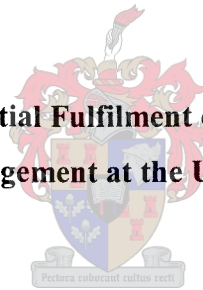


***THE POLICY MAKING PROCESS: THE CASE OF SOUTH
AFRICA'S TOBACCO AMENDMENT ACT***

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Philosophy in Political Management at the University of Stellenbosch**



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DECLARATION

I, the undersigned hereby declare that the work contained in this assignment is my own work and that I have not previously in its entirety or in part submitted it at any university for a degree.

ABSTRACT

Policies made by the government of a democratic country affect the lives of all citizens whether directly or indirectly. Policies should therefore represent the values of a democratic society. Since South Africa's transition to democracy in 1994, policy-making processes have promised to be everything that those in the past were not. The new government's ruling policy has promised to maximize opportunities for political participation, especially in terms of citizens being able to influence governmental decision making in cases where it affects their lives. The Tobacco Products Control Amendment Act of 1999 is regarded by many as one of the world's most controversial and regulated tobacco control policies. What makes this case exceptional is the fact that the policy process thereof seems to have caused some concern with regard to issues such as transparency, participation and consultation. The study, therefore, aims to establish the degree of political participation and consultation that one could observe in the making of the new tobacco law. It also gives an overview of what the policy-making process in general is like in South Africa; this is then compared with the case of the Tobacco Amendment Act. The study also focuses on broader aspects of the policy process such as the role of public policy with regard to the problems of the society. This research assignment is intent on describing the nature of the policy process of the Tobacco Amendment Bill and, by doing this, to promote the principles of democracy such as transparency, accountability and legitimacy, to which so many South Africans have dedicated their lives.

OPSOMMING

Openbare beleid en die daarmee gepaardgaande besluite wat deur die regering van 'n demokratiese land gemaak word, affekteer die lewens van elke burger direk of indirek. Beleid moet dus so geformuleer word dat dit die waardes van 'n demokratiese samelewing reflekteer. Sedert Suid-Afrika se oorgang tot demokrasie in 1994, was die nuwe regering se belofte dat beleidmaking meer inklusief sal wees as die van die verlede. Die nuwe bedeling se regeringsbeleid sou daarvolgens optimale geleenthede vir politieke deelname en seggenskap in belangrike beleidsbesluite skep.

Die Wysigingswetontwerp op Tabakprodukte van 1999 word deur vele beskou as een van die mees kontroversiële en streng beheerde tabak beleide in die wêreld. Wat die geval so besonder maak, is die feit dat daar diegene is wat meen dat kwessies soos deursigtigheid, politieke deelname en konsultasie in die parlementêre beleidsproses agterweë gelaat is. Hierdie studie beoog dus om die mate van politieke deelname en konsultasie in die beleidsproses van die Wysigingswetontwerp op Tabakprodukte ondersoek. Die studie verskaf ook 'n oorsig oor hoe die algemene beleidsproses in Suid-Afrika daar uitsien. Dit word dan vervolgens vergelyk met die beleidsproses van die nuwe Tabakwet. Verder fokus dit ook op wyer aspekte van die beleidsproses soos die rol wat openbare beleid in die aanspreek van publieke probleme speel. In geheel, poog dit dus om die aard van die beleidsproses van die Wysigingswetontwerp op Tabakprodukte te beskryf en sodoende die beginsels van demokrasie, onder andere deursigtigheid, verantwoordbaarheid en legimiteit, waaraan so baie Suid-Afrikaners hul lewens toegewy het, te bevorder.

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CHAPTER ONE: INTRODUCTION

1.1 Introductory comments

South Africa's political history has been characterised by inhumane policies based on the exclusion of the majority of its citizens. They could not participate legally and have a say in the manner by which government conducted its affairs. After the country's historical transition to democracy in 1994, the new government realised that old policies, as well as policy-making processes, had to change to fit the country's newly acquired status as a democracy. The transformation of the policy-making process to one that involves greater participation and consultation has formed the central part in the endeavour to formulate policies in such a manner that it promotes and strengthens a democratic political culture.

From the late 1990's onwards, it has become increasingly evident that government had changed its initial uncertain policy-making style to more specific and new policy-making initiatives. New ways of policy-making, had to be based on the objectives of the Reconstruction and Development Plan (RDP). This document demonstrated a firm commitment to address the issues of poverty and inequality. In terms of policy-making, this would have meant that government had to deliver the "goods" through efficient planning and implementation. The RDP also placed an emphasis on capacity-building and sustainable development. Training and access by people and communities to information was another central element of the RDP, which specifically focuses on values such as participation, transparency and inclusivity (See Booysen and Erasmus in Venter, 1998:230).

The policy making of the new Tobacco Amendment Bill is an interesting case by means of which one can study the above-mentioned values and their presence in the policy process. The use of tobacco products and smoking especially is a societal problem that impacts on both the smoking and non-smoking community. The problems associated with smoking, such as the negative health effects thereof on the

smoker and the effect of passive smoking on non-smokers and young children, have made the issue even more controversial than before.

In South Africa, smoking rates have reached alarming heights. Research shows, for instance, that the smoking rate increases among Coloureds, which was 12% between 1992 and 1995. This has translated into a 100% increase in cancer mortality rates among Coloured men, and a 300% increase among Coloured women over the past two decades in the Western Cape. The Western Cape also has the highest rate of tobacco-related deaths. The provinces with the highest smoking rates are North-West (46%), Western Cape (45%), and Northern Cape (40%), while the Northern Province has the lowest smoking rate (17%)¹.

The above figures suggest that smoking has therefore become a policy problem, which demands the attention of the national government. Not only has the issue of tobacco use held the interest of those who specialise in health and related professions, but it has also recently come under the attention of the government. The problem of smoking and its consequences for the health of both smokers and non-smokers has caused significant concern among interest groups concerned with the dangers of smoking and passive smoking. These groups consist of well-known institutions such as the World Health Organisation (WHO) that have demanded that governments all over the world should formulate policies, that impose restrictions on both tobacco companies and smokers in terms of their advertising and use (Strachan, 1999:13; World Health International: Press Releases,1999:2).

It is clear that the policy process plays a significant role in the sense that it addresses public problems. It is during the policy process that a problem is recognized, defined, and placed on governmental agendas. Alternative ways to solve a problem are developed and presented and, in some cases, officially adopted and implemented. During this process, some sort of evaluation and feedback occur; legislative or

¹ See Steyn, K (1999:3) in "Implementable strategies to strengthen comprehensive tobacco control in South Africa: Towards an optimal policy intervention mix" at <<http://www.mrc.ac.za>> (20 May 2000)

administrative changes or adjustments may be made; more implementation follows; evaluation occurs and in some cases the policy may be terminated. In short, the policy process is best thought of as a circular and on-going process (Anderson, 1984:263; Parsons, 1995:77). Policy studies are therefore of crucial importance in a society where policy processes are intent on enhancing social and political opportunities and participation (Cloete, 1991:2). The policy process provides insight into the identification of a public problem and the development of a particular solution to that problem. It also enhances our knowledge of the major political actors and non-political actors and of their views and concerns. Policy processes reflect how decisions regarding existing and new policies are made. The policy process can therefore be regarded as a complex issue that involves the assessment of the impact and implementation of policies.

One important policy problem in South Africa that has recently gone through the policy cycle was the amendment of the new tobacco control act. This brings South Africa in line with the European Union and other developed countries that have stringent anti-smoking policies. The Act gives the Minister of Health the discretion to impose stricter controls on the tobacco industry, including a total ban on advertising (Bisseker, 1998:26). In this research assignment, I want to describe the parliamentary process of the Tobacco Amendment Act, with the focus on the role of participation and consultation with major stakeholders. I shall, therefore, focus on the nature and degree of public political participation that could be observed during the different phases of the policymaking process of the new tobacco legislation.

1.2 Problem Statement

In contrast with the rest of the developed world, South Africa has only recently begun to look at stricter measures to curb the use of tobacco products. In 1992 the Department of Health, in conjunction with the Tobacco Action Group (TAG), published plans for an anti-smoking campaign, which, among other things, called for a limitation on sport sponsorships by tobacco companies by 1995. According to the Tobacco Institute of Southern Africa, members of the Department of Health visited those countries with the most stringent anti-tobacco laws, which seemed to have set

the drafting process, that started in 1997, in motion (“NHPRDO component: Research Programme for South Africa”, 1999:3).

In 1998, when the draft bill on the amendment of the existing tobacco control policy was introduced in the National Assembly, the tobacco, media and marketing industries expressed their discontentment with government’s long-threatened legislation to prohibit all advertising or promotion of cigarettes and tobacco products. The Bill was also questioned by opposition parties which said that such an act could be difficult to implement, unconstitutional and may infringe upon the freedom of speech (Loxton, 1998:9). The advertising media and print industries claimed that the regulations of the Act would have a huge negative financial impact on their respective businesses (*The Citizen*, Dec 10, 1999:6). These groups claimed that the legislation undermined commercial freedom of speech. Association of Marketers executive director, Derrick Dickens, has argued that it should be legal to promote a product if it is sold legally. Businesses that were to be affected by the implementation of the proposed Tobacco Bill’s strict regulations, have strongly opposed the strict regulations in the new Tobacco Bill after its announcement. The hospitality industry was particularly outraged over the regulations accompanying the Tobacco Amendment Bill. The Federated Hospitality Association of South Africa (FEDHASA) has claimed that the amendment bill has placed totally unacceptable restrictions on the hospitality industry. These regulations, among which stipulated that shebeens, pubs, bars, hotels, etc. should designate at least 25% of their total public area to smokers, could become a huge problem for the owners of small bars and pubs. Hospitality industries also claim that the proposed regulations made no provision for the phasing in of the proposed measures (Cumberlege, 1999: 10; Pela & Tloti, 2000:3).

