REPUBLIC OF SOUTH AFRICA

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*(As introduced in the National Assembly (proposed section 76)); (explanatory summary of Bill and prior notice of its introduction published in Government Gazette No. 46994 of 29 September 2022)*
*(The English text is the official text of the Bill)*

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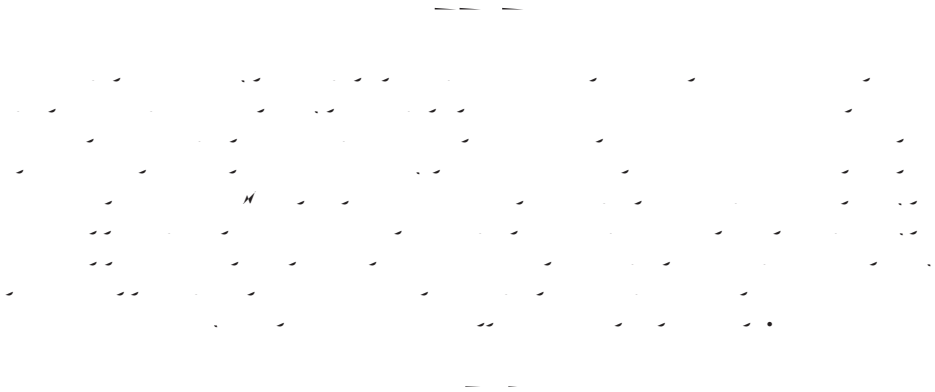
(MINISTER OF HEALTH)

**33 2022**



that tobacco use—

- is injurious to the health of tobacco users and non-smokers exposed to tobacco product emissions and has caused widespread addiction, disease and mortal harm in society;
- jeopardises sustainable development goals and commitments due to tobacco-related health, economic social and environmental costs;

that the extent of the harmful effects of the use of tobacco products on users and persons exposed to tobacco smoke calls for strong action to—

- deter people, especially children and youth, from using tobacco products;
- encourage existing users to quit; and
-

E IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

*(b)* in respect of an electronic nicotine delivery system and electronic non-nicotine delivery system, whether or not sold separately from the system, is any part or element integral to the system, and includes but is not limited to the cartridge, cartomiser, clearomiser, tank system, drip tip, mouthpiece, atomiser, internal power source, electronics, any software, any nicotine containing substance and any other substance, whether containing nicotine or not, including any source of characterised flavouring or other substances; and

*(c)* in respect of a tobacco device, whether or not sold separately from such device is any part or element integral to the device such as the mouthpiece, fascia, battery pack, heat source and any other part or element manufactured as a part of the device;

**”** means the content, arrangement or combination of substances

” means any premises, place or space, in or on which one or more persons are employed or perform their work, for work purposes, whether for compensation or voluntarily, and includes—

*(a)*

*(b)* notwithstanding the provisions of paragraph *(a)*, initiate, produce or publish any advertising, promotion or sponsorship content; or

*(c)* in the course of that person's business, for financial or other gain, be a party to an agreement for or related to sponsorship in respect of a relevant product or a related product.

(3) A commercial communication between a manufacturer, importer, trade partners, business partners, employees and shareholders of that manufacturer or importer of a relevant product or a related product must contain no information other than factual or scientific information about that product, namely—

*(a)*

*(k)* the offering for sale, selling, supplying, placing or displaying of a relevant product or a related product, at any educational establishment, health establishment or a hospitality, sporting, entertainment, music, dance or social venue or event;

*(l)* the displaying of any brand element in an entertainment venue, retail outlet public venue, public place or on a vehicle or equipment;

*(m)* the provision of financial or other support, whether or not in exchange for publicity, by a manufacturer, importer, distributor or supplier of a relevant product or a related product to—

(i) any event, activity, individual or group, including a sporting or arts event;

(ii) an individual sports person or sporting team;

(iii) an individual artist or group of artists;

(iv) any civil society, welfare organisation, community and community structures, politician, political candidate or political party;

(v) an educational institution or health establishment; or

(vi) any corporate social responsibility activity; and

*(n)* any other form, method, or means of advertising, promotion, or sponsorship in relation to a relevant product or a related product.

