

TOBACCO PRODUCTS (PREVENTION OF SUPPLY TO CHILDREN) BILL 1997

EXPLANATORY NOTE

GENERAL OUTLINE

Policy Objectives of the Bill

The primary objective of the Bill is to reduce the number of children in Queensland who take up smoking.

Youth smoking is a serious problem in Queensland. Research released in September 1997 shows that 20 per cent of school students in grades 7 to 12 (over 55,000 children) are smokers¹. Studies have shown that the earlier a person takes up smoking, the more difficult he or she will find it to quit. Also, because the health effects of smoking are cumulative, the longer a person smokes, the more likely it is that the person will develop heart disease, cancer or one of the other health problems linked with smoking. A child who starts smoking before he or she is 14 years old is 15 times more likely to die of lung cancer than someone who has never smoked². Of every four children who take up smoking now, one will die in middle age of a smoking-related illness, and one will die in old age of a smoking related illness³.

The Commonwealth Department of Health and Family Services has estimated that smoking costs the Australian community \$12.7 billion

¹ Lowe JB, Walker DM, Ballard R and Stanton WR (1997) *Smoking and Skin Protection among Year 7 to 12 students in Queensland 1996* Centre for Health Promotion and Cancer Prevention Research, University of Queensland, Brisbane

² Winstanley M, Woodward S and Walker N (1995) *Tobacco in Australia: Facts and Issues 1995* Victorian Smoking and Health Program, Melbourne

³ Petro R (1994) Smoking and Death: the Past 40 years and the next 40 *British Medical Journal* 309 at pp.937-938

dollars per annum⁴.

Seventy-eight per cent of Queenslanders who currently smoke first tried smoking as children⁵. Reducing the number of children who take up smoking is the most effective way of reducing the incidence of smoking in the community, and reducing the deaths and illnesses caused by smoking and the resultant demands on the health care system.

The number of children taking up smoking can be reduced by reducing demand for tobacco amongst young people (eg. through public health campaigns, and information provided through schools), and by reducing supply of tobacco to young people.

How the policy objectives will be achieved

The policy objectives of the Bill will be mainly achieved by reducing the availability of tobacco products to children. Making it more difficult for children to obtain tobacco has been shown to reduce the number of children who take up smoking. Reducing the availability of tobacco to children also re-enforces the message that tobacco use has serious health consequences.

The Bill controls the availability of tobacco to children in three main areas—

- supply of tobacco to children as part of a business activity (eg. “over the counter” sales, commercial distribution of free samples). In this area the Bill will—
 - make it an offence for a tobacco product supplier, or their employee, to supply tobacco to a child;
 - provide for a fair division of responsibility between tobacco product suppliers and employees in relation to any such offences; and

⁴ Collins DJ and Lapsley HM (1996) *The Social Costs of Drug Abuse in Australia in 1988 and 1992* Report prepared for the Commonwealth Department of Human Services and Health, National Drug Strategy Monograph Series No. 30, Canberra

⁵ Commonwealth Department of Health and Family Services (1996) *National Drug Strategy Household Survey: Table Set 2 Geographical Characteristics* Commonwealth Department of Health and Family Services, Canberra

- specify the measures a tobacco product supplier should take to ensure that the supplier’s employees do not supply tobacco to children;
- supply of tobacco to children via vending machines. In this area the Bill will—
 - restrict the location of tobacco vending machines to premises which are licensed premises under the *Liquor Act 1992*;
 - make it an offence for a person in charge of a vending machine to allow a child to obtain tobacco from a vending machine; and
 - specify the measures a person in charge of a vending machine should take to prevent children obtaining tobacco from the machine; and
- supply of tobacco to children other than as part of a business activity or via a vending machine (eg. supply of tobacco to a child by an 18 year old acquaintance of the child). In this area the Bill will make it an offence for an adult to supply tobacco to a child.

The Bill will also—

- raise the age at which people may legally be sold tobacco from 16 to 18 (in line with all other Australian States and Territories);
- make it clear that when supplying tobacco to a person as part of a business activity or via a vending machine, if there is doubt about the person’s age, the person should be asked for proof of age;
- require people who supply tobacco to the public to display signs about the prohibition on sales to children at the point of sale;
- prohibit certain conduct which makes tobacco more easily obtainable, or more desirable, to children (eg. the sale of single cigarettes, or food or toys which resemble tobacco products);
- provide appropriate enforcement powers for authorised persons; and
- repeal the *Juvenile Smoking Suppression Act 1905*.

The Bill is part of a package aimed at reducing youth smoking. The package will include public awareness (eg. to alert people to the fact that they may be asked for proof of age before being able to purchase tobacco products) and retailer and vending machine operator education. The retailer

and vending machine operator education component of the package will include free signage, a “plain English” explanation of the Bill, and information for employees.

Estimated cost for Government implementation

The campaign to support the Bill (i.e. public awareness campaign, retailer and vending machine operator education, free signage and training for authorised persons) will cost approximately \$500,000 in the 1997/98 financial year. The Government is currently also considering options for a broader campaign targeted at reducing demand for tobacco among young people.

Consistency with Fundamental Legislative Principles

Aspects of the Bill which raise possible fundamental legislative principles issues are outlined below.

