

REPUBLIC OF SOUTH AFRICA

TOBACCO PRODUCTS AND ELECTRONIC DELIVERY SYSTEMS CONTROL BILL

*(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)*

(MINISTER OF HEALTH)

[B 33—2022]

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BILL

To regulate smoking; to regulate the sale and advertising of tobacco products and electronic delivery systems; to regulate the packaging and appearance of tobacco products and electronic delivery systems and to make provision for the standardisation of their packaging; to provide for standards in respect of the manufacturing and export of tobacco products and electronic delivery systems; to prohibit the sale of tobacco products and electronic delivery systems to children; to prohibit the free distribution of tobacco products and electronic delivery systems; to prohibit the sale of tobacco products and electronic delivery systems by means of vending machines; and to provide for matters connected therewith.

PREAMBLE

ACKNOWLEDGING 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;

CONSIDERING 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
- protect non-smokers from tobacco smoke exposure;

CONSIDERING FURTHER that nicotine is a highly addictive and toxic substance, that is especially harmful to children and youth, and evolving scientific evidence points to harmful effects of use and exposure to emissions of electronic nicotine delivery systems and related products, that there should be a precautionary approach to the regulation of electronic nicotine delivery systems and electronic non-nicotine delivery systems;

REALISING that people need to be informed of the mortal threat of tobacco use and the highly addictive nature of nicotine;

REALISING FURTHER that advertising, promotion and sponsorship create an association between the use of tobacco products, electronic nicotine delivery systems and electronic non-nicotine delivery systems with social prestige and aspirational lifestyle that are especially appealing to children and youth, and have been shown to encourage initiation of use of both products and increase tobacco consumption;

RESOLVING to align the health system with the democratic values of the Constitution of the Republic of South Africa, 1996, and the World Health Organisation's Framework Convention on Tobacco Control, and to enhance and protect the fundamental rights of the society by enacting and implementing effective measures to reduce the prevalence of tobacco use and nicotine dependence,

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

ARRANGEMENT OF SECTIONS

1. Definitions	
2. Control over smoking	5
3. Advertising, promotion, sponsorship, distribution and display of relevant product or related product	
4. Standardised packaging and labelling of tobacco products	
5. Packaging and labelling of tobacco devices, electronic nicotine delivery systems and electronic non-nicotine delivery systems	10
6. Packaging and labelling of non-nicotine and nicotine containing products	
7. Health warning and required information	
8. Standards for manufacturing, processing and importing of relevant product and related product	
9. Restrictions of sales in respect of relevant product and related product	15
10. Disclosures to Minister	
11. Minister may make certain information publicly available	
12. Establishment of Relevant Product Monitoring Committee	
13. Functions and powers of Monitoring Committee	
14. Appointment of members of Monitoring Committee	20
15. Regulations	
16. Offences and penalties	
17. Application of certain sections of National Health Act	
18. Repeal of laws	
19. Transitional arrangement	25
20. Short title and commencement	

Definitions

- In this Act, unless the context indicates otherwise—
 - “**brand element**” includes the brand name, trademark, trade name, distinguishing guise, logo, graphic arrangement, design, slogan, symbol, motto, selling message, print, typeface, recognisable colour or pattern or combination of colours, or any other symbol of product identification of a relevant product or a related product, or such feature, that is likely to be taken as or confused with any relevant product or related product brand element; 30
 - “**characterised flavour**” means a clearly noticeable taste or smell, other than one of tobacco or nicotine, resulting from a substance or ingredient, or a combination of substances or ingredients, including, but not limited to, fruit, spice, herbs, alcohol, sweet, menthol, mint, chocolate or vanilla, and which is noticeable before or during the consumption of a relevant product or a related product; 35
 - “**child**” means a person below the age of 18 years; 40
 - “**commercial communication**” means a communication made in pursuit of direct or indirect furthering of a business or financial interest of an entity or individual, between the manufacturer or importer of such product and the trade partners, business partners, employees and shareholders of the manufacturer or importer, and includes communication through— 45
 - (a) any audio, visual or audio-visual means;
 - (b) business newspapers, trade magazines, pamphlets, leaflets, flyers and letters; or
 - (c) any other digital communication platforms, including the internet and mobile devices; 50
 - “**common area**”—
 - (a) means common property as defined by the Sectional Titles Act, in respect of any property covered under that Act; and
 - (b) in respect of a multi-unit residence not covered by the Sectional Titles Act, means the land and such parts of the building or buildings on the premises that are not part of a private dwelling; 55
 - “**component**”—
 - (a) in respect of a tobacco product, whether or not sold separately from the product, includes such parts as the paper, filter, plug wrap and tube;

