

# Public Health (Tobacco) Act 2008 No 94

[2008-94]



New South Wales

## Status Information

### Currency of version

Historical version for 27 October 2020 to 29 October 2023 (accessed 3 December 2023 at 13:20)

Legislation on this site is usually updated within 3 working days after a change to the legislation.

### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **Does not include amendments by**
  - [Passenger Transport Act 2014 No 46](#) (not commenced)
  - [Medicines, Poisons and Therapeutic Goods Act 2022 No 73](#) (not commenced)

### Authorisation

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File last modified 27 February 2023

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New South Wales

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# Public Health (Tobacco) Act 2008 No 94



New South Wales

An Act to regulate the sale, supply, advertising and promotion of tobacco products; and for other purposes.

## Part 1 Preliminary

### 1 Name of Act

This Act is the *Public Health (Tobacco) Act 2008*.

### 2 Commencement

This Act commences on a day or days to be appointed by proclamation.

### 3 Objects of Act

- (1) The object of this Act is to reduce the incidence of smoking and other consumption of tobacco products and non-tobacco smoking products, particularly by young people, in recognition of the fact that the consumption of those products adversely impacts on the health of the people of New South Wales and places a substantial burden on the State's health and financial resources.
- (2) This Act aims to achieve that object by—
  - (a) regulating the packaging, advertising and display of tobacco products, non-tobacco smoking products and e-cigarettes, and
  - (b) prohibiting the supply of tobacco products, non-tobacco smoking products, e-cigarettes and e-cigarette accessories to children, and
  - (c) reducing the exposure of children to environmental tobacco smoke.

### 4 Definitions

- (1) In this Act—

**brand name** includes any part of a brand name.

**Commonwealth Act** means the *Tobacco Advertising Prohibition Act 1992* of the Commonwealth.

**display**, in relation to a tobacco advertisement, includes cause or permit to be displayed.

**e-cigarette** means—

(a1) e-cigarette liquid, or

- (a) a device (other than a device of a kind excluded by the regulations) that is designed to generate or release an aerosol or vapour (whether or not containing nicotine) by electronic means for inhalation by its user in a manner that replicates, or produces an experience similar to, the inhalation of smoke from an ignited tobacco product or ignited non-tobacco smoking product, or
- (b) any other device of a kind prescribed by the regulations that is designed to be used by its user in a way that replicates, or produces an experience similar to, the use of a tobacco product or non-tobacco smoking product.

**e-cigarette accessory** means—

- (a) a cartridge, capsule or other container designed to contain e-cigarette liquid, or
- (b) a heating element designed for use in an e-cigarette, or
- (c) any other component of an e-cigarette (or class of e-cigarettes) of a kind prescribed by the regulations.

**e-cigarette liquid** means a liquid, aerosol, gas, vapour or other substance which, if inserted or otherwise placed in a device, generates or is released as an aerosol or vapour for inhalation by a user of the device in a manner that replicates, or produces an experience similar to, the inhalation of smoke from an ignited tobacco product or ignited non-tobacco smoking product.

**e-cigarette vending machine** means a machine, device or contrivance from which e-cigarettes or e-cigarette accessories can be obtained by an operation that involves inserting money, or a token or object, into the machine, device or contrivance, whether or not some other action is required to activate the machine.

**exercise** a function includes perform a duty.

**function** includes a power, authority or duty.

**inspector** means—

- (a) an authorised officer within the meaning of the [Public Health Act 2010](#), or
- (b) a person of a class prescribed by the regulations for the purposes of this definition.

**non-tobacco smoking product** means any product (other than a tobacco product)

that is intended to be smoked, and includes any product known or described as herbal cigarettes.

**occupier**, in relation to premises or a part of premises, means—

- (a) a person who has the right to occupy the premises or part to the exclusion of the owner, or
- (b) the person who is the owner of the premises or part if there is no person with a right to occupy the premises or part to the exclusion of the owner,

even if the premises are, or the part is, vacant.

**pack** includes cause or permit to be packed.

**package** includes—

- (a) a box, carton, cylinder, packet, pouch or tin, or
- (b) a wrapping other than a transparent outer wrapping.

**premises** means—

- (a) a building or other structure on land, or
- (b) vacant land, or
- (c) a vessel, or
- (d) an aircraft.

**public place** means a place, vehicle or vessel that the public, or a section of the public, is entitled to use or that 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, or otherwise).

**Secretary** means the Secretary of the Ministry of Health.

**sell** includes—

- (a) barter or exchange, or
- (b) offer or expose for sale, barter or exchange, or
- (c) keep for sale or have in possession for sale, or
- (d) supply, or offer to supply, in circumstances in which the supplier derives, or would derive, a direct or indirect pecuniary benefit, or
- (e) supply, or offer to supply, gratuitously, but with a view to gaining or maintaining custom or otherwise with a view to commercial gain.



**smoke** means smoke, hold or otherwise have control over, an ignited tobacco product or non-tobacco smoking product.

**smoking accessory** includes cigarette papers, pipes, cigarette holders, hookahs, water pipes or any other smoking implement.

**tobacco advertisement** means writing, or any still or moving picture, sign, symbol or other visual image or message or audible message, or a combination of two or more of them, that gives publicity to, or otherwise promotes or is intended to promote—

- (a) the purchase or use of a tobacco product, or
- (b) the trademark or brand name, or part of a trademark or brand name, of a tobacco product.

**tobacco product** means tobacco, or a cigarette or cigar, or any other product containing tobacco and designed for human consumption or use.

**tobacco vending machine** means a machine, device or contrivance from which tobacco products or non-tobacco smoking products can be obtained by an operation that involves inserting money, or a token or object, into the machine, device or contrivance, whether or not some other action is required to activate the machine.

**trademark** includes any part of a trademark.

**vending machine token** means—

- (a) in relation to a tobacco vending machine—a tobacco vending machine token, or
- (b) in relation to an e-cigarette vending machine—a token that is designed to be inserted into an e-cigarette vending machine to enable the purchase or supply of e-cigarettes or e-cigarette accessories from the vending machine.

**word** includes symbol.

**Note—**

The [Interpretation Act 1987](#) contains definitions and other provisions that affect the interpretation and application of this Act.

- (2) For the purposes of this Act—
  - (a) every sale that is not a sale by wholesale or otherwise for the purposes of resale is taken to be a sale by retail, and
  - (b) a sale is presumed to be a sale by retail unless it is established that the sale is a sale by wholesale or otherwise for the purposes of resale.
- (3) Notes included in this Act do not form part of this Act.

## **Part 2 Tobacco and other smoking products and sales**

### **Division 1 Tobacco packaging**

#### **5 Meaning of “health warning”**

In this Part, **health warning** means a health warning that meets the requirements of Parts 2 and 9 of the *Competition and Consumer (Tobacco) Information Standard 2011* made under the *Competition and Consumer Act 2010* of the Commonwealth to the extent that those requirements relate to labelling, marking, display, position, prominence and rotation.

#### **6 Certain sales prohibited**

- (1) A person must not sell a tobacco product that is not in the package in which it was packed by the manufacturer.
- (2) A person must not sell cigarettes as individual items or in a package containing fewer than 20.
- (3) This section does not apply to the sale of single cigars.
- (4) For the purposes of subsection (1), a quantity of tobacco product that exceeds the amount prescribed by the regulations is presumed to be for the purposes of sale if—
  - (a) it is on premises where tobacco products are being sold, and
  - (b) it is not in the package in which it was packed by the manufacturer.

Any such presumption is rebuttable.

Maximum penalty—100 penalty units, in the case of an individual and 500 penalty units, in the case of a corporation.

#### **7 Packing and sale of tobacco product without health warning prohibited**

- (1) A person must not pack a tobacco product into a package in which the product is to be sold unless the package is marked with a health warning.
- (2) A person must not sell a tobacco product unless the package in which the product is sold is marked with a health warning.
- (3) This section does not apply to the sale or packing of single cigars.
- (4) For the purposes of subsection (2), a quantity of tobacco product that exceeds the amount prescribed by the regulations is presumed to be for the purposes of sale if—
  - (a) it is on premises where tobacco products are being sold, and
  - (b) it is not in packaging marked with a health warning.

Any such presumption is rebuttable.

Maximum penalty—100 penalty units, in the case of an individual and 500 penalty units, in the case of a corporation.

