Report of the Administrative Review of the *Tobacco Products Regulation Act 1997*

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Executive Summary

This Report is a review of the *Tobacco Products Regulation Act 1997* and its Regulations and was directed by the following terms of reference requiring me to:

1. Identify areas to improve consistency between the Act and the Regulations.
2. Identify areas to improve consistency between tobacco control legislation and other relevant South Australian legislation.
3. Identify sections and regulations that are no longer relevant for proposed removal.
4. Identify any other administrative areas to improve the operation of the Act and Regulations.

It is therefore an *administrative* rather than a general review of the Act and is driven by the principal question – 'How can the existing provisions be made to work more effectively?' As such it has needed to distinguish between, on the one hand, the more limited or 'housekeeping' issues of identifying redundancies or areas where the current arrangements may be unclear or could work better if strengthened or modified (all falling within its terms of reference) and, on the other hand, the wider policy questions, such as how the Act could be expanded or new directions taken or novel regulatory strategies adopted.

It has not always been easy to draw this distinction. Firstly a wide range of issues were raised with me in consultation. Some were policy related, others housekeeping, and I have been concerned to acknowledge all of them wherever possible. Secondly it is not always easy to distinguish between the two. So many operational or housekeeping issues are expressions of a policy (which makes them both policy *and* administrative).

Given these two points, I have firstly tried to characterise each issue and then to separate the recommendations, firstly into administrative (substantive operational matters) and then into what seem clearly to be policy matters. In comparison to the administrative recommendations there are relatively few policy recommendations, and I have included them here under a separate heading, both for completeness and also do justice to the many contributions I received from interested agencies and officers during my inquiry.

Summary of Recommendations

The formal recommendations of this Report (numbers 1-34) are listed below and provide a summary of its substantive findings. For convenience they are grouped into recommendations relating to sections of the Act, the Regulations, and finally to some enforcement issues. As indicated, there are also a small number of matters relating more to policy than to operational questions. They are included in the list as the concluding set of 6 recommendations but not as matters requiring specific action, rather as issues that could be considered as initiatives for better administering the Act. Should a wider review of the legislation be undertaken following on from this Report they can be considered further.

Administrative: Recommendations relating to the Act

1 S4 - 'Advertisement' definition

Subject to Parliamentary Counsel's opinion, there is some scope to broaden the definition to have it apply explicitly to media not envisaged in 2004 and potentially to future media as well. Specifically:

- The current definition of 'advertise' can further be expanded through regulation, which could state explicitly that the definition covers social media.
- The issue of advertising via social media should be raised nationally possibly with the view mounting a test prosecution.

See also a policy recommendation regarding a current exclusion from the definition of 'advertisement'.

2 S4 - The interaction between the definitions of 'Advertise' and 'Advertisement'

The interaction between these two definitions does not appear to pose problems, though Parliamentary Counsel may wish to consider this point further.

3 S4 - 'Residential Premises' definition (prison cells etc, an exclusion from definition of 'workplace'

Correctional Services is moving towards a 'smoke-free' status in all of its facilities. Acknowledging this current progress, it is thought that the best approach is to leave the definition of residential premises (and therefore the exclusion from s46) unchanged at this stage.

4 S4 - 'Tobacco Product' definition

The following amendments could make the definition more explicitly suited to changing needs:

- Make a regulation under (f) of the definition of 'tobacco product' to specifically list hookah/shisha tobacco whether or not it contains all or any of the material from the plants of the genus Nicotiana.
- Alternatively, the definition of 'tobacco product' could be amended by inserting a reference to hookah or shisha pipe tobacco.
- Further amendments following on from the regulation of e-cigarettes are being prepared by Parliamentary Counsel as a separate exercise.

5 S 4A - Exclusion of the Independent Gambling Authority's powers to restrict tobacco use

S4A can be repealed as it was a transitional provision and serves no current purpose.

6 S 29 - Exclusion of radio and television broadcasts from Part 3

S29 should be repealed.

7 Ss 30-31- Packaging and Labelling

Sections 30 and 31 should (subject to the recommendations below) be repealed

and replaced with a provision to say that a person who sells or imports tobacco in SA must comply with the governing (Commonwealth) packaging requirements, with an appropriate offence under the TPR Act. This would include sale at both the wholesale and retail level.

8 S 30(5) - Sale by mail, telephone, internet etc

This provision should be retained and may increasingly be important for e-cigarettes and e-cigarette accessories. A penalty should also be inserted for this offence.

9 Add a new section - Labelling not covered by Commonwealth law

The Act should allow the making of regulations for labelling and packaging that might be additional to and not inconsistent with the Commonwealth's national scheme or for products that are not covered by it.

10 Add a new section - Sale of single or loose cigarettes or loose tobacco

On the repeal of s30(1) a new section should be inserted along the lines of reg 4A, requiring:

- That packets comply with the general requirement of 20 cigarettes or more, in packs that cannot be divided into portions or sub-packs of less than 20.
- That tobacco can only be sold in packets that comply with Commonwealth law and therefore cannot be sold singly or in loose bundles (as recommended above).

11 S 36 - Products designed to resemble tobacco products

This offence should be expiated.

12 S 37(2) - Vending machines

Delete s37(2) – the expiry dates have long passed.

13 S 38(2) - Cigarette trays etc

This offence should be expiated.

14 S 38A - Sale or supply to children

- The penalty should be significantly increased, potentially beyond the increase envisaged more generally for offences in this Part.

See also two policy recommendations regarding s38A.

15 S 42 - Competition & reward schemes

This offence should be expiated.

16 S 43 - Free samples

This offence should be expiated.

17 S 45 - Business promotions to attract smokers

To clarify s45, a 'smoking-permitted' sign should be excluded from this general prohibition, provided it does no more than clearly indicate the entry to an area where smoking is not prohibited. The exclusion could also specify that the sign can only indicate the entrance to such an area and must satisfy any prescribed

dimensions, style and wording. The use of the sign should be optional rather than mandatory.

18 Penalties

The penalties currently applying to Parts 2 and 3 are significantly lower than their interstate equivalents and should be increased.

19 S 46 - Smoking banned in enclosed public places

To ensure that this section is administered effectively and to ensure certainty for all parties, the following changes to the method of calculating the term 'enclosed' (either administratively or, if necessary, through an amendment to S4(3) and (4)) should be considered:

- *Determining 'place or area' (S4(3))* - In determining the calculation, the following areas or places should *not* be counted:
  a) unenclosed areas or places that are beyond the direct control of the occupier (such as a roadway or common open area) even if directly accessible to the occupier's premises;
  b) areas or places not structurally part of the enclosed part – The enclosed and unenclosed parts must be components of the one coherent or unified area, the two parts must constitute an integral whole

  Note this will *not* change the current definition of 'enclosed' or alter the 70% criterion. Rather it clarifies the way of calculating it.
- *A notice to comply* - Amend the Act to allow an authorised officer to serve a compliance notice on the occupier, requiring them either to modify the area so it does comply or to place no smoking signs (this is further set out in a recommendation below).
- *Compliance Guidelines* - Amend the Act either:
  a) To allow guidelines relating to the calculations of enclosed places to be issued by the Minister or the Chief Public Health Officer, on which an order to comply could be based can be issued or enforcement proceedings commenced.
  b) To allow guidelines with similar effect to be called up as part of the regulations under the Act (as in NSW).

  Option (a) is the preferred approach.

20 Ss 51(5) - 52(4) - Smoking bans, placing of signs

Ss 51(5) and 52(4) should be reconsidered with a view to making it clear on whom the obligation falls, and also to impose a penalty which can be enforced by way of an expiation or a notice to comply.

21 General penalties

The penalties currently applying to Part 4 are significantly lower than their interstate equivalents and should be increased.

22 S 69 - Seizure of tobacco – powers

The 'public tender' provision should be replaced by a provision giving the Minister authority to order the tobacco destroyed.

23 S 70 - Nicotine Replacement Therapy trial

S70 can now be repealed.

24 S 71(2),(3) and (4) - Transitional exemptions

These sub-sections can be repealed; the 'phasing in' of the sponsorship bans following on from the 1988 amendment has long been completed.

25 Add a new section - Controlled Purchase Operations

A set of provisions establishing a framework for controlled purchase operations is recommended.

26 Add a new section - Compliance notices

The TPR Act should contain the power for an authorised officer to issue a notice to comply with its provisions, with a penalty for non-compliance with the notice.

27 Add a new section - Immunity from liability

The TPR Act should include an immunity provision (along the lines of s102 of the *South Australian Public Health Act 2011)* for authorised officers in relation to all actions that are done honestly and in furtherance of the Act.

Administrative: Recommendations relating to the Regulations

Tobacco Products Regulations 2004 (the General Regulations)

28 Reg 3 etc - References to 'tar and nicotine content'

These should be deleted wherever they occur.

29 Reg 5(2) - Vending machine prescribed sign

This requirement should be retained.

30 Reg 8 - 'No smoking' signs

This provision should be retained.

31 Reg 10(2) - Price boards

There is no case to tighten or otherwise amend the regulation.

Tobacco Products (Smoking in Public Areas - Longer Term) Regulations 2012

32 Reg 6 - Smoking ban - outdoor dining areas

The regulation should be amended in order to prevent persons taking meals into areas set aside for smoking. Two options are available:

a) Amend reg 6 to broaden to definition of outdoor dining area to include any outdoor area that the occupier has either set aside for the purpose of public dining or knows, or should know, is used by patrons to consume meals.
b) Prevent a person consuming a meal (other than snack food) in an area set aside for smoking. The obligation (and liability for breach) to be on the occupier / manager of the outdoor dining area.

Option (a) (the broadening of reg 6) fits better into the current framework of the Act and is the preferred option.

Enforcement

33 Local Government

There is a case for local councils to take a more direct involvement in the administration and enforcement of the TPR Act in their respective areas. Councils should also be able to retain any expiation fees recovered as a result of their enforcement the Act.

34 South Australian Police

- Where a breach of s38A (sales to children) has been alleged, the circumstances could be investigated by SAPOL officers who could either issue the expiation or a warning directly, or pass the information onto SA Health for possible prosecution or the issue of an expiation notice.
- Where sellers have been found to have made sales in the course of a controlled purchase operation, SAPOL could be involved in the follow up by attending at the shop and reminding the vendor of their responsibilities.
- Where vendors are known to be selling single sticks, SAPOL officers could similarly investigate the circumstances and issue an expiation notice.

Policy Issues

35 The declaration of the Act as 'designated health legislation' under the SA Public Health Act

The anticipated link between the TPR Act and the SAPH Act could be formalised for the reasons set out in part 1.4.2 of the Report.

36 S3 - Objects of the Act

If the designation was not adopted, the TPR Act could contain a preamble rehearsing the public health concerns stemming from the use and uptake of tobacco. The 'Objects' section should also be reviewed, potentially incorporating the statements and observations set out in the discussion of this issue in part 2.1 of the Report.

37 S4 - Definition of 'advertisement'

- The 'accidental or incidental' exclusion in the Regulations could be reconsidered. However, this issue has national significance, and should be considered via state, territory and Commonwealth policy officers before any change is made in SA.

38 Ss 6-13 - Licensing

The following should be considered:

- Retain the distinction between specialist tobacconists and other sellers of tobacco.
- Establish criteria for licensing that would allow greater oversight as to where new sellers might operate.
- Introduce a wholesalers licence.

39 S 38A - Sale or Supply to Children

- There should be power for a court to restrict, suspend or cancel a retailer's licence on being found guilty of the offence. In the case of a second offence, the Act should require that the licence should be suspended for a specified period of time (possibly 12 months).
- The court's power in these cases should complement the general power given to the Minister in s11 to cancel or suspend a licence.

40 S 50 - Playgrounds, 10 metre ban on smoking

The boundaries of child care centres, kindergartens and schools could also be brought under s50 in similar terms (ie banning smoking in public areas within 10 metres of their boundaries).

1: THE ACT: CONTEXT AND CONSISTENCIES

1.1 Introduction and Terms of Reference

This Report is a review of the *Tobacco Products Regulation Act1997* (TPR Act) and its regulations. It was carried out in accordance with the following terms of reference, namely to conduct an 'administrative review' to:

5. Identify areas to improve consistency between the Act and the Regulations.
6. Identify areas to improve consistency between tobacco control legislation and other relevant South Australian legislation.
7. Identify sections and regulations that are no longer relevant for proposed removal.
8. Identify any other administrative areas to improve the operation of the Act and Regulations.

The review was undertaken as a targeted exercise, limited to consultation only with state government agencies that have a direct interest in the operation of the Act. Consultation with a broader range of interested parties can then occur at a later stage in this process, should the Minister agree to develop the recommendations made here into a more formal proposal for amendments to the TPR Act. During the course of my inquiry I consulted and met with the following six State agencies: SA Health (Drug and Alcohol Services SA and Health Protection Operations, Public Health); SA Police; Parliamentary Counsel's Office; the Office of Consumer and Business Affairs; and Correctional Services.

