

**Submission
No 21**

E-CIGARETTE REGULATION AND COMPLIANCE IN NEW SOUTH WALES

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Issue:

Submission by Graham BAXTER to the Legislative Assembly Committee on Law and Safety inquiry into E-cigarette regulation and compliance in New South Wales.

Background:

I am employed by NSW Health as the Tobacco Control Officer for the Central Coast Local Health District and have been in this position since 4 September 2023. Whilst I have only been in this position for a short time, I come to it following a 15 year career in the NSW Police Force, including 7 years spent targeting Organised Crime at the State Crime Command. My experience has allowed me to make a rapid assessment of the issues facing Authorised Officers in the E-cigarette and Tobacco Space. Whilst I am employed by NSW Health, I make this submission as a private individual concerned at the long term health impacts to the people of NSW, arising from the uncontrolled supply of e-cigarettes and illicit tobacco. The opinions offered in it are my own, and not those of NSW Health.

Nicotine as a drug.

It is important to recognise in considering the issue of e-cigarettes, that they are, like tobacco, a drug delivery system for nicotine. Nicotine is a highly addictive drug, one which a significant majority of tobacco and e-cigarette users are addicted to. Any regulation which limits the availability of e-cigarettes may cause a displacement effect, where the nicotine dependent users move on to other available nicotine delivery systems, such as illicit tobacco.

Illicit Tobacco

Based on my personal observations, and analysis of information available to me, there is a significant correlation between businesses involved in the unlawful supply of nicotine containing e-cigarettes, and those also engaged in the supply of illicit tobacco. These businesses also appear most likely to supply tobacco and e-cigarettes to minors.

The tobacco and e-cigarette space is heavily infiltrated by organised crime in the form of illicit tobacco. It is my opinion that the traditional thinking in regards to investigating and prosecuting offences identified in this space does not reflect the profit motivation and involvement of organised crime. Organised criminals view the illicit tobacco trade as low-risk and high-reward.¹

The main attraction of illicit tobacco for the consumer is the price. As an example, an illicit packet of 20 Marlboro Gold cigarettes sells for \$20, however legitimately purchased

¹ [Media Statement – Illicit Tobacco - ACIC – 26 April 2022](#)

Marlboro Gold Cigarettes cost \$41.45 for a packet of 20. This difference in price is due to the fact that duty has not been paid on illicit tobacco. Some locally grown illicit tobacco is being sold for as little as \$6 a packet of \$20 cigarettes

Research in Australia and overseas has found that lower income groups such as young people and low-socioeconomic populations tend to be responsive to price increases. The WHO 2015 report on the global tobacco epidemic concludes that raising tobacco taxes and prices reduces consumption, promotes quitting, and is especially effective in reducing tobacco use by vulnerable populations.²

Illicit tobacco increases, rather than reduces, the affordability of tobacco, undermining the efforts of various governments to reduce the consumption of tobacco products, and increasing the adverse impacts on the health of the people of NSW. Indeed, NSW has recognised the important role that taxation plays in tobacco control, recommending to the Australian Government Henry Review that “the Australian Government increase the price of tobacco through taxation and that it abolish duty-free sales of tobacco products.”³

Additionally, given the intent of the inquiry to look at the use of e-cigarettes by young people specifically, I would be concerned that young, nicotine dependent, users of e cigarettes, who could no longer acquire e-cigarettes under the proposed changes to availability currently being suggested by the TGA, would seek out illicit tobacco. The reason for this is two-fold. Firstly, illicit tobacco is attractive from a price point, and secondly, persons involved in the supply of illicit tobacco appear to have little conscience regarding sales to minors.

Traditionally illicit tobacco has been seized using powers under Section 7A of the Public Health (Tobacco) Act for offences committed under Section 7(2). Section 7(2) of the Public Health (Tobacco) Act prohibits the sale of tobacco without health warnings, and traditionally, illicit tobacco did not have the required health warnings, however, this has changed.

Recent developments have nullified the ability of Authorised Officers in this area. Organised criminals are now packing illicit tobacco in packages with all of the required health warnings, and currently, authorised officers under the Public Health (Tobacco) Act have no power to seize illicit tobacco merely because it is illicit.

Illicit tobacco also has a significant cost to the community, with the media recently reporting some 30 arsons associated with the illicit tobacco trade in Victoria, and, in my area, I have

² [National Tobacco Strategy 2023 – 2030 pp 16.](#)

³ [NSW Tobacco Strategy 2012-2021 NSW HEALTH pp 8](#)

had at least one legitimate retailer report standover type activity from persons engaged in the supply of illicit tobacco.

