

WESTERN AUSTRALIA

TOBACCO CONTROL ACT 1990

(No. 104 of 1990)

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TOBACCO CONTROL ACT

No. 104 of 1990

AN ACT to regulate the sale and promotion of tobacco products, to establish the Western Australian Health Promotion Foundation, to amend the *Constitution Acts Amendment Act 1899*, the *Financial Administration and Audit Act 1985*, the *Government Employees Superannuation Act 1987*, the *Health Act 1911*, and the *Parliamentary Commissioner Act 1971* and to repeal the *Sale of Tobacco Act 1916* and to provide for matters incidental to or connected with the foregoing.

[Assented to 2 January 1991.]

The Parliament of Western Australia enacts as follows:

PART 1—PRELIMINARY

Short title

1. This Act may be cited as the *Tobacco Control Act 1990*.

Commencement

2. (1) Subject to this section, this Act shall come into operation on such day as is fixed by proclamation.

(2) Sections 5 (2), 6 (1), 11 (1) and (2), and 12 shall come into operation 6 months after the appointed day.

(3) Section 5 (1) shall come into operation 12 months after the appointed day.

Purposes of Act

3. The purposes of this Act are—

(a) the active discouragement of the smoking of tobacco by—

- (i) encouraging non-smokers, particularly young people, not to start smoking;
- (ii) limiting exposure of children and young people to persuasion to smoke; and
- (iii) encouraging and assisting smokers to give up smoking;

and

(b) the promotion of good health and the prevention of illness.

Interpretation

4. In this Act, unless the contrary intention appears—

“banned contract” means—

- (a) a contract or arrangement entered into before the appointed day and which pursuant to Part 2 is unlawful in whole or part; or

- (b) a contract or arrangement which the Foundation considers there to have been a reasonable likelihood would have been entered into after the appointed day but for the passing of this Act and which pursuant to Part 2 would have been unlawful in whole or part but only where the potential parties to such contract or arrangement have prior to 24 August, 1989 been parties to a contract or arrangement which if it continued beyond the appointed day would pursuant to Part 2 be unlawful in whole or part;

“banned sponsorship” means a banned contract which pursuant to section 8 would be unlawful in whole or part;

“benefit” with respect to a banned contract or banned sponsorship means any benefit that would have flowed to a person other than a manufacturer or wholesaler of a tobacco product under or in connection with or as a result of a banned contract or banned sponsorship as the case may be;

“book” includes any printed material in any language;

“brand name” includes any part of a brand name;

“Chairperson” means Chairperson of the Foundation appointed under section 17 (1);

“function” has the meaning given by section 5 of the *Interpretation Act 1984*;

“member” means member of the Foundation appointed under or referred to in section 17 (1);

“newspaper” includes copy of any magazine, journal or periodical, or any other publication copies of which contain—

- (a) news, intelligence, information or reports of occurrences;

or

- (b) remarks, observations or comments in relation to any news, intelligence, information or occurrences or to any other matter of interest to the public or any section of the public,

which are printed in any language and published at regular or irregular intervals;

“objective” means objective of the Foundation set out in section 22;

“package”, in relation to a tobacco product, means package—

(a) in which the tobacco product is packed by the manufacturer of; and

(b) which immediately contains,

the tobacco product;

“public place” includes place to which the public or a section thereof ordinarily has access, whether by payment or not or by invitation or not;

“racing” means horse racing and pacing, dog racing and motor car and motorcycle racing;

“sell” includes—

(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; and

(d) supply, or offer to supply, gratuitously but with a view to gaining or maintaining custom or otherwise with a view to commercial gain;

“sponsorship” includes—

(a) scholarship, prize, gift or other like benefit; and

(b) financial arrangement (other than *bona fide* contract of employment or *bona fide* contract for services) for the direct promotion or publicization of one or more of the

matters referred to in section 8 (1) (a) and (b) through the medium of sporting, arts, youth, educational or other like activities;

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

“the appointed day” means the day referred to in section 2 (1);

“the Commissioner of Health” has the meaning given by the *Health Act 1911*;

“the Foundation” means the Western Australian Health Promotion Foundation established by section 15 (1);

“the Fund” means the Western Australian Health Promotion Fund referred to in section 26 (3);

“the Minister for Racing and Gaming” means the Minister to whom the administration of the *Casino Control Act 1984* is for the time being committed by the Governor;

“the Minister for Sport and Recreation” means the Minister to whom the administration of the *Western Australian Sports Centre Trust Act 1986* is for the time being committed by the Governor;

“the Minister for the Arts” means the Minister to whom the administration of the *Art Gallery Act 1959* is for the time being committed by the Governor;

“tobacco advertisement” means writing, still or moving picture, sign, symbol or other visual image or message, or audible message, designed to promote or publicize a tobacco product;

“tobacco product” means tobacco, 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, but excludes nicotine or a product containing nicotine insofar as the *Poisons Act 1964* applies to or in relation to nicotine or a product containing nicotine;

“trademark” includes part of a trademark;

“vending machine” means machine, device or contrivance that is constructed to contain tobacco products that can be obtained from it by an operation which involves—

- (a) the insertion in that machine, device or contrivance of a coin, token or similar object; or
- (b) any other action taken without the assistance of the vendor or his or her employee or agent.