The new bill has also given the Minister of Health the discretion to issue certain regulations to ban smoking in any public place (Koenderman, 1998:100; *Beeld*, 1999:10). Opponents furthermore agreed that the legislation was being steamrolled through parliament and that the tobacco and marketing companies were not given sufficient time to challenge it. Without waiting for the deadlines for submissions on the Draft Bill, Cabinet had already given its approval. This has given rise to

suspicious that the department had no intention of tolerating any opposing views. (Koenderman, 1998:105). In the process, legitimate objections were being ignored (*The Natal Witness*, 1999. Jan 23, p.6). It has also been said that the department had been unwilling to meet members of the affected industries, and were ignoring attempts to discuss or debate the proposed legislation (*Business Day*, Nov, 1998:14; Koenderman, 1998:105; Bennett, 1999:3).

During the proposal of the amendments, the Tobacco Institute of South Africa stated that no tobacco control policy should be made without conducting a detailed analysis of the likely economic impact on South Africa and other SADC countries. They have reiterated concerns that the Health Ministry had failed to consult the tobacco industries about the proposed changes (*The Citizen*, May 29, 1998:13). These claims have added to the suspicion that the relevant government department simply went ahead with “preconceived policies” (*The Citizen*, July 31, 1998:6).

It is clear that there are mixed feelings about the new tobacco law. The main criticism against the act is related to the fact that there seems to be concerns about the policy process and the lack of consultation during the process of policy-making. It seems that, contrary to the constitution’s provision for participatory democracy, some interest groups still feel that they were not given ample opportunity by the Department of Health to fully debate the implications of the Tobacco Act. The problem then clearly becomes one that focuses on the nature and extent of public participation and consultation in the decision-making processes of government. This study sets out to establish whether the constitutional right to participate in the government’s decision-making processes was adhered to in the making of the Tobacco Products Control Amendment Act.

The study will, therefore, focus on the description of the policy process of the Tobacco Products Control Amendment Act, which was introduced in August 1998. It will try to explain why the amendment bill was regarded as necessary, and will include an overview of the previous Tobacco Products Control Act (1993). The study will also include an evaluation of the actual policy process as well as the role of major

actors who were involved in the policy formation of the above-mentioned Act. In order to understand the whole policy-making process, the study will describe the major policy issues with regard to the problem and the process by which decisions were made. It will include the identification, some of the views of the major “stakeholders”, and a brief overview of the opportunities for consultation that were presented by the government at the time. Finally, the study will give an overview of the outcome of the process.

1.3 Objectives of the Study

The aim of the study is to investigate and assess the process of policy formation in the new South African democracy with special reference to the Tobacco Products Control Amendment Act. The study highlights the significance of transparency and public interest in the South African democracy. Citizens and other interested parties will benefit by gaining insight into the process of policy-making. The reader will also be able to assess whether the policy process is considered one that upholds the principles of transparency and credibility. The study will, therefore, contribute to the general knowledge of policy-making procedures, seeing that it entails a universal problem, which concern everyone. It can, if effectively done, improve decision-making by highlighting certain weaknesses of the policy process. The findings of the study may also produce recommendations for further study in the field.

1.4 Definition of terms

There is consensus that it is important to know the meanings of concepts in order to grasp the objectives and findings of a research report. Every problem, hypothesis and term consists of concepts or variables that refer to those aspects of reality in which the researcher is interested. Theoretical definitions “direct the search for appropriate measures of concepts, establish a basis for judging the quality of one’s measures, and allow others to assess the meaning of one’s research findings” (Singleton, 1993:101). It can also be useful in offering explanations for the actions and decisions that go hand in hand with policy-making. They are useful to the extent that they direct our attention to important political phenomena and help clarify and structure our thinking (Anderson, 1984:24). As Denzin mentions in Patton (1980:275), research methods are

of little use until they are seen in the light of theoretical perspectives. Evaluation researchers have a responsibility to reflect on, bring into consciousness, and make explicit whatever theoretical predispositions they may have with regard to the focus of a particular study. Such theoretical predispositions may contain some substantive positions that the researcher hold (Patton, 1980: 276). The following paragraphs will therefore attempt to explain the meanings of concepts used in the study:

Policy: This concept indicates a purposive course of action followed by an actor or set of actors in dealing with a problem or matter of concern. This concept emphasises “what is being done” instead of what is proposed or intended, and it differentiates a policy from a decision, which is a choice among competing alternatives. Public policies are those policies developed by governmental bodies and officials, although non-official actors may have an influence on policy development (Anderson, 1984:5, 293; Howlett & Ramesh, 1998:11).

Policy problem: A policy problem points out a condition or a situation that produces dissatisfaction on the part of people for which relief or redress is sought. Matters become problems if they produce sufficient anxiety or dissatisfaction as to cause people to seek a remedy. If people view a condition as normal, inevitable or their own responsibility, nothing will probably happen, because it is not perceived as a problem. Conditions do not become public problems unless they are defined as such, then articulated by someone, and then brought to the attention of government. “Policy problems are often of an ill-defined nature and is based on the presumption that there is a problem” (Anderson, 1984:79; See also Jones in Parsons, 1995:87; Howlett & Ramesh, 1998:6).

Policy process: This concept can be defined as “a sequential pattern of action involving certain functional stages of activity” (Anderson, 1984:35) that can easily be distinguished analytically, but may be more difficult to separate empirically. Anderson states that these stages include problem identification and agenda formation, policy formulation, adoption, policy implementation and evaluation (1984:35). It is a sequence of events that ranges from the initial conception and

definition of a problem to the formulation, implementation, and evaluation of a policy in response to that problem (Kruschke & Jackson, 1987:29; Anderson, 1984:294).

Actors: In the policy process, actors may include either individuals or groups. Policy actors come from the machinery of the state and the society at large. For the sake of simplification, policy actors may be divided into five categories: elected officials, appointed officials, interest groups, research organisations and mass media (Howlett & Ramesh, 1998:52). Anderson (1984:51,60) distinguishes between official policy actors and unofficial policy actors. Official policy makers possess the legal authority to engage in the formation of public policy. These include legislators, executives, administrators and judges. Each of these groups performs policy tasks slightly different from the others. Unofficial policy actors, in contrast, do not usually have the legal authority to make binding policy decisions, although they may be perceived as important or dominant. These policy actors may be of use to the policy-making arena in the sense that they provide information, exert pressure and often seek to persuade.

Policy Formulation: This refers to the process by which policy options are formulated within government. It can also be viewed as the development of a “proposed course of action or alternatives” for dealing with public problems (Howlett & Ramesh, 1998:11; Anderson, 1984:294). Formulation is that stage of the policy process in which policy actors decide upon a method to resolve a problem. It is not a straightforward or simple routine; it involves a large number of participants and the process may take up to years or months (Kruschke & Jackson, 1987:51).

Decision-making: Government engages in a process by which they decide to take a particular course of action or non-action (Howlett & Ramesh, 1998:11, Anderson, 1984: 293; Krushcke & Jackson, 1987:14).

Policy Implementation: This means that the policy is ready to be put into effect and usually involves enforcement or some type of policing (Howlett & Ramesh, 1998:11;

Policy Evaluation: This usually is the final stage in the policy cycle and refers to the process by which the policy and its results are monitored by state or societal actors. This may lead to a reconceptualisation of the policy problem, which could result in a repetition of the whole policy cycle (Howlett & Ramesh, 1998:11).

Interest groups:

Interest groups are essential elements of democratic states as they often are the medium through which people make known what they want from government. They can broadly be defined as any group of people whose intent is to promote some shared interest, either consciously or spontaneously, by influencing government's decision-making process in some or other way. (Booyesen & Erasmus, 1998:280). Interest groups can play an important role in modern politics, especially in the policy process. One of the most important resources that these groups have to offer is knowledge. This may include knowledge that is unavailable or less available to others. The members of interest groups often know the most about the issues or problem with which they are concerned. As policy-making is a highly information-intensive process, those with information may normally expect to play an important role (Howlett & Ramesh, 1998:57). The impact or power of interest groups upon decisions and policy formation, as well as their legitimacy, vary considerably, depending on factors such as membership size, monetary and other resources, its social status, the skill of its leadership and whether competing organisations are present or not as well as the attitudes of public officials towards the interest group (Anderson, 1984:62; Parsons, 1995:30).

Apparently, the policy process is a very dynamic one as it involves different stages and policy actors that are interrelated and could, in some cases, be difficult to tell apart. However, by understanding what each stage entails, as well as what the relevant conceptual definitions entail, one's ability to study the policy process is enhanced. One's understanding of the major role players and their functions in the legislative processes also makes their actions and decisions more significant in terms of a particular policy process.