(5) *(a)* A retailer or wholesaler who offers for sale or sells a relevant product or a related product may not display that product at his or her place of business, but may make the product available to consumers upon request, provided that the requestor is not a child.

*(b)* In this subsection, a consumer is any person who is not a retailer or wholesaler of a relevant product or a related product and who is not acting in the course of his or her business.

*(c)* Paragraph *(a)* does not apply to a wholesaler if that wholesaler deals exclusively with retailers or wholesalers of the relevant product or the related product and any display of that product is not visible to consumers.

*(d)* A retailer or wholesaler who offers for sale or sells a relevant product or a related product to consumers may display at his or her place of business a single prescribed notice informing consumers that a list of relevant products or related products for sale, along with their prices and quantities, may be requested at the sales counter.

*(e)* The notice and the list of the products referred to in paragraph *(d)* shall contain only text information, presented as prescribed, and any pictorial health warning as may be required.

(6) No person shall—

*(a)* place, or cause to be placed, a vending machine of a relevant product or a related product in or on any place or premises; or

*(b)* permit the placement by any other person of a vending machine containing a relevant product or a related product in or on any place or premises.

(7) This section must not be construed as limiting, amending, repealing or otherwise altering any legal obligation or liability in terms of this Act and any other law to warn consumers of the risks of using a relevant product or a related product with which a manufacturer, importer or retailer is required to comply.

**4.** (1) The Minister must prescribe standardised packaging and labelling of tobacco products.

(2) The regulations referred to in subsection (1) must at least prescribe—

*(a)* that the packaging of a tobacco product must have a uniform plain colour and texture;

*(b)* which material may be used for, and the size, type and shape of such packaging;

*(c)* the means by which such packaging is opened;

*(d)* that all brand elements on, inside or attached to the packaging or on an individual tobacco product, are prohibited, subject to paragraphs *(e)* and

*(f)* the quantity or weight, as the case may be, of tobacco products that may be contained in an individual package;

*(g)* the markings on and the appearance of an individual tobacco product, including the use of brand elements; and

*(h)* the size and shape of individual tobacco products.

(3) No person shall manufacture for sale, import, offer for sale or sell a tobacco product unless—

*(a)* it is packaged in the prescribed manner;

*(b)* its appearance is as prescribed; and

*(c)* it is in an intact package containing the prescribed quantity or weight of the tobacco product.

(4) No person shall manufacture for sale, import or sell a tobacco product that has packaging or labelling that is false, misleading, deceptive or likely to create any erroneous, deceptive or misleading impression about its characteristics, properties, health effects, toxicity, composition, merit, safety, hazards or emissions, including any term, descriptor, trademark, figurative, colour, number or other sign that directly or indirectly creates or is likely to create, the erroneous impression that a particular tobacco product—

*(a)* is less harmful than another tobacco product;

*(b)* reduces or aims to reduce the effect of any harmful content of the product or its smoke;

*(c)* has vitalising, energising, healing, rejuvenating, natural or organic properties or has other health or lifestyle benefits; or

*(d)* has a taste, smell or any characterised flavour or other additive that is prohibited by any law or that any such taste, smell, characterised flavour or additive is absent in a particular tobacco product.

**5.** (1) The Minister may make regulations for the packaging and labelling of an electronic nicotine delivery system, electronic non-nicotine delivery system and a tobacco device, which may include standardised packaging.

(2) No person shall manufacture for sale, import or sell an electronic nicotine delivery system, electronic non-nicotine delivery system or a tobacco device unless—

*(a)* it is packaged and labelled in the prescribed manner; and

*(b)* the appearance, size and shape of the tobacco device, electronic delivery system or electronic non-nicotine delivery system is as prescribed.