PART 2—CONTROLS RELATING TO TOBACCO PRODUCTS

Certain advertising prohibited

5. (1) A person who in Western Australia for any direct or indirect benefit displays a tobacco advertisement in, or so that it can be seen or heard from, a public place commits an offence.

(2) A person who in Western Australia—

- (a) distributes to the public any unsolicited object; or
- (b) sells, hires or supplies for any direct or indirect benefit any object,

that constitutes or contains a tobacco advertisement commits an offence.

(3) This section does not apply in relation to—

- (a) anything done by means of a radio or television broadcast;
- (b) a tobacco advertisement in or on—
 - (i) a newspaper or book printed or published outside Western Australia, the sole or main purpose of which newspaper or book is a purpose other than the promotion or publicization of—

(A) the purchase or use; or

(B) a trademark or brand name,

of a tobacco product; or

(ii) a package or carton containing a tobacco product;

- (c) a tobacco advertisement that is an incidental accompaniment to the subject of a film or video tape (not being a film or video tape which is wholly or mainly concerned with the promotion of tobacco products);
- (d) a tobacco advertisement that is displayed inside a shop or other retail outlet where tobacco products are offered or exposed for sale, that is directly adjacent to a place where all or any of those tobacco products are offered or exposed for sale and that complies with any regulations made under section 33(1) (c);
- (e) an invoice, statement, order, letterhead, business card, cheque, manual or other document that is ordinarily used in the course of business; or
- (f) anything to which this section does not apply by virtue of an exemption granted under section 14.

(4) In any proceedings for an offence under subsection (1), it shall be presumed that, if there is present in the relevant tobacco advertisement—

- (a) the name of a person who manufactures or distributes any tobacco product;
- (b) a trademark, of which a person who manufactures or distributes any tobacco product is the registered proprietor or the registered user within the meaning of the *Trade Marks Act 1955* of the Commonwealth; or
- (c) a brand name, used by a person who manufactures or distributes any tobacco product,

that person displayed that tobacco advertisement for a direct or indirect benefit, until the contrary is proved.

(5) In any proceedings for an offence under this section where the thing that is alleged to constitute a tobacco advertisement contains the trademark or brand name of a tobacco product it shall be presumed to be designed to promote or publicize the tobacco product to which it relates until the contrary is proved.

Competitions

6. (1) A person who, in connection with the sale of a tobacco product or for the purpose of promoting the sale of a tobacco product—

(a) supplies (whether from inside or outside Western Australia) to the purchaser, or any other person, in Western Australia—

(i) a prize, gift or other benefit; or

(ii) 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 (whether that entitlement or qualification is absolute or conditional);

or

(b) conducts (whether from inside or outside Western Australia) a scheme—

(i) prescribed to be a scheme to promote the sale of a tobacco product or to promote smoking generally; and

(ii) the whole or any part of which is implemented in Western Australia,

commits an offence.

(2) It is a defence in proceedings for an offence under subsection (1) to prove that the benefit or thing supplied, or participation in the relevant scheme, was only incidentally connected with the purchase

of a tobacco product and that equal opportunity to receive that benefit or thing, or to participate in that scheme, and to buy products other than tobacco products, was afforded generally to persons who purchased products, whether or not they were tobacco products.

Free samples

7. A person who, for the purpose of inducing or promoting the sale of a tobacco product, offers, gives or distributes (whether from inside or outside Western Australia) to a member of the public within Western Australia a free sample of a tobacco product commits an offence.

Prohibition of sponsorships

8. (1) A person who promotes or publicizes, or agrees to promote or publicize, in Western Australia—

- (a) a tobacco product or a trademark or brand name, or part of a trademark or brand name, of a tobacco product; or
- (b) the name or interests of a manufacturer or distributor of a tobacco product (whether or not that manufacturer or distributor also manufactures or distributes a product other than the tobacco product) in association directly or indirectly with the 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 commits an offence.

(2) A person (whether inside or outside Western Australia) who provides, or agrees to provide, in Western Australia a sponsorship under a contract or arrangement of a kind referred to in subsection (1) commits an offence.

