

SOUTH AUSTRALIA

TOBACCO PRODUCTS (LICENSING) ACT 1986

This Act is reprinted pursuant to the Acts Republication Act 1967 and incorporates all amendments in force as at 3 February 1997.

It should be noted that the Act was not revised (for obsolete references, etc.) by the Commissioner of Statute Revision prior to the publication of this reprint.

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TOBACCO PRODUCTS (LICENSING) ACT 1986

being

Tobacco Products (Licensing) Act 1986 No. 123 of 1986
[Assented to 18 December 1986]¹

as amended by

Tobacco Products Control Act Amendment Act 1988 No. 42 of 1988 [Assented to 5 May 1988]²

Tobacco Products (Licensing) Act Amendment Act 1990 No. 42 of 1990 [Assented to 25 October 1990]³

Tobacco Products (Licensing) (Fees) Amendment Act 1992 No. 47 of 1992 [Assented to 17 September 1992]⁴

Tobacco Products (Licensing) (Fees) Amendment Act 1993 No. 38 of 1993 [Assented to 13 May 1993]⁵

Tobacco Products (Licensing) (Miscellaneous) Amendment Act 1995 No. 80 of 1995 [Assented to 23 November 1995]⁶

Statutes Amendment and Repeal (Common Expiation Scheme) Act 1996 No. 34 of 1996 [Assented to 2 May 1996]⁷

¹ Came into operation 18 December 1986: *Gaz.* 18 December 1986, p. 1877.

² Came into operation 1 July 1988: *Gaz.* 26 May 1988, p. 1333.

³ Came into operation (except ss. 3 and 5) on assent: s. 2(1); ss. 3 and 5 came into operation 1 November 1990: s. 2(2).

⁴ Came into operation 1 September 1992: s. 2.

⁵ Came into operation 1 June 1993: s. 2.

⁶ Came into operation 7 December 1995: *Gaz.* 7 December 1995, p. 1556.

⁷ **Came into operation 3 February 1997: *Gaz.* 19 December 1996, p. 1923.**

N.B. The amendments effected to this Act by the *Statutes Amendment (Administrative and Disciplinary Division of District Court) Act 1996* had not been brought into operation at the date of, and have not been included in, this reprint.

NOTE:

- Asterisks indicate repeal or deletion of text.
- Entries appearing in bold type indicate the amendments incorporated since the last reprint.
- For the legislative history of the Act see Appendix.

An Act to recover from consumers of tobacco products an appropriate contribution towards the State's revenues; to repeal the Business Franchise (Tobacco) Act 1974; and for other purposes.

Preamble:

1. *The consumption of tobacco products impairs the health of the citizens of the State and places a substantial burden on the State's financial resources.*
2. *In view of this financial burden, the Parliament considers it fair that consumers of tobacco products should make an appropriate contribution to State revenues irrespective of the source of the tobacco products.*
3. *The purpose of this Act is to establish a legislative scheme under which—*
 - (a) *a direct contribution to State revenues, in the form of a licence fee, will be made by a consumer who takes out a consumption licence; but*
 - (b) *a tobacco merchant who chooses to be licensed and thus by payment of licence fees to make a contribution to State revenues on behalf of consumers will relieve a consumer from the obligation to hold a consumption licence for the consumption of tobacco products obtained through the merchant.*

The Parliament of South Australia therefore enacts as follows:

**PART 1
PRELIMINARY**

Short title

1. This Act may be cited as the *Tobacco Products (Licensing) Act 1986*.

Commencement

2. This Act shall come into operation on a day to be fixed by proclamation.

Repeal of the Business Franchise (Tobacco) Act 1974

3. The *Business Franchise (Tobacco) Act 1974* is repealed.

Interpretation

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

"act" includes an omission; and "to act" has a corresponding meaning;

"the Commissioner" means the Commissioner of Stamps or a Deputy Commissioner of Stamps;

"beneficiary" includes a person—

- (a) who is an object of a discretionary trust; or
- (b) who will take or acquire an interest in default of an appointment under a discretionary trust;

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"to consume" in relation to a tobacco product means—

- (a) to smoke; or
- (b) to inhale (in the form of a powder); or
- (c) to chew or suck; or
- (d) to give away;

and **"consumer"** has a corresponding meaning;

"grant" includes renewal; and **"to grant"** includes to renew;

"inspector" means—

- (a) a person authorised by the Commissioner to exercise the powers of an inspector under this Act; or
- (b) a member of the police force;

"licensed" in relation to a tobacco merchant connotes that the merchant holds a tobacco merchant's licence and **"unlicensed"** in relation to a tobacco merchant connotes that the merchant does not hold a tobacco merchant's licence;

"officer" means—

- (a) the Commissioner or a delegate of the Commissioner; or
- (b) an inspector; or
- (c) any other person engaged in the administration or enforcement of this Act;

"premises" means—

- (a) any land, building or structure;
- (b) any vehicle, vessel or aircraft;

"purchase" of tobacco products includes receipt of tobacco products in the course of a business (whether or not for valuable consideration);

"record" means—

- (a) a documentary record;
- (b) a record made by an electronic, electro-magnetic, photographic or optical process;
- (c) any other kind of record;

"relevant period" in relation to the grant of a tobacco merchant's licence means the calendar month ending one calendar month before the commencement of the calendar month for which the licence is, or is to be, granted;