Finally, it should be noted that this Report includes *all* of the issues raised during the review. In some cases the sections were discussed and their meanings were clarified, with the result that they are not recommended for change or repeal. However, for completeness, I have included them here.

1.2 The Scope of this Report

The terms of reference have directed this inquiry towards specific administrative or 'housekeeping' issues (notably the ways in which the operation of the Act can be improved, or the identification of redundant sections) rather than the broader policy question of how the Act might be reformed and new directions taken. As such it is intentionally a limited study.

Yet, it is difficult in practice to completely separate these two elements: an administrative issue is typically the expression of legislative policy (in the sense that all administrative provisions are designed to further the overall objects of an Act). Nevertheless, I have attempted to focus this Report by structuring it in a way that responds explicitly to the issues that were raised in preliminary discussions with DASSA and HPO. Thus parts 2 and 3 are mostly a section by section list and discussion of these issues. Similarly, parts 1 and 4 have been structured in a way that mainly responds to the wider consistency and administration and enforcement concerns that were also raised by these two agencies.

On occasions though this Report does touch on broader issues that I believe are integral to the administrative questions, and if the Act is to better achieve its general objectives

ought not to be separated from them. So to assist readers in distinguishing between these two contexts of the Inquiry, I have broken the summary of recommendations into two parts - those that might be seen as 'policy questions' and those that can better be seen as 'tidying up the Act and improving its administration and enforcement capability'. As envisaged by the Terms of Reference, the bulk of the recommendations fall into the latter category, though some of these could just as easily be seen as policy related.

On some occasions, discussions with interested agencies went far beyond the Terms of Reference, exploring options that included a complete restructuring of the Act and even re-focussing it, for example by concentrating less on tobacco as the issue and more on smoking from any source, or by focusing on where a person *can* smoke, as opposed to the current position which is concerned with where a person can't smoke.

Such 'blue sky' thinking is certainly worthwhile, but clearly it is not the purpose of this Report. Nevertheless I should say at the outset that there is a strong case for a complete review and probably a rewrite of the Act since it has been patched and re-patched so many times since 1986. And while my recommendations taken together are extensive, they are not in themselves a re-write (and if implemented will involve yet more 're-patching'). They do, however, aim to address a range of issues that at this time either present uncertainties in administration and enforcement, or are redundant.

Finally, and to explain how the Terms of Reference are reflected in this Report. Terms of Reference 1 and 3 are dealt with in parts 2 and 3 which comprise a section by section discussion of the Act and its regulations. Term of Reference 2 is dealt with in the discussion set out in part 1.4. Term of Reference 4 is covered in part 4 and also where relevant in parts 2 and 3.

1.3 The Context

The *Tobacco Products Regulation Act 1997* is an old and much re-worked piece of legislation. Its origins go back over 30 years to the *Tobacco Products Control Act 1986*, passed as the first attempt at comprehensive tobacco regulation. Some laws are earlier still: in 1904 the *Children's Protection Amendment Act* (South Australia's earliest tobacco control law) banned the sale or supply of tobacco to children.

Since 1986 the current Act has gone through many modifications and re-structures responding to new policies and public health initiatives: in 1988 to ban tobacco advertising and sponsorship; in 1993 to allow for labelling and packaging requirements; in 1997 to incorporate the substantial 'licence' fees levied on wholesalers (struck down later that year by the High Court). Since 1997 the Act has been amended over 20 times, the last being in 2016.

The 30 years since 1986 have also seen substantial change in the general tobacco policy and regulatory environment at all levels of government. Notably, in 1992 the Commonwealth passed comprehensive advertising controls, designed to fill the jurisdictional gaps in state laws. In 1994 mutual recognition and the need for uniform

labelling of packets prompted a national approach, first done under the *Trade Practices Act* and culminating in the *Tobacco Plain Packaging Act 2011* (Cth) a world first. Indeed the Commonwealth through a combination of its commercial and external affairs powers (the latter arising from its obligations under the 2003 WHO *Framework Convention on Tobacco Control*) has virtually total power to regulate for tobacco should it wish to.[1]

Public health priorities have changed too: in 1988 the challenge was to ban advertising and unwind tobacco sponsorship, replacing it with 'healthy sponsorship' made available through Foundation SA. In the 1990s 'passive smoking', not initially addressed in the Acts, became an issue as a result of court decisions and workers compensation claims. The resulting uncertainty for businesses made an orderly response and the setting of a 'level playing field for all' a high priority for regulation. The emergence of the internet, and then social media, (both unknown in 1986) have radically enhanced possibilities for the targeted promotion of tobacco, making this outlet potentially as effective as traditional advertising. Finally new 'tobacco like' products notably e-cigarettes present ongoing regulatory challenges.

Finally the tobacco control laws are important examples (really the first examples) of how law can contribute to the task of addressing non-communicable diseases more generally and their framework and history suggest options and possibilities in other areas of concern, notably in the public health impacts of obesity and alcohol.

1.4 How the Tobacco Products Regulation Act Interacts with other Acts

1.4.1 With National and Interstate Tobacco Acts

(a) The general interaction

Tobacco control in Australia is both a national and regional responsibility. In South Australia's case the 1986 Act and its substantial 1988 amendment pre-dated the Commonwealth's *Tobacco Advertising Prohibition Act 1992*. The 1988 amendment focussed on banning advertising and sponsorship but consciously excluded the media that fell within Commonwealth jurisdiction or which logically required a national approach (radio, television and interstate or national print). This was the origin of s29 of the TPR Act, discussed below.[2] Similarly, packaging and labelling is a national issue and though the Act provides powers to regulate in this area, a national approach is the only feasible option.[3]

However, it is possible for the states to pass legislation in the same general field covered by Commonwealth tobacco laws providing their requirements are not directly inconsistent

1 The Convention broadly expects that signatory states to take 'all appropriate measures to curb tobacco consumption and exposure to tobacco smoke' (WHO Resolution, Annex 1). It contains a series of specific obligations to implement this, including controls on promotion and marketing, packaging, pricing, passive smoking and sales to children.

2 S8 *Tobacco Products Control Act Amendment Act, 1988. (*inserting a new s3a).

3 See the discussion below in relation to ss 30, 31.

with the latter's. S6 of the *Tobacco Advertising Prohibition Act 1992* provides that:

> (1) This Act does not exclude or limit the operation of a tobacco advertising law of a State or Territory that is capable of operating concurrently with this Act.
>
> (2) If:
>
> (a) particular conduct constitutes an offence against this Act; and
>
> (b) apart from this Act, that conduct also constitutes an offence against a tobacco advertising law of a State or Territory;
>
> this Act does not exclude or limit the application of that law to that conduct.

A similar provision also exists in s11 of the Commonwealth *Tobacco Plain Packaging Act 2011.*

While these 1992 and 2011 laws do allow for state laws to supplement and potentially even overlap the Commonwealth controls, the national nature of most print media, radio and television would demand a uniform approach by all 8 regional jurisdictions. Similarly with packaging and labelling, since tobacco is a national industry and mutual recognition provisions would defeat any attempt by a state to impose its own particular requirements.[4]

(b) S 29 and Commonwealth / State power

S29 provides that 'This Part[5] does not apply in relation to anything done by means of a radio or television broadcast'. Should s29 be repealed? As discussed it was first drafted in 1988 as a simple acknowledgement that broadcasting was a Commonwealth power and therefore subject to Commonwealth regulation. Implicitly it also acknowledged the increasingly national nature of programming, and with it the problems associated with a relatively small state implementing its own controls. Furthermore since 1992 the Commonwealth has implemented bans on advertising and sponsorship, and tobacco companies have long been denied their traditional methods of promotion, including direct advertising via radio and television.[6]

On one reading it matters little whether or not s29 remains in place. Many would see it as a declaration of a self-evident constitutional limitation on state power and therefore unnecessary. On another reading there may be opportunities in the future to explore the actual limits of Commonwealth broadcasting power and whether, in effect, it does have exclusive control over the field of radio and television broadcasting.[7] If that is not the case (ie the Commonwealth does not have total power in this field and state laws will not

4 Broadly mutual recognition allows a product that complies with the labelling or packaging requirements of the state in which it was made, to be sold throughout Australia even if the requirements are different in other states.

5 Part 3 – 'Restrictions on supply or promotion of tobacco products' and most obviously the advertising and sponsorship provisions in ss 40 and 41.

6 While direct tobacco advertising on television was banned by Commonwealth law prior to 1992, sponsorship messaging (a potent form of advertising) was not.

7 In other words whether the High Court would interpret the various current Commonwealth broadcasting laws as indicating an intention to cover 'the whole field' of broadcasting in which case any law passed by a state that was directed to broadcasting would likely be invalid on inconsistency grounds (s109). Alternatively, the court may decide that there was not such an intention, allowing states to regulate in the area providing their laws supplemented or were otherwise compatible with Commonwealth law.

necessarily be struck down under s109) there may be opportunities for states to then explore whether there are any options available for worthwhile and effective regulatory responses in this general field. Currently s29 would prevent this.

On both readings, I consider that s29 should be repealed.

1.4.2 Interaction with other SA Laws

(a) potential overlaps

Mostly the TPR Act operates independently of other South Australian acts, seeking to provide the dominant law in the field of tobacco control. In one respect the Act makes this explicit: s4A (added in 2004) specifically excludes the power of the Independent Gambling Authority to 'restrict the sale or consumption of tobacco products'. This section is discussed in part 2.1, below.

However, other than s4A the TPR Act does not prevent supplementary or additional controls over tobacco and these do exist notably in the declaration of areas where smoking is prohibited additional to those spelt out in the Act. These declarations take two forms. Firstly, the owners of land or buildings are entitled to impose general conditions of entry or use, and non-smoking requirements can be one of those conditions. Secondly, local councils can establish formal smoke-free areas in a number of ways. One option is to use the short or long term ban provisions allowed under ss 51 and 52 of the TPR Act. Another option is s238 of the *Local Government Act 1999* which allows councils to make by-laws controlling access and use of local government land. In a number of councils, a no-smoking requirement has been incorporated into the by-law. To provide some examples, the City of Adelaide has a by-law in relation to Rundle Mall;[8] the City of Port Adelaide Enfield has a general prohibition in relation to any council building or declared local government land;[9] the City of Salisbury provides in its *Local Government Land By-law 2015* that:

> 10.9. *Smoking*
>
> Subject to the *Tobacco Products Regulation Act 1997*, smoke, hold or otherwise have control over an ignited tobacco product:
>
> 10.9.1 in any building; or
>
> 10.9.2 on any land to which the Council has determined this subclause applies[10]

Additional provisions, such as these examples, add to or extend the operation of 'no smoking bans' currently provided by Part 4 of the TPR Act and are not inconsistent with, or problematic for, its operation. However it should be noted that there is power in the TPR Act to achieve the same end via smoking ban declarations made under the *Tobacco Products (Smoking Bans in Public Areas – Longer Term) Regulations 2012* which already cover some areas of high congregation (Henley Square, Moseley Square (Glenelg) and the Royal Adelaide Show) and can be extended to any similar area including places

8 By Law No 10 'Smoking Control'. Cl 1 'No person shall, in any part of Rundle Mall or the vicinity of Rundle Mall, to which the Council has resolved this paragraph shall apply, smoke tobacco or any other substance.'

9 By-Law No. 3 of 2015—Local Government Land.

10 See also City of Onkaparinga By-law 4 Local Government Land (note also the lead in – the by-law is 'subject to' the TPR Act).

covered in the by-laws.

However, given that the by-laws extend the areas where smoking is not permitted and do not limit the power of the TPR Act, there is no case to suggest that they should be repealed and the places covered by them brought under the 2012 Regulations.[11]

Occupational health and safety is an area of potential duplication. Smoking in enclosed workplaces (as defined in the *Work Health and Safety Act 2012*, though with some limitations)[12] is prohibited by s46, potentially creating some overlap with the general duty of care provisions of the *Work Health and Safety Act*. However in practice this has not been raised as an issue and is not addressed in this Report other than for the specific question of prisons (discussed in part 2.1 below).

(b) potential links

There are also opportunities to build links with other public health laws. Specifically, the *South Australian Public Health Act 2011*(SAPH Act) establishes a new 'risk based' approach to the management of public health. It also sets out a broad set of objects and principles, which establish statements of public health values for the operation of public health law and policy more generally. Specifically, the Act envisages, via s21, that links can be made with other public health acts. S21 sets out the functions of the Chief Public Health Officer, which includes ensuring that 'any designated health legislation are complied with.' (s21(1)(b)). Designated health legislation is defined by s21(3)(b) as any 'Act designated by regulation'. The TPR Act could be so designated and it would be appropriate to do so, since its primary purpose is protecting public health and therefore is in harmony with the objects and principles of the SA Public Health Act, especially since the latter Act has a focus on non-communicable disease.[13]

Such a declaration relates to *compliance* which, for the TPR Act, would mainly involve sales to minors, restrictions on advertising and promotions, licensing and banned smoking areas (issues monitored by the Health Protection Operations, SA Health). More generally though, a declaration could in effect be seen as bringing the TPR Act under the umbrella of the principles and objects of public health practice generally, and which are set out in the SAPH Act, since s4(2) requires the CPHO as a person involved in the administration of the latter Act to have 'regard to and seek to further' its objects as listed in s4(1) and also to have regard to the principles listed in ss6-13.[14]

In practice this means that the TPR Act would be enforced within the framework of a proactive public health approach, conscious of the special needs of vulnerable communities (including indigenous Australians) and informed by a precautionary approach

11 If the 'no-smoking by-laws' made under s238 were ever to be challenged successfully this issue can be re-thought and the areas brought under the TPR Act.

