Tobacco and Other Smoking Products Amendment Bill 2004

EXPLANATORY NOTES

GENERAL OUTLINE

Policy Objectives of the Legislation

The primary policy objective of the Bill is to improve the health of the public and reduce the incidence of smoking.

Reasons for and means of achieving the policy objectives

In 2001, significant amendments to the *Tobacco and Other Smoking Products Act 1998* (the Act) gave effect to the legislative components of the *Queensland Tobacco Action Plan 2000/01 to 2003/04*. The amendments commenced on 31 May 2002 as a 'first-step' in addressing the impact of tobacco smoking on the public.

Section 52 of the Act required the Minister for Health to commence a review of the operation of the Act (the Review) by 31 May 2004. The *Tobacco and Other Smoking Products Amendment Bill 2004* (the Bill) gives effect to the outcomes of the Review by amending the Act to:

- further reduce youth access to smoking products
- further restrict the advertising, display and promotion of smoking products
- further reduce exposure to environmental tobacco smoke (particularly for hospitality workers), by removing the exemption from the ban on smoking in enclosed places for licensed premises, and banning smoking in specified outdoor areas
- improve the operation of existing provisions of the Act.

Reducing youth access to smoking products.

The uptake of smoking is influenced by access to smoking products. The Act currently makes it an offence to supply a smoking product to a child,

and obliges a supplier to ensure that employees do not supply smoking products to a child. The Bill strengthens the current offences to provide a clear message to suppliers of smoking products that sale of smoking products to minors is a serious offence, which warrants significant penalties.

Stronger penalties will apply to retailers who are convicted of selling smoking products to minors. The penalty for first and second offences of supplying smoking products to a minor are increased by the Bill. Further, a new penalty of 420 penalty units will apply to a third or later offence from the end of 2005. In addition, on conviction for supplying smoking products to a child, or allowing an employee to supply smoking products to a child, a court may make an order prohibiting the supply of smoking products by the supplier. For a first offence, the court may prohibit the supplier from supplying smoking products for up to six months; for a second offence the prohibition may be ordered for up to one year; and for a third or later offence the prohibition may be ordered for up to three years.

It will be also be an offence for a child to falsely represent their age as 18 years or older for the purpose of purchasing a smoking product.

Access to tobacco product vending machines will be further restricted by requiring these machines located in bar areas of liquor licensed premises to be easily observed by bar staff. Those machines that are placed in gaming machine areas, must also be easily observed by employees, and be placed no more than 1 metre from a gaming machine.

In order to prevent the sale of small quantities of loose tobacco or loose smoking blend for smoking in a hookah pipe, the Bill makes minor amendments to require the current minimum saleable quantities of loose tobacco and loose smoking blend - no less than 25 grams or 15 grams respectively - to be contained in a package that is packed by the manufacturer or importer.

Further restricting the advertising, display and promotion of smoking products.

Advertising, display and promotion of smoking products has a significant influence on smoking behaviour. Amendments made to the Act in 2001 generally restricted the advertising and display of smoking products to the point of sale in a retail outlet, and restricted the forms of display that are permitted. While the form of display is currently restricted, there is no limit on the size of the display at retail outlets. The Bill imposes additional restrictions on the display of smoking products.

The permitted forms and size of display will be –

- smoking products may be advertised or displayed only at a retail outlet, in one location in the outlet, and only as provided for by the legislation
- the size of a display of smoking products will be restricted to a surface area of 3 square metres for tobacconists, and 1 square metre for other retailers; the surface area includes surfaces of a humidified cigar container through which a customer can see the contents of the container
- cigars may be located separately from the display if they are in a humidified container
- each product line of an immediate package (eg a packet of cigarettes) may be displayed within the allowed surface area for a display in one of three ways, ie an individual packet, a representation of the package, or by means of a stack dispenser. However, packages in a stack dispenser may not be arranged as a display panel which highlights the immediate packages and are fewer in number than in a standard stack dispenser.

The advertising and display of smoking products is further restricted by:

- including cigarette papers in the definition of 'smoking products' (for this part of the Act)
- prohibiting the display of cartons of smoking products
- prohibiting the display of images that promote consumption, use or association with a smoking product
- prohibiting 'special' or 'discount' tickets, and
- reducing the permitted size of price tickets and price boards, and limiting price boards to displaying product and price information for cartons only.

The Act prohibits the supply of objects or entitlements in association with the sale or consumption of a smoking product. It is currently a defence to prove that the object or entitlement would have been received if goods other than a smoking product had been purchased. The Bill qualifies the defence, and enables smoking products to be excluded from 'shopper loyalty' schemes. Indirect promotion of smoking products through incentives for customers to purchase the products from retailers participating in the scheme (eg receiving discount petrol vouchers from

purchasing smoking products) will no longer be included in the defence. However, loyalty schemes associated with credit cards will not constitute an offence.

Further reducing exposure to environmental tobacco smoke

There is an increasing body of scientific evidence that inhalation of environmental tobacco smoke (ETS) poses the same type of health threats to involuntary smokers as active smoking does to smokers. Recent research has indicated that ETS can have detrimental effects in outdoor areas, depending on proximity.

Indoor areas of licensed premises

The Bill will remove the current exemption from the ban on smoking in indoor areas of licensed premises, to be fully implemented by 1 July 2006. Consequently, hospitality workers and patrons will have the same level of protection from the toxic effects of ETS as other indoor workers. The ban will contribute to improving the health of Queenslanders. The Bill provides for a regulation to be made about the details of phasing in the smoking ban in indoor areas of licensed premises. The phase-in period will enable the hospitality industry to prepare for the changes and for Queensland Health to undertake an education campaign to raise community and industry awareness of the reforms.