"the repealed Act" means the *Business Franchise (Tobacco) Act 1974*;

"restricted licence" means a tobacco merchant's licence subject to the condition that the tobacco merchant must not, during the period for which the licence remains in force, sell tobacco products except tobacco products purchased from licensed tobacco merchants;

"retail" connotes a sale to a consumer or an agent for a consumer;

"sale" of tobacco products includes supply of tobacco products in the course of a business (whether or not for valuable consideration) and **"sell"** has a corresponding meaning;

"substantial shareholder" in relation to a body corporate means—

- (a) a person who is in a position to control or substantially influence the decisions taken at a general meeting of the body corporate; or
- (b) a person who is a member of a group that is in a position to control or substantially influence decisions taken at a general meeting of the body corporate;

"tobacco merchandising" includes—

- (a) the processing of tobacco for sale;
- (b) the packaging of tobacco products for sale;
- (c) the possession or storage of tobacco products for or prior to sale;
- (d) the distribution of tobacco products;
- (e) the sale or purchase of tobacco products by wholesale or the sale of tobacco products by retail;

"tobacco merchant" means a person who engages in tobacco merchandising;

"tobacco product" means—

- (a) a cigarette; or
- (b) a cigar; or
- (c) cigarette or pipe tobacco; or
- (d) tobacco prepared for chewing or sucking; or
- (e) snuff; or
- (f) any other product containing tobacco of a kind prescribed by regulation,

and includes any packet, carton, shipper or other device in which any of the above is contained;

"vending machine" means a device from which a tobacco product can be obtained by the insertion of a coin, banknote or token;

"wholesale" connotes a sale to a tobacco merchant for re-sale.

(2) If a person returns tobacco products purchased by wholesale or retail from a licensed tobacco merchant to the licensed tobacco merchant, the return of the products and the preceding sale will not be taken to be a sale or purchase of tobacco products for the purposes of Part 2.

(3) If a person returns tobacco products purchased by wholesale or retail from a licensed tobacco merchant to the manufacturer or distributor of the products and the manufacturer or distributor replaces them with the same or an equivalent quantity of tobacco products of the same or a similar kind, the return of the products and the supply of the new products will not be taken to be a sale or purchase of tobacco products for the purposes of Part 2.

Grouping of tobacco merchants

5. (1) Two persons are associates of each other if—

- (a) they are related corporations for the purpose of the *Companies (South Australia) Code*; or
- (b) they have common employees or the employees of one provide services for the other; or
- (c) one is a body corporate and the other is a director or substantial shareholder of the body corporate; or
- (d) they are in partnership; or
- (e) one is an agent of the other; or
- (f) they are both trustees or beneficiaries of the same trust or one is a trustee and the other is a beneficiary of the same trust; or
- (g) there is an agreement, arrangement or understanding under which—
 - (i) one acts in accordance with the directions, instructions or wishes of the other; or
 - (ii) they act in accordance with a pre-arranged pattern; or
- (h) a chain of associations can (by applying any one or more of the above provisions) be traced between them through another person or other persons.

(2) Subject to this section, if a tobacco merchant is an associate of another tobacco merchant or other tobacco merchants, those tobacco merchants constitute a group of tobacco merchants.

(3) A tobacco merchant that holds a restricted licence will not, while the condition of the licence is observed, be regarded as a member of a group.

(4) The Commissioner may, if satisfied that a member of a group of tobacco merchants will carry on business in substantial independence from the other member or members of the group, determine that the tobacco merchant will not be regarded as a member of the group.

(5) While a determination is in force under subsection (4), the tobacco merchant will not be regarded as a member of the group.

(6) The Commissioner may, by notice in writing to the tobacco merchant, revoke a determination under subsection (4).

Territorial application of this Act

6. (1) This Act applies to tobacco merchants—

(a) who carry on business in the State; or

(b) who carry on business outside the State and in the course of that business dispatch tobacco products to purchasers in the State.

(2) If a tobacco merchant does not carry on business in the State, this Act applies to the merchant as if the sale and dispatch of tobacco products to purchasers in the State constituted the merchant's sole business.

Act to bind the Crown

7. This Act binds the Crown not only in right of the State but also (so far as the legislative power of the State extends) in all its other capacities.

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**PART 2
LICENCES**

DIVISION 1—CONSUMPTION LICENCES

Unlawful consumption of tobacco products

8. (1) Subject to this section, a person shall not consume a tobacco product unless—

- (a) that person holds a consumption licence; or
- (b) the tobacco product was obtained from a licensed tobacco merchant.

Penalty: \$10 000.

Expiation fee: \$200.

(2) This section does not prevent a person from consuming a tobacco product if—

- (a) the person obtained the tobacco product, while outside the State, for personal consumption; or
- (b) the person obtained the tobacco product as a gift from a person who is neither a tobacco merchant nor an associate of a tobacco merchant.

* * * * *

Consumption licences

9. (1) A consumption licence may be granted for a term of 3 months, 6 months or 12 months.

(2) The fee for a consumption licence is—

- (a) if granted for a 3 month term—\$150;
- (b) if granted for a 6 month term—\$300;
- (c) if granted for a 12 month term—\$600.

(3) An application for a consumption licence—

- (a) must be made in writing to the Commissioner; and
- (b) must contain—
 - (i) the applicant's name and address; and
 - (ii) a statement, signed by the applicant, to the effect that the applicant is of or over the age of 18 years; and
- (c) must be accompanied by the appropriate fee.