Sales to Minors

Traditionally, NSW Health combatted sales to minors by using minors to attempt the purchase of tobacco and e-cigarettes at retailers. Retailers are still selling both tobacco and e-cigarettes to minors, however, they are taking countermeasures in this space. These countermeasures take several forms. Referral systems, identification cards, and code words are all being used to identify minors that the retailer can “safely” sell tobacco and e-cigarettes to. More recently, it has been identified that retailers are sharing CCTV images of minors they suspect are used by NSW Health in the sales to minors operations.

My understanding is that in many Local Health Districts (LHD), these operations are on hold whilst the Work Health and Safety risks posed to the minors involved in these operations are assessed. I have consulted with my Director regarding my personal concerns about these types of operations. Beyond the risk to the minors involved, there appears to be no enabling legislation for the conduct of these operations. Whilst the children involved commit no offence in purchasing tobacco or e-cigarettes, it would be better if legislation specifically provided that evidence gained from such operations was lawfully obtained.

Since I have begun working at CCLHD I have implemented a new strategy regarding sales to minors. By seizing and reviewing CCTV from retailers I have been able to identify sales of e-cigarettes to persons believed to be under the age of 18 years.

There are a number of challenges to this approach. Under the current legislation I must be able to prove, beyond a reasonable doubt, that the person depicted in the footage is in fact under the age of 18 years. This requires that I attempt to identify the person believed to be a minor, and obtain admissible evidence that the person is both the person in the footage, and is under the age of 18 years.

Retailers have already started to take countermeasures to this approach. One retailer has, on two occasions, deleted footage from a CCTV system remotely, requiring the data to be recovered. Another retailer, following the seizure of a CCTV system at one of their stores, appears to have deleted all of the old footage at their other stores, and have set their CCTV system to only record when the store is not open. Other retailers have used fasteners that require drilling out to physically secure the CCTV system to the premises, thus preventing it from being seized.

Anecdotally, most users of e-cigarettes, including children, prefer the flavoured disposable varieties usually sold from tobacconists and other retailers, rather than the more expensive reusable type sold from specialist e-cigarette retailers.

Nicotine containing E-cigarettes

Currently, the sale of nicotine free e-cigarettes is not unlawful unless that sale is to a minor. Retailers are taking advantage of this gap in the law by claiming that the products they sell do not contain nicotine. Stickers are being placed on e-cigarette products which say “0mg”. These stickers are removed from the product at the time of sale to the consumer. This was captured in CCTV seized from inspections. CCTV also clearly depicts persons entering the premises and asking for “nicotine vapes” which they are then supplied.

Additionally, retailers are using concealments of e-cigarette’s containing nicotine to prevent their identification and seizure. CCTV has captured that the staff wait until the e-cigarette is requested by a customer before they remove it from the concealment. Concealments have also been identified which contain illicit tobacco.

The sale of e-cigarettes containing nicotine is unlawful without a prescription, however proving that an e-cigarette contains nicotine requires expensive lab testing of the product. Additionally, not all officers authorised under the Public Health (Tobacco) Act are authorised officers under the Poisons Act, thus are not empowered to seize e-cigarette products, even if they contain nicotine.

Where e-cigarette products are seized, they require storage and expensive specialised disposal, a cost traditionally borne by the LHD. Recently some funding has become available for storage and disposal at a Ministry of Health level which LHD’s can apply for after the fact.

There is currently no provision to recover the cost of storage and disposal from the offender.

The current negative licensing scheme is not fit for purpose

The current negative licensing scheme is not fit for purpose and fails to take into account the active involvement of organised crime in the illicit tobacco and e-cigarette market.

The only current licensing requirement is set down at Section 39 of the Public Health (Tobacco) Act 2008 (PHT Act). This section obliges the secretary to issue a retailer identification number upon application. There is no fit and proper person test, or public interest test, set down in the legislation.

Further, the only method by which a person can be prohibited from engaging in tobacco and e-cigarette retailing is found under section 33 of the PHT Act. This requires the person to be convicted of offences on two or more occasions. This can lead to a prohibition for a period of three months for two offences, or 12 months for three or more offences.

To be “convicted” for an offence the person must be found guilty by a Court. Penalty notices do not count as convictions. Section 33(3) of the PHT Act means that multiple offences committed on the same day only count as a single offence for the purpose of determining the length of a prohibition under section 33.

Even where multiple convictions are obtained, and a prohibition against tobacco retailing is enacted, Section 34 of the PHT Act limits the effect of that prohibition to only the premises at which the contraventions resulting in the convictions took place, and any *new* premises within 5km of that place. There is no prohibition on that person engaging in tobacco retailing at an existing store within the 5km radius, or opening a new store outside the 5km radius. Additionally there is nothing in the existing legislation which prevents “phoenixing”, the practice of continuing to trade at the same premises with a retailer identification number issued to a different person, often a spouse or family member.

Current NSW Health Prosecution Policy and KPI's

In my opinion current NSW Health prosecution policy, whilst adequate for the majority of offences under the Public Health Act 2010, does not take into account the unique challenges facing investigators and LHD's in the tobacco and e-cigarette enforcement space.