Smoking bans in specified outdoor areas

Implementation of bans on smoking in indoor areas of licensed premises is expected to increase the quantity of ETS in outdoor areas. To reduce exposure to ETS and improve the health of the public, the Bill will prohibit smoking in the following areas:

- at outdoor eating or drinking places (ie, outdoor areas where food or drink is provided, while food or drink is being provided or consumed, like outdoor areas of cafes, restaurants, beer gardens)
- within 4 metres of non-residential building entrances (except for entrances to hotels and clubs, and entrances to buildings that are part of an outdoor pedestrian mall)
- at major sports facilities managed by the Major Sports Facilities Authority
- within 10 metres of children's playground equipment located at a place that is ordinarily open to the public (so a person smoking on

residential premises, or inside a motor vehicle that is near playground equipment will not commit an offence)

- at patrolled beaches and prescribed 'artificial beaches'.

However, the Bill provides for licensees of hotels and clubs to make a business decision to establish a 'designated outdoor smoking area', from 1 July 2006. If there is a designated outdoor smoking area, the licensee is required to develop a smoking management plan to manage and minimise the adverse effects of smoking in the licensed premises.

The prohibition on smoking near non-residential building entrances, at major sports facilities, near children's playground equipment and on patrolled and prescribed artificial beaches will come into effect on 1 January 2005. The prohibition on smoking at outdoor eating or drinking places will come into effect on 1 July 2006.

Estimated Cost for Government Implementation

Implementation of the new requirements in the Bill will involve appointment and training of authorised persons, and training of a state-wide network of Queensland Health staff to monitor compliance with the Act. A significant public and industry education campaign is planned, and all costs will be met from within the existing Queensland Health budget.

Consistency with Fundamental Legislative Principles

Phase-in of smoking ban in indoor areas of licensed premises

The Bill inserts section 26RA into the Act to enable the *Tobacco and Other Smoking Products Regulation 1998* (the Regulation) to detail the phase-in for the ban on smoking in indoor areas of licensed premises. As the Bill allows the detail of the phase-in to be delegated to the Regulation, this may be viewed as a 'Henry VIII clause'.

It is important to note that section 26RA (and the resulting Regulation) make transitional arrangements for indoor areas of licensed premises until a total ban is achieved on 1 July 2006. Although the dates for the phase-in have been approved, the details of the phase-in are to be determined. It is anticipated that on 1 January 2005, one-third of the indoor area of licensed premises, including one-third of all gaming machines at the premises, will be no smoking, followed by two-thirds of the premises on 30 September 2005, and a complete ban by 1 July 2006.

However, the Bill places important safeguards around what the Regulation can prescribe, to ensure that the principle of the Act is preserved, and sufficient regard for the institution of Parliament is observed.

For example, the Regulation cannot 'override' section 26RA of the Act by prescribing a complete (rather than progressive) smoking ban in indoor areas of licensed premises. As an additional safeguard, the section of the Regulation that prescribes the details of the phase-in will expire at the end of 30 June 2006 – this means that the Regulation can only be used for this phase-in. While the Regulation can impose penalties for a contravention (eg, against a person for smoking in a no smoking area) the maximum penalty is limited to 20 penalty units ($1,500).

Consultation

The Review of the Act included public and stakeholder consultation. Preliminary consultation with key stakeholders, including health groups, the hospitality industry, unions, and tobacco retailers, was followed by release of a Discussion Paper to assist stakeholders to make submissions to Queensland Health. A total of 1,302 submissions were made by key stakeholders and members of the public. Submissions were received from members of the public (57%), the tobacco retail industry (33%), non-Government health organisations (3%), the hospitality industry (2%), Queensland Government Departments (1%), unions (0.23%), and others who did not identify which category they belonged to (4%).

Further consultation was undertaken with key stakeholders in the tobacco retail sector in September 2004 to address the new display restrictions in the Bill. Further consultation was also undertaken in September and October 2004 with hospitality industry representative organisations, and with the Local Government Association of Queensland.

The Review found that there was overwhelming public support for a ban on smoking inside hotels and clubs. Key stakeholders in the hospitality industry agreed that smoking bans should be introduced inside licensed premises, but proposed a lengthy delay before bans are implemented.

Responses to the discussion paper indicated general support from key stakeholders and the public on other no smoking initiatives, such as banning smoking in certain outdoor areas, banning the display of tobacco products at retail outlets and making the purchase of tobacco by minors an offence. There was some divergent opinion among stakeholders on the implementation or extent of the bans. These views were taken into consideration in preparing the Bill.

NOTES ON PROVISIONS

Clause 1 – specifies the short title of the Act.

Clause 2 – provides for staged commencement of the Act. The provisions which will commence on assent include: provision of supplier contact information by manufacturers and wholesalers on the request of the chief executive of Queensland Health; and a head of power to enable a regulation to be made about phasing in the ban on smoking indoors at licensed premises.

The clause provides for commencement, on 1 January 2005, of provisions which prohibit smoking at patrolled beaches, artificial beaches and near children's playground equipment and non-residential building entrances. As local government will have the power to monitor and enforce those outdoor smoking bans, provisions relevant to local government's role also commence on 1 January 2005. The clause also provides for commencement of the ban on smoking at major sports facilities on 1 January 2005.

Clause 2 also provides for commencement, on 31 December 2005, of provisions which strengthen the penalties for supply of smoking products to minors, create a new offence for a child to falsely represent their age, and new restrictions on the advertising and display of smoking products.