(4) If an application for a consumption licence is made in accordance with subsection (3), the Commissioner must (unless the Commissioner has reason to doubt the veracity of the declaration as to the applicant's age) grant a licence to the applicant.

(5) A consumption licence must contain a warning in a form approved by the Minister against the dangers of smoking.

DIVISION 2—TOBACCO MERCHANTS' LICENCES

Tobacco merchant may choose whether to be licensed

10. (1) A tobacco merchant may hold a tobacco merchant's licence but is not obliged to hold such a licence.

(2) If a tobacco merchant is a member of a group, a tobacco merchant's licence cannot be held by a member of the group independently of the other members of the group but must be held on behalf of all members of the group.

(3) Where a tobacco merchant's licence is held on behalf of a group of tobacco merchants, each member of the group is a licensed tobacco merchant.

Classes and terms of licences

11. (1) Tobacco merchants' licences will be of two classes:

(a) licences (referred to in this Act as "unrestricted licences") that are not subject to any condition; and

(b) licences (referred to in this Act as "restricted licences") that are subject to a condition that the holder of the licence must not, during the period for which the licence remains in force, sell tobacco products except tobacco products purchased from licensed tobacco merchants or purchase tobacco products for sale except from licensed tobacco merchants.

(2) A restricted licence will not be granted to an applicant for a tobacco merchant's licence unless the applicant applies for such a licence.

(3) If the condition of a restricted licence is not observed—

(a) the holder of the licence is guilty of an offence and liable to a penalty not exceeding \$20 000; and

(b) the licence fee for each month in which the condition is not observed will be re-assessed by the Commissioner as if the licence were an unrestricted licence and the relevant period were that month.

(4) Subject to this section, a tobacco merchant's licence will be granted for a term of one calendar month.

(5) If a tobacco merchant's licence is granted after the commencement of a calendar month—

(a) the licence will expire at the end of the month; and

(b) the licence will, if the Commissioner so determines, operate retrospectively from the first day of the month.

(6) The Commissioner may grant a restricted licence on the basis that the licence will be automatically renewed, without further application by the tobacco merchant, up to a total period (not exceeding 12 months) specified in the licence.

(7) A licensed tobacco merchant may surrender the licence to the Commissioner at any time.

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Application for tobacco merchant's licence

12. (1) An application for a tobacco merchant's licence—

- (a) must be made in writing to the Commissioner; and
- (b) must contain the applicant's name and, if the applicant is a member of a group, the names of all tobacco merchants in the group; and
- (c) must state—
 - (i) the address or addresses of the premises from which the tobacco merchant carries or proposes to carry on business; and
 - (ii) if the tobacco merchant is a member of a group—the address or addresses of premises from which other members of the group carry on business; and
- (d) must (except in the case of an application for a restricted licence) state—
 - (i) if the applicant is not a member of a group—the aggregate value of tobacco products (not being tobacco products purchased from a licensed tobacco merchant) sold by the merchant during the relevant period; and
 - (ii) if the applicant is a member of a group—the aggregate value of tobacco products (not being tobacco products purchased from a licensed tobacco merchant) sold by the members of the group during the relevant period; and
- (e) in the case of an application for a restricted licence—must contain—
 - (i) a declaration that during the period of 2 months preceding the date of the application the applicant has not sold tobacco products other than tobacco products purchased from licensed tobacco merchants; and
 - (ii) a declaration that the applicant does not intend to sell tobacco products other than tobacco products purchased from licensed tobacco merchants; and
- (f) must contain any further statements or declarations required by the Commissioner.

(2) If during the relevant period the tobacco merchant sold tobacco products for delivery and consumption outside the State, the application must contain a statement of—

- (a) the value of the tobacco products so sold; and
- (b) the names and addresses of the persons to whom those tobacco products were sold.

Licence fees

13. (1) Subject to this section, the fee for a tobacco merchant's licence (not being a restricted licence) is—

- (a) if the tobacco merchant is not a member of a group—\$2 plus—
 - (i) 100 per cent of the aggregate value of tobacco products (not being tobacco products purchased from a licensed tobacco merchant) sold by the merchant to licensed tobacco merchants during the relevant period; and