Clause 15 Restriction on the location of tobacco product vending machines

Clause 15 of the Bill will make it illegal to possess a tobacco product vending machine other than in premises which are licensed premises under the *Liquor Act 1992* (except where the machine is being stored, repaired, transported etc.). Over 95% of vending machines in Queensland are already in licensed premises, because the tobacco companies which hold the majority of the market-share in vending machine leasing do not lease machines to be used in premises other than licensed premises. However, there are a small number of businesses which lease vending machines to be placed in other areas (eg. tourist information kiosks, service stations). Those businesses will experience a reduction in the range of premises to which they can lease tobacco product vending machines, and may experience a resulting loss in income. Lessees of vending machines who do not currently place the vending machine in a licensed premises may also experience a loss in income.

This aspect of the Bill raises a fundamental legislative principle issue in that it affects *existing* contractual arrangements of lessees and lessors of vending machines. It could therefore be argued that clause 15 infringes the principle that legislation should not adversely affect rights and liberties, or

impose obligations, retrospectively.

Queensland Health has minimised the impact of this aspect of the Bill by giving vending machine lessors notice of the proposed restriction on the location of vending machines, and providing for delayed commencement of the relevant provision in the Bill. Restricting the location of vending machines to licensed premises was an option discussed in a discussion paper released to the public in 1993. The Director-General of Queensland Health wrote to all known vending machine lessors in Queensland in October 1997, informing them that legislation is being developed to restrict the location of vending machines. The Bill provides that the provision restricting the location of vending machines to licensed premises will commence 6 months after the other provisions of the Bill. This will give vending machine lessors 9 to 10 months after the Bill is passed (and approximately a year after they were informed about the new legislation by the Director-General of Queensland Health) to find alternative locations for vending machines. It also gives vending machine lessees time to sell remaining stock.

In order to restrict children's access to tobacco, it is *essential* to ensure that vending machines cannot be placed in unsupervised areas. A Queensland Health survey in 1993 found that children were successful in 97% of their attempts to purchase tobacco from vending machines⁶. A 1992 study in New South Wales found that children perceive vending machines as the easiest source of tobacco⁷. In recognition of this, the Senate Community Affairs References Committee, in its 1995 report *The Tobacco Industry and the Costs of Tobacco-related Illness* recommended that vending machines be banned all together. This recommendation is under consideration by the Federal Government.

Legislation restricting children's access to tobacco in "over the counter" situations will be ineffective if it is not accompanied by legislation preventing children obtaining tobacco from vending machines.

Licensed premises are generally not left open to the public while unsupervised. Children are not allowed on some licensed premises, and are

⁶ Health Advancement Branch (1993) *Youth Purchase Survey 1993* Queensland Health, unpublished

⁷ Sanson-Fisher R et al (1992) Availability of Cigarettes to Minors *Australian Journal of Public Health* 16, 4, p.356

usually accompanied by adults in others. Staff in licensed premises already have responsibility for ensuring that children are not supplied with alcohol, and can be expected to properly exercise responsibilities for ensuring that children are not supplied with tobacco. Premises such as service stations and information kiosks do not have these characteristics, and a vending machine located in such an area could quickly become a prime source of tobacco for local children. This would defeat the object of the Bill.

Clause 25 Liability of person for conduct of representatives

Under clause 22 of the Bill, it will be an offence to sell cigarettes other than in a package of 20 or more cigarettes. It will also be an offence to sell cut tobacco (i.e. roll your own tobacco) in quantities of less than 25g (clause 23). The rationale for these provisions is that very small packages of cigarettes, or very small quantities of cut tobacco, are attractive to children (as children have low disposable income levels). It will be illegal to sell cigarettes or cut tobacco in less than minimum quantities to any person, not only to a child.

It will also be an offence under clause 24 of the Bill to sell food or toys which resemble a tobacco product (eg chocolate cigarettes). The rationale for this provision is that studies have shown that children who have used such products are more likely to experiment with tobacco than children who have not used such products. It will be illegal to sell food or a toy resembling a tobacco product to any person, not only a child.

It is likely that any actual sales of tobacco or food or toys in contravention of these provisions would be made not by the owners of the store at which the sale occurred, but by their employee. However, it is appropriate the liability for these offences should rest with the owner rather than with the employee. This is because these products are illegal in themselves (and not only when sold to children). Products of this nature should not be available for sale in shops at all. Therefore it is appropriate that primary liability for sales of such products will be placed with the owner of the shop.

As with most provisions to this effect, the owner of the shop will have a defence where he or she can show that he or she took reasonable steps to prevent the sale by the employee of the items concerned.

This provision may constitute a reversal of the onus of proof, because the shop owner is presumed to be responsible for the conduct of his or her

employee unless the shop owner is able to establish that he or she took reasonable steps to prevent that conduct. However, for the reasons outlined above, it is appropriate for these offences that primary responsibility be placed on shop owners rather than on their employees.

Clause 36 Power to require name and address

When an authorised person sees a person supply tobacco to a child in a commercial situation, an offence against the Bill may have been committed either by the person or, if the person is the employee of another person, by the person's employer (called a "tobacco product supplier" under the Bill). Who will be liable for the offence will depend upon whether the tobacco product supplier has taken the "prevention measures" set out in the Bill in relation to the employee. The "prevention measures" are that the supplier has instructed the employee not to supply tobacco to children, to ask for proof of age, and warned the employee that if he or she disregards these instructions he or she will commit an offence, and that the employee has acknowledged these instructions in writing.

The supply of tobacco to a child is an offence by an employee where the supplier *has* completed the prevention measures in relation to the employee, and an offence by the supplier where the supplier *has not* completed the prevention measures in relation to the employee. An authorised person who observes a sale of tobacco to a minor will not be in a position to determine whether the offence was committed by an employee or by the supplier because the authorised person will not know whether or not the prevention measures have been taken.