On 1 July 2006, provisions of the Bill relevant to implementation of a complete ban on smoking indoors in licensed premises will commence. On the same date, provisions will commence that are relevant to a ban smoking in an outdoor eating or drinking place, including the capacity for hotels and clubs to designate an outdoor smoking area.

Clause 3 – identifies that the Bill amends the *Tobacco and Other Smoking Products Act 1998*.

Clause 4 – amends existing section 9A to increase the maximum monetary penalty to 40 penalty units ($3 000) for a supplier which did not "take prevention measures in relation to employees".

The prevention measures in existing section 9 of the Act remain unchanged. These include, for example, instructing the employee not to supply smoking products to children in any circumstances, even if the supply is for, or claimed to be for, an adult; and to sight acceptable evidence of age for a person before supplying a smoking product to the person, unless satisfied the person is an adult.

Clause 5 – amends the existing subsection 10(1) to clarify that both individuals and companies can be prosecuted for supplying smoking products to children. The existing provision excludes companies and corporations, and limited prosecutions to a 'natural persons'. The maximum penalty for first and second offences will increase to 140 ($10 500) and 280 penalty units ($21 000), respectively.

The existing section 10 provides only for a first and a second or later offence. This clause also adds a maximum penalty for a third or later offence of 420 penalty units ($31 500) for supplying smoking products to children. This commences on 31 December 2005, when the new section 13 takes effect (a court may under new section 13 impose restrictions on the sale of smoking products).

Clause 6 – amends subsection 11(1) to increase the penalty for first and second offences to 140 ($10 500) and 280 penalty units ($21 000), respectively.

The existing section 11 provides penalties only for a first and a second or later offence. This clause adds a penalty for a third or later offence for a supplier who allows an employee to supply smoking products to children. Consistent with clause 5, the maximum penalty for a third or later offence is 420 penalty units ($31 500). This change commences on 31 December 2005, when the new section 13 takes effect (a court may under new section 13 impose restrictions on the sale of smoking products.)

Clause 7 – amends section 12 to increase the maximum monetary penalties a court could impose on an employee for supplying smoking products to a child to 20 penalty units ($1 500) for a first offence and 40 penalty units ($3 000) for second or later offence.

Clause 8 – replaces existing section 13. The new section 13 provides that a court, at its discretion, may make an order imposing a prohibition of, or conditions or restrictions on, the sale of smoking products on a person or company who is convicted under section 10 or 11, of supplying or allowing an employee to supply a smoking product to a child. The maximum period of the order would be 6 months for a first conviction, 1 year for a second conviction and 3 years for a third or later conviction.

Where a person or company was supplying smoking products from more than 1 outlet when the offence was committed, the prohibition of, or restriction or conditions imposed on, supplying the products could only be applied to the retail outlet where the offence occurred.

The prohibition, restriction or conditions imposed by the court apply in addition to any other penalty imposed by a court for a conviction under amended sections 10 or 11.

A person or company must not contravene a prohibition order – a maximum penalty of 420 penalty units ($31 500) may be imposed.

Clause 9 – inserts new section 13A which provides the chief executive of Queensland Health with the ability to seek information about the location and contact details of suppliers of smoking products from manufacturers and wholesalers, for the purpose of monitoring compliance and enforcement with the Act, and maintaining a list of suppliers for the purpose of providing information and advice on the requirements of the Act.

The chief executive may, in writing, require the manufacturer or wholesaler to provide some or all of the prescribed contact details for each supplier. The details that can be requested are limited to the details listed in new subsection 13A(2). The notice may require contact details of retailers supplied for up to 12 months and may require information by a date that is 28 days from the date of the notice. It may specify the form in which the information is provided (such as facsimile or email).

It will be an offence for a manufacturer or wholesaler not to comply with the chief executive's request for information, unless there is a reasonable excuse. A maximum penalty of 70 penalty units ($5 250) applies.

Privacy concerns are addressed, by allowing the chief executive to use or disclose this information to a person only for the following purposes: maintaining an accurate contact list of suppliers, so that the suppliers can be updated about the requirements of the Act and any subsequent changes; and for the purposes of monitoring and enforcing compliance with the Act.

Clause 10 – amends existing section 15(2)(a) to require *use of* a tobacco product vending machine (a vending machine) to be observed by bar staff (for example to prevent a vending machine from being positioned so that only the back of the machine can be observed). This clause also amends section 15(2)(c) to require a vending machine be placed no more than 1 metre from a gaming machine in a gaming machine area of a liquor licensed premises. This provides clear direction to licensees about placement of vending machines.

Clause 11 – increases the maximum monetary penalty a court may impose for an adult who supplies a smoking product to a child to 140 penalty units ($10 500).

Clause 12 – inserts new Part 2, Division 3B.

New Division 3B – False representation of age

New section 19A creates an offence for a child to falsely represent their age to be 18 or over for the purpose of attempting to, or actually acquiring, smoking products from a supplier.

Initial investigation of alleged breaches of this provision will be by Queensland Health Environmental Health Officers. If it appears that an offence has been committed, Queensland Health will refer the alleged breach to the Queensland Police Service, which will assess what action is appropriate within the procedural requirements of the *Juvenile Justice Act 1992*. The *Juvenile Justice Act 1992* provides for cautioning as a diversion from court proceedings.

The provision prescribes the maximum penalty for this offence is 20 penalty units ($1 500).

Clause 13 – increases the maximum monetary penalty for not displaying a prohibition sign at the point of sale of smoking products to 20 penalty units ($1 500).