- (ii) 105 per cent of the aggregate value of tobacco products (not being tobacco products purchased from a licensed tobacco merchant) sold by the merchant otherwise than to licensed tobacco merchants during the relevant period;
 - (b) if the tobacco merchant is a member of a group—\$2 plus—
 - (i) 100 per cent of the aggregate value of tobacco products (not being tobacco products purchased from a licensed tobacco merchant) sold by the members of the group to licensed tobacco merchants during the relevant period; and
 - (ii) 105 per cent of the aggregate value of tobacco products (not being tobacco products purchased from a licensed tobacco merchant) sold by the members of the group otherwise than to licensed tobacco merchants during the relevant period.
- (2) The fee for a restricted licence is \$2 multiplied by the number of months in the period for which the licence is to be in force or \$10 whichever is the lesser (but this fee is subject to re-assessment if the condition of the licence is not observed).
- (3) Licence fees for tobacco merchants' licences will be assessed by the Commissioner.
- (4) If an applicant for a tobacco merchant's licence (not being a restricted licence) did not carry on business during the relevant period, or part of the relevant period, the Commissioner may assess a licence fee on the basis of—
- (a) the Commissioner's estimates of the scale of the business that would have been carried on by the applicant during the relevant period or that part of the relevant period if the applicant had then carried on business; and
 - (b) assumptions by the Commissioner as to the nature of that business.
- (5) If the information for assessing a licence fee is incomplete, the Commissioner may supply the deficiency by making any estimate or assumption that appears reasonable in the circumstances.
- (6) The Commissioner may at any time re-assess a licence fee if—
- (a) it appears that—
 - (i) an error was made in the original assessment; or
 - (ii) the information, or an estimate or assumption, on which the original assessment was based is erroneous or incomplete; or
 - (b) it is appropriate on account of amendments effected to this Act.
- (7) A re-assessment under subsection (6) has retrospective effect and accordingly if such a re-assessment is made—
- (a) any amount overpaid will (without the necessity of any further appropriation) be refunded; or
 - (b) if the fee is increased, the difference between that fee and the fee as originally assessed may be recovered as a debt from the person to whom the licence was issued or, if that person was a member of a group, from any member or members of the group.

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(8) The value of tobacco products sold for delivery and consumption outside the State will be disregarded in assessing licence fees under this section.

(9) If a tobacco merchant deals in tobacco products directly imported by the merchant from outside Australia, then, for the purpose of assessing licence fees, sales of tobacco products by that tobacco merchant will, if the Commissioner so determines, be treated as if made to licensed tobacco merchants (whether actually so made or not).

(10) If the Commissioner determines that this subsection should apply in relation to a particular licensed tobacco merchant then—

- (a) sales of tobacco products to that tobacco merchant by any other licensed tobacco merchant will be disregarded in assessing the vendor's licence fee; but
- (b) the purchaser's licence fee will be assessed as if those tobacco products had not been purchased from a licensed tobacco merchant.

(11) The Commissioner may grant an extension of time for payment of a licence fee, or permit payment of a licence fee to be made by instalments.

Valuation of tobacco products

14. (1) The Minister may, by notice in the *Gazette*—

- (a) set out a basis for valuing tobacco products;
- (b) vary or revoke any such notice previously published.

(2) While such a notice is in force, the tobacco products will, for the purpose of assessing licence fees, be valued in accordance with the notice.

PART 3

SALE OF TOBACCO PRODUCTS BY UNLICENSED TOBACCO MERCHANTS

Declarations to be obtained from purchasers

15. (1) An unlicensed tobacco merchant must not sell tobacco products to a person by retail without obtaining from that person—

- (a) a declaration in Form No. 1 in Schedule 1; or
- (b) a declaration in Form No. 2 in Schedule 1.

Penalty: \$20 000.

(2) The declaration must be obtained from the purchaser before the purchaser leaves the tobacco merchant's premises or, if the tobacco product is not taken by the purchaser from the premises, before it is dispatched to the purchaser.

(3) An unlicensed tobacco merchant shall, within 7 days after the end of each month, send to the Commissioner—

- (a) a return—
 - (i) showing the quantities of tobacco products of each class sold by the tobacco merchant during the month; and
 - (ii) differentiating the quantities referred to above into subclasses by reference to the brand names of the tobacco products; and
- (b) all declarations obtained by the merchant during the month.

Penalty: \$20 000.

(4) A purchaser of a tobacco product who is requested by an unlicensed tobacco merchant, or a person acting on behalf of an unlicensed tobacco merchant, to sign a declaration in a form prescribed by schedule 1 and who takes the tobacco product from the tobacco merchant's premises without signing such a declaration is guilty of an offence.

Penalty: \$2 000.

Notice to be displayed for the information of prospective purchasers

16. (1) An unlicensed tobacco merchant must not engage in tobacco merchandising unless a notice or notices are prominently displayed in the premises used by the merchant for tobacco merchandising so as to ensure (as far as reasonably practicable) that prospective purchasers will, before purchasing tobacco products, or selecting tobacco products for purchase, be made aware—

- (a) that the tobacco merchant is unlicensed; and
- (b) that purchasers of tobacco products will be required to sign a declaration under this Act; and
- (c) that the tobacco products cannot be lawfully consumed without a consumption licence.

Penalty: \$20 000.

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(2) One such notice must be prominently displayed at or near the main entrance to the merchant's premises so as to be clearly legible by members of the public as they enter the premises.

(3) A notice displayed under this section must conform with any requirements of the regulations as to its form or contents.

(4) This section does not apply to premises situated outside the State.

Notice to be given to Commissioner

17. (1) A person must not act as a tobacco merchant within the State unless the person has given notice to the Commissioner in the manner and containing the information prescribed by regulation—

(a) not more than two months before commencing to so act; and

(b) at not more than two monthly intervals while continuing to so act.

Penalty: \$20 000.

(2) Subsection (1) does not apply to a person if the person is a licensed tobacco merchant.

**PART 4
ADMINISTRATION AND ENFORCEMENT**

DIVISION 1—THE COMMISSIONER

Administration of the Act

18. The Commissioner is responsible to the Minister for the administration of this Act.

Delegation of the Commissioner's powers

19. (1) The Commissioner's powers under this Act may be delegated to any person.

(2) In particular, the power to grant consumption licences may be delegated.

