



Tobacco Advertising Prohibition Amendment Bill 2010

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Law and Bills Digest Section

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Tobacco Advertising Prohibition Amendment Bill 2010

Date introduced: 17 November 2010

House: House of Representatives

Portfolio: Health and Ageing

Commencement: The substantive provisions commence on proclamation or six months and one day after Royal Assent. However it is of note that the new offence provision (**proposed section 15A**) will be applied retrospectively, (**Part 2, item 16**).

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bills home page, or through <http://www.aph.gov.au/bills/>. When bills have been passed they can be found at the ComLaw website, which is at <http://www.comlaw.gov.au/>.

Purpose

The Bill amends the *Tobacco Advertising Prohibition Act 1992* (the TAP Act) in order to bring restrictions on tobacco advertising on the internet or in electronic media into line with restrictions in other media and at physical points of sale.

Background

History of tobacco advertising regulation

The first legislative restriction on the promotion of tobacco products was the 1976 amendment to the *Broadcasting Act 1942*. This introduced a prohibition on the broadcasting, on radio and television, of advertisements for tobacco products, except as an accidental or incidental accompaniment to other matter.

This broadcasting prohibition, while appearing prima facie to prevent tobacco advertising on television, in fact did not do so. The exemption for accidental or incidental advertising enabled the continuation of the broadcasting of events such as the Benson & Hedges World Series Cup, the Winfield Cup Rugby League, and tobacco-sponsored motor-racing without infringing the prohibition, and provided an effective loophole through which tobacco companies were able to achieve significant exposure by increasing their sponsorship funding of sport.

Perimeter signage in particular became prolific and tobacco products thereby received substantial promotion during the television coverage of sporting events.

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The result was, in the late 1980s and 1990s, the enactment of State and Territory legislation imposing restrictions on tobacco advertising and sponsorship, striking at advertisements through such media as billboards and venue signage.

In 1989 the Commonwealth government imposed a ban on advertising tobacco products in the print media, but this was repealed in 1992 by the *Tobacco Advertising Prohibition Act 1992* (the TAP Act) which introduced restrictions at the national level, on all forms of tobacco advertising, including broadcasting and print media.

The Commonwealth legislation sought to provide a national standard in response to the differences in State and Territory legislation, and no legislation in some States and Territories:

These inconsistencies had meant that, if advertising was not prohibited or was exempted in one State, sporting events containing such advertising could be broadcast into another State, despite tobacco advertising restrictions in the receiving State.

In imposing an Australia-wide restriction on the advertising of tobacco products, the TAP Act overcame these problems to some extent, but still allowed some exemptions.

Tobacco Advertising Prohibition Act 1992—Outline

The TAP Act contains two main prohibitions, one the broadcasting of tobacco advertisements¹ and the other on the publishing of tobacco advertisements².

The penalties for offences against these prohibitions are a maximum of 120 penalty units (\$13 200) for an individual, and 600 penalty units (\$66 000) for a corporation.

In general, and noting the exemptions referred to below, the Act prohibits a very wide range of conduct that brings a tobacco product to the attention of the public.

The effect of the legislation is to prohibit print media advertising; advertisements in films, videos, television or radio; advertising on tickets, handbills and other documents; the sale or supply of any item containing a tobacco advertisement; and outdoor advertising on billboards or public transport.

'Tobacco advertisement' is defined very broadly in section 9 of the TAP Act and includes:

- any writing, still or moving picture, sign, symbol or other visual image, or audible message, or combination of these things, that publicises, promotes or is intended to promote:
 - smoking
 - the purchase or use of tobacco products
 - registered trade marks or designs for goods that include tobacco products
 - the name of a person who is the manufacturer or whose name appears on tobacco products, or

1. Section 13.

2. Section 15.

- any other words and/or designs that are 'closely associated' with tobacco products.

It is of note that the Australian Government Department of Health and Ageing Easy Guide to the TAP Act states that bringing the advertisement to the notice of the public by any means includes 'via the internet, email or other electronic means'.³

'Tobacco product' is also defined widely to include not only tobacco and products containing tobacco, but also cigarette paper, cigarette rollers and pipes.

