

Navigating Australia's Illicit Tobacco Laws – A Case for Lifting the Bar Across Australia

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Introduction

- Australia's illicit tobacco market is a lucrative industry, estimated by the Australian Tax Office (ATO) to be worth 2.7 billion dollars in 2022—23 or 18% of the overall tobacco market
- Significant increase in illicitly traded tobacco undermines principles under Australia's National Tobacco Strategy which aim to reduce the prevalence of daily smokers to <5% by 2030
- Illicitly traded tobacco is generally defined as either:
 - domestically farmed tobacco (since there is no legal tobacco farming in Australia) (taxation offence)
 - tobacco smuggled into Australia from overseas jurisdictions in circumstances where no excise or excise-equivalent customs duty has been paid (customs offence)
 - tobacco products that do not comply with legislated requirements, including packaging and labelling requirements (offence against public-health legislation)

Introduction

- Regulating the tobacco retail space is the responsibility of the States and Territories
- States and Territories administer tobacco retailing and wholesaling licence schemes and have generally focused on preventing supply to minors and advertising and promotion controls within retail premises
- Compliance monitoring is largely performed by the individual states & territories
- Despite recent efforts from Federal and State/Territory Governments to curtail illicit tobacco trade, the public health legislative response to this issue remains inconsistent and convoluted
- Critically analysed the public health-related illicit tobacco offences that apply to tobacco retailers who engage in illicit tobacco trade across Australia
- Critically analysed sanctions for tobacco retailers who engage in ITT under state/territory tobacco control law
- We identified several gaps and inconsistencies in Federal and State/Territory law and provide practical recommendations to address these issues

Public Health Related Tobacco Offence

- Tobacco products must comply with the tobacco product requirements (TPR) established under the *Public Health (Tobacco and Other Products) Act 2023 (Cth)* & *Public Health (Tobacco and Other Products) Regulations 2023 (Cth)*

For example:

- Plain packaging requirements
 - Mandatory pack sizes
 - Graphic health warning requirements
 - Health promotion inserts
 - Prohibition on flavoured cigarettes/tobacco accessories (crush balls)
- Illicit tobacco products are generally easy to identify as they do not comply with Australian packaging requirements
 - The Act creates offences for failing to comply with a TPR (selling/possessing/purchasing) come under the jurisdiction of the Department of Health, Disability and Ageing

Public Health Related Tobacco Offence

- Concurrent operation provisions: Gives States and Territories latitude to enact similar offences for selling tobacco that does not comply with a TPR (i.e., illicit tobacco)
- Many jurisdictions have significantly amended existing tobacco control legislation to increase penalties for engaging in ITT
- Resulting spate of law reform has resulted in the States and Territories adopting very different responses to ITT, with some jurisdictions not taking an active role in ITT
- Examples:
 - ▣ South Australia
 - ▣ Western Australia
 - ▣ Queensland

Recommendations

- The NT amend the definition of ‘sell’ to include possession with intent to sell, consistent with the approach taken in NSW and WA.
- The NT remove reference to ‘health warning requirement’ and the now repealed *Information Standard* and replace it with ‘tobacco product requirements’ under the *Public Health (Tobacco and Other Products) Act 2023* (Cth), similar to the recent amendments in NSW.
- Tasmania and the ACT amend their legislation to authorise the regulator to suspend or cancel a license if a licensee is suspected of contravening, or has contravened, a tobacco product requirement under the *Public Health (Tobacco and Other Products) Regulations 2024* (Cth) pt 3.7, or is suspected of committing, or has been convicted of, an offence against pt 3.4 of the *Tobacco Act* (Cth).
- The ACT amend its legislation to authorise the Tribunal (ACAT) to cancel a tobacco licence and disqualify a person from holding a licence for 5-years if they are convicted of two or more offences against *Tobacco Act* (Cth) within a 2-year period.
- Tasmania includes similar cancellation and disqualification provisions to those recommended in Point 4.
- All States and Territories include a mandatory condition on licenses stipulating that tobacco retailers must not engage in the sale, supply or possession of illicit tobacco, and all States and Territories make it an offence to contravene a licence condition.

Recommendations

- All States and Territories implement closure order provisions, similar to those recently enacted in Queensland, SA and NSW.
- WA and the NT increase the current maximum penalty for illicit tobacco offences, to sufficiently deter illicit conduct and reflect the serious impact illicit tobacco has on the community.
- The *Public Health (Tobacco and Other Products) Regulations 2024* (Cth) be amended to reduce the prescribed amount of illicit tobacco for personal use from 500 cigarettes or 500 grams of loose-leaf tobacco to 50 cigarettes or 50 grams of loose-leaf tobacco.
- Improve transparency and reporting of information on illicit tobacco offences that cross jurisdictional borders between law enforcement agencies and government departments responsible for tobacco licensing.
- Tasmania and the ACT to also prohibit the sale or supply of unpackaged loose tobacco.
- A consistent definition of illicit tobacco be adopted in all jurisdictions that incorporates compliance with packaging and other product standards.



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Questions?