



Australian Government
Department of Health and Ageing



Easy guide to the

Tobacco Advertising Prohibition Act 1992



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**Australian Government Department of Health and Ageing
Canberra, Australia**

ISBN: 1 74186 268 X
Online ISBN: 1 74186 269 8
Approval Number: P3-1908

Paper-based publications

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You should not rely on the information in this guide as a legal interpretation of the *Tobacco Advertising Prohibition Act 1992*. Anyone who needs a legal interpretation of the Act should seek independent legal advice.

Produced by the Drug Strategy Branch
Australian Government Department of Health and Ageing
Canberra, Australia.



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Introduction

Purpose of the guide

The Australian Government Department of Health and Ageing has produced this guide. It aims to help the public understand the Commonwealth *Tobacco Advertising Prohibition Act 1992* ('the Act').

It has been designed to assist:

- people who sell tobacco products (such as tobacconists, service stations and grocery shop owners);
- those whose work involves publishing or broadcasting (like advertising agents and people who work in the media); and
- people who deal with the tobacco industry (like sporting or cultural groups seeking sponsorship).

This guide explains, using examples, what is and is not allowed under the Act. It also explains why there is a ban on tobacco advertising in Australia. However, the guide is provided for general information only and you should not rely on the information in this guide as a legal interpretation of the Act for the purpose of a particular matter. Anyone who needs a legal interpretation of the Act should seek independent legal advice before any action or decision is taken on the basis of the material in this guide.

You can download an up-to-date version of the Act from the 'Comlaw' website (www.comlaw.gov.au). You can also download an up-to-date version of the Tobacco Advertising Prohibition Regulations and Guidelines from this site.

Why is tobacco advertising banned?

Tobacco advertising is banned because it promotes a product that is highly addictive and lethal.

The aim of the tobacco advertising ban is to help prevent smoking uptake and reduce smoking rates. The goal is to improve the health of all Australians.

Tobacco remains one of the largest preventable causes of disease and premature death in Australia and kills over 15,000 Australians each year. It is estimated to cost the Australian community approximately \$21 billion in social costs per year.¹

Passive smoke, also known as Environmental Tobacco Smoke (ETS), is a combination of poisonous gases and breathable particles that are harmful to health, particularly that of children. Smoking near babies and children exposes them to ETS. Children exposed to ETS experience serious illnesses such as pneumonia, middle ear infections and asthma attacks.

Around three million Australians are smokers. Most of these people are addicted to nicotine. For this reason, it is not currently possible for the Australian Government simply to make tobacco illegal. Instead, the Government has initiated a number of measures to limit the harm of tobacco use. The ban on tobacco advertising is one of those measures.

Historically, tobacco advertisements have used images and messages that feature health, success, youth and leisure. The constant linking of cigarettes with such messages distracts people from the reality that smoking causes illness and death.

Tobacco advertising is a powerful influence that increases the use of tobacco products, particularly by children and young people.

¹ Based on statistics compiled for 2006 Intergovernmental Committee on Drugs, National Drug Strategy Annual Report July 2004 – June 2005.