- (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 5
- (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; 10

“composition” means the content, arrangement or combination of substances included in the processing and manufacture of a relevant product or a related product;

“design feature” means a characteristic of the design of a relevant product that has an immediate causal link with the testing and measuring of its contents and emissions; 15

“electronic delivery system” means an electronic device designed to produce an aerosol or vapour inhaled by the user and any nicotine containing substance or a non-nicotine or non-tobacco containing substance manufactured to be used with such a system; 20

“electronic nicotine delivery system” means an electronic device designed to produce an aerosol or vapour inhaled by the user and any nicotine containing substance, other than a tobacco product manufactured to be used with such a system: Provided that this definition shall not apply to any nicotine device or nicotine substance regulated under the Medicines and Related Substances Act, 1965 (Act No. 101 of 1965); 25

“electronic non-nicotine delivery system” means an electronic device designed to produce an aerosol or vapour inhaled by the user and a non-nicotine or non-tobacco containing substance manufactured to be used with such a system: Provided that this definition shall not apply to any nicotine device or nicotine substance regulated under the Medicines and Related Substances Act, 1965 (Act No. 101 of 1965); 30

“emission” means a substance that is produced with a relevant product or a related product is used; 35

“enclosed” means any space covered by a roof or enclosed by one or more walls or sides, regardless of the type of material used for the roof, wall or sides, and regardless of whether the structure is temporary or permanent;

“ingredients”, in respect of—

- (a) a tobacco product, means tobacco, components and materials used to manufacture those components, additives, processing aids and residual substances found in tobacco following agricultural practices, storage, processing and substances that migrate from the packaging material into the tobacco product; and 40
- (b) an electronic nicotine delivery system, means nicotine and chemicals used in relation to creation of the aerosol or vapour produced when using the system, additives and any other substances in the nicotine containing substance or manufactured to be used with the system; 45

“manufacturer” means—

- (a) a company, including its holding company or any subsidiary and any subsidiary of its holding company; 50
- (b) any subsidiary and affiliate or licensee of a company engaged in the manufacture of tobacco products and other nicotine containing products; or
- (c) an entity other than a company, which includes an entity that controls or is controlled by such manufacturer or that is controlled by the same entity that controls such manufacturer; 55

“Minister” means the Minister responsible for health;

“Monitoring Committee” means the Relevant Product Monitoring Committee established in terms of section 12;

“multi-unit residence” means land and a building or buildings containing— 60

- (a) two or more residential units available for lease in a multi-tenant building; or
- (b) privately owned sections as contemplated in the Sectional Titles Act;