(3) For the purposes of subsection (1) (b), the name or interests of a manufacturer or distributor of a tobacco product shall be deemed to be in association directly or indirectly with the tobacco product if that name or those interests are commonly associated by members of the public in Western Australia with the tobacco product.

(4) This section does not apply in relation to—

- (a) a contract or arrangement of a kind referred to in subsection (1), which contract or arrangement was entered into before the appointed day, during the period of 12 months commencing on the appointed day; or
- (b) anything to which this section does not apply by virtue of an exemption granted under section 14.

Labelling of packaged tobacco

9. A person who sells in Western Australia any tobacco prepared for smoking that is in a package that is not labelled—

- (a) in accordance with any regulations made under section 33 with a prescribed statement and warning (if any) applicable to packages of the class to which that package belongs;
- (b) with the prescribed statement (if any) applicable to packages of the class to which that package belongs and giving the tar content of that tobacco; or
- (c) with any other prescribed information applicable to packages of the class to which that package belongs,

commits an offence.

Supplying tobacco to persons under 18 years

10. (1) A person who sells or supplies in Western Australia a tobacco product to a person under the age of 18 years commits an offence.

(2) A person who permits, or whose employee or agent permits, a person under the age of 18 years to obtain a tobacco product from a vending machine situated on premises in Western Australia occupied by the firstmentioned person commits an offence.

(3) It is a defence in proceedings for an offence under subsection (1) to prove that the defendant—

- (a) had honest and reasonable cause to believe that the person to whom the tobacco product concerned was sold or supplied was not under the age of 18 years; or
- (b) had taken all precautions that were reasonably required to ensure that the tobacco product concerned was not sold or supplied to a person under the age of 18 years.

(4) It is a defence in proceedings for an offence under subsection (2) to prove that—

- (a) in the case of proceedings against the person occupying the premises concerned for himself or herself having permitted a person under the age of 18 years to obtain a tobacco product from a vending machine situated on those premises, the firstmentioned person—

- (i) had honest and reasonable cause to believe that the secondmentioned person was not under the age of 18 years; or
 - (ii) had taken all precautions that were reasonably required to ensure that the tobacco product was not so obtained by a person under the age of 18 years;

or

- (b) in the case of proceedings against the person occupying the premises concerned for his or her employee or agent having permitted a person under the age of 18 years to obtain a tobacco product from a vending machine situated on those premises, that employee or agent—

- (i) had honest and reasonable cause to believe that the secondmentioned person was not under the age of 18 years; or
 - (ii) had taken all precautions that were reasonably required to ensure that the tobacco product was not so obtained by a person under the age of 18 years.

Vending machines

11. (1) A person who places, or causes or permits to be placed, in any premises in Western Australia a vending machine for operation by members of the public commits an offence unless the premises are—

- (a) licensed premises within the meaning of the *Liquor Licensing Act 1988*; or
- (b) premises set aside by an employer as a staff amenity area.

(2) A person who—

- (a) owns or is the lessee of a vending machine in Western Australia; and
- (b) does not ensure that a statement in the prescribed form is kept conspicuously displayed on the front of the vending machine referred to in paragraph (a),

commits an offence.

Packages of cigarettes

12. A person who sells in Western Australia cigarettes—

- (a) in a package containing less than 20 cigarettes; or
- (b) otherwise than in a package,

commits an offence.

Smokeless tobacco

13. (1) A person who manufactures or sells in Western Australia a tobacco product other than a tobacco product prepared for smoking commits an offence.

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

Exemptions

14. (1) Subject to this section, the Minister may, by notice published in the *Gazette*—

(a) exempt a person or class of persons either wholly or in part from the operation of section 5 or 8 subject to such conditions (if any) as are set out in that notice or prescribed for the purposes of this paragraph; or

(b) amend or repeal an exemption granted under this section.

(2) An exemption may only be granted under this section—

(a) after consultation between the Minister and the appropriate Minister, and having regard to the nature and background of the event, function or series concerned and to the purposes of this Act, to facilitate the promotion and conduct of—

(i) a sporting, racing or arts event or function; or

(ii) a series of sporting, racing or arts events or functions,

of national or international significance;

(b) in the case of the operation of section 5, to allow the performance during the period of 12 months commencing on the appointed day of a contract entered into before that day if significant hardship to persons other than manufacturers or wholesalers of tobacco might result if the exemption is not granted; or

(c) in any other case of significant hardship to persons other than manufacturers or wholesalers of tobacco.

(3) For the purposes of subsection (2) (a), the appropriate Minister is—

(a) in relation to an exemption to facilitate the promotion and conduct of a sporting or racing event or function or a series of such events or functions—

(i) which is a racing event or function not involving motor car or motorcycle racing the Minister for Racing and Gaming;

or

- (ii) which is a sporting event or function or a motor car or motorcycle racing event or function, the Minister for Sport and Recreation;

or

- (b) in relation to an exemption to facilitate the promotion and conduct of a arts event or function or a series of such events or functions, the Minister for the Arts.