12 See s4, TPR Act (and specifically the definitions of 'workplace' and the exclusion for 'residential premises').

13 See Part 8, SA Public Health Act 2011.

14 S5, SAPH Act

and related principles. While some of this framework would be symbolic and reflect existing practice, ideas such as the precautionary principle would have operational significance in areas such as passive smoking restrictions, or further controls over marketing, where new measures calculated to advance public health are proposed, but the 'full scientific certainty' that they will, is yet to be demonstrated.[15]

Furthermore the need to rely upon the precautionary principle will become more apparent when arguments for bringing e-cigarettes under the scope of the TPR Act are made. The 2014 WHO report *Electronic nicotine delivery systems* specifically urged that a precautionary approach should be taken to their management, notably in relation to passive exposures. Also, the State Government's submission to the SA Parliament *Select Committee on E-Cigarettes* (September 2015) made the point that:

> 'The South Australian Government is committed to protecting the health of the South Australian public and reducing the incidence of preventable illness, injury and disability (*South Australian Public Health Act 2011)*. This includes a commitment to the precautionary principle where a lack of full scientific certainty should not postpone measures to prevent, control or abate a perceived material risk.' (p8)

Impact on DASSA

The anticipated link between the TPR Act and the SAPH Act could be formalised in the way envisaged here. A s21 designation would allow DASSA to take a more robust policy approach to expanding the sweep of the TPR Act whenever necessary. Also, by linking the enforcement of the Act with the objects and principles established by the SAPH Act there may be no need for the TPR Act to have its own objects or principles, beyond the general statement of purpose. (See the discussion on 'objects' in 2.1 below).

Impact on HPO

Finally, while the proposal would not have any likely resource implications for DASSA, there may be some impact in terms of enforcement effort for HPO, though the community would (whether or not a designation was made) continue to expect that the TPR Act was being effectively enforced. Furthermore, a designation, with the explicit expectations that flow from it, may bolster a case for additional enforcement resources (discussed below) and possibly the expansion of local government's role in this area as well.[16]

There are also administrative and policy issues, that revolve around the different statutory roles of the two different ministers (Mental Health and Substance Abuse, and Health). These are beyond the scope of this Report but will be an additional factor in any implementation of this recommendation.

15 Indeed, the 'passive smoking' concerns of the mid 1990s were propelled by the view that the emerging epidemiology was tending to demonstrate a risk to exposed non-smokers, which suggested, though it was yet to conclusively establish, a firm basis for regulation. Here was a clear case where a precautionary approach could be justified.

16 The SA Public Health Act sees the administration of public health related issues as a shared state / local government responsibility. See s37 in particular.

2: THE ACT: SPECIFIC PROVISIONS

2.1 Preliminary Sections

S3 - Objects

- Currently the objects of the TPR Act are a series of statements about what the Act seeks to to do - for example s3(b) provides for the object of reducing:

  > the incidence of smoking and other consumption of tobacco products in the population, especially young people - (ii) by prohibiting the supply of tobacco products to children.

  Broadly the objects are the same as those first drafted into the 1988 amendment.

- The preamble to s3 is focussed on the financial burden of tobacco to the State namely:

  > In recognition of the fact that the consumption of tobacco products impairs the health of the citizens of the State and places a substantial burden on the State's financial resources, the objects of this Act are ...

  This preamble, inserted in early 1997 was part of the method used (though unsuccessfully) to justify the business franchise licensing scheme from a constitutional challenge and protect the substantial revenue it brought in. There is no compelling need to continue with this wording.

- The specific reference to the requirement for health warnings in s3(b)(i) first inserted in 1988 is now also unnecessary (and arguably has been since 1994) since this area has long been the responsibility of the Commonwealth.

- More generally, there is a strong case to upgrade s3. However, if the TPR Act is declared designated health legislation, then the objects and principles of the SAPH Act (the precautionary principle, the equity principle, proportionality, a focus on disadvantaged communities) could be regarded as a 'charter' able to inform the development of legislative policy and its implementation through enforcement.

- However, if the designation was not adopted, the TPR Act could contain a preamble rehearsing the public health concerns stemming from the use and uptake of tobacco. The Victorian *Tobacco Act 1987* commences with the following preamble:

  > (a) the following guiding principles are recognised in relation to the use, supply and promotion of tobacco—
  >
  > (i) tobacco use is so injurious to the health of both smokers and non-smokers as to warrant restrictive legislation;
  >
  > (ii) tobacco use has adverse health effects even with infrequent use and there is no completely safe form of tobacco use;
  >
  > (iii) tobacco use is a widely accepted practice amongst adults which it is inappropriate to ban completely;
  >
  > (iv) the extent of the health effects of smoking requires strong action to deter people from taking up smoking and to encourage existing smokers to give up smoking;
  >
  > (v) the association of smoking with social success, business advancement and sporting prowess through use of advertising and promotion has a particularly harmful effect by encouraging children and young people to take up smoking; and
  >
  > (b) it has been resolved to discourage the use of tobacco in all its forms and to prohibit

> various types of promotion and advertising of tobacco products in order to reduce the incidence of tobacco-related illness and death.

This statement, is a general compendium of the harms associated with tobacco use and unlike SA's s3 does not seek to describe the various components of the Act.[17] A South Australian preamble might also contain a version of the precautionary principle authorising policy makers to 'err on the side of caution.'[18]

- In summary, s3 of the TPR Act could be replaced by a more general description, building on general statements about the public health challenges tobacco use brings and asserting the role of legislation as one of the components in a comprehensive tobacco strategy. The objects, if modified, should also be broad enough to embrace new directions in regulation, most obviously the regulation of non-tobacco smoking products.

S 4 – Interpretation - 'Advertise'

The origins of the term

- The current definition of 'advertise' is:

> *advertise* tobacco products means take any action that is designed to publicise or promote tobacco products, smoking, or the sale of tobacco products, whether visual or auditory means are employed and whether tobacco products are directly depicted or referred to or symbolism of some kind is employed, and includes take any action of a kind prescribed by regulation, and *tobacco advertisement* and *advertisement* have corresponding meanings.

- This definition was inserted in 2004[19] and was not previously defined and is different to the approach currently in the Commonwealth 1992 Act, which is concerned with *publishing* a tobacco advertisement, the latter being defined (in part) as:

> ' any writing, still or moving picture, sign, symbol or other visual image, or any audible message, or any combination of 2 or more of those things, that gives publicity to, or otherwise promotes or is intended to promote:
>
> (a) smoking; or
>
> (b) the purchase or use of a tobacco product or a range of tobacco products;[20]

Its applicability to social media

- Focusing on the current SA approach, the specific concern regarding 'advertise' raised during the Inquiry was the applicability of the term to social media such as Facebook.
- The issue of internet promotion and advertising is a real one, all the more so since the conventional methods of promotion are banned, while the tobacco industry also has a history of using third parties to indirectly promote its products.
- On its face, the current definition would seem to cover social media and the internet more generally since the the term 'advertise' is cast broadly to include 'any action.'

17 S1 (Purpose) of the Victorian Act briefly does that.

18 The Preamble and Articles 3 and 4 of the WHO *Framework Convention on Tobacco Control* also offer ideas from which a local statement of objects and aims can be drawn.

19 S7 of Act no 42 of 2004.

20 See s9 of the Commonwealth's T*obacco Advertising Prohibition Act 1992* - See also s10, 'Meaning of publish a tobacco advertisement.'

And it should also be noted that the 2004 definition was passed in the light of internet possibilities, though before social media (Facebook or earlier versions) became common means of communication. However, there is no indication in the parliamentary debates relating to the Bill that suggests the internet was a specific reason for broadening the definition. Rather, discussion turned more on whether or not incidental references to tobacco products (such as on a T-shirt) could come within the meaning of the term.

Limits to the term

- While the phrase 'any action' in the 2004 amendment is broad, the definition then goes on to state that this action must be '*designed* to publicise or promote tobacco products' (in other words, the action has been done with the actual purpose of promoting etc tobacco products).
- It is also important to consider how the term 'advertise' is used in the Act. Specifically by s40(1) provides:

  > A person must not advertise tobacco products in the course of a business or for any direct or indirect pecuniary benefit.

  This creates the offence to which it applies and requires the prosecution to demonstrate that the advertisement is in the course of a business or 'for any direct or indirect pecuniary benefit'. This link is going to be difficult to prove in the case of many social media posts, even if it does exist. There are also two additional issues that present obstacles to a successful prosecution.
- The first relates to the exclusions from s40(1). Specifically, s40(3)(c) provides that the section does not apply in the particular circumstances spelt out in regulations, and regulation 10(1)(b) excludes 'accidental *or* incidental' references to tobacco products. This phrase operates with similar effect in Commonwealth law,[21] and potentially allows 'crypto advertisements' to slip through via this exemption on the grounds that even if deliberately there in order to publicise the product, they are considered incidental to the main event.[22]
- The second problem relates to the general issue of regulating the internet and social media sites, namely where did the alleged offence occur? In many cases the potential defendants will be offshore, and it is not always clear that SA will have jurisdiction. And even if it does, enforcing it may well require disproportionate resources and efforts that cannot then be directed elsewhere.

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21 S19 *Tobacco Advertising Prohibition Act 1992* Cth 'A person may publish a tobacco advertisement if:
(a) the person publishes the advertisement as an *accidental or incidental* accompaniment to the publication of other matter; and
(b) the person does not receive any direct or indirect benefit (whether financial or not) for publishing the advertisement (in addition to any direct or indirect benefit that the person receives for publishing the other matter).

22 See the cases referred to in Christopher Reynolds *Public and Environmental Health Law* (2011, The Federation Press) p374. For example, the argument might go that crash barriers emblazoned with brand logos have been put in place with the clear intention of catching the camera's eye (so in no way are they *accidentally* there) but the resulting vision of the advertisement is only *incidental* to the running and televising of the motor race itself. See also *Channel Seven Adelaide Pty Limited v Australian Communications and Media Authority* [2013] FCA 812 (Federal Court 14 August 2013); and *Channel Seven Adelaide Pty Limited v Australian Communications and Media Authority* [2014] FCAFC 32 (Full Court, Federal Court 21 March 2014).

Should the term be amended?

- Parliamentary Counsel may take the view that the term 'advertisement' as currently defined is wide enough to cover social media posts and would allow a prosecution under s 40(1) provided the obstacles discussed above can be overcome. However there is some scope to broaden the definition to have it apply explicitly to media not envisaged in 2004 and potentially to future media as well. Specifically:
  - The current definition of 'advertise' can further be expanded through regulation, (an advertisement can include 'any action of a kind prescribed by regulation'). Such a regulation could state explicitly that the definition covers social media, making it clear that individual posts or internet sites should not be regarded as falling outside of the prohibitions.
  - The issue could be raised nationally through policy officer meetings, potentially leading to an agreement to monitor the internet and mount a test case if one is found that would result in a likely prosecution.
  - The 'accidental or incidental' exclusion in the Regulations should be reconsidered. From a tobacco control perspective accidental *and* incidental would be preferable since it would catch more indirect references to tobacco products. However, this issue has national significance, could be far reaching in its implications and before any change is made at a local level should be considered via state, territory and Commonwealth policy officers in order to gauge whether or not, based on the most current case law, it continues to be a problem and if so to consider a uniform approach.

'Advertise' and 'tobacco advertisement'

- A second definition namely, 'tobacco advertisement' has been raised in the context of its relationship with the definition of 'advertise'. A tobacco advertisement is:

  > any writing, still or moving picture, sign, symbol or other visual image or message designed to promote or publicise—
  >
  > (a) the purchase or use of a tobacco product; or
  > (b) a trademark or brand name, or part of a trademark or brand name, of a tobacco product

- Generally, the distinction between the two definitions lies in one ('advertise') involving a set of actions and the other ('tobacco advertisement') being a description of an object or a text, though the phrase 'designed to promote or publicise' in the latter does suggest an intention is implicit in the definition.
- The term 'tobacco advertisement' is also relevant through s40. In particular s40(2) provides that

  > A person must not —
  >
  > (a) distribute to the public any unsolicited leaflet, handbill, or other document that constitutes a tobacco advertisement; or
  > (b) sell any object that constitutes or contains a tobacco advertisement

- It should be noted that ss 40(1) and 40(2) are separate provisions with separate penalties (though both subsections are subject to the same exclusions allowed by s40(3)).

- Overall, I cannot see that there is an obvious problem in the interaction between these two definitions, though Parliamentary Counsel may wish to consider this point further when the next set of amendments is prepared.