- “**National Health Act**” means the National Health Act, 2003 (Act No. 61 of 2003);
- “**nicotine**” means nicotine alkaloid, whether from plant extracts or synthetically produced;
- “**packaging**”, in respect of a relevant and electronic non-nicotine delivery system product, means— 5
- (a) any container which contains a relevant and electronic non-nicotine delivery system product;
 - (b) any additional layers of wrapping or containment of a relevant and electronic non-nicotine delivery system product; and 10
 - (c) any other material attached to, or included with, a relevant and electronic non-nicotine delivery system product or a container or wrapper as contemplated in paragraph (a) or (b);
- “**prescribe**” means prescribe by regulation made under this Act;
- “**private dwelling**” means any part of— 15
- (a) any room or apartment of a building or structure which is occupied as a residence; or
 - (b) any building or structure or outdoor living area which is accessory to, and used wholly or principally for, residential purposes;
- “**promote**” means any form of communication, advertisement, recommendation 20 or action with the aim, effect or likely effect of increasing awareness, creating interests, generating sales and creating brand loyalty of a relevant product or a related product or the use of such product, directly or indirectly, but excludes—
- (a) any commercial communication between a manufacturer or importer of such product and the trade partners, business partners, employees and shareholders 25 of the manufacturer or importer; and
 - (b) any communication required by law;
- “**public conveyance**” means any aircraft, ship, boat, train, bus, mini-bus, taxi or other vehicle which is used for the transport, for profit or otherwise, of members of the public; 30
- “**public place**” means any place accessible to the public or place for collective use, regardless of the ownership or right to access thereof, and includes a restaurant and hotel;
- “**related product**” refers to an electronic non-nicotine delivery system, a pipe, a water-pipe, rolling your own papers or a similar item that is likely to promote the 35 use of a relevant product;
- “**relevant product**” refers to a tobacco product, a tobacco device and an electronic nicotine delivery system, and includes any component, whether sold separately or not;
- “**Sectional Titles Act**” means the Sectional Titles Act, 1986 (Act No. 95 of 1986); 40
- “**smoke**” means inhaling, exhaling, holding or otherwise being responsible for a relevant product or electronic non-nicotine delivery system producing any emission;
- “**social media**” means a website or digital application where users are able to view, share and generate content, and find and connect with other users who have 45 common interests;
- “**sponsorship**”, in respect of a relevant product or a related product, means any form of contribution to any event, activity or individual with the aim, effect or likely effect of promoting that product, or use of the product, directly or indirectly;
- “**this Act**” includes any regulation made under this Act; 50
- “**tobacco device**” means an item or system manufactured to enable consumption of a tobacco product by producing an aerosol or vapour for inhalation by heating the tobacco without igniting it;
- “**tobacco product**” means a product containing tobacco leaf that is intended for human consumption; 55
- “**trade mark**”—
- (a) means a mark used or proposed to be used by a person in relation to goods or services for the purpose of distinguishing the goods or services in relation to which the mark is used or proposed to be used from the same kind of goods or services connected in the course of trade with any other person; and 60
 - (b) includes a certification trade mark or collective trade mark as contemplated in sections 42 and 43 of the Trade Marks Act, 1993 (Act No. 194 of 1993); and

“**workplace**” 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) any corridor, lobby, stairwell, elevator, cafeteria, washroom or other common area; and 5
- (b) any pool vehicle or a vehicle used during or incidental to the course of employment or work.

Control over smoking

2. (1) No person may smoke in—
- (a) an enclosed public place, enclosed workplace, or in or on a public conveyance; 10
 - (b) any space that is within a prescribed distance from an operable window or ventilation inlet of an entrance or exit of a place where smoking is prohibited;
 - (c) any motor vehicle or a private enclosed space when a non-smoker or a child is present; 15
 - (d) an enclosed common area of a multi-unit residence;
 - (e) a private dwelling or elsewhere on the premises of a multi-unit residence if smoking interferes unreasonably with the enjoyment of other persons lawfully on the premises, pursuant to the Sectional Titles Act and the Sectional Titles Schemes Management Act, 2011 (Act No. 8 of 2011); 20
 - (f) a private dwelling, if that private dwelling is used for any commercial childcare activity, child stay, for schooling, tutoring, domestic employment or otherwise as a workplace; or
 - (g) any place contemplated in subsection (2).