1.5 Methodology

The intent of the study is to gain insight into the procedure which underlies the policy process of a particular policy. The case study method is considered to be the most appropriate for the purposes of this study. In this account, the case study will mostly be qualitative in nature, although this need not always be the case (Majchrzak, 1984:63). The case study is only one of several ways of doing social science research. According to Yin (1981) a case study can be defined as an empirical inquiry that:

- Investigates a contemporary phenomenon within its real-life context; when
- the boundaries between phenomenon and context are not clearly evident; and in which
- multiple sources of evidence are used.

Usually, case studies are found to be useful when one wants to understand why and how a certain research problem has emerged. They are also used in instances where the investigator has little or no control over the events, and when the focus is on a contemporary phenomenon within a real-life context. The case study, as a research method, can therefore be applied to research, which is explanatory, descriptive or exploratory in nature (Yin, 1984:13). This approach to qualitative analysis entails a specific way of collecting data, organizing data and analysing data. The purpose is to gather comprehensive, systematic and in-depth information about each case of interest. Case studies should take the reader into the case situation, a person's life, a group's life, or a programme's life. The need for case studies arises out of the desire to understand complex social phenomena. It therefore allows the researcher to study the holistic and meaningful characteristics of real-life events, such as individual life cycles, organizational processes, international relations, and the maturation of industries (See Patton, 1980:303; Yin, 1984:14; Berg, 1998:212).

Case studies are useful in the sense that they provide for a more complete understanding of a situation's complexity by examining behaviour or processes in context. Such studies also promote examination of the process by which an intervention or a policy action has been implemented. It can be said that the case

study contributes, in a unique way to our knowledge of individual, social, organisational and political phenomena (Yin, 1984:14; Majchrzak, 1984:63). The latter is especially helpful in view of the fact that the study focuses on the policy process surrounding a certain social phenomena, which is smoking, in this particular case. There are certain important characteristics of case studies, which make it particularly attractive to research involving policy processes. These are outlined in the following:

- Case studies are usually quick, cost efficient and make room for impressionistic analyses of a certain situation or process;
- they also allow for the identification of behaviours and other variables that were not, initially, expected to be related to the social problem;
- case studies provide a more in-depth analysis of certain situations.

It can therefore be argued that case study methods are as objective as any other data-collection and analysis strategies used by social scientists. The findings from case study methods can be generalized to a certain extent, especially when the study is done correctly. It should, when completed, provide a general understanding of similar individuals, groups, and events. The researcher should be able to tell whether the findings are a case of a specific event, process or phenomenon (Berg, 1998:218). Given the versatility of the case study method, it may be rather narrowly focused or it may take a broad view on life and society (Berg, 1998:212). For the purposes of this study, the former method might be more suited since the objective is to examine the policy process of the legislation in question. One could say that this particular study portrays a single case of policy making in South Africa, but can be generalized in the sense that it describes the phases that a policy problem normally goes through when government has decided to respond to the problem.

According to Hakim (1987:28), Berg (1998:3) and Yin (1984:17), qualitative research is mostly used in disciplines where the emphasis is on description and explanation. Since one of the stated objectives of this study is to accurately describe the policy process of the Tobacco Products Control Amendment Act, it is only fitting that the

study will be mostly qualitative in nature. Studies based on qualitative methods will include a large amount of pure description of the process, and the relevant experiences of those involved in the programme. The purpose of this description is to let the reader know what happened in the process and what it was like to be part of the process from the participants' point of view (Patton, 1980:302 and Berg, 1998:7).

Qualitative research involves the selective use and gathering of a wide range of empirical material such as visual texts, interviews, personal experience, and historical, observational and interactional information. These methods are used quite often in qualitative research in order to describe problematic moments and meanings in people's lives (Denzil & Lincoln, 1998:3 and Berg, 1998:3). There are several advantages to engaging in a qualitative study of this nature. The qualitative method comprises of descriptive accounts, which is not influenced or distorted by any specific theory. It is therefore considered to be one of the most open-ended and the least biased types of research study (Hakim, 1987:34).

Qualitative research is considered important for reasons involving the following:

- Presenting the findings of a project;
- with these findings often providing the starting point for evaluating proceedings which led to them and, consequently, the results themselves.

This type of research is inclined towards analysing concrete cases in temporal and local particularity, and starting from people's expressions and activities in their local contexts (Flick, 1998:13). The qualitative researcher wants to understand and share this, and the process of understanding with the reader. Contrary to quantitative research, which seeks to test and prove an idea already assumed, or to persuade the reader to an idea already held, qualitative research intends to explore and discover some unknown experience, personal or social (Nickerson, 1993:60). This makes qualitative research better suited to the needs of this particular study. The study will be conducted according to the inductive approach. The latter is based on the assumption that the researcher is open to whatever emerges from the data (Patton,

1980:46). Inductive analysis means that the patterns, themes, and categories of analysis come from the data; they emerge out of the data rather than being imposed on it prior to data collection and analysis (Patton, 1980:306).

1.6 Data Collection

There are four basic approaches to data collection: experiment, survey, field research, and use of available data (Singleton, 1993:95). For the purposes of this study, the use of available data, as well as the interview as survey method, will be relied on to collect information with regard to the policy process. One of the general strategies of doing social research is to make use of available data. The sources of available data, which will be used for this study, are contained in public documents and official records, the mass media and where possible, private documents. Another method for gathering primary data on the social problem and its causes is through surveys.

Surveys can vary in scope, content and rigor, as well as the data collection method used. It may involve a series of qualitative interviews with a small number of purposefully selected individuals (Majchrzak, 1984:62). The standardized open-ended interview will be used in this particular study. This type of interview consists of a set of questions carefully worded and arranged with the intention of taking each respondent through the same sequence and questions with essentially the same words. This reduces the possibility of bias when different interviews are conducted with different people. Careful consideration is given to the wording of each question before the interview. There are several reasons for the use of the open-ended interview in this study:

- The instrument used in the evaluation is available to decision makers and information users;
- the interview is highly focused;
- it makes data analysis easier because it is possible to locate each respondent's answer to the same question rather quickly and to organise questions and answers that are familiar.

1.7 Limitations of the study

Despite the advantages that case studies provide, certain limitations are also to be found. These limitations usually occur in terms of the objectivity and generalization of the findings of a particular case study. For many, the objectivity of these findings lies in the fact that the study can be repeated, in other words the researcher should clearly indicate what is to be investigated and what means are used. If someone else follows the same procedures, and the findings are inconsistent, the original study might have been faulty, due to a lack of objectivity. Findings from a single case study therefore is often questioned and not accepted immediately (Berg, 1998:218).

Due to the time frame of the study and the fact that Members of Parliament were unavailable during the period from November to January, the views of most portfolio members of the Health Committee could not be obtained. An attempt was made to obtain the views of the Medical Research Council (MRC). They were however, unable to comment.

1.8 Tobacco Legislation: A Brief Historical Overview

Studying tobacco regulation is considered as a unique opportunity to study political, economic, legal and social aspects of health and health behaviour. Tobacco regulation can be seen as the exertion of power exercised by government in order to protect the health preferences of the non-smoking part of the population. As part of societal nature, we are bound to affect others when we engage in our own individual preferences. The question of rights, depending on one's own ideologies, is a sensitive issue and can either be ensured or imposed upon in the case of tobacco regulation. The various initiatives to control the use of tobacco products have different objectives. Some initiatives want to reduce public exposure to smoking, especially to children, while others aim at protecting smokers from themselves by increasing tobacco taxation and regulation of tobacco as an addictive substance. There also are those initiatives that are aimed at changing tobacco's public image by restricting tobacco advertising (Schaler, 1999:11).

Tobacco control legislation in South Africa is not really a new phenomenon. It started in the 1970s, with authorities banning smoking in cinemas and restricting tobacco use on domestic air flights. Later a total ban on smoking was imposed on all domestic and international flights. Current attempts to reduce the use and sale of tobacco were preceded by the MRC's report on the economic costs of tobacco use in South Africa (Reddy, 1999). South Africa is now on the brink of joining countries, which have already introduced stricter steps against tobacco in response to the global threat to health posed by smoking ("South Africa: A Majority of South Africans Back Ban on Tobacco Ads", 1998:2; "Anti-tobacco legislation passes first hurdle", 1999:3; Strachan, 2000:1).

In developed countries, legislation similar to the Tobacco Products Control Amendment Act dates back to nearly a century ago. Governments in these countries have recognized the importance of restricting the use of tobacco and have taken strict measures to implement policies, which address the problem. In the second half of the century anti-tobacco societies sprang up, principally in Britain, France, the United States and, to a lesser extent, in other European countries. They all had similar objectives such as to inform the public about the dangers of tobacco and to lobby for legislation against tobacco abuse. What they accomplished is hard to judge, but there is some evidence that the Children Bill of 1908, passed in Britain to prohibit the sale of tobacco to children and to ban juvenile smoking in public places, enshrined at least some of the arguments of the anti-tobacco movement (Goodman, 1993:119).

