

LAW REVIEW PROJECT

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COMMENTS AND REPRESENTATIONS

to the

**DIRECTOR-GENERAL OF THE DEPARTMENT OF HEALTH
(FOR THE ATTENTION OF THE DIRECTOR: HEATH PROMOTION)**

about the proposed

REGULATIONS RELATING TO
THE DISPLAY OF TOBACCO PRODUCTS AT WHOLESALE AND RETAIL
[MADE KNOWN UNDER GOVERNMENT NOTICE R.634 OF 24 AUGUST 2012]

1. Introduction

1.1. The Law Review Project (also referred to here as ‘the Project’ or ‘the LRP’) comments as follows on the proposed ‘Regulations Relating the Display of Tobacco Products at Wholesale and Retail’ (hereinafter referred to as ‘the proposed regulations’ or ‘the draft regulations’), which were published in the *Government Gazette* on 24 August 2012 under a Government Notice.¹

1.2. Interested persons are invited to submit comments or representations on the proposed regulations, within three months of the date of publication of the Notice. The Notice was published on 24 August 2012.

1.3. This means that interested persons can submit comments or representations by 24 November 2012.

2. Summary

2.1. We note that the Act requires a wholesaler or retailer to display a tobacco product in the prescribed manner. No person shall sell tobacco products at retail unless prescribed notices are displayed. A retailer must display a notice in the prescribed manner containing prescribed information regarding any tobacco product available at his place of business. The Minister may make regulations regarding signs in respect of tobacco products and information that must be displayed at points of sale, including health warnings to appear on signs, and their size, format and location. A person who fails to comply will be guilty of an offence and liable on conviction to a fine of up to R100,000.²

2.2. The proposed regulations state that tobacco products in a wholesaler’s or retailer’s premises must be displayed only in a single sales unit with a maximum display area. Cigars can be in a humidor or humidified room. Only one packet or item of each product line may be displayed. No tobacco product may be exposed for sale within a metre of products for children or confectionary unless this distance can’t be practicably maintained due to the premises’ size. Not more than a

¹ Government Notice R634 of 24 August 2012.

² See part 3 below.

hundred tobacco products may be displayed unless the premises are a specialist tobacconist's. A display may include the products' price, only if on price tickets or one price list conforming to prescribed requirements. A health and age warning sign must be displayed. Displays must not have enhancing features. The regulations, other than requirements for a price list, do not apply to retail outlets with a floor or equivalent area of less than 15 sq. m. The regulations will come into operation six months after final publication.³

2.3. We make recommendations for improvement of ambiguous or confusing regulations. The definition of 'package' differing from the Act's definition should be deleted, and the redundant word 'packet' replaced by the Act's term 'package'. There is a vague and tautologous regulation about a display area's surface and perimeter. The regulations should allow display of more than one package of cigars in a humidified room. The redundant expression 'other consumables' should be deleted and 'other indicators of price' defined or deleted. The requirements for price lists should be properly cross-referenced, and the reference to 'price board' corrected. The different words used for lettering should be replaced by one. The regulation prohibiting product packages from facing windows and entrances should be clarified. We suggest a few other adjustments in the interest of certainty.⁴

3. Tobacco Products Control Act's relevant provisions

3.1. The Notice states that the Minister intends to make the regulations in terms of the Tobacco Products Control Act,⁵ and in particular under its provisions governing display of tobacco products,⁶ read with the provision authorising the Minister to make regulations regarding anything that must or may be prescribed in terms of the Act.⁷

3.2. The Act defines 'prescribe' to mean prescribe by regulation under the Act.⁸

3.3. The Act provides, among other things, that a wholesaler shall display a tobacco product at his or her place of business in the prescribed manner.⁹

³ See part 4 below.

⁴ See part 5 below.

⁵ Act 83 of 1993 as amended, hereinafter referred to also as 'the Act'.

⁶ Section 3 of the Act.

⁷ Section 6(1)(a).