Clause 14 – increases the maximum monetary penalty that a court may impose on a person in charge of a tobacco product vending machine who fails to display a prohibition sign on or near the machine to 20 penalty units ($1 500).

Clause 15 – increases the maximum penalty for a supplier that supplies loose cigarettes or herbal cigarettes to 140 penalty units ($10 500).

Clause 16 – replaces existing sections 23 and 23A of the Act with new sections 23 and 23A to correct an ambiguity which had unintentionally allowed the sale of small quantities of unpackaged loose tobacco to smoke in a hookah pipe. The amended sections 23 and 23A clarify that loose tobacco and loose smoking blend can only be sold in packages, packed by the manufacturer or importer, of the specified minimum weight. The penalties for breaching amended sections 23 and 23A have been increased to 140 penalty units ($10 500).

Clause 17 – increases the maximum penalty for supply of food or toys resembling smoking products to 140 penalty units ($10 500).

Clause 18 –

New Division 1A – Definitions

The current definitions for 'humidified container' and 'humidified room' are moved from section 26B(6) of the Act to new section 26AA. Section 26AA provides the definitions for Part 2A of the Act, and includes an amended definition of 'smoking product' which now includes cigarette papers. The amended definition will prevent advertisements for cigarette papers acting as *de facto* tobacco advertisements, and prevent oversized packages of cigarette papers being displayed.

Clause 19 – replaces existing section 26A, to clarify that it is an offence for a supplier to advertise or display smoking products anywhere other than at a retail outlet, and that it is an offence for any such advertising or display to not be in accordance with the requirements of Part 2A, Division 1 of the Act (sections 26A to 26HB). The maximum penalty for these offences is 140 penalty units ($10 500).

Clause 20 – omits existing subsection 26B(4) so that a duty-free store is subject to the same display and advertising restrictions as any other retail outlet. The definitions for 'humidified container' and 'humidified room' which were in omitted subsection 26B(6) are reinserted at Clause 18. With two subsections omitted, there is also a consequential renumbering of existing subsection (5).

Clause 21 – inserts new sections 26CA and 26CB.

Section 26CA allows retail outlets to have only one smoking product display per outlet. Section 26CB restricts the surface area of a display to 1 square metre, except for a tobacconist, whose display is restricted to 3 square metres (section 26CB). There is no requirement for a 1 square metre display to be in a display unit of that size. It will be possible for retailers to comply with the maximum surface area in a number of ways, for example, by covering any part of an existing display that exceeds the display restriction.

The Bill requires that the smoking product display must be continuous – for example it would be unlawful to have two separate 0.5 square metre displays in a store, even though the surface area of the entire display totals 1 square metre.

In the Bill, a tobacconist is defined as a retailer where 80% or more of the average gross turnover of the business is derived from the sale of smoking products. The definition also requires that the business is conducted separately from, not in conjunction with, and not within the premises of,

any other business. This will prevent a large retail store subletting shop space with the intent to set up a 'tobacconist' within their store and circumvent the normal 1 square metre restriction. The Bill also provides special provisions for the display of cigars.

The maximum monetary penalty of 140 penalty units ($10 500) for breaching display provisions is prescribed in section 26A.

Clause 22 – amends existing section 26D to further restrict the manner of display of an immediate package of smoking products to prevent smoking products being arranged as a display (or feature) panel. Display panels have been developed to highlight smoking products to make them more appealing to consumers.

Clause 23 – removes the existing section 26F which provided for the display of cartons of smoking products, so that cartons of smoking products will be no longer permitted to be displayed.

The new section 26F requires humidified containers or humidified rooms which store cigars at retail outlets to display, on the container or door, the same health warnings that would be found on the retail packaging of cigars. The warning must be displayed in the way prescribed under a regulation.

Clause 24 – inserts a new subsection (2) to section 26H to further restrict the content of price displays for smoking products to only the price itself. That is, tickets with words like 'discount' or 'special' cannot be incorporated into price displays.

Clause 25 – Provides for new section 26HA and 26HB which allow a business that supplies smoking products to include reference to smoking products in the business name. This is to ensure that the display of a business name which includes such a reference, will not contravene the advertising and display restrictions mentioned in clause 19. Section 26HB allows a tobacconist to use the term in advertising for the business, without breaching the advertising provisions of the Division. This does not however, provide a tobacconist any rights to advertise individual smoking products.

Clause 26 – increases the maximum penalty for not displaying a mandatory quit smoking sign to 20 penalty units ($1 500).

Clause 27 – increases the maximum penalty for the offence in existing section 26L for supplying an object or entitlement that promotes smoking products to 140 penalty units ($10 500).

Clause 28 – increases the maximum penalty for supplying an object or entitlement in association with the sale or consumption of a smoking product to 140 penalty units ($10 500).

New subsection (4) narrows the existing defence, where the object or entitlement could only be received by purchasing the smoking product from the defendant or the defendant's nominated supplier. This enables smoking products to be excluded from 'shopper loyalty' schemes, which indirectly promote smoking products by offering incentives for customers to purchase the products from retailers participating in the scheme (eg receiving discount petrol vouchers from purchasing smoking products). These schemes are controlled at point of sale and existing technology can be used to remove the cost of smoking products from the total expenditure at the retail outlet.

The Bill does not remove the defence for credit card rewards schemes, because these are not controlled at point of sale, and a credit card provider has no way of distinguishing the purchase of any smoking products from any other goods.

Clause 29 – increases to 140 penalty units ($10 500), the maximum penalty for an offence against existing section 26N for supplying a smoking product for free, if the supply promotes the sale of a smoking product.