S4 – Interpretation - 'Public area or public place'

- The Act contains the following definition:

  '*public area* or *public place* means an area or place that the public, or a section of the public, is entitled to use or that is open to, or used by, the public or a section of the public (whether access is unrestricted or subject to payment of money, membership of a body or otherwise)'

- The term *public place* is widely used in legislation and there is substantial law on it. For the purposes of the TPR Act it is clear that the current definition is broad enough to cover a private function held in rooms set aside in public venues such as a wedding reception. However, a reception or gathering at a private house would not be covered.

S4 - Interpretation - 'Residential premises'

- residential premises are *excluded* from the definition of 'workplace' (also defined in s4). This is relevant because it follows that s46, which bans smoking in enclosed workplaces, does not apply when the workplace is someone's home or specifically for the discussion below, a prison cell. This is despite the fact that employees, contractors etc are often required to work in residential premises, which for the duration become their workplaces.
- The current position reflects a resolution of two conflicting views – that a person has a right to smoke in their homes, and the right to a safe workplace (in the sense of not being exposed to others' tobacco smoke). In this case Parliament has decided the resolution should be in favour of the home-owner.

The specific issue of prisons

- The definition of residential premises includes (c) 'a sleeping or living area in a prison or other place of detention'.
- Thus prison cells and living areas (whatever other areas that includes) are *excluded* from the operation of s46 which bans smoking in workplaces, meaning that both correctional services staff, visitors and other inmates are exposed to tobacco smoke.
- Correctional Services is moving towards a 'smoke-free' status in all of its facilities and the Adelaide Remand Centre was so declared on 1 March 2016. The powers to do this stem from general correctional services legislation. There is a range of issues that need to be confronted in this new policy, including assistance to quit, cost and compliance. Acknowledging the current progress it is felt that the best approach is to leave the definition of 'residential premises' unchanged, and if necessary review it at a later stage when the new 'smoke-free' policy is further advanced. Correctional Services supports this approach.

'*Residential premises' more generally*

- This definition (and thus the exclusion from s46) also includes motels, hotels, boarding houses, hostels, nursing homes etc. There appears to be no pressing case at this time to make changes. And the current position does not prevent institutions, hotels etc implementing their own 'smoke-free' policies.
- It should also be noted that many institutions may, in addition to containing areas that are 'residential premises', also contain areas that fall within the definition of enclosed public places, workplaces or shared areas. In these spaces, s46 will apply.

S4 – Interpretation - 'Tobacco product'

The Act contains the following definition:

> *tobacco product* means—
>
> (a) a cigarette; or
> (b) a cigar; or
> (c) cigarette or pipe tobacco; or
> (d) tobacco prepared for chewing or sucking; or
> (e) snuff; or
> (f) any other product containing tobacco of a kind prescribed by regulation; or
> (g) any product that does not contain tobacco but is designed for smoking,
> and includes any packet, carton, shipper or other device in which any of the above is contained;

Some general issues

- The current definition of 'Tobacco product' lies at the heart of a broader question about the future direction and even the name of the Act.[23] If, increasingly, the TPR Act is to regulate 'non-tobacco smoking products', on the basis they they also represent a public health risk, and/or have the same passive smoking concerns as traditional tobacco, choices have to be made.
- Specifically two emerging areas of concern present issues for regulation. These are e-cigarettes and hookahs or shisha pipes.

  E-cigarettes

  - The problem of accommodating new products is particularity acute when e-cigarettes are brought under the Act, insofar as the 'smoking material' is a liquid which in many cases does not contain nicotine and the vapour or 'smoke' is released not by ignition but by heating.
  - However, since the issue of e-cigarettes and the method by which they will be regulated is being dealt with by Parliamentary Counsel as a separate issue, it is not considered in Report, other than incidentally.

  Hookahs or shisha pipes

  - The use of Hookahs or shisha pipes was raised by HPO in the context of passive smoking and the need to be confident that their use and the places

23 For example both Queensland and the ACT have a 'Tobacco and Other Smoking Products Act.'

where they are used are subject to the general provisions of the Act. Potentially this question is made more complex since the 'tobacco' used in these pipes can be either in a traditional form or a herbal product.

- How might these two issues, or any future novel forms of 'tobacco' use, be accommodated within the Act, given its twin concerns of both regulating sales and promotions and also protecting others from the impacts of the by-products of use (typically traditional tobacco smoke)?
- One option is to maintain the general definition of 'tobacco product' and regard the term 'tobacco' as a *generic* term, rather than as a specific reference to material derived from plant from the genus Nicotiana.
- In effect this is the current position since the definition of 'tobacco product' includes (g) 'any product that does not contain tobacco but is designed for smoking.' And on this basis tobacco used in a shisha could be considered to be conventional pipe tobacco, and therefore coming within (c) of the current definition of 'tobacco product'. Alternatively if it is a herbal product, rather than conventional tobacco, it is caught by (g).
- On these propositions, the combustible ingredient of hookahs/shisha pipes are already effectively brought under the Act and all provisions relating to promotion, sale, supply and use will apply as they do for other tobacco products.

Possible additions to the definition of tobacco product

- However, there are options to make this point more explicit should that be thought useful for the enforcement of the Act. If so it would be possible to make a regulation under (f) of the definition of 'tobacco product' to specifically list hookah/shisha tobacco whether or not it contains all or any of the material from the plants of the genus Nicotiana.
- Another option would be to amend the definition of tobacco product by inserting a reference to hookah or shisha pipe tobacco. If so it would supplement the existing reference to conventional pipe tobacco.
- Should a definition of 'shisha' or 'hookah' be thought necessary, Queensland provides the following:

> hookah means a fully assembled device—
>
> (a) for smoking tobacco or another thing by the drawing of smoke, fumes or vapour, resulting from heating or burning the tobacco or other thing in the device, through water or another liquid in the device; and
>
> (b) that has—
>
> (i) 1 or more openings; and
>
> (ii) 1 or more flexible hoses, each with a mouthpiece, through which the smoke or fumes are drawn.[24]

Interaction of 'tobacco product' with 'smoke'

- It was said that there was an issue in the interaction of these two definitions. In particular, smoke means 'smoke, hold, or otherwise have control over, an ignited

24 Definitions Schedule to *Tobacco and Other Smoking Products Act 1998* (Qld).

tobacco product.'

- At first glance, the interaction between (g) of the definition of 'tobacco product' namely, 'any product that does not contain tobacco but is designed for smoking' – for example a herbal cigarette - does seem odd when it is to be treated as a tobacco product for the purposes of 'smoke'.
- If this is an issue it is more to do with the fact that non-tobacco products are treated as 'tobacco products' for the purposes of the Act. Ways of dealing with this have been discussed above.
- It should also be noted that when the legislation is amended to take account of e-cigarettes, the definition of 'smoke' will need to be extended since, as noted, the vapour (the 'smoke') is generated in these cases by heating and not by ignition. And Parliamentary Counsel will have had the opportunity to consider this question when preparing this set of amendments.

S4A - Exclusion of the Independent Gambling Authority's powers to restrict tobacco use

- S4A provides that:

  > This Act operates to the exclusion of any power of the Independent Gambling Authority to restrict the sale or consumption of tobacco products.

- This provision was inserted by the 2004 amendment as part of the package of smoke free area provisions, which set in place a phasing in of controls and restrictions.[25] Specifically, it inserted current s46, together with a detailed set of phasing in provisions, notably for bars, gaming areas and the Casino. This was also accompanied by an exempting proclamation.[26] The phasing in process was fully completed by the end of October 2007, and s47 expired.
- Specifically, s4A was intended to be a limit on the Independent Gambling Authority's capacity to become involved in tobacco regulation as an element of its general regulatory powers and oversight of the gaming industry. In answer to a question in the Legislative Council, the Minister explained the reason for the section, namely:

  > this clause aims to ensure that the Independent Gambling Authority cannot introduce smoking restrictions under its term of reference. The hospitality smoke-free provisions in this bill are comprehensive, and the implications have been thoroughly considered … If the Independent Gambling Authority were to introduce its own restrictions on smoking, it could undermine the effectiveness of this bill and create confusion among proprietors and the public.[27]

- The phasing out process envisaged by the 2004 Act has now been completed and s47 and the accompanying proclamation is now of no effect. However, the restrictions on the power of the Independent Gambling Authority's capacity to impose controls in this field remain, with the effect of making the TPR Act the sole law on tobacco control in this area.
- It is thought that the hospitality or gaming industry may have sought the provision, understandably wanting only one set of phasing out controls (those imposed under the TPR Act) to apply. However, given that the process has been completed, there

25 Act no 42 of 2004.
26 Exemption made under s 71, *SA Government Gazette* 2 December 2004, p4446.
27 *SA Hansard* (Legislative Council) 26 October 2004, p334.

appears to be no need for the continued existence of s4A. Though in practice it would make little difference whether the section is repealed or retained.

- The Office of Consumer and Business Services has been consulted on the section, and I was told that there is no indication that the Independent Gambling Authority would seek to become involved in tobacco regulation in the future, rather leaving it to the Health portfolio. As such, the preferred option would be to repeal s4A, since it serves no current purpose.

2.2 Licensing (Part 2 ss 6-13)

General issues

- A number of possible changes to the existing arrangements were discussed during the Inquiry.

Specialist tobacconists

- The Act maintains a distinction between 'specialist tobacconist' (as defined in reg 3(4) of the 2004 General Regulations) and other sellers of tobacco. Broadly, specialist tobacconists must have at least 80% of their turnover attributable to tobacco products and be operating from what in effect are separate premises.
- At present the only clear distinction between these two categories lies in the size of the signboard that indicates the varieties of brands for sale and their prices. Reg10(2) provides:

> the total surface area of the board (including, in the case of a sandwich board, the combined surface area of both sides) does not exceed—
>
> (i) if the price board is in the premises of a *specialist tobacconist*—1 square metre; or
>
> (ii) in any other case—0.5 square metres;[28]

- As the number of outlets operating purely as traditional tobacconists dwindles I considered whether or not there was a need to maintain this distinction.
- On balance, I believe that the licensing category of 'specialist tobacconist' should be maintained for the sole reason that potentially it provides more flexibility for possible future changes to the regulation of outlets.[29] However, should the category have significance beyond current reg 10(2), the 80% threshold may need to be reconsidered in the light of changing commercial practices.[30]

28 Reg 10(2) General Regulations.

29 Victoria retains the licensing category of 'specialist tobacconist' (Part 2A *Tobacco Act1987* and s15U, which also sets an 80% threshold.)

30 In particular, the unit price of tobacco may have risen disproportionately since the 80% rule was initially set, while the shops themselves, though still retaining their 'specialist' character, now carry a more diversified range of non-tobacco products.

Increased licence fees

- One option has been to increase licence fees, currently set at $271 for all vendors.[31] Interstate comparisons suggest that SA's fee is on par with the jurisdictions that set fees, though there is a Tasmanian proposal to lift the fee to $1,050. Any substantial increase would (subject to Tasmania) make the State an outlier. There has been no strong arguments from HPO that fees should be increased, beyond the normal CPI movements.
- As all fees collected under the Act go in the first instance to general revenue, an increase would not automatically provide more resources for enforcement but would help to provide a case for it.
- E-cigarette sellers should be included in the general licensing requirement. The arrangements for that, and the issue of e-cigarette sellers already licensed as tobacco sellers under the Act, is being considered by Parliamentary Counsel.

Tightening the licence criteria

- The SA *Tobacco Control Strategy 2017-2020* envisages that policy makers should 'explore options to reduce retail tobacco licence density especially in socio-economically disadvantaged areas.'[32] At present the Act simply gives the Minister power to issue or renew, or refuse to issue or renew, a licence, specifying no guiding criteria.[33]
- At present licences are invariably issued on request, and a very significant restriction on new applicants, based on geography or the numbers of existing sellers in a particular area, would warrant a specific authorisation were it to be introduced. To achieve this, specific criteria for new licences will need to be brought into the Act since this issue is not covered in the regulation making powers and the specific criterion envisaged by the Strategy would need either to be set in the Act or in regulations (once the general power is inserted).
- This will be a controversial amendment and most likely apply only to new applicants in the sense that existing sellers will be 'grandfathered', or phased out but it will make the point that tobacco is a product whose sale should be closely regulated in the interests of public health as traditionally has been the case with liquor licensing.