Most Acts enable authorised persons to demand the name and address of a person the authorised person observes committing, or suspects has just committed, an offence against the Act. A provision of this nature would be inadequate in this Bill, however, because forming a "reasonable suspicion" that an offence had been committed would necessarily involve the formation of a suspicion that the prevention measures had, or had not, been taken. An authorised person would not be in a position to form a reasonable suspicion on this matter where the authorised person had merely witnessed tobacco being supplied to a child. Determination of whether or not the prevention measures were completed would occur as part of the later investigation of the offence.

The Bill therefore provides that where an authorised person finds a

person in circumstances that lead the authorised person to reasonably suspect the person *or the person's employer* has just committed an offence against the Bill, the authorised person may require the person to state his or her name and address.

This provision may be seen to impinge on the rights and liberties of individuals because it allows an authorised person to demand name and address from a person who may not necessarily have committed an offence against the Bill. However, as is explained above, it is necessary to include a provision of this nature in order to enable an authorised person to determine whether the employee or the supplier is liable for the offence. It will not be an offence not to state name and address if neither the employee nor the tobacco product supplier is proved to have committed an offence against the Bill.

Clause 37 Power to require evidence of age, name and address of person observed being supplied a tobacco product

The *Discussion Paper on the Availability and Marketing of Tobacco Products to Children and Adolescents* proposed that it should be an offence for a child to purchase or attempt to purchase tobacco. This was a problematic proposal because enforcement would have involved police and other authorised persons in “disciplining” children who had been experimenting with tobacco. In addition, this proposal was strongly opposed by groups representing young people.

One effect of there being an offence for a child purchasing tobacco is that if an authorised person observed a young-looking person being supplied with tobacco, the authorised person would have the power to ask the person for his or her name and address (since the authorised person would have reasonable grounds to suspect that the person had just committed an offence). The ability to obtain the name and address of a young-looking person observed purchasing tobacco is important because the name and address can be used to establish that that person was in fact under 18 years of age. This would be essential to bringing a successful prosecution under the Bill.

Since it is not an offence for a child to purchase tobacco, authorised persons would not have the power to obtain the name and address of a young-looking person observed purchasing tobacco without the inclusion in the Bill of a provision expressly providing that power. Without such a

provision, an authorised person who reasonably suspects that he or she has witnessed an offence against the Bill would have no means of establishing whether the person observed purchasing tobacco was or was not a child. This would make the Bill very difficult to enforce.

Clause 37 therefore provides that where an authorised person observes a person being supplied with tobacco, and the authorised person reasonably suspects that the person is a child, the authorised person may ask that person to show acceptable evidence of age. If the person cannot show acceptable evidence of age (eg. because he or she does not have a driver's license, passport or proof of age card) or shows acceptable evidence of age which indicates that the person is a child, the authorised person may demand the person's name and address. It will be an offence for the person not to state his or her name and address (unless the person has a reasonable excuse).

This provision may be seen to have a negative impact on the rights and liberties of young-looking people observed purchasing tobacco. In relation to this, the following points should be noted:

- The power is only available where a person has been observed being supplied with tobacco. It would not, for example, allow an authorised person to approach a young-looking person smoking in public and ask where he or she obtained the cigarettes.
- The power is essential to the effective enforcement of the Bill. It would not be appropriate for an authorised person to observe an offence but have no way of establishing that the young-looking person observed obtaining tobacco was a child. The only other option for effective enforcement (i.e. creating an offence for children purchasing tobacco) is far more intrusive to the rights and liberties of young people.
- Under the procedures to be followed by authorised persons in enforcing the Bill, people who are asked for proof of age, and name and address under this provision will be informed that it is not an offence for a child to purchase tobacco. If such a person co-operates with the authorised person, he or she will not have committed any offence.

Consultation

The Bill is the result of an extensive public consultation process. A discussion paper on *The Availability and Marketing of Tobacco Products to Children and Adolescents* was released in October 1993. There have been several rounds of consultation since that time. The most recent round was undertaken in October 1997. Consultation was undertaken with the Queensland Cancer Fund, the Australian Medical Association and the National Heart Foundation. Consultation was also undertaken with—

- representatives of hotels and licensed clubs;
- representatives of tobacco retailers (including newsagents, service stations, tobacconists and small and large shops);
- tobacco companies;
- youth advocacy groups; and
- unions.

NOTES ON PROVISIONS

PART 1—PRELIMINARY

Clause 1 sets out the short title of the Bill.

Clause 2 provides that the Bill (other than clause 15) commences on a day to be fixed by proclamation. Clause 15 makes it an offence for the occupier of premises other than premises licensed under the *Liquor Act 1992* to have a tobacco product vending machine at those premises. Clause 15 will commence 6 months after the other provisions of the Bill.

The delayed commencement of clause 15 is explained on page 5 of these Notes

Clause 3 sets out the main object of the Bill. The object is to reduce the number of children who take up smoking. “Child” means an individual who is under 18. The current Queensland legislation (the *Juvenile Smoking Suppression Act 1905*) applies to people under 16 years of age.

Clause 3 also sets out how the object of the Bill is to be achieved. The object of the Bill, and how it is to be achieved, are discussed on pages 1 to 3

of these Notes.

Clause 4 provides that particular words used in the Bill are defined in the dictionary in the schedule to the Bill (located at the end of the Bill).

Clause 5 defines the term “responsible adult”. This term is relevant to clause 19. Clause 19 provides that an adult must not supply a tobacco product to a child. However, it is not an offence for an adult to supply a tobacco product to a child for whom the person is a “responsible adult” within the meaning of clause 5. A responsible adult in relation to a child is a parent, step-parent or guardian of the child, or an adult with parental rights and responsibilities for the child.

