

Tobacco and Other Smoking Products and Other Legislation Amendment Regulation 2023

Explanatory notes for SL 2023 No. 82

made under the

Corrective Services Act 2006

Land Act 1994

Marine Parks Act 2004

Nature Conservation Act 1992

Parliamentary Service Act 1988

State Penalties Enforcement Act 1999

Tobacco and Other Smoking Products Act 1998

General Outline

Short title

Tobacco and Other Smoking Products and Other Legislation Amendment Regulation 2023

Authorising law

Section 17 of the *Acts Interpretation Act 1954*, section 355 of the *Corrective Services Act 2006*, section 448 of the *Land Act 1994*, section 150 of the *Marine Parks Act 2004*, section 175 of the *Nature Conservation Act 1992*, section 56 of the *Parliamentary Service Act 1988*, section 165 of the *State Penalties Enforcement Act 1999* and sections 7G, 7M, 7N, 7ZK, 7L, 26ZQB and 53 of the *Tobacco and Other Smoking Products Act 1998*.

Policy objectives and the reasons for them

The object of the *Tobacco and Other Smoking Products Act 1998* (the Act) is to improve the health of the public by reducing their exposure to tobacco and other smoking products. Initiatives implemented under the Act have included restricting the supply of smoking products to children, limiting their advertising and promotion, reducing public exposure to second-hand smoke and establishing a framework for compliance monitoring and enforcement activities.

The *Tobacco and Other Smoking Products Amendment Act 2023* (the Amendment Act) updated the existing legislative framework to improve monitoring of the smoking product industry and enable more effective enforcement of the Act. These amendments are designed to assist smokers to quit, discourage youth uptake of smoking and further protect the community from exposure to second-hand smoke. The amendments included:

- establishing a licensing scheme for the wholesale and retail sale of smoking products;

- taking strong and decisive action to combat the trade in illicit tobacco and providing significant penalties for unlicensed or unlawful supply of smoking products;
- facilitating the sharing of intelligence with other State and Commonwealth law enforcement agencies;
- modernising and clarifying the requirements for advertising, display and promotion of smoking products, including their application to online trading;
- expanding smoke-free public spaces, including outdoor markets and places where families and children gather;
- reducing opportunities for children to be exposed to smoking products and second-hand smoke;
- improving protections at liquor licensed premises, including tighter requirements for smoking areas and tobacco product vending machines, and
- making other minor and technical amendments to improve the operation of the Act.

The Amendment Act included heads of power to prescribe additional matters by regulation. These matters are largely to effect implementation of the new licensing and illicit tobacco provisions. This will give licence holders additional clarity about their obligations under the Act and assist authorised persons to monitor compliance with the Act.

To support the offences introduced in the Amendment Act, new penalty infringement notices (PINs) will be prescribed under the *State Penalties Enforcement Regulation 2014*.

Achievement of policy objectives

To achieve the policy objectives, the regulation amends the *Tobacco and Other Smoking Products Regulation 2021* to prescribe matters which support the new licensing scheme and the new offence of possession of illicit tobacco.

Licensing

The new licensing scheme will allow Queensland Health to better identify and monitor the number, type and location of businesses selling smoking products. There are three types of licenses, being:

- a retail license, authorising sale of smoking products by retail sale;
- a wholesale license, authorising sale of smoking products by wholesale; and
- a retail licence (liquor), authorising retail sales at liquor licensed premises.

To operationalise the new licensing scheme, the Act allows for certain matters to be prescribed by regulation, including licensing fees, licence display requirements and invoicing requirements.

The prescribed fees for grant, renewal and restoration of a licence will be 448 fee units for a retail licence and 636 fee units for a wholesale licence.

The displayed licence (that is, the ‘approved copy’) must either be a copy of the licence granted under the Act or contain prescribed licence information. In either case, there are prescribed style, content and size requirements, including:

- only use black text on a white background;
- do not use any symbols or images which signify approval/endorsement; and
- be A4 size.

The prescribed requirements for invoices issued by wholesale licensees to retailers include:

- unique identifier for the invoice;
- date of the supply;
- details of the wholesaler and the retailer;

- type, brand, variant and quantity of each smoking product supplied; and
- the information must be legible and visible.

