

Certified Specialist Tobacconist Cancellation of Certification Policy

21 December 2011

Introduction

As of 1 January 2011, the *Tobacco Act 1987* (the Act) banned the display of tobacco products in retail outlets. An exemption from the point of sale ban has been allowed for certified specialist tobacconists and on-airport duty free shops. The Department of Health (the department) has prepared the following cancellation of certification policy which should be read and understood by all certificate holders.

Certification as a specialist tobacconist

Certification as a specialist tobacconist is based upon the following criteria:

1. *Section 15U(2)(b)* – The sale of tobacco products must constitute 80% or more gross turnover of all products sold at the premises in the 12 months immediately preceding the application or the applicant's period of trading at the premises, whichever is shorter; or the sale of tobacco products must be projected to constitute 80% or more of the projected gross turnover of all products sold from the premises in the 12 months following the commencement of trading at the premises.
2. *Section 15U(2)(d)* – Certification of the premises must be consistent with any strategic plan, statement, code or guideline adopted by the Minister for Health relating to specialist tobacconists. In this instance, the Minister has endorsed the following criteria relating to the certification of premises as specialist tobacconists:

- Products or services for children or adolescents must not be display or sold from the premises.
- No dairy products, bread or bakery products, breakfast cereals, or other food or beverages, other than low risk, shelf stable foods or beverages are to be sold from the premises.
- The premises must be clearly identified as a specialist tobacconist through external branding containing the words: tobacco and/or tobacconist and/or cigarettes.
- The premises must not be identified as a newsagent through external or internal branding and can not sell any print materials other than local, state and national/daily/weekly newspapers.

3. *Section 15U(2)(e)* – The premises must be physically separated from any other retail premises by a wall and any doorway or entrance to or exit from the premises must not open directly into any other retail premises.

Cancellation of certification under section 15X

Section 15X(1) of the Act provides two grounds for the cancellation of certification, namely;

- a. that the certification holder has not complied with a requirement of the Act or Regulations; or
- b. that the premises no longer satisfy the criteria set out in section 15U(2).

Section 15X(3) states, before cancelling a certification under subsection (1), the Secretary must give the certification holder an opportunity to be heard.

Certification process

Applications for certification as a specialist tobacconist are initially assessed through a desk-top assessment with accompanying documentation. Each eligible premises is then referred to a local government Environmental Health Officer or Tobacco Inspector for a site inspection. This inspection serves to verify information supplied in the application and that the premises otherwise meets the eligibility criteria. The premises must also comply with the requirements under Act and *Tobacco Regulations 2007* (the Regulations).

Upon meeting all relevant requirements, the premises is certified by the Director, Prevention and Population Health under powers delegated by the Secretary.

Feedback on compliance from local government

The department receives regular feedback from local government with respect to non-compliance matters, including any breach of the Act or failure to comply with the criteria specified in section 15(U)(2) of the Act.

It is appropriate information concerning non-compliance is provided to the department as it is responsible for the certification of specialist tobacconists. Information received from local government is used by the department when reviewing the certification of specialist tobacconists.

Department of Health decision making process

1. On becoming aware of possible grounds for cancellation of certification, the Secretary or delegate will write to the certificate holder outlining those grounds and the facts known to the department in relation to the matter. Correspondence will inform the decision in contemplation and give the certificate holder at least 30 days to make a submission and be heard before a settled view is formed as to whether certification should be cancelled.
2. The Secretary or delegate will consider any submission including individual facts and circumstances, explanations or other reasons before a decision is made on cancellation. The Secretary or delegate must also view all available evidence obtained that establishes the grounds for cancellation.
3. If, after reviewing and considering all information, including any submission, should the Secretary or delegate decide to cancel certification, the certificate holder will be notified in writing within 7 days in accordance with section 15Y(2). The letter informing the certificate holder of the decision to cancel certification will explain the reasons for the decision made.

Cancellation of certification for non compliance with the Act or Regulations - considerations in the decision making process

The first grounds for cancellation relates to the certificate holder having not complied with the Act or Regulations. Unless reliable and documented evidence that the **certificate holder** has breached the Act is obtained, cancellation can not be considered.

Cancellation of certification under section 15X(1)(a) will be determined on a **case-by-case** basis. Cancellation will only be considered in instances where the relevant authority has issued the certificate holder with a *formal warning* or *infringement notice*, or where a *prosecution* against the certificate holder has resulted in a guilty verdict. However, prosecutions that result in a guilty verdict in a court of law will generally carry more weight than an infringement notice or formal warning.

The following factors will be considered and investigated by the department in the decision making process under section 15X(1)(a):

- The nature, intent, extent and frequency of any identified breach of the Act.
- Defences available to a certificate holder under Section 12(4) of the Act including:

- the manager had no knowledge of the primary offence; and
- the manager had taken preventative measures in relation to the primary offence.

- Statements, interviews, copies of warnings/infringements notices, prosecution results and any other available evidence provided by local government Environmental Health Officers or Tobacco inspectors.
- Opportunity given to the certificate holder to rectify any breach of the Act.
- Individual facts and circumstances of the certificate holder.
- Submissions and explanations from the certificate holder.

Cancellation of certification for failure to conform to criteria under section 15U(2) – considerations in the decision making process

The second grounds for cancellation relates to the premises not conforming to the criteria specified under section 15U(2), including criteria adopted by the Minister under subsection (d). Apart from the criteria in relation to gross turnover of tobacco products sold from the premises, these grounds for cancellation relate to the physical premises themselves.

Cancellation of certification under section 15X(1)(b) will be determined on a **case-by-case** basis.

The following factors will be considered and investigated by the department in the decision making process under section 15X(1)(b):

- The nature, intent, extent and frequency of any identified non-conformity with the criteria set out in section 15U(2).
- Statements, photos and other available evidence to assist establishing whether the premises no longer conforms with the criteria under section 15U(2).
- Opportunity given to the certificate holder to rectify any identified non-conformity.
- Individual facts and circumstances of the certificate holder.
- Submissions and explanations from the certificate holder.

Record keeping

All information relevant to the decision will be recorded, maintained and made available to the certificate holder on request.

Local government involvement

The department will liaise closely with local government Environmental Health Officers and Tobacco Inspectors in this process where it is necessary to obtain further information and evidence. Upon cancellation of certification the local government council in which the premises operates will be informed of the decision.

Further information

For further information please call the Tobacco Information Line: 1300 136 775.

DISCLAIMER: Please note that any advice contained in this policy is for general guidance only. The Department of Health does not accept any liability for any loss or damage suffered as a result of reliance upon the advice contained in this policy. Nothing in this policy should replace seeking appropriate legal advice.

To receive this document in an accessible format phone Tobacco Control Section on 9096 0469.

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