The current policy discourages court prosecutions, minimises penalties faced by retailers under the Public Health (Tobacco) Act, and does not recognise that the tobacco and e-cigarette space is infiltrated by organised crime.

Section 53 of the Public Health (Tobacco) Act 2008 provides that both corporations and directors may be prosecuted. Corporations face increased penalties under the Act. The current policy states that it is inappropriate to proceed in this manner, requiring that where an offender is a shell corporation with a single director, to proceed against the director only, limiting the penalty notice amount to \$1100 per offence.

Additionally, a full brief of evidence must be compiled and submitted to the Ministry of Health for approval, before any court prosecution can be commenced. Anecdotally, from conversations with my colleagues, there is often a decision that no prosecution will take place and no reasons are provided for that decision. This encourages Authorised Officers to issue penalty notices, as the work required is significantly less than that which is required to commence a Court prosecution. This also leads to a situation where some offences are not prosecuted at all, because there is no provision to issue a penalty notice for the offences.

The current policy is also somewhat deprecating to many of the NSW Health Authorised officers who, like myself, are former Police Officers with many years experience in conducting criminal investigations and prosecutions.

Key performance indicators are also currently used by NSW Health to assess the performance of Authorised Officers in the Tobacco Control Space. The performance is gauged on the number of inspections completed, and there is no allowance made for the difficulty or follow up arising from an individual inspection. In my opinion this policy encourages conducting inspections that lead to no or limited follow up, or are unlikely to require prosecutions.

Lack of resourcing for compliance activities.

Currently I am only employed 16 hours per week, and it is my understanding that many other tobacco control officers are either part time, or the role is performed by a Public Health Officer who has other duties under the Public Health Act. My director and I have been attempting to gather further resources by liaison with the Local Police, however they are also similarly stretched for resources.

Powers of Authorised Officers

Currently, there is some ambiguity regarding the power of Authorised Officers under the Public Health (Tobacco) Act and whether or not “inspect” includes a power to search a premises, or use force. Additionally, the definition of premises in the Act does not include a vehicle, and information indicates that persons involved in the unlawful supply of e-cigarettes and illicit tobacco are limiting the amount of product on premises, and keeping the majority of stock in vehicles nearby.

Illicit Tobacco and unlawful E-cigarette supply is a Low Risk, High reward endeavour.

Recent seizures of business records have identified that, in a single store, in a period of under five months, \$174,909 worth of illicit tobacco products were sold, in addition to \$98,583 worth of e-cigarette products believed to contain nicotine. Given the scarcity of enforcement resources, many tobacco control officers being part time, and the large profits to be made

from this activity, offenders are unlikely to be deterred by an enforcement regime with limited ability to detect offences. Even where those offences are detected, there is little to no deterrence in the current prosecution policy, or even maximum penalties that are less than the profit which stands to be made.

Authorised Officers currently have no power to seize the proceeds of unlawful sales. Whilst Police do have the power to seize these proceeds, recent joint operations proposed by the author to seize the proceeds of the sale of illicit tobacco and nicotine e-cigarettes, have been rejected. The nature of the operation was such that NSW Police would be required to take the lead, in order that proceeds of illicit tobacco and unlawful e-cigarette sales could be seized. The reasons cited for this rejection were that Police do not consider themselves to have a primary role in the tobacco and e-cigarette space, and their resources are limited.

Authorised Officers do not have adequate protections under law

Currently Authorised Officers under the Public Health (Tobacco) Act are not considered “law enforcement officers” for the purpose of [Division 8A of the Crimes Act 1900 No 40](#). As discussed, Authorised Officers are now working in a space infiltrated by organised crime, and deserve the protection of law offered to others who work in this space.

Comment:

To improve outcomes in this space regulatory reform should be targeted at making the unlawful supply of tobacco and e-cigarettes a high risk, low reward proposition. Additionally, consumer demand for these products should be tempered through laws that allow the seizure of illicit tobacco and unlawful e-cigarettes from adults, thus encouraging them to purchase the lawful products. The powers of Inspectors under the Public Health (Tobacco) Act should be clarified and enhanced, and Inspectors under that act should receive the protection of law offered to other persons working in occupations which expose them to organised crime.

Sales to Minors

Currently, “ID25 Policy” is widely adopted by retailers in relation to the supply of both alcohol and tobacco. This policy requires that the retailer’s employees to ask for proof of age from any person who appears to be under 25. Enshrining the ID25 Policy into law and placing the onus on tobacco and e-cigarette retailers to ask for ID before supplying a product would have limited to no impact on legitimate retailers, as most have already adopted this policy.

Creating a new offence of supplying products to a person reasonably suspected of being a minor without first checking proof of age, would eliminate the need to employ actual minors in sales to minors operations. Additionally, sales to minors offences could be prosecuted from CCTV if the retailer has not complied with their obligation to ask for proof of age.