Clause 19 is intended to apply to situations such as that where an older acquaintance of a child purchases tobacco on behalf of the child and supplies the tobacco to the child. Responsible adults are exempted from clause 19 so that the State does not intrude into domestic relationships.

Clause 6 sets out what acceptable evidence of age means. The meaning of this term is similar to that in section 6 of the *Liquor Act 1992*. The terms “driver’s licence” and “proof of age card” are defined in the dictionary in the schedule to the Bill.

Clause 7 provides that the Bill binds all persons (which includes the State).

PART 2—SUPPLY OF TOBACCO PRODUCTS

Division 1—Tobacco product suppliers and employees

Clause 8 provides that division 1 of part 2 does not apply to the supply of tobacco products from tobacco product vending machines. Division 2 is the operative division in relation to the supply of tobacco products from tobacco product vending machines.

Division 1 applies to the supply of tobacco products by tobacco product suppliers and their employees. “Tobacco product supplier” means a person who, as part of a business activity, supplies tobacco products to the public,

but does not include a person who supplies tobacco products to the public as the employee of another person.

The reference to “as part of a business activity” is intended to distinguish supply of tobacco in a commercial or business-like situation from supply of tobacco in a social situation (supply of tobacco in a social situation is covered by part 2, division 3). It is not necessary that the business activity involve the *sale* of tobacco (eg. a person distributing free samples of tobacco as part of a business activity would be a tobacco product supplier). It is also not necessary that a person owns, or derives a personal profit from, the business activity for the person to be a tobacco product supplier. However, the definition of tobacco product supplier excludes a person who supplies tobacco to the public as the employee of another person.

To be a tobacco product supplier, a person needs to supply tobacco to the public. The term therefore excludes a person who, for example, only supplies tobacco to retail outlets.

Clause 9 sets out what the term “prevention measures” means for the purposes of part 2, division 1. The prevention measures are relevant in determining whether a tobacco product supplier, or the supplier’s employee, has committed an offence if the supplier’s employee supplies tobacco to a child.

If an employee of a tobacco product supplier supplies tobacco to a child, the tobacco product supplier only commits an offence under clause 11(1) if the tobacco product supplier has not undertaken the prevention measures in relation to the employee (clause 11(2)).

If the employee of a tobacco product supplier supplies tobacco to a child after the tobacco product supplier has undertaken the prevention measures in relation to the employee, the employee commits an offence under clause 12.

The intention of clauses 11 and 12 is to ensure that there is a fair division of responsibility between tobacco product suppliers and their employees in relation to the supply of tobacco to children by ensuring that—

- employees will only be liable for supplying tobacco to children where the employee has first been instructed of his or her responsibilities under the Bill;
- tobacco product suppliers will not be liable for offences committed by employees who have been properly instructed not

to supply tobacco to children, and who disobey those instructions; and

- it will generally be straightforward to determine whether the supplier or the employee is liable for a particular offence. This will avoid the situation where the supplier and the employee dispute liability for a particular offence (which is disadvantageous to both suppliers and employees).

The prevention measures are a series of measures which, if taken, will ensure that employees understand their responsibilities under the Bill. The first aspect of the prevention measures is that employees are instructed—

- not to supply tobacco products to children in any circumstances, even if the supply is for, or is claimed to be for, an adult; and
- to sight acceptable evidence of age for a person before supplying a tobacco product to the person, unless satisfied that the person is an adult.

This aspect of the prevention measures is intended to prepare employees to deal with situations that may arise in relation to the supply of tobacco (eg. so that employees know that if in doubt about a person's age, they should ask for proof of age, and that they must not supply tobacco to a child who claims to have a note from a parent allowing the child to obtain tobacco for the parent).

Clause 9 requires that employees be *instructed* of these requirements. This is intended to require that the tobacco product supplier explains these requirements to employees and not, for example, merely has employees sign a form containing the instructions without giving employees a proper opportunity to read the form and ask questions.

The second aspect of the prevention measures is that the employee is warned that if the employee supplies tobacco to children in disregard of the instructions, the employee will commit an offence against the Bill. Again, the warning requires some element of explanation or opportunity to ask questions, and not the mere signing of a form.

The third aspect of the prevention measures is that the employee acknowledges in writing that he or she has been given the instructions and warnings outlined above. This aspect of the prevention measures is intended to ensure that there is a record of the tobacco product supplier having given the necessary warnings and instructions, to avoid future

disputes between suppliers and employees.

Clause 10 provides that a tobacco product supplier who is an individual must not supply a tobacco product to a child. This provision applies where a tobacco product supplier supplies tobacco to a child *personally*, and not through an employee. Clause 10 necessarily excludes tobacco product suppliers who are bodies corporate because bodies corporate cannot act “personally”.

Clause 26 of the Bill contains a defence to the offence in clause 10.

The penalty for a breach of clause 10 is 1 penalty unit for a first offence, and 2 penalty units for a second or later offence. Clause 13 (which allows a court to prohibit a tobacco product supplier from supplying tobacco) will also apply in relation to a second offence under clause 10 or clause 11.

Clause 11 provides that a tobacco product supplier must ensure an employee of the tobacco product supplier does not supply tobacco to a child.

If an employee of a tobacco product supplier supplies tobacco to a child, and the tobacco product supplier took the prevention measures in relation to the employee prior to the supply, the tobacco product supplier does not commit an offence against this provision. “Prevention measures” are explained under clause 9 above.

Clause 26 of the Bill contains a defence to the offence in clause 11.

