

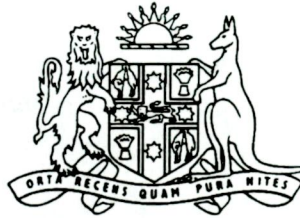


New South Wales

Public Health Amendment (Tobacco Advertising) Act 1997 No 129

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New South Wales

Public Health Amendment (Tobacco Advertising) Act 1997 No 129

Act No 129, 1997

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- An Act to amend the *Public Health Act 1991* with respect to the advertising of tobacco products; to repeal the *Tobacco Advertising Prohibition Act 1991*; and for other purposes. [Assented to 16 December 1997]
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The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Public Health Amendment (Tobacco Advertising) Act 1997*.

2 Commencement

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

3 Amendment of Public Health Act 1991 No 10

The *Public Health Act 1991* is amended as set out in Schedule 1.

4 Repeal of Tobacco Advertising Prohibition Act 1991 No 65

The *Tobacco Advertising Prohibition Act 1991* is repealed.

Schedule 1 Amendments

(Section 3)

[1] Section 53 Definitions

Insert the following definitions in alphabetical order:

authorised officer means:

- (a) an environmental health officer, or
- (b) a person authorised as an officer for the purposes of this Part by an order made by the Director-General.

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.

racing includes horse racing and harness racing, greyhound racing and motor car and motorcycle racing.

registered club has the same meaning as in the *Registered Clubs Act 1976*.

sporting includes recreational and other activities but does not include racing.

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.

trademark includes any part of a trademark.

[2] Section 53, definition of "sell"

Omit the definition. Insert instead:

sell includes:

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

[3] Section 53, definition of "tobacco product"

Omit the definition. Insert instead:

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

[4] Sections 53A and 54

Omit section 54. Insert instead:

53A Tobacco products to which this Division does not apply

This Division does not apply to cigars or plug tobacco.

54 Certain sales prohibited

A person who:

- (a) sells a tobacco product that is not in the package in which it was packed by the manufacturer, or
- (b) sells cigarettes as individual items or in a package containing fewer than 20,

is guilty of an offence.

Maximum penalty: 50 penalty units.

[5] Section 58 Definition

Omit the section.

[6] Sections 59 Sale of tobacco products to minors

Omit "tobacco" from section 59 (1).
Insert instead "a tobacco product".

[7] Section 59 (2)

Omit "tobacco" wherever occurring.
Insert instead "tobacco product".

[8] Section 59 (4) (b)

Omit "sells tobacco".
Insert instead "sells tobacco products".

[9] Sections 59 (4) (b) and 61 (b)

Omit "tobacco is" wherever occurring.
Insert instead "tobacco products are".

[10] Part 6, Division 4

Insert after Division 3 of Part 6:

Division 4 Advertising of tobacco products

61A Objects of this Division

The objects of this Division are:

- (a) the active discouragement of the smoking of tobacco by:
 - (i) encouraging non-smokers, particularly young people, not to start smoking, and
 - (ii) limiting the exposure of children and young people to persuasion to smoke, and
- (b) the promotion of good health and the prevention of illness.

61B Certain advertising prohibited

- (1) A person who in New South Wales for any direct or indirect benefit displays a tobacco advertisement in, or so that it can be seen or heard from, a public place or a place prescribed by the regulations is guilty of an offence.
- (2) A person who in New South Wales:
 - (a) distributes to the public any unsolicited object, or
 - (b) sells, hires or supplies 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),that constitutes or contains a tobacco advertisement is guilty of an offence.
- (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) a tobacco advertisement (other than an advertisement involving an audible message) in or on a package containing a tobacco product, where:
 - (i) the advertisement was included in or on the package before it was sold by the manufacturer, and
 - (ii) the size of the package does not exceed the size (if any) prescribed by the regulations,

- (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 of tobacco products within a retail outlet, where the display complies with 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,
 - (g) any matter the subject of an exemption under section 61H, to the extent provided by the exemption.
- (4) Subsection (3) (c) does not operate so as to permit an advertisement to be created and displayed by means of:
- (a) any arrangement of two or more packages containing a tobacco product, or
 - (b) such a package and any other thing,
- unless every such package or other thing is displayed, in accordance with the regulations, within a shop at which tobacco products are sold by retail.
- (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 proprietor or the registered user within the meaning of the *Trade Marks Act 1955* of the Commonwealth, or

- (c) a brand name, used by a person who manufactures or distributes any tobacco product,

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 any other publication copies of which contain:

- (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 are printed in any language and published at regular or irregular intervals.

public place includes any place to which the public or a section of the public ordinarily has access, whether or not by payment or by invitation.