**7A Powers of inspector to seize and dispose of tobacco products exceeding prescribed amounts**

- (1) An inspector may seize any tobacco product that the inspector reasonably believes contravenes section 6 (1) or 7 (2) if—
  - (a) it is on premises where tobacco products are being sold, and
  - (b) the quantity of tobacco product exceeds the amount prescribed by the regulations for the purposes of section 6 (4) or 7 (4) (as the case requires).
- (2) Any tobacco product seized under this section may, at the option of the inspector who made the seizure or of any inspector acting in his or her place, be detained in the place, vehicle or vessel where it was found or be removed to another place and detained there.
- (3) If the tobacco product is to be detained in the place, vehicle or vessel where it was found, the inspector may—
  - (a) place it in a room, compartment or cabinet in that place, vehicle, or vessel, and
  - (b) mark, fasten and seal the door or opening providing access to that room, compartment or cabinet.

- (4) A person must not retake or attempt to retake any tobacco product seized under this section or resist or attempt to prevent such a seizure.

Maximum penalty—

- (a) in the case of an individual, 500 penalty units for a first offence or 1,000 penalty units for a second or subsequent offence, or
  - (b) in the case of a corporation, 1,000 penalty units for a first offence or 2,000 penalty units for a second or subsequent offence.
- (5) The seizure of tobacco products under this section does not subject the State, the Minister, the Secretary, an inspector or any other person to any action, liability, claim or demand.
- (6) Any tobacco products seized under this section must be returned to the person from whom they were seized (or to such other person as appears to the inspector to be entitled to them) if—
  - (a) the person from whom they were seized makes an application to the Secretary

within 28 days after seizure to have the tobacco products returned, and

- (b) the Secretary is satisfied that the tobacco products were, at the time they were seized, for personal use and not in the person's possession, custody or control for the purposes of sale.
- (7) An inspector is required to dispose of the tobacco products seized under this section in any manner that the inspector considers appropriate if—
- (a) the person from whom they were seized makes an application to the Secretary within 28 days after seizure to have the tobacco products returned and the Secretary is satisfied that the tobacco products were, at the time they were seized, not for personal use but in the person's possession, custody or control for the purposes of sale, or
  - (b) the person from whom the tobacco products were seized does not make an application under subsection (6).

## **8 Prohibited words**

(1) A person must not—

- (a) pack a tobacco product into a package in which the product is to be sold, or
- (b) sell a tobacco product in a package,

if the package is marked with, or accompanied by, any material that contains any prohibited words.

Maximum penalty—100 penalty units, in the case of an individual and 500 penalty units, in the case of a corporation.

(2) For the purposes of this section, the prohibited words are—

- (a) “non-injurious”, “non-hazardous”, “harmless to man” and “harmless to woman”, and
- (b) words of similar import to those specified in paragraph (a), and
- (c) words that directly or by implication contradict, qualify or modify a health warning that is marked, or required to be marked, on the package.

## **Division 2 Sale and display of tobacco and other smoking products**

### **8A Application of Division to e-cigarettes and e-cigarette accessories**

- (1) This Division applies in relation to e-cigarettes and e-cigarette accessories in the same way as it applies in relation to tobacco products and smoking accessories, respectively.

(2) For this purpose—

- (a) each reference in this Division to a tobacco product is to be read as including a reference to an e-cigarette, and
- (b) each reference in this Division to a smoking accessory is to be read as including a reference to an e-cigarette accessory.

### **9 Display of tobacco products, non-tobacco smoking products and smoking accessories**

(1) A person who is the occupier of premises on which tobacco products or non-tobacco smoking products are sold must ensure that members of the public cannot see any of those products, or any smoking accessories, from inside or outside the premises.

Maximum penalty—100 penalty units, in the case of an individual and 500 penalty units, in the case of a corporation.

(2) This section does not apply to—

- (a) the display of tobacco products, non-tobacco smoking products or smoking accessories to a customer of the business concerned at his or her request, or
- (b) the display of tobacco products, non-tobacco smoking products or smoking accessories by a customer of the business concerned, or
- (c) the display of tobacco products, non-tobacco smoking products or smoking accessories in such other circumstances as may be prescribed by the regulations as exempt from this section.

#### **Note—**

Lead-in periods for offences under this section are provided for existing businesses (see clause 5 of Schedule 1).

### **10 Tobacco products, non-tobacco smoking products and smoking accessories to be sold from one place on premises**

(1) The occupier of premises on which tobacco products or non-tobacco smoking products are sold must ensure that those products, and any smoking accessories, are sold from only one point of sale on those premises.

Maximum penalty—100 penalty units, in the case of an individual and 500 penalty units, in the case of a corporation.

(2) For the purposes of this section, a **point of sale** includes a cash register but does not include a tobacco vending machine.

### **11 Sale of tobacco products by certain means and from certain premises prohibited**

(1) A person (the **vendor**) must not carry a tobacco product in any public place for the purpose of the sale of the product by retail to persons in the place.

- (2) A person must not cause or permit a vendor to carry a tobacco product in contravention of subsection (1) on premises under the person's control.
- (3) If a vendor contravenes subsection (1)—
  - (a) a person who is the employer of the vendor in the person's capacity as vendor, or
  - (b) a person who has entered into a contract with the vendor in the performance of which the vendor engaged in the activity that constituted the contravention,is also guilty of an offence.
- (4) A person must not sell a tobacco product by retail from—
  - (a) any booth, tent or other temporary enclosure (including a market stall or stand), whether or not part of the booth, tent or enclosure is permanent, or
  - (b) any mobile structure, vehicle or vessel.
- (5) A person must not cause or permit another person to sell a tobacco product in contravention of subsection (4)—
  - (a) on premises under the person's control, or
  - (b) on premises being used for a concert or other event organised by the person.

Maximum penalty—100 penalty units, in the case of an individual and 500 penalty units, in the case of a corporation.

### **Division 3 Tobacco vending machines and e-cigarette vending machines**

#### **12 Places where tobacco or e-cigarette vending machines may be placed**

- (1) A person who owns or is the lessee of a tobacco or e-cigarette vending machine must not place the vending machine, or cause or permit the vending machine to be placed, in any premises in New South Wales for the purpose of the sale of tobacco products or non-tobacco smoking products unless the vending machine is placed in an area of the premises that is—
  - (a) a bar area of a hotel or club premises within the meaning of the [Liquor Act 2007](#), or
  - (b) a bar area of a casino within the meaning of the [Liquor Act 2007](#) as applied by the [Casino Control Act 1992](#), or
  - (c) a gaming machine area within the meaning of the [Gaming Machines Act 2001](#).
- (2) A person who owns or is the lessee of a tobacco or e-cigarette vending machine must

not place the vending machine, or cause or permit the vending machine to be placed, in any of the following premises in New South Wales for the purpose of the sale of tobacco products or non-tobacco smoking products if, as a result, more than one tobacco or e-cigarette vending machine would be situated on those premises—

- (a) a hotel (within the meaning of the *Liquor Act 2007*),
- (b) club premises (within the meaning of the *Liquor Act 2007*),
- (c) a casino (within the meaning of the *Casino Control Act 1992*), including premises to be considered to form part of the casino by an order under section 89 (3) of that Act.

Maximum penalty—100 penalty units, in the case of an individual and 500 penalty units, in any other case.

**Note—**

Continuing offences against subsections (1) and (2) are dealt with in section 52.

**Note—**

Lead-in periods for offences under this section are provided in relation to tobacco vending machines already situated in premises (see clause 6 of Schedule 1).

### **13 Operation of tobacco or e-cigarette vending machines to be controlled by staff**

A person who owns or is the lessee of a tobacco or e-cigarette vending machine must not place the vending machine, or cause or permit the vending machine to be placed, in any premises in New South Wales for the purpose of the sale of tobacco products, non-tobacco smoking products, e-cigarettes or e-cigarette accessories unless—

- (a) the vending machine can only be activated by a member of staff of the hotel, club or casino in which the vending machine is situated, whether by remote control or some other means, or
- (b) a person intending to obtain products from the vending machine is required to use a vending machine token that is only available from a member of staff of the hotel, club or casino in which the vending machine is situated.

Maximum penalty—100 penalty units, in the case of an individual and 500 penalty units, in the case of a corporation.

**Note—**

Part 4 (Protection of juveniles) contains offences relating to the supply of tokens for vending machines to minors.

**Note—**

Continuing offences against this section are dealt with in section 52.

**Note—**

Lead-in periods for offences under this section are provided in relation to tobacco vending machines already situated in premises. (See clause 6 of Schedule 1.)

