

South Australia

Tobacco Products Regulation (Further Restrictions) Amendment Act 2004

An Act to amend the *Tobacco Products Regulation Act 1997*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Tobacco Products Regulation (Further Restrictions) Amendment Act 2004*.

2—Commencement

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

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Tobacco Products Regulation Act 1997*

4—Amendment of section 4—Interpretation

- (1) Section 4(1)—after the definition of *act* insert:

advertise tobacco products means take any action that is designed to publicise or promote tobacco products, smoking, or the sale of tobacco products, whether visual or auditory means are employed and whether tobacco products are directly depicted or referred to or symbolism of some kind is employed, and includes take any action of a kind prescribed by regulation, and *tobacco advertisement* and *advertisement* have corresponding meanings;

- (2) Section 4(1), definition of *entertainment*—delete the definition and substitute:

employee has the same meaning as in the *Occupational Health, Safety and Welfare Act 1986*;

enclosed public place, workplace or shared area means—

- (a) an enclosed public place; or
- (b) an enclosed workplace; or
- (c) an enclosed shared area;

- (3) Section 4(1), definition of *health warning*— delete "for Human Services"

- (4) Section 4(1), definition of *place of public entertainment*—delete the definition and substitute:

multi-unit premises means premises divided into parts that are in separate ownership or let or provided for separate occupation;

place includes a vehicle;

- (5) Section 4(1), definition of *public*—delete the definition and substitute:
public area or *public place* means an area or place that the public, or a section of the public, is entitled to use or that is open to, or used by, the public or a section of the public (whether access is unrestricted or subject to payment of money, membership of a body or otherwise);
- (6) Section 4(1)— after the definition of *record* insert:
residential premises means—
- (a) a house, home or residential unit, apartment or flat; or
 - (b) a bedroom or living area let or provided for separate occupation (for example, accommodation in a motel, hotel, boarding house, hostel, nursing home or college or accommodation for employees); or
 - (c) a sleeping or living area in a prison or other place of detention; or
 - (d) any other place of a kind prescribed by regulation;
- (7) Section 4(1)— after the definition of *sell* insert:
shared area means an area in multi-unit premises the use of which is shared by persons from various parts of the premises that are in separate ownership or occupation;
- (8) Section 4(1), definition of *tobacco product*— after paragraph (f) insert:
(g) any product that does not contain tobacco but is designed for smoking,
- (9) Section 4(1)— after the definition of *vending machine* insert:
workplace has the same meaning as in the *Occupational Health, Safety and Welfare Act 1986*, but does not include—
- (a) a place occupied as residential premises; or
 - (b) a place (other than a vehicle) where only a single self-employed person is working; or
 - (c) a vehicle that is used for work purposes by only one person; or
 - (d) any other place of a kind prescribed by regulation.
- (10) Section 4—after subsection (2) insert:
- (3) A place or area is *enclosed* if it is fully enclosed or is at least partially covered by a ceiling and has walls such that the total area of the ceiling and wall surfaces exceeds 70 per cent of the total notional ceiling and wall area.
 - (4) For the purposes of subsection (3)—
 - (a) *ceiling* includes any structure or device (whether fixed or movable) that prevents or impedes upward airflow, but does not include anything prescribed by regulation;
 - (b) *wall* includes any structure or device (whether fixed or movable) that prevents or impedes lateral airflow, but does not include anything prescribed by regulation;

- (c) the *total notional ceiling and wall area* is the sum of—
 - (i) what would be the total area of the wall surfaces if—
 - (A) the walls were continuous, any gap in the walls being filled by a surface of the minimum area required for the purpose; and
 - (B) the walls were of a uniform height equal to the lowest height of the ceiling; and
 - (ii) what would be the floor area of the space within the walls if the walls were continuous as referred to in subparagraph (i).

5—Insertion of section 4A

After section 4 insert:

4A—Independent Gambling Authority powers excluded

This Act operates to the exclusion of any power of the Independent Gambling Authority to restrict the sale or consumption of tobacco products.

6—Amendment of section 9—Licence conditions

Section 9(2)—delete subsection (2) and substitute:

- (2) Without limiting subsection (1), the conditions of a licence may include—
 - (a) a condition under which the holder of the licence is prevented from selling tobacco products except at a single place specified in the condition (with the effect that a separate licence will be required by the person for any or each other place at which the person sells tobacco products);
 - (b) a condition that restricts the points of sale of tobacco products within the place at which the holder of the licence may sell tobacco products under the licence.

7—Substitution of heading to Part 3

Heading to Part 3—delete the heading and substitute:

Part 3—Restrictions on supply or promotion of tobacco products

8—Repeal of section 28

Section 28—delete the section

9—Amendment of section 32—Tobacco products in relation to which no health warning has been prescribed

Section 32—delete "for Human Services"

10—Repeal of section 33

Section 33—delete the section

11—Substitution of section 36

Section 36—delete the section and substitute:

36—Products designed to resemble tobacco products

A person must not sell by retail any product (other than a tobacco product) that is designed to resemble a tobacco product.