In the United States, however, the anti-tobacco movement had a much more direct and widespread impact, at least in terms of legislation. The tobacco reform movements resulted in a range of legislation beginning in the states of North Dakota, Iowa and Tennessee in 1897, and growing until 1921, when some form of legislation against smokers and the tobacco industry was on the statute books in twenty-eight different states. The range of proscription was very wide, but only two states, Idaho and Utah, passed specifically anti-cigarette legislation. In many cases, however, the repeal of the laws came as swiftly as their enactment as fiscal needs often were the reason for their enactment (Goodman, 1993:119).

The fact that tobacco is a dangerous substance became known in the 1960s for the first time. This, of course, had considerable impact in many different areas. First, tobacco was put on the political agendas of many first world countries as it became increasingly evident that there were powerful interests involved. Soon afterwards, an intense war broke out between the pro-tobacco forces, including the tobacco companies, some government agencies, tobacco producers and some consumers, and the anti-tobacco forces, including consumer pressure groups and some other government agencies in most countries. The role of government became conspicuous, especially since, on the one hand, it had a duty to protect consumers from potentially dangerous substances, while, on the other hand, it acted to protect its own interests, financial and electoral (Goodman, 1993:126).

Over the last thirty years, the media worldwide have been reporting the negative effects of smoking. Evidence to substantiate this was generated from almost every health and medical organisation in the world. This has led to stricter forms of tobacco control in several developed countries. In response to this, the tobacco companies have tried to keep the debate alive, by continually publishing information that contradicts arguments against the use of tobacco, thereby creating doubt in the minds of the public (Salojee, 1994:2).

In 1970, the World Health Organisation launched a campaign against tobacco, urging governments worldwide to adopt stricter regulations against smoking. Ideally, such tobacco control measures should include:

- An established policy on the production, promotion and use of tobacco in order to protect the health of the nation;
- the encouragement of smokers to stop and to try and prevent non-smokers from starting smoking;
- the protection of non-smokers' right to breathe in clean air;
- the reduction of harmful substances in cigarettes;
- the promotion and ensurance of a socially acceptable non-smoking norm; and

- the provision for resources to promote health, e.g. health education (Salus 1994; Vol 17:8).

While organisations like WHO, the World Bank, the Cancer Association, etc. lobby for anti-smoking legislation, the tobacco industry, on the other hand, has formulated their own arguments against anti-smoking medical and research organisations. The tobacco industry has, for example, claimed the following (Salojee, 1994:2; Strachan, 1999:13):

- It has not yet been proven that smoking is the cause of certain ailments;
- tobacco is not the only product harmful to a person's health; e.g. alcohol can also be bad for one's health;
- if a product is sold legally, it should also have the right to be advertised;
- there is no definite evidence that environmental tobacco smoke causes disease;
- it should be kept in mind that smokers have rights too (Salojee 1994:3).

Health advocates, on the other hand, have reacted to this by saying that all health and medical organisations, as well as some independent research organisations, agree on the health risks of smoking. Tobacco is not like many other products. It should be treated differently, given that it is the only product that is lethal if used exactly as intended by the manufacturer. It is also responsible for far more deaths than AIDS, fires, alcohol, homicide, suicide, etc. combined (Salojee, 1994:2). Tobacco has also been classified as among the most dangerous category of cancer-causing agents by the United States Environmental Protection Agency (Schaler, 1999:249). Many developed countries have banned tobacco advertising. The issue of commercial speech is a different issue to the more general issue of political and religious speech that demand protection thereof. Many other countries have "socially acceptable restrictions" on the advertising, sale and distribution of legally produced products. Lastly, the issue of rights: Smokers do not have the right to pollute the air, which non-

smokers have to inhale. Smokers may therefore have the right to smoke, but not in instances when their smoke can harm others (Salojee, 1994:3).

After examining evidence, the governments of the United States and the United Kingdom, have come to the realisation that a ban on smoking does cause smoking levels to fall. The United States has a series of Acts directed towards the tobacco industry. There is, for example, the 1965 Cigarette Labelling and Advertising Act, which required health warnings on all cigarette packages. In 1969, the United States Congress passed the Public Health Cigarette Smoking Act banning all cigarette advertising from television and radio. The ban was enacted with the acquiescence of the tobacco industry, which was beginning to feel the effect of the anti-smoking advertisements. In 1986, the Comprehensive Smoking Education Act required three rotating health warnings for all smokeless tobacco products packaging and advertising. More significantly, the US government has enacted the Alcohol, Drug Abuse and Mental Health Agency Reorganisation Act in 1992, which required states to enact and enforce laws prohibiting the sale and distribution of tobacco products to minors under the age of eighteen. Congress has also enacted the Pro-Children Act of 1994; prohibiting smoking in indoor facilities that are used on a regular basis for the delivery of services to children, such as schools, libraries, and early childhood development centres (Schaler, 1999:46).

In other countries with effective bans on tobacco advertising and promotion, such as Norway, Finland, New Zealand and France, cigarette sales dropped after advertising was totally banned in 1996 (Strachan, 1999:13). In Australia, also, tobacco sponsorships of sporting events have been banned since 1993, along with billboard advertising. This ban, together with others before it, means that tobacco advertising in Australia will be limited to the point-of-sale (*Finance Week*, Feb 4, 1993:23). In Germany, however, officials are reluctant to support European Union legislation with regard to tobacco advertising. Politicians are convinced that this could get out of hand, as has happened before (Moerdyk, 1998:17).

The fact that this type of legislation is not even considered in Germany, suggests that it is possible that the legislation may fail to meet government's desired intentions and that it might bring forth unintended consequences. On the other hand, most of the countries where it is being enforced have shown that the use of tobacco can be regulated effectively if the government has the capacity and necessary resources to do so.

1.9 Concluding Remarks

The aim of the study is to give an overview of the policy process, which resulted in the Tobacco Products Control Amendment Act and, bearing in mind the context of the Act, determine whether the policy process was conducted in an efficient and transparent manner. The following chapters will focus on the identification and development of the social problem, together with the elements inherent to the policy process. In the following chapter, the meaning and functions of public policy are discussed in greater detail. The role and development of policy with regard to public problems, such as those related to use of tobacco are also described. The actual stages of the policy process, in this case, the tobacco amendment bill, are also outlined in chapter two. Chapter two thus gives an overview of public policy, as well as of the role it plays in society. It also briefly looks at the development of existing as well as new tobacco legislation in South Africa.

CHAPTER TWO: PUBLIC POLICY AND ITS ROLE IN THE DEVELOPMENT OF TOBACCO REGULATION IN SOUTH AFRICA

2.1 Introduction

Since South Africa has made its remarkable transition to the status of a democratic country in 1994, policy making has become quite important. Contrary to those made in the past, policies that are being made by the new government should reflect the ideals of the democratic country we hope to become. Policies should be realistic and practical, and the country should have the capacity to enforce and maintain the implementation of such policies.

The debate about tobacco regulation, more specifically smoking, has, in recent years, become a very controversial issue². As with many public problems, government, and other policy actors who are involved in policy formulation, have a significant role to play, seeing that they are the ones who should provide citizens with solutions to public problems. These “solutions” usually occur in the form of policy as public policy refers to a course or principle of action adopted or proposed by government. Policies usually become law when it is enacted by Parliament to prescribe or prohibit certain actions. Laws aims to put policy into practice³.

This chapter will describe the concept of “public policy” and the role it plays in addressing policy problems in society. The chapter also focuses on the major role players that can be found in the policy process; in other words, who make the decisions about what should, or should not, be reflected in a particular policy. The above-mentioned section is useful in the sense that it includes some of the policy actors and actions found when a specific policy is being made. The second part of the chapter aims to give an overview of tobacco regulation and some of the problems

² See Lancet: Nov 4, 1998 “Tough anti-tobacco legislation moves forward in South Africa. (Policy and People)” at <<http://www.findarticles.com>> (19 July 2000)

³ See “The Structures and Roles of Government in Making Policy and Laws” at <<http://www.advocacy.org.za>> (20 August 2000)

associated with it, as well as why the introduction of this new tobacco policy has been seen as a necessary one. The discussion of the necessity of a stricter form of tobacco control is followed by an overview of the main provisions of the Tobacco Control Act of 1993, as well as its successor, the Tobacco Products Control Amendment Act, 1999 (Act 12 of 1999), and the latter's objectives and intended effects.

2.2 Public Policy and its role in society

2.2.1 Definition

Evidently there are many definitions of what public policy really consists of. Although these definitions vary, they do concur on some aspects of policy making such as that public policies are the results of decisions made by governments and that these decisions may include the decision not to do anything. In other aspects these definitions do differ significantly (Howlett & Ramesh, 1998:4; Anderson, 1984:4-5). Problems with the definitions of public policy suggest that it is not an easy task to see public policy as a concrete or specific phenomenon (Ham & Hill, 1984:11; Howlett & Ramesh, 1998:6). In some instances it is hard to identify precisely when policy is being made, since policy comprises several sequential phases, which continue to evolve (Ham & Hill, 1984:11). The following definitions for public policy occur in literature on the subject:

Public policy is concerned with the public and its problems. It deals with how issues and problems are defined and constructed and how they are placed on the political and policy agenda. It is also the study of "how, why and to what effect government pursues particular courses of action and inaction"(Dewey in Parsons, 1995:xv). Hogwood & Gunn (1984:13-19) define the term "policy, as having ten functions. According to them, policy in the modern sense can therefore be used:

- As a label for a field of activity;
- as an expression of general purpose or a desired state of affairs;
- as specific proposals;
- as decisions of government;
- as formal authorization;
- as a programme;

- as output;
- as outcome;
- as a theory or model; and
- as a process.