(3) A delegation under this section—

- (a) will be subject to any conditions contained in the instrument of delegation; and
- (b) will not derogate from the Commissioner's power to act personally in any matter; and
- (c) will be revocable at will.

**DIVISION 2—REVIEW OF, AND APPEALS AGAINST, THE
COMMISSIONER'S DECISIONS**

Reviews

20. (1) A person who is dissatisfied with a decision of the Commissioner under this Act may apply to the Commissioner for a review of the decision.

(2) An application for review—

- (a) must be made within one month after the applicant received notice of the decision to which the application relates; and
- (b) must set out in detail the grounds on which the applicant seeks the review.

(3) Where an application is made under subsection (1), the Commissioner must review the decision to which the application relates.

(4) On a review the Commissioner may—

- (a) confirm or vary the decision under review; or
- (b) quash the decision and substitute for it a decision that should, in the Commissioner's opinion, have been made in the first instance.

(5) The Commissioner must inform the applicant in writing of the result of the review.

Appeals

21. (1) There will be an appellate Tribunal for the purposes of this Act.

(2) The Senior Judge may appoint one or more District Court Judges to be members of the Tribunal.

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(3) The Tribunal will be constituted of a single judge for the purpose of hearing and determining an appeal and, as so constituted, the Tribunal may hear and determine separate appeals simultaneously.

(4) There will be a Registrar of the Tribunal.

(5) A person who remains dissatisfied with a decision of the Commissioner after a review or who is dissatisfied with a decision taken by the Commissioner on the review may appeal to the Tribunal against the decision.

(6) An appeal will be commenced by lodging notice of the appeal, setting out in detail the grounds of the appeal, with the Registrar.

(7) An appeal must be commenced within one month after the appellant received notice of the Commissioner's decision on the review or such longer period as may be allowed by the Tribunal.

(8) The Tribunal may, after considering any relevant evidence and submissions that the appellant and the Commissioner desire to place before it—

- (a) confirm or vary the decision under appeal;
- (b) quash the decision and substitute its own decision;
- (c) give any incidental or ancillary directions.

DIVISION 3—INSPECTORS

Identification of inspectors

22. (1) An inspector, other than a member of the police force, must be issued with an identity document—

- (a) containing the person's name and a photograph of the person; and
- (b) stating that the person is an inspector for the purposes of this Act.

(2) An inspector must, at the request of a person in relation to whom the inspector intends to exercise any powers under this Act, produce for the inspection of the person—

- (a) in the case of an inspector who is a member of the police force and is not in uniform—his or her certificate of authority; or
- (b) in the case of an inspector who is not a member of the police force—his or her identity document.

Powers of inspectors

22A. (1) An inspector may—

- (a) enter and remain on premises and inspect the premises and any part of or thing in or on the premises if the inspector reasonably suspects that the premises are being used for tobacco merchandising or that records relating to tobacco merchandising are being kept on the premises;

- (b) with the authority of a warrant issued under this Division or in circumstances in which the inspector reasonably believes that immediate action is required in order to prevent destruction of evidence of an offence against this Act, use reasonable force to break into or open premises and any part of or thing in or on the premises;
- (c) require a person to produce a record that the inspector reasonably suspects contains information relating to tobacco merchandising, including a written record that reproduces in an understandable form information stored by computer, microfilm or other process;
- (d) examine, copy or take extracts from a record that the inspector reasonably suspects contains information relating to tobacco merchandising or require a person to provide a copy of such a record;
- (e) seize and retain tobacco products or records if the inspector reasonably suspects that an offence against this Act has been committed in relation to the products or records or that the products or records may afford evidence of an offence against this Act;
- (f) if the inspector reasonably suspects that a person has sold or purchased tobacco products or otherwise engaged in tobacco merchandising in contravention of this Act, seize and retain all tobacco products on or adjacent to premises that the inspector reasonably suspects are being used by the person for tobacco merchandising;
- (g) require a person who the inspector reasonably suspects has committed an offence against this Act to state the person's full name and usual place of residence and to produce evidence of the person's identity;
- (h) require a person who the inspector reasonably suspects has knowledge of matters relating to tobacco merchandising to answer questions in relation to those matters;
- (i) require a person holding or claiming to hold a licence to produce it for inspection;
- (j) give directions reasonably required in connection with the exercise of a power conferred by this subsection or otherwise in connection with the administration and enforcement of this Act.

(2) A magistrate may issue a warrant for the purposes of subsection (1) if satisfied that the warrant is reasonably required for the administration or enforcement of this Act.

(3) In the exercise of powers under this Act an inspector may be assisted by such persons as he or she considers necessary in the circumstances.

Offence to hinder, etc., inspectors

22B. A person who—

- (a) hinders or obstructs an inspector, or a person assisting an inspector, in the exercise of powers conferred by this Act; or
- (b) uses abusive, threatening or insulting language to an inspector, or a person assisting an inspector; or
- (c) refuses or fails to comply with a requirement or direction of an inspector under this Division; or

- (d) when required by an inspector under this Division to answer a question, refuses or fails to answer the question to the best of the person's knowledge, information and belief; or
- (e) falsely represents, by words or conduct, that he or she is an inspector,

is guilty of an offence.

Penalty: \$20 000.

Self-incrimination

22C. (1) It is not an excuse for a person to refuse or fail to answer a question or to produce, or provide a copy of, a record or information as required under this Division on the ground that to do so might tend to incriminate the person or make the person liable to a penalty.