Maximum penalty: \$5 000.

12—Substitution of section 37

Section 37—delete the section and substitute:

37—Sale of tobacco products by vending machine

A person must not sell cigarettes or any other tobacco product by means of a vending machine unless—

- (a) the machine is situated in an area delineated under a gaming machine licence under the *Gaming Machines Act 1992* as the area in which gaming machines may be operated pursuant to the licence and no other such vending machine is situated in the gaming area or any other part of the premises in respect of which the licence is in force under the *Liquor Licensing Act 1997*; or
- (b) the machine is situated in some other part of premises in respect of which a licence is in force under the *Liquor Licensing Act 1997* and can only be operated by obtaining a token from, or with some other assistance from, the holder of the licence or an employee of the holder of the licence and no other such vending machine is situated in the premises in respect of which the licence is in force; or
- (c) the machine is situated in a part of the casino in which the public are permitted to engage in gambling activities under the *Casino Act 1997* and no other such vending machine is situated in the casino.

Maximum penalty: \$5 000.

13—Substitution of section 38

Section 38—delete the section and substitute:

38—Carrying tray etc of tobacco products for making of successive retail sales

- (1) A person must not go amongst persons in premises carrying tobacco products in a tray or container or otherwise on his or her person for the purpose of making successive sales of tobacco products by retail.

Maximum penalty: \$5 000.

- (2) A person must not cause or permit another to engage in the practice referred to in subsection (1) in premises under the person's control.
Maximum penalty: \$5 000.

38A—Sale or supply of tobacco products to children

- (1) If a tobacco product is sold or supplied to a child, the responsible person is guilty of an offence, or if there is more than one responsible person, each responsible person is guilty of an offence.
Maximum penalty: \$5 000.
Expiation fee: \$315.
- (2) It is a defence to a charge of an offence against subsection (1) that was allegedly committed in the course of a business to prove that—
- (a) the proprietor of the business or some person acting on behalf of the proprietor of the business required the minor to produce evidence of age of a kind prescribed by regulation; and
 - (b) the minor made a false statement, or produced false evidence, in response to that requirement; and
 - (c) in consequence the person who served or assisted the minor reasonably assumed that the minor was of or above the age of 18 years.
- (3) It is a defence to a charge of an offence against subsection (1) that was allegedly committed otherwise than in the course of a business to prove that the defendant had reasonable cause to believe that the child was of or above the age of 18 years.
- (4) The defence under subsection (2) or (3) applies to the exclusion of the general defence under section 79.
- (5) A person who sells tobacco products by retail or who occupies premises in which a vending machine that is designed to sell tobacco products is situated must display a notice in the prescribed form setting out the effect of, and the penalty for, an offence against subsection (1) in a manner and position that is likely to attract the attention of his or her customers or of persons using the machine.
Maximum penalty: \$750.
Expiation fee: \$105.
- (6) In this section—
- responsible person**, in relation to the sale or supply of a tobacco product to a child, means—
- (a) if the product is sold or supplied in the course of a business otherwise than by means of a vending machine—
 - (i) the proprietor of the business; or
 - (ii) a person who sells or supplies the product on behalf of the proprietor; or

- (b) if the product is sold or supplied by means of a vending machine—
 - (i) the proprietor of the business carried on in the premises where the machine is situated; or
 - (ii) a person who, on behalf of the proprietor, provides a token to, or other assistance to, the child for the operation of the machine; or
- (c) if the product is sold or supplied otherwise than in the course of a business—the person who sells or supplies the product.

14—Amendment of section 39—Power to require evidence of age

- (1) Section 39(1)—delete "or prescribed product"
- (2) Section 39(3)(ab)—delete paragraph (ab)

15—Amendment of section 40—Certain advertising prohibited

- (1) Section 40(1)—delete subsection (1) and substitute:
 - (1) A person must not advertise tobacco products in the course of a business or for any direct or indirect pecuniary benefit.
Maximum penalty: \$5 000.
- (2) Section 40(3)(a), (b), (c) and (d)—delete paragraphs(a), (b), (c) and (d) and substitute:
 - (a) the display, in accordance with the regulations, of signs outside premises where tobacco products are sold by retail; or
 - (b) the provision of assistance to customers or potential customers by sales assistants in premises where tobacco products are sold by retail;
or
 - (c) action of a kind prescribed by regulation; or

16—Amendment of section 41—Prohibition of certain sponsorships

Section 41(3)—delete subsection (3)

17—Substitution of sections 44 to 47

Sections 44 to 47—delete the sections and substitute:

45—Business promotions to attract smokers

A person must not display signs, or engage in a practice of any kind, designed to promote a business as welcoming or permitting smoking on its premises.