The penalty for a breach of clause 11 is 1 penalty unit for a first offence, and 2 penalty units for a second or later offence. Clause 13 (which allows a court to prohibit a tobacco product supplier from supplying tobacco to the public) will also apply in relation to a second offence under clause 11 or clause 10.

Clause 12 provides that an employee of a tobacco product supplier must not supply a tobacco product to a child. This provision only applies if the tobacco product supplier has taken the prevention measures in relation to the employee before the employee supplies tobacco to the child. “Prevention measures” are explained under clause 9 above.

Clause 26 of the Bill contains a defence to the offence in clause 12.

The penalty for a breach of clause 12 is 1 penalty unit for a first offence, and 2 penalty units for a second or later offence.

Clause 13 enables a court sentencing a tobacco product supplier for offences against this division, in certain circumstances, to prohibit or restrict

the supply of tobacco by that supplier. A court may make such an order where—

- a tobacco product supplier is convicted of an offence against clause 10 or 11 of the Bill; and
- within 2 years after the conviction, the supplier is again convicted of an offence against either clause.

The court may make an order of at least two months, but not longer than one year's duration. The order may—

- prohibit the supply of all or specified tobacco products by the supplier; or
- impose conditions or restrictions on the supply of tobacco products by the supplier.

The intention of this provision is to allow a court to impose a more serious sanction for repeat offenders under the Bill.

Subclause (4) of clause 13 provides that if the supplier supplies tobacco products to the public at more than one outlet, the order may only apply to the outlets where the offences happened.

The intention of this subclause is to restrict a court's discretion in making an order to those outlets where the offences occurred. In the absence of this subclause a court could, theoretically, make an order affecting all outlets in a chain of stores when the offences occurred at one or two outlets.

Division 2—Tobacco product vending machines

Clause 14 sets out two definitions relevant to this division. This division relates to the supply of tobacco products via tobacco product vending machines.

“Tobacco product vending machine” means a coin-operated vending machine used, or intended for use, for selling tobacco products, whether or not it is also used, or intended for use, for selling other products. “Coin-operated vending machine” means a machine or device operated by money, token, debit card or credit card. The definition of coin-operated vending machine is intended to exclude dispensing machines linked to cash registers and operated electronically by tobacco product suppliers or their employees.

A “person in charge” of a tobacco product vending machine is the licensee of the licensed premises at which the vending machine is situated. “Licensee” means a licensee under the *Liquor Act 1992*. The definition is limited to licensees because, under clause 15, it is an offence to have a tobacco product vending machine on premises other than licensed premises. Clause 15 is subject to delayed commencement, and some transitional provisions are required in relation to division 2 as a result. These transitional provisions are explained under clause 52.

A person in charge of a tobacco product vending machine commits an offence if the person allows a child to obtain tobacco from the vending machine (clause 16(1)). However, the person in charge will not commit an offence if, prior to the child obtaining tobacco from the vending machine, the person has undertaken the prevention measures in relation to the vending machine (clause 16(2)).

Clause 14 sets out what is meant by prevention measures in relation to a vending machine. The first aspect of the prevention measures is that the vending machine is located so that its use can be observed by the person’s employees. This aspect of the prevention measures will be satisfied where the machine is within the line of sight of an area (such as a serving area in a bar, or a reception area in a restaurant) which is usually attended by a staff member or members. It would not be satisfied, for example, where the machine is placed in a corridor or entry area and is not usually visible to staff members.

The second aspect of the prevention measures is that employees are instructed—

- to take reasonable steps to ensure that a child does not obtain a tobacco product from the vending machine, even if the supply is for, or is claimed to be for, an adult; and
- to sight acceptable evidence of age for a person before allowing the person to obtain a tobacco product from the vending machine, unless satisfied that the person is an adult.

This aspect of the prevention measures is intended to prepare employees to deal with situations that may arise in relation to the supply of tobacco via a vending machine (eg. so that employees know that if in doubt about a person’s age, they should ask for proof of age, and that they must take reasonable steps to ensure a child does not obtain tobacco from the vending machine even where the child claims to have a note from a parent allowing

the child to obtain tobacco for the parent).

Unlike in “over the counter” situations, an employee will not always be able to prevent a child from obtaining tobacco from a vending machine. The person in charge of the vending machine therefore only needs to instruct employees to take reasonable steps to prevent a child obtaining tobacco from the machine. Reasonable steps might be, for example, telling the child to move away from the machine and, if the child refuses to do so, calling for assistance from a senior staff member.

As with the instructions and warnings discussed in relation to clause 9, the giving of instructions under clause 14 requires some element of explanation or opportunity to ask questions, and not the mere signing of a form by the employee.

It is not necessary that the person in charge of the tobacco product vending machine gives the instructions outlined in clause 14 to all the person’s employees. The instructions only need to be given to employees whose employment requires them to work near a tobacco product vending machine, and who in performing their duties, can observe the use of the vending machine (this is the effect of the definition of “employee” in clause 14).

The third aspect of the prevention measures is that employees acknowledge in writing that they have been given the instructions outlined above. This aspect of the prevention measures is intended to ensure that there is a record of the person in charge of a vending machine having given the necessary instructions.

Clause 15 provides that an occupier of premises that is not licensed premises must not have a tobacco product vending machine at the premises. “Licensed premises” is defined in the dictionary in the schedule to the Bill to have the meaning provided for in section 4 of the *Liquor Act 1992*. The penalty for breach of this provision is 1 penalty unit.