61C Competitions

- (1) A person who, in connection with the sale of a tobacco product or for the purpose of promoting the sale of a tobacco product:
- (a) supplies (whether from inside or outside New South Wales) to a person in New South Wales:
- (i) a prize, gift or other benefit, or

- (ii) 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), or
 - (b) conducts (whether from inside or outside New South Wales) a scheme:
 - (i) declared by the regulations to be a scheme to promote the sale of a tobacco product or to promote smoking generally, and
 - (ii) the whole or any part of which is implemented in New South Wales,
- is guilty of an offence.
- (2) Subsection (1) (a):
 - (a) applies whether or not the person supplied with the benefit or thing concerned is a purchaser of a tobacco product, and
 - (b) does not apply to the supply of a benefit or thing to a person who is, or is the employee of, a manufacturer or distributor of tobacco products, and
 - (c) does not apply to the supply of a benefit or thing to a person who is, or is the employee of, 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.
 - (3) 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 (2) (c), to have been so supplied for resupply to such a purchaser.

- (4) It is a defence in proceedings for an offence under this section to prove that the benefit or thing supplied, or participation in the relevant scheme, was only incidentally connected with the purchase of a tobacco product and that equal opportunity to receive that benefit or thing, or to participate in that scheme, and to buy products other than tobacco products, was afforded generally to persons who purchased products, whether or not they were tobacco products.
- (5) It is no defence in any such proceedings to prove that the benefit or thing concerned was of negligible or no value.

61D Free samples

A person who, for the purpose of inducing or promoting the sale of a tobacco product, offers, gives or distributes 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 is guilty of an offence.

61E Prohibition of sponsorships

- (1) A person who promotes or publicises, or agrees to promote or publicise, in New South Wales:
 - (a) a tobacco product or a trademark or brand name of a tobacco product, or
 - (b) the name or interests of a manufacturer or distributor of a tobacco product (whether or not that manufacturer or distributor also manufactures or distributes a product other than the tobacco product) in association directly or indirectly with the tobacco product,under a contract, or an arrangement (whether or not legally binding), under which a sponsorship is provided, or to be provided, by another person is guilty of an offence.
- (2) A person who provides, or agrees to provide, a sponsorship under a contract or arrangement of a kind referred to in subsection (1) is guilty of an offence.

- (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) This section does not apply in relation to anything to which this section does not apply by virtue of an exemption granted under section 61H.
- (5) Nothing in subsection (1), (2) or (3) applies to the giving of, or an agreement to give, a scholarship by a manufacturer or distributor of a tobacco product to an employee, or a member of the family of an employee, of the manufacturer or distributor.
- (6) 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.

61F Tobacco vending machines

- (1) A person who places, or causes or permits to be placed, in any premises in New South Wales a tobacco vending machine for operation by members of the public is guilty of an offence unless the premises are:
 - (a) a restricted area within the meaning of the *Liquor Act 1982*, or
 - (b) a bar or poker machine area within the meaning of the *Registered Clubs Act 1976*, or
 - (c) premises set aside by an employer as a staff amenity area.

- (2) A person who:
- (a) owns or is the lessee of a tobacco vending machine in New South Wales, and
 - (b) does not ensure that a statement in the prescribed form is kept conspicuously displayed on the front of the vending machine,
- is guilty of an offence.
- (3) In this section, *tobacco vending machine* means a machine, device or contrivance from which tobacco products can be obtained by an operation that involves:
- (a) inserting money, or a token or object, in the machine, device or contrivance, or
 - (b) any other action taken without the assistance of the vendor or his or her employee or agent.

61G Smokeless tobacco, confectionery and toys

- (1) A person who manufactures or sells in New South Wales a tobacco product designed for consumption otherwise than by smoking is guilty of an offence.
- (2) Subsection (1) does not apply to the manufacture or sale of prescribed mixtures or products in prescribed circumstances.
- (3) A person who sells:
- (a) any confectionery or other food, or
 - (b) any toy, amusement or other product,
- that resembles a tobacco product is guilty of an offence.
- Maximum penalty (subsection (3)): 25 penalty units.