Maximum penalty: \$5 000.

Part 4—Restrictions on smoking

46—Smoking banned in enclosed public places, workplaces and shared areas

- (1) Smoking is banned in an enclosed public place, workplace or shared area.
- (2) If a person smokes in contravention of subsection (1), the person is guilty of an offence.
Maximum penalty: \$200.
Expiation fee: \$75.
- (3) If smoking occurs in an enclosed public place in contravention of subsection (1), the occupier of the place is guilty of an offence.
Maximum penalty: \$1 250.
Expiation fee: \$160.
- (4) If smoking occurs in an enclosed workplace in contravention of subsection (1), the employer with responsibility for the workplace under the *Occupational Health, Safety and Welfare Act 1986* is guilty of an offence.
Maximum penalty: \$1 250.
Expiation fee: \$160.
- (5) It is a defence to an offence against subsection (3) or (4) if the defendant proves—
 - (a) that he or she did not provide an ashtray, matches, a lighter or any other thing designed to facilitate smoking where the contravention occurred; and
 - (b) that—
 - (i) he or she was not aware, and could not reasonably be expected to have been aware, that the contravention was occurring; or
 - (ii) he or she requested the person smoking to stop smoking and informed the person that the person was committing an offence.

47—Temporary exceptions to smoking ban

- (1) Until the end of October 2007, there are exceptions to the smoking ban in bars and lounge areas as follows:
 - (a) in licensed premises (other than the casino) with multiple separate bars, the ban does not apply in separate bars designated in the prescribed manner by the licensee as smoking areas or in separate lounge areas designated in the prescribed manner by the licensee as smoking areas if—
 - (i) the prescribed area is excluded in the prescribed manner from any designated smoking area; and

- (ii) at least 1 of the separate bars in the premises is not a designated smoking area; and
 - (iii) no more than 1 of the designated smoking areas consists of or includes a dining area;
 - (b) in licensed premises (other than the casino) with a single separate bar, the ban does not apply in an area of the bar designated in the prescribed manner by the licensee as a smoking area or in separate lounge areas designated in the prescribed manner by the licensee as smoking areas if—
 - (i) the prescribed area is excluded in the prescribed manner from any designated smoking area; and
 - (ii) any designated smoking area in the bar does not exceed 50 per cent of the total area of the bar and is not alongside more than 50 per cent of the length of the drinks service counter in the bar; and
 - (iii) any dining area in the bar consists of or includes the part of the bar not within the designated smoking area; and
 - (iv) no more than 1 of the designated smoking areas consists of or includes a dining area;
 - (c) in the casino, the ban does not apply in bars designated in the prescribed manner by the licensee as smoking areas or in lounge areas designated in the prescribed manner by the licensee as smoking areas if—
 - (i) the prescribed area is excluded in the prescribed manner from any designated smoking area; and
 - (ii) no more than half of the bars in the casino are designated as smoking areas; and
 - (iii) no more than 1 of the designated smoking areas consists of or includes a dining area.
- (2) Until the end of October 2005, in a gaming area, the smoking ban does not apply in an area designated in the prescribed manner by the licensee as a smoking area if —
 - (a) the area within 1 metre of any service area is excluded in the prescribed manner from the designated smoking area; and
 - (b) in the case of a gaming area in which gaming machines may be operated (not being the casino)—
 - (i) the designated smoking area contains no more than 75 per cent of the gaming machines in the gaming area; and
 - (ii) the gaming machines not in the designated smoking area consist of a single row or grouping of machines separated from the designated smoking area by not less than 1 metre; and

- (c) in any other case—the designated smoking area does not exceed 75 per cent of the total area of the gaming area.
- (3) From the end of October 2005 until the end of October 2007, in a gaming area, the smoking ban does not apply in an area designated in the prescribed manner by the licensee as a smoking area if—
 - (a) the area within 1 metre of any service area is excluded in the prescribed manner from the designated smoking area; and
 - (b) in the case of a gaming area in which gaming machines may be operated (not being the casino)—
 - (i) the designated smoking area contains no more than 50 per cent of the gaming machines in the gaming area; and
 - (ii) the gaming machines not in the designated smoking area consist of a single row or grouping of machines separated from the designated smoking area by not less than 1 metre; and
 - (c) in any other case—the designated smoking area does not exceed 50 per cent of the total area of the gaming area.
- (4) In this section—

bar means an enclosed public area in licensed premises that has 1 or more drinks service counters and is used solely or mainly for the consumption of alcoholic drinks rather than meals, but does not include a gaming area or functions area;

casino has the same meaning as in the *Casino Act 1997*;

dining area means an enclosed public area in licensed premises used (whether or not exclusively) for the consumption of meals;

drinks service counter means a fixed counter across which alcoholic drinks are supplied directly to customers and at which, or in the immediate vicinity of which, customers may remain and consume the drinks supplied;

functions area means an enclosed public area in licensed premises while it is given over under a special arrangement to the exclusive use of members of a group;

gaming area means—

- (a) an enclosed public area in licensed premises delineated under a gaming machine licence under the *Gaming Machines Act 1992* as the area in which gaming machines may be operated pursuant to the licence; or
- (b) an enclosed public area of the casino in which the public are permitted to engage in gambling activities under the *Casino Act 1997*; or