An occupier of premises that is not licensed premises will not commit an offence against clause 15 if the machine is not being used by anyone to supply tobacco products (eg. if the machine is being stored, transported or repaired).

The rationale for this clause is set out on page 5 of these Notes. Clause 15 is to commence 6 months after the rest of the Bill. The delayed commencement of this clause is explained on page 4 of these Notes.

Clause 16 provides that a person in charge of a vending machine must not allow a child to obtain a tobacco product from the vending machine.

If a child obtains tobacco from the vending machine, and the person in charge of the vending machine took the prevention measures in relation to the vending machine prior to the supply, the person in charge does not commit an offence against this provision. “Prevention measures” are explained under clause 14 above.

Clause 26 of the Bill contains a defence to the offence in clause 16.

The penalty for a breach of clause 16 is 1 penalty unit for a first offence, and 2 penalty units for a second or later offence. Clause 17 (which allows a court to prohibit a person in charge of a tobacco product vending machine from possessing a tobacco product vending machine) will also apply in relation to a second or subsequent offence under clause 16.

It should be noted that the Bill does not make employees of persons in charge of vending machines liable for supply of tobacco to children via a vending machine. This is because, unlike “over the counter” and similar situations, no individual employee could be considered to be directly responsible for allowing a child to obtain tobacco from a vending machine (since an employee would not be personally involved in the transaction).

Clause 17 enables a court sentencing a person in charge of a tobacco product vending machine for offences against this Division, in certain circumstances, to prohibit or restrict the possession or use of tobacco product vending machines by that person. A court may make such an order where—

- a person in charge of a tobacco product vending machine is convicted of an offence against clause 16 of the Bill; and
- within 2 years after the conviction, the supplier is again convicted of an offence against that clause.

The court may make an order of at least two months, but not longer than one year’s duration. The order may—

- prohibit the person from possessing tobacco product vending machines; or
- impose conditions or restrictions on the possession or use of tobacco product vending machines by the person.

The intention of this provision is to allow a court to impose a more

serious sanction for repeat offenders under the Bill.

Subclause (4) of clause 17 provides that if the person is in charge of a tobacco product vending machine at more than one licensed premises, the order may only apply to the licensed premises where the offences happened.

The intention of this subclause is to restrict a court's discretion in making an order to those licensed premises where the offences occurred. In the absence of this subclause a court could, theoretically, make an order affecting all licensed premises in a chain of licensed premises when the offences occurred at one or two premises.

Division 3—Supply of tobacco products by adults to children

Clause 18 provides that part 2, division 3 does not apply to the supply of tobacco products—

- by tobacco product suppliers or their employees (covered by division 1); or
- from tobacco product vending machines (covered by division 2).

Clause 19 provides that an adult must not supply a tobacco product to a child. The maximum penalty for this offence is 1 penalty unit.

However, a responsible adult for a child may supply a tobacco product to that child without committing an offence against this clause.

The rationale for this clause, and for the exemption for responsible adults, is set out under clause 5.

A defence will apply where the adult who supplied tobacco to a child honestly and reasonably believed that the child was an adult. This defence provision operates slightly differently to the defence which applies in “commercial” situations (clause 26). Under clause 26, proof that the defendant or the defendant's employee did not ask the person to whom tobacco was supplied to produce acceptable evidence of age is evidence that any belief that the person was an adult was not reasonable. Clause 19 covers social rather than commercial situations, and it would be unfair for a person to be expected to ask for proof of age in a social situation.

Division 4—Signage

Clause 20 provides that a tobacco product supplier must display prohibition signs at each place at which the supplier supplies tobacco products. A “prohibition sign” is a sign about the supply of tobacco products to children which complies with the requirements prescribed under a regulation. The details as to what signs are to say (eg. that it is illegal to supply tobacco to people under 18 years of age, and that proof of age may be requested), and where they are to be placed (eg. in a conspicuous place clearly visible from each point of sale) will be set out in a regulation under the Bill.

The maximum penalty for a breach of this clause is 1 penalty unit.

Subclause (2) of clause 20 is intended to make it clear that clause 21 (and not clause 20) is the operative provision for the signage which should be affixed to or displayed on a tobacco product vending machine.

Clause 21 provides that a person in charge of a tobacco product vending machine must attach prohibition signs to, or display prohibition signs near, the vending machine. As with clause 20, details as to what signs are to say, and where they are to be placed, will be set out in a regulation under the Bill.

The maximum penalty for a breach of this clause is 1 penalty unit.

Division 5—Minimum saleable quantities of tobacco products

Clause 22 makes it an offence to sell cigarettes—

- other than in a package (eg. it is an offence to sell single cigarettes); or
- in a package containing less than 20 cigarettes.

“Cigarette” is defined in the dictionary in the schedule to the Bill. Cigars are excluded from the definition of cigarette, and therefore from the coverage of this provision. For the purposes of this clause, “package” means a package packed by the manufacturer or importer of the cigarettes.

It should be noted that this clause prohibits the sale of cigarettes not in packages, or below the minimum package size, to any person, not only to a child. The rationale for this clause is that very small packages of cigarettes

are attractive to children (as children have low disposable income levels). The clause therefore provides an additional means of reducing the availability of tobacco to children.

The clause applies only to “sale” and not to “supply” because it is not intended that the giving of cigarettes (eg. as samples) be restricted by this clause. A tobacco product supplier who gives cigarettes *to a child* commits an offence under clause 10 of the Bill (or clause 11 if the supply is by the tobacco product supplier’s employee).

The maximum penalty for breach of this clause is 1 penalty unit.