(4) The Minister shall, when deciding whether or not to grant an exemption under this section for the purpose referred to in subsection (2) (a), have regard to—

- (a) any substantial connection between the relevant event or function or series of events or functions and other significant events or functions outside the State; and
- (b) any reasonable efforts that have been made to obtain sufficient financial or other support for the relevant event or function or series of events or functions from sources other than the advertising of tobacco products to render the exemption unnecessary.

(5) An exemption granted under this section for the purpose referred to in subsection (2) (c) shall not have effect after 30 June 1994.

PART 3—WESTERN AUSTRALIAN HEALTH PROMOTION FOUNDATION

Establishment of Foundation

15. (1) The Western Australian Health Promotion Foundation is established.

(2) The Foundation is—

- (a) a body corporate with perpetual succession and shall have a common seal;

- (b) capable of suing and being sued in its corporate name and of acquiring, holding, dealing with and disposing of real and personal property;
- (c) capable of acquiring or incurring any other rights or liabilities and of doing and suffering all such acts and things as bodies corporate may lawfully do and suffer; and
- (d) an agency of, and holds its property on behalf of, the Crown.

(3) The common seal of the Foundation shall be in a form determined by the Foundation, shall be kept in such custody as the Foundation directs and shall not, subject to subsection (4), be used except as authorized by the Foundation.

(4) A document is duly executed by the Foundation if it is sealed with the common seal of the Foundation and signed by 2 members.

(5) A document apparently executed by the Foundation shall be presumed in any legal proceedings, in the absence of proof to the contrary, to have been duly executed.

(6) For the purposes of this Act, the Foundation may make use of a facsimile of the common seal of the Foundation and a document purporting to create or evidence an obligation on the part of the Foundation and to be endorsed with such a facsimile seal shall, until the contrary is proved, be deemed to have been sealed by the Foundation.

Provision of information to Minister

16. The Foundation shall provide the Minister with such information and reports concerning the activities of the Foundation as the Minister may from time to time require.

Constitution of Foundation

17. (1) The Foundation shall consist of 11 members, of whom—

- (a) one shall be appointed by the Minister on the nomination of the Premier and shall be the Chairperson of the Foundation;

- (b) one shall be appointed by the Minister on the nomination of the body known as the Australian Medical Association Western Australian Branch;
- (c) one shall be appointed by the Minister on the nomination of the body known as the Western Australian Sports Federation;
- (d) one shall be appointed by the Minister on the nomination of the body known as the Western Australian Sports Council;
- (e) one shall be appointed by the Minister on the nomination of the body known as the Country Shire Councils' Association to represent country sporting interests;
- (f) one shall be appointed by the Minister on the nomination of the body known as the WA Association of Professional Performing Arts;
- (g) one shall be appointed by the Minister on the nomination of the body known as the Australian Council on Smoking and Health;
- (h) one shall be the person for the time being holding or acting in the office of the Commissioner of Health or the nominee of that person;
- (i) one shall be the chief executive officer of the department principally assisting the Minister for Sport and Recreation or the nominee of that chief executive officer;
- (j) one shall be the chief executive officer of the department principally assisting the Minister for the Arts or the nominee of that chief executive officer; and
- (k) one shall be the principal employee for the time being of the body known as the Office of the Family or the nominee of that principal employee.

(2) The Premier shall, before making a nomination for the purposes of subsection (1) (a), consult with the parliamentary leader of each party in the Parliament.

(3) A nomination referred to in subsection (1) (a), (b), (c), (d), (e), (f) or (g) shall—

(a) be submitted in writing to the Minister at his or her request;

and

(b) be in respect of a person who is willing to accept appointment as a member.

(4) If at any time—

(a) the Premier; or

(b) the body referred to in subsection (1) (b), (c), (d), (e), (f) or (g),

does not submit a nomination within 30 days after the making of the relevant request referred to in subsection (3) (a), the Minister may, without the submission of that nomination, appoint a person to be the member concerned to represent the interests of the Premier or body in default until—

(c) the relevant nomination is submitted and a member is appointed on that nomination; or

(d) the expiry of the period (being a period not exceeding 3 years) specified in the instrument of the appointment under this subsection,

whichever is the sooner.

(5) A person appointed, and holding office as a member, under subsection (4) shall for all purposes be deemed to be duly appointed a member and to be the representative of the Premier or body in default.

(6) The Minister shall, before making an appointment under subsection (4) representative of the interests of the Premier, consult with the parliamentary leader of each party in the Parliament.