According to Dye (1987:3) public policy is “whatever governments choose to do or not to do”. This definition is seen by some as perhaps too simplistic to accurately explain the phenomena of public policy. However, Dye’s definition above is credited for two reasons. Firstly, the definition highlights the fact that government is the key role player in policy formation. This, therefore, implies that decisions by any other actors cannot be regarded as public policies. Secondly, Dye states that public policies also include the decision of government to take some form of action, or not to take action (Howlett & Ramesh, 1998:5). Another conceptualisation, by Jenkins, states that public policy is *“a set of interrelated decisions taken by a political actor or group of actors concerning the selection of goals and the means of achieving them within a specified situation where those decisions should, in principle, be within the power of those actors to achieve”* (Jenkins in Howlett & Ramesh, 1998:5).

Howlett and Ramesh point out that the above definition is a slight improvement on Dye’s definition in the sense that Jenkins views public policy as a process rather than a choice (as defined by Dye) and includes the definition of public policy as consisting of decisions. Jenkins also states that the decisions, which the government choose to make, as well as the implementation of such decisions, should be well within its capacity to do so. He also specifies that governments take action in order to achieve a certain goal, an element that is missing from Dye’s definition and that provides a measure for evaluating policies (Howlett & Ramesh, 1998:5).

Anderson, on the other hand, defines public policy as a “purposive course of action followed by an actor or set of actors in dealing with a problem or matter of concern” (Anderson, 1994:5). This definition adds two additional factors to those defined by Dye and Jenkins. It acknowledges the fact that decisions are taken by a set of actors within government and not by any single actor. Secondly, it highlights the fact that

there is a link between government action and the awareness of a matter of concern that requires action from government (Howlett & Ramesh, 1998:6).

From the above it is clear that there is a vast range of different conceptualisations of what public policy is. It appears, however, that most of these definitions of public policy have one or more elements in common, for example, there is consensus about the fact that policy is an action taken by government and political actors and that this action or inaction involves decisions. In my opinion, one may view public policy as a complex and interrelated process, which can be characterised by a set of sequential actions and decisions that take place when policy makers respond to a public problem.

2.2.2 The phases of the policy cycle

Once a problem has been placed on the government's political agenda, it goes through several phases during the policy cycle before it is enacted as a law. The policy cycle is characterised by several stages. According to Howlett & Ramesh (1998:11), these are:

1. Agenda setting;
2. policy formulation;
3. decision making;
4. policy implementation; and
5. policy evaluation.

Parsons (1995:77) has identified similar stages of the policy process, such as the existence of a problem after which the latter develops in the following sequence: problem definition; identifying alternative solutions; evaluation of options; selection of policy options; implementation; and evaluation. After the final stage of the process it is possible that other problems may surface, starting the cycle again as policy makers have to deal with the new problem by, for example, weighing alternative strategies to solve the new problem. (See also Jenkins: 1978; Hogwood & Gunn: 1984; Rose: 1973 ; Mack: 1971 and Dye: 1987). There is an advantage to having

models which outline policy cycles, since this helps one to better understand policy making. Each of the stages can be investigated separately, or in terms of their relationship to another. The policy cycle has the advantage that it allows one to study the roles of the actors and institutions dealing with a policy. On the other hand, it may also be misleading seeing as it could lead one to think that policy makers deal with policies in a rather linear or systematic way which, in reality, often is not the case (Howlett & Ramesh, 1998:12).

Public policies cover legislation developed by governmental bodies and officials. Often, non-governmental actors and factors may have limited influence on the development of public policies. These policies are designed to bring about certain objectives although they do not always succeed. Policies do not only refer to decision making about the adoption of laws, but to enforcement and implementation thereof. It usually arises out of claims or demands made by citizens, interest groups or other public officials on government to take some form of action. Policy also involves the actual action taken by government and not merely intentions. One could also say that public policy may be considered to be either positive or negative, depending on whether government decides to take action (positive) on a specific problem or not (negative). It is important to realise that when government has decided to take action on a certain problem it should be based on law and it should be authoritative. Sometimes public policy is ignored by the public, for example the health warning on cigarette packets. Policies may also be of a regulative, redistributive or distributive nature. Public policies may well lead to additional public policy or other future inputs, and even policy termination (See Anderson, 1994:8; and Kruschke & Jackson, 1987:35).

2.2.3 The Role of institutions and actors in the policy process

Apparently there is a lively and as yet, inconclusive debate in public policy about the exact role of actors and institutions in the policy process. The debate seems to be grounded on the importance of the interests and abilities of the actors on the one hand, and on the significance of the institutional context, on the other (Howlett & Ramesh, 1998:50). Actors and institutions do play a significant role in the policy process. Their

importance, however, may vary, as it depends on the specific circumstances of a particular policy. The term *actors* are used so as to include the state and individuals, or interest groups, as well as all other groups in society.

2.2.3.1 Institutions

Institutions, on the other hand, are defined as the structures and different organisations of the state, society as well as the international system. The significance of institutions lies in the fact that it shapes the behaviour of actors to a certain extent, given that it influences their interests by facilitating or limiting them in different ways. It is also believed that some institutional structures are more susceptible to effective policy making than others (Howlett & Ramesh, 1998:51).

In South Africa, we distinguish between public and private institutions. Currently, the following public institutions exist:

- legislative institutions;
- governmental or political executive institutions;
- administrative institutions;
- judicial institutions; and
- redress institutions.

South Africa has three levels of legislative institutions at the national, provincial and municipal level respectively. On each of these levels, the legislature is the directive institution. This means that the legislature will determine what goods and services are to be provided for the people. The legislatures will thus determine the conduct of the people in many ways. The Cabinet is the executive institution in South Africa and usually performs its activities in secret. However, the Cabinet can be held accountable by the legislature. Administrative institutions are those that have direct contact with the public and are subordinate to the legislative and executive institutions. Judicial institutions are those institutions dealing with disputes between members of the public and public institutions. Redress institutions exist to perform judicial and/or advisory functions to promote the interests of the individual, as well as the general interest. Examples of these are the Human Rights Commission and Public Protectors (Cloete,

1996:34-39). The former promotes respect for human rights and investigates complaints about human rights violations, while the Public Protector investigates complaints when a complainant believes that he or she has been prejudiced due to government misadministration and improper conduct.⁴ Private institutions refer to political parties, interest or pressure groups and civic movements and actions (Cloete, 1996:47).

2.2.3.2. Actors

Policy actors are often divided into several categories. According to Howlett & Ramesh, they are divided into five different categories. These are: elected officials, appointed officials, interest groups, research organisations, and the mass media. The first two are members from within the state while the other three are made up of various groups in society. Together they constitute the main role players in policy-making (Howlett & Ramesh, 1998:52).

(a) Elected officials

Elected officials consist of members of both the executive and the legislature. The former, which is known as the cabinet in South Africa, is probably the most influential role player in the policy process. They are responsible for implementing national legislation, the initiation and the preparation of legislation (“The Structures and Roles of Government in Making Policy and Laws”, 2000:2). In addition, the executive also have access to a vast range of resources such as control over information, access to the mass media, as well as a vast range of financial, personnel and constitutional resources. The legislature operates on a less influential scale in terms of making policies. They are responsible for holding government accountable to the rest of the public. They are, however, important, given that they are often considered as the platform from which social problems are highlighted and an attempt to address them is demanded. They may also highlight problems regarding the implementation of policies. Committees that review proposed legislation are formed

⁴ See more about the role of the Public Protector in Cloete, 1991:48.

in some legislatures and often have the required expertise to deal effectively with policy issues (Howlett & Ramesh, 1998:54). In South Africa, members of the Cabinet usually are elected political office bearers each of whom has a ministerial portfolio for certain governmental functions (Booyesen & Erasmus, 1998:134). The relevant governmental department in this case is the Department of Health as tobacco control has an impact on health.

In South Africa, portfolio committees consisting of delegates from various political parties, deals with policy and related issues and performs the above-mentioned task. The Portfolio Committee on Health is a formal section of and accountable to the South African Parliament. It consists of members of the National Assembly drawn from all the political parties represented in Parliament (Tshabalalo, 1995:24). The National Assembly therefore consists of 26 portfolio committees, one for each government department (“The Structures and Roles of Government in Making Policy and Laws”, 2000:2). The Portfolio committee on Health was established a short while after the country’s first democratic Parliament was elected. Although the Committee does not form part of the Health Department, it seeks to work in collaboration with departmental officials, where possible. The Portfolio’s main responsibility is to scrutinize all health legislation coming from the Department and it also plays the role of “watchdog” by being specifically appointed to analyse health legislation and other related matters.