Clause 30 – increases to 140 penalty units ($10 500), the maximum penalty for an offence against existing section 26O (Competition that promotes smoking product).

Clause 31 – increases to 140 penalty units ($10 500), the maximum penalty for an offence against existing section 26P (Conduct of competition in association with smoking product sale or consumption).

Clause 32 – inserts a new section 26PA to make it an offence for a supplier to display an image that promotes a person or thing using or being associated with a smoking product. This is to prevent the promotion of smoking products by the use of images that may not be considered as advertisements or displays.

This provision would not apply, for example, to a newsagent that displays oversized magazine covers and the like, even if they contain an image of someone smoking. Similarly, it is not an offence to display magazines that have similar images on the cover.

The maximum penalty for displaying such an image is 140 penalty units ($10 500).

Clause 33 – amends existing section 26Q, by removing the definitions of 'bingo', 'bingo area', 'bingo session', 'dining area', 'gaming table area' and 'meal' from 1 July 2006. These definitions will become redundant when the amendment prescribed in clause 34 takes effect, as all indoor areas of licensed premises will become no smoking.

The definitions of 'occupier', 'residential premises', 'smoke' and 'enclosed', are removed from this section, but inserted into the dictionary in the schedule of the Act by clause 47, to ensure the definitions apply across the whole of the Act.

The existing definition of 'multi-unit residential accommodation' is amended to include 'hotel accommodation' for the purpose of ensuring the prohibition on smoking does not apply inside individual hotel rooms.

Clause 34 – omits existing paragraph 26R(2)(e) on 1 July 2006. This is the day the final exemptions from smoking in enclosed places of licensed premises are removed, making them 100% smoke free.

Clause 35 – provides a head of power for a regulation to require licensed premises to progressively set aside certain, previously exempt indoor areas, as no smoking areas. This phase-in of smoking bans in these areas is to commence on 1 January 2005.

It is important to note that new section 26RA (and the resulting Regulation) will provide for transitional arrangements for indoor areas of licensed premises until a total smoking ban is achieved on 1 July 2006. Although, phase in dates have been approved, the details of the phase-in are still to be determined. It is anticipated that on 1 January 2005, one-third of the indoor area of licensed premises, including one-third of all gaming machines at the premises will be no smoking, followed by two-thirds of the premises on 30 September 2005, and a complete ban by 1 July 2006.

The regulation may, despite the exemption given to licensed premises in existing paragraph 26R(2)(e), require a licensee to set aside parts of the licensed premises as non-smoking areas and prescribe how the ban may be implemented and enforced.

Subsection (2) prescribes a number of details that the regulation can provide for. For example, the proportion of the licensed premises which must be set aside as non-smoking; the commencement date from which the non-smoking areas are to be implemented; and the proportion of gaming machines that must be located in non-smoking areas.

The Bill places important safeguards around what the Regulation can prescribe, to ensure that the principle of the Act is preserved, and sufficient

regard for the institution of Parliament is observed. For example, the Regulation cannot 'override' new subsection 26RA(3) of the Act by prescribing that the whole of a licensed premises is required to be smoke free before 1 July 2006.

New subsection 26RA(4) provides an additional safeguard. The section 26RA and Regulation that prescribes the details of the phase-in will expire at the end of 30 June 2006 – this means that the Regulation can only be used for this phase-in.

Clause 36 – amends existing section 26S to provide that a licensed premises must display a no smoking sign at the entrance to the premises. The maximum penalty for not complying with the provision is increased to 20 penalty units ($1 500).

Clause 37 – removes existing section 26T, which clarifies that there is no right to smoke in enclosed place. Clause 43 inserts a similar provision (section 51C), but applies it generally to take account of the new bans in specified outdoor areas. The Bill ensures that in prescribing specific areas where persons cannot smoke, it does not, by default, create or preserve a right for a person to smoke elsewhere.

Similarly, by prescribing only specific areas where persons cannot smoke, the Bill does not override any provisions of another Act that prohibits smoking. For example, where a regulation under the *Transport Infrastructure Act 1994* prohibits smoking at train stations where a no smoking sign is displayed, the provisions of this Bill do not affect the smoking prohibition in relation to stations.

Clause 38 – adds a new subsection 26U(2) to provide that where a person is smoking in an enclosed place where food or drink is provided, and has been directed to stop smoking, the occupier of the business (or an employee or agent of the occupier) must not provide food or drink to the person while they continue to smoke. The maximum penalty for an occupier who continues to serve food or drink to the person smoking is 140 penalty units ($10 500). Clause 40 inserts a similar provision on occupiers for outdoor eating or drinking places (new section 26Y).

Clause 39 – increases the maximum penalty for an offence by an occupier for allowing a person to breach section 26R (person must not smoke in an enclosed place) to 140 penalty units ($10 500). The defences that an occupier has in existing section 26V(2) remain unchanged.

Clause 40 –

New Part 2C – Smoke Free Outdoor Places

New Division 1 – Outdoor eating or drinking places

New section 26W provides that an 'outdoor eating or drinking place' is an area, other than an enclosed place (an enclosed place is defined in existing section 26Q), which is provided by a business for the purpose of consuming food or drink provided by the business, but only during the times when food or drink is being provided by the business or food or drink is being consumed there.

To remove doubt about whether food is provided by the business, subsection (2) clearly states that the food or drink is provided by the business whether the food or drink is served to the area by the business or taken by a customer to the area to be consumed. Examples of outdoor eating and drinking places include open beer gardens, footpath dining areas, and restaurants that have open rear decks.

