



# **Tobacco Advertising Prohibition Amendment Act 1995**

**No. 17 of 1995**

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**An Act to amend the *Tobacco Advertising Prohibition Act 1992*, and for related purposes**

*[Assented to 29 March 1995]*

The Parliament of Australia enacts:

**Short title etc.**

**1.(1)** This Act may be cited as the *Tobacco Advertising Prohibition Amendment Act 1995*.

**(2)** In this Act, “**Principal Act**” means the *Tobacco Advertising Prohibition Act 1992*<sup>1</sup>.

**Commencement**

2. This Act commences on the day on which it receives the Royal Assent.

**Amendments of the *Tobacco Advertising Prohibition Act 1992***

3. The Principal Act is amended as set out in the Schedule.

**Saving of notices**

4. A notice published under subsection 9(5) of the Principal Act that was in force immediately before the commencement of this Act continues in force after that commencement as if it had been published under subsection 9(5) of the Principal Act as amended by this Act.
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**SCHEDULE**

Section 3

**AMENDMENTS OF THE TOBACCO ADVERTISING  
PROHIBITION ACT 1992**

**1. After section 4:**

**Insert:**

**Act not to apply so as to exceed Commonwealth power**

“4A.(1) Unless the contrary intention appears, if a provision of this Act:

- (a) would, apart from this section, have an invalid application; but
- (b) also has at least one valid application;

it is the Parliament’s intention that the provision is not to have the invalid application, but is to have every valid application.

“(2) Despite subsection (1), the provision is not to have a particular valid application if:

- (a) apart from this section, it is clear, taking into account the provision’s context and the purpose or object underlying this Act, that the provision was intended to have that valid application only if every invalid application, or a particular invalid application, of the provision had also been within the Commonwealth’s legislative power; or
- (b) the provision’s operation in relation to that valid application would be different in a substantial respect from what would have been its operation in relation to that valid application if every invalid application of the provision had been within the Commonwealth’s legislative power.

“(3) Subsection (2) does not limit the cases in which a contrary intention may be taken to appear for the purposes of subsection (1).

“(4) This section applies to a provision of this Act, whether enacted before, at or after the commencement of this section.

“(5) This section is in addition to, and not in derogation of, section 15A of the *Acts Interpretation Act 1901*.

“(6) In this section:

**‘application’** means an application in relation to:

- (a) one or more particular persons, things, matters, places, circumstances or cases; or
- (b) one or more classes (however defined or determined) of persons, things, matters, places, circumstances or cases;

**‘invalid application’**, in relation to a provision, means an application because of which the provision exceeds the Commonwealth’s legislative power;

**SCHEDULE—continued**

**‘valid application’**, in relation to a provision, means an application which, if it were the provision’s only application, would be within the Commonwealth’s legislative power.”.

**2. Section 8:**

Insert:

“ **‘government or political matters’** means government or political matters relating to any level of government in Australia, and includes any of the following matters:

- (a) participation in, association with and communications in relation to any election or appointment to public office; and
- (b) political views or public conduct relating to activities that have become the subject of political debate; and
- (c) the performance, conduct, capacity or fitness for office of a person elected or appointed to, or seeking election or appointment to, any public office; and
- (d) the actions or policies, or proposed actions or policies, of any government in Australia or any Australian political party;

**‘non-tobacco product’** means a product other than a tobacco product;”.

**3. After subsection 9(1):**

Insert:

**[Exception—political discourse]**

“(1A) To remove any doubt, it is declared that if:

- (a) something (**‘the advertisement’**) does not promote, and is not intended to promote, any particular tobacco product or particular range of tobacco products; and
  - (b) the advertisement does not promote, and is not intended to promote, smoking; and
  - (c) the advertisement relates solely to government or political matters;
- the advertisement is not a tobacco advertisement for the purposes of this Act.

**[Use of name of manufacturer etc.]**

“(1B) Without limiting the scope of paragraphs (1A)(a) and (b), the use in an advertisement of the whole name of a manufacturer, distributor or retailer of tobacco products does not, of itself, constitute:

- (a) promotion of a tobacco product or range of tobacco products for the purposes of paragraph (1A)(a); or
- (b) promotion of smoking for the purposes of paragraph (1A)(b).

**SCHEDULE—continued**

**[Prohibited uses of names]**

“(1C) Subsection (1B) does not apply in relation to use of such a name in a way prohibited by regulations made for the purposes of this subsection.”.

**4. After subsection 9(3):**

Insert:

**[Exceptions—management advertisements and certain advertisements as to availability of products]**

“(3A) To remove any doubt, it is declared that the following do not constitute tobacco advertisements:

- (a) the doing of anything that is, or apart from this Act would be, required to be done by any other law of the Commonwealth or by any law of a State or Territory;
- (b) an advertisement (for example, an advertisement for staff or calling for tenders), relating to the internal management of the business of a manufacturer, distributor or retailer of tobacco products, that does not promote a tobacco product or smoking;
- (c) an advertisement by a manufacturer, distributor or retailer of tobacco products indicating that tobacco products, or tobacco products of a particular kind, are available from the manufacturer, distributor or retailer, as the case may be, provided that the advertisement does not:
  - (i) state the brand name of any individual product; or
  - (ii) contain any other matter that would enable any individual product to be identified; or
  - (iii) promote, or give publicity to, any individual product;
- (d) the taking of any action to prevent a product from causing injury to anyone, including action:
  - (i) to recall a product; or
  - (ii) to disclose a defect in, or a dangerous characteristic of, a product; or
  - (iii) to disclose circumstances in which the use of a product is or may be dangerous; or
  - (iv) to disclose procedures for disposing of a product; or
  - (v) to tell people who have bought a product that the product will be repaired or replaced, or that the price of the product will be refunded.