- (c) an enclosed public area in which a bingo session is being conducted under a licence or exemption under the *Lottery and Gaming Regulations 1993*;

licensed premises means premises that are the subject of a single licence in force under the *Liquor Licensing Act 1997*;

licensee includes a person conducting a bingo session under an exemption under the *Lottery and Gaming Regulations 1993*;

lounge area means an enclosed public area in licensed premises that does not have a drinks service counter but is used solely or mainly for the consumption of alcoholic drinks rather than meals, but does not include a gaming area;

meal means a genuine meal eaten by a person seated at a table;

service area means a drinks service counter or any other part of licensed premises at which an employee of the licensee is stationed to provide services to customers;

smoking ban means the ban on smoking under section 46.

- (5) For the purposes of this section, public areas in premises are **separate** if separated by a fixed wall surface that is unbroken or has a total surface area not less than 50 per cent of the area of the interface between the public areas.
- (6) For the purposes of subsection (1), the **prescribed area** is the area within 1 metre of any service area.
- (7) However, if a bar has a continuous fixed wall surface (whether or not including doors or windows) that, within 3 metres of the drinks service counter, borders the public area alongside not less than 75 per cent of the length of the drinks service counter in the bar—
- (a) subsection (6) does not apply in relation to the bar; and
 - (b) if the bar is a bar referred to in subsection (1)(a) or (c), the **prescribed area** in the bar is an area that is not less than 25 per cent of the total area of the bar and adjoins not less than 25 per cent of the length of the drinks service counter in the bar.
- (8) This section will expire at the end of October 2007.

18—Insertion of Part 6

After section 69 insert:

Part 6—Trial of nicotine replacement therapy to aid in quitting smoking

70—Trial of nicotine replacement therapy to aid in quitting smoking

- (1) The Minister must establish a scheme to trial the effectiveness of using nicotine replacement therapy to overcome the physical addiction to tobacco products.
- (2) The Minister must establish the scheme in accordance with the following principles:
 - (a) at least 1 000 users of tobacco products who wish to quit using tobacco products must participate in the trial;
 - (b) the trial must be conducted in accordance with established scientific methods using control groups;
 - (c) participants in the trial must be selected according to a means test;
 - (d) participants in the trial must receive a subsidy determined by the Minister of up to 75% of any cost incurred by the participant for nicotine replacement therapy but not exceeding \$300 per participant;
 - (e) an evaluation of the trial must be carried out to determine—
 - (i) whether the nicotine replacement therapy contributed significantly to the success rate of participants quitting the use of tobacco products; and
 - (ii) whether making nicotine replacement therapy generally affordable would be a cost-effective method of dealing with a serious public health issue.
- (3) The Minister must take into account any recommendations of Quit SA when establishing the scheme.

Note—

Quit SA is an initiative of The Cancer Council of Australia and the National Heart Foundation (SA Division). Most of its funding is provided by the State Government.

19—Amendment of section 71—Exemptions

- (1) Section 71(3)(c)—delete "for Human Services"
- (2) Section 71(4)(a)—delete "for Human Services"

20—Amendment of section 81—Vicarious liability

Section 81—after its present contents (now to be designated as subsection (1)) insert:

- (2) If an employee or agent is convicted of an offence against this Act, the employer or principal is, subject to the general defence under this Part, guilty of an offence and liable to the same penalty as may be imposed for the principal offence.
- (3) If an offence is committed against this Act in relation to a sale, any person who has derived or would, if the sale were completed, expect to derive a direct or indirect pecuniary benefit from the transaction is, subject to the general defence under this Part, guilty of an offence and liable to the same penalty as may be imposed for the principal offence.

21—Amendment of section 87—Regulations

- (1) Section 87(2)(d)—delete "for Human Services"
- (2) Section 87(2)(e)—delete "for Human Services"
- (3) Section 87(2)(f)—delete "in, or in conjunction with, advertisements of tobacco products" and substitute:

at premises at which tobacco products are offered for sale by retail
- (4) Section 87(2)—after paragraph (f) insert:
 - (fa) prescribe signs that must be displayed in relation to places or areas where smoking is prohibited or permitted and the manner and form in which those signs must be displayed;