Introducing a wholesaler's licence

- Currently only retail sellers of tobacco are licensed. It would be possible to introduce a wholesalers licence. Western Australia has done this: s17 of the *Tobacco Products Control Act 2006* provides that:

  > 'A person must not sell a tobacco product by way of wholesale sale except under the authority of a wholesaler's licence'

- This requirement will not affect many businesses and, unlike earlier arrangements, will not raise significant additional revenue. The licence fee must be a flat amount and *cannot* be volumetrically assessed (as it was in the initial, pre 1997 scheme) on

31 Reg 4 General Regulations.
32 Part 5, Action 5, p10.
33 S7 TPR Act.

account of s90 of the Commonwealth *Constitution* and the ruling of the High Court case of that year.[34] Furthermore the fee must be set at a level that is proportionate to the costs of regulation and administration, lest it be challenged as seeking to achieve general revenue raising ends not envisaged by the Act

- The argument for introducing this new licence is not revenue raising, rather that a wholesaler can, as a condition of its licence, be required to keep track of the retailers it supplies and also ensure that its sales are made only to licensed retail outlets. This should also assist in detecting the illegal trade.
- It is estimated that only around 5 wholesale licences would be issued. Since their businesses are all substantial and well resourced the compliance burdens should not be unduly onerous.[35]

The scope of the licensing scheme

- An issue was raised relating to the scope of the licensing scheme, specifically whether it could be seen as broad enough to cover places where tobacco was smoked and, if not, whether it should be. Clearly, the current scheme applies only to the persons engaged in the business of *selling* tobacco.[36] It does not extend to the use or consumption of tobacco by individuals[37] or to the proprietors of 'smoking lounges' (assuming such places exist in SA).[38] Rather, the current controls in s46, which relate to smoking in enclosed public places etc, should effectively cover this issue.
- In my view there is no case to extend the licensing scheme beyond the current requirements in s6 (which relates only to the business of selling tobacco, noting that the term *sell* is widely defined in the Act to include supply without payment providing it is in the course of business.)[39]

In summary

The following should be considered in relation to licensing:

- Retain the distinction between specialist tobacconists and other sellers of tobacco.
- Establish criteria for licensing that would allow greater oversight as to where new sellers might operate.
- Introduce a wholesalers licence.

Note these should be considered as matters of policy.

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34 *Ha v New South Wales* (1997) 189 CLR 465.

35 Though I have not explored this point.

36 S 6 of the TPR Act provides 'A person must not—
(a) carry on the business of *selling* tobacco products by retail; or
(b) hold himself or herself out as carrying on such a business,
unless the person holds a licence under this Part.'

37 There was at one time a 'consumption licence' imposed by s8 of the *Tobacco Products (Licensing) Act 1986*. However this requirement was a component of the now defunct business franchise scheme designed to catch smokers evading the 'tax' by purchasing directly from outside of SA. It had no public health significance.

38 Unless they are also selling tobacco within the meaning of the Act, thus bringing them within s6.

39 *Sell* includes supply in the course of a business (whether or not for valuable consideration) and offer or expose for sale or such supply.

2.3 Restrictions on Supply and Promotion etc (Part 3 ss 29-45)

S 29 - Exclusion of Radio and Television from Part 3

- S29 provides:

  > This Part [Part 3] does not apply in relation to anything done by means of a radio or television broadcast.

- This exclusion should be removed for the reasons discussed earlier in part 1.4.1.

Ss 30-31 - Packaging and Labelling

- Broadly, these provisions provide as follows:

  > A person must not sell/import a tobacco product by retail unless it is enclosed in a package that complies with the regulations and is labelled in accordance with the regulations

  The reference to 'regulations' here mean regulations made under the TPR Act.

- These two sections were initially drafted into the 1986 Act[40] and pre-dated the comprehensive Commonwealth labelling laws. There is a strong case to repeal both ss 30 and 31 in their entirety and to draft new provisions to cover certain incidental areas that should continue to be regulated at the state level. The case for repeal is set out as follows:
  - There are no regulations for ss 30 and 31 other than reg 4A.
  - These sections essentially cover the same field as that regulated by the Commonwealth's *Tobacco Plain Packaging Act 2011*.
  - The Commonwealth Act is primarily based on the external affairs power with only secondary reliance on the corporations and trade and commerce power so there *will be no constitutional gaps* (sole traders operating only within SA) that the State needs to pick up, as there are in other areas such as therapeutics. Specifically, s13 of the *Tobacco Plain Packaging Act* provides:

    > This Act relies on the external affairs power of the Constitution by implementing certain obligations in the Convention on Tobacco Control. However, if this Act is not supported by that power, then this Act will apply in more limited circumstances by relying on the corporations power, the trade and commerce power and the Territories power'

  - The result is that Commonwealth law covers all tobacco sold in the State. It also means that the State could not validly impose inconsistent or different warning statements and realistically would never aim to do so. Moreover, even if local labelling requirements were valid constitutionally, mutual recognition principles would likely erode their impact as interstate products sold locally (and almost all tobacco fits into this category) would not need to comply with them.

40 S5 no 74 of 1986. They were then modified by no 71 of 1993 with a view to SA implementing the uniform 'rotating' labelling arrangements. This was in line with a national agreement (though in fact implemented via Commonwealth legislation).

In summary

- Sections 30 and 31 should be repealed (subject to the discussion below) and replaced with a provision to say that a person who sells or imports tobacco in SA must comply with the governing (Commonwealth) packaging requirements, with an appropriate offence under the TPR Act. This would include sale at both the wholesale and retail level.
- HPO and SAPOL would support this provision, seeing it as an enforcement tool in dealing with unpackaged and potentially illegally grown, manufactured or imported 'chop-chop' tobacco.

S 30(5) - Retail sale by mail order etc

- S30(5) provides that:

  'A person must not sell a tobacco product by retail if the order for the tobacco product was placed by mail, telephone, facsimile transmission or internet or other electronic communication.'

  The subsection was inserted by an amendment to the Act in 2007.[41] Both its continuing relevance and the lack of a penalty were queried.
- I consider that this provision should be retained. Increasingly it may be important for e-cigarettes and e-cigarette accessories, though since many sales involve extra-territorial elements enforcement will often be difficult and time consuming.
- Research by DASA indicates that in the case of one major retail outlet at least, prospective SA customers are blocked from proceeding with an online sale. If this is generally the case then it suggests that the provision is being adhered to and therefore should be retained. Nevertheless, HPO did report that there are regular complaints about the sale of internet tobacco. If so, these may be occurring via smaller or overseas outlets unaware of, or indifferent to, the existence of s30(5), and a 'Google search' did identify a number of overseas sites which offered worldwide on-line sales.
- Overall, s30(5) should be retained and a penalty inserted for this offence.

A new section – Labelling not covered by Commonwealth law

- Add a new section to allow local (SA) requirements relating to packaging or labelling of tobacco products in cases - (a) where the packaging/labelling of those products is *not* regulated by the Commonwealth, or (b) in cases where the State may seek to impose additional requirements that are compatible with the National scheme.
- There is still capacity for the State to require *additional* labelling that is not at odds with the *Plain Packaging Act* since the latter does not intend to provide the *sole* law on labelling across Australia. Specifically S 11(1) provides that:

  This Act does not exclude or limit the operation of a relevant tobacco law of a State or Territory that is capable of operating concurrently with this Act.
- Thus the TPR Act should allow the making of regulations for labelling and

41 S4, Act no58 of 2007.

packaging that might be additional to the Commonwealth's national scheme or for products that are not covered by it.

- This may be important for e-cigarettes, pending national labelling regulation (though a national approach is preferable).
- Other than the possibility of e-cigarette labelling, no other regulations are envisaged at this time.
- However, mutual recognition issues will always impose a practical limit on the effectiveness of any new local regulation under this section, emphasising the importance of an agreed national response to these questions (either via Commonwealth regulation or concerted and uniform action by all of the states and territories).

A new section - Sale of single or loose cigarettes or loose tobacco

- A new section should be added to the Act to state that tobacco can only be sold in a properly labelled packet and specifically cannot be sold loose or in the case of cigarettes as one or more single sticks.
- At present the combination of s30(1) (tobacco sold by retail must be in a packet that complies with the regulations) and reg 4A which specifies the minimum pack size (20 or more in a packet that cannot be further divided) means that cigarettes cannot be sold loose as single or more sticks.
- However, and despite these provisions, DASSA believes that some retailers are breaking packs and selling single sticks. This is said to be a particular issue in the remote Indigenous communities where individual cigarettes are sold for a dollar each.
- This is undesirable and should continue to be prohibited and more effectively enforced (see part 4, below). Given the recommendations in relation to repealing ss 30 and 31, the best approach would be to introduce a specific provision into the Act creating an offence of selling tobacco products unpackaged.
- Thus it is recommended that a new section be inserted along the lines of reg 4A, requiring:
  - that packets comply with the general requirement of 20 or more, in packs that cannot be divided into portions of less than 20.
  - and, repeating the recommendations for ss 30 and 31, that tobacco can only be sold in packets that comply with governing (Commonwealth) packaging requirements and therefore cannot be sold singly or in loose bundles.
- It should be noted though that Reg 4A and any subsequent version relating to the nature of the packets may well be of limited effect on account of mutual recognition provisions.[42]

42 Other states do have similar limits on pack sizes, see s14 *Tobacco Act 1987* (Vic).

S 36 - Products designed to resemble tobacco products

- This offence should be expiated.

S 37(2) - Vending machines

- Delete s37(2) – the expiry dates have long passed.

S 38(2) - Cigarette trays etc

- This offence should be expiated.

S 38A - Sale or supply to children

- This prohibition (now extending to persons under 18) is South Australia's earliest tobacco law. It is an essential component of any tobacco control strategy and if properly complied with can help prevent young people from being introduced to tobacco at an early age. Yet the penalties for breach of the provision are modest ($5,000 maximum fine and $315 expiation). There is also a defence available of 'reasonable cause' to believe the person was 18 years or older.
- The offence, given its importance for tobacco policy, should be strengthened. Two changes are recommended:
  - The penalty should be significantly increased, potentially beyond the increase envisaged more generally for offences in this part.
  - *And, on a matter of policy* - there should be power for a court to restrict, suspend or cancel a retailer's licence on being found guilty of the offence. In the case of a second offence, the Act should require that the licence be suspended for a specified period of time (possibly 12 months).[43]

  The court's power in these cases should complement the general power given to the Minister in s11 to cancel or suspend.

S 42 - Competition & reward schemes

- This offence should be expiated.

S 43 - Free samples

- This offence should be expiated.

43 Such a power did exist in the original ('pre *Ha*')1997 Act – see ss 38(5), (6) of the TPR Act no 26 of 1997.

S 45 - Business promotions to attract smokers

- S45 specifies that:

  > A person must not display signs, or engage in a practice of any kind, designed to promote a business as welcoming or permitting smoking on its premises.

- This prohibition, read literally seems wide enough to cover any advertisement or notice indicating the presence of a smoking permitted space.
- To be clear, it would be desirable to exempt a 'smoking-permitted' sign from this general prohibition. It seems reasonable to allow the display of a simple sign clearly indicating the entry to an area where smoking is not prohibited. The exemption could also specify that the sign can only indicate the entrance to such an area and must satisfy any prescribed dimensions, style and wording.
- The use of the sign should be optional rather than mandatory.

Penalties

- As a general issue there is a case to increase penalties for these sections, currently they stand at a maximum of $5,000 with an expiation fee of $315. This has not been changed since 1988.[44]
- Other jurisdictions have significantly higher penalties. To give one example, Western Australia provides (in s115 *Tobacco Products Control Act 2006* (WA)) for the following penalties for breaches of equivalent sections in SA's Part 2 and 3:

  > (1) For an offence under a provision of this Act specified in the Table to this subsection the penalty is
  >
  > (a) for an individual
  >
  > (i) for a first offence, a fine of $10,000;
  >
  > (ii) for a second or subsequent offence, a fine of $20,000;
  >
  > (b) for a body corporate
  >
  > (i) for a first offence, a fine of $40,000;
  >
  > (ii) for a second or subsequent offence, a fine of $80,000.[45]

- Higher penalties exist in other states too: in Victoria;[46] New South Wales;[47] and also Queensland.[48]
- Thus the case to increase penalties in SA is a compelling one if interstate comparisons provide a guide. Of course, the deterrent value of a penalty, stringent or otherwise, is dependant on the levels of enforcement and may be much reduced

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44 S 16 *Tobacco Products Control Act Amendment Act 1988.*

45 Other sections in the WA Act are higher still, selling tobacco without a licence attracts a maximum penalty of $50,000 for a first offence (s16).

46 For example the advertising prohibitions in s6(1) *Tobacco Act 1987* attract a penalty of 300 penalty units for a corporation and 60 for an individual (a unit is currently set at $155.46 – Vic Government Gazette No. G 15 Thursday 14 April 2016).

47 The penalty for sales to minors in New South Wales is: 'in the case of an individual, 100 penalty units for a first offence or 500 penalty units for a second or subsequent offence, or (b) in the case of a corporation, 500 penalty units for a first offence or 1,000 penalty units for a second or subsequent offence.' (s22 *Public Health(Tobacco) Act 2008*). A penalty unit in NSW is $110 (s17 *Crimes (Sentencing Procedure) Act 1999*).

48 S10 *Tobacco and Other Smoking Products Act 1998* (Qld) (1) A supplier must not supply a smoking product to a child. Maximum penalty— (a) for a first offence—140 penalty units; or (b) for a second offence—280 penalty units; or (c) for a third or later offence—420 penalty units. (The current penalty unit value in Queensland is $121.90).

if prosecutions never occur or expiation notices never issued. This issue is further explored in the General Enforcement discussion below (part 4).