(2) If compliance by a person with a requirement to answer a question or to produce, or provide a copy of, a record or information might tend to incriminate the person or make the person liable to a penalty, then—

- (a) in the case of a person who is required to produce, or provide a copy of, a record or information—the fact of production, or provision of a copy of, the record or the information (as distinct from the contents of the record or the information); or
- (b) in any other case—the answer given in compliance with the requirement,

is not admissible in evidence against the person in proceedings for an offence or for the imposition of a penalty (other than proceedings under this Act).

Powers in relation to seized tobacco products

22D. (1) If tobacco products are seized under this Division, the following provisions apply:

- (a) the Commissioner may, if satisfied that it is necessary to do so to avoid loss due to the deterioration of the products, determine that the products are forfeited to the Crown and sell the products by public tender;
- (b) apart from paragraph (a), the products will be forfeited to the Crown if a court convicts a person of an offence against this Act in relation to the products, unless the court determines that the circumstances of the offence were trifling;
- (c) subject to this section, the owner of the products will be entitled to recover the products or, if the products have been forfeited by determination of the Commissioner or have deteriorated, will be entitled to be paid compensation by the Crown in respect of the products—
 - (i) if a prosecution for an offence against this Act in relation to the products has been commenced but—
 - (A) the defendant is acquitted; or
 - (B) the prosecution is withdrawn or lapses; or
 - (C) the court hearing the proceedings determines that the circumstances of the offence were trifling; or

- (ii) if—
 - (A) a prosecution for an offence against this Act in relation to the products has not been commenced within three months of the date of seizure; and
 - (B) the District Court determines, on application by the owner, that the justice of the case requires that the products be returned or that compensation be paid;
- (d) at the end of the period of three years from the date of seizure—
 - (i) if the products have not been forfeited or returned to the owner, they are forfeited to the Crown; and
 - (ii) in any case, the owner will not have any right to recover the products or be paid compensation in respect of the products (other than a right that has already arisen or been determined under paragraph (c));
- (e) if the products are forfeited otherwise than under paragraph (a), the Commissioner may sell the products by public tender;
- (f) any compensation payable under this section in respect of the products will be in an amount equal to the consideration paid by the owner of the products when he or she purchased them or, where the owner is the manufacturer of the products, their value (determined on the basis provided under section 14 for the purpose of assessing licence fees) as at the date of seizure;
- (g) the owner of the products has no right to recover the products or be paid compensation in respect of the products apart from under this section.

(2) If tobacco products, when seized under this Division, are on or adjacent to premises that are being used for tobacco merchandising by a person who has sold or purchased tobacco products or otherwise engaged in tobacco merchandising in contravention of this Act, any such contravention by the person is, for the purposes of subsection (1), to be taken to be an offence against this Act in relation to the products so seized.

DIVISION 4—MISCELLANEOUS

Immunity from civil liability for the Crown and officers

23. If an officer—

- (a) acts honestly in the exercise of powers conferred by this Act; or
- (b) acts in the honest but mistaken belief that the act is authorised by this Act,

no civil liability attaches to the Crown or the officer in respect of the act.

Secrecy

24. An officer shall not divulge or communicate information obtained in, or in connection with, the administration of this Act, except—

- (a) with the consent of the person from whom the information was obtained; or
- (b) in connection with the administration of this Act; or

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- (c) to—
 - (i) the Commonwealth Commissioner of Taxation; or
 - (ii) an officer of this or another State, or of a Territory, employed in the administration of laws relating to taxation; or
 - (iii) the Comptroller-General of the Australian Customs Service; or
- (d) to the Commissioner for Corporate Affairs; or
- (e) for the purposes of legal proceedings.

Penalty: \$10 000.

**PART 5
MISCELLANEOUS**

Register of licences

24AA. (1) The Commissioner must cause a register to be kept of licensees under this Part.

(2) The register must be kept available for public inspection during ordinary office hours at a place approved by the Minister.

Application of money collected under Act

24A. (1) The money collected under this Act as licence fees must be paid into the Consolidated Account.

(2) Not less than 5.5 per cent of the amount collected under this Act as fees for tobacco merchants' licences (not being restricted licences) must be paid into the Sports Promotion, Cultural and Health Advancement Fund for application in accordance with the provisions of the *Tobacco Products Control Act 1986*.

(3) Payments must be made into the Fund for the purposes of subsection (2) at times and in amounts determined by the Treasurer after consultation with the Minister of Health.

(4) This section is sufficient authority for appropriation from the Consolidated Account of the amounts referred to in subsection (3).

Commissioner may requisition information

25. (1) The Commissioner may, by instrument in writing, require any person who is or has been engaged (whether as a principal, agent or employee) in a business consisting of or related to tobacco merchandising to furnish the Commissioner, within a period specified in the instrument, with a return containing the particulars of dealings in tobacco products referred to in the instrument.

(2) A person who fails, without reasonable excuse, to comply with a requirement under subsection (1) is guilty of an offence.

Penalty: \$20 000.

Commissioner may require verification of information

26. (1) The Commissioner may require any person by whom an application, declaration or return has been or is to be made under this Act to verify information contained in it by statutory declaration.

(2) A person who fails, without reasonable excuse, to comply with a requirement under subsection (1) is guilty of an offence.