Exceptions/exemptions to the general bans

There is a range of exemptions and defences in the TAP Act. For example tobacco advertising is exempted from the prohibition where:

- it is an accidental or incidental broadcast or publication of tobacco advertisements and the person does not receive any direct or indirect benefit for broadcasting or publishing the advertisement in addition to that received for the other matter⁴
- the advertisement is contained in a publication printed outside Australia and not principally intended for distribution or use in Australia⁵
- the advertisement is not published in the course of manufacture, distribution or sale of tobacco products and is published at an individual's own initiative and the individual does not receive any benefit for publishing the advertisement⁶
- the advertisement relate solely to government or political matters⁷
- the advertisement relates to the internal management of the business of a manufacturer or retailer of tobacco products.⁸

Probably the most significant exemption is for point of sale advertising. Tobacco advertisements may be displayed at or on a place where tobacco products are offered for sale to the public, providing they comply with State or Territory laws, or, if there is no such legislation, that they comply with State or Territory laws.

State/Territory regulations

All States and Territories now have laws affecting tobacco product advertising and these continue to be relevant. While the Commonwealth TAP Act provides a national baseline of tobacco advertising

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3. Department of Health and Ageing, *Easy guide to the Tobacco Advertising Prohibition Act 1992*, 2007, viewed 22 November 2010, [http://www.health.gov.au/internet/main/publishing.nsf/Content/355399AFA90CFB88CA25734F0008A847/\\$File/prohibition-act.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/355399AFA90CFB88CA25734F0008A847/$File/prohibition-act.pdf)
 4. Sections 14 and 19.
 5. Section 17.
 6. Section 20.
 7. Subsection 9(1A).
 8. Subsection 9(3A).

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prohibition, it also provides that States and Territories with specific legislation can continue to rely on their legislation, except where the Commonwealth prohibition is more stringent. For example, point-of-sale advertising is governed by State laws where such laws exist. In the absence of specific State laws, Commonwealth regulations govern this form of advertising. In addition, some State legislation contains other provisions regulating the promotion and sale of tobacco products.

Tobacco advertising on the internet

Previous inquiries

Since the advent of the internet and its increasing use as an advertising medium, there have been concerns raised that tobacco advertising needs to be regulated more fully in this new medium.

As early as 31 May 2002, the then Federal Parliamentary Health Secretary, Trish Worth, announced a review of the *Tobacco Advertising Prohibition Act 1992*.⁹ Amongst other things, the review considered whether the legislation should be extended to cover the internet and emerging advertising and marketing practices. After numerous calls for release of the report, the Government responded in June 2005, stating that no report was prepared and that submissions to the inquiry would not be made publicly available. It was stated that the review found that the Act is working well to protect the Australian public from advertising messages.¹⁰

The Australian Democrats had a long history of parliamentary action against the advertising of tobacco products¹¹ and on March 10, 2004, Australian Democrat Senator Lyn Allison tabled in the Senate an exposure draft of a Tobacco Advertising Prohibition (Film, Internet and Misleading Promotion) Amendment Bill 2004 (the TAP Draft Bill 2004). The TAP Draft Bill, together with the Commonwealth Electoral Amendment (Preventing Smoking Related Deaths) Bill 2004¹² (the Electoral Amendment Bill), were referred to the Senate Community Affairs Legislation Committee for inquiry and report. The TAP Draft Bill 2004 went further than the current Bill in that it proposed to actually prohibit the sale of tobacco products on the internet. The Committee's report was issued on 30 September 2004. It included a recommendation that the TAP Draft Bill 2004 proceed, though amended to put in place a strict regulatory framework rather than a ban on tobacco product sales on

9. T Worth (former Parliamentary Secretary to the Federal Minister for Health and Ageing), *Review of the Tobacco Advertising Prohibition Act 1992*, media release, 31 May 2002, viewed 25 November: <http://www.health.gov.au/internet/main/publishing.nsf/Content/health-mediarel-yr2002-tw-tw02012.htm>

10. K Patterson, Tobacco advertising: Answer to Question on notice no. 582, from Senator Lyn Allison, *Hansard*, 22 June 2005.

11. For example the passing of Senator Janet Powell's private senator's Bill in 1989 which banned cigarette advertising in the print media.

12. This was a Government Bill that had been introduced into the House of Representatives.

the Internet. The report also recommended the tightening of restrictions on tobacco sponsorship to prohibit publicity achieved in that way.¹³

Basis of policy commitment

The Bill is part of the Labor Government's promised package of measures targeting smoking announced on 29 April 2010. The then Prime Minister's press release states:

The Rudd Government today announced a comprehensive package targeting smoking and its harmful effects, including an increase in the tobacco excise of 25 per cent.

This increase in tobacco excise will provide an extra \$5 billion over four years, which along with existing revenues from tobacco, will be directly invested in better health and hospitals through the National Health and Hospitals Network Fund.