- (2) The Minister may prohibit smoking in— 25
- (a) any prescribed outdoor public place or workplace, or such portion of an outdoor public place or workplace as may be prescribed, where smoking may pose a health, fire or other hazard; or
 - (b) such other place where the Minister considers it appropriate to prohibit smoking in order reduce or prevent the public’s exposure to smoking. 30

(3) The owner of or person in control of a public place, public conveyance, workplace, or multi-unit residence may designate the whole or part of any outdoor space as an area where smoking is prohibited.

(4) The person in control of a place or an area contemplated in subsections (1), (2) and (3) or an employer in respect of a workplace must ensure that no person smokes in that place or area and must undertake any actions as may be prescribed to ensure compliance with those subsections. 35

(5) The owner or person in control of a place or an area contemplated in subsections (1)(a), (b) and (d), (2)(a) and (b) and (3) must display signs and may make public notification in a manner as may be prescribed. 40

- (6) An employer must ensure that—
- (a) employees may object to any person smoking in the workplace in contravention of this Act without retaliation of any kind;
 - (b) employees who do not want to be exposed to smoke at the workplace are not so exposed; and 45
 - (c) it is not a condition of employment, expressly or implied, that any employee is required to work in any outdoor portion of the workplace where smoking is permitted.

(7) For the purpose of this clause, “employer” means any person who employs or provides work for any person and remunerates that person or expressly or tacitly undertakes to remunerate him or her. 50

Advertising, promotion, sponsorship, distribution and display of relevant product or related product

3. (1) All domestic and cross-border advertising, promotion and sponsorship of a relevant product or a related product are prohibited. 55

- (2) No person shall—
- (a) advertise, promote, sponsor or cause any other person to advertise, promote, sponsor or be a party to any advertisement, promotion or sponsorship of a relevant product or a related product;

- (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. 5
- (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— 10
- (a) the characteristics;
- (b) the availability and price;
- (c) the pictures of the product;
- (d) the component; and
- (e) the packaging.
- (4) The advertising, promotion and sponsorship of a relevant product or a related product includes— 15
- (a) product placement by means of the depiction of, or reference to, the product component or brand element in a broadcast programme, film, video recording, telecast, social media, game or other communication for which the producer or any other person associated with such broadcast programme, film, video recording, telecast, social media or other communication, receives payment or other consideration; 20
- (b) brand stretching, which occurs when a brand element of a relevant product, a related product, a service or company is connected with a non-relevant product or a non-related product, service or company in such a way that the products, services or company are likely to be associated; 25
- (c) brand sharing, which occurs when a brand element of a non-relevant product, a non-related product, a service or a company is connected with a relevant product, a related product, a service or a company in such a way that the products, services or company are likely to be associated; 30
- (d) the offer for sale, sale or supply of any confectionery, toy or other item that resembles, whether intended or not, to represent the relevant product or the related product;
- (e) any commercial communication, act or practice that is likely to advertise or promote a manufacturer, wholesale distributor or importer of the relevant product or the related product, or a retailer who deals exclusively in a relevant product or a related product; 35
- (f) the offer or the supply of a relevant product or a related product to any person for their use or for subsequent supply for free, or as a sample or at a reduced price other than normal trade discount; 40
- (g) the offer of a financial or other incentive, or reward, to a retailer in order to encourage or induce that retailer to—
- (i) sell a relevant product or a related product;
- (ii) achieve a certain sales volume;
- (iii) exclusively sell a relevant product or a related product; or 45
- (iv) promote the sale or use of a relevant product or a related product;
- (h) the offer of—
- (i) any gift, cash rebate or redeemable coupon;
- (ii) the right to participate in or attend any contest, lottery, game, any sporting, cultural, social or recreational event or any activity; or 50
- (iii) any incentive or loyalty reward, to any person in consideration of the purchase of a relevant product or a related product, the furnishing of evidence of such a purchase or the confirmation of the use of that product;
- (i) the offer or promotion of an opportunity to participate in a competition associated with a relevant product or a related product, or with the brand name of a relevant product or a related product whether or not the purchase of that product is required; 55
- (j) the direct or indirect targeting of an individual with promotional material regarding a relevant product or a related product, including through electronic mail, short messaging service or any other form of messaging service, whereby text or any image is sent over an electronic communications network, telemarketing, face-to-face contact or by any other means; 60