(7) The members shall, at the first meeting of the Foundation after the appointed day and thereafter at the first meeting of the Foundation after a Deputy Chairperson ceases to be a member, elect

a Deputy Chairperson from among their number to preside, whilst he or she remains a member, over any meeting, or part of a meeting, of the Foundation from which the Chairperson is absent.

(8) A member, other than the member referred to in subsection (1) (a), may nominate by writing served on the person concerned and on the Chairperson a person—

(a) to be his or her deputy and to attend; and

(b) to represent the interests of the relevant body or of the Commissioner of Health or of the relevant department at,

any meeting, or part of a meeting, of the Foundation from which that member is absent.

(9) A deputy nominated under subsection (8) has, while attending a meeting, or part of a meeting, of the Foundation from which the member who nominated him or her is absent, all the functions of a member.

Term of appointment or nomination

18. (1) A member referred to in section 17 (1) (a), (b), (c), (d), (e), (f) or (g) shall, subject to section 52 of the *Interpretation Act 1984*, hold office for such period not exceeding 3 years as is specified in the instrument of his or her appointment and is eligible for reappointment.

(2) A deputy nominated under section 17 (8) shall, unless his or her nomination is earlier withdrawn by writing served on that deputy and on the Chairperson by the member who made that nomination, hold office for such period ending on or before the end of the period for which that member holds office as is specified in the relevant instrument of nomination.

Remuneration and allowances of members and deputies

19. A member and his or her deputy are each of them entitled to such remuneration and allowances (if any) as the Minister from time to time determines in his or her case on the recommendation of the Public Service Commissioner.

Resignation of members

20. A member referred to in section 17 (1) (a), (b), (c), (d), (e), (f) or (g) may resign his or her office by notice in writing signed by the member and delivered to the Minister.

Further provisions relating to constitution, etc., of Foundation

21. Further provisions governing the constitution, proceedings and operations of the Foundation are set out in the Schedule.

Objectives of Foundation

22. (1) The objectives 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 offer an alternative source of funds for sporting and arts activities currently supported by manufacturers or wholesalers of tobacco products;
- (c) to support sporting and arts activities which encourage healthy lifestyles and advance health promotion programmes;
- (d) to provide funds to replace tobacco advertising with health promotion advertising;
- (e) to provide grants to organizations engaged in health promotion programmes;
- (f) to fund research relevant to health promotion;
- (g) to raise funds by soliciting donations and grants and, subject to subsection (2), engaging in the production or marketing or both referred to in section 23 (2) (d) in order to support the work of the Foundation;
- (h) to evaluate and report on the effectiveness of the performance of the Foundation in achieving health promotion activities; and

- (i) generally to fulfil the purposes set out in section 3.

(2) It is not an objective of the Foundation to make a profit by engaging in the production or marketing or both referred to in section 23 (2) (d), but any surplus of revenue over expenditure arising as a result of that engagement shall be paid into and to the credit of the Fund.

(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.

Powers of Foundation

23. (1) The Foundation has power to do all things necessary or convenient to be done for or in connection with the achievement of its objectives.

(2) Without limiting the generality of subsection (1), the Foundation may, in its absolute discretion—

- (a) after consultation with the Minister, make grants from the Fund to persons other than manufacturers or wholesalers of tobacco products who have suffered hardship as a result of the loss of benefits under a banned contract entered into before the appointed day; or
- (b) make grants for the purpose of providing support to persons who have lost or who will lose benefits under a banned sponsorship;
- (c) make grants to—
 - (i) sporting organizations;
 - (ii) arts organizations;
 - (iii) health organizations;
 - (iv) community organizations;
 - (v) research organizations;

(vi) youth organizations; and

(vii) racing organizations;

(d) engage in the production or marketing or both of goods and services which themselves constitute or form part of health promotion activities in order—

(i) to promote the purposes of this Act and the objectives of the Foundation; and

(ii) by generating revenue to cover the cost of that production or marketing or both;

and

(e) do anything necessary or desirable for implementing the capacity conferred on it by section 15 (2).

(3) For the period of five years from the appointed day the Foundation shall give priority to applicants for grants—

(a) firstly pursuant to subsection (2) (a); and

(b) secondly pursuant to subsection (2) (b),

up to the full amount of any loss of benefit.

Ministerial directions

24. (1) The Minister may give directions in writing to the Foundation with respect to the exercise or performance of its functions, either generally or in relation to a particular matter, and the Foundation shall give effect to any such direction.

(2) The text of any direction given under subsection (1) shall be included in the annual report submitted by the accountable authority of the Foundation under section 66 of the *Financial Administration and Audit Act 1985* and shall also be tabled in both Houses of Parliament within 6 sitting days.