To ensure that this can occur, there should be an obligation on retailers to have CCTV of sufficient quality and storage.

Sales to minors of E-cigarettes appears to be taking place at tobacconists and other retailers, and not from specialised e-cigarette stores which generally prohibit minors from entering. By prohibiting the supply of e-cigarettes from any store other than a specialist e-cigarette retailer, would go some way to drying up the supply of e-cigarettes to minors.

It should be unlawful for retailers to allow persons suspected of being minors to enter the premises of a specialist tobacconist or e-cigarette retailer. This is already common practice at most specialist e-cigarette retailers. Expanding this practice to tobacconists would the perceived increase the risk of supplying tobacco and e-cigarettes to minors, as the offence would be committed before the actual supply had taken place. The law already provides for offences of this nature under the liquor licensing legislation.

The term “sell” should be omitted from the Act and replaced with “supply” thus bringing tobacco supply into line with legislation relating to the supply of alcohol.

Additionally, the sale of disposable e-cigarettes should be banned. These are the preferred choice of minors.

Illicit tobacco

Inspectors should be granted new powers to deal with the influx of illicit tobacco. Offences should be created with significant custodial penalties for offences involving the supply of illicit tobacco and unlawful e-cigarettes. Additionally, to discourage the purchase of illicit tobacco, the legislation should clarify that illicit tobacco is unlawfully obtained, thus making it clear to the public that Police are empowered to search for and seize illicit tobacco from persons who choose to buy it. This would not be a change to the law as it stands, as illicit tobacco is already a thing which may be reasonably suspected of being unlawfully obtained.

Powers of Authorised Officers

The definition of “inspect” should be clarified to include searching a premises and using force to carry out that search if required. Further the powers of authorised officers to seize

both products and proceeds from the unlawful supply of tobacco and e-cigarettes should be expanded. “Vehicle” should be included in the definition of premises. Where products are seized the cost of the storage and disposal of those products should be borne by the offender.

Protection for Authorised Officers

Inspectors under the Public Health (Tobacco) Act should be defined as a “Law Enforcement Officer” for the purpose of the Crimes Act.

Resourcing

Local Health Districts should be resourced for, as a minimum, a full time tobacco control officer. Consideration should be given to resourcing for a second tobacco control officer, or assistant, in order to improve the safety of tobacco control officers who are, at present, required to work alone most of the time.

New Powers for the Secretary of Health

The Secretary should be empowered to prohibit a person from engaging in the supply of tobacco or e-cigarette products, with appropriate avenues of appeal available to a person aggrieved by the decision. Additionally, the Commissioner of Police should be empowered to provide criminal intelligence information to the Secretary, with appropriate protections in place to safeguard that information.

Recommendation:

Consideration be given to amending the Public Health (Tobacco) Act 2008 in the following manner:

Section 4 Definitions

Insert in alphabetical order in section 4 (1):

CCTV means Closed Circuit Television System

close associate has the same meaning as [section 4 of the Tattoo Industry Act 2012 No 32](#)

Commissioner means the Commissioner of the NSW Police.

evidence of age document has the same meaning as in [Section 4 of the Liquor Act 2007 No 90](#)

illicit tobacco includes —

- (a) any tobacco product it is reasonable to suspect is illicit tobacco;
- (b) without limiting paragraph (a), it is reasonable to suspect that a tobacco product is illicit tobacco if:
 - (i) any of the matters referred to in [sub-division 308-55 of the Taxation Administration Act 1953 \(Commonwealth\)](#) are satisfied;
 - (ii) the tobacco product is sold on a “cash only” basis, or a discount is offered if cash is paid;
 - (iii) the retail price of the tobacco product is substantially inconsistent with the retail price of legitimate tobacco products; or,
 - (iv) the tobacco product is concealed in circumstances which appear to be intended to prevent the discovery or seizure of the product.
- (c) a tobacco product is not to be considered concealed merely because a retailer has engaged in industry standard practices designed to comply with section 9.

inspect includes —

- (a) Search a premises, and
- (b) unlock, open, or look into, any cupboard, drawer, void, or other receptacle, and

- (c) require an occupier of a premises to unlock or open any cupboard, drawer, void, or other receptacle, and
- (d) use any assistance that may be required to unlock, open, or look into, any cupboard, drawer, void, or other receptacle, and
- (e) use any tool or equipment that may be required to unlock, open, or look into, any cupboard, drawer, void, or other receptacle, and
- (f) remove any screw, nut, bolt or other fastener, and,
- (g) use any force that may be reasonable in the circumstances.

person reasonably suspected of being a minor means—

- (a) A person who, to a reasonable person, is apparently less than 25 years of age, and
- (b) who did not, at or immediately before the supply or other event referred to in the Act took place, produce to the defendant an evidence of age document, bearing the image of the person reasonably suspected of being a minor, and confirming the person is over the age of 18 years.