Illicit Tobacco

The Act makes it an offence under Queensland law to supply or possess ‘illicit tobacco’, being smoking products which do not comply with Commonwealth requirements for plain packaging and health warnings. A supplier in possession of illicit tobacco may have a defence if they can prove it was for personal use. However, this defence is not available if the quantity of illicit tobacco is a commercial quantity.

The regulation prescribes the amount which constitutes a ‘commercial quantity’, being more than 50 cigarettes or more than 50 grams of another tobacco product.

Penalty infringements notices

The Amendment Act introduces a range of new offences into the Act. For many of these, new PINs will be prescribed under State Penalties Enforcement Regulation. The new offences for which PINs will be prescribed are as follows:

- section 7ZK(2): licensee to display approved copy of licence on website of online shop (2 penalty units);
- section 7ZK(3): licensee to produce licence for inspection by authorised person (2 penalty units);
- section 7ZK(4): licensee to remove display of licence after licence ceases to have effect (2 penalty units);
- section 7ZM(3): licensee to give information to chief executive in compliance with notice (2 penalty units);
- section 7ZN(1): wholesale licensee must not sell smoking products to an unlicensed retailer (20 penalty units for an individual, 100 penalty units for a corporation);
- section 7ZO(b): licensee must not advertise that their licence is available for sale (20 penalty units for an individual, 100 penalty units for a corporation);
- section 26HC(2): licensee must not display more than one mandatory sign (2 penalty units);
- section 26HC(4): licensee must not display more than one permitted sign (2 penalty units);
- section 26X(2): person must not smoke within 5m of an outdoor eating or drinking place (2 penalty units);
- section 26XA(5): occupier of an outdoor eating or drinking place must not set aside a smoking area other than in compliance with the Act (4 penalty units);
- section 26ZE(1): person must not smoke at an outdoor market (2 penalty units);
- section 26ZF(1): person must not smoke within 5m of any entry or exit to an outdoor market (2 penalty units);
- section 26ZGA(3): organiser of an outdoor market must not set aside a smoking area other than in compliance with the Act (4 penalty units);
- section 26ZKD(1A): person must not smoke in an area being used for an organised children’s activity (2 penalty units);
- section 26ZQB(1): supplier must not supply illicit tobacco (20 penalty units for an individual, 100 penalty units for a corporation);
- section 26ZQB(2): supplier must not be in possession of illicit tobacco (20 penalty units for an individual, 100 penalty units for a corporation); and
- section 50B(1): person must comply with a direction to stop smoking (2 penalty units).

Under the Amendment Act, there are staggered commencement dates for some provisions. The commencement date of each PIN will align with the commencement date of the corresponding offence in the Amendment Act. To achieve this, the Regulation makes various technical

amendments to ensure the correct cross references between the State Penalty Enforcement Regulation and the Act.

Consistency with policy objectives of authorising law

The regulation is consistent with the policy objectives of the *Tobacco and Other Smoking Products Act 1998*.

Inconsistency with policy objectives of other legislation

No inconsistencies with the policy objectives of other legislation have been identified.

Alternative ways of achieving policy objectives

The regulation is the only effective means of achieving the policy objective.

Benefits and costs of implementation

To give practical effect to provisions in the Amendment Act, the regulation imposes a number of obligations on smoking product businesses in relation to the new licensing scheme, including:

- licence fees;
- requirements for the display of licenses; and
- requirements for invoices issued by wholesalers to retailer.

These obligations are not expected to impose significant costs on business:

- as the licence fees were calculated to ensure cost recovery of the licensing scheme, rather than generate a profit for government, they are considered reasonable and not a barrier to entry to the industry;
- the different options for displaying a licence will allow businesses to choose the type which best suits their needs; and
- the invoice requirements are similar to what would ordinarily be required of an invoice of that type.

Consistency with fundamental legislative principles

The regulation is consistent with fundamental legislative principles in section 4 of the *Legislative Standards Act 1992*. However, several clauses may impact on particular principles. These potential departures from fundamental legislative principles have been carefully considered and, wherever possible, their impact has been minimised.