**SCHEDULE—continued**

**[Exception—non-tobacco product having the same name as a tobacco product]**

“(3B) If:

- (a) apart from this subsection, something (**‘the advertisement’**) that relates to a non-tobacco product would, technically, be a tobacco advertisement because the name, or part of the name, of the non-tobacco product is the same as, or substantially similar to, the name, or part of the name, of:
  - (i) a tobacco product; or
  - (ii) the manufacturer, distributor or retailer of a tobacco product; and
- (b) the manufacturer of the non-tobacco product is not associated in any way with the manufacturer of the tobacco product;

then, despite subsection (1), the advertisement is not a tobacco advertisement for the purposes of this Act.

**[Related bodies corporate taken to be associated with each other]**

“(3C) Without limiting the circumstances in which 2 persons would, apart from this subsection, be taken to be associated with each other for the purposes of subsection (3B), 2 bodies corporate that are related to each other are taken to be associated with each other for the purposes of that subsection.”.

**5. Subsections 9(4) and (5):**

Omit the subsections (and the note to subsection (5)), substitute:

**[Exception—certain advertisements for non-tobacco products]**

“(4) If:

- (a) apart from this subsection, something (**‘the advertisement’**) would, technically, be a tobacco advertisement because it gives publicity to, or otherwise promotes:
  - (i) the purchase or use of a tobacco product or a range of tobacco products referred to in paragraph (1)(b); or
  - (ii) the whole or a part of a trade mark registered as mentioned in paragraph (1)(c) in respect of goods that are or include tobacco products; or
  - (iii) the whole or a part of a design registered as mentioned in paragraph (1)(d) in respect of articles that are or include tobacco products; or
  - (iv) the whole or a part of the name of a person referred to in paragraph (1)(e); or

**SCHEDULE—continued**

- (v) any words or designs, or combination of words and designs, associated as mentioned in paragraph (1)(f) with a tobacco product or a range of tobacco products; and
- (b) either:
  - (i) if subparagraph (a)(i), (ii), (iii) or (v) applies, a tobacco product or tobacco products of a kind referred to in the subparagraph were sold in Australia on or before 1 January 1995; or
  - (ii) if subparagraph (a)(iv) applies, the person referred to in that subparagraph was in existence under that name on 1 January 1995 or at a time before that date; and
- (c) the advertisement does not explicitly promote, or give publicity to, any particular tobacco product or particular range of tobacco products; and
- (d) the advertisement is not an advertisement in respect of whose publication section 21 would have applied if paragraphs (1)(c) and (d) of that section had not been enacted; and
- (e) the advertisement:
  - (i) explicitly promotes, or gives publicity to; or
  - (ii) appears on, or on the packaging of;

a product that is covered by a notice in force under subsection (5); then, despite subsection (1), the advertisement is not a tobacco advertisement for the purposes of this Act.

**[Specification of classes of products for the purposes of subsection (4)]**

“(5) For the purposes of subsection (4), the Minister may, by notice published in the *Gazette*, specify a class of products if, and only if:

- (a) the Minister is satisfied that:
  - (i) the products are not tobacco products; and
  - (ii) the products, or similar or substantially similar products, were available for purchase from a place in Australia before 1 April 1992; and
- (b) the Minister is satisfied that not specifying the class of products would cause significant financial detriment to the manufacturer of products in the class or to some other person involved in the distribution or sale of products in the class.

Note: Section 29 provides for the making of applications to have classes of products specified in notices under this subsection.”.

**SCHEDULE—continued**

**6. Section 10:**

After subsection (3), insert:

**[Exception—advertisements in telephone directories]**

“(3A) For the purposes of this Act, the publication of the name of a manufacturer, distributor or retailer of tobacco products in a telephone directory does not, of itself, amount to the publication of a tobacco advertisement.”.

**7. Section 11:**

Repeal the section, substitute:

**Meaning of “holding company” and “related body corporate”**

“11. For the purposes of this Act:

- (a) a body corporate is a holding company of another body corporate if, for the purposes of the Corporations Law, the first-mentioned body corporate is a holding company of the other body corporate; and
- (b) the question whether 2 bodies corporate are related to each other is to be determined in the same way as the question would be determined under the Corporations Law.”.

**8. Section 13:**

(a) Omit the penalty, substitute:

“Penalty: 120 penalty units.”.

(b) Add:

“(2) This section has effect subject to section 26A.”.

**9. Subsection 15(3):**

Omit the penalty.

**10. Section 15:**

Add at the end:

“(4) This section has effect subject to section 26A.

Penalty: 120 penalty units.”.

**11. Section 23:**

Omit the penalty, substitute:

“Penalty: 120 penalty units.”.



**SCHEDULE—continued**

**12. After section 26:**

Insert:

**Broadcast or publication of advertisements during flights of aircraft**

“26A.(1) It is not an offence against this Act to broadcast or publish a tobacco advertisement in an aircraft during a flight of the aircraft unless the flight begins at a place in Australia and is intended to end at another place in Australia.

“(2) For the purposes of subsection (1), each sector of a flight of an aircraft is taken to be a separate flight.”.

**13. Paragraph 29(1)(a):**

Omit “product, or a particular class of products,”, substitute “class of products”.

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**NOTE**

1. No. 218, 1992.

[*Minister's second reading speech made in—  
Senate on 7 December 1994  
House of Representatives on 1 March 1995*]