- (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; 5
- (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; 10
 - (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; 15
 - (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. 20
- (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. 25
- (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. 30
- (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. 35
- (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. 40
- (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. 45

Standardised packaging and labelling of tobacco products

- 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; 50
 - (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 (g); 55
 - (e) that the brand name and product name may appear on packaging in a standard colour and typeface, together with other permitted or mandatory information such as manufacturer's details, health warnings, pictures, graphics and images and fiscal identification markings; 60

- (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. 5
- (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. 10
- (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; 20
 - (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. 25

Packaging and labelling of tobacco devices, electronic nicotine delivery systems and electronic non-nicotine delivery systems

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. 30
- (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. 35
- (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. 40

Packaging and labelling of non-nicotine and nicotine containing products

6. (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. 45
- (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. 50
- (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 characteristics, properties, health effects, toxicity, composition, merit, safety, hazards or emissions. 55

Health warning and required information

7. (1) The packaging for a tobacco product must display the following information:
- (a) A message on each principal display area of the packaging relating to either or both—
 - (i) the harmful health, social, economic or other harmful effects of using the product; and 5
 - (ii) the benefits of stopping the use of the product or of not using the product;
 - (b) a descriptive statement about the product's constituents and emissions;
 - (c) in the case of an ignited tobacco product, a corresponding picture, graphic or image relating to paragraph (a)(i); and 10
 - (d) in the case of any other tobacco product, a picture, graphic or image as may be prescribed relating to paragraph (a)(i).
- (2) The packaging for an electronic nicotine delivery system and electronic non-nicotine delivery system including any non-nicotine substances or products that are used with electronic non-nicotine delivery system and electronic nicotine delivery system, and nicotine containing substances or products sold separately, and of a tobacco device, must display the following information: 15
- (a) A message as described in subsection (1)(a)(i) and (ii) on each principal display area of the packaging, which may include a picture, graphic or image; and 20
 - (b) in the case of an electronic nicotine delivery system, a descriptive only statement about the contents of the nicotine containing substance and its emissions.
- (3) The packaging of a relevant product or a related product must contain a leaflet, which must be in the prescribed form, of the prescribed size and have the prescribed appearance and which must contain nothing else except the following information: 25
- (a) The health, social, economic or other harmful effects caused by its use, including any pictures, graphics or images as may be prescribed;
 - (b) the benefits of stopping the use of the product or of not using the product; 30
 - (c) the reference to the class of relevant product to which the product belongs, or to the product's brand as a relevant product of any class or variant of a brand of a relevant product of any class; and
 - (d) only descriptive information on the contents and emissions.
- (4) (a) The Minister must provide electronic files containing the required health warnings and any other information, including any pictures, graphics, or images required to be displayed on or in the packaging of relevant products and related products. 35
- (b) The health warnings and other labelling elements, including any pictures, graphics or images which must be displayed on the packaging and labelling on or in the packaging of relevant products and related products, must be displayed with the same quality and clarity as contained in the electronic files contemplated in paragraph (a). 40
- (5) Only prescribed messages, constituents and emissions statements may be displayed on or in the packaging of relevant products and related products.

Standards for manufacturing, processing and importing of relevant product and related product 45

8. (1) The Minister may make regulations regarding the standards for the manufacturing, testing, measuring and processing of the relevant products and the related products, including the—
- (a) component; 50
 - (b) design features;
 - (c) contents and emissions;
 - (d) ingredients, additives, colourants and characterised flavourings;
 - (e) reduced ignition propensity; and
 - (f) the type, shape and size. 55
- (2) No person shall manufacture and process for sale or import a relevant product or a related product unless it complies with such standards as may be prescribed and has been tested in the prescribed manner, using the prescribed methods.
- (3) All relevant products and related products must be imported through the places of entry in the Republic designated or prescribed in terms of the Customs and Excise Act, 60

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.