Section 4 (1)

Omit the definition of *premises*. Insert in alphabetical order:

premises means:

- (a) a building or other structure on land, or
- (b) vacant land, or

(c) a vehicle, or

(d) a vessel, or

(e) an aircraft.

Part 2 Division 2A

Insert after Part 2 Division 2—

Part 2 Division 2A- Possession and supply of illicit tobacco and disposable e-cigarettes

11A – Meaning of “possess”

(1) For the purpose of this Act a person possesses illicit tobacco or an e-cigarette where the person knowingly—

(a) has custody of the illicit tobacco or e-cigarette; or

(b) has the illicit tobacco or e-cigarette in the custody of another person, or

(c) has the illicit tobacco or e-cigarette in or on any premises, place, vehicle, vessel or aircraft, whether or not belonging to or occupied by the person.

(2) Without limiting paragraph subsection (1), for the purposes of any proceedings under this Act, illicit tobacco or an e-cigarette is taken to be in the possession of a person so long as it is in or on any premises owned, leased or occupied by, or in the care, control or management of, the person, unless the court is satisfied that—

(a) the person did not know and could not reasonably be expected to have known that the illicit tobacco or e-cigarette was in or on the premises, or

(b) on the evidence before it, the person was not in possession of the illicit tobacco or e-cigarette.

11B Meaning of “supply”

- (1) For the purpose of this Act *supply* includes sell and distribute, and also includes agreeing to supply, or offering to supply, or keeping or having in possession for supply, or sending, forwarding, delivering or receiving for supply, or authorising, directing, causing, suffering, permitting or attempting any of those acts or things.

11C Meaning of “take part in”

- (1) For the purpose of this Act a person takes part in the supply if—
- (a) the person takes, or participates in, any step, or causes any step to be taken, in the process of that supply;
 - (b) the person provides or arranges finance for any such step in that process; or,
 - (c) the person provides the premises in which any such step in that process is taken, or suffers or permits any such step in that process to be taken in premises of which the person is the owner, lessee or occupier or in the management of which the person participates.

11D Possession of illicit tobacco prohibited

- (1) For the purpose of section [527C of the Crimes Act 1900 No 40](#), illicit tobacco is a thing which may be reasonably suspected of being unlawfully obtained, and a person who possesses illicit tobacco may be proceeded against under that section.

11E Supply of illicit tobacco prohibited

- (1) A person who supplies, or who knowingly takes part in the supply of, illicit tobacco, is guilty of an offence.

Maximum Penalty—1,000 penalty units or imprisonment for a term of 5 years, or both.

11F Prohibition on the supply of e-cigarettes and e-cigarette accessories by other than specialist e-cigarette retailers.

- (1) A person, who is not a specialist e-cigarette retailer, must not supply, or knowingly take part in the supply of, other than by wholesale, e-cigarettes or e-cigarette accessories.

- (2) A person must not supply, or knowingly take part in the supply of, an e-cigarette, or e-cigarette accessory by wholesale to another person who is not a specialist e-cigarette retailer.
- (3) A person does not commit an offence under subsection (2) if the person satisfies the Court that, prior to supplying or knowingly taking part in the supply of the e-cigarette or e-cigarette accessory to the other person, the other person produced to them evidence that the person was a specialist e-cigarette retailer.
- (4) For the purpose of this section a specialist e-cigarette retailer is a retailer who has notified the Secretary, in accordance with section 39, that they intend to engage in e-cigarette retailing only.

Maximum Penalty—1,000 penalty units or imprisonment for a term of 5 years, or both.

11G Prohibition on the supply of disposable e-cigarettes.

- (1) A person must not supply a disposable e-cigarette to another person.
- (2) For the purpose of this section, a disposable e-cigarette is any e-cigarette which does not contain components designed by the manufacturer to be user replaceable, or for which the manufacturer does not supply replacement parts.

Maximum Penalty—1,000 penalty units or imprisonment for a term of 5 years, or both.

11H Possession deemed to be for the purpose of supply

- (1) For the purposes of this Act a person who has in their possession—
 - (a) more than 5 e-cigarettes; or,
 - (b) more than 1000 cigarettes; or,
 - (c) more than 150 grams of any other product containing tobacco, whether or not the product contains ingredients other than tobacco,

is deemed to have those items in their possession for the purposes of supply, unless the person proves that they had those items in their possession otherwise than for supply.