Whether the legislation has sufficient regard to the rights and liberties of individuals (Legislative Standards Act 1992, s 4(2)(a))

The regulation contains several clauses that potentially impact on the fundamental legislative principle that legislation must have sufficient regard to the rights and liberties of individuals.

Penalty infringement notices

For legislation to have sufficient regard to the rights and liberties of individuals, new offences should be appropriate and reasonable, and the penalty should be proportionate to the wrong

occasioned by the breach. The Amendment Act introduced new offences and the regulation proposes to prescribe PINs in relation to some of those offences.

When used appropriately and in conjunction with other compliance mechanisms under the Act, PINs have proven to be a fair and effective enforcement response.

PINs provide a more immediate deterrent than commencing lengthy prosecution action. By avoiding a prosecution, PINs reduce demand on Queensland courts while still maintaining a person's right to access the judicial system if they wish to challenge the offence. The option of a PIN also advantages alleged offenders by giving them an alternative to court-based prosecution. Further, the PIN amounts prescribed in the regulation are consistent with similar offences in both the Act and other health portfolio legislation.

For these reasons, the introduction of new PINs has sufficient regard to the fundamental legislative principles regarding individual rights and liberties.

Display licence requirements and licence fees

For legislation to have sufficient regard to the rights and liberties of individuals, a person's right to liberty and freedom of movement and association should be protected as far as practicable.

The Amendment Act requires a licence to be displayed in a retail outlet or an online shop. The regulation prescribes the style of the displayed licence and the information it must contain.

Specifying the display requirements for a licence ensures the public is provided sufficient information about a licensee and the licensees have clear direction about how to satisfy the display requirement. Also, prescribing the information required to be displayed, including limiting its appearance, colour and size, ensures the display of a licence is not used as a promotion, advertisement or endorsement for smoking. The regulation gives the licensee the option to display the licence that was granted or display limited prescribed information.

The Act also provides that a regulation may prescribe the licence fees for the grant, renewal or restoration of a retail or wholesale licence. Under the regulation, these annual fees are 448 fee units for a retail licence and 636 fee units for a wholesale licence. At the time the regulation is made, this amounts to \$474.88 and \$674.16, respectively.

The licensing scheme will ensure only legitimate businesses are authorised to sell smoking products. This will provide Queensland Health with greater visibility of the retail smoking product industry and improve public confidence in the industry. The amounts of the licence fees have been set to ensure full cost recovery for the licensing scheme and to fund additional compliance activities. The amounts are not intended to operate as 'penalties' or as barriers to entry to the industry.

For these reasons, the display licence requirements and licence fees have sufficient regard to the fundamental legislative principles regarding individual rights and liberties.

Consultation

Most of the amendments to the Act arose from the options canvassed in a Consultation Regulatory Impact Statement (RIS), Reducing the negative effects of smoking in Queensland, released for public comment on 30 May 2022. Responses were received from members of the public, businesses, peak bodies, health agencies and health researchers. The results were published in the Decision RIS, Reducing the negative effects of smoking in Queensland, dated September 2022.

The regulation prescribes practical matters needed to operationalise the amendments in the Amendment Act. Even after the RIS processes concluded, stakeholders continued to be extensively consulted in the development of the Amendment Act and the proposed content of the regulation. Impacted stakeholders were generally supportive of the amendments in both the Amendment Act and the regulation.

Notes on provisions

Part 1 Preliminary

Short Title

Clause 1 provides the short title of the regulation, being the *Tobacco and Other Smoking Products and Other Legislation Amendment Regulation 2023*.

Commencement

Clause 2 provides for the commencement of the regulation.

Clause 2(1) provides that part 2, division 3 commences on 1 September 2023.

Clause 2(2) provides that part 3, division 3 commences on 1 September 2023, immediately after commencement of section 64 of the *Tobacco and Other Smoking Products Amendment Act 2023*, which renumbers the *Tobacco and Other Smoking Products Act 1998*.

Part 2 Amendment of State Penalties Enforcement Regulation 2014

Division 1 Preliminary

Regulation amended

Clause 3 provides that part 2 amends the *State Penalties Enforcement Regulation 2014*.