Staff of Foundation

25. (1) The Foundation may, subject to any relevant industrial agreement or award, appoint and employ, either on a permanent full time basis or otherwise and on such terms and conditions as the Foundation determines, a Director of the Foundation and such other persons as the Foundation considers necessary to assist that Director and to enable the Foundation to achieve its objectives.

(2) The Foundation shall not appoint or employ any person except in accordance with an establishment scheme from time to time approved by the Minister which shall set out—

- (a) the numbers of staff which may be employed and the general functions each is intended to perform; and
- (b) the salary range for each such person.

(3) With the consent of the Minister or within a budget approved by the Minister, 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 Foundation considers necessary to enable it to achieve its objectives.

(4) The Foundation may, by arrangement made between it and the Minister concerned, and on such terms and conditions as may be mutually arranged by it with that Minister and, if appropriate, with the Public Service Commissioner, make use, either full time or part time, of—

- (a) the services of any officer or employee employed in the Public Service of the State or in a State agency or instrumentality or otherwise in the service of the Crown in right of the State; or
- (b) any facilities of a department of the Public Service of the State or of a State agency or instrumentality.

(5) The appointment and employment or engagement of a person under subsection (1) or (3) does not—

- (a) render the provisions of the *Public Service Act 1978* or of any Act applying to persons as officers of the Public Service of the State 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 him or her at the time of his or her appointment or engagement.

Funds of Foundation

26. (1) The funds available for the purpose of enabling the Foundation to achieve its objectives and to exercise and perform its functions consist of—

- (a) moneys paid to the Foundation under subsection (2);
- (b) moneys from time to time appropriated by Parliament and paid to the Foundation; and
- (c) any moneys, other than moneys referred to in paragraphs (a) and (b), lawfully received by, made available to or payable to the Foundation.

(2) There shall in respect of the financial year commencing on—

- (a) 1 July 1990 be paid to the Foundation an amount equal to 10 per cent; and
- (b) 1 July 1991 and of each subsequent financial year be paid to the Foundation an amount equal to 10 per cent, or to such greater percentage as the Minister may determine by notice published in the *Gazette*,

of the total amount of fees paid under the *Business Franchise (Tobacco) Act 1975* to the Commissioner of State Taxation during that financial year, and the Consolidated Revenue Fund is hereby appropriated to the extent necessary for the making of each such payment.

(3) The funds referred to in subsection (1) shall be paid into and placed to the credit of an account at the Treasury to be called the “Western Australian Health Promotion Fund”.

(4) There shall be paid from the moneys from time to time in and standing to the credit of the Fund—

- (a) the remuneration and allowances payable to members and their deputies and to persons employed under section 25 (1);
- (b) expenditure incurred by the Foundation in achieving its objectives and exercising and 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 moneys from time to time in and standing to the credit of the Fund shall not contain any picture of, 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,

nor shall any such moneys 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 Fund shall not decide nor announce any decision to disburse any part of the Fund, pursuant to section 23 (2) (c) of the Act during the period from the issue of the writs for a general election to be held within the State, whether State or Federal until the close of voting in that election.

(7) All moneys in and standing to the credit of the Fund immediately before the commencement of a financial year shall, subject to subsection (4), remain in and standing to the credit of the Fund after that commencement.

(8) The Foundation shall endeavour to ensure that, in each financial year—

- (a) not less than 30% of the moneys paid under subsection (4) in any one financial year are disbursed to sporting organizations;

- (b) not less than 15% of the moneys paid under subsection (4) in any one financial year are disbursed to arts organizations; and
- (c) not more than 50% of the moneys paid under subsection (4) in any one financial year are disbursed to any one of the following categories of organizations—
 - (i) sporting organizations;
 - (ii) arts organizations;
 - (iii) health organizations;
 - (iv) community organizations;
 - (v) research organizations; or
 - (vi) racing organizations,

which the Foundation is satisfied are promoting, or will promote, the objectives of the Foundation.

(9) The Foundation shall endeavour to disburse the funds received from the State by it for the objectives of the Foundation within the year they are received or reasonably soon thereafter and shall include in its annual report the reason for any accumulation beyond that year.

(10) Any amount of funds received by the Foundation from the State which have not been disbursed 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 shall be returned to Consolidated Revenue.

Temporary investment of moneys in Fund

27. All moneys recorded as standing to the credit of the Fund 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 Administration and Audit Act 1985*, may lawfully be invested and the Treasurer shall cause all interest derived from that investment to be paid to the credit of the Fund.

**Application of *Financial
Administration and Audit Act 1985***

28. Subject to this Part, the provisions of the *Financial Administration and Audit Act 1985* regulating the financial administration, audit and reporting of statutory authorities apply to and in respect of the Foundation and its operations.

PART 4—ENFORCEMENT

Consent required for prosecutions

29. Proceedings for an offence under this Act shall not be commenced without the consent in writing of the Commissioner of Health or a person authorized by him or her in writing for the purpose of this section.