**14 Regulation of product display on tobacco or e-cigarette vending machines**

- (1) A person who owns or is the lessee of a tobacco or e-cigarette vending machine situated in premises in New South Wales for the purpose of the sale of tobacco products, non-tobacco smoking products, e-cigarettes or e-cigarette accessories must ensure that a statement in the form (if any) prescribed by the regulations is kept conspicuously displayed on the front of the vending machine.
- (2) A person who owns or is the lessee of a tobacco vending machine in New South Wales must ensure that—
  - (a) the tobacco products contained in the vending machine are not displayed so as to be in view of members of the public, and
  - (b) no information about tobacco products, or representation of a tobacco product or package of a tobacco product, is displayed on the vending machine other than permissible information.
- (3) For the purposes of this section, **permissible information** that may be displayed on a tobacco vending machine is—
  - (a) any information, statement or symbol required by law to be displayed on the vending machine, and
  - (b) the name and description of the tobacco products for sale in the vending machine, and their price, displayed in black writing on a white background and in letters or figures of not more than 1 centimetre in width and 1 centimetre in height.

Maximum penalty—100 penalty units, in the case of an individual and 500 penalty units, in the case of a corporation.

**15 Responsibilities of occupiers for vending machines**

- (1) If the owner or lessee of a tobacco or e-cigarette vending machine contravenes a provision of this Division in relation to the tobacco or e-cigarette vending machine, the occupier of the premises on which the vending machine was situated at the time of the contravention is taken to have contravened the same provision unless the occupier proves that—
  - (a) the vending machine was placed on the premises in compliance with this Division and the occupier could not by the exercise of due diligence have prevented the contravention, or
  - (b) the vending machine was placed and retained on the premises without the



occupier's knowledge or consent.

- (2) If a person sells or displays tobacco products, non-tobacco smoking products, e-cigarettes or e-cigarette accessories by means of a tobacco or e-cigarette vending machine in contravention of a provision of this Act, the occupier of the premises on which the vending machine was situated at the time of the contravention is taken to have contravened the same provision unless the occupier proves that—
  - (a) the vending machine was placed on the premises in compliance with this Division and the occupier could not by the exercise of due diligence have prevented the contravention, or
  - (b) the vending machine was placed and retained on the premises without the occupier's knowledge or consent.
- (3) The occupier of premises may be proceeded against and convicted under a provision of this Act by virtue of this section whether or not the owner or lessee of the tobacco or e-cigarette vending machine, or person who sold or displayed the tobacco products, non-tobacco smoking products, e-cigarettes or e-cigarette accessories, has been proceeded against or convicted under the provision.
- (4) This section is not affected by the terms of any agreement or other arrangement with respect to the use or operation of the tobacco or e-cigarette vending machine or the sale or display of tobacco products, non-tobacco smoking products, e-cigarettes or e-cigarette accessories by means of the machine (including an agreement or other arrangement entered into before the commencement of this section).

### **Part 3 Advertising and promotion of tobacco products and e-cigarettes**

#### **15A Application of Part to e-cigarettes and e-cigarette accessories**

- (1) This Part applies in relation to e-cigarette advertisements and e-cigarettes in the same way as it applies in relation to tobacco advertisements and tobacco products, respectively.
- (2) For this purpose—
  - (a) each reference in this Part to a tobacco advertisement is to be read as including a reference to an e-cigarette advertisement, and
  - (b) each reference in this Part to a tobacco product is to be read as including a reference to an e-cigarette, and
  - (c) the reference to otherwise than by smoking in section 21 (1), in its application to e-cigarettes, is to be read as including a reference to otherwise than by inhalation of an aerosol or vapour.

- (3) In this section, an ***e-cigarette advertisement*** means writing, or any still or moving picture, sign, symbol or other visual image or message or audible message, or a combination of two or more of them, that gives publicity to, or otherwise promotes or is intended to promote—
- (a) the purchase or use of an e-cigarette, or
  - (b) the trademark or brand name, or part of a trademark or brand name, of an e-cigarette,
- but does not include anything of a kind excluded by the regulations.

## **16 Certain advertising prohibited**

- (1) A person must not, in New South Wales and for any direct or indirect benefit, display a tobacco advertisement in, or so that it can be seen or heard from, a public place or a place prescribed by the regulations.
- (2) A person must not, in New South Wales—
- (a) distribute to the public any unsolicited object that constitutes or contains a tobacco advertisement, or
  - (b) sell, hire or supply for any direct or indirect benefit any object to any person (other than a person, or the employee of a person, who is a manufacturer, distributor or retailer of a tobacco product) if the object constitutes or contains a tobacco advertisement.
- (3) This section 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 or on a newspaper or book—
    - (i) printed and published outside New South Wales, or
    - (ii) printed and published before 17 December 1991,unless the sole or main purpose of the newspaper or book is the promotion or publicising of the purchase or use of a tobacco product or a trademark or brand name of a tobacco product,
  - (c) (Repealed)
  - (d) a tobacco advertisement that is an incidental accompaniment to the subject of a film, video tape or live stage performance unless the sole or main purpose of the film, video tape or performance is the promotion or publicising of the purchase or use of a tobacco product or a trademark or brand name of a tobacco product,

- (e) the display of retail prices and names of tobacco products within a retail outlet, where the display complies with this Act and the regulations,
- (f) an invoice, statement, order, letterhead, business card, cheque, manual or other document that is ordinarily used in the course of the business of a manufacturer or distributor of a tobacco product.

(4) (Repealed)

(5) In any proceedings for an offence under this section, if there is present in the relevant tobacco advertisement, or the relevant object alleged to constitute or contain a tobacco advertisement—

- (a) the name of a person who manufactures or distributes any tobacco product, or
- (b) a trademark of which a person who manufactures or distributes any tobacco product is the registered owner or the authorised user within the meaning of the [Trade Marks Act 1995](#) of the Commonwealth, or
- (c) a brand name, used by a person who manufactures or distributes any tobacco product,

it is to be presumed, until the contrary is proved, that that person displayed the tobacco advertisement, or distributed, sold, hired or supplied the object, for a direct or indirect benefit.

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

(7) In this section—

**book** includes any printed material in any language.

**newspaper** includes a copy of any magazine, journal or periodical or a copy of any other publication that contains—

- (a) news, information or reports of events, or
  - (b) remarks, observations or comments about any news, information or events or about any other matter of interest to the public or to any section of the public,
- that is printed in any language and published at regular or irregular intervals.

Maximum penalty—

- (a) in the case of an individual, 500 penalty units for a first offence or 1,000 penalty units for a second or subsequent offence, or

- (b) in the case of a corporation, 6,000 penalty units for a first offence or 10,000 penalty units for a second or subsequent offence.

**Note—**

Continuing offences against this section are dealt with in section 52.

**Note—**

Schedule 2.4 repeals subsections (3) (c) and (4) on a proclaimed day.

**17 Tobacco products promotions involving prizes or gifts**

- (1) A person must not, in connection with the sale of a tobacco product or for the purpose of promoting the sale of a tobacco product, supply (whether from inside or outside New South Wales) to a person in New South Wales—
- (a) a prize, gift or other benefit, or
  - (b) a stamp, coupon, token, voucher, ticket or other thing by virtue of which any person may become entitled to, or may qualify for, a prize, gift or other benefit (whether that entitlement or qualification is absolute or conditional).
- (2) Subsection (1) applies whether or not the person supplied with the benefit or thing concerned is a purchaser of a tobacco product.
- (3) Subsection (1) does not apply to the supply of a benefit or thing to a person who is, or is the employee of—
- (a) a manufacturer or distributor of tobacco products, or
  - (b) a retailer of tobacco products, unless it is established that the benefit or thing was supplied for resupply to persons who purchase tobacco products from the retailer.
- (4) A benefit or thing supplied to a tobacco retailer, or an employee of a tobacco retailer, that is actually resupplied to a purchaser of tobacco products from the retailer (or any employee of the retailer) is taken, for the purposes of subsection (3) (b), to have been so supplied for resupply to such a purchaser.
- (5) A person must not, in connection with the sale of a tobacco product or for the purpose of promoting the sale of a tobacco product, conduct (whether from inside or outside New South Wales) a scheme—
- (a) declared by the regulations to be a scheme to promote the sale of a tobacco product or to promote smoking generally, and
  - (b) the whole or any part of which is implemented in New South Wales.
- (6) It is a defence in proceedings for an offence under this section to prove that the benefit or thing supplied was only incidentally connected with the purchase of a

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

- (7) It is no defence in any such proceedings to prove that the benefit or thing concerned was of negligible or no value.

Maximum penalty—

- (a) in the case of an individual, 500 penalty units for a first offence or 1,000 penalty units for a second or subsequent offence, or
- (b) in the case of a corporation, 6,000 penalty units for a first offence or 10,000 penalty units for a second or subsequent offence.

**Note—**

Continuing offences against subsection (1) are dealt with in section 52.