The Government's anti-smoking action includes:

- The first increase in tobacco excise (above inflation) in more than a decade, an increase of 25 per cent.
- Cracking down on one of the last frontiers for tobacco advertising - in a world first, cigarettes will have to be sold in plain packaging.
- Restricting Australian internet advertising of tobacco products.
- Injecting an extra \$27.8 million into hard-hitting anti-smoking campaigns.

All four measures deliver on major recommendations of the National Preventative Health Taskforce.¹⁴

Position of major interest groups

To date, most comment on the Bill has come from medical and health lobbyists whose reaction has been supportive. The Australian Council on Smoking and Health is reported as welcoming the move.

"Cigarettes are now being heavily promoted on the Internet, and there are serious concerns that both online advertising and social networking sites are being used to promote tobacco to young people," said council president Mike Daube.

13. Senate Community Affairs Legislation Committee, *Tobacco advertising prohibition*, September 2004, viewed 22 November 2010, http://www.aph.gov.au/Senate/committee/clac_ctte/completed_inquiries/2002-04/tob_adv_proh/report/report.pdf

14. K Rudd (former Prime Minister), *Anti-smoking action*, media release, 29 April 2010, viewed 22 November 2010, http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/67MW6/upload_binary/67mw60.pdf;fileType=application/pdf#search=%22tobacco%20advertising%20internet%20%20|%20EBSCO,AAP%22

Mike Daube, chairman of the National Preventative Health Taskforce, which advised the government to tighten restrictions, said Parliament had intended to ban all tobacco advertising and tobacco companies would always try to subvert bans.¹⁵

The Australian Medical Association is also supportive of the Bill, stating:

AMA President, Dr Andrew Pesce, said today that the AMA supports Government moves to ban the advertising of tobacco products on the Internet and other electronic media.

Dr Pesce said that the AMA wants a ban on all forms of tobacco promotion to reduce the harms that smoking causes.

“The Government’s strong action to restrict advertising of tobacco products must be backed by the Parliament,” Dr Pesce said.

“The proposed new law will make it harder for tobacco companies to target teenagers and young Australians with attractive ads and promotions on the Internet.

“It will help deter young people from taking up smoking and save the lives of thousands of Australians.

“Banning or limiting tobacco industry advertising is vital if we are going to help people to quit smoking or stop taking up the killer habit.

“Plain packaging of all tobacco products and increasing the price of tobacco products are also crucial elements of the anti-smoking strategy, and are necessary and urgent next steps.¹⁶

Media reports

To date there is very little media commentary on the Bill. However an article in the Sydney Morning Herald at the time of the introduction of the Bill discusses whether the legislation would impact on ‘stealth marketing’ of tobacco products on websites such as You-Tube and MySpace.¹⁷

15. ‘Australia to restrict internet tobacco advertising’, *Reuters*, viewed 25 November 2010, <http://www.reuters.com/article/idUSTRE6AG3TY20101117>

16. AMA, *AMA supports ban on Internet tobacco advertising*, media release, 17 November 2010, viewed 25 November 2010, <http://ama.com.au/node/6218>

17. B Cubby and A Corderoy, ‘Internet cigar fanciers create a stink’, *Sydney Morning Herald*, 17 November 2010. In recent years there have been a series of media reports suggesting that there has been a proliferation of tobacco companies using the internet as a marketing tool. See for example C Weaver, ‘Tobacco’s ‘stealth’ pushers’, *Sunday Telegraph*, 7 October 2007, p. 33 and J Lee, ‘Whiff of tobacco firms on net’, *Sydney Morning Herald*, 18 November 2006.

Key provisions

Expanded meaning of ‘publish a tobacco advertisement’ (proposed paragraph 10(1)(da))

Item 5 inserts a **new paragraph (da)** into **subsection 10(1)**. Its effect is to expand the conduct that constitutes publishing a tobacco advertisement for the purposes of the Act. The conduct of a person who brings a tobacco advertisement or something containing the advertisement to the notice of the public by electronic means, including via the internet, or by making the advertisement remotely accessible by a computer, mobile phone or any other electronic device will satisfy the definition of publishing a tobacco advertisement.

Main offence provision (proposed section 15A)

Proposed section 15A inserted by **item 13** is the key provision. **Subsection 15A(1)** makes it an offence for a person to publish electronically¹⁸ in Australia anything that meets the definition of a tobacco advertisement¹⁹. A person also commits an offence if they cause or authorise such a publication.

The offence has the same penalty that applies to other tobacco advertising offences under the TAP Act, namely (\$13,200) for an individual and \$66,000 for a corporation.