⁸ Section 1 sv 'prescribe'.

⁹ Section 3(8).

3.4. The Act states that a retailer must display a tobacco product at his or her place of business in the prescribed manner, and in such a way that no person will be able to handle the tobacco product before paying for it.¹⁰

3.5. No person shall sell or offer to sell tobacco products at retail, unless the prescribed notices are displayed.¹¹ A retailer must display a notice in the prescribed manner in his or her place of business that contains the prescribed information regarding any tobacco product available at his or her place of business.¹²

3.6. (The Act, further, contains power to make signage regulations: it contains provisions authorising the Minister to make regulations regarding the signs in respect of tobacco products and the information that must be displayed at points of sale, including health warnings that must appear on the signs, and the size, format and location of the signs,¹³ and also (somewhat repetitively) the location, content, size and format of any sign required in terms of the Act.¹⁴

3.7. (The Government Notice, in mentioning the provisions of the Act in terms of which the Minister intends to make the regulations,¹⁵ does not mention these further provisions of the Act authorising the making of signage regulations.¹⁶ The power to make a particular regulation might be found only in a provision of the Act not expressly mentioned in the Government Notice as authority to make the regulations. This would however not be material.¹⁷)

¹⁰ Section 3(9)(b).

¹¹ Section 3(10).

¹² Section 3(9)(a).

¹³ Section 6(1)(b)(i)–(iii).

¹⁴ Section 6(1)(c).

¹⁵ Section 6(1)(a) read with section 3, relevant provisions of which were set out earlier above.

¹⁶ Sections 6(1)(b)(i)–(iii), and section 6(1)(c).

¹⁷ It is submitted that, as long as the Act contains authority to make particular regulations, it is not material that the Government Notice under which they are made does not mention the correct authorising provision of the Act. It has been held that, where a Minister has the power in terms of a particular provision of a statute to make a regulation, the fact that the Minister purported to make the regulation under the wrong provision of the statute does not invalidate the regulation, if the empowering statute does not require that the provision in terms of which the regulation is made be expressly specified. See *Avenue Delicatessen and others v Natal Technikon* [1986] 2 All SA 1 (A); *Latib v Administrator, Transvaal*, 1969 (3) SA 186 (T) at 190B–191A; *S v Van Zyl* 1991 (1) SA 804 (A); *Howick District Landowners Association v uMngeni Municipality* [2006] SCA 107 (RSA) para [19].

3.8. Any person who contravenes or fails to comply with the Act's display provisions, or contravenes or fails to comply with the regulations, shall be guilty of an offence and liable on conviction to a fine not exceeding R100,000.00.¹⁸

4. Intended regulations in outline

4.1. In broad outline, the proposed regulations state that tobacco products in a wholesaler's or retailer's premises must be displayed only in a single sales unit,¹⁹ which must be not be on a counter accessible to the public.²⁰ The area of the display must not exceed in area one square metre (four sq. m. in the case of specialist tobacconist's premises).²¹ The display's surface area must include the whole area within the perimeter of the display.²²

4.2. Cigars need not be displayed in a sales unit, but may instead be in a humidor accessible only by a supplier or an employee thereof, or kept in a humidified room accessible by a customer accompanied by the supplier or an employee thereof.²³

4.3. Not more than one packet²⁴ of each tobacco product line,²⁵ and only one item of each particular product line used in consumption of tobacco,²⁶ may be displayed.²⁷

4.4. No tobacco product shall be exposed for sale within one metre of products for children or confectionary, or be separated as much as possible if this distance can't be practicably maintained due to the premises' size.²⁸

¹⁸ Section 7(2).

¹⁹ Regulation 3(a) and (c); regulation 6.

²⁰ Regulation 3(b).

²¹ Regulation 3(d).

²² Regulation 4.

²³ Regulation 7.

²⁴ One carton, if the supplier sells tobacco products in cartons only.

