwise injure an employee in relation to the employee's employment; or~~

~~(e) threaten to do any of those things;~~

~~—for the reason, or for reasons that include the reason, that the employee does not consent to working in a smoking zone when the smoking zone is open to, or being used by, the public or a section of the public (the consent).~~

~~—Penalty: see section 115.~~

~~(3) In proceedings for a contravention of subsection (2), if it is proved that an employer took any course of action mentioned in that subsection against or in relation to an employee after the employee refused to give the consent, it is for the employer to prove that the course of action was taken for some reason other than because the employee refused to give the consent.~~

~~(4) Subsection (2) is a civil penalty provision for the purposes of the Industrial Relations Act 1979 section 83E.~~

~~(5) The Industrial Relations Act 1979 section 97YG applies as if the reference in that section to a contravention of section 97YF of that Act includes a reference to a contravention of the Tobacco Products Control Act 2006 section 107F(2).~~

~~10. Section 115 amended~~

~~(1) In section 115(1)(b) in the Table in column 1 delete "s. 22(1), (2), (3), (4)" and insert:~~

~~s. 22(1)~~

~~(2) In section 115(1)(b) in the Table at the end of column 2 insert:~~

~~s. 107F(2)~~

~~11. Section 124A inserted~~

~~After section 123 insert:~~

~~124A. Provision of information about alleged offences of smoking near children~~

~~(1) If a police officer suspects on reasonable grounds that a person has committed an offence under section 107C or 107D, the Commissioner of Police is to supply the CEO with the alleged offender's name, address and date of birth and the date and details of the alleged offence, to the extent that the Commissioner has that information.~~

~~(2) Information supplied under subsection (1) may be used in the performance of any function that the CEO or the Foundation has under this Act.~~

~~(3) Subsection (1) applies whether or not the person is charged with having committed the alleged offence, or otherwise dealt with for the alleged offence without being prosecuted.~~

~~12. Section 124 amended~~

~~In section 124(2):~~

~~(a) after paragraph (b) insert:~~

~~(ca) prescribing matters in relation to the storage of tobacco products, packages and smoking implements at places where those items are sold by way of retail sale including the means to avoid or minimise attention being given to those items;~~

~~(b) in paragraph (c) after "products" insert:~~

~~or smoking implements~~

~~13. Glossary amended~~

~~In the Glossary insert in alphabetical order:~~

- ~~— **enclosed public place** has the meaning given to that term in regulations mentioned under section 125 about smoking in public places as it may be amended from time to time;~~
- ~~— **occupier**, in relation to a public place, means a person having the management or control, or otherwise being in charge, of that place;~~
- ~~— **outdoor eating area** means a public place or part of a public place—
  - ~~— (a) — that is provided, on a commercial basis, as an area where food or drink may be consumed by people sitting at tables; and~~
  - ~~— (b) — that is not an enclosed public place;~~~~
- ~~— **restaurant licence**, in relation to a place, means—
  - ~~— (a) — a restaurant licence granted under the *Liquor Control Act 1988* in relation to that place; or~~
  - ~~— (b) — a condition of any other kind of licence, order or permit under the *Liquor Control Act 1988*—
    - ~~— (i) — to the effect that a provision of that Act relating to restaurant licences applies to that place; or~~
    - ~~— (ii) — that otherwise has an effect in relation to that place that is similar to a provision of that Act relating to restaurant licences;~~~~~~
- ~~— **smoking zone** means a place allocated under section 107B(4);~~