11I Seizure of proceeds

- (1) An inspector may seize the whole of any sum of money located on premises where an offence under sections 11E, 11F or 11G is reasonably suspected of having taken place.
- (2) Money seized under this section is forfeited to the Crown upon conviction for an offence under section 11E, 11F or 11G.
- (3) In this section conviction includes a finding of guilt or payment of a penalty notice.
- (4) A Court must, if it is satisfied that there are reasonable grounds to suspect that money seized under this section is connected with any offence, whether or not an offence under this Act or the regulations, order that the money be forfeited to the Crown, whether or not any person has been found guilty of that offence.
- (5) A person may apply to a Court for the return of money seized under this section.
- (6) A Court may, if it is satisfied that there are no reasonable grounds to suspect that money seized under this section is connected with any offence, whether or not an offence under this Act or the regulations, order that the money be returned to any person with a lawful claim to the money.

11J Seizure of illicit tobacco, e-cigarettes and e-cigarette accessories

- (1) An inspector may seize any illicit tobacco, e-cigarette, or e-cigarette accessory reasonably suspected of being connected to an offence under this division.
- (2) A person may, within 7 days of an item being seized under subsection (1), apply to the Secretary for the return of the item.
- (3) The secretary must not return an item seized under subsection (1) unless the Secretary is satisfied that the items were not connected to an offence under this division.
- (4) If no application under subsection (2) is received by the Secretary within 7 days of the items being seized, the items are forfeited to the Crown and may be destroyed.
- (5) If a person is convicted of an offence under this division, the person is liable to pay to the Secretary a fee for the cost of seizure, storage, transport and disposal of the items seized in connection with that offence. The regulations may prescribe fees for the purpose of this subsection.
- (6) In this section conviction includes a finding of guilt or payment of a penalty notice.

Section 22

Omit the section, insert instead—

22 Supply of tobacco and non-tobacco smoking products, smoking accessories, e-cigarettes, or e-cigarette accessories to persons reasonably suspected of being a minor prohibited.

- (1) A person must not supply a tobacco product to a person who is reasonably suspected of being a minor.

- (2) A person must not supply a non-tobacco smoking product to a person who is reasonably suspected of being a minor.
- (3) A person must not supply a smoking accessory to a person who is reasonably suspected of being a minor.
- (4) A person must not supply an e-cigarette or e-cigarette accessory to a person who is reasonably suspected of being a minor unless it is an authorised product.
- (5) A person who contravenes this section is guilty of an offence.

Maximum penalty—

- (a) in the case of an individual, 100 penalty units for a first offence or 500 penalty units for a second or subsequent offence, or
- (b) in the case of a corporation, 500 penalty units for a first offence or 1,000 penalty units for a second or subsequent offence.

(6) In this section—

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

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

Section 23

Omit the section, insert instead—

23 Persons suspected of being minors prohibited from entering or remaining on specialist premises.

- (1) a person must not allow a person reasonably suspected of being a minor to enter into, or remain upon, any specialist premises under the management, care, or control of the person.
- (2) A person does not commit an offence under this section if, immediately upon a person who may be reasonably suspected of being a minor entering the premises, the person—

- (a) requests and is supplied with an evidence of age document confirming the person who may be reasonably suspected of being a minor is over the age of 18 years, or
 - (b) directs the person who may be reasonably suspected of being a minor to immediately leave the premises.
- (3) This section does not apply to a person under the age of 18 years who is a child of, or under the care of, an employee at the premises.
- (4) For the purpose of this section specialist premises includes—
- (a) any premises described as a tobacconist or similar, whether or not it also sells other products,
 - (b) any premises described as a vape store or similar, whether or not it also sells other products,
 - (c) any business that generates a substantial amount of its turnover from the sale of tobacco and/or, non-tobacco smoking products and/or, smoking accessories and/or, e-cigarettes and/or, e-cigarette accessories,

but does not include any premises engaging in wholesale supply only.

Section 24

Omit the section, insert instead—

24 Liability of employers

- (1) If an employee contravenes section 22 or 23, the employer is taken to have contravened that section (whether or not the employee contravened the provision without the employer's authority or contrary to the employer's orders or instructions).
- (2) It is a defence to a prosecution against an employer for such a contravention if it is established—
 - (a) that the employer had no prior knowledge of the contravention, and
 - (b) that the employer could not, by the exercise of due diligence, have prevented the contravention.
- (3) An employer may be proceeded against and convicted under section 22 or 23 by virtue of this section whether or not the employee has been proceeded against or convicted under that provision.
- (4) For the purposes of this section, any person who authorised a person who contravenes section 22 or 23 to sell tobacco products, non-tobacco smoking products, e-cigarettes or e-cigarette accessories as the person's agent is taken to be an employer of a person who contravenes section 22 or 23.