2.4 Restrictions on Smoking (Part 4 ss 46-52)

S 46 - Smoking banned in enclosed public places.

- S46 provides:
    1) Smoking is banned in an *enclosed* public place, workplace or shared area.
    2) If a person smokes in contravention of subsection (1), the person is guilty of an offence.

  Sub section 3) repeats 2), except that in this case the occupier is liable.
- It should be noted that the term 'enclosed' in s46(1) extends to 'workplaces' and 'shared areas' as well as 'public places'.[49] 'Enclosed' has a common dictionary meaning ('surrounded by a wall fence etc; shut in on all sides')[50] and is more specifically defined in the Act as follows:

  > A place or area is *enclosed* if it is fully enclosed or is at least partially covered by a ceiling and has walls such that the total area of the ceiling and wall surfaces exceeds 70 per cent of the total notional ceiling and wall area[51]

  'Ceiling', 'wall' and 'total notional ceiling and wall area' are further defined.

- SA Health also states on its website that:
    - An area is enclosed if it is fully or partially enclosed by a ceiling/roof and walls such that the combined area of the ceiling and the wall surface exceeds 70% of the total ceiling/wall space.
    - Materials such as shade sails, umbrellas, shade cloth, lattice and louvers are all considered to enclose as area as they restrict airflow.[52]

  An information sheet *Smoke-free for Good: Important information for all licensed premises* has also been prepared by DASSA and HPO. This is in a 'question and answer' format and includes diagrams and specifications to assist compliance.

- However this definition and its application in s46 has caused much uncertainty both for HPO who monitor and enforce it and also for the hotel managers etc who need to comply with it. These relate largely to the calculations and design requirements implicit in determining whether or not a place is enclosed. In particular, a number of areas that occupiers claim are not caught by s46 (and thus are still allowed for smoking) appear to contain enclosed 'core' areas with adjacent ancillary open places, which are then added to the enclosed component for the purpose of

49 See the definition of 'enclosed etc' in s3.

50 *The Australian Concise Oxford Dictionary* (3rd ed 1997).

51 By implication a place or area that has no ceiling whatsoever or a ceiling but no walls is unenclosed since it is excluded from the definition – ie an enclosed place must have a full or partial ceiling *and* walls exceeding the specified 70%.

52 http://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/protecting+public+health/smoking+the+rules+and+regulations/smoke-free+enclosed+public+areas

declaring the whole area 'unenclosed' (or more precisely, not a place to which s46 applies).[53] An example of this might be where a pergola has been tacked on to a lounge in order to claim the open space under the pergola.

- Understandably many hotels and restaurants will want to push the envelope as far as possible in order to create 'smoking permitted' areas and will continue to do so, while it is difficult to cover all contingencies in the drafting. However, discussions with HPO suggest that the requirements of s46 might be made clearer with a number of additional requirements, both to formulating the method of determining 'enclosed' and 'unenclosed' areas and also assisting with its general administration. These are set out as follows:

  Determining 'place or area'

  In considering whether a particular 'place or area' is to be regarded as 'enclosed' or 'unenclosed', the overall dimensions of the place or area subject to the calculation *cannot* include:

  a) areas or places beyond the direct control of the occupier (such as a roadway or common open area) even if directly accessible to the occupier's premises;

  b) areas or places not structurally part of the enclosed part – Thus the enclosed and unenclosed parts must, for the purpose of the calculation, be components of the one coherent or unified area; the two parts must constitute an integral whole.

     To provide an example. A hotel lounge and deck leads out onto an open beer garden or a car park. Here, the latter two areas (the beer garden and car park) could *not* be included in the calculation to determine whether or not the area is 'enclosed' or 'unenclosed'. Rather it should be restricted to the lounge and deck alone.

  Both of these restrictions may need legislative backing (see below) and if so will require changes to the Act, either to expand or qualify the existing definition of 'enclosed', or to allow regulations that are then able to expand or qualify it.

  A notice to comply

  There is currently no way of dealing with a place or area, claimed by its occupier to be unenclosed, but which is in fact considered by HPO to be enclosed (and thus *not* available for smoking), other than to wait until there is a breach of s46 (in other words, smoking must be shown to have occurred). A better approach would be to amend the Act to allow an authorised officer to serve a compliance notice on the occupier, requiring them either to modify the area so it is no longer enclosed, or to place no smoking signs as required and to monitor compliance.

  Compliance Guidelines

  Currently HPO has issued a number of documents that aim to assist with compliance. These have no formal standing (though they are useful for persons wanting to comply). This process could be formalised:

  a) One option could be to amend the TPR Act to allow the preparation of stand

53 The term 'unenclosed' has no formal meaning in the Act and, as indicated, it is used here simply to denote open areas to which s46 does not apply, insofar as they do not satisfy the definition of 'enclosed'.

alone administrative guidelines, to be issued by the Minister or the Chief Public Health Officer, on which an order to comply could be based or enforcement proceedings commenced.

b) A second option would be to amend the Act to allow guidelines be called up as part of the regulations. This approach has been used in New South Wales, where s23(e) of the *Smoke-Free Environment Act 2000* (NSW) allows its regulations to establish guidelines 'in relation to determining what is an enclosed public place and when a covered outside area is considered to be substantially enclosed for the purposes of this Act' and guidelines are incorporated into the *Smoke-Free Environment Regulation 2007.*

Either approach would provide more detail in relation to what does and does not amount to 'enclosed' while providing greater legal backing to the process.[54] Overall, I consider that option (a) is the preferred approach since it provides the greater flexibility in terms of modifying and refining the guidelines should this become necessary.[55]

- It should be noted that the proposed changes outlined above will, if implemented, not alter the current standard (ie the '70% test'). *As such this is not a change to the law*. Rather the changes are intended to eliminate uncertainties around the method of making the calculation and in doing so provide clarity for all parties. They are also designed to prevent licensees etc from exploiting uncertainties and making claims to surrounding open spaces for no better reason than to get around the 'smoke-free' requirements. This defeats the purpose of the legislation and is also unfair to the occupiers who have gone to some lengths to do the right thing and keep within the spirit of the law.
- The clarifications envisaged in the method of measurement do not necessarily require an amendment to the Act. They could be adopted administratively by HPO and be incorporated into the formula for calculating the areas. Were they to be challenged, and a prosecution commenced, a court may agree with HPO's methodology. If so, no amendment is required. If not, amendments to the definition may need to be considered.

- It is worth adding that some general directions and possibilities for dealing with this issue were discussed with HPO and DASSA. They focussed on the idea of keeping the term broad, as a general statement of obligation or a performance standard (which concentrates on the required outcome rather than prescribing how you achieve it). This may seem a better approach than creating a set of detailed compliance specifications that may not take account of novel cases or exceptional circumstances. Granted, performance standards may appear to be more flexible and the better approach, but the occupiers on whom the obligations fall will look for certainty and expect regulators to flesh out the general requirement with detailed specifications and accompanying assurances that compliance with them amounts to

54 A number of Acts, including the *South Australian Public Health Act 2011* and the *Environment Protection Act 1993* operate through 'tertiary documents' such as codes or guidelines.

55 There may be a concern that option (a) as an 'in-house' document' lacks a level of parliamentary scrutiny that subordinate legislation, typically a regulation, would receive. This concern raises questions of legislative policy generally and can be raised with Parliamentary Counsel.

compliance with the general obligation. As such the preferred approach in legislation generally, and specifically in relation to the TPR Act 'enclosed', would be to retain the current definition and supplement it with a set of formalised compliance guidelines.[56]

- As a concluding point it must also be said that terms such as 'enclosed' necessarily lack absolute precision and cannot cover all possibilities. There will always be exceptions to the general rule or unusual situations that will provide a challenge to regulators especially in an environment where there will be continuing pressure to test the limits. This was the NSW experience, with its guidelines written into reg 8 of the *Smoke-Free Environment Regulation 2016.* Despite this attempt at providing certainty, the issue continued to cause uncertainties to the point of taking cases to the Supreme Court.[57]

- In summary, the recommendations in relation to s46 are as follows:
  - *Determining 'place or area' (S4(3))* - In determining the calculation, the following areas or places should *not* be counted:
    a) unenclosed areas or places that are beyond the direct control of the occupier (such as a roadway or common open area) even if directly accessible to the occupier's premises;
    b) areas or places not structurally part of the enclosed part – The enclosed and unenclosed parts must be components of the one coherent or unified area, the two parts must constitute an integral whole

    Note this will *not* change the current definition of 'enclosed' or alter the 70% criterion. Rather it clarifies the way of calculating it.
  - *A notice to comply* - Amend the Act to allow an authorised officer to serve a compliance notice on the occupier, requiring them either to modify the area so it does comply or to place no smoking signs (this is further set out in a recommendation below).
  - *Compliance Guidelines* - Amend the Act either
    a) to allow guidelines relating to the calculations of enclosed places to be issued by the Minister or the Chief Public Health Officer on which an order to comply could be based, or enforcement proceedings commenced.
    b) to allow guidelines with similar effect to be called up as part of the regulations under the Act (as in NSW).

    The first option (a) is the preferred approach.

56 Broadly, this is the approach taken in other regulatory laws, for example in the SA Public Health Act where policies etc spell out the scope of the s56 general duty for particular areas of public health concern.

57 See *Blacktown Workers' Club Ltd v O'Shannessy* [2011] NSWCA 265 and also the earlier case *Dubbo RSL Memorial Club Limited & Anor v Steppat & Ors* [2008] NSWSC 965.

S 50 - Playgrounds, 10 metre ban on smoking

- Currently, the Act imposes bans on smoking within 10 metres of 'prescribed playground equipment.[58] HPO reports that it has received complaints from operators of childcare centres that persons are smoking within close proximity to the boundaries of their premises and if this is the case an argument exists to extend s50 to other facilities or places where children congregate.
- Thus the boundaries of child care centres, kindergartens and schools could also be brought under s50 in similar terms (ie all public areas within 10 metres of their boundaries).

  Note: this is a policy issue.

S 51(5)and S 52(4) - Displaying a Sign (short and long term bans)

- Concern was raised about the interaction between these sub-sections[59] and reg 8 of the General Regulations.
- S51(5) requires the placing of 'no smoking' signs in areas subject to a short term ban (such as a one off event) . S52(4) provides a similar requirement in relation to a longer term ban. In the case of the longer term bans these are generally seen as open areas[60] and similarly in the declared short term bans. However, either ban could include closed areas (which would in any event trigger s46).
- Neither section is specific, it does not specify numbers (only 'such numbers and in positions of such prominence that the signs are likely to be seen by persons within the public area'), or who must place them. And there is no penalty attached to the requirement.
- Reg 8 of the General Regulations relates to the placing of no-smoking signs in enclosed public places.[61] The occupiers of these places must comply with the requirement and risk a penalty if they do not.
- Mostly the ss 51(5) / 52(4) and reg 8 requirements work in different contexts so there is no persistent overlap, and even if there were, the ss 51/52 requirements are sufficiently general so as not to cause a conflict with reg 8 especially as both sets of requirements seek the same end and the language used in relation to the number and positioning of signs is the same.[62]

- However, I consider that there are some issues with ss 51(5) and 52(4). And while Parliament may have had good reasons for keeping their requirements general

58 S50(1) 'A person in a public area must not smoke within 10 metres of any prescribed children's playground equipment.' There is an exclusion from this provision in the case of persons smoking within the 'zone' but in a motor vehicle.

59 Inserted by Act no5 of 2012.

60 Moseley and Henley Squares and The Adelaide Showground (which does include closed as well as open areas).

61 The current version of reg 8 excludes sub regulations (2), (3) and (4) originally in the 2004 consolidation but which appear to have been transitional and related to the phasing in of smoking bans introduced by the 2004 amendments to the Act.

62 Compare the language in 51(5), 52(4) and reg 8(1)(b).

there are some aspects that should be reconsidered. These are discussed as follows:

- *Who must comply?*: - it is unclear where the obligations imposed by these sections falls. Specifically, who must erect the signs? Whether that is the proponents of the ban, or the local council in the case of bans on local government managed land, or the organisers of the event, is left unstated. However, in the more specific case of outdoor dining areas (as covered by the longer term bans) the obligation should clearly be on the occupier / manager of the premises (though again, this is not specified).
- *How many signs?*: - the lack of specificity in the ss 51(5), 52(4) requirements ('such numbers and in positions of such prominence etc') is of less concern. As with reg 8, the focus is on the outcome, namely overall effectiveness in getting the message across for each particular area.
- *The lack of a penalty:* - As with reg 8 (which does have a penalty) ss 51(5) and 52(4) imposes an obligation ('signs .. *must* be erected') and once it is clear on whom the obligation falls, a penalty should be attached. Alternatively, the requirement could then be enforced via a notice to comply, imposed by an authorised officer.[63]

- Ss 51(4) and 52(5) should be reconsidered with a view to making it clear on whom the obligation falls, and also to impose a penalty which can be enforced by way of an expiation or a notice to comply.