Division 2 Amendment commencing on notification

Amendment of sch 1 (Infringement notice offences and fines for nominated laws)

Clause 4 amends schedule 1 (infringement notices offences and fines for nominated laws) of the *State Penalties Enforcement Regulation*.

Clause 4(1) amends the part of schedule 1 which prescribes infringement notice offences for the *Tobacco and Other Smoking Products Act* and their corresponding penalty unit fines.

The clause omits the entries for sections 26S, 26ZPF and 26ZQA. Although omitted by this clause, these sections are reinserted in schedule 1 by clause 4(2) to also note the specific subsection creating the offence (for example, section 26S(2)). The clause does not prescribe any new infringement notice offences.

Clause 4(2) also amends the part of schedule 1 which prescribes infringement notice offences and penalties for the *Tobacco and Other Smoking Products Act*. The clause inserts the following entries into schedule 1:

- section 7ZK(2) – 2 penalty units;
- section 7ZK(3) – 2 penalty units;
- section 7ZK(4) – 2 penalty units;
- section 7ZM(3) – 2 penalty units;

- section 7ZN(1) – individual 20 penalty units, corporation 100 penalty units;
- section 7ZO(b) – individual 20 penalty units, corporation 100 penalty units;
- section 26HC(2) – 2 penalty units;
- section 26HC(4) – 2 penalty units;
- section 26S(2) – 2 penalty units;
- section 26ZPF(1) – 4 penalty units;
- section 26ZQA(1) – 4 penalty units;
- section 26ZQB(1) – individual 20 penalty units, corporation 100 penalty units; and
- section 26ZQB(2) – individual 20 penalty units, corporation 100 penalty units.

Of these entries, ten are for new offences in the Tobacco and Other Smoking Products Act. The offences commenced on 2 June 2023. The remaining three entries relate to clause 4(1).

Clause 4(3) amends the part of schedule 1 which prescribes the relevant administering authority for various infringement notice offences. The clause amends paragraph (c), to note that pursuant to section 28(5B) of the Tobacco and Other Smoking Products Act, a police officer is also an authorised person under that Act.

Clause 4(4) also amends the part of schedule 1 which prescribes administering authorities. The clause replaces the existing paragraph (d), to change the basis upon which a conservation officer serves an infringement notice. Pursuant to section 28(5A) of the Tobacco and Other Smoking Products Act, a conservation officer is now an authorised person under that Act.

Clause 4(5) amends the part of schedule 1 which prescribes the relevant authorised person for service of various infringement notices. The clause amends paragraph (b), to replace the reference to two existing infringement notice offences to note the specific subsection creating the offence. The clause does not prescribe any new infringement notice offences.

Clause 4(6) also amends the part of schedule 1 which prescribes authorised persons. The clause amends paragraph (f), to make a typographical change for consistency with other paragraphs in the schedule.

Clause 4(7) also amends the part of schedule 1 which prescribes authorised persons. The clause amends paragraph (g), to change the basis upon which a conservation officer serves an infringement notice. Pursuant to section 28(5A) of the Tobacco and Other Smoking Products Act, a conservation officer is now an authorised person under that Act.

Clause 4(7) also inserts paragraph (ga), to prescribe the authorised persons for the new illicit tobacco offences in the Tobacco and Other Smoking Products Act. The offences commenced on 2 June 2023.

Clause 4(8) also amends the part of schedule 1 which prescribes authorised persons. The clause renumbers the paragraphs to accommodate the new paragraph (ga).

Division 3 Amendment commencing 1 September 2023

Amendment of schedule 1 (infringement notice offences and fines for nominated laws)

Clause 5 amends schedule 1 (infringement notice offences and fines for nominated laws) of the State Penalties Enforcement Regulation.

Clause 5(1) amends the part of schedule 1 which prescribes infringement notice offences and penalties for the Tobacco and Other Smoking Products Act. The clause omits the entries for sections 26U(1), 26VI, 26VM, 26VP, 26VR, 26VT, 26VV, 26VX, 26Y(1), 26ZE and 26ZL.