Penalties

30. (1) A person who commits an offence under a provision of this Act specified in the Table to this subsection is liable—

(a) in the case of an individual, to a penalty of—

(i) \$5 000 for a first offence; or

(ii) \$10 000 for a second or subsequent offence;

or

(b) in the case of a body corporate, to a penalty of—

(i) \$20 000 for a first offence; or

(ii) \$40 000 for a second or subsequent offence.

TABLE

Sections 5 (1), and (2), 6 (1), 7, 8 (1) and (2), 9, 10 (1) and (2), 11 (1) and (2), 12 and 13 (1).

(2) If a continuing state of affairs is created by an offence referred to in subsection (1), the offender is liable to a penalty of—

(a) \$5 000 in the case of an individual; or

(b) \$20 000 in the case of a body corporate,

in respect of each day on which that offence continues, in addition to the penalty specified in that subsection.

Offences by bodies corporate

31. (1) When a body corporate commits an offence under this Act, every officer of the body corporate commits the like offence unless he or she proves that—

(a) that offence was committed without his or her consent or connivance; and

(b) he or she exercised all such due diligence to prevent the commission of that offence as he or she ought to have exercised, having regard to the nature of his or her functions in that capacity and to all the circumstances.

(2) In subsection (1)—

“officer”, in relation to a body corporate, means—

(a) a director, secretary or executive officer of the body corporate;

(b) a receiver, or receiver and manager, of property of the body corporate, or any other authorized person who enters into possession or assumes control of property of the body corporate for the purpose of enforcing any charge;

- (c) an official manager or a deputy official manager of the body corporate;
- (d) a liquidator of the body corporate; and
- (e) a trustee or other person administering a compromise or arrangement made between the body corporate and another person or other persons,

and any other person, by whatever name called and whether or not a director of the body corporate, who is concerned, or takes part, in the management of the body corporate.

PART 5—GENERAL

Certain civil proceedings barred

32. An action does not lie against a person for—

- (a) the omission to do any thing the doing of which; or
- (b) the doing of any thing the omission to do which,

would constitute an offence under this Act.

Regulations

33. (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, and, in particular—

- (a) prescribing the labelling of packages containing tobacco, including the position of labels on packages and the size, colour, style and nature of labels or labelling;
- (b) prescribing statements or warnings for the purpose of labelling packages;

- (c) prescribing the size, colour, style, position and nature of tobacco advertisements displayed inside shops and other retail outlets where tobacco products are offered or exposed for sale, and any statements or warnings to be included in those tobacco advertisements;
- (d) prescribing the labelling of vending machines containing tobacco products;
- (e) prescribing the duty of persons packing, or causing other persons to pack, specified tobacco products prepared for smoking to label those tobacco products in a specified manner;
- (f) prohibiting the sale of packages containing specified tobacco products prepared for smoking unless those packages are labelled in a specified manner; and
- (g) creating offences and providing in respect of any such offence a penalty not exceeding \$1 000.

(2) In subsection (1)—

“specified” means specified in regulations made under this section.

Review of Act

34. (1) Within a period of 12 months commencing on the third anniversary of the appointed day, the Minister shall cause an investigation and review to be conducted, and a report prepared, concerning—

- (a) the operation of this Act;
- (b) the operation of the Foundation; and
- (c) the need for this Act to continue in operation.

(2) The Minister shall cause a copy of the report referred to in subsection (1) to be laid before each House of Parliament as soon as is practicable after the completion of that report.

PART 6—AMENDMENTS, REPEAL AND TRANSITIONAL

Amendment and modification of *Constitution Acts Amendment Act 1899*

35. (1) Schedule V to the *Constitution Acts Amendment Act 1899** is amended in Part 3 by inserting in the appropriate alphabetical position the following item—

“ The Western Australian Health Promotion Foundation established by the *Tobacco Control Act 1990*. ”.

(2) Section 37 (1) (b) of the *Constitution Acts Amendment Act 1899** shall have effect in relation to the Foundation as if the reference to “member” included a reference to a deputy of a member.

[*Reprinted as at 16 March 1989 and amended by Acts Nos. 75 of 1988 and 19 of 1989.]

Amendment of *Financial Administration and Audit Act 1985*

36. Schedule 1 to the *Financial Administration and Audit Act 1985** is amended by inserting in the appropriate alphabetical position the following—

“ Western Australian Health Promotion Foundation. ”.

[*Reprinted as at 4 March 1987 and amended by Acts Nos. 94 of 1986, 9, 32, 65, 88, 89, 91, 99 and 113 of 1987, 4, 19, 21 and 52 of 1988 and 5, 31 and 48 of 1989.]