General penalties

- An increases in penalties for the TPR Act has already been alluded to in the discussion in part 3 above. Similarly, penalties in Part 4 of the Act are also very low by interstate standards: $200 for smokers (expiation fee $75), and $1,250 for occupiers (expiation fee $160).[64] To take Western Australia as a point of comparison, a person found smoking in an 'outdoor eating area' faces a maximum fine of $2,000.[65]
- There is a strong case to increase the penalties in Part 4 of the TPR Act, however, this proposal is also subject to the general enforcement discussion in part 4 of the Report, below

63 See the discussion in part 2.9 below.

64 Though it should be noted that the victims of crime levy will apply in these cases adding disproportionately to a small expiation fee.

65 S107B T*obacco Products Control Act 2006* (WA).

2.5 Investigations (Part 5)

S 67 - Hindering offence

- This offence (which relates to the hindering, obstructing, threatening or abusing authorised officer) should *not* be expiable – (the penalty, a maximum of $20,000 is beyond the range of expiable offences).

S 69 - Seizure of tobacco – powers of the Crown

- As it stands s69 sets out the somewhat odd provision that seized tobacco can be forfeited to the Crown and can be sold by public tender, which in effect makes the State a seller within the meaning of the Act and in any event is clearly undesirable. In the absence of this option, or any recovery by the original owner under s69(c), the tobacco potentially may need to be stored indefinitely.
- The 'public tender' provision should be replaced by a provision giving the Minister authority to order the tobacco destroyed, which is the only practical option if the original owner has no right to recover it.
- It should be noted that in the case of S70A, which gives the power to confiscate tobacco from children, the tobacco *must* be destroyed 'as soon as is reasonably practicable' and without compensation.

2.6 Nicotine Replacement Therapy trial (Part 6 s70)

- The requirement for a Nicotine Replacement Therapy trial was the result of an amendment by an Upper House Independent member in 2004, that the Government agreed to accept. As such, the trial was undertaken as required by s70 and so there is now no further use for Part 6.
- Part 6 can now be repealed.

2.7 Exemptions s71

- S71(1) is a general, though conditional, exempting power. There may be circumstances where it is useful to retain such a power, and most regulatory statutes do contain a provision that allows the granting of exemptions.
- S71(2),(3) and (4) impose additional requirements for some specific exemptions from Part 3 (in effect s41 - the sponsorship bans), where the issue relates to sporting or cultural events. These can be granted only with the recommendation of the State Ministers responsible for those events (Minister for Recreation, Sports and Racing and for Minister for the Arts).[66] The origins of these sub-sections go back to 1988 when the existing tobacco sponsored events (racing, football, the Festival of

66 S71(2) 'An exemption from the operation of a provision of Part 3 may not be granted under this section *except as recommended by* the appropriate Minister'.

Arts etc) were being disentangled and phased out. There seems to be little need for them now that the process has long been completed and while retaining the sub-sections would not cause problems for tobacco control policy they are unnecessary and as such s71(2),(3) and (4) should be repealed.

2.8 Controlled Purchase Operations

- A set of provisions establishing a framework for controlled purchase operations is recommended and is supported by HPO.
- Controlled purchase operations are supported by the SA Tobacco Control Strategy (Action 2, part 5) as potentially the only effective way of monitoring compliance on a regular basis and in so doing testing the effectiveness of s38A, whilst also identifying specific breaches.
- There are ethical issues involved with these exercises since they necessarily require the involvement of young people under 18 ('children' for the purposes of the Act) and a level of public concern too.
- HPO indicates that these operations have been stalled for around the past two years, and that they have also proved controversial and sometimes have attracted adverse publicity. But that it would like to re-commence them, though preferably on a more formal basis in which case the program can be said to be authorised and supported by Parliament.
- The best approach is to amend the TPR Act in order to provide a formal structure for controlled purchase operations that will both authorise them and spell out safeguards.
- Western Australia has provisions for controlled purchase operations see ss 94-97 *Tobacco Products Control Act 2006* (these sections are set out in the Appendix to the Report as a useful example for comparison).

2.9 Compliance Notices

- This issue has been mentioned in the context of specific sections but is argued more fully here.
- The problem that the introduction of notices is designed to address is this. Although the TPR Act contains a range of obligations with penalties attached, they are in some cases difficult to enforce. For example, a 'smoking area' that is said to be unenclosed, may not on account of its design, satisfy the definition in the Act.[67] In these cases the only formal way this defect can be demonstrated is following on from a breach of the Act (ie a patron must be seen to be smoking in breach of s46(1)). This has resource implications and it in any event is not the most efficient or desirable way of obtaining compliance the Act.
- An alternative way of achieving compliance is via the issuing of notices. Much

67 In other words that despite being set aside for smoking the area is in fact not sufficiently 'open' so as to be considered 'enclosed' within the definition of the term in s4(3) and therefore for the purposes of the offence in s46.

current health or environmental legislation is enforced this way. For example, the *South Australian Public Health Act* has detailed provisions for the issuing of compliance notices for breach of the general duty or for more specific concerns (a breach of a regulation or a code of practice).[68] A notice typically can identify potential breaches of the Act and require the person on whom it is served to remedy those breaches and/or take specified action. Notices do not come with a penalty. However, most Acts provide that it is an offence not to comply with a notice within the required time.[69]

- The TPR Act should contain a power to issue a notice to comply. This might be used in a number of ways One example, already considered, is where an unenclosed (and therefore smoking permitted) area has been found to in fact be 'enclosed' as defined by s4. In such a case the authorised officer might issue a notice served on the occupier / manager requiring them either to bring the area into compliance or post 'no-smoking' signs and to monitor the area to ensure that smoking does not occur. Another example might involve a case where a shop is found to contain an advertisement in breach of the Act. In this case the notice could, as an alternative to prosecuting under s40(1), require the proprietor to remove the advertisement forthwith.

- Overall, it is recommended that the TPR Act should contain the power for an authorised officer to issue a notice to comply with its provisions, with a penalty for non-compliance with the notice.

2.10 Immunity from personal liability

- Unlike many other pieces of legislation the TPR Act does not contain an immunity provision. As a general principle there is an argument that it should. For example s102(1) of the *South Australian Public Health Act 2011* provides (in part) that:

> No personal liability attaches to—
>
> (a) the Chief Public Health Officer or Chief Executive; or
> (b) a member of a body constituted under this Act; or
> (c) an authorised officer or any other person engaged in the administration of this Act,
>
> for an honest act or omission in the performance, exercise or discharge, or purported performance, exercise or discharge, of a function, power or duty under this Act.

- Although most of the HPO authorised officers involved in day to day enforcement of the TPR Act are also appointed under the SA Public Health Act, s102 does not give a general immunity but is limited to actions taken under that (SAPH) Act, and so they should be properly protected under the TPR Act as well. This is important given the extent of an officer's powers and the potentially volatile context in which they operate, involving seizures and destruction of property. As with any immunity provision, the scope would be limited to actions that are honestly or properly undertaken in furtherance of the Act.

68 See s92 *South Australian Public Health Act 2011*.
69 A defence of 'reasonable cause' for non-compliance with a notice is generally provided.

3: - REGULATIONS

3.1 Tobacco Products Regulations 2004 (the General Regulations)

Reg 3 - Definitions 'nicotine or tar content'

- delete 'nicotine or tar content' from the definition of *product line*
- delete same from reg 10(2)(e)
- delete same from reg 10(3)(e)
- delete same from reg 12(1).

Reg 3(4) - specialist tobacconists

- As discussed in part 2.2, there is a case for retaining the definition of specialist tobacconist, should the future grant of licences become more restrictive (as is envisaged by the Strategy). However, if the status of 'specialist tobacconist' adopts a broader significance than it currently has (just limited to the size of sign boards) there would be benefit in reconsidering the current '80% definition'. At this stage there is no need to alter the regulation.

Reg 5(2) - Vending machine - prescribed sign

- Reg 5(2) and Schedule 1 specify the prescribed sign in relation to sales to children required by s38A(5) of the Act. The requirement applies to direct sales and vending machines alike. I was asked to consider whether there was value in retaining the requirement insofar as it applied to vending machines, given that they are now situated in areas where children are unlikely to go unless supervised (typically licensed premises – see s37).
- Certainly, children are unlikely to be in the few areas where vending machines are now permitted but I consider that this requirement should be retained. Implicitly there is less supervision of the use of these devices and the staff/manager etc of the premises should be reminded that they are still responsible for all sales potentially caught by s38A including indirect sales via a token.

Reg 8 - 'No smoking' signs –

- this provision should be retained. There will be visitors to SA and others who may not be familiar with the law and the signs are a general reminder to clientele or patrons not to smoke They can also assist management in complying with the Act, firstly by providing a reminder to the public and also by allowing staff to point them out to any patrons seen smoking in prohibited areas, as a relatively low key way of complying with management's obligations under s46(3) and, in the case of workplaces, s46(4).

- Further if the recommendation relating to notices to comply in respect of enclosed areas is accepted (discussed in part 2.4 above), authorised officers should have the power to require occupiers to post 'no smoking' signs as one of the possible requirements of the notice.

Reg 10(2) - Price boards

- This provision allows sellers to maintain a price board provided it complies with the regulations. There is no case to change this position, other than to further require that that there is no highlighting or illumination of the board, though at present this is not seen as an issue.
- Overall there is no case to tighten or otherwise amend the regulation.

Regs 10(2)(f), (3)(f) &(6) - Expired regulations

- These regulations expired and have already been removed from the current consolidation.

Reg 11 - Expired regulations

- these regulations have expired and have been removed from the current consolidation.

Reg 13 - Expiry dates

- These have all long passed, and so this regulation can be deleted in the general tidy-up.

3.2 Long Term Regulations.[70]

Reg 6 - Smoking ban - outdoor dining areas

- The definition of 'outdoor dining areas' should be considered – in part it states:

  'outdoor dining area' means an unenclosed public area in which tables, or tables and chairs, are permanently or temporarily provided *for the purpose of public dining* in the area,

  This implies that the area must have been positively or consciously set aside for this purpose rather than being simply an unenclosed part of the premises to which a person can take and eat a meal.
- HPO report that in some cases patrons are routinely taking meals from the dining area and eating them in the smoking permitted areas, ie in unenclosed public areas that have *not* been set aside 'for the *purposes* of public dining.'

70 *Tobacco Products (Smoking Bans in Public Areas—Longer Term) Regulations 2012.*

- The effect of this is to blur the desired distinction established by the regulations between smoke-free dining areas (areas specifically set aside for the purposes of dining) and other (non-dining) areas where smoking is permitted, potentially creating de-facto dining areas in the latter spaces. This erodes the significance of the introduction of 'smoke-free dining' because the community will continue to witness people smoking and dining in close proximity and undermines the extensive publicity directed to this initiative. It is also unfair for the occupiers who have worked to comply with the regulations.

- If the purpose of reg 6 is to be retained the issue needs to be addressed. Two possible options were discussed with HPO:
  a) to amend reg 6 to broaden the definition of outdoor dining area to include any outdoor area that the occupier has either set aside for the purpose of public dining or knows or should know is being used by patrons to consume meals.[71]
  b) to prevent a person consuming a meal (other than snack food) in an area set aside for smoking. Here the liability, and therefore the responsibility for compliance, should lie primarily with the occupier / manager of the 'smoking permitted' area in which he or she is responsible.

- The approach taken in Queensland tends to reflect option (b). S26ZB(2) of the *Tobacco and Other Smoking Products Act 1998* provides:

  > The licensee must ensure that, in the designated outdoor smoking are
  > (a) no food or drink is served; and
  > (b) *no food is consumed;* and
  > (c) no entertainment is offered; and
  > (d) there are no gaming machines.

- In practice either option should prompt occupiers to make it clear to diners (eg via a sign, or more directly if necessary) that they cannot consume meals in areas set aside for smoking. The standard defence in reg 7(2) would apply to occupiers in these cases.
- However, it should be noted that option (b) (and specifically the Queensland approach) would set a precedent for South Australia insofar as it is in effect a regulation of a 'smoking permitted area'. Currently the Act is simply concerned with where a person *cannot* smoke (eg playgrounds, enclosed places, outdoor dining areas). By adopting the Queensland approach, the TPR Act would be changing this focus.

- Given this, option (a) would involve less change to the Act and if thought effective by HPO, would be the better approach.

71 Western Australia defines an 'outdoor eating area' as an area 'that is provided, on a commercial basis, as an area where food or drink may be consumed by people sitting at tables.' This seems broader than SA's term 'purpose' insofar as it implies that if there are tables and if people are allowed eat meals at them (ie they are not prevented from doing so) the area comes within the WA definition. (Glossary *Tobacco Products Control Act 2006* (WA)).

4: - GENERAL ADMINISTRATION, RESOURCING AND ENFORCEMENT

4.1 Introduction

- This part of the Report focuses on administrative and enforcement issues.
- Specifically, Term of Reference 4 asks me to 'identify any other administrative areas to improve the operation of the Act and Regulations' and so part 4 is a brief account of how the various sections are being administered at present and how they might better be administered and enforced in the future. This a question that leads on logically from the discussions of the substantive issues in the preceding parts 2 and 3.