(3) No person shall manufacture for sale, import or sell a tobacco device, an electronic nicotine delivery system or an electronic non-nicotine delivery system that has packaging or labelling that is false, misleading, deceptive or likely to create any erroneous, deceptive or misleading impression about its characteristics, properties, health effects, toxicity, composition, merit, safety, hazards or emissions.

**.** (1) The Minister must make regulations for the packaging and labelling of non-nicotine substances and products that are used with electronic non-nicotine delivery system and electronic nicotine delivery system, and nicotine containing substances or products, which may include standardised packaging.

(2) The regulations referred to in subsection (1) must at least prescribe—

*(a)* which material may be used for, and the size, type and shape of such packaging; and

*(b)* the quantity, weight or volume of a product.

(3) No person shall manufacture for sale, import or sell a nicotine and non-nicotine product that is used with an electronic non-nicotine delivery system or an electronic nicotine delivery system, which has packaging or labelling that is false, misleading, deceptive or likely to create any erroneous, deceptive or misleading impression about its

1964 (Act No. 91 of 1964), and may be detained for inspection by the relevant authorities.

(4) Any relevant product or related product which does not comply with the prescribed standards, may be destroyed in the prescribed manner at the cost of the manufacturer or importer.

**.** (1) No person shall sell or supply a relevant product or related product to any child.

(2) The owner or person in control of any business must ensure that a child in his or her employ or under his or her control, as the case may be, does not offer for sale or sell any relevant product or related product.

(3) No person shall sell or offer to sell or supply any confectionery or toy or any item designed to resemble or has the likely effect of promoting a relevant product or related product.

(4) No person shall sell or offer for sale a relevant product or related product to—

*(a)* any health establishment contemplated in section 1 of the National Health Act, including any pharmacy;

*(b)* any place where a child receives education or training or within a prescribed distance of the premises providing education or training to a child; or

*(c)* any other place as may be prescribed.

**13.** (1) The functions of the Monitoring Committee are—

*(a)* to monitor the implementation of tobacco control programmes and laws;

*(b)* to facilitate the review, development and alignment of tobacco control policies;

*(c)* to monitor and facilitate the implementation and enforcement of tobacco control laws and regulations; and

*(d)* any other related function delegated by the Minister.

(2) The Minister may assign specific powers to the members of the Monitoring Committee for the purposes of performing any function contemplated in subsection (1).

(3) The Minister, officials of the Department and other state organs, must assist the Monitoring Committee to protect the development and implementation of policies relevant to the control of tobacco products and electronic nicotine delivery system from the commercial and other vested interests of the tobacco and electronic nicotine delivery system industries.

(4) The Department must provide administrative support to the Monitoring Committee.

**14.** (1) The Minister must, on advice of a nomination panel, appoint the members of the Monitoring Committee, consisting of not more than 15 members, for a period not exceeding five years.

(2) The Minister must publish the names of the members of the Monitoring Committee in the *Gazette*.

(3) A member of the Monitoring Committee must—

*(a)* be a fit and proper person;

*(b)* have appropriate expertise or experience; and

*(c)* have the ability to perform effectively as a member of the Monitoring Committee.

(4) Members of the Monitoring Committee must not—

*(a)* act in any way that is inconsistent with this section;

*(b)* expose themselves to any situation in which the risk of a conflict may arise between their responsibilities and any personal financial interest; or

*(c)*

product, or on any informational leaflet contained in the packaging of such product, including—

(i) the content, composition and design of a health warning, which shall be no less than 65 per cent of each principal display area of the package;

(ii) the requirements for text and corresponding pictures, graphics or

*(b)*

**1.**

The Bill seeks to strengthen public health protection measures, align the South African tobacco control law with World Health Organisation Framework Convention and to repeal the Tobacco Control Act, 1993 (Act No. 83 of 1993). The proposed legislative and policy changes seek to introduce the following:

*(a)* Indoor public places and certain outdoor areas that will be determined to be 100 per cent smoke-free;
*(b)* ban the sale of cigarettes through vending machines;
*(c)* plain packaging with graphic health warnings and pictorials;
*(d)* ban on display at point-of-sale; and
*(e)* the regulation and control of electronic nicotine delivery systems and non-nicotine delivery systems.

