

**THE LEGISLATIVE ASSEMBLY FOR
THE AUSTRALIAN CAPITAL TERRITORY**

TOBACCO (COMPLIANCE TESTING) AMENDMENT BILL 2006

EXPLANATORY STATEMENT

**Circulated by the authority of
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OUTLINE

The purpose of Bill is to amend the *Tobacco Act 1927* (the Tobacco Act) to enable the conduct of compliance testing for compliance monitoring and enforcement of the prohibition on the sale of smoking products to persons under the age of 18.

BACKGROUND

The Tobacco Act prohibits the sale of smoking products to persons under the age of 18. Monitoring and enforcement of this prohibition currently consists of investigating complaints and conducting discreet surveillance of retail tobacco outlets. These strategies have not proved to be effective in detecting offences or in preventing tobacco sales to young people.

The *Smoking behaviours of Australian secondary students in 2002* report commissioned by the Australian Government Department of Health and Ageing states that nearly 1 in 5 ACT under-age smokers purchased their last cigarettes from a shop. The report also states that fewer than 1 in 5 under-age smokers were frequently asked to show proof of age when buying cigarettes, and more than 1 in 3 say that they have never been asked to provide proof of age.

Studies conducted in Australia and overseas have shown that increased retail compliance reduces young people's access to tobacco.

Studies have also shown that retail compliance can be increased by proactive activities such as compliance testing, community awareness campaigns, and successful prosecution of retailers.

Compliance testing is a strategy which involves test purchases of cigarettes or other tobacco products made by trained young persons under the supervision of an authorised officer.

Under the Tobacco Act, smoking products are defined as products containing tobacco or herbs (for example cigarettes).

A young person is defined in the *Children and Young People Act 1999* as person aged between 12 and 18 years old.

AIMS AND PURPOSE OF THE LEGISLATION

The Tobacco (Compliance Testing) Amendment Bill 2006 creates a legislative framework, which enables compliance testing, using test purchases of tobacco products, to be undertaken legally and lawfully.

DETAILS

Detailed explanation of each clause of the Bill follows.

The notes provided in the legislation are not part of the law and are intended to assist readers with additional information or explanation.

CLAUSE 1 NAME OF ACT

Names the Act.

CLAUSE 2 COMMENCEMENT

The legislation commences on the day after it is notified on the ACT legislation register.

CLAUSE 3 LEGISLATION AMENDED

This clause specifies the legislation, which is amended by the Bill.

CLAUSE 4 NEW PART 6A

This clause inserts a new part, 6A into the Tobacco Act.

Part 6A contains the provisions, which provide the legislative framework for the operation of the compliance testing regime.

Part 6A is made up of clauses 42A to 42H.

Clause 42A Definitions-pt 6A

The definition clause contains definitions of key terms used in the legislative framework for the compliance testing regime.

Clause 42B What is compliance test?

This clause specifies what constitutes compliance testing.

It is an offence for a person to sell smoking products to person under the age of 18. Section 5 of the Tobacco Act contains the definition of sell.

Compliance testing is a strategy to test the compliance of a tobacco seller in relation to section 14 (Supply of smoking products to under 18 year olds) of the Tobacco Act. It involves a trained young person under the supervision of an authorised officer attempting to purchase cigarettes or other tobacco products.

A tobacco seller is an individual person and includes a retail tobacco licensee, their agent or employee.

Section 32 of the Tobacco Act specifies who are authorised officers. In relation to the conduct of compliance testing, a police officer is not an authorised officer.

Clause 42C Approval of compliance testing programs

Compliance testing is undertaken in accordance with a program approved by the Minister.

A number of safeguards have been incorporated in the Bill to ensure that compliance testing is appropriately conducted and not being misused.

Examples of these safeguards include:

- a program must specify areas where compliance testing will be undertaken (in other words each program only authorises testing over a given location);
- each program will operate for a maximum of three months;
- the Minister must be satisfied of the need to conduct a program in a particular area; and
- before approving a program of testing, the Minister must approve compliance testing procedures.

Clause 42D Approval of compliance testing procedures

This clause provides the Minister with the power to approve procedures for compliance testing. The procedures must protect the welfare as well as the health and safety of young persons who assist in compliance tests (purchase assistants). The procedures also ensure that retailers freely and voluntarily sell tobacco products, and are not pressured, persuaded, manipulated or harassed into doing so.

Examples of matters that must be in the procedures include:

- considerations of welfare, health and safety of purchase assistants;
- allowing a purchase assistant to withdraw from a compliance test at any time;
- protecting the anonymity of a purchase assistant;
- making certain that a purchase assistant is indistinguishable from other young purchasers;
- requiring a purchase assistant not to lie about their age; and
- purchase assistants following the approved script and instructions.

Ministerial approval of compliance testing procedures is a disallowable instrument.

Clause 42E Carrying out of compliance testing

A compliance test is undertaken by an authorised officer in order to obtain evidence for an enforcement action for an offence against section 14 (Supply of smoking product to under 18 year olds) of the Tobacco Act. It involves a

purchase assistant under the supervision of an authorised officer, purchasing, or attempting to purchase, tobacco products from a tobacco seller.

Before a young person can be used as a purchase assistant, the authorised officer must have obtained the informed consent of the young person and at least one of the person(s) with parental responsibility for the young person, as defined in the *Children and Young people Act 1999*. This clause specifies what information must be provided to the young person and the person(s) with parental responsibility for the young person. The compliance testing procedures require that the authorised officer obtains written consent.

Clause 42F Lawfulness of compliance testing

This clause provides for the lawfulness of the program, which uses test purchases to monitor and enforce the sale of tobacco products provisions of the Tobacco Act. It ensures that the carrying out of compliance testing is not unlawful provided that the authorised officer and/or the purchase assistant act in accordance to an approved program and procedures and in good faith.

This clause does not permit the purchase assistant to be part of compliance tests on premises where they are not authorised to enter (e.g. a licensed premises).

The authorised officer supervising the compliance test must ensure that it is carried out in accordance with the approved program and procedures.

Disciplinary action can be taken against an authorised officer under the *Public Sector Management Act 1994* where the authorised officer or purchase assistant undertake compliance testing that is not consistent with the approved procedures.

Clause 42G Indemnification of authorised officers and purchase assistants

This clause is intended to protect authorised officers and purchase assistants in order to ensure that the program of compliance testing can be effectively carried out.

An authorised officer cannot be sued for any of their actions while engaged in carrying out compliance tests, provided that his or her actions were consistent with an approved program and procedures.

A purchase assistant cannot be sued for any of their actions while engaged in carrying out compliance tests, provided that his or her actions were substantially consistent with the approved procedures (training) and any instructions by the authorised officers supervising the compliance test.

In the event of either an authorised officer or purchase assistant is sued the civil liability would be with the Territory, not the individual(s).

Clause 42H Annual report about compliance testing

This clause specifies the information that must be provided by the Chief Executive in the annual report regarding the undertaking of compliance testing in the ACT.

CLAUSE 5 DICTIONARY, NEW DEFINITIONS

This clause contains the definition of approved procedures in relation to the conducting of compliance testing.

CLAUSE 6 DEFINITION OF AUTHORISED OFFICER

This clause contains the definition of an authorised officer.

In relation to the conduct of compliance testing, a police officer is not an authorised officer.

CLAUSE 7 DICTIONARY, NEW DEFINITIONS

This clause adds new defined terms relating to compliance testing to the Dictionary at the end of the Tobacco Act.