## **18 Shopper loyalty programs**

- (1) A person must not implement or conduct a shopper loyalty program.

Maximum penalty—100 penalty units, in the case of an individual and 500 penalty units, in the case of a corporation.

- (2) In this section, a **shopper loyalty program** means any of the following programs—
- (a) a program under which a gift or other benefit may be obtained by a purchaser of tobacco products or non-tobacco smoking products on the basis of the amount or type of those products purchased, regardless of whether the program extends to the purchase of other products or goods,
- (b) a program under which a purchaser of goods or products may be entitled to a gift of tobacco products or non-tobacco smoking products, regardless of whether the purchaser may choose to accept another type of gift instead.
- (3) However, a shopper loyalty program does not include the following—
- (a) any program under which a gift or other benefit may be obtained by a purchaser of goods on the basis of the method of payment used, such as the use of a particular credit card,
- (b) any program conducted by a manufacturer or distributor of tobacco products or non-tobacco smoking products where the gift or other benefit provided under the program is provided to a retailer of such products for the use of the retailer and is not intended for resupply.

## 19 Free samples

A person must not, for the purpose of inducing or promoting the sale of a tobacco product, offer, give or distribute to another person (not being a person who is, or is the employee of, a manufacturer, distributor or retailer of a tobacco product) a free tobacco product.

Maximum penalty—

- (a) in the case of an individual, 500 penalty units for a first offence or 1,000 penalty units for a second or subsequent offence, or
- (b) in the case of a corporation, 6,000 penalty units for a first offence or 10,000 penalty units for a second or subsequent offence.

### Note—

Continuing offences against this section are dealt with in section 52.

## 20 Prohibition of sponsorships

- (1) A person must not promote or publicise, or agree to promote or publicise, in New South Wales any of the following under a contract, or an arrangement (whether or not legally binding), under which a sponsorship is provided, or to be provided, by another person—
  - (a) a tobacco product or a trademark or brand name of a tobacco product,
  - (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.
- (2) A person must not provide, or agree to provide, a sponsorship under a contract or arrangement of a kind referred to in subsection (1).
- (3) For the purposes of subsection (1) (b), the name or interests of a manufacturer or distributor of a tobacco product are taken 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 New South Wales with the tobacco product.
- (4) In this section, **sponsorship** includes—
  - (a) any scholarship, prize, gift or other benefit, and
  - (b) any financial arrangement (other than a genuine contract of employment or a genuine contract for services) for the direction, promotion or publicity of one or more of the matters referred to in subsection (1) (a) and (b) through the medium of sporting, arts, youth, educational or other like activities.

Maximum penalty—

- (a) in the case of an individual, 500 penalty units for a first offence or 1,000 penalty units for a second or subsequent offence, or
- (b) in the case of a corporation, 6,000 penalty units for a first offence or 10,000 penalty units for a second or subsequent offence.

**Note—**

Continuing offences against this section are dealt with in section 52.

**21 Smokeless tobacco, confectionery and toys**

- (1) A person must not manufacture or sell in New South Wales a tobacco product designed for consumption otherwise than by smoking.
  - (1A) For the purposes of subsection (1), a quantity of tobacco product that exceeds the amount prescribed by the regulations is presumed to be for the purposes of sale if—
    - (a) it is on premises where tobacco products are being sold, and
    - (b) it is a tobacco product designed for consumption otherwise than by smoking.
  - (1B) The presumption referred to in subsection (1A) is rebuttable.
- (2) Subsection (1) does not apply to the manufacture or sale of any mixture or product, or mixture or product of a class, prescribed by the regulations if the manufacture or sale occurred in the circumstances prescribed by the regulations.
- (3) A person must not sell—
  - (a) any confectionery or other food, or
  - (b) any toy, amusement or other product,that resembles a tobacco product or is packaged to resemble a tobacco product.

**Maximum penalty—**

- (a) in the case of an individual, 500 penalty units for a first offence or 1,000 penalty units for a second or subsequent offence, or
- (b) in the case of a corporation, 1,000 penalty units for a first offence or 2,000 penalty units for a second or subsequent offence.

**Note—**

Continuing offences against subsection (1) are dealt with in section 52.

**21A Powers of inspector to seize and dispose of smokeless tobacco products**

- (1) An inspector may seize a tobacco product that the inspector reasonably believes is for

sale in contravention of section 21(1) if—

- (a) it is on premises where tobacco products are being sold, and
- (b) the quantity of tobacco product exceeds the amount prescribed by the regulations for the purposes of section 21(1A).

(2) A tobacco product seized under this section may, at the option of the inspector who made the seizure or of an inspector acting in place of that inspector, be detained in the place, vehicle or vessel where it was found or be removed to another place and detained there.

(3) If the tobacco product is to be detained in the place, vehicle or vessel where it was found, the inspector may—

- (a) place it in a room, compartment or cabinet in that place, vehicle or vessel, and
- (b) mark, fasten and seal the door or opening providing access to that room, compartment or cabinet.

(4) A person must not retake or attempt to retake a tobacco product seized under this section or resist or attempt to prevent a seizure.

Maximum penalty—

- (a) for an individual, 500 penalty units for a first offence or 1,000 penalty units for a second or subsequent offence, or
- (b) for a corporation, 1,000 penalty units for a first offence or 2,000 penalty units for a second or subsequent offence.

(5) The seizure of tobacco products under this section does not subject the State, the Minister, the Secretary, an inspector or another person to any action, liability, claim or demand.

(6) Tobacco products seized under this section must be returned to the person from whom they were seized, or to another person who appears to the inspector to be entitled to them, if—

- (a) the person from whom they were seized makes an application to the Secretary within 28 days after seizure to have the tobacco products returned, and
- (b) the Secretary is satisfied that the tobacco products were, at the time they were seized, for personal use and not in the person's possession, custody or control for the purposes of sale.

(7) An inspector is required to dispose of tobacco products seized under this section in a manner that the inspector considers appropriate if—



- (a) the person from whom they were seized makes an application to the Secretary within 28 days after seizure to have the tobacco products returned and the Secretary is satisfied that the tobacco products were, at the time they were seized, not for personal use but in the person's possession, custody or control for the purposes of sale, or
- (b) the person from whom the tobacco products were seized does not make an application under subsection (6).

## **Part 4 Protection of juveniles**

### **Division 1 Juvenile smoking**

#### **22 Sale of tobacco and non-tobacco smoking products or e-cigarettes and e-cigarette accessories to minors**

- (1) A person must not sell a tobacco product to a person who is under the age of 18 years.
- (2) A person must not sell a non-tobacco smoking product to a person who is under the age of 18 years.
- (2A) A person must not sell an e-cigarette or e-cigarette accessory to a person who is under the age of 18 years unless it is an authorised product.

**Note—**

The sale of an e-cigarette that generates or releases an aerosol or vapour that contains nicotine, or the sale of an e-cigarette accessory containing nicotine, is prohibited in New South Wales unless it is an authorised product. See, in particular, the [Poisons and Therapeutic Goods Act 1966](#).

- (2B) A person who contravenes this section is guilty of an offence.

Maximum penalty—

- (a) in the case of an individual, 100 penalty units for a first offence or 500 penalty units for a second or subsequent offence, or
  - (b) in the case of a corporation, 500 penalty units for a first offence or 1,000 penalty units for a second or subsequent offence.
- (3) It is a defence to a prosecution for an offence under this section if the court is satisfied that—
    - (a) the person to whom the tobacco product, non-tobacco smoking product, e-cigarette or e-cigarette accessory was sold was over the age of 14 years at the time of the sale, and
    - (b) at or before the time of the sale there was produced to the defendant documentary evidence that might reasonably be accepted as applying to the

person to whom the tobacco product or non-tobacco smoking product was sold and as proving that the person was at least 18 years of age.

(4) In this section—

**authorised product** means a device or accessory (other than a device or accessory of a kind excluded by the regulations) that is—

- (a) a therapeutic good (as defined in the *Therapeutic Goods Act 1989* of the Commonwealth)—
  - (i) registered in the Australian Register of Therapeutic Goods maintained under section 9A of that Act, or
  - (ii) the subject of an approval or authority under section 19 of that Act, or
- (b) supplied under a licence or authority in force under the *Poisons and Therapeutic Goods Act 1966* or the regulations under that Act.

### **23 Purchasing tobacco, smoking or vaping products on behalf of minors**

- (1) A person of or above the age of 18 years must not purchase, on behalf of a person under the age of 18 years, a tobacco, smoking or vaping product from premises where such products are sold.

Maximum penalty—20 penalty units.