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Restrictions of sales in respect of relevant product and related product

9. (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.

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(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.

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(5) No person shall sell, offer for sale, supply or distribute a relevant product or related product to a consumer through the postal services, courier services, internet or any other electronic medium, or by any other means as may be prescribed in furtherance of the objectives of the Act.

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(6) No person shall buy a relevant product or related product through the postal and courier services, internet or any other electronic medium, or by any other means as may be prescribed in furtherance of the objectives of the Act.

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(7) The Minister may prescribe additional requirements applicable to the sale of a relevant product or related product in order to prevent access by children or to otherwise further the objectives of the Act.

Disclosures to Minister

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10. (1) The Minister may require a manufacturer or importer of a relevant product or related product to submit information in respect of—

- (a) research conducted into a product by a manufacturer or by a person who conducted research paid for in whole or in part by a manufacturer;
- (b) the quantity of a product manufactured or imported, as the case may be;
- (c) information on product composition, contents and emissions; and
- (d) any other information to further the objectives of this Act.

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(2) The Minister may require any person who conducted research on a relevant product or related product to submit any documentation on the research within a stipulated time.

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(3) The Minister may make information contemplated in subsections (1) and (2) publicly available, subject to any other applicable law.

Minister may make certain information publicly available

11. The Minister may make information obtained pursuant to the provisions of this Act available to the public, subject to the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).

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Establishment of Relevant Product Monitoring Committee

12. (1) The Minister may, by notice in *Gazette*, establish a Relevant Product Monitoring Committee.

(2) The Monitoring Committee may—

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- (a) be established for an indefinite term or for a period determined by the Minister when the committee is established; and
- (b) determine its own procedures.

Functions and powers of Monitoring Committee

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; 5
 - (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). 10
- (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. 15
- (4) The Department must provide administrative support to the Monitoring Committee.

Appointment of members of 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. 20
- (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— 25
- (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— 30
- (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) use their position or any information entrusted to them to enrich themselves or improperly benefit any other person.
- (5) A member of the Monitoring Committee ceases to be a member if— 35
- (a) the member resigns from the Monitoring Committee;
 - (b) the Minister terminates the person's membership because the member no longer complies with subsection (3) or has contravened subsection (4); or
 - (c) the member's term of office has expired.
- (6) A member of the Monitoring Committee who has any personal or financial interest in any matter on which the Monitoring Committee gives advice, must disclose that interest and withdraw from the proceedings of the Monitoring Committee when that matter is discussed. 40
- (7) The Minister must, in consultation with the Minister of Finance, determine the remuneration, allowances, benefits and other terms and conditions of appointment of each member of the Monitoring Committee. 45

Regulations

15. (1) The Minister must make regulations regarding—
- (a) a distance within which smoking is prohibited from an operable window or ventilation inlet of or entrance and exit of an enclosed public place or workplace; 50
 - (b) the sale of a relevant product or a related product, including— 55
 - (i) where the relevant product or the related product may not be sold;
 - (ii) who may not sell the relevant product or the related product; and
 - (iii) additional requirements to prevent access to a relevant product or a related product by children;
 - (c) the signs and notices regarding a relevant product or a related product at points of sale, including— 60
 - (i) information that must and must not appear on the sign;
 - (ii) size, text and format of the sign; and
 - (iii) location of the sign;
 - (d) the health warnings and other information that must appear, or information that must not appear on the packaging of any relevant product or related