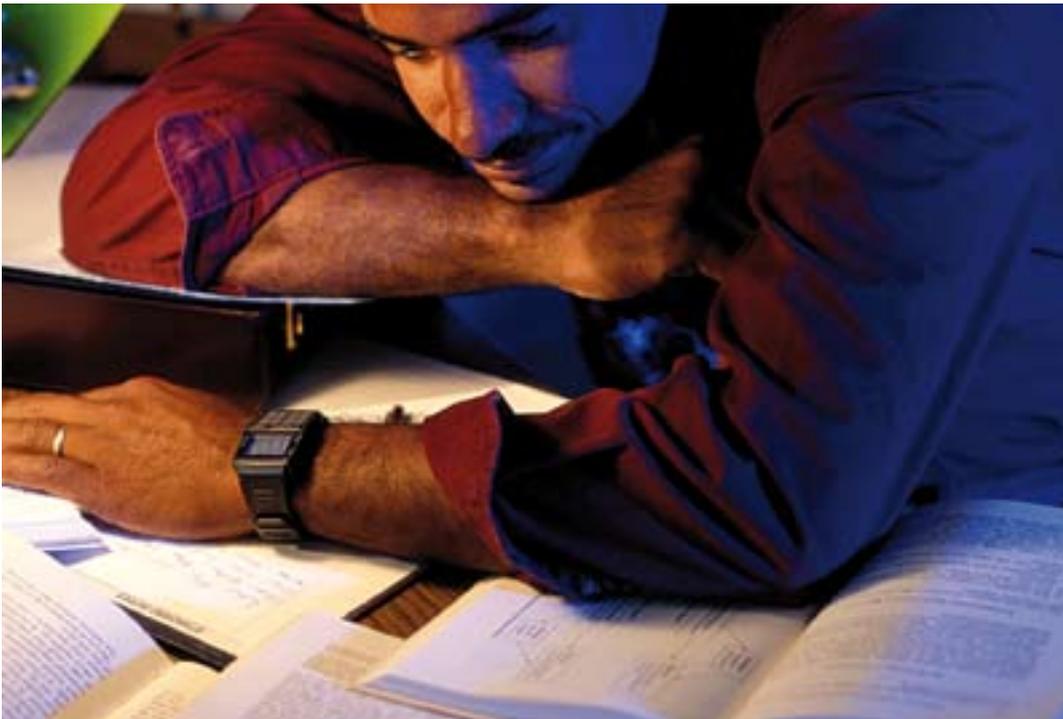


Further reading on tobacco and health effects

Tobacco on the Australian Government Department of Health and Ageing website:
www.health.gov.au/tobacco

Ministerial Council on Drug Strategy (2004)
National Tobacco Strategy 2004-2009
National Drug Strategy website:
www.nationaldrugstrategy.gov.au

Australian Institute of Health and Welfare website:
www.aihw.gov.au



An outline of the Act

The Act bans tobacco advertising with certain limited exceptions. Section 13 bans the *broadcast* of tobacco advertisements. Section 15 bans the *publication* of tobacco advertisements. On page 11 of this guide we outline what it means to 'broadcast' and 'publish' a tobacco advertisement under the Act.

The Act defines 'tobacco advertisement' more broadly than the everyday meaning of the term. The definition, for example, includes all writing, still or moving pictures, signs, symbols, or other images or audible messages that 'promote smoking' – s.9(1). There is further discussion of what the term 'tobacco advertisement' means on page 10 of this booklet.

The Act then provides for a number of exclusions from its broad definition of a tobacco advertisement. An example is s.9(2), which excludes from the definition, words or symbols when they appear on tobacco products, packaging and business documents.

The Act also sets out certain instances where, although a publication or a broadcast may fit within the definition of publication or broadcast of a 'tobacco advertisement', they may be exempt from the general ban on tobacco advertising. The listing of a tobacco company in a phone book, for example, may not be a publication of a tobacco advertisement in certain circumstances – s.10(3A).

Other exceptions/exemptions to the general bans are discussed more fully beginning at page 13 of this guide.

State and Territory laws

Throughout Australia, both Commonwealth and State or Territory laws apply to tobacco advertising. State and Territory laws are often more stringent.

As a rule, the law that restricts people the most will apply if there is both Commonwealth and State and Territory laws dealing with the same issue.

This rule applies to all parts of the Act except for the part that deals with 'point of sale' advertising. Where a State or Territory has a law that deals with point of sale tobacco advertising, the State or Territory law applies in all cases.

For further information about State and Territory law please contact the relevant State or Territory health department.



Contact details

Australian Government Contact details

Tobacco and Drug Prevention Section
Australian Government Department of Health and Ageing
GPO Box 9848, CANBERRA ACT 2601
Ph (02) 6289 5939, Fax (02) 6289 7837
www.health.gov.au/tobacco

State and Territory Government Contact details

Australian Capital Territory
Health Protection Service
Office of Regulatory Services
GPO Box 158
CANBERRA ACT 2601
Ph (02) 6207 0400
Fax (02) 6207 0538
www.ors.act.gov.au

New South Wales
Tobacco and Health Branch
NSW Health
Locked Mail Bag 961
NORTH SYDNEY NSW 2059
Ph 1800 357 412 or
(02) 9391 9111
Fax (02) 9391 9579
www.health.nsw.gov.au/public-health/health-promotion/tobacco

Northern Territory
Alcohol and Other Drugs
Department of Health and Community Services
PO Box 40596
CASUARINA NT 0811
Ph 1800 888 564
Fax (08) 8999 2420
www.smokefree.nt.gov.au

Queensland
Alcohol, Tobacco and Other Drug Branch
Queensland Health
GPO Box 48
BRISBANE QLD 4001
Ph (07) 3234 1709
Fax (07) 3234 1699
www.health.qld.gov.au/atods

South Australia
Tobacco Control Unit
Drug and Alcohol Services SA
Department of Health
Suite 1, 161 Greenhill Road
EASTWOOD SA 5063
Ph (08) 8274 3451
Fax (08) 8274 3399
www.tobaccolaws.sa.gov.au