- (2) It is a defence to a prosecution for an offence under this section if the court is satisfied that—
  - (a) the person on whose behalf the relevant product was purchased was over the age of 14 years, and
  - (b) at or before the time the relevant product was purchased there was produced to the defendant documentary evidence that might reasonably be accepted as applying to the person and as proving that the person was at least 18 years of age.

(3) In this section—

**tobacco, smoking or vaping product** means any of the following—

- (a) a tobacco product,
- (b) a non-tobacco smoking product,
- (c) an e-cigarette that is not an authorised product within the meaning of section 22,
- (d) an e-cigarette accessory that is not an authorised product within the meaning of section 22.

#### **24 Supplying vending machine tokens to minors and activating tobacco or e-cigarette vending machines for minors**

- (1) A manager or member of staff of premises on which a tobacco or e-cigarette vending is situated must not supply a vending machine token to a person who is under the age of 18 years or activate a tobacco or e-cigarette vending for a person under the age of 18 years.

Maximum penalty—

- (a) in the case of an individual, 100 penalty units for a first offence or 500 penalty units for a second or subsequent offence, or
  - (b) in the case of a corporation, 500 penalty units for a first offence or 1,000 penalty units for a second or subsequent offence.
- (2) It is a defence to a prosecution for an offence under this section if the court is satisfied that—
    - (a) the person to whom the relevant token was supplied or for whom the tobacco or e-cigarette vending machine was activated was over the age of 14 years, and
    - (b) at or before the time the relevant token was supplied or tobacco or e-cigarette vending machine was activated there was produced to the defendant documentary evidence that might reasonably be accepted as applying to the person and as proving that the person was at least 18 years of age.

#### **25 Obtaining vending machine tokens on behalf of minors**

- (1) A person of or above the age of 18 years must not obtain, on behalf of a person under the age of 18 years, a vending machine token.

Maximum penalty—20 penalty units.

- (2) It is a defence to a prosecution for an offence under this section if the court is satisfied that—
  - (a) the person on whose behalf the relevant token was obtained was over the age of 14 years, and
  - (b) at or before the time the relevant token was obtained there was produced to the defendant documentary evidence that might reasonably be accepted as applying to the person and as proving that the person was at least 18 years of age.

#### **26 Seizure of tobacco products, non-tobacco smoking products or e-cigarettes in possession of minors**

- (1) A police officer may seize a tobacco product, non-tobacco smoking product or e-cigarette in the possession of a person in a public place if the officer suspects on

reasonable grounds that the person is under the age of 18 years.

- (2) Any tobacco product, non-tobacco smoking product or e-cigarette seized under subsection (1) is forfeited to the Crown.
- (3) A tobacco product, non-tobacco smoking product or e-cigarette may be seized under subsection (1) from a person's possession even though the person is under the age of criminal responsibility.
- (4) The regulations may make provision for or with respect to the following—
  - (a) the procedure to be followed for the seizure of tobacco products, non-tobacco smoking products or e-cigarettes under subsection (1),
  - (b) without limiting paragraph (a), prescribing the circumstances in which, and the procedure by which, tobacco products, non-tobacco smoking products or e-cigarettes seized under this section are to be returned.

## **27 Evidence of age**

For the purposes of sections 22 (3), 23 (2), 24 (2) and 25 (2), documentary evidence includes an evidence of age document within the meaning of the [Liquor Act 2007](#).

## **28 Liability of employers**

- (1) If an employee contravenes section 22 or 24, the employer is taken to have contravened that section (whether or not the employee contravened the provision without the employer's authority or contrary to the employer's orders or instructions).
- (2) It is a defence to a prosecution against an employer for such a contravention if it is established—
  - (a) that the employer had no prior knowledge of the contravention, and
  - (b) that the employer could not, by the exercise of due diligence, have prevented the contravention.
- (3) An employer may be proceeded against and convicted under section 22 or 24 by virtue of this section whether or not the employee has been proceeded against or convicted under that provision.
- (4) For the purposes of this section, any person who authorised a person who contravenes section 22 to sell tobacco products, non-tobacco smoking products, e-cigarettes or e-cigarette accessories as the person's agent is taken to be an employer of a person who contravenes section 22.

## **Division 2 Other measures for the protection of juveniles**

### **29 Prohibited tobacco products**

- (1) The Minister may, by notice published in the Gazette, declare that a tobacco product, or a class of tobacco products, specified in the notice is a prohibited tobacco product or are prohibited tobacco products.
- (2) The Minister must not make a declaration under subsection (1) unless the Minister is satisfied that the tobacco product or products, or the smoke of the product or products, has a distinctive fruity, sweet or confectionery-like character that might encourage a minor to smoke.
- (3) The Minister may, by further notice published in the Gazette, vary or revoke a notice under this section.
- (4) A person must not sell a prohibited tobacco product.

Maximum penalty (subsection (4)): 500 penalty units for a first offence or 1,000 penalty units for a second or subsequent offence.

#### **Editorial note—**

For notices under this section, see Gazettes No 11 of 15.1.2010, p 136 and No 135 of 17.12.2010, p 5910. From April 2021, PCO is no longer updating notes in provisions of in force titles about related gazette notices. To search for related gazette notices, please use the Gazette Search functionality.

### **30 Smoking in motor vehicle prohibited if juvenile present**

- (1) A person must not smoke in a motor vehicle that is on a road or road related area if there is a person under the age of 16 years present in the vehicle.  
Maximum penalty—10 penalty units.
- (2) The driver of a motor vehicle in which a person is smoking in contravention of subsection (1) is guilty of an offence.  
Maximum penalty—10 penalty units.
- (3) The driver may be proceeded against and convicted of an offence against subsection (2) whether or not the person who was smoking has been proceeded against or convicted of an offence under subsection (1).
- (4) It is a defence to a prosecution for an offence under subsection (1) if the court is satisfied that, when the defendant was smoking, the defendant believed on reasonable grounds that no person in the motor vehicle was under the age of 16 years.
- (5) It is a defence to a prosecution for an offence under subsection (2) if the court is satisfied that the defendant believed on reasonable grounds that, when the person

who contravened subsection (1) was smoking, no person in the motor vehicle was under the age of 16 years.

- (6) For the purposes of investigating whether an offence has been committed against this section, a police officer may do any or all of the following—
- (a) direct the driver of a motor vehicle to stop the vehicle,
  - (b) require the driver of a motor vehicle who the police officer reasonably suspects has committed an offence against this section to produce his or her driver licence (within the meaning of the [Road Transport Act 2013](#)) and state his or her name and home address,
  - (c) require a passenger in a motor vehicle who the police officer reasonably suspects has committed an offence against this section to state his or her name and home address.
- (7) If it is established in any proceedings for an offence against this section that at the time of the alleged commission of the offence there was present in the motor vehicle concerned a person who appeared to be under the age of 16 years, it is to be presumed in the absence of evidence to the contrary that the person was under the age of 16 years.
- (8) In this section—

**drive** has the same meaning as in the [Road Transport Act 2013](#).

**driver of a motor vehicle** means any person driving the vehicle.

**motor vehicle** has the same meaning as in the [Road Transport Act 2013](#), but does not include a public passenger vehicle within the meaning of the [Passenger Transport Act 1990](#).

**road** or **road related area** has the same meaning as in section 4 (1) of the [Road Transport Act 2013](#).

**smoke** includes using an e-cigarette to generate or release an aerosol or vapour.

## **Part 5 Restrictions on tobacco retailing and e-cigarette retailing**

### **Division 1 Preliminary**

#### **31 Meaning of “engaging in tobacco retailing”**

- (1) For the purposes of this Part, a person engages in tobacco retailing when—
- (a) tobacco products or non-tobacco smoking products are sold by retail in the course of the carrying on of a business that is owned, managed, conducted or operated by the person, or

- (b) the person is the owner or lessee of a tobacco vending machine that is situated on premises for the purpose of the sale of tobacco products or non-tobacco smoking products, or
  - (c) the person is the occupier of premises on which a tobacco vending machine is situated for the purpose of the sale of tobacco products or non-tobacco smoking products (whether or not the vending machine was placed there by the person).
- (2) If a sale of tobacco products occurs on premises on which a business is carried on, it is to be presumed for the purposes of this Part, unless the contrary is established, that the sale occurred in the course of the carrying on of that business.