- 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 images;
 - (iii) the requirements for rotation of the health warning;
 - (iv) the descriptive only information on constituents and emissions;
 - (v) any other information to be displayed with, on or in the packaging of a relevant product;
 - (vi) information that must not appear on packaging or leaflets; and
 - (vii) the specified period after which a relevant product or related product that does not comply with packaging and labelling provisions of this Act may not be supplied, offered for sale or sold in the Republic;
- (e) the content, composition, ingredients, additives, colourants, characterised flavour and emissions of a relevant product or related product and components, including but not limited to—
- (i) the amount of any substance or ingredient that may be contained into a product or its emissions;
 - (ii) the substances and ingredients that may not be contained in or added to a product;
 - (iii) the prohibition of any substance or ingredient that creates a specified colour, characterised flavour, smell or effect on the consumer;
 - (iv) design features and composition of products; and
 - (v) the ignition propensity of a relevant product, where appropriate;
- (f) the reporting by a manufacturer or importer of a relevant product or related product, including methods to assess conformity and methods of testing and measuring compliance with any prescribed standard;
- (g) the monitoring and reporting on any relevant product, including methods to assess conformity and methods of testing and measuring compliance with any prescribed standard; and
- (h) the application form to be used by a manufacturer, importer, distributor, seller, marketer or any person making a relevant product available in the country to apply for such approval.
- (2) The Minister may make regulations regarding—
- (a) any information that a manufacturer or importer of a relevant product or related product must submit to the Minister, including information in respect of—
 - (i) research conducted into a product by a manufacturer or by a person who conducted research paid for in whole or in part by a manufacturer;
 - (ii) the quantity of a product manufactured or imported, as the case may be; and
 - (iii) information on product composition, ingredients and emissions;
 - (b) the prohibition on smoking in or at an outdoor public place or workplace, or such portion of an outdoor public place or workplace, where smoking may pose a health, fire or other hazard;
 - (c) a notice that a retailer or wholesaler who offers for sale or sells relevant products or related products to consumers may display at his or her place of business informing consumers that a list of those products for sale, along with their prices and quantities, may be requested at the sales counter; and
 - (d) the actions that must be taken by the owner or person in control of public place to prevent smoking.
- (3) The Minister shall, not less than one month before issuing any regulation under this Act, cause a draft of the regulation to be published in the *Gazette* together with a notice declaring the intention to issue such a regulation and inviting interested persons to furnish any comments thereon or representations in connection therewith within a specified period.
- (4) The provisions of subsection (3) do not apply in respect of—
- (a) a regulation which, after the provisions of the said subsection have been complied with, has been amended by the Minister in consequence of comments or representations received by him or her in pursuance of the notice published in terms of the said subsection; and

- (b) any regulation in respect of which the Minister is of the opinion that it is in the public interest that it be issued without delay.

Offences and penalties

16. (1) Any person who contravenes or fails to comply with section 2(1)(a), (b), (d), and (e) is guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding a period of three months or both a fine and such imprisonment. 5

(2) Any person who contravenes or fails to comply with section 2(1)(c) and (g) and (5) is guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding a period of six months or both a fine and such imprisonment.

(3) Any person who contravenes or fails to comply with section 2(1)(f) and (4), is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years or both a fine and such imprisonment. 10

(4) Any person who contravenes or fails to comply with section 2(6), 3(1), (2), (3), (5)(a) and (e), (6), section 4(3) and (4); section 5(2) and (3), section 6(3), section 7(1), (2), (3), 7(4)(b) and (5), and section 10(1) and (2), is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or both a fine and such imprisonment. 15

(5) Any person who contravenes or fails to comply with section 9(2) to (6) is guilty of an offence and liable on conviction to a fine or to imprisonment for a period of not exceeding 15 years or both a fine and such imprisonment. 20

(6) Any person who contravenes or fails to comply with section 8(2) and (3) and section 9(1), is guilty of an offence and liable on conviction to a fine or to imprisonment for a period of not exceeding 20 years or both a fine and such imprisonment.

Application of certain sections of National Health Act

17. (1) Sections 80, 82, 82A, 83, 84, 85, 86, 86A, 88 and 89 of the National Health Act apply to this Act with changes required by the context. 25

(2) Any environmental health practitioner registered as such in terms of the Health Professions Act, 1974 (Act No. 56 of 1974), or any other person or class of persons authorised by the Director-General of the Department of Health to enforce this Act, may enforce this Act in the Republic. 30

(3) Any official of the Department of Labour acting in terms of the Labour Relations Act, 1995 (Act No. 66 of 1995), may enforce this Act in the Republic.