Clause 23 provides that a tobacco product supplier must not sell prepackaged loose tobacco in quantities of less than 25 grams. “Prepackaged loose tobacco” means tobacco product for smoking that is cut and packaged for retail sale, but does not include a cigarette or cigar. “Roll your own” tobacco and pipe tobacco are examples of prepackaged loose tobacco.

The rationale for, and operation of, this clause are similar to that for clause 22 discussed above.

The maximum penalty for breach of this clause is 1 penalty unit.

Division 6—Supply of things resembling tobacco products

Clause 24 provides that a person must not, as part of a business activity, supply to a person food or a toy which resembles a tobacco product.

Subclause (2) of clause 24 sets out when food or a toy will resemble a tobacco product. Examples of food or toys which resemble tobacco products include chocolate cigarettes, candy cigars, toy cigarettes and toys which resemble a package of cigarettes (whether or not the package contains toy cigarettes). A regulation may declare a particular food or toy to resemble a tobacco product.

The reference in clause 24 to “as part of a business activity” is intended to distinguish the supply of food or a toy resembling a tobacco product in a commercial or business-like situation from supply of tobacco in a social situation. The clause prohibits the supply of food or a toy which resembles a tobacco product to any person, not only to a child.

The rationale for this clause is that studies have shown that children who

have used such products are more likely to experiment with tobacco than children who have not used such products.

Division 7—Liability for certain offences against part

Clause 25 sets out the circumstances in which a person may be liable for a breach of clauses 22, 23 or 24 committed by the person's representative. The terms "representative" and "state of mind" are defined in the dictionary in the schedule to the Bill. The operation of this clause is discussed on page 6 of these Notes.

Clause 26 provides a defence to the offences set out in clauses 10, 11, 12 and 16. Those clauses relate to the supply of tobacco to a child. Where a tobacco product supplier, or the supplier's employee, has supplied tobacco to a child in breach of clauses 10, 11 or 12, the supplier or employee will have a defence under clause 26 if the supplier or employee honestly and reasonably believed that the child was an adult. Where a person in charge of a vending machine has allowed a child to obtain tobacco from the vending machine, the person will have a defence under clause 26 if the person, or an employee of the person who dealt with the child, honestly and reasonably believed that the child was an adult.

Subclause (3) of clause 26 provides that proof that the defendant or the defendant's employee did not ask the child to produce acceptable evidence of age is evidence that any belief that the relevant person was an adult was not reasonable. Failure to ask for proof of age is not *conclusive* evidence that the belief that the child was an adult was unreasonable. The intention of this provision is to re-enforce that in commercial situations the rule should be "when in doubt ask for proof of age".

An example of a situation where a tobacco product supplier or the supplier's employee could have an honest and reasonable belief that a child was in fact an adult is where, prior to being supplied with tobacco, the child showed the supplier or employee a convincing, but false, driver's license which indicated that the child was over 18. An example of a situation where a person in charge of a tobacco product vending machine could have an honest and reasonable belief that a child was in fact an adult is where the vending machine is located in an area only accessible to adults, and the child had obtained entry using a convincing, but false, driver's license which indicated that the child was over 18.

PART 3—MONITORING AND ENFORCEMENT

Division 1—Appointment of authorised persons and other matters

Clause 27 gives the chief executive of Queensland Health the ability to appoint authorised persons under the Bill. Under subclause (3) of clause 27, police officers are automatically authorised persons.

Subclause (2) of clause 27 requires that persons appointed as authorised persons have the necessary expertise or experience to be an authorised person.

Clause 28 sets out some “machinery” provisions in relation to the term of appointment of authorised persons (other than police officers).

Clause 29 provides for the chief executive of Queensland Health to give authorised persons (other than police officers) identity cards, and sets out the information to be included on an identity card. An authorised person who ceases to be an authorised person must return his or her identity card to the chief executive of Queensland Health.

Clause 30 provides that an authorised person (other than a uniformed police officer) may exercise a power under the Bill in relation to someone only if the authorised person first produces appropriate identification, or has his or her identification displayed.

Clause 31 is a “standard” provision protecting authorised persons and persons acting under the direction of authorised persons from civil liability for acts done honestly and without negligence under the Bill. Such liability will attach to the State instead of the authorised person or person acting under the direction of an authorised person.

Division 2—Powers of authorised persons

Clause 32 sets out the meaning of the term “occupier” for the purposes of division 2 of part 3. A separate definition of “occupier” is required for this division, because the term “occupier” is used in a broader sense in this division than it is in clause 15 of the Bill.

Clause 33 is a “standard provision” setting out the circumstances in

which an authorised person may enter a place. Subclause (2)(a) provides that an authorised person may, without the occupier's consent or a warrant, enter a public place when the place is open to the public. "Public place" means a place that the public is entitled to use, is open to the public or is used by the public (whether or not on payment of money). Subclause (2)(b) provides that an authorised person may, without the occupier's consent or a warrant, enter a licensed premises or an outlet of a tobacco product supplier while it is open for carrying on business.

Clause 34 is a "standard provision" setting out how an authorised person may apply to a magistrate for a warrant, and the grounds on which a magistrate may grant a warrant. An example of a situation in which a warrant might be sought under the Bill is where a warrant is required to enable an authorised person to investigate a report of a tobacco product vending machine on unlicensed premises.

Clause 35 sets out what an authorised person who has entered a place under clause 33 may do while in that place. For example, this section would allow an authorised person who suspected that packages of prepacked loose tobacco were being sold at the place in less than the minimum quantity required under clause 23 to weigh the packages of tobacco.