### **31A Meaning of “engaging in e-cigarette retailing”**

For the purposes of this Part, a person ***engages in e-cigarette retailing*** when—

- (a) e-cigarettes or e-cigarette accessories are sold by retail in the course of the carrying on of a business that is owned, managed, conducted or operated by the person, or
- (b) the person is the owner or lessee of an e-cigarette vending machine that is situated on premises for the purpose of the sale of e-cigarettes or e-cigarette accessories, or
- (c) the person is the occupier of premises on which an e-cigarette vending machine is situated for the purpose of the sale of e-cigarettes or e-cigarette accessories (whether or not the vending machine was placed there by the person).

### **32 Meaning of “conviction”**

For the purposes of this Part, a person is taken to have been convicted of an offence if the person was found guilty of the offence but an order under section 10 of the [Crimes \(Sentencing Procedure\) Act 1999](#) was made in relation to the offence.

## **Division 2 Prohibition against tobacco retailing**

### **33 Prohibition against tobacco retailing for multiple offences**

- (1) A person who has been convicted of 2 offences against the same provision of this Act or the regulations committed within any 3-year period on the same premises is prohibited from engaging in tobacco retailing for a 3-month period commencing on the day after the later of the 2 convictions.
- (2) A person who has been convicted of 3 offences against the same provision of this Act or the regulations committed within any 3-year period on the same premises is prohibited from engaging in tobacco retailing for a 12-month period commencing on the day after the latest of the 3 convictions.
- (3) If a person is convicted of more than one offence committed on the same day against the same provision of this Act or the regulations, those convictions are to be counted

together for the purposes of this Part as one conviction only.

#### **34 Prohibition applicable to certain premises only**

- (1) A prohibition under section 33 applies only to prohibit a person from engaging in tobacco retailing at the following premises (which are referred to in this Part as **the prohibited premises**)—
  - (a) the premises at which the relevant offences that resulted in the prohibition were committed,
  - (b) any premises within 5 kilometres of the premises at which the relevant offences were committed, except premises at which the person engaged in tobacco retailing before the commission of the last of those offences.
- (2) In this section, **premises** means the premises of a shop, restaurant, premises referred to in section 12 (2) or any other retail outlet.

#### **35 Offence of engaging in tobacco retailing while prohibited**

- (1) A person who is prohibited under this Part from engaging in tobacco retailing for any period must not engage in tobacco retailing during that period on the prohibited premises.  
Maximum penalty—
  - (a) in the case of an individual, 500 penalty units for a first offence or 1,000 penalty units for a second or subsequent offence, or
  - (b) in the case of a corporation, 1,000 penalty units for a first offence or 2,000 penalty units for a second or subsequent offence.
- (2) Despite section 33, if a person is prohibited from engaging in tobacco retailing for 2 or more periods that overlap, those periods are to apply consecutively.

#### **36 Offence of displaying tobacco and other smoking products while prohibited**

- (1) A person who is prohibited under this Part from engaging in tobacco retailing for any period must ensure that none of the following things are displayed on the prohibited premises during that period if the person is operating any business on those premises—
  - (a) tobacco products or non-tobacco smoking products,
  - (b) smoking accessories,
  - (c) any sign, information or other thing (including any health warning) relating to a thing referred to in paragraph (a) or (b).

Maximum penalty—



- (a) in the case of an individual, 500 penalty units for a first offence or 1,000 penalty units for a second or subsequent offence, or
  - (b) in the case of a corporation, 1,000 penalty units for a first offence or 2,000 penalty units for a second or subsequent offence.
- (2) For the purposes of this section, products in a tobacco vending machine on premises are taken to be displayed on those premises.
- (3) This section does not apply to the display of tobacco products, non-tobacco smoking products or smoking accessories by customers of the business concerned.

### **37 Effect of appeal against conviction**

- (1) An offence is not to be taken into account for the purposes of this Part while an appeal against the conviction for the offence is pending.
- (2) If the conviction stands following determination or withdrawal of the appeal—
- (a) the conviction is then to be taken into account as provided by this Part, and
  - (b) any period for which a person is prohibited from engaging in tobacco retailing that would (were it not for this section) have commenced before the appeal is determined or withdrawn instead commences on the day after the appeal is determined or withdrawn.

### **38 Offences only to be taken into account once**

- (1) An offence may only be taken into account once under section 33 (1) in respect of a particular person and once under section 33 (2) in respect of that person.
- (2) An offence that has been taken into account under section 33 (1) in respect of a particular person may also be taken into account under section 33 (2) in respect of that person.

#### **Note—**

If 3 offences are committed within a 3 year period, the first 2 offences give rise to a 3 month prohibition and the third offence (taken into account with the first 2) results in a further 12 month prohibition. However the second and third offences do not give rise to another 3 month prohibition. Further offences cannot be taken into account with offences that have already been taken into account.

## **Division 3 Notification by tobacco retailers and e-cigarette retailers**

### **39 Notification by person engaging in tobacco retailing or e-cigarette retailing**

- (1) A person must not engage in tobacco retailing or e-cigarette retailing, or both, unless the person has notified the Secretary, in accordance with this section, that the person intends to engage in retailing of a type so notified.

Maximum penalty—100 penalty units.

- (2) A notice must be provided in the manner prescribed by the regulations and contain the following information—
  - (a) the business address of the person intending to engage in tobacco retailing or e-cigarette retailing,
  - (b) the address of the premises at which the person intends to engage in tobacco retailing or e-cigarette retailing,
  - (c) the registered business name (if any) of the relevant business and, if the business is incorporated, the ACN,
  - (d) the names and addresses of the owners and directors of the relevant business,
  - (e) whether the person is intending to engage in tobacco retailing or e-cigarette retailing, or both types of retailing.
- (3) A person engaged in tobacco retailing or e-cigarette retailing (but not both) must, before engaging in the other type of retailing, notify the Secretary of the intention to engage in that other type of retailing.
- (4) A person engaged in tobacco retailing or e-cigarette retailing, or both, must notify the Secretary of any of the following events within 28 days after becoming aware of the event—
  - (a) a change in the person's business address,
  - (b) a change in the address of the premises at which the person engages in that retailing,
  - (c) a change in the name or address of any owner or director of the retailing business,
  - (d) a change in the ownership of the retailing business.
- (5) The Secretary is, as soon as practicable after being notified that a person intends to engage in tobacco retailing, e-cigarette retailing or both, to ensure that the person—
  - (a) has a retailer identification number, or
  - (b) if the person does not have a retailer identification number—is issued a retailer identification number.

**39A Restriction on obtaining or selling tobacco, e-cigarettes or e-cigarette accessories by wholesale without retailer identification number**

- (1) A person must not obtain a tobacco product, e-cigarette or e-cigarette accessory by wholesale unless the person provides the wholesaler with the retailer identification

number issued to the person under section 39 (5).

- (2) A person (the **wholesaler**) must not sell a tobacco product, e-cigarette or e-cigarette accessory by wholesale to another person unless the retailer identification number issued to that other person under section 39 (5) is provided to the wholesaler.

Maximum penalty—100 penalty units.

## **Division 4 Seizure and forfeiture of tobacco products**

### **40 Seizure of tobacco products for contravention of retailing prohibition**

- (1) An inspector may seize any tobacco product that the inspector believes on reasonable grounds is in a person's possession, custody or control in the course of committing, or for the purposes of committing, an offence under Division 2.
- (2) Any tobacco product seized under this section may, at the option of the inspector who made the seizure or of any inspector acting in his or her place, be detained in the place, vehicle or vessel where it was found or be removed to another place and detained there.
- (3) If the tobacco product is to be detained in the place, vehicle or vessel where it was found, the inspector may—
  - (a) place it in a room, compartment or cabinet in that place, vehicle, or vessel and
  - (b) mark, fasten and seal the door or opening providing access to that room, compartment or cabinet.
- (4) A person must not retake or attempt to retake any tobacco product seized under this section or resist or attempt to prevent such a seizure.

Maximum penalty—

- (a) in the case of an individual, 500 penalty units for a first offence or 1,000 penalty units for a second or subsequent offence, or
  - (b) in the case of a corporation, 1,000 penalty units for a first offence or 2,000 penalty units for a second or subsequent offence.
- (5) The seizure of tobacco products under this section for which there was reasonable cause does not subject the State, the Minister, the Secretary, an inspector or any other person to any action, liability, claim or demand.

### **41 Forfeiture of tobacco on conviction**

- (1) If a court that convicts a person for an offence under Division 2 finds that any tobacco product seized under this Division was in any person's possession, custody or control in the course of committing, or for the purposes of committing, the offence, the court

is to order the tobacco product to be forfeited to the Crown unless the court is of the opinion that exceptional circumstances justify the court not ordering the tobacco product to be forfeited.

- (2) The court's order operates to forfeit the tobacco products to the Crown.