61H Exemptions

- (1) The Minister may, by notice published in the Gazette:
- (a) exempt a person or class of persons either wholly or in part from the operation of section 61B or 61E subject to such conditions (if any) as are set out in that notice or prescribed by regulation for the purposes of this paragraph, or

- (b) amend or revoke an exemption granted under this section.
- (2) An exemption is not to be granted under this section except:
 - (a) to facilitate the promotion and conduct of a sporting, racing or cultural event that the Minister considers to be of international significance, or
 - (b) in any case of significant hardship to persons other than manufacturers or wholesalers of tobacco products.
- (3) An exemption is not to be granted under this section in connection with a sporting, racing or cultural event unless the Minister is satisfied that a failure to grant the exemption would be likely to result in the event not being held in Australia.
- (4) In deciding whether an exemption should be granted under this section in relation to a sporting, racing or cultural event, the Minister is to consult with the Minister responsible for sport, racing or the arts, as the case requires.
- (5) When deciding whether or not to grant an exemption under this section in relation to a sporting, racing or cultural event in respect of which an application is required to be made to the Minister administering the Commonwealth Act for the purposes of section 18 of that Act, the Minister is entitled:
 - (a) to refuse to grant the exemption if that application has been refused, or
 - (b) to defer making a decision on the exemption if that application has not yet been made, or is still awaiting the decision of the Commonwealth Minister, or is the subject of an appeal in accordance with section 30 of the Commonwealth Act.
- (6) In this section, *event* includes a series of events.

611 Powers of authorised officers

- (1) For the purpose of ascertaining whether any of the provisions of this Division or the regulations made under this Division are being or have been complied with or contravened in any premises, an authorised officer may, alone or with such police officers or other persons as may be necessary, enter and inspect the premises.
- (2) On entering any premises, the authorised officer may do any of the following:
 - (a) open and inspect any package on which a tobacco advertisement is displayed or that the officer reasonably believes contains any tobacco product,
 - (b) examine any labelling or advertising material that appears to be intended for use in connection with the sale of any tobacco product,
 - (c) open, or require the opening of, and examine any appliance, cabinet, dispensing unit or other item that appears to be used in connection with the sale of tobacco products,
 - (d) take such photographs, or videotape or other films, as the authorised officer considers necessary,
 - (e) inspect any invoice or record on the premises relating to tobacco products or advertising or promotional material supplied to the occupier of the premises, and make copies of any such invoice or record or any part of it and, for that purpose, take away and retain (for such time as may, for that purpose, be reasonably necessary) any such invoice or record,
 - (f) generally make such investigations and inquiries as may be necessary to ascertain whether an offence under this Division or any regulations made under this Division is being or has been committed.
- (3) This section does not authorise an authorised officer acting without a search warrant to enter any premises or part of any premises used as a dwelling without the consent of the occupier.

61J Authorised officer may require information

- (1) An authorised officer may at any time require a person by whom the officer reasonably suspects any provision of this Division or the regulations made under this Division 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 authorised officer 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.
- (3) A person who, without a reasonable excuse, refuses or fails to comply with a requirement under this section is guilty of an offence.
Maximum penalty: 100 penalty units.
- (4) A person is not guilty of an offence under subsection (3) unless, at the time at which the relevant requirement was made:
 - (a) the authorised officer had identified himself or herself to the person as an authorised officer, and
 - (b) the person had been warned that a refusal or failure to comply with the request constituted an offence.

61K Removal of certain advertisements

- (1) If a tobacco advertisement is displayed in contravention of this Division or any regulations made under this Division, a Local Court constituted by a Magistrate sitting alone may order:
 - (a) that the advertisement be removed or obscured by an authorised officer, and

- (b) if any person has been convicted of an offence against this Division or any regulations made under this Division in relation to the placement or display of the advertisement, that the person pay the reasonable costs incurred by the authorised officer in removing or obscuring the advertisement.
- (2) An authorised officer may enter any premises in order to remove or obscure an advertisement in execution of an order under subsection (1).
- (3) Any tobacco advertisement in the form of an article that is removed in accordance with such an order is taken to be the property of such person as is specified in the order.
- (4) Any costs payable under such an order may be recovered in a court of competent jurisdiction as a debt due to the Crown or a council, as the case requires.
- (5) This section does not apply to a tobacco advertisement for the time being lawfully displayed in accordance with an exemption granted under this Division.

61L Consent required for prosecutions

- (1) Proceedings for an offence against this Division or any regulations made under this Division are not to be commenced without the consent in writing of the Director-General or a person authorised by the Director-General in writing for the purposes of this section.
- (2) In any such proceedings, a certificate:
 - (a) purporting to be signed by the Director-General, or
 - (b) stating that the person who signed it is authorised by the Director-General for the purposes of this section,

is prima facie evidence of the matters stated in it, in so far as they bear on the requirements of this section.

61M Proceedings for offences

- (1) Proceedings for an offence under this Division or the regulations made under this Division may be disposed of in a summary manner before a Local Court constituted by a Magistrate sitting alone or before the Supreme Court in its summary jurisdiction.
- (2) The maximum penalty that can be imposed by a Local Court for any such offence is 100 penalty units or the maximum penalty elsewhere provided in this Division, whichever is less.
- (3) Proceedings for any such offence that are brought before a Local Court may be brought at any time within 12 months after the date on which the offence was committed.