Meaning of ‘published in Australia’

Proposed subsections 15A(4) and 15A(4) expand the meaning of the term ‘published in Australia’ so that it applies to circumstances where the advertisement did not originate in Australia, or its origin cannot be determined, and the advertiser has a significant Australian connection. Such a connection would be where a publisher, who may or may not be the defendant publisher, is:

- an Australian citizen
- a permanent resident
- an entity that was incorporated or formed in Australia
- a foreign person in Australia; or
- a foreign entity or unincorporated body with its central management and control in Australia.

The Explanatory Memorandum explains:

18. **Item 3** inserts a definition of ‘electronically’ into section 8 to define the term by referring to the meaning given to it in the new paragraph 10(1)(da), item 5. This new paragraph is explained above.

19. Tobacco advertisement is defined in the TAP Act at section 9.

Consequently, if the publication constituting the offence (such as the uploading of the advertisement onto the internet) occurs outside Australia, the defendant publisher must be an Australian citizen or resident, or a body corporate incorporated in Australia. However, if the publication occurs within Australia, such a requirement does not apply to the defendant publisher. This is intended to ensure that the offence in section 15A covers the maximum number of persons advertising tobacco products electronically to the Australian public.

Exceptions to the offence

Existing exceptions that allow tobacco advertising in other media will also apply to the new offence provision so that the following behaviour will not be considered an offence:

- point of sale advertising
- periodicals printed outside Australia
- accidental or incidental publishing, and
- publication by an individual not receiving any benefit. (**proposed subsection 15A(2)**).

Exception of point of sale advertising related to internet sales

In addition, a new exception is provided in **proposed section 16A** allowing point of sale advertising specifically related to internet sales. **Section 16A** provides an exception for tobacco advertisements published electronically where the tobacco product is sold, provided that the publishing of the tobacco advertisement is not an offence under the relevant State or Territory law or if there is no such law, provided it complies with the relevant Commonwealth regulations. **Proposed subsection 16A(4)** sets out the relevant requirements that may be included in the regulations. These include matters relating to size and content of the advertisement, health warnings and age restriction access.

Exception for internet provider and carriers

There is an additional exception for a carrier, a carriage service provider, an internet service provider or an internet content host²⁰ acting solely in these various capacities (**new section 16B**).

In regard to all these exceptions the defendant has an evidential burden of proof (see note to **proposed subsection 15A(2)**). The Explanatory Memorandum explains the meaning and reason for this.²¹

20. All defined by reference to the *Telecommunications Act 1997* and the *Broadcasting Services Act 1992*.

21. Explanatory Memorandum, Tobacco Advertising Prohibition Amendment Bill 2010, pp. 42–43.

Concluding comments

The Bill is cautious in its approach proposing only to bring internet advertising in line with advertising in other media and clarifying some uncertainty about the reach of the existing TAP Act. A more adventurous approach would have been a complete prohibition on internet advertising or even a prohibition on internet retail sales. This, according to the Minister's second reading speech, was not undertaken on the basis that people living in rural and regional areas should not be disadvantaged when purchasing grocery items, including tobacco products, over the internet.²²

As has often been noted, internet regulation and its enforcement is problematic. So while the Bill aims to regulate tobacco advertising that has an 'Australian link' it can do nothing about the advertisements on overseas websites by a foreign company. Also there is some question as to whether the Bill can successfully regulate what has been described as 'stealth marketing' on popular websites such as You-Tube and MySpace.²³

It could also be argued that the Government could have taken this opportunity to tighten the restrictions on tobacco advertising by removing some of the exceptions to the prohibitions. For example, could there be more restrictions on advertising at point of sale and is the exemption for accidental or incidental publishing necessary?

So far the Bill has received little attention, possibly because of its reasonably limited purpose. A much bigger challenge for the Government will be the implementation of its planned legislation to bring in plain packaging for all cigarettes sold in Australia by 1 July 2012.

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22. N Roxon (Minister for Health and Ageing), 'Second reading speech: Tobacco Advertising Prohibition Amendment Bill 2010', House of Representatives, *Debates*, 17 November 2010, p. 3, viewed 25 November 2010, http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2010-11-17/0016/hansard_frag.pdf;fileType=application%2Fpdf
 23. There have been media reports of work by Professor Simon Chapman of the School of Public Health at Sydney University alleging that tobacco manufacturers have hijacked YouTube by flooding it with videos of glamorous smoking teens. See: J Lee, 'Whiff of tobacco firms on net', *Sydney Morning Herald*, 18 November 2006.

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