Penalty: \$20 000.

Keeping of records

27. (1) Subject to subsection (2), a person who engages or has engaged in tobacco merchandising—

(a) must keep records of his or her dealings in tobacco products in accordance with the regulations; and

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- (b) must preserve those records for a period of 5 years or a lesser period determined by the Commissioner.

Penalty: \$10 000.

(1a) Subject to subsection (2), where tobacco products are being transported by a person prior to their sale by retail, the person—

- (a) must keep a record containing the prescribed particulars in the vehicle being used to transport the tobacco products whilst they are being transported; and
- (b) must preserve those records for a period of 5 years or a lesser period determined by the Commissioner.

Penalty: \$10 000.

(2) The preservation of a record is not required under this section if the Commissioner notifies the tobacco merchant to that effect.

False applications, declarations and returns

28. (1) A person who makes a false or misleading statement in an application, declaration or return under this Act is guilty of an offence.

Penalty: \$50 000.

(2) It is a defence to a charge of an offence under subsection (1) to prove that the defendant had no intention to mislead.

Unlawful holding out as licensed merchant

29. A person who is not a licensed tobacco merchant shall not hold himself or herself out as a licensed tobacco merchant.

Penalty: \$50 000.

Invoice to be prepared

29A. A person selling tobacco products by wholesale must prepare and tender to the purchaser an invoice containing the prescribed particulars in respect of the sale.

Penalty: \$10 000

Endorsement to be made on wholesale invoices

30. A licensed tobacco merchant shall endorse or cause to be endorsed on every invoice issued by the merchant in relation to the sale of tobacco products by wholesale:

SOLD BY LICENSED TOBACCO MERCHANT—LICENCE No. *(here insert the number of the licence)*

Penalty: \$10 000.

Offences

31. (1) The offences constituted by this Act are summary offences.

(2) A prosecution for an offence against this Act may be commenced within five years after the day on which the offence is alleged to have been committed.

- (3) If a body corporate is guilty of an offence against this Act—
- (a) each director of the body corporate; and
 - (b) each agent of the body corporate (not being one of its employees) who was involved in the circumstances of the offence; and
 - (c) each manager of the body corporate or any aspect of its business who was involved in the circumstances of the offence,

is guilty of an offence and is liable to the same penalty as is prescribed for the principal offence unless it is proved that the director, agent or manager could not, by the exercise of reasonable diligence, have prevented the commission of the offence by the body corporate.

Recovery of amounts payable under Act

31A. (1) An amount payable under this Act may be recovered by the Commissioner, as a debt due to the Crown, in a court of competent jurisdiction.

(2) A certificate purporting to be signed by the Commissioner and stating that a specified amount is an amount payable under this Act in respect of a specified person is admissible in proceedings for the recovery of that amount and will, in the absence of proof to the contrary, be proof of the amount payable.

Evidentiary provisions

32. (1) It shall be presumed, in the absence of proof to the contrary, that the occupier of the premises in which a vending machine is situated is the vendor of the tobacco products dispensed by the machine.

- (2) In proceedings for an offence against this Act—
- (a) an allegation in the complaint that a person named in the complaint was, at a specified time, an inspector;
 - (b) an allegation in the complaint that a tobacco merchant was, or was not, at a specified time, the holder of a tobacco merchant's licence,

will be accepted as proved in the absence of proof to the contrary.

(3) If, in proceedings for an offence against this Act, it is proved that a person purchased or was in possession of more than a prescribed quantity of tobacco products it will be presumed, in the absence of proof to the contrary, that the person purchased or was in possession of the tobacco products for the purposes of sale.

Regulations

33. (1) The Governor may make such regulations as are contemplated by this Act or as are necessary or expedient for the purposes of this Act.

- (2) Without limiting the generality of subsection (1), the regulations—
- (a) may require tobacco merchants to furnish returns relating to stocks of, or dealings in, tobacco products;

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- (b) may require that tobacco products sold by retail by unlicensed tobacco merchants bear distinctive markings, or be enclosed in packages or wrappers bearing distinctive markings, designed to alert potential consumers into whose hands they may fall of the illegality of consuming the products without a consumption licence;
 - (c) grant exemptions from this Act, or any specified provisions of this Act in relation to—
 - (i) a specified class of tobacco products; or
 - (ii) a specified person or class of persons; or
 - (iii) a specified transaction or class of transactions;
 - (d) may impose a penalty (not exceeding \$2 000) for breach of a regulation.
- (3) This Act may be amended by regulation for the purpose of altering licence fees.
- (4) If a regulation made under subsection (3) is disallowed, the provision affected by the amendment reverts to the form in which it existed immediately before the amendment.

SCHEDULE 1

(Section)

Form No. 1

1. I (here insert the name of the purchaser) of (here insert the address of the purchaser) acknowledge that I have purchased from (here insert the name of the tobacco merchant) the following tobacco products (here state the nature (including the brand names) and quantities of tobacco products purchased).

2.¹ I declare that I am the holder of consumption licence No. (here insert the number of the consumption licence)

.....
(Signature)

¹ Where the purchaser acts as an agent for the consumer, substitute for this paragraph the following:

2. In purchasing these tobacco products I acted as agent for (here insert the name of the principal) of (here insert the address of the principal).

3. I declare that my principal is the holder of consumption licence No. (here insert the number of the principal's consumption licence).