New section 26X creates an offence for smoking in an outdoor eating or drinking place. The maximum penalty is 20 penalty units ($1 500). However, smoking in a 'designated outdoor smoking area', as defined in new section 26ZA is not an offence.

New section 26Y creates an offence for a person to smoke in an outdoor eating or drinking place (which is not a 'designated outdoor smoking area') once directed to stop smoking by an authorised person, or the occupier of the place where the person is smoking (or an employee or agent of the occupier). The maximum penalty for the offence is 20 penalty units ($1 500).

Subsection (2) provides that where a person is smoking in an outdoor eating or drinking place and has been directed to stop smoking, the occupier of the business (or an employee or agent of the occupier) must not provide food or drink to the person while they continue to smoke. The maximum penalty for continuing to provide food or drink is 140 penalty units ($10 500). An occupier is defined in the Dictionary of the Act.

New section 26Z creates an offence by an occupier for allowing a person to breach section 26X(1) (Person must not smoke at outdoor eating or drinking place). The maximum penalty for a breach by an occupier is 140 penalty units ($10 500).

The offence, and the defences that an occupier has, are the same as those for an occupier in relation to an enclosed place. It is a defence if the

occupier was not aware, or could not be reasonably expected to be aware, that there was a person smoking in the outdoor eating or drinking area. It is also a defence for the occupier, if the occupier or his or her employee or agent directed the person to stop smoking and advise them it was offence to continue smoking in the outdoor eating or drinking area.

New section 26ZA – provides where a premises is subject to a 'general' or 'club' licence under the *Liquor Act 1992*, an occupier may set aside a part of the outdoor area of the premises as a 'designated outdoor smoking area'. An outdoor area for this section is an area that is not enclosed.

A 'general' licence usually applies to hotels, a 'club' licence applies to such licensed premises as RSL clubs and sporting clubs.

In setting aside a 'designated outdoor smoking area', a licensee must include a buffer at the perimeter of any part of the designated outdoor smoking area that is adjacent to outdoor areas ordinarily accessed by patrons. A buffer must be a screen, impervious to smoke, that is a least 2.1 metres high, or an area at least 2 metres wide, in which patrons cannot eat, drink or smoke. If a buffer is an area 2 metres wide (eg a garden), at least half of its area must be taken from the area that would otherwise form part of the outdoor smoking area.

A buffer will help identify the designated outdoor smoking area and minimise patrons' immediate exposure to tobacco smoke coming from the outdoor smoking area of hotels or licensed clubs. A buffer will be required, for example, at the perimeter of a designated outdoor smoking area which adjoins an area where drinking or eating is permitted, or where there is children's playground equipment. The total area cannot be more than 50% of the outdoor areas of the licensed premises. The maximum penalty for not complying with these requirements is 140 penalty units ($10 500).

A hotel or licensed club may have more than one designated outdoor smoking area, provided the total area for the designated outdoor smoking areas do not exceed 50% of the total outdoor area of the licensed premises.

A licensee must not allow anyone to smoke in an outdoor area. For example, if the licensee of a hotel or licensed club sets up one or more designated outdoor smoking areas, the licensee cannot make any other part of the outdoor area of the licensed premises a 'smoking area'. It would be unlawful for a licensee to set aside a part of an outdoor area of the hotel or licensed club as a 'no food, no drinks area' and allow smoking. A maximum penalty of 140 penalty units ($10 500) applies.

New section 26ZB requires a licensee who has decided to have a 'designated outdoor smoking area' to ensure that

- no food or drink is served to the area (although a person may take a drink to the area, if purchased elsewhere on the premises);
- no food can be consumed in the area;
- no entertainment is offered in the area; and
- there are no gaming machines in the area.

The maximum penalty for not complying with these requirements is 140 penalty units ($10 500).

Section 26ZB also requires a licensee who decides to have a designated outdoor smoking area to develop and maintain a 'smoking management plan'. The minimum contents of a smoking management plan are specified in new section 26ZC. The plan must identify the designated outdoor smoking area, outdoor areas where food is provided, the buffers for the area, state how the licensee will minimise exposure to environmental tobacco smoke, and address staff training and signage to clearly identify smoking and non-smoking areas.

A licensee of a hotel or club with a designated outdoor smoking area must:

- prepare and keep up to date, in accordance with section 26ZC, a 'smoking management plan';
- display a notice in or near the area, stating that the smoking management plan is available for the perusal of patrons;
- make the plan available for perusal on request by a patron; and
- produce a copy of the plan, on request by an authorised person.

The maximum penalty for failure to comply with these requirements is 70 penalty units ($5 250).

New Division 2 – Major sports facilities

New section 26ZD – defines a 'major sports facility' to be a facility declared to be a major sports facility under the *Major Sports Facilities Act 2001*. Currently, these include The Gabba; The Queensland Sport and Athletics Centre (formerly the QEII Sports Centre and ANZ Stadium); The Sleeman Centre; The Brisbane Entertainment Centre; Suncorp Stadium; and Dairy Farmers Stadium, Townsville.

New section 26ZE creates an offence to smoke at a major sports facility. The maximum penalty for this offence is 20 penalty units ($1 500). However, it is not an offence to smoke in any outdoor areas of the facility that may always be accessed without the payment of an entry fee. This will allow smoking, for example, in the general grounds of the Sleeman Centre

at Chandler, where outdoor recreation venues are used for picnics and other recreational activities.

New section 26ZF creates an offence if a person does not stop smoking in a major sports facility or part of a facility, when told to do so by an authorised person or by an occupier or employee or agent of the occupier.