Amendment of *Government Employees Superannuation Act 1987*

37. Schedule 1 to the *Government Employees Superannuation Act 1987** is amended by inserting in Part B in the appropriate alphabetical position the following—

“ Western Australian Health Promotion Foundation ”.

[*Act No. 25 of 1987 as amended by Acts Nos. 83 and 91 of 1987, 52 of 1988 and 5, 44 and 48 of 1989.]

Amendment of *Health Act 1911* and transitional

38. (1) Section 3 (1) of the *Health Act 1911** is amended in the definition of "Drug" by deleting "tobacco,".

(2) The *Tobacco (Warning Labels) Regulations 1987* as in force under the *Health Act 1911** immediately before the appointed day shall be deemed to have been made and to be in force under section 33 and may be amended or repealed accordingly.

[*Reprinted as approved 14 May 1981 and amended by Acts Nos. 63 of 1981, 30 and 116 of 1982, 28 of 1984, 26, 53, 57, 98 and 109 of 1985, 93 of 1986 and 80 of 1987.]

Amendment of *Parliamentary Commissioner Act 1971*

39. The Schedule to the *Parliamentary Commissioner Act 1971** is amended by inserting in the appropriate alphabetical position the following—

“ Western Australian Health Promotion Foundation
established by the *Tobacco Control Act 1990*. ”.

[*Reprinted as at 31 March 1989 and amended by Acts Nos. 75 of 1988 and 31 of 1989.]

Repeal of *Sale of Tobacco Act 1916*

40. The *Sale of Tobacco Act 1916** is repealed.

[*Reprinted as at 17 February 1987.]

THE SCHEDULE**(Section 21)****FURTHER PROVISIONS RELATING TO WESTERN AUSTRALIAN
HEALTH PROMOTION FOUNDATION****Interpretation**

1. (1) In this Schedule—

“committee” means committee established under clause 5.

(2) A reference in this Schedule to a member includes, unless the contrary intention appears, a reference to the deputy of a member.

Meetings and procedure

2. (1) Five members constitute a quorum of the Foundation.

(2) A decision carried by the votes of a majority of the members present at a meeting of the Foundation is a decision of the Foundation.

(3) Each member present at a meeting of the Foundation is entitled to one vote on a matter arising for determination at that meeting and the presiding member has, in the event of an equality of votes, a second or casting vote.

(4) The Foundation shall cause accurate minutes to be kept of its proceedings.

(5) Subject to this Act, the business of the Foundation may be conducted in a manner determined by the Foundation.

Disclosure of interest

3. (1) A member who has a direct or indirect pecuniary or other personal interest in a matter under consideration by the Foundation—

(a) shall disclose the nature of that interest to the Foundation; and

(b) shall not take part in any deliberation or decision of the Foundation with respect to that matter.

Penalty: \$2 500.

(2) A disclosure under this clause shall be recorded in the minutes of the Foundation.

Delegation by Foundation

4. (1) Subject to this clause, the Foundation may, by instrument in writing, delegate any of its functions—

(a) to a member or employee of the Foundation; or

(b) to a committee.

(2) The Foundation shall not delegate its function of determining to whom or in what amounts financial support may be provided from the Fund.

(3) A function delegated under this clause may, if the instrument of delegation so provides, be subdelegated.

(4) When a delegation is made to a committee under this clause—

- (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.

(5) A person to whom, or a member of a committee to which, a function is delegated under this clause is disqualified from acting under the delegation in relation to any matter in which that person or member of a committee has a direct or indirect pecuniary interest or other personal interest.

Committees

5. (1) The Foundation may establish one or more Committees to advise or assist it in the exercise or performance of its functions. In any event, the Foundation shall establish three advisory Committees to advise on—

- (1) the Arts;
- (2) Sport; and
- (3) Racing;

each of which shall include a reasonable number of country representatives.

(2) A committee established under subclause (1) may act in relation to any matter referred or delegated to it by the Foundation and shall be governed in its proceedings by rules approved by the Foundation.

(3) A member of a committee established under subclause (1) is entitled to such allowances and expenses (if any) as the Minister may determine.

Duty to act honestly

6. A member, or officer of the Foundation shall at all times act honestly and exercise a reasonable degree of care and diligence in the exercise of his or her powers or the performance of his or her duties.

Penalty—\$5 000.

Non-disclosure of information

7. A member, member of a committee or employee of the Foundation shall not disclose any information declared in writing by the Foundation to be confidential, to which information he or she has had access in the course of official duties, unless that disclosure is made—

- (a) with the consent of the person from whom the information was obtained;
- (b) in connection with the administration of this Act; or
- (c) for the purposes of any legal proceedings arising out of the administration of this Act.

Penalty: \$2 500.