(4) Any law enforcement officer may enforce this Act in the Republic.

(5) For the purpose of this clause, “law enforcement officer” means a person empowered to exercise legislative powers and perform legislative functions, and includes a member of the South African Police Service, Metropolitan Police Departments, National Traffic Force members, Provincial Traffic Officers, Municipal Traffic Officers, Port Health Officers, Emigration Officers and Border Management Officers. 35

Repeal of laws

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18. The laws mentioned in the Schedule are hereby repealed to the extent set out in the third column of that Schedule.

Transitional arrangement

19. Anything done or deemed to have been done under any provision of a law repealed in terms of section 18 and which could be done under a provision of this Act, is deemed to have been done under the last-mentioned provision. 45

Short title and commencement

20. This Act is called the Tobacco Products and Electronic Delivery Systems Control Act, 2022, and shall come into operation on a date fixed by the President by proclamation in the *Gazette*. 50

SCHEDULE

(Section 18)

REPEAL OF LAWS

No. and year of Law	Short title	Extent of repeal
Act No. 83 of 1993	Tobacco Products Control Act, 1993	The whole
Act No.157 of 1993	General Law Fifth Amendment Act,1993	Section 9

**MEMORANDUM ON OBJECTS OF TOBACCO PRODUCTS AND
ELECTRONIC DELIVERY SYSTEMS CONTROL BILL**

1. BACKGROUND

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. SUMMARY OF BILL

- 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.
- 2.16 Clause 16 provides for offences and penalties.
- 2.17 Clause 17 provides for the application of certain sections of the National Health Act, 2003 (Act No. 61 of 2003), in respect of the enforcement of the provisions in the Bill.
- 2.18 Clause 18 provides for the repeal of the Tobacco Products Control Act, 1993 (Act No. 83 of 1993).
- 2.19 Clause 19 provides for transitional provisions.
- 2.20 Clause 20 provides for the short title and commencement.

3. CONSULTATION

The Department consulted with the private and public sectors, 14 state departments and state institutions, 28 tobacco industry stakeholders, and five civil society organisations. The state departments responded in support of the new policy changes except the Department of Tourism which expressed concern about 100 per cent smoke-free laws in the hospitality sector. The Department of Small Business Development expressed concern about the introduction of plain packaging.

4. FINANCIAL IMPLICATIONS FOR STATE

None.

5. PARLIAMENTARY PROCEDURE

5.1 The Constitution of the Republic of South Africa, 1996 (“Constitution”) regulates the manner in which legislation may be enacted by Parliament and prescribes the different procedures to be followed for such enactment. Section 76 of the Constitution provides for the parliamentary procedure for ordinary Bills affecting the provinces. In terms of section 76(3) a Bill must be dealt with in accordance with the procedure established by either section 76(1) or section 76(2) if that Bill provides for legislation envisaged in section 76(3)(a) to (f) or if it falls within a functional area listed in Schedule 4.

5.2 In *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others*^{1*} (“*Tongoane* judgment”), the Constitutional Court confirmed and upheld the test for tagging that was formulated in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*^{2*}, where the CC held that—

“the heading of section 76, namely, ‘Ordinary Bills affecting provinces’ provides a strong textual indication that section 76(3) must be understood as requiring that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4, be dealt with under section 76.”.

5.3 At paragraph 50 of the *Tongoane* judgment, the Constitutional Court held that the tagging test focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect the functional areas listed in

1. CCT 100/09 [2010] ZACC 10.

2. [1999] ZACC 15; 2000 (1) SA 732 (CC); 2000 (1) BCLR 1(CC).

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 of trade 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.

3. Paragraph 60 of the Tongoane judgment.