Division 3—Other enforcement powers of authorised persons

Clause 36 gives an authorised person power to demand the name and address of a person observed committing, or reasonably suspected to have just committed, an offence against the Bill. The Bill is generally similar to "name and address" provisions in other Queensland legislation, except that an authorised person may demand the name and address of a person where the authorised person reasonably suspects that *the person's employer* has committed an offence against the Act. The rationale for this aspect of clause 36 is outlined on pages 6 and 7 of these Notes.

Clause 37 gives an authorised person power to require a person to show acceptable evidence of age where the authorised person observes the person being supplied a tobacco product, and the authorised person suspects that the person is a child. If the person cannot provide acceptable evidence of age, or provides acceptable evidence of age which shows that the person is

under 18, the authorised person may require the person to state his or her name and address. It is an offence not to comply with a requirement to state name and address (the maximum penalty is 1 penalty unit). The rationale for this provision is outlined on pages 8 and 9 of these Notes.

Clause 38 gives an authorised person the power, in certain limited circumstances, to seize a tobacco product from a person who the authorised person has observed being supplied with the tobacco product. The seizure power is only available where the authorised person suspects on reasonable grounds that the person is a child. The authorised person must also have asked the person to show acceptable evidence of age, and the person must have been unable to do so, or must have produced acceptable evidence of age that showed that the person was under 18. In addition, the authorised person must reasonably believe that the tobacco product supplied to the person is evidence of an offence against the Bill.

Clause 37 is directed to enabling an authorised person to establish that a young-looking person who the authorised person has observed being supplied with tobacco is in fact a child. Clause 38 is directed to enabling an authorised person to establish that the item supplied to the child was in fact tobacco. The rationale for this provision is similar to that for clause 37 (discussed on pages 8 and 9 of these Notes).

An authorised person who seizes a tobacco product under clause 38 is subject to clause 40 in relation to the procedures to be followed in dealing with the seized item.

Division 4—Seizure of evidence

Clause 39 sets out the powers of authorised officers in relation to the seizure of evidence.

Clause 40 sets out the procedures to be followed in relation to seized items.

Clause 41 allows a court, on the conviction of a person for an offence under the Bill, to order the forfeiture to the State of anything used to commit the offence, or anything else the subject of the offence. For example, since food and toys resembling tobacco products cannot be legally sold in

Queensland, it might be appropriate for the court to order the forfeiture of such items where a person has been convicted under clause 24.

Clause 42 makes it clear that, upon forfeiture of an item under clause 41, the item becomes the property of the State.

Division 5—Other enforcement matters

Clause 43 provides that a person must not provide false or misleading information to an authorised person. This would cover the situation where, for example, a person gave false or misleading information to an authorised person investigating a complaint against the person, as well as the situation where a person makes a false complaint to an authorised person about a person contravening the Bill.

Clause 44 provides that a person must not give an authorised person a document containing information the person knows is false, misleading or incomplete in a material particular. This will cover similar situations in relation to documents to those covered by clause 43 in relation to statements.

Clause 45 is a “standard provision” requiring an authorised person who damages something while exercising a power under Part 3 of the Bill to give notice of the damage to the appropriate person.

Clause 46 is a “standard provision” enabling a person who incurs loss or expense because of the exercise or purported exercise of a power under part 3 of the Bill to claim compensation from the State for that loss or expense.

Clause 47 makes it an offence for a person to impersonate an authorised person. The maximum penalty for this offence is 10 penalty units.

Clause 48 makes it an offence for a person to obstruct an authorised person in the exercise of a power under the Bill, unless the person has a reasonable excuse. The maximum penalty for this offence is 5 penalty units.

PART 4—MISCELLANEOUS

Clause 49 is an evidentiary provision which provides that a thing labelled

as a tobacco product, or labelled in a way a reasonable person would take to be labelled as a tobacco product (eg. a flip top pack with a recognised cigarette brand name on it), is evidence the thing is or contains a tobacco product.

Clause 50 provides that the Governor in Council may make regulations under the Bill. For example, it is intended that a regulation will be made to set out the requirements in relation to the signage to be displayed under clauses 20 and 21.

PART 5—REPEAL AND TRANSITIONAL

Clause 51 repeals the *Juvenile Smoking Suppression Act 1905* (the legislation which controlled the availability of tobacco to children prior to this Bill).

Clause 52 is a transitional provision relating to tobacco product vending machines. Clause 15 of the Bill will prohibit the possession of vending machines in places other than premises which are licensed premises under the *Liquor Act 1992*. This provision is scheduled to commence 6 months after the rest of the Bill, so people other than licensees will be able to retain vending machines for six months after proclamation of the Bill. (The rationale for the delayed commencement of clause 15 is outlined on page 5 of these Notes.)

Under clauses 16 and 21, a person in charge of a vending machine (i.e. a licensee of licensed premises on which there is a vending machine) must not “allow” a child to obtain tobacco from the machine, and must place signs on the machine. It is necessary that similar controls be placed on people in charge of vending machines in non-licensed premises for the six months while vending machines are allowed to be on non-licensed premises.

Therefore, the effect of clause 52 is to extend the application of clauses 16 and 21, as well as clause 14 (which defines “prevention measures” in relation to vending machines) and clause 26 (which provides a defence to clause 16) to cover an occupier of premises other than licensed premises in which a tobacco product vending machine is located.

Clause 52 will operate for the six months while vending machines are allowed in premises other than licensed premises, and will then expire. The expiry of clause 52 will occur on the same day the clause prohibiting the possession of vending machines other than on licensed premises (i.e. clause 15) becomes operative.

Clause 53 provides for the expiry of part 5.