Section 25

Omit the section, insert instead—

25 Seizure of tobacco and non-tobacco smoking products, smoking accessories, e-cigarettes, or e-cigarette accessories in possession of minors

- (1) A police officer may seize a tobacco or non-tobacco smoking product, smoking accessory, e-cigarette, or e-cigarette accessory in the possession of a person in a public place if the officer suspects on reasonable grounds that the person is under the age of 18 years.
- (2) Any tobacco or non-tobacco smoking product, smoking accessory, e-cigarette, or e-cigarette accessory seized under subsection (1) is forfeited to the Crown.
- (3) A tobacco or non-tobacco smoking product, smoking accessory, e-cigarette, or e-cigarette accessory may be seized under subsection (1) from a person's possession even though the person is under the age of criminal responsibility.
- (4) The regulations may make provision for or with respect to the following—
 - (a) the procedure to be followed for the seizure of a tobacco or non-tobacco smoking product, smoking accessory, e-cigarette, or e-cigarette accessory under subsection (1),
 - (b) without limiting paragraph (a), prescribing the circumstances in which, and the procedure by which, tobacco or non-tobacco smoking products, smoking accessories, e-cigarettes, or e-cigarette accessories seized under this section are to be returned.

Section 26

Omit the section, insert instead—

26 CCTV Requirement for Tobacco and E Cigarette suppliers.

- (1) Any person who engages in the supply of tobacco products, non-tobacco smoking products, smoking accessories, e-cigarette products or e-cigarette accessories, to the public, otherwise than by wholesale, must maintain a CCTV System that complies with this section.
- (2) A CCTV System complies with this section if, and only if—
 - a. Records in an unencrypted digital format, and
 - b. covers the entire point of sale with a resolution not less than 420 pixels per metre, and
 - c. covers the point of sale so that any proof of age shown by a customer is visible to the camera, and
 - d. covers any customer area, or storage area, with a resolution of not less than 176 pixels per metre, and

- e. records continuously at all times the premises is conducting the supply of tobacco or e-cigarettes, and
- f. has a minimum storage capacity of 30 days of footage, and
- g. all footage not older than 30 days is downloadable from the device and is not deleted.

(3) In this section –

- a. **customer area** means any area a customer is permitted to go within the premises, whether or not they are usually permitted to enter that area.
- b. **storage area** means any area where tobacco products, non-tobacco smoking products, smoking accessories, e-cigarette products or e-cigarette accessories, are stored, whether or not those items are usually stored in that location.

(4) A person who contravenes this section is guilty of an offence.

Maximum penalty—

- (a) in the case of an individual, 100 penalty units for a first offence or 500 penalty units for a second or subsequent offence, or
- (b) in the case of a corporation, 500 penalty units for a first offence or 1,000 penalty units for a second or subsequent offence.

(5) It is a defence to a prosecution under this section if the person satisfied the Court that—

- a. that the person had no prior knowledge of the failure of the CCTV System to comply with this section, and
- b. that the person could not, by the exercise of due diligence, have prevented the CCTV System from failing to comply with this section.
- c. In this sub-section **due diligence** includes, but is not limited to, regular checks of the CCTV system at not more than 7 day intervals, and, preventing unauthorised physical or virtual access to footage stored on the CCTV system.

Section 27

Omit the section.

Section 28

Omit the section.

Section 31

Omit the section, insert instead—

31 Interpretation

- (1) In this part supply includes take part in the supply.

Section 31A

Omit the section.

Section 32

Omit the section.

Part 5 Division 2—

Omit the Division, insert instead—

Division 2 Prohibition Notices

33 Secretary may prohibit person from engaging in supply of tobacco products, non-tobacco smoking products, smoking accessories, e-cigarettes, or e-cigarette accessories.

- (1) The Secretary, or their delegate, may, by notice in writing served on the person, prohibit any person from engaging in supply of tobacco products, non-tobacco smoking products, smoking accessories, e-cigarettes, or e-cigarette accessories, if the Secretary is satisfied that —
- (a) the person has contravened any provision of this Act or the regulations, whether or not the person has been convicted of an offence for the contravention, or
 - (b) the person provided false or misleading information in a notification under section 39, or
 - (c) the person is not a fit and proper person to engage in the supply of tobacco products, non-tobacco smoking products, smoking accessories, e-cigarettes, or e-cigarette accessories, or
 - (d) it would be contrary to the public interest for the person to engage in the supply of tobacco products, non-tobacco smoking products, smoking accessories, e-cigarettes, or e-cigarette accessories, or
 - (e) a close associate of the person is subject to a prohibition under this section.
- (2) The prohibition notice must give reasons for the decision of the Secretary.
- (3) The notice may prohibit the person from engaging in the supply of tobacco products, non-tobacco smoking products, smoking accessories, e-cigarettes, or e-cigarette accessories generally, or may specify which products the person is prohibited from supplying specifically.