#### **42 Destruction of forfeited tobacco**

- (1) The Secretary is to cause all tobacco products forfeited under this Division to be destroyed.
- (2) The person convicted of the offence that resulted in forfeiture of tobacco products is liable to pay to the Secretary the reasonable costs incurred in destroying the tobacco products, and any such costs may be recovered by the Secretary in a court of competent jurisdiction as a debt due to the Crown.
- (3) In proceedings for recovery of the costs of destroying tobacco products, a certificate signed by the Secretary certifying the amount of those costs and the manner in which they were incurred is evidence of the matters certified.

#### **43 Return of seized tobacco**

Any tobacco products seized under this Division must be returned to the person from whom they were seized (or to such other person as appears to the Secretary to be entitled to them) if—

- (a) proceedings for an offence under Division 2 have not been commenced against the person from whom they were seized within 42 days after seizure, or
- (b) proceedings for such an offence against the person have been commenced within that 42 days but the court that disposes of the proceedings does not convict the person or does not make an order for forfeiture of the tobacco products, or
- (c) the Secretary becomes satisfied that the tobacco products were not, at the time they were seized, in a person's possession, custody or control in the course of committing, or for the purposes of committing, an offence under Division 2.

### **Part 6 Enforcement**

#### **44 Powers of inspectors to enter premises**

- (1) For the purposes of this Act, an inspector may, at any reasonable time, do any one or more of the following—
- (a) alone, or with such other persons as the inspector considers necessary, enter and inspect any premises,
- (b) examine and inspect any apparatus or equipment in any premises,

- (c) take such photographs, films and audio, video and other recordings as the inspector considers necessary,
  - (d) for the purpose of analysis, take samples of any thing to determine whether the provisions of this Act and the regulations are being complied with in relation to the premises,
  - (e) take samples of any thing, other than for the purpose of analysis, that the inspector reasonably believes may be used as evidence that an offence has been, or is being, committed under this Act or the regulations,
  - (f) require records or documents to be produced for inspection,
  - (g) examine, inspect and copy any such records or documents and, for that purpose, take away and retain (for such time as may, for that purpose, be reasonably necessary) any such records or documents.
- (2) An inspector who enters any premises in accordance with this section that he or she is not otherwise entitled to enter (unless under the authority of a search warrant) is not to remain on the premises if, on request by the occupier of the premises, the inspector does not produce his or her certificate of authority.
- (3) This section does not authorise entry into any part of premises that is being used solely for residential purposes, except—
- (a) with the consent of the occupier of the premises, or
  - (b) under the authority of a search warrant.

#### **45 Inspector may require information**

- (1) An inspector may at any time require a person by whom the officer reasonably suspects any provision of this Act or the regulations is being or has been contravened, or who is apparently in charge of premises where such a contravention is occurring or evidently has occurred, to state his or her name and address and (if the person is not the occupier of the premises) the name of the occupier of the premises.
- (2) If the contravention concerns an advertisement or any object containing an advertisement, the inspector may require a person referred to in subsection (1) to produce for inspection any invoice or record relating to the advertisement or object or relating to any tobacco products in connection with which the material for the advertisement, or the object, was obtained.

#### **46 Failure to comply with directions or requirements of inspectors**

- (1) A person must not, without reasonable excuse, fail to comply with a requirement or direction of a police officer or an inspector duly made under this Act.

Maximum penalty—100 penalty units.

- (2) A person must not, in connection with a requirement of a police officer or an inspector made under this Act, provide any information or produce any document that the person knows is false or misleading in a material particular.

Maximum penalty—100 penalty units.

- (3) A requirement of an inspector under this Act is not duly made unless, at the time of the making of the requirement—
- (a) the inspector has identified himself or herself to the person of whom the requirement is made as an inspector and, on request, produced his or her certificate of authority, and
  - (b) the person is informed by the inspector that a refusal or failure to comply with the requirement may constitute an offence.

#### **47 Obstruction or impersonation of inspectors**

- (1) A person must not, without reasonable excuse, resist, obstruct, or attempt to obstruct, a police officer or an inspector in the exercise of the police officer's or inspector's functions under this Act.

Maximum penalty—5 penalty units.

- (2) A person must not impersonate an inspector.

Maximum penalty—5 penalty units.

#### **48 Search warrants**

- (1) An inspector may apply to an authorised officer for a search warrant if the inspector has reasonable grounds for believing that a provision of this Act or the regulations has been or is being contravened on premises.
- (2) An authorised officer to whom an application is made under this section may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising the inspector named in the warrant, when accompanied by a police officer, and such other person (if any) as is named in the warrant—
- (a) to enter the premises concerned, and
  - (b) to search the premises for evidence of a contravention of this Act or the regulations.
- (3) Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* applies to a search warrant issued under this section.
- (4) In this section—

**authorised officer** has the same meaning as it has in the *Law Enforcement (Powers and Responsibilities) Act 2002*.

#### 49 Removal of certain advertisements

- (1) If a tobacco advertisement is displayed in contravention of this Act or the regulations, the Local Court may order—
  - (a) that the advertisement be removed or obscured by an inspector, and
  - (b) if any person has been convicted of an offence against this Act or the regulations in relation to the placement or display of the advertisement, that the person pay the reasonable costs incurred by the inspector in removing or obscuring the advertisement.
- (2) An inspector may enter any premises in order to remove or obscure an advertisement in execution of an order under this section.
- (3) Any tobacco advertisement in the form of an article that is removed in accordance with an order under this section is taken to be the property of the person specified in the order.
- (4) Any costs payable under an order under this section may be recovered in a court of competent jurisdiction as a debt due to the Crown or a council, as the case requires.

#### 50 Penalty notices

- (1) An inspector may issue a penalty notice to a person if it appears to the inspector that the person has committed a penalty notice offence.
- (2) A penalty notice offence is an offence against this Act or the regulations that is prescribed by the regulations as a penalty notice offence.
- (3) The *Fines Act 1996* applies to a penalty notice issued under this section.

**Note—**

The *Fines Act 1996* provides that, if a person issued with a penalty notice does not wish to have the matter determined by a court, the person may pay the amount specified in the notice and is not liable to any further proceedings for the alleged offence.

- (4) The amount payable under a penalty notice issued under this section is the amount prescribed for the alleged offence by the regulations (not exceeding the maximum amount of penalty that could be imposed for the offence by a court).
- (5) This section does not limit the operation of any other provision of, or made under, this or any other Act relating to proceedings that may be taken in respect of offences.
- (6) In this section, **inspector** includes a police officer.

## **Part 7 Proceedings for offences**

### **51 Certain civil proceedings barred**

An action at law or in equity 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 or the regulations made under this Act.

### **52 Penalties for continuing offences**

- (1) If a continuing state of affairs is created by an offence committed against section 12 (1) or (2) or 13, the offender is liable to a penalty of not more than—

- (a) 50 penalty units in the case of an individual, or
- (b) 200 penalty units in the case of a corporation,

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

- (2) If a continuing state of affairs is created by an offence committed against section 16 (1) or (2), 17 (1), 19, 20 (1) or (2) or 21 (1), the offender is liable to a penalty of not more than—

- (a) 200 penalty units in the case of an individual, or
- (b) 2,000 penalty units in the case of a corporation,

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

### **53 Offences by corporations**

- (1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision if the person knowingly authorised or permitted the contravention.
- (2) A person may be proceeded against and convicted under a provision pursuant to subsection (1) whether or not the corporation has been proceeded against or has been convicted under the provision.
- (3) Nothing in this section affects any liability imposed on a corporation for an offence committed by the corporation under this Act or the regulations.



#### **54 Proceedings for offences**

- (1) Proceedings for an offence against this Act or the regulations are to be disposed of summarily before—
  - (a) the Local Court, or
  - (b) the Supreme Court in its summary jurisdiction.
- (2) If proceedings are brought before the Local Court, the maximum monetary penalty that the Local Court may impose for the offence is 1,000 penalty units, despite any higher maximum monetary penalty provided in respect of the offence.
- (3) Proceedings for an offence against this Act or the regulations that are brought before the Local Court may be brought at any time within 12 months after the date on which the offence was allegedly committed.

### **Part 8 Miscellaneous**

#### **55 Act to bind Crown**

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.

#### **56 Protection from personal liability**

Anything done or omitted to be done by the Secretary or an inspector does not subject the Secretary or inspector personally to any action, liability, claim or demand if the thing was done, or omitted to be done, in good faith for the purpose of executing this Act or the regulations.