Under section 50B of the Tobacco and Other Smoking Products Act, it is an offence not to comply with a lawful direction to stop smoking. Section 50B, which commenced on 2 June 2023, consolidated and replaced various similar offence provisions in the Act. Clause 5(1) removes the entries for those offences which were replaced by section 50B.

Clause 5(2) also amends the part of schedule 1 which prescribes infringement notice offences and penalties for the Tobacco and Other Smoking Products Act. The clause inserts the following entries into Schedule 1:

- section 26X(2) – 2 penalty units;
- section 26XA(5) – 4 penalty units;
- section 26ZE(1) – 2 penalty units;
- section 26ZF(1) – 2 penalty units;
- section 26ZGA(3) – 4 penalty units;
- section 26ZKD(1A) – 2 penalty units; and
- section 50B(1) – 2 penalty units.

The entries are for new offences in the Tobacco and Other Smoking Products Act. The offences commence on 1 September 2023.

Clause 5(3) amends the part of schedule 1 which prescribes authorised persons. The clause amends paragraph (a), to prescribe five of the new infringement notice offences in clause 5(2) where the relevant authorised person is appointed under sections 28(1) to (3) of the Tobacco and Other Smoking Products Act.

Clause 5(4) also amends the part of schedule 1 which prescribes authorised persons. The clause amends paragraph (a), to omit one infringement notice offence (section 26ZL) and insert another (section 26ZKD(1A)), where the relevant authorised person is appointed under sections 28(1) to (3) of the Tobacco and Other Smoking Products Act.

Section 26ZL is omitted because it was replaced by section 50B of the Tobacco and Other Smoking Products Act. Section 26ZKD(1A) is one of the new infringement notice offences in clause 5(2).

Clause 5(5) also amends the part of schedule 1 which prescribes authorised persons. The clause amends paragraph (d), to omit two infringement notice offence (sections 26VP and 26VX). These sections are omitted because they were replaced by section 50B of the Tobacco and Other Smoking Products Act.

Clause 5(6) also amends the part of schedule 1 which prescribes authorised persons. The clause amends paragraph (e), to omit one infringement notice offence (section 26VR). Section 26VR is omitted because it was replaced by section 50B of the Tobacco and Other Smoking Products Act.

Clause 5(7) also amends the part of schedule 1 which prescribes authorised persons. The clause inserts paragraph (ha), to prescribe the authorised persons for the new section 50B offence in the Tobacco and Other Smoking Products Act. The offence commences on 1 September 2023.

Clause 5(8) also amends the part of schedule 1 which prescribes authorised persons. The clause renumbers the paragraphs to accommodate the new paragraph (ha).

Part 3 Amendment of Tobacco and Other Smoking Products Regulation 2021

Division 1 Preliminary

Regulation amended

Clause 6 provides that part 3 amends the Tobacco and Other Smoking Products Regulation.

Division 2 Amendments commencing on notification

Insertion of new part 1A

Clause 7 inserts new part 1A ‘Retail and wholesale licences’.

New section 2A prescribes the requirements for an approved copy of a licence and the information which an approved copy of a licence must contain.

Section 7ZK of the Tobacco and Other Smoking Products Act requires a retail or wholesale licensee to display an approved copy of their licence at a retail outlet or online shop. Section 7ZK(5) defines ‘approved copy’ to mean a copy of the licence which (a) complies with the requirements prescribed by regulation, and (b) contains the information about the licence prescribed by regulation.

New section 2A(1) prescribes the requirements of an approved copy of the licence, including:

- the symbols, images or works displayed on the copy of the licence must be displayed in black on a white background;
- the copy of the licence must not contain symbols, images or words that would be likely to cause a reasonable person to believe the sale of smoking products is promoted by the State; and
- if the copy of the licence is displayed at a retail or wholesale outlet for the licence, the copy must be on an A4 page.

New section 2A(2) prescribes the information which an approved copy of a licence must contain. If the licensee decides to display an extract of the licence that was granted under the Tobacco and Other Smoking Products Act, it must contain:

- specific words naming the type of licence (for example, ‘*Tobacco and Other Smoking Products Act 1998* retail licence’);
- the unique identification number of the licence; and
- a link or QR code that a person may use to access the register of licenses kept by the chief executive.