²⁵ It is submitted that this means only one packet of each brand of cigarettes, cigars, tobacco (whether for pipes or rolling cigarettes). It also means only one packet of each brand of matches and cigarette-rolling papers.

²⁶ It is submitted that this means only one item of each brand of pipe, lighter and cigarette-roller.

²⁷ Regulation 8.

²⁸ Regulation 10.

4.5. Not more than a hundred tobacco products may be displayed, unless the premises are those²⁹ of a specialist tobacconist.³⁰

4.6. A display may include the products' price, only if the price is displayed on a price ticket or other price indicator, and (in addition or alternatively) on a single price list.³¹ Requirements are prescribed for price tickets and price lists.³² A prescribed health and age warning sign must be displayed at a sales unit.³³ Displays must not have specified enhancing features.³⁴

4.7. The regulations say that these regulations, other than one prescribing requirements for the display of a price list,³⁵ do not apply to retail outlets 'that have a floor or equivalent area of less than 15 square metres'.³⁶

4.8. The regulations propose the repeal³⁷ of the current regulations relating to the point of sale of tobacco products.³⁸ The proposed regulations state that they will come into operation six months from date of their publication in the *Gazette*.³⁹

5. Recommendations for improvement

5.1. The Act defines a 'package' to mean 'the container, receptacle or wrapper in which tobacco products are sold, supplied or distributed' at wholesale or at retail.⁴⁰ Confusingly, the proposed regulations define a 'package' differently, as meaning 'a box, carton, cylinder and packet, pouch, tin and wrapping'.⁴¹ It is not clear why the regulations seek to define a package differently from the

²⁹ The draft (ungrammatically, it is submitted) employs the phrase 'the premises are *that of*'.

³⁰ Regulation 11.

³¹ Regulation 12(1).

³² Regulations 13, 14 and 15.

³³ Regulation 16.

³⁴ Regulations 17 and 18.

³⁵ Regulation 15.

³⁶ Regulation 2(2).

³⁷ Regulation 19.

³⁸ Regulations Relating to the Point of Sale of Tobacco Products, made under 'GN. R. 976'. Presumably Government Notice R976 of 29 September 2000 is intended.

³⁹ Regulation 20.

⁴⁰ Act s 1 sv 'package'.

⁴¹ Regulation 1 sv 'package'.

Act. The Act's definition appears adequate, in mentioning a container, receptacle or wrapper. This difference may cause uncertainty and dispute. It is submitted that the proposed regulations' definition of 'package' be deleted from the regulations.

5.2. The proposed regulations also define a 'packet', to mean 'an individual packet containing a tobacco product'.⁴² This causes two overlaps. First, the Act already defines a 'package', as mentioned, to mean 'the container, receptacle or wrapper in which tobacco products are sold, supplied or distributed', which adequately embraces the same thing as the regulations' definition of 'packet'. Second, the regulations' proposed definition of 'package' also mentions a 'packet'. These anomalies may also cause uncertainty and dispute. It is submitted that the proposed regulations' definition of 'packet' be deleted from the regulations, and that the regulations refer instead to packages within the meaning of the Act.

5.3. The regulations say that '[t]he area of the surface of a display of tobacco products includes the whole of the area within the perimeter of the display'.⁴³ It is not clear what this means. It looks like mere repetition: A display's surface area includes the area within the display's perimeter. This seems to be just a statement of the same idea in two different ways, adding nothing to what has gone before. If so, it is submitted that this regulation be deleted. If it is intended that a surface and a perimeter mean different things, so that something substantive is intended, this should be clarified.

5.4. The regulations say that a display of cigars need not be located in a sales unit, if the cigars are kept in a humidified container or humidified room.⁴⁴ Yet, say the regulations, not more than one packet of each tobacco product line may be displayed at any premises.⁴⁵ It is submitted that there should be an exception for 'packages of cigars kept'⁴⁶ in a humidified container or humidified room'.

5.5. The regulations say that no tobacco product can be exposed for sale within one metre of products for children or confectionary, but if this distance can't be practicably maintained due to the premises' size then the tobacco products must be separated as much as possible from the children's

⁴² Regulation 1 sv 'packet'.