#### **57 Service of documents**

- (1) A document that is authorised or required by this Act or the regulations to be served on or given to any person may be served or given by—
  - (a) in the case of a natural person—
    - (i) delivering it to the person personally, or
    - (ii) sending it by post to the address specified by the person for the giving or service of documents or, if no such address is specified, the residential or business address of the person last known to the person giving or serving the document, or
    - (iii) sending it by facsimile transmission to the facsimile number of the person, or
    - (iv) email to an email address specified by the person for the service of documents of that kind, or

- (v) any other method authorised by the regulations for the service of documents of that kind, or
- (b) in the case of a body corporate—
  - (i) leaving it with a person apparently of or above the age of 16 years at, or by sending it by post to, the head office, a registered office or a principal office of the body corporate or to an address specified by the body corporate for the giving or service of documents, or
  - (ii) sending it by facsimile transmission to the facsimile number of the body corporate, or
  - (iii) email to an email address specified by the body corporate for the service of documents of that kind, or
  - (iv) any other method authorised by the regulations for the service of documents of that kind.
- (2) Nothing in this section affects the operation of any provision of a law or of the rules of a court authorising a document to be served on or given to a person in any other manner.

## **58 Regulations**

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act, and in particular, for or with respect to any of the following—
  - (a) the labelling of packages in which tobacco products, e-cigarettes, e-cigarette accessories or non-tobacco smoking products are packed by a manufacturer, including the position of labels on such packages and the size, colour, style and nature of such labels or labelling,
  - (b) statements or warnings for the purpose of the labelling of any such packages,
  - (c) any statements or warnings to be displayed inside shops and other retail outlets where tobacco products, e-cigarettes, e-cigarette accessories or non-tobacco smoking products are offered or exposed for sale,
  - (d) the labelling of tobacco or e-cigarette vending machines,
  - (e) the duty of persons packing, or causing other persons to pack, specified tobacco products prepared for smoking, e-cigarettes, e-cigarette accessories or non-tobacco smoking products to label those products in a specified manner,
  - (f) prohibiting the sale of packages containing specified tobacco products prepared

for smoking, e-cigarettes, e-cigarette accessories or non-tobacco smoking products unless those packages are labelled in a specified manner,

- (g) the form of notices to be used in connection with the entry by inspectors on to any premises, and the manner and occasion of use of such notices,
- (h) generally regulating the form and content of tobacco advertisements or e-cigarette advertisements and the matter that may appear on packages containing tobacco products, e-cigarettes, e-cigarette accessories or non-tobacco smoking products,
- (i) the form and content of signs relating to the provisions of this Act,
- (j) the display of the signs at places where tobacco products, e-cigarettes, e-cigarette accessories or non-tobacco smoking products are sold,
- (k) the display of price and other product information in relation to tobacco products, e-cigarettes, e-cigarette accessories, non-tobacco smoking products and smoking accessories.

(2) The regulations may provide for what is taken to comprise premises or not comprise premises for the purposes of all provisions, or any specified provision, of this Act or the regulations.

(3) The regulations may create offences punishable by a penalty not exceeding 25 penalty units.

(4) In this section, ***e-cigarette advertisement*** has the same meaning as in section 15A.

## **59 Savings, transitional and other provisions**

Schedule 1 has effect.

## **60 Amendment of Acts**

The Acts specified in Schedule 2 are amended as set out in that Schedule.

## **61 Review of Act**

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

## Schedule 1 Savings, transitional and other provisions

(Section 59)

### Part 1 General

#### 1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts—
  - this Act
  - any other Act that amends this Act
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as—
  - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
  - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.
- (4) The provisions of this Schedule are subject to the regulations.

### Part 2 Provisions consequent on enactment of this Act

#### 2 Existing regulations

The *Public Health (Tobacco) Regulation 1999* is taken to have been made under this Act.

#### 3 Existing authorised officers

- (1) A person who was authorised as an officer for the purposes of Part 6 of the *Public Health Act 1991* by an order made by the Director-General and in force immediately before the repeal of that Part is taken to be an inspector for the purposes of this Act.
- (2) Nothing in subclause (1) prevents the Director-General from revoking the authorisation of a person referred to in that subclause as an inspector.

#### 4 Existing declarations and consents

- (1) A declaration made under section 54A of the *Public Health Act 1991* and in force immediately before the repeal of that section is taken to have been made under

section 29 of this Act.

- (2) Section 61L of the *Public Health Act 1991* (as in force immediately before its repeal) continues to apply to proceedings for offences under Division 4 of Part 6 of that Act (as in force immediately before its repeal) as if that section had not been repealed.

## **5 Lead-in periods for offences against section 9**

- (1) This clause applies to persons engaged in tobacco retailing immediately before the introduction date.
- (2) A person to whom this clause applies does not commit an offence against section 9—
  - (a) in the case of a person who, immediately before the introduction date, employed more than 50 people—during the period of 6 months after the commencement of that section, or
  - (b) in the case of a person other than a person referred to in paragraph (a) or a specialist tobacconist—during the period of 12 months after the commencement of that section.
- (3) A person to whom this clause applies who is a specialist tobacconist does not commit an offence against section 9—
  - (a) during the period of 12 months after the commencement of that section in relation to the display of tobacco products, non-tobacco smoking products and smoking accessories that can be seen by members of the public whether from inside or outside the premises at which they are sold, and
  - (b) during a further period of 3 years from the expiration of the 12-month period referred to in paragraph (a) in relation to the display of tobacco products, non-tobacco smoking products and smoking accessories if those products and accessories are displayed on the premises at which they are sold in accordance with the regulations.
- (4) Subclause (3) (b) applies only to premises on which the specialist tobacconist concerned engaged in tobacco retailing immediately before the introduction date and, if the tobacconist moved that tobacco retailing business to new premises after that date, to the new premises, but does not apply to any additional premises opened after that date by the tobacconist.
- (5) For the purposes of this clause, a specialist tobacconist is a person who the Director-General determines carries on a business that had, for the year immediately preceding the introduction date (or, if the person had been engaged in tobacco retailing for less than a year before that date, for the period for which the person had been engaged in tobacco retailing), a gross turnover at least 80 per cent of which was obtained from the sale of tobacco products, non-tobacco smoking products or smoking

accessories.

- (6) A determination under subclause (5) may only be made on an application made within 6 months after the commencement of section 9 and accompanied by the fee prescribed by the regulations.
- (7) The Director-General may request that an applicant for a determination under subclause (5) provide such information or documentation as the Director-General requires to determine the application. The Director-General may refuse to determine the application unless any such information or documentation is provided within the time required by the Director-General.
- (8) In this clause, **introduction date** means the day on which the Bill for this Act was introduced into Parliament.

## **6 Lead-in periods for other new offences**

- (1) During the period of 6 months after the commencement of section 12 (1), a person does not commit an offence against that subsection in relation to a tobacco vending machine situated in premises set aside by an employer as a staff amenity area if the vending machine was lawfully placed on those premises before that commencement.
- (2) During the period of 6 months after the commencement of section 12 (2), a person does not commit an offence against that subsection in relation to a tobacco vending machine if the vending machine was lawfully placed on the premises concerned before that commencement.
- (3) A person does not commit an offence against section 13 during the period of 6 months after the commencement of that section.

## **7 Shopper loyalty programs**

A shopper loyalty program referred to in section 18 is not enforceable and no compensation is payable to any person as a consequence of the enactment of that section or this clause.

## **8 Confiscation of proof of age cards**

The following persons are authorised persons for the purposes of clause 21 (Confiscation of existing RTA proof of age cards) of Schedule 1 to the [Liquor Act 2007](#)—

- (a) any police officer,
- (b) a person who sells tobacco products or non-tobacco smoking products and any employee of that person (being a person or employee of or above the age of 18 years), but only while on, or in the immediate vicinity of, the premises where the tobacco products or non-tobacco smoking products are sold.

## **Part 3 Provisions consequent on enactment of [Smoke-free Environment Amendment Act 2018](#)**

### **9 Definition**

In this Part—

**amending Act** means the [Smoke-free Environment Amendment Act 2018](#).

### **10 Existing tobacco retailers and e-cigarette retailers**

- (1) A person who, immediately before the substitution of section 39 by the amending Act, had been issued a tobacco retailer notification number by the Secretary is taken to have notified the Secretary of an intention to engage in tobacco retailing under that section as so substituted.
- (2) A tobacco retailer notification number issued under section 39 before the substitution of that section is taken to be a retailer identification number for the purposes of that section.
- (3) A person who was engaged in e-cigarette retailing immediately before the substitution of section 39 by the amending Act does not commit an offence against section 39 if the person gives notice of the intention to engage in e-cigarette retailing within the period of 3 months after the day of that substitution.

### **Schedule 2 (Repealed)**