Another essential role that the Committee fulfils is that it provides an access point for public and professional concerns about health, thereby seeking to strengthen the interaction between parliamentary institutions and the public (Tshabalalo, 1995:24). In general, Parliament plays an indirect role in the policy process, since the formulation and implementation of policies take part in relatively closed policy communities of government departments and interest groups (Hogwood & Gunn, 1984:53).

(b) Appointed officials

Appointed officials, public or civil servants as they are often called, assist the executive with their duties. They consist of individuals who are experts and have the time to deal sufficiently with policy issues. These officials usually comprise of a range of organizations, each with their own goals, interests and principles of conduct. It is true that they often play a key part in the policy process (Howlett & Ramesh, 1998:56). In South Africa, appointed officials are called public servants and cannot be replaced after a change of government, since most of them are trained to do a certain job and have the necessary skills and qualifications to perform their duties (Booyesen & Erasmus, 1998: 134).

(c) Interest groups

Interest groups, more often than not, play a major role in the making of policies. They are often valued for their knowledge; some of which is not available to others. Since policy involves a highly information based practice, it is understandable that those with knowledge of a particular subject will be valued. They often have relatively good relationships with government as the latter often make use of their information. They may, therefore, to a certain extent, influence the policy process considerably (Howlett & Ramesh, 1998:57). Interest groups often serve to make public institutions accountable. They may also prevent the unjustifiable neglect or favouring of certain interests by stressing numerous individual interests.

Interest groups are also useful in the sense that they make valuable data available to policy makers and other administrative institutions, which deliver services that will address the needs and expectations of citizens (Cloete, 1996:46). Citizens can therefore contribute to the legislative process by bringing their needs to the attention of the legislators by means of petitions and submissions by interest groups (Cloete, 1996:70; Booyesen & Erasmus, 1998:284). In South Africa, a wide range of interests groups has been established around tobacco as a theme, for example, the Tobacco Action Group (TAG) and the Cape Town No Tobacco Forum (Cloete, 1996:46).

In large parts of the Third World there are a growing number of groups, which are often referred to as Non-Governmental Organisations (NGOs), which are not recognized as interest groups, but may sometimes have a very visible influence on policy (Walt, 1994:115). NGOs are usually voluntary organisations and part of the private sector. It could be established in terms of formal agreements by which the goals and structures of the association, as well as the conduct it expects from his members, are determined (Cloete, 1996:4).

(d) Research Organisations

Research organizations comprise of researchers working at universities and think tanks. The former conduct research in order to be able to participate in the policy debate while think tanks are independent organisations focused on intensive research with which they strive to influence public policy. Their research is aimed at providing realistic solutions that can be implemented. It also is not uncommon for researchers at universities to be sponsored by think tanks in order to do research for them. Research organisations thus influence the policy making process in various ways (Howlett & Ramesh, 1998:58). In South Africa, there is a range of research organisations that provide information to the public about governmental and democratic processes. Examples of these types of organisations is the Institute for a Democratic Alternative in South Africa (Idasa) and the Parliamentary Monitoring Group (PMG).

(e) Mass Media

The role of the mass media are often said to be significant in some ways and not in others. There is widespread agreement about the fact that they provide crucial links between government and the public. The mass media are important to the policy process since they are often responsible for highlighting social problems that need resolutions. They also are often able to influence the way in which people see problems and other policy issues. They do, therefore, play a major part in the policy process (Howlett & Ramesh, 1998:59). The media have a tremendous effect on voter behaviour (Heinemann et al, 1990:104). Therefore they have an influence on how policies are portrayed, which will, in turn, affect voters' choice of political parties.

The independent media in South Africa plays a vital role in making the public support new policies.

From the above it is clear that the Portfolio Committee on Health played a crucial role in the legislative process of the new tobacco law, as they had to decide what the law would ultimately entail. Research organisations supply scientific evidence to both sides of the tobacco debate. The mass media, on the other hand contributed in two ways, by creating public awareness of the tobacco legislation and the debate surrounding it. Secondly, it can be regarded as an interest group since the regulations of the new tobacco act will, indirectly, have an impact on the printing and advertising industry. Interest groups from different sectors in society (See Graph 1, p.51) were involved at certain stages in the policy process.

2.3 Tobacco Regulation and Smoking as a policy problem

2.3.1 The Development of tobacco regulation in South Africa

Universally, smoking has become the most health-injurious habit practised by large numbers of people. It is also the cause of numberless ailments and diseases of which many are fatal. A substantial amount is spent on the treatment and hospitalisation of those suffering from the consequences of smoking. Therefore, the government is determined to continue with its efforts to limit smoking in public places and to protect smokers from their addiction by imposing reductions in the tar content of cigarettes is to be applauded (*The Citizen*, Dec 4, 1999: 4; *Cape Times*, Dec 6, 1999:12).

As mentioned earlier, tobacco legislation can be traced back to as early as the 1970s when local authorities started banning smoking in various public places. After that, a number of events occurred. Among these events was the formation of a specific group of anti-tobacco activists in 1991, namely the Tobacco Action Group (TAG). This group was made up of the National Council Against Smoking, the Cancer Association of South Africa and the Heart Foundation of Southern Africa. They were most successful in their attempts to increase awareness of the necessity of tobacco control. The only problem seemed to have been the fact that this awareness was

limited to certain sections of society. The coalition became larger as more groups decided to join them. In 1992 on the World No Tobacco Day, the former president of the African National Congress (ANC), Nelson Mandela, issued a statement by which he gave his support to anti-tobacco movements. The development of a comprehensive Tobacco Control Act previously, was not possible given that the then National Party government had been strongly lobbied by the tobacco industry. In light of this, it became clear to tobacco activists that they had to change their strategy, which they did, by looking at what other countries were doing with regard to the matter (Reddy, 1999:3).

In 1992, TAG launched a major campaign to ensure the successful passage of the draft bill, which provided for the control and regulation of the use and advertising of tobacco products, through parliament. The draft legislation had given local authorities the right to ban or limit smoking in public places and to ban the advertising of tobacco (Salus, Sep: 1992). By 1995, researchers in South Africa were convinced that urgent measures needed to be taken to prevent future tobacco-related deaths. From a study conducted by the Medical Research Council, it is clear that there was large public support for tougher health-promoting measures against tobacco use and promotion (SA Family Practice, 1995:572). Three researchers from the MRC and Human Sciences Research Council, namely Priscilla Reddy, Jonathan Levin and Anna Meyer-Weitz, have completed a study on perceptions of South Africa's first tobacco control legislation which was introduced in 1993. The study's findings concluded that an average of 67% of respondents supported government measures to ban tobacco advertising and regulate smoking in public places. A third of the respondents backed a ban on smoking in public places (ANC Daily News Briefing, November 7, 1997). Another nation-wide survey conducted by *Research Surveys* also showed that the majority of South Africans supported the former Health Minister's anti-smoking bill (*The Star*, Nov 3, 1998:9; Altenroxel, 2000:p.3)(See also Mzolo, 1999:7).

2.3.2 Health risks associated with the use of tobacco products

According to Salojee (1994:2), it has been proven through more than 50 000 scientific studies that smoking is the greatest cause of preventable death in the world. The

World Health Organisation estimates that about three million smokers are killed world-wide through the use of tobacco each year. Smoking has thus become the leading preventable cause of death in the developed countries and is assumed to becoming an even greater cause of death in developing countries in terms of morbidity and mortality. In 1994, it was projected that seven million people in the Third World would die from smoking related conditions within the next two to three decades (Salus, 1994:8).

Tobacco use in South Africa supports an ever-increasing health problem. In 1990, 25 000 tobacco related deaths were reported annually, seven million South Africans smoked⁵ and the economic costs of tobacco in terms of lost productivity due to premature deaths and hospitalisation exceeded R2.5 billion in 1994. The direct cost of hospitalisation and outpatient treatment for smoking related diseases in the public sector was estimated at approximately R1, 5 billion per year⁶.

Studies on the status of smoking in South Africa have revealed that one in three adults smoke, and that the incidence of smoking is increasing. It has also been found that 52% of men and 17% of women in South Africa smoke (SA Family Practice, 1995:572). A Medical Research Council report has estimated that there is a small increased risk of lung cancer and heart disease associated with passive smoking (People Dynamics, 1993:1; Salus, 1991:22; Schaler, 1999:258). Age-standardised lung cancer death rates for 45- to 75- year old South Africans for the period from 1968 to 1988 show a 100% increase in lung cancer for coloured men and 300% increase among coloured women (Reddy, 1999:2).

There is consensus among the World Health Organisation, World Medical Association and every other independent medical organisation that smoking causes

⁵ Statistics provided by the National Health Promotion Research and Development Office, MRC Cape Town (September 21, 1999)

⁶ Figures released by the Human Sciences Research Council, Pretoria (June 20, 1997)

cancer, heart attacks and lung disease and kills unborn babies (Salojee, 1994:2; *The Citizen*; Dec 4; 1999:4).

Through extensive research, it has become evident that non-smokers who inhale cigarette smoke, through the process known as passive smoking, are also at risk of contracting certain tobacco-related diseases. Six expert committees, including the WHO and the US Surgeon General, which reviewed the scientific evidence, have all concluded that passive smoking is harmful to the health of non-smokers (Salojee, 1994:3).