If the licensee decides to display a full copy of the licence that was granted under the Act, it must contain the information in that full copy.

New section 2B prescribes the details to be included in invoices for wholesale supply of a smoking product to a retailer. Section 7ZL of the Tobacco and Other Smoking Products Act requires an invoice to be given to a retailer by the wholesaler and for that invoice to comply with the requirements prescribed by regulation.

New section 2B(1) prescribes the details which the invoice must contain, including:

- the unique identifier for the invoice;
- the date of supply of the smoking product;
- the brand name, type, variant and quantity of the smoking product; and
- the business names, contact details and ABNs or ACNs of the wholesaler or retailer.

New section 2B(2) requires these details to be legible and visible.

Insertion of new section 15A

Clause 8 inserts new section 15A.

New section 15A defines a ‘commercial quantity’ of illicit tobacco, for the purposes of section 26ZQB of the Tobacco and Other Smoking Products Act, as follows:

- 50 cigarettes; or
- 50 grams of tobacco products other than cigarettes.

Insertion of new part 5A

Clause 9 inserts new part 5A.

New part 5A prescribes the fees payable for the licences under the Tobacco and Other Smoking Products Act.

New section 15B defines ‘application’ to mean an application mentioned in new schedule 2.

New section 15C provides that fees payable under the Tobacco and Other Smoking Products Act in relation to a retail or wholesale licence are stated in schedule 2. For terms less than one year, a proportionate fee is payable.

New section 15D provides that where an application is refused or withdrawn, the chief executive must refund any application fee already paid.

Replacement of part 6, heading (Transitional provision)

Clause 10 omits the existing part 6 heading (transitional provision), replaces it with the new heading ‘Transitional provisions’, and inserts a new division 1 with the heading ‘Transitional provisions for SL No. 111 of 2021’.

Insertion of new part 6, division 2

Clause 11 inserts new part 6, division 2, to prescribe the transitional provisions for the regulation.

New section 17 prescribes how licence fees are to be discounted for applications made prior to 1 September 2024.

Applications may be lodged through an online portal, which is expected to be operational from 1 September 2023. To encourage early applications, any received in September 2023 will only pay one-twelfth of the usual fee, with applications received in October paying two-twelfths, and so on. As applications received prior to the portal going live cannot be processed, no fee is

payable. Also, to not encourage last-minute applications, no discount is available for applications received in August 2024.

Insertion of new schedule 2

Clause 12 inserts new schedule 2 ‘Fees’.

New schedule 2 prescribes the fees as follows:

- for application, renewal and restoration of a retail licence or retail licence (liquor) - 448 fee units; and
- for application, renewal and restoration of a wholesale licence - 636 fee units.

Division 3 Amendment commencing on 1 September 2023

Insertion of new section 18

Clause 13 inserts new section 18.

New section 18 provides for the renumbering of references to the Tobacco and Other Smoking Products Act in various regulations. This is required as result of commencement of section 56(1) of the Act, which renumbers the Act. The legislation to be amended is:

- this regulation;
- the *Corrective Services Regulation 2017*, section 19(1)(y);
- the *Land Regulation 2020*, section 82(3), definition *smoking product*;
- the *Marine Parks Regulation 2017*, section 152(4), definition *smoking product*;
- the *Nature Conservation (Protected Areas Management) Regulation 2017*, section 110(5), definition *smoking product*; and
- the *State Penalties Enforcement Regulation 2014*, schedule 1, entry for Tobacco and Other Smoking Products Act.

New section 18(2) provides that this section expires on 2 September 2024.

Part 4 Other amendments

Legislation amended

Clause 14 inserts schedule 1 to amend other legislation.

Schedule 1 Other amendments

Schedule 1 makes cross-referencing updates to the *Land Regulation 2020*, *Marine Parks Regulation 2017*, *Nature Conservation (Protected Areas Management) Regulation 2017* and *Parliamentary Service By-law 2013*.

Schedule 1 also makes consequential amendments to the Tobacco and Other Smoking Products Regulation.