**2.**

2.1 Clause 1 provides for the definitions of the expressions used in the Bill.

2.2 Clause 2 provides for control over smoking. Clause 2(1) prohibits smoking in certain specified places. Smoking includes inhaling, exhaling, holding or otherwise being responsible for a relevant product or electronic non-nicotine delivery system producing any emission.

2.3 Clause 3 provides for the prohibition of advertising, promotion and sponsorship of tobacco products, relevant products and related products.

2.4 Clause 4 provides for the standardised packaging and labelling of tobacco products and prescribes certain health warnings and other information that must be displayed on the packaging of tobacco products.

2.5 Clause 5 provides for packaging and labelling of tobacco devices, electronic nicotine delivery systems and electronic non-nicotine delivery systems.

2.6 Clause 6 authorises the Minister to make regulations relating to the packaging and labelling of non-nicotine substances and products that are used with electronic non-nicotine delivery system, and electronic nicotine delivery systems, and nicotine containing substances or products, which may include standardised packaging.

2.7 Clause 7 provides for health warnings and required manufacturing information that must be displayed on tobacco products and empowers the Minister to prescribe the health warning that must be contained in the packaging of tobacco products and electronic delivery systems.

2.8 Clause 8 authorises the Minister to make regulations regarding the standards for manufacturing, processing and importing of relevant products and related products.

2.9 Clause 9 provides for the restriction of sales in respect of relevant products and related products.

2.10 Clause 10 provides for certain information to be disclosed by the industry to Minister.

2.11 Clause 11 authorises the Minister to make certain information publicly available.

2.12 Clause 12 authorises the Minister to establish a Relevant Product Monitoring Committee (‘‘Monitoring Committee’’).

2.13 Clause 13 provides for functions and powers of the Monitoring Committee.

2.14 Clause 14 provides for the Minister to appoint members of the Monitoring Committee.

2.15 Clause 15 authorises the Minister to make regulations in respect of certain specified matters.

Schedule 4 and not on whether any of its provisions are incidental to its substance.

5.4 The Constitutional Court stated the following at paragraph 58 of the Tongoane judgment:

> *''What matters for the purposes of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill 'in substantial measure fall within a functional area listed in Schedule 4'.''*.

5.5 The Constitutional Court further held that the test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the purpose concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how the Bill should be considered by the provinces and in the National Council of Provinces, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interest, concerns and capacities of the provinces, the more say the provinces should have on its content.[3]*

5.6 To determine whether the provisions of the Bill in substantial measure fall within a functional area listed in Schedule 4, the Bill ought to be considered against the provisions of the Constitution relating to the tagging of Bills as well as against the functional areas listed in Schedule 4 and Schedule 5 to the Constitution.

5.7 The test compels the consideration of the substance, purpose and effect of the subject matter of the Bill. In view of the discussion above and after careful scrutiny of all the provisions in the Bill, we are of the opinion that the Bill in substantial measure falls within the ambit ôtradeö which makes provision for functional areas of concurrent national and provincial legislative competence as listed in Part A of Schedule 4 to the Constitution.

5.8 The Department and the State Law Advisers are therefore of the opinion that the Bill must be dealt with in accordance with the procedure established by section 76 of the Constitution.

5.9 The Department and the State Law Advisers are also of the opinion that it is not necessary to refer this Bill to the National House of Traditional and Khoi-San Leadership in terms of section 39(1)*(a)*(i) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it does not contain provisions pertaining to customary law or the customs of traditional communities.

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3. Paragraph 60 of the Tongoane judgment.

Printed by Creda Communications
ISBN 978-1-4850-0842-2