The maximum penalty for this offence is 20 penalty units ($1 500).

New section 26ZG creates an offence for the occupier of major sports facility for allowing a person to smoke in the facility, or part of the facility.

Where the Major Sports Facilities Authority (MFSA) leases an area of the facility to a food outlet, and the food outlet provides an outdoor eating or drinking place as part of its business, the lessee will be the occupier to which any offence for allowing a person to smoke in that area will apply. In other cases, the MSFA is considered the occupier, and the offence for allowing a person to smoke will be by the MSFA.

The defences that an occupier has against such an offence are the same as those for an occupier in relation to an enclosed place and outdoor eating or drinking place.

The maximum penalty for this offence is 140 penalty units ($10 500).

New Division 3 Beaches, building entrances and playground equipment

New section 26ZH creates an offence for a person to smoke at a 'patrolled beach' with a maximum penalty of 20 penalty units ($1 500).

The section provides that a 'patrolled beach' is a beach that has red and yellow flags marking the area that is safe for swimming. The beach is only deemed to be 'patrolled' while the flags are put up by the club or organisation providing lifesaving services on the beach, and hence the smoking ban only applies while the flags are in place.

The smoke free area is bounded by four prescribed lines. In simple terms, it is the area between these flags that extends, at right angles to the imaginary line between the flags, seaward for 50 metres and away from the sea, as far as beach continues until it reaches land that is no longer a part of the beach.

Land that is no longer part of the beach is any registered land, for example, private land, leasehold land or any other land such as parks and reserves, road or Crown land.

To clarify, a 'line' means an imaginary line and not a line drawn on the ground, and 'seawards' means in the direction of the water to which the flags indicate an area safe for swimming.

New section 26ZI creates an offence for a person to smoke at a 'prescribed outdoor swimming area' with a maximum penalty of 20 penalty units ($1 500).

The section provides that a 'prescribed outdoor swimming area' is an area in or adjacent to a pool or other body of water used for public swimming, where the area or part thereof is prescribed under a regulation. An example of such a swimming area is an artificial beach like South Bank Beach, at South Bank Parklands, Brisbane. A public swimming pool or a swimming pool at a person's residence would not be a prescribed outdoor swimming area.

New section 26ZJ creates an offence for a person to smoke within 4 metres of any part of an entrance to a building without a reasonable excuse. A maximum penalty of 20 penalty units ($1 500) applies to the offence. The ban applies while access to the building is available by the entrance. Consequently the ban will always apply to the entrance of a 24-hour café, but will apply to the entrance to a bank or retail store only during opening hours.

An exemption from the smoking ban applies near the entrances to residential premises, including multi-unit residential accommodation such as a boarding house, motel or nursing home. An exemption also applies to entrances to hotels and clubs, which have a general or club licence under the *Liquor Act 1992*.

A further exemption from the ban applies to non-residential building entrances in an outdoor pedestrian mall, which is prescribed under a regulation. By prescribing malls such as the Brisbane Queen Street Mall and the Cavill Mall at the Gold Coast, it will be possible for people to smoke within 4 metres of non-residential building entrances located in malls.

The provision specifies that it would not be an offence if a person smokes while simply passing the entrance to a building or while smoking inside a motor vehicle that is within 4 metres of a non-residential building entrance.

New section 26ZK creates an offence for a person to smoke within 10 metres of any children's playground equipment, where the playground equipment is normally open to the public. The maximum penalty is 20 penalty units ($1 500).

It is not an offence for a person to smoke within 10 metres of children's playground equipment that is part of residential premises. For example, if playground equipment is located in a park that is within 10 metres of a person's backyard, the person could smoke in the backyard, still be within 10 metres of the equipment, and not commit an offence. It is also not an offence if a person smokes inside a motor vehicle that is within 10 metres of the equipment.

New section 26ZL creates an offence against a person, if they do not stop smoking in the no smoking areas relating to patrolled beaches (section 26ZH); prescribed outdoor swimming areas (section 26ZI), non-residential building entrances (section 26ZJ); and children's playground equipment (section 26ZK); when told to do so by an authorised person.

New section 26ZM provides that both State and local governments have a role in administering smoking bans at patrolled and prescribed artificial beaches; near non-residential building entrances; and near children's playground equipment.

However, nothing in sections 26ZH to 26ZP imposes a duty on local governments to enforce the smoking bans in relation to non-residential building entrances, children's playground equipment and patrolled or prescribed artificial beaches.

New section 26ZN provides that where a local government exercises its power to enforce the provisions relating to non-residential building entrances and children's playground equipment, it can do so in its area.

In certain circumstances, a patrolled beach or a prescribed outdoor swimming area (eg an artificial beach) may not be within the local government area. To remove any doubt, the provision states the local government can exercise it power to enforce the smoking ban on these beaches, both within its area and where the beach area is adjacent to its area.

New section 26ZO provides the chief executive of Queensland Health may, by written notice to a local government, request information about its administration and enforcement of the prohibition of smoking in relation to non-residential building entrances, children's playground equipment and patrolled and prescribed artificial beaches. This will enable Queensland Health to collate information about which local governments have decided to exercise their powers to enforce the smoking bans, and to monitor the overall enforcement of the bans. The local government is required to comply with the request.

New section 26ZP provides that where a court imposes a fine for a conviction for an offence for smoking in relation to patrolled or prescribed artificial beaches, building entrances or playground equipment under Division 3, the fine must be paid to State or local government that commenced the proceeding.