Tasmania
Public & Environmental Health Service
Department of Health and Human Services
GPO Box 125
HOBART TAS 7001
Ph 1800 671 738 or
(03) 6222 7737
Fax (03) 6222 7407
<http://dhhs.tas.gov.au/agency/pro/tobacco>

Victoria
Tobacco Policy Section
Public Health Branch
Department of Human Services
GPO Box 4057
MELBOURNE VIC 3001
Ph (03) 9096 0469
Fax (03) 9096 9197
www.health.vic.gov.au/tobaccoreforms

Western Australia
Tobacco Control Branch
Environmental Health Directorate
Department of Health
PO Box 8172
PERTH BUSINESS CENTRE WA 6849
Ph 1300 784 892
Fax (08) 9242 9634
www.health.wa.gov.au/tobaccocontrol

The general ban on tobacco advertising

Definition of a 'tobacco advertisement'

Advertisements for tobacco products take a number of forms. They can be magazine and newspaper advertisements, point of sale promotions, signage at sporting and cultural events, and cinema advertising. For this reason the Act defines a tobacco advertisement broadly – s.9(1).

Under the Act a tobacco advertisement is basically anything that gives publicity to or promotes:

- **smoking**
- **the purchase or use of tobacco products**

A tobacco product is defined in section 8 of the *Tobacco Advertising Prohibition Act 1992*. It is tobacco itself and any product that contains tobacco (as a main or substantial ingredient) designed for human consumption. Cigarette papers, cigarette rollers and pipes are also tobacco products under the Act.
- **a trademark or registered design for tobacco products**

For example, this would include the word 'Marlboro'. It could also include the packet design, for example the red and white Marlboro chevron.
- **a name of a tobacco manufacturer whose name appears on the packaging of tobacco products**

Under the definition, anything promoting the name of a tobacco manufacturer would be a tobacco advertisement if those names appear on the packaging of tobacco products that they manufacture.
- **any other words or designs or combination of words or designs that are closely linked with a tobacco product.**

For example, the Winfield motto "...anyhow*" combines words and a symbol that, when they appear in that format in white on a red background, are closely linked with a tobacco product. Likewise, the camel logo that has become famous in America promoting Camel cigarettes is a design that is closely linked with a tobacco product.

Definition of 'publish a tobacco advertisement'

What it means to 'publish a tobacco advertisement' is set out at subsection s.10(1) of the Act.

A person publishes a tobacco advertisement if they:

- **include it in a document that is available or distributed to the public or a section of the public**

For example, a document may be a newspaper, magazine, leaflet or ticket.

- **include it in a film, video, TV or radio program that is to be seen or heard by the public or a section of the public**

For example, if a film producer includes a tobacco advertisement in a film, they publish that advertisement for the purposes of the Act.

- **sell, hire or supply it to the public or a section of the public – or offer to do so**

For example, if a person tried to sell a t-shirt or stubby holder that had a cigarette brand logo on it they would have published a tobacco advertisement.

- **display, screen or play it so that it can be seen or heard from a public place, public transport or a workplace**

For example, promoting a cigarette brand over a public address system.

- **disseminate or bring it to the notice of the public by any means**

For example, by means of a film, video or computer disk or via the Internet, email or other electronic means.

Thus, most forms of media are covered. The main exception is 'broadcasting', which is excluded from the definition of 'publish' – s.9(2)

Definition of 'broadcast'

The Act defines 'broadcast' to include 'transmit by means of a broadcasting service within the meaning of the *Broadcasting Services Act 1992*'. In most cases, this simply means by way of radio or television – s.8.

Enforcing the Act

It is an offence to publish or broadcast a tobacco advertisement in contravention of the Act.

The maximum fine for an individual who publishes or broadcasts an advertisement is 120 penalty units (\$13,200 as at January 2007). For a corporation the fine is up to 600 penalty units (\$66,000 as at January 2007).¹

These penalties are set out in s.13(1) and s.15(4).

Most people willingly comply with the Act. The Government takes breaches of the Act seriously. The Department of Health and Ageing follows up on every reported breach. The Department can refer alleged breaches of the Act to the Australian Federal Police to investigate. If appropriate, matters can then be referred to the Director of Public Prosecutions for prosecution in the courts.

Each year the Minister must table a report in Parliament on the number and nature of contraventions of the Act and what action has been taken – s.34A.

If you wish to report a potential breach of the Act, please contact the Department of Health and Ageing, Tobacco and Drug Prevention Section. Contact details are on page 9 of this guide. It is preferable that reports of breaches are submitted in writing. Please enclose a copy of the alleged breach if it was printed or sufficient evidence to enable the Department to investigate.