4.2 General administration

- The general administrative arrangements are as follows. The TPR Act is the responsibility of the Minister for Mental Health and Substance Abuse. In practice the policy directions and advice is provided by DASSA while the enforcement and licensing is the responsibility of the Health Protection Operations (HPO) branch of the Public Health Service, SA Health.
- Direct interaction with the community and enforcement is undertaken by authorised officers appointed by the Minister under s63 of the Act. Officers of the HPO branch are appointed in this way, though HPO's resources are limited. While some fourteen persons are authorised under the Act, ongoing administration and enforcement is undertaken by far fewer and, I understand, amounts to around 1.5 full time equivalents.
- S63(4) also provides that all 'members of the police force are authorised officers' which also gives SAPOL a role in enforcing the Act. With a strength of well over 5,000, SAPOL, by sheer weight of numbers, comprises almost the entirety of the State's potential enforcement effort in tobacco control.[72]
- Local councils have a very limited role in the administration of the TPR Act, though their officers do take on take on some responsibilities in the case of short term bans made under s51. This is a condition of the Ministerial declaration (and an acknowledgement of this responsibility is part of the application process for the ban). Presumably councils also see themselves as responsible for policing the smoking bans that are made under their own by-laws.

4.3 The licensing arrangements

- The licence scheme is administered within the Public Health Service of SA Health. There are 2,165 licensees in the system and the annual fee is $271.[73] Thus the total generated revenue is around $587,000. If those receipts were to be set *just*

72 SAPOL *Annual Report 2014-2015*, p28. (1.1 Departmental Strength as at 30 June 2015).
73 Reg 4 General Regulations.

against HPO's budget,[74] they do appear to more than cover it, and if so this fact would help sustain a claim for more resources and more extensive enforcement that could translate into additional 'on the ground' capacity for HPO.

- As discussed, licence fees could be increased, provided they are not imposed volumetrically (ie calculated by the amount sold) and are seen as necessary to meet the specified purpose of the Act, which is the monitoring and enforcement of the tobacco laws, and not revenue raising. The licensing of e-cigarette retailers and wholesalers, possibly with a somewhat higher annual fee, would increase revenue, which could then provide an argument for more resources (though the resulting additional revenue from these sources would not be substantial).

4.4 How are the sections being enforced?

- Parts 2 and 3 of this Report are an inquiry into individual sections and regulations with a view to strengthening their operation. But this leads on to the next question: how are they being enforced in practice?
- To summarise the framework of the TPR Act; broadly it contains two categories of offences. Parts 2 and 3 regulate the 'sale and supply side' which covers licensing obligations (Part 2 – obligation to be licensed, breach of licence conditions) and 'sales' related offences (Part 3 – promotions and advertising, inducements and sales to children). The second category (the 'use side') comprises the offences in Part 4, relating to the smoking bans (dining, enclosed areas, playgrounds, children in vehicles etc).
- In addition, the Act gives the Minister power to suspend or cancel a licence if the holder has contravened the Act or is no longer a 'fit and proper' person (S11).[75]
- There are no specific enforcement arrangements in place and the Act offers no formal delineation of responsibilities. Thus any person appointed an authorised officer can exercise their powers in relation to the whole Act. However, in practice the two primary enforcement agencies (HPO and SAPOL) do tend to concentrate their efforts in the particular areas set out in parts 4.4.1 – 4.4.3 below.

4.4.1 - General 'business enforcement'. and licensing

- Business enforcement is currently undertaken by HPO which tends to be responsible for Parts 2 (licensing) and 3 (advertising promotions, prohibited products etc). HPO indicates that compliance measures are regularly undertaken in response to breaches of these Parts, though this is not their only function (see below). As with many similar acts, actual or proposed prosecutions as the enforcement end point are rare. The last recorded attempted prosecution was in relation to the illegal sale of 'chop-chop' tobacco which did not proceed to court. Beyond this, HPO indicates that it has issued 'numerous expiations and some warning letters'. Mostly these related to trading without a licence, sales to minors and smoking in enclosed areas.

74 Though other costs centres could also be attributed to tobacco control, notably DASSA's policy input.
75 This power is subject to both a Ministerial review (s12) and an appeal to the District Court (s13).

4.4.2 - S38A sales to children - selling loose cigarettes etc

- While the offence of sales to children is our oldest tobacco law it is also remains one of our most important. The value of Quit campaigns or school based programs is seriously eroded if children can still get easy access to cigarettes, either in packs or sold as single sticks. Enforcement in this area is crucial and here I believe that there is a need to expand the current resources available to policing it.

HPO

- Currently HPO monitors and investigates the s38A breaches, though it is a 'victimless crime' (in the strict sense that there is no injured third party to complain) and HPO will typically get to hear about it, if at all, via parental, school or community complaint. As such it is a difficult offence to detect. But, importantly their efforts in this area can be augmented (and therefore compliance increased) by controlled purchase operations, overseen by HPO, which can both detect the incidence of illegal sales and warn individual vendors who have been caught out of their responsibilities.

Local Government

- There is a strong case to encourage local government to become more involved with the Act and certainly with s38A in particular. Firstly, tobacco remains a significant public health problem and cause of long term illness and disability in their communities and tobacco control measures are one important response to those problems. Greater local involvement fits with the 'positive' and 'holistic' approach to public health envisaged by the *South Australian Public Health Act 2011* and reflected in the local government public health plans made under it. Secondly, local council environmental health officers have existing statutory responsibilities, notably under the *Food Act 2001,* which take them to delicatessens and other mixed businesses within their areas that might also be selling tobacco to children or in other ways encouraging their sale. Councils should be able to retain any expiation fees recovered as a result of their enforcement of this part of the Act.

SAPOL

- I consider that the greatest potential for expanding resources in this area lies with SAPOL which I was given to understand did not see itself as responsible for following up s38A and related offences. However, there is a strong case that it should. Specifically, police do have a far greater physical presence especially in rural and remote areas than the very small number of SA Health authorised officers, all based down in Adelaide. And it is the case that smoking prevalence is higher in country South Australia than in the City, hence the need to prevent under age access to tobacco, (potentially a 'gateway' to a lifetime of smoking) is more pressing. Moreover, as very visible enforcers of law and order generally, police stand to exercise a greater psychological impact on sellers who've done the wrong thing, than SA Health's officers might be able to exercise.

For these reasons I consider that SAPOL can play a role in enforcing s38A and a related offence (of selling loose cigarettes) and in this regard there are three possibilities:

- Where a s38A offence has been alleged, for example on the complaint of a parent or teacher, or via information received from a child found in possession of tobacco, the circumstances could be investigated by SAPOL officers who could either issue the expiation or a warning directly or pass the information onto SA Health for possible prosecution or the issue of an expiation notice.
- Where sellers have been found to have made sales in the course of a controlled purchase operation, SAPOL could be involved in the follow up by attending at the shop and reminding the vendor of their responsibilities.
- Where vendors are known to be selling single sticks, SAPOL officers could similarly investigate the circumstances and issue an expiation notice.

4.4.3 - Restrictions on smoking (Part 4)

HPO

- HPO has an active role in this area, though primarily in the implementation of the very high profile 'smoke-free outdoor dining' initiative and also overseeing the effectiveness of the enclosed area bans under s46, down to the level of commenting on proposals and assisting with compliance. And a number of recommendations in this Report stem from issues HPO have had in these processes. Following on from that, HPO would see itself as responsible for enforcing s46 and also reg 6 of the Longer Term Regulations (outdoor dining).

Local government

- As noted above, local council officers are closely involved in their local communities including facilities subject to Part 4 bans (playgrounds, shopping malls etc). Furthermore, as with delicatessens and places that might sell tobacco, local government's general responsibilities under the *Food Act 2001* will bring council authorised officers in close contact with both restaurants and the other dining areas that are also subject to smoking bans, potentially putting them in a position where they will also come across breaches of Part 4. This would be an extension of their responsibilities currently existing in relation to the smoking bans under ss 51 and 52 (Henley Square and Moseley Square) and their own by-laws where they apply. Councils should be able to retain any expiation fees recovered as a result of their enforcement of this part of the Act.

SAPOL

- SAPOL appears to be most active in enforcing a number of offences set out in Part 4. and police regularly issue expiations for breaches of the smoking bans. However, this effort appears not to be the result of active enforcement of the TPR Act, rather the alleged breaches are detected opportunistically

and are incidents of SAPOL's broader concerns in relation to road traffic (where police may detect a breach of s48 – smoking in a motor vehicle if a child is present) or their general work in maintaining public order (s49 – smoking in a covered bus stop, railway station etc, or s50 – smoking at a playground). Even their responsibilities for bushfire prevention, where for example they detect a person throwing a smouldering cigarette end from a car, may also lead indirectly to a reported breach of the TPR Act.

Thus, whether opportunistic or otherwise it must be acknowledged that the bulk of the enforcement of the TPR Act is in relation to the 'street offences' contained in Part 4 and that it is undertaken by SAPOL.

4.5 Some concluding points

- Part 4.4 (above) envisages some important changes designed to expand the enforcement effort of the Act. If implemented these potential arrangements that draw in both SAPOL more so than currently, and also local government, are made in the light of some obvious contexts and long standing issues.
- In the case of local government, there are many complex and abiding questions about resourcing, the devolution of state functions to councils and specifically the breadth of local government's responsibility for public health issues. As these questions are beyond the scope of my terms of reference they are not discussed further, other than to make the obvious point that the TPR Act would be better enforced if there were more authorised officers out and about in the local community, as is the case in other states.[76]
- In the case of SAPOL, the recommendations in relation to s38A and related offences are made in the knowledge that police officers have many calls on their time often responding to urgent and far more acute problems than the longer term problems of juvenile tobacco use. However, and for the reasons set out above, a police presence offers both a very potent and compelling enforcement tool and also the capacity to detect breaches that otherwise would never come to light. SAPOL officers are already very active in enforcement and the specific issue of 'sales to children' is an extension, and in public health terms a very necessary extension, of this work.

- Finally any exploration of enforcement questions must acknowledge that numbers of expiation notices issued and prosecutions undertaken is certainly one way of determining how effectively the legislation is being implemented. But it is not the only way and is always secondary to the main question namely, how well is the Act being complied with? In many ways the TPR Act is 'self-enforcing.' Thus, as no-smoking areas were created, the public (its attitudes reinforced by the required

76 In other jurisdictions local government is encouraged to enforce the Act. Victoria for example envisages that its Act will be administered by local councils and provides that councils can keep the expiations that they issue. (ss 36 and 40(2) *Tobacco Act 1987* (Vic)). In Western Australia the restricted smoking area laws are administered by local councils. See for example http://www .fremantle.wa.gov.au/residents/health-and-wellbeing/smoking

notices) mostly complied, creating changed environments in which smoking ceased to be an accepted practice. In this way the whole community became active in enforcing the Act.

APPENDIX

Extract from the *Tobacco Products Control Act 2006* (WA)

Division 4 — Compliance surveys and controlled purchase operations

94. Terms used

In this Division —

compliance survey means a survey the intended purpose of which is to gather data as to the likelihood of a young person offence being committed if the opportunity to commit the offence is given;

controlled purchase officer means a person acting as a controlled purchase officer under this Division;

controlled purchase operation means an operation the intended purpose of which is to provide a person suspected of having committed a young person offence on one or more occasions with an opportunity to commit or to attempt to commit a young person offence;

young person offence means an offence under section 6, 7, 8(1) or 9.

95. Controlled purchase officers, authorisation of etc.

(1)The CEO may, in writing, authorise a suitable person, including a person who has not reached 18 years of age, to act as a controlled purchase officer and may in writing revoke that authority.

(2)A controlled purchase officer who has not reached 18 years of age must deliver to the person directing the compliance survey or controlled purchase operation any tobacco product or smoking implement obtained by the officer as a result of the survey or operation.

(3)The identity or purpose of a controlled purchase officer may, for the time being, be concealed or misrepresented for the purpose of a compliance survey or controlled purchase operation.

96. Compliance surveys and controlled purchase operations

(1) A controlled purchase officer may take any action that is specified in the authorisation given by the CEO for the purpose of a compliance survey or controlled purchase operation.

(2) If a controlled purchase officer takes any action that is specified in the authorisation given by the CEO for the purpose of a compliance survey or controlled purchase operation the controlled purchase officer, the CEO and any person directing the survey or operation do not commit an offence and are not liable as a party to an offence committed by another person.

(3) If a controlled purchase officer takes any action that is specified in the authorisation given by the CEO for the purpose of a controlled purchase operation the controlled purchase officer's evidence in any proceedings against another person in connection with which the controlled purchase officer took the action is not the evidence of an accomplice.

97. Reports about compliance surveys etc., CEO's duties as to

The CEO is required, whenever requested by the Minister to do so, to give the Minister a report in writing containing such particulars of compliance surveys and controlled purchase operation as the Minister requires.