Clause 41 – replaces existing sections 27 to 30 with new sections 27 to 30E.

New section 27 – provides that an authorised person has the powers given to them under the Act and is subject to the direction of the chief executive or chief executive officer for the jurisdiction for which he or she is acting.

New section 28 – provides the chief executive of Queensland Health may appoint public service officers or employees, health service employees or any person prescribed by a regulation for the purpose, to be an authorised person.

The new section also provides, in the case of local governments, that a chief executive officer may appoint an employee of the local government, another person under contract to the local government, or with the approval of another chief executive officer, an employee of the other local government.

In some areas of Queensland, some local governments share employees or contractors. The section provides that the employee or contractor of one local government may be an authorised person for another local government.

New section 29 provides that the chief executive of Queensland Health or the chief executive officer of a local government must be satisfied a person has the necessary expertise or experience before appointing the person as an authorised person.

New section 30 provides that an authorised person is subject to conditions stated in the person's instrument of appointment, a signed notice given to the person, or conditions stated in a regulation for that purpose. The section also provides that these conditions may limit the authorised person's powers under the Act.

New section 30A provides that the chief executive of Queensland Health or the chief executive officer of a local government must issue an identity card to each authorised person. The card must comply with the details prescribed in subsection 30A(2).

The identity card may be used for purposes other than those provided for by this Act. For example, a single identity card could be issued by a local government to allow a person to issue an infringement notice under this Act and a parking ticket under the *Local Government Act 1993*.

New section 30B simply replaces existing section 30 (production or display of authorised person's identity card).

New sections 30C, 30D and 30E update existing provisions of the Act relating to when an authorised person ceases to hold office, resignation of an authorised person and the return of identity cards.

Clause 42 – replaces existing section 48 (Compensation) with new section 48.

Section 48 provides a remedy to a person or company that incurs a loss or expense incurred because of the exercise or purported exercise of a power under Part 3 – Monitoring and Enforcement. The new section extends this remedy to the exercise or purported exercise of a power by a local government, which has now been given enforcement powers in relation to non-residential building entrances, children's playground equipment and patrolled beaches and 'prescribed outdoor swimming areas'. The compensation claim is limited to the State or local government that exercised the power.

Clause 43 – inserts new sections 51C.

New section 51C provides that the Act would not create or preserve a right to smoke. For example, the proprietor of a zoo could place signs at the entry to the premises, indicating that it is a condition of entry that smoking is not permitted on the premises. The absence of a specific provision, prohibiting smoking in zoos in the Act (as amended), does not create a right for a person to smoke and breach the conditions of entry into the zoo.

Similarly, nothing in the Act (as amended) can affect any no smoking provisions in another Act. For example, the *Transport Infrastructure (Rail) Regulation 1996* made under the *Transport Infrastructure Act 1994*, prohibits smoking on trains. The absence of a specific provision prohibiting smoking in trains in the Act (as amended) does not effect or limit the offence under the *Transport Infrastructure (Rail) Regulation 1996*.

Clause 44 – will, on a date to be fixed by proclamation, remove from the Act existing section 52, which required the Minister for Health to review the operation of the Act. The review was completed in accordance with the section and the provision is now redundant.

Clause 45 – amends the existing regulation making power of the Act to enable requirements about signs for new Part 2C (Smoke-free outdoor places) of the Act to be prescribed by the *Tobacco and Other Smoking Products Regulation 1998*, and to provide that the maximum penalty that may apply to a contravention of the Regulation is 20 penalty units ($1 500).

Clause 46 – inserts new sections 54 and 55. New section 54 is a transitional provision that provides that a court imposed prohibition from the selling of smoking products, resulting from an offence relating to supplying smoking products to children (section 13), can only be imposed where the offence was committed after the commencement of clause 8 of the Bill (which inserts the new section 13).

New section 55 provides that the minor amendments to the *Tobacco and Other Products Regulation 1998* made by clause 46 of the Bill does not affect the Governor in Council's ability to further amend or repeal the Regulation.

Clause 47 – amends the Schedule (Dictionary) to remove definitions in the Act that are no longer required; inserts definitions that are needed for the purposes of the new provisions; and amends or replaces some existing definitions to more accurately reflect the amended provisions of the Act.

Clause 48 – makes consequential amendments to the *Tobacco and Other Smoking Products Regulation 1998* (the Regulation) as a result of amendments to the advertising, display and promotion provisions of the Act (Part 2A).

Schedule (Amendment of regulation)

Clauses 1, 3 and 5 – References to section 26H(a) in sections 6(1), 7(1) and 8 of the Regulation now refer to 26H(1)(a). This is a consequence of clause 24 of the Bill renumbering existing section 26H(a) to section 26H(1)(a).

Clauses 2 and 4 – reduces the maximum size of a price ticket for a smoking product at a retail outlet and on a tobacco product vending machine from 100mm x 80mm to 80mm x 40mm.

Clause 6 – Section 9(1) of the Regulation now refers to 26H(1)(b), as a consequence of clause 24 of the Bill renumbering section 26H(b) as 26H(1)(b).

Clause 7 – reduces the size of a price board prescribed under section 9(1)(a) of the Regulation from 1 square metre in area to 0.5 square metre.

Clauses 8 and 9 – removes the parts of section 9(1)(b)(i) of the Regulation, which enabled a price board to include information about cigarettes and other smoking products. As a result, a price board will only be able to include information relating to cartons of smoking products, including for example, the brand name and price of a carton of cigarettes.

Clauses 10 to 12 renumber the remaining parts of section 9(1)(b)(i) as a result of removing the parts detailed above.