¹ The value of a penalty unit is given by s.4AA of the *Crimes Act 1914*. As at January 2007, a penalty unit is \$110. The *Crimes Act 1914* s.4B(3) raises the penalty for a corporation.

Exceptions/exemptions to the general bans

Earlier in this guide, we explained that the Act defines a 'tobacco advertisement' as almost anything that gives publicity to or promotes tobacco products or smoking. This does not mean, however, that any mention of a tobacco company, brand or image associated with smoking is a breach of the Act. The Act has a number of exceptions and exemptions. These allow tobacco advertising under certain circumstances.

The main exceptions to the general ban are discussed below.

Political discourse

Political comments by media, manufacturers, distributors or retailers of tobacco products are not tobacco advertisements if they only relate to 'government or political matters' and don't promote smoking, a particular tobacco product or range of tobacco products – s.9(1A).

'Government or political matters' is a term defined in section 8 of the Act. It includes matters to do with any level of government in Australia including government policies, elections, appointments to public office and the performance of politicians.

For example, debates among the public, politicians or tobacco companies are permissible, provided tobacco manufacturers do not explicitly promote tobacco brands or particular products.



Words on products, packaging, business documents and premises

The words, signs or symbols on a tobacco product or its packaging are not tobacco advertisements under the Act.

Words, signs or symbols on standard business documents of a manufacturer, distributor or retailer of tobacco products are also not tobacco advertisements under the Act. For example, the standard words on invoices, statements, letterheads, business cards, cheques or in a manual used in the normal course of business are allowed.

Signage on the land or buildings occupied by a manufacturer of tobacco products is permitted.

However, an image (such as a photo or film) of tobacco company signage or of tobacco packaging would still be a tobacco advertisement under the Act – s.9(2) and s.9(3).

Management advertisements and availability of products

The Act exempts conduct required by other laws. For example, under company law, tobacco companies need to produce annual reports. These reports are permitted to mention brand names to the extent necessary to comply with the law.

Advertisements made for internal management reasons are also not tobacco advertisements under the Act as long as they do not promote smoking or a tobacco product. For example, an advertisement for staff or a call for tenders that does not promote smoking or a tobacco product would not be tobacco advertisements.

A manufacturer, distributor or retailer of tobacco products is allowed to publish advertisements that say they have tobacco products available. However, any such advertisement must not state the brand name of any product or let any individual product be identified or promoted. For example, a retailer may advertise that they are a tobacconist and that they have cigars for sale but not which brands of cigars.

Advertisements are allowed to prevent a product from causing injury, including action to recall a product, or to advise defects, danger, procedures for disposal or repair, replacement or refund arrangements.

These exceptions are set out at s.9(3A).

Non-tobacco product having the same name as a tobacco product

The Act makes an allowance for non-tobacco products that share a name with a tobacco product by coincidence. In this case, advertisements for the non-tobacco product are allowed under the Act – s.9(3B).

For example, Kent cigarettes have a name in common with a training institute in Sydney. The institute has no formal business relationship with the makers of Kent cigarettes. In this case, the Act ensures that advertisements for the Kent Institute are not tobacco advertisements and are allowed.

Anti-smoking

Advertisements that are clearly trying to deter people from using tobacco products are not tobacco advertisements under the Act – s.9(7) and as such are allowed.



Trade communications

Under the Act a tobacco advertisement has not been published if the advertisement went out solely to people involved in the manufacture, distribution or retailing of tobacco products – s.10(3).

For example, tobacco distributors may send lists of products to people they know to be tobacco retailers. In this case, the distributors would not have published an advertisement under the Act.

Listings in telephone directories

Section 10(3A) makes it clear that putting the name of a manufacturer, distributor or retailer of tobacco products in a telephone book does not amount to the publication of a tobacco advertisement.

Activities of exempt libraries

An 'exempt library' means a public library, a library of a tertiary educational institution or a government library.

Under the Act, the normal activities of an 'exempt' library (loan of books for example) do not amount to publication of tobacco advertisements – s.10(4).





While tobacco advertisements at sporting or cultural events are banned under the Act, tobacco companies may still sponsor these activities although they can only receive limited recognition. The Act has regulations called Tobacco Advertising Prohibition Regulations. The limits of what is allowed are set out in the Regulations – s.10(5) and rr. 3, 4 and 5.

For example, if an acknowledgement of assistance or support is included in an annual report, the advertisement must not appear on the outside of the front or back cover, or on the spine. It must be in the same typeface as, and in type not larger than, the generality. It must not include a trademark or logo. If there is more than one sponsor, the acknowledgement must only appear within a list of those sponsors.

The Regulations detail a number of other conditions that apply in different circumstances. If more detailed information is required about how tobacco company sponsorship may be acknowledged under the Act, please refer to the Act and Regulations or seek legal advice.