The next section of this chapter gives an overview of the policy discussed in this particular study, namely the Tobacco Products Control Amendment Act of 1999. Seeing that it is an amendment of the Tobacco Products Control Act of 1994, I will also look at how these two acts differ from each other as well, as why there was a need for a tougher tobacco regulation act in South Africa.

2.3.3 Tobacco Legislation in South Africa: The Tobacco Products Control Act of 1993

The Tobacco Products Control Act was passed in 1993 and approved by all political parties. The act was intended to limit the use of tobacco products to a certain extent, but was subject to serious limitations. It became evident that more was needed to be done in terms of tobacco regulation, and the Tobacco Control Act served as a document which could serve as a basis for the development of tougher tobacco control measures (Reddy, 1999:3).

The Tobacco Products Control Act gave the Minister of Health the right to issue regulations to prohibit the smoking of tobacco products in public places, or stipulate conditions for smoking in public places, after consultation with the Council for the Co-ordination of Local Government Affairs, and by notice in the *Government Gazette*. The Minister may grant these powers to the local authority, at the request of any local authority, except in respect of a public place which is owned by the state,

occupied by state employees, or which the Minister may determine by notice in the *Gazette*. Local authority regulations must be issued by notice in the official gazette. A local authority's exercise of power may be subject to conditions prescribed by the Minister (Loots, 1993:369).

The Tobacco Products Control Act consists of provisions for the restriction of smoking in public places, for regulating the sale and advertising of tobacco products in certain respects, and for specifying what is to be reflected on packages, as well as provisions for other matters related to the use of tobacco. The Act also prohibits the advertising and sale of any tobacco product, unless the advertisement contains the prescribed warning of the danger that tobacco products may hold for the health of smokers as well as non-smokers. The Tobacco Control Act 83 of 1993 came into effect on 1 February 1994. The Act dealt mainly with the following (Loots, 1993:36):

- It made the regulation of smoking in public places possible which means that the local authorities could apply this law;
- it forbade the sale of tobacco to minors under the age of 16;
- it regulated tobacco advertising in certain respects such as labelling;
- it prescribed health warnings and quantities of hazardous constituents on advertisements and packaging;
- it required information to be provided with regard to the advertising and especially in terms of the packaging of tobacco products;
- regulations in terms of authoritative allocations;
- offences and penalties;
- the official title and commencement of the Act.

South Africa needed a more inclusive tobacco control programme, as the Tobacco Control Act lacked several important elements, which were needed in order to make tobacco regulation more effective. Firstly, the act was not comprehensive enough. Secondly, smoking in public places was not banned completely and the act was not specific in the definition of "public places" (Reddy, 1999:3). The Tobacco Control

Act did not define public places and no reference was made to the workplace (Salus, 1994:11). Another major shortcoming of the Tobacco Control Act was the fact that its definition of advertising did not include radio advertising, which was a quite significant medium of advertising, especially among the poorer sectors of society. Issues such as mechanisms of enforcement, especially with regard to the sale of tobacco to children were not adequately addressed (Reddy, 1999:3). The Tobacco Control Act did make provision for health warnings on cigarette packets, but this was not effective. Health warnings should be recurrent, attention drawing and capable of being read (Salus, 1994:11). The size of health warnings is yet another aspect with which the Tobacco Control Act failed to deal with (Reddy, 1999:2).

It also became apparent that the tobacco industry did not comply with the regulations of the Tobacco Control Act's regulations. The tobacco industry continued to violate the recommended size of health warnings by putting tobacco advertisements on billboards in such a manner that health warnings could hardly be seen. This happened in spite of the fact that it became compulsory for tobacco products and advertising to be labelled with health warnings. Cigarettes were also relatively freely available in shopping malls, concerts, carnivals, etc, thereby making it easily accessible for children. Tobacco companies have also displayed aggressive marketing techniques by sponsoring cultural and sporting events (Reddy, 1999:3).

2.3.4 The Tobacco Products Control Amendment Act of 1999

In 1996, government made known its intentions to enforce tougher legislation on the use of tobacco products (Koenderman, 1998:100). Former Minister of Health, Nkosazana Zuma, and the tobacco industry first locked horns in the same year, about her initiative to have compulsory health warnings on cigarette packets and advertisements. She was supported by research conducted by the Economics of Tobacco Control Project undertaken at the University of Cape Town's school of economics (Bisseker, 1998:26).

In 1998, Zuma announced that South Africa was on the brink of joining countries which had already taken strong legislative steps against tobacco, as legislation to ban

tobacco advertising and limit smoking in public had passed its first parliamentary hurdle⁷ in October of the same year. The introduction of the Tobacco Products Control Amendment Act (TPCAA) should therefore be regarded as an attempt to address the weaknesses of the Tobacco Control Act, as well as other issues surrounding the use of tobacco products. It is also an attempt to bring South Africa in line with other developed countries, which have already enforced strict legislation with regard to the use of tobacco products and other related matters (Reddy, 1999; Strachan, 2000:13).

It should be said that the Tobacco Products Control Amendment Bill has been considered a very debatable issue since its introduction in 1998 by Minister of Health, Nkolasana Zuma, who, herself, is a strong supporter of the anti-smoking lobby. Zuma said that the Bill would protect children and non-smokers⁸. After the 1999 national election, Zuma's successor, Health Minister, Manto Tshabalala-Msimang, declared that she was going ahead with the legislative agenda against the tobacco lobby (Keenan, 1999:10). The World Health Organisation (WHO) and the World Bank have recommended a ban on tobacco advertising and promotion as such a measure makes sense in both health and economic terms, the main reason being that advertising increases the sales and consumption of tobacco (Strachan, 1999:13). Part of the reason why it is such a disputed issue is the fact that its stipulations have given rise to discontent among pro-tobacco lobbyists and other organisations, which would be affected by the ban on tobacco advertising and promotion. The Tobacco Products Control Amendment Act was suggested as a measure to discourage the use, promotion and advertising of tobacco products in order to reduce tobacco related diseases and death, as well as to ensure a healthy environment for citizens of South Africa. The aim of the Tobacco Products Control Amendment Act is to give full effect to section 24(a) of the South African constitution. This section specifies that:

⁷ See "Anti-tobacco legislation passes first hurdle" (1998) at <<http://www.woza.co.za/news/oct 98>>(28 July 2000)

⁸ See "Lancet: Tough anti-tobacco legislation moves forward in South Africa" at <<http://findarticles.com>>(19 July 2000)

“Everyone has the right to an environment that is not, harmful to their health or well-being”.

The Tobacco Products Control Amendment Act of 1999 comprises several restrictions and provisions for amending the Tobacco Products Control Act of 1993. The Act amends the Tobacco Control Act by:

- making provision for the prohibition of advertising and promotion of tobacco products;
- providing for the prohibition of advertising and promotion of tobacco products with regard to sponsored events;
- prohibiting the free distribution of tobacco products and the receipt of gifts or cash prizes in contests, lotteries or games to or by the purchaser of a tobacco product in consideration of such purchase;
- providing for the prescription of maximum yields of tar, nicotine and other constituents in tobacco products;
- making provision for the increase in fines; and providing for matters connected therewith;
- controlling smoking of tobacco products;
- prohibiting the sale of tobacco products to persons under the age of 16 years;
- stipulating regulations in terms of authoritative allocations;
- listing offences and penalties;
- naming the official title and dates of commencement of the Act;

In contrast to the 1993 Act, the TPCAA is a far more stringent requirement than the previous one. It consists of detailed definitions of what is meant by the term “public places”. In terms of advertising, the new Act also places severe limitations on the media, tobacco industry and all retail outlets and places where tobacco products are being sold (*Cape Times*, 6 Dec 1999:12).

2.4 The role of legislation in addressing public problems

Cigarette smoking and the dangers thereof, both to the smoker and the non-smoker, has caused it to be seen as a social problem, as well as a policy issue. It can be seen as a policy problem because attempts to solve a complex issue such as smoking in public places would require action on behalf of government. It is therefore, considered to be the responsibility of the incumbent regime to protect its citizens from possible threats to their health. Any attempt or action of government to address this problem would then occur in the form of legislation, of which the purpose would be to provide adequate solutions for the problem in question. Anti-smoking programmes need three essential components that are often linked. These are:

- Legislation
- Information and Education
- Economic incentives

Legislation is a crucial element of any national anti-smoking strategy. It is an indicator of the government's commitment to protect the health of its citizens. Legislation has been proven to be more effective than voluntary agreements with the tobacco industry (Salus, 1994:8). According to Heidenheimer *et al*, in Parsons (1995:xv), a policy problem requires government to take action or not (Parsons, 1995: xv). It can therefore be said that the issue of smoking or rather, the use of tobacco products, can be firmly placed within the area of public policy.

2.5 Concluding Remarks

The Tobacco Products Control Amendment Act of 1999 remains controversial. Although sections of the legislation are already in effect, there was a general dissatisfaction with the way government handled the process⁹. The purpose of the following chapter is to address these claims, especially in terms of the consultation processes inherent in policy-making. It will also include an overview of statements

⁹ Several role players complained about the policy process. These statements can be found under "Submissions handed in to Portfolio committee"(section 3.4 of the next chapter).

and submissions that were made by various policy actors, such as interest groups, individuals and NGOs etc. to make government aware of their concerns about the proposed tobacco bill before the latter actually becomes a written and binding law. Chapter three will thus give an overview of the phases through which the tobacco legislation has passed including issues such as what the tobacco policy debate is actually about, how the bill became an act and who the major policy actors were.