(4) A prohibition under this section—

(a) remains in force for 2 years, and

(b) commences—

(i) when the prohibition notice is served on the person, or

(ii) if the person seeks a review of the decision to issue a prohibition notice—when the review and any related appeals are finally determined

(5) A prohibition notice may be served on the person—

(a) personally, or

(b) by post, or

(c) by leaving a copy of the notice with any person apparently above the age of 16 years at the person's residential address, or

(d) by leaving a copy of the notice with any apparent employee of the person at the person's business address

34 Commissioner may provide information

(1) The Commissioner may, whether at the request of the secretary, or of their own volition, provide any criminal intelligence report or other criminal information to the Secretary for the purpose of making a determination under section 33.

(2) The Secretary is not, under this or any other Act or law, required to give any reasons for issuing a prohibition if the giving of those reasons would disclose the existence or content of any criminal intelligence report or other criminal information as referred to in subsection (1)

35 Right to seek administrative review from Civil and Administrative Tribunal

(1) A person may apply to the Civil and Administrative Tribunal for an administrative review under the [Administrative Decisions Review Act 1997](#) of a decision by the Secretary to prohibit the person from engaging in tobacco or e-cigarette retailing.

(2) In determining an application for an administrative review of a decision referred to in subsection (1), the Civil and Administrative Tribunal (and any Appeal Panel of the Tribunal in determining any internal appeal against such a review under the [Civil and Administrative Tribunal Act 2013](#))—

- (a) is to ensure that it does not, in the reasons for its decision or otherwise, disclose the existence or content of any criminal intelligence report or other criminal information provided to the secretary under section 34 without the approval of the Commissioner, and
 - (b) in order to prevent the disclosure of any such report or other criminal information, is to receive evidence and hear argument in the absence of the public, the applicant for the administrative review, the applicant's representative and any other interested party, unless the Commissioner approves otherwise.
- (3) If the Tribunal considers that information contained in a criminal intelligence report or comprising other criminal information has not been properly identified as such, the Tribunal must ask the Secretary whether the Secretary wishes to withdraw the information from consideration by the Tribunal in its determination of an application.
- (4) Information that is withdrawn by the Secretary must not be—
- (a) disclosed to any person, or
 - (b) taken into consideration by the Tribunal in determining an application.

36 Offence of engaging in the supply of tobacco products, non-tobacco smoking products, smoking accessories, e-cigarettes, or e-cigarette accessories whilst prohibited.

- (1) A person who is subject to a prohibition under section 33 must not engage in the supply of tobacco products, non-tobacco smoking products, smoking accessories, e-cigarettes, or e-cigarette accessories whilst prohibited.

Maximum penalty—

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

37 Offence of displaying tobacco products, non-tobacco smoking products, smoking accessories, e-cigarettes, or e-cigarette accessories whilst prohibited.

- (1) A person who is subject to a prohibition under section 33 must ensure that none of the following things are displayed on any premises during that period if the person is operating any business on those premises—
- (a) tobacco products or non-tobacco smoking products,

- (b) smoking accessories,
- (c) e-cigarettes or e-cigarette accessories,
- (d) any sign, information or other thing (including any health warning) relating to a thing referred to in paragraphs (a) – (c).

Maximum penalty—

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

- (2) For the purposes of this section, products in a tobacco or e-cigarette vending machine on premises are taken to be displayed on those premises.
- (3) This section does not apply to the display of tobacco products, non-tobacco smoking products, smoking accessories, e-cigarettes, or e-cigarette accessories by customers of the business concerned.

38 Aggravated Offence – offences under Part 2, Division 2A whilst prohibited.

- (1) A person who commits any offence under Part 2 Division 2A of this Act whilst subject to a prohibition under Section 33 is guilty of an offence.

Maximum Penalty—2,000 penalty units or imprisonment for a term of 10 years, or both.

- (2) A person may be convicted of an offence under this section whether or not they have been charged with or convicted of an offence under Part 2 division 2A.

Section 39 (1)

Omit “, or both,”

Section 39 (2) (e)

Omit “, or both types of retailing”

Section 39 (3)

Omit the subsection instead insert—

- (3) A person who holds a retailer identification number to engage in both tobacco and e-cigarette retailing must, within 28 days of the commencement of this section, notify the secretary whether they intend to engage in e-cigarette retailing only. A person who does not notify the Secretary within 28 days of the commencement of this section will

be deemed to hold a retailer identification number authorising them to engage in tobacco retailing only.

Section 39 (4)

Omit “, or both,”

Section 39 (5)

Omit “retailing, e-cigarette retailing or both,”

Insert instead after tobacco—

“or e-cigarette retailing,”

Section 39 (6)

Insert after (5)

(6) Nothing in this section requires the secretary to issue a retailer identification number to a person who is prohibited under section 33, or a close associate of that person.

Miscellaneous amendments to Crimes Act 1900 No 40

[1] **Section 60AA Definitions - law enforcement officer means—**

Insert after sub paragraph (q)—

(r) an Inspector within the meaning of the Public Health (Tobacco) Act 2008