Most States and Territories have banned tobacco sponsorship. These bans override more lenient Commonwealth laws. In some States, health promotion sponsorship programs have replaced tobacco sponsorship. State and Territory health departments can provide more information on the laws and any programs that apply. Contact details are on page 9.

Sponsorship – acknowledgements of assistance or support

Accidental or incidental advertising

The Act allows tobacco advertisements that accidentally or incidentally accompany other matters. Such advertisements are allowed only where the broadcaster or publisher receives no direct or indirect payment or other benefit for their appearance – s.14 and s.19.

For example, under the Act, a film can include smoking as part of a dramatic sequence if it was not placed and funded by the tobacco industry. Other examples would include incidental descriptions of smoking in books, photos of people smoking in magazines, or mention of tobacco products in news stories.

The issue of “accidental or incidental” tobacco advertising is complex. The Act limits the ability of tobacco companies to place paid advertisements. At the same time, it does not restrict or censor every film, program or printed work that depicts a person smoking.

Point of sale advertising

‘Point of sale’ advertising refers to advertising that is displayed where tobacco products are sold. This includes places such as grocery stores, service stations, newsagents and tobacconists.

All States and Territories have tobacco point of sale laws. The Act is drafted so that point of sale advertising is permitted if it is permitted under the relevant State or Territory law.

For advice on point of sale advertising restrictions in force in States and Territories, contact the relevant State or Territory health department. Contact details are on page 9.

Periodicals printed overseas

Periodicals (magazines for example) that are meant to be circulated mainly abroad may be allowed in Australia even if they contain tobacco advertisements – s.17(1).

Australian sporting and cultural events of international significance

From 1 October 2006, the Minister is no longer able to exempt significant international events from the ban on tobacco advertising – s.18.



Individuals to receive no benefit from publishing a tobacco advertisement

An individual may publish a tobacco advertisement if it is not in the course of the manufacture, distribution or sale of tobacco products. The individual must have published on his or her own initiative and received no benefit in doing so – s.20. This exemption only applies to individuals and not corporations.

Broadcasts during overseas flights

It is an offence to broadcast or publish a tobacco advertisement on a domestic flight or on a domestic sector of an international flight. It is not an offence to publish a tobacco advertisement on a flight sector that starts or ends overseas – s.26A.



Internet advertising

The advertising, promotion of smoking and ease of access to products on the Internet are powerful influences that increase the use of tobacco products, particularly by children and young people.

The Act extends to electronic media such as the Internet, limiting exposure to material that may promote the uptake or continuation of smoking, or the use of tobacco products. Section 15 of the Act prohibits the publication of tobacco advertisements. This includes prohibiting the publication of tobacco advertisements via the Internet, e-mail or other electronic means.



The reach of Commonwealth legislation

So as not to exceed the legal powers provided by the *Constitution*, the Act limits itself to apply only to:

- broadcasts
- publications made by 'regulated corporations'
- publications made in the course of, or for the purposes of, 'regulated trade or commerce'.

By reference to s.51(xx) of the *Constitution*, 'regulated corporations' are 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'. Regulated corporations also include:

- bodies corporate which are holding companies of, or controlled by a s.51(xx) corporation
- partnerships in which at least one partner is a s.51(xx) corporation or a body corporate referred to above
- bodies corporate or unincorporated bodies established by a law of the Commonwealth.

'Regulated trade or commerce' is defined in section 8 of the Act. It means trade or commerce:

- between Australia and places outside Australia
- between States, or between a State and Territory, or between two Territories
- by way of the supply of goods or services to the Commonwealth or an authority or instrumentality of the Commonwealth.

Most tobacco advertisements fall within the operation of the Commonwealth legislation.

Glossary

Term	Meaning
the Act	<i>Tobacco Advertising Prohibition Act 1992</i>
Broadcast	Transmit by way of ' <i>...a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means</i> ' or ' <i>a service that delivers content...to persons having equipment appropriate for receiving that content, where the delivery of the service uses the broadcasting service bands</i> ' (From the definition of 'broadcasting service' in the <i>Broadcasting Services Act 1992</i>)
Constitution	The Constitution of the Commonwealth of Australia under the <i>Commonwealth of Australia Constitution Act</i>
Minister	The Minister responsible for the administration of the Act
Passive Smoking	Exposure to airborne combustion products produced by other people smoking tobacco, also called Environmental Tobacco Smoke (ETS)
Regulations	<i>Tobacco Advertising Prohibition Regulations</i>

The meanings of other terms used in this guide are defined in section 8 of the Act.



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