61N Penalties

- (1) A person who is guilty of an offence under section 61B (1) or (2), 61C (1), 61D, 61E (1) or (2), 61F (1) or (2) or 61G (1) is liable:
 - (a) in the case of an individual, to a penalty of not more than:
 - (i) 50 penalty units for a first offence, or
 - (ii) 100 penalty units for a second or subsequent offence, or
 - (b) in the case of a body corporate, to a penalty of not more than:
 - (i) 200 penalty units for a first offence, or
 - (ii) 400 penalty units for a second or subsequent offence.
- (2) If a continuing state of affairs is created by an offence referred to in subsection (1), the offender is liable to a penalty of not more than:
 - (a) 50 penalty units in the case of an individual, or

- (b) 200 penalty units in the case of a body corporate, in respect of each day on which that offence continues, in addition to the penalty specified in that subsection.

61O 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 Division or the regulations made under this Division.

61P Regulations

- (1) The Governor may make regulations, not inconsistent with this Division, for or with respect to any matter that by this Division is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Division, and in particular, for or with respect to any of the following:
- (a) the labelling of packages in which tobacco 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 labelling of any such packages,
- (c) any statements or warnings to be displayed inside shops and other retail outlets where tobacco products are offered or exposed for sale,
- (d) the labelling of tobacco vending machines,
- (e) the duty of persons packing, or causing other persons to pack, specified tobacco products prepared for smoking to label those tobacco products in a specified manner,

- (f) prohibiting the sale of packages containing specified tobacco products prepared for smoking unless those packages are labelled in a specified manner,
 - (g) the form of notices to be used in connection with the entry by authorised officers on to any premises, and the manner and occasion of use of such notices,
 - (h) generally regulating the form and content of tobacco advertisements and the matter that may appear on packages containing tobacco products,
 - (i) creating offences and providing in respect of any such offence a penalty not exceeding 10 penalty units.
- (2) In this section, *specified* means specified in regulations made under this section.

[11] Section 74 Obstruction or assault of officers and others

Insert “intimidates or” after “who”.

[12] Section 74 (2)

Insert at the end of section 74:

- (2) A person who assaults an authorised officer in the course of the exercise by the officer of his or her duties under this Act or the regulations is guilty of an offence.

Maximum penalty: 50 penalty units or imprisonment for a term not exceeding 6 months, or both.

[13] Section 79 Proceedings for offences

Insert “, 61M” after “50” in section 79 (2).

[14] Schedule 4 Savings and transitional provisions

Insert after "1995" in clause 1 (2A):

or any of the following Acts:

Public Health Amendment (Tobacco Advertising) Act 1997

[15] Schedule 4, clause 1 (2B)

Omit "the *Health Legislation Amendment Act 1995*".

Insert instead "the Act concerned".

[16] Schedule 4, Part 5

Insert after Part 4:

**Part 5 Provisions consequent on enactment of the
Public Health Amendment (Tobacco
Advertising) Act 1997**

15 Saving of certain exemptions

An exemption under section 12 of the *Tobacco Advertising Prohibition Act 1991* that was in force immediately before the repeal of that section continues to have effect as though that section were still in force, and despite the provisions of section 61H.

16 Termination of agreement

- (1) The agreement dated 14 April 1989 made between the Minister for Health and Phillip Morris (Aust) Limited, Rothmans of Pall Mall (Aust) Limited, W D and H O Wills (Aust) Limited and R J Reynolds Tobacco (Aust) Inc., is terminated.
- (2) No person is entitled to compensation, and no action or proceedings at law or in equity may be instituted or maintained by any person in respect of the termination of the agreement.

17 Tobacco Advertising Prohibition Committee

- (1) The Tobacco Advertising Prohibition Committee is dissolved.
- (2) No compensation or remuneration is payable to a former member of the Tobacco Advertising Prohibition Committee for loss of office as a consequence of the enactment of this clause.

18 Tobacco vending machines

Despite section 61F, a tobacco vending machine that, on the day before the *Public Health Amendment (Tobacco Advertising) Bill 1997* was introduced into the Legislative Assembly, was lawfully placed on licensed premises (within the meaning of the *Liquor Act 1982*) that do not include a restricted area (within the meaning of that Act) may continue to be placed there until the close of business on 31 December 1998.

[Minister's second reading speech made in—
Legislative Assembly on 12 November 1997
Legislative Council on 27 November 1997]

BY AUTHORITY