Form No. 2

1. I (here insert the name of the purchaser) of (here insert the address of the purchaser) acknowledge that I have purchased from (here insert the name of the tobacco merchant) the following tobacco products (here state the nature (including the brand names) and quantities of tobacco products purchased).

2.¹ I understand that South Australian law prohibits me from consuming these tobacco products without a consumption licence.

3.¹ I undertake that, if I or any person acting with my consent consumes these tobacco products contrary to the *Tobacco Products (Licensing) Act 1986*, I will pay to the State of South Australia the sum of \$200 by way of a civil penalty.

.....
(Signature)

¹ Where the purchaser acts as agent for the consumer, substitute for paragraphs 2 and 3 the following paragraphs:

2. In purchasing these tobacco products I acted as agent for (here insert the name of the principal) of (here insert the address of the principal).

3. I understand that South Australian law prohibits consumption of these tobacco products without a consumption licence under the *Tobacco Products (Licensing) Act 1986*.

4. I undertake that if my principal or I, or any person acting with the consent of either of us, consumes these tobacco products contrary to the *Tobacco Products (Licensing) Act 1986*, I will pay to the State of South Australia the sum of \$200 by way of a civil penalty.

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SCHEDULE 2

Transitional Provisions

1. A licence in force under the repealed Act immediately before the commencement of this Act continues in force (subject to surrender under this Act) as a tobacco merchant's licence under this Act until the end of the period for which it was granted.

2. An annual licence under the repealed Act to which Clause 1 applies becomes, on the commencement of this Act, a restricted licence.

3. Tobacco products obtained from a tobacco merchant licensed under the repealed Act will be taken, for the purposes of this Act, to have been obtained from a tobacco merchant licensed under this Act.

APPENDIX

LEGISLATIVE HISTORY

Transitional Provisions

(Transitional provision from Tobacco Products (Licensing) Act Amendment Act 1990, s. 6)

6. The amendments effected to section 13 of the principal Act by this Act apply in relation to any tobacco merchant's licence that is to operate on or after 1 November, 1990 (including any such licence issued before 1 November, 1990).

(Transitional provision from Tobacco Products (Licensing) (Fees) Amendment Act 1992, s. 6)

6. The amendments made by section 4 of this Act apply in relation to any licence in force under the principal Act on or after 1 September 1992 (including any such licence issued before that date).

(Transitional provision from Tobacco Products (Licensing) (Fees) Amendment Act 1993, s. 6)

6. The amendments made by section 4 of this Act apply in relation to any licence in force under the principal Act on or after 1 June 1993 (including any such licence issued before that date).

(Transitional provision from Statutes Amendment and Repeal (Common Expiation Scheme) Act 1996, s. 5)

5. An Act repealed or amended by this Act will continue to apply (as in force immediately prior to the repeal or amendment coming into operation) to an expiation notice issued under the repealed or amended Act.

Legislative History

(entries in bold type indicate amendments incorporated since the last reprint)

Section 4:	redesignated as s. 4(1) by 80, 1995, s. 3(g) definition of "purchase" inserted by 80, 1995, s. 3(a) definition of "sale" inserted by 80, 1995, s. 3(b) definition of "tobacco merchandising" amended by 80, 1995, s. 3(c), (d) definition of "tobacco merchant" substituted by 80, 1995, s. 3(e) definition of "tobacco product" amended by 80, 1995, s. 3(f) inserted by 80, 1995, s. 3(g)
Section 4(2) and (3):	amended by 34, 1996, s. 4 (Sched. cl. 37)
Section 8(1):	repealed by 34, 1996, s. 4 (Sched. cl. 37)
Section 8(3) - (6):	repealed by 34, 1996, s. 4 (Sched. cl. 37)
Section 9(2):	amended by 47, 1992, s. 3; 38, 1993, s. 3
Section 9(3):	amended by 80, 1995, s. 4
Section 11(1):	amended by 80, 1995, s. 5(a)
Section 11(3):	amended by 80, 1995, s. 5(b)
Section 13(1):	amended by 42, 1988, s. 18(a)-(d); 42, 1990, s. 3(a)-(d); 47, 1992, s. 4(a)-(d); 38, 1993, s. 4
Section 13(6):	substituted by 42, 1990, s. 3(e)
Section 13(7):	amended by 47, 1992, s. 4(e), (f)
Section 13(11):	inserted by 80, 1995, s. 6
Section 15(1):	amended by 80, 1995, s. 7
Section 16(1):	amended by 80, 1995, s. 8
Section 17:	substituted by 80, 1995, s. 9
	Division 3 of Part 4 comprising s. 22 and heading repealed and ss. 22 - 22D and heading inserted in its place by 80, 1995, s. 10
Section 24:	amended by 42, 1990, s. 4; 80, 1995, s. 11
Section 24AA:	inserted by 80, 1995, s. 12
Section 24A:	inserted by 42, 1988, s. 18(e)

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Section 24A(2):	amended by 42, 1990, s. 5; 47, 1992, s. 5; amended by 38, 1993, s. 5
Section 27(1):	substituted by 80, 1995, s. 13
Section 27(1a):	inserted by 80, 1995, s. 13
Section 29A:	inserted by 80, 1995, s. 14
Section 31A:	inserted by 80, 1995, s. 15
Section 32(3):	inserted by 80, 1995, s. 16