⁴³ Regulation 4.

⁴⁴ Regulation 7.

⁴⁵ Regulation 8.

⁴⁶ As contemplated in regulation 7.

products, confectionary ‘or consumables’.⁴⁷ It is not clear to what consumables this expression ‘or consumables’ refers. The expression should be deleted.

5.6. The regulations say that a display may include the products’ price, only if the price is displayed on a price ticket ‘or other indicator of price’ for each product, or a single price list.⁴⁸ It is not clear to what price indicators this expression ‘or other indicator of price’ refers. The expression should be either defined or deleted.

5.7. The regulations say that a display may include the products’ price if the price is displayed on a single price list ‘if it complies with regulation 15’. But regulation 13 also contains requirements for information on a price list.⁴⁹ It is submitted that regulation 15 containing requirements for the display of price lists should include a paragraph ‘(g) comply with regulation 13’.

5.8. The regulations use different terms for lettering. It refers to ‘writing [of] consistent...shape’,⁵⁰ ‘font’,⁵¹ ‘characters’,⁵² and ‘type face’.⁵³ These differences are unnecessary and give rise to doubt about whether different ideas are intended. It is recommended that one word be used throughout, and we suggest using the term ‘lettering’.

5.9. One of the regulations stipulating that displays must not have specified enhancing features⁵⁴ contains a paragraph that is difficult to comprehend, because it splits phrasing that perhaps should belong together. It states that a person must not enhance the display using cabinets or display cases that contain trademark, colours or wording usually used in packaging of the tobacco product, ‘except for a device’ containing no designs, colours, fabrics or wording usually associated with the packaging of the tobacco product ‘that is used to allow it to be extracted’.⁵⁵ Perhaps what is intended is that a person must not enhance the display using cabinets or display cases that contain

⁴⁷ Regulation 10.

⁴⁸ Regulation 12(1).

⁴⁹ Regulation 12(1).

⁵⁰ Regulation 13(b).

⁵¹ Regulation 14(b).

⁵² Regulation 15(c).

⁵³ Regulation 16(b).

⁵⁴ Regulation 17.

⁵⁵ Regulation 17(g).

trademark, colours or wording usually used in packaging of the tobacco product, ‘except for a device that is used to allow it to be extracted’ containing no designs, colours, fabrics or wording usually associated with the packaging of the tobacco product.

5.10. The following regulation refers to a price ticket or ‘price board’.⁵⁶ Presumably it should refer instead to a price ticket or ‘price list’.

5.11. This regulation says that a sales unit shall not be positioned so that any packet of tobacco product faces ‘more or less towards’ a window or a public entrance unless the window or public entrance is at least two metres from the display.⁵⁷ This wording, that a sales unit must not be positioned so that a packet of tobacco product faces ‘more or less towards’ a window or entrance, does not clearly indicate what is required in order to comply. Presumably what is intended is that a sales unit shall not be positioned so that any packet of tobacco product ‘faces more towards than away from’ a window or a public entrance unless the window or public entrance is at least two metres from the display.

5.12. The regulations state that they come into operation six months from the date of ‘final’ publication in the *Gazette*.⁵⁸ It is recommended that this be altered to say that the regulations come into operation six months from the date of ‘their’ publication in the *Gazette*.

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⁵⁶ Regulation 18(b).

⁵⁷ Regulation 18(d).

⁵⁸ Regulation 20.

About the Law Review Project

Law Review Project (also referred to here as ‘the Project’ or ‘the LRP’) is an independent legal research organisation founded to promote the removal of unnecessary, burdensome and unduly-restrictive laws with the aim of promoting economic development.

The Project makes submissions to government for the review of legislation and proposes and formulates legislative change to achieve this aim. It is a private-sector resource to assist governments.

The Project is a non-profit company. It receives funding from companies, organisations and individuals who support these goals.