CHAPTER THREE: THE PROCESS OF POLICY FORMULATION AND PUBLIC PARTICIPATION

3.1 Introduction

The process by which a bill becomes an act is often seen as a complex procedure in which the public has no part. It is therefore essential that the public should be aware of the policy and law making process in order to be able to participate in the political affairs of a country. The tenets of democracy thus require that citizens should be involved in decisions about actions regarding public affairs. Governments of democratic states should therefore provide certain structures that would enable citizens to take part in decision-making about public affairs (Cloete, 1996:8). The previous government excluded the views of the majority of the population from decision-making processes. It is the present government's responsibility to ensure that policy processes are transparent, and to allow for a diversity of views to be heard before deciding to pass legislation. This chapter aims to give an overview of policy making in South Africa and of the process of consultation accompanying a participatory democracy.

A democratic state should exist to serve the interest of its citizens in order to provide and maintain the general welfare of that particular state. Since citizens' interests are at stake, it is important that they should take part in activities that could promote their interests. It is difficult to take part in the political process; individuals and citizens have, therefore, formed political parties and interest groups that make collective inputs into the policy process. In a democracy it is also important that citizens should monitor the performance of the legislators by holding them accountable for the outcome of a given legislation (Cloete, 1996:32-35; Calland, 1999:63). Many governments have experimented with promoting participation in the policy process. The intention of these experiments is to prevent challenges to policies on the grounds of a lack of consultation and to promote the development of social movements of political actors (Calland, 1999:62). The usefulness of public inputs has been questioned as public hearings are prone to legitimizing conclusions already reached by the government, rather than altering the contents of legislation on the basis of input

from other spheres of the policy process e.g. interest groups (Howlett & Ramesh, 1995:173).

It is therefore imperative that there should be certain institutions that enable citizens to take part in the policy-making process. In most countries, there are certain parliamentary bodies, which are responsible for making the laws by which a country is governed. These bodies often have sub-committees that assist them in the rendering of their duties. The next section gives a brief overview of the legislative institutions in South Africa.

3.2 The role of Legislative institutions in policymaking

There are three levels of legislative institutions in South Africa. Parliament is the national legislature, while there also are a provincial and municipal legislatures. On every level, the legislatures will be the directive institutions. This means that the legislature will determine the nature and extent of services and goods to be provided to the people (Cloete, 1996:35). According to Bhabha, legislative institutions also have far more opportunities than constraints in transforming South Africa into a democracy within the general context of the Reconstruction and Development Plan (Kotzé, 1996:135). The legislature has a powerful contribution to make to the public policy-making process (See Calland in Kotzé, 1996:125). In Chapter 4, section 44(1) of Act 108 of 1996, it is said that the national legislative authority has the power to:

- amend the Constitution;
- pass legislation, including laws where both national and provincial government have responsibility, including health, education, housing, welfare and transport (see schedule 4 of the Constitution);
- delegate its legislative power, except the power to amend the Constitution;
- pass laws in areas of policy where provinces have exclusive responsibility, when this is necessary to:
 - maintain national security;
 - maintain economic unity;

- maintain essential standards;
- establish minimum standards for the rendering of services;
- prevent unreasonable action by a province that is prejudicial to the interests of another province or to the country as a whole.

While it is the executive branch's duty to develop policy and laws, it is the role of the legislature to examine alternative visions of the public interest. This should be done by bearing in mind the interests and objectives of the constituencies and interest groups (Kotzé, 1996:125).

3.3 The Policy-Making Process in the South African Parliament

The executive branch of government consists of several departments that carry out everyday work. Each department has its duties and responsibilities laid out within a legal and policy framework. These duties include the drafting of policy. The executive has no obligation to consult before setting policy, but it does so in reality by:

- consulting with interest groups and experts in a particular field before drawing up a bill, which is then released as a draft bill or tabled;
- engaging in the Green Paper, White Paper and public consultation processes before drafting a bill.

A Green Paper is generally a draft policy document which presents government's preliminary thinking to the public and all interested stakeholders. A Green Paper suggests that government has not made a final decision regarding a certain piece of legislation yet. After submissions from the public and consultation with the relevant stakeholders, the government will revise or elaborate on the Green Paper, if necessary ("The Legislative Process", 2000:1; "South African Legislation: The Legislative Process", 2000:2).

A White Paper, on the other hand, follows after the Green Paper and can be seen as a final policy document, which is approved by Cabinet. A White Paper is therefore the revised version of the Green Paper and is, in fact, a statement of intent by government. It is a detailed policy plan, which forms the basis of legislation (Booyesen

& Erasmus, 1998:42). Opportunities for public participation in the pre-bill policy formulation stage are often created by the Green and White Paper processes. (“The Policy and Law Making Process”, 2000:1). It is important, however, to bear in mind that government does not always have to draft a green and a white paper. Government may sometimes draft a policy document, and then leap from that to a draft bill. In some cases, government may simply publish or announce a new policy. Government may choose what process to follow in each case (“The Structures and Role of Government in Making Policy and Laws”, 2000:2).

The process of making a new law may be identified by the production of a series of written documents. This may include position papers and discussion documents within political parties or interest organizations. Policy documents can be found in various forms ranging from a discussion document to green paper, followed by a white paper, draft legislation and then the final legislation. In Parliament, policy documents may range from legislative proposals, to draft legislation, to becoming a bill when tabled in Parliament. After discussion and voting by the various institutions involved in policy making, the Bill becomes an Act after being announced in the *Government Gazette* (Booyesen & Erasmus, 1998:240).

A bill is proposed legislation that has been introduced in Parliament. It can also be seen as the draft version of a law or an Act. Parliament can react to a bill in three ways. They can either pass or reject the bill or choose to amend an existing Act. All bills must be considered and voted on by both the National Assembly as well as the National Council of Provinces. After a bill is passed by them, whether amended or not, the bill is sent to the President for his assent and signature and only then it becomes law. Once a bill becomes law it is called an Act of Parliament (“The Legislative Process”, 2000:2; “The Structures and Roles of Government in Making Policy and Laws”, 2000:1).

The three spheres of government have the power to make laws. At the national level it is Parliament’s responsibility to pass laws and have oversight over their implementation. On the provincial level, the nine provincial legislatures perform this function, while different forms of local councils perform this duty on a local level.

Bills can be drafted by Ministers, individual MPs as well as parliamentary committees (Booyesen & Erasmus, 1998:43). Ministers usually draft bills, since individual MPs and parliamentary committees experience great difficulty in doing so, because of the lack of expertise. The Ministers may also assign a task team of the relevant department to draft a particular bill. Private individuals or organizations may also draft bills, but a member of the legislative body should present it. The legislative body comprises various committees consisting of members of the different parties represented in Parliament. These committees debate bills relevant to their area of interest (“The Policy and Law making process”, 2000:3 and Booyesen & Erasmus, 1998:44). These committees often ask for experts in the field and public submissions in order to refine it. They may also, after hearing submissions, suggest amendments to bills. It is possible for a bill to pass to and fro between the legislative body and its committees before being accepted. Usually voting on bills takes place according to party affiliation. Discussions of the bills often take place in the party caucuses, which are not open to the public (“The Policy and Law making process”, 2000:3; “South African Legislation: The Legislative Process”, 2000:3; “The Legislative Process”, 2000:2).

Usually new Bills that are introduced in Parliament follow a certain procedure that starts with a bill’s introduction and ends with the President signing it into an Act. The Bill is then published in the Government Gazette, together with the date when it starts being an official and binding law of the country (See Table 1 below).

TABLE 1: An illustration of the South African policy making process

Minister, MPs or Parliamentary committees introduces policy
Cabinet discusses and adopts draft policy
Proposals in the form of a Green Paper is tabled by the Minister in Parliament
The Green Paper is processed by Parliament through discussion and public hearings by a committee*
The relevant department makes changes or rewrites the bill

The rewritten document is processed and adopted by Parliament as a Policy in the form of the White Paper
The White Paper is tabled by the Minister in Parliament
Parliament considers the White Paper through committees and by holding public hearings*
Development of draft legislation by Department based on processing of the White Paper
The Minister presents it as draft legislation to Cabinet
Draft legislation is processed and adopted by Cabinet
Draft legislation is tabled as a Bill by the Minister
Bill is processed by committees and presented to the Houses of Parliament*
Houses vote on Bill and, if both support it, the legislation is adopted and is awarded an Act number
The President signs it and it becomes an Act of Parliament
Printed in the Government Gazette as a law of the Country with the date of inception

* Opportunity for Public Participation

3.3.1 The policy process of the Tobacco Products Control Amendment Bill

The procedure¹⁰ through which the Tobacco Bill passed was as follows:

- The Bill was made available during July 1998 and public comment was invited by the 14 August 1998.
- By the 14th of August, Cabinet had already approved the Amended Bill.
- The original date of 14 August was extended to 21 August 1998.
- On 18 August 1998, the Health Department briefed the NCOP Select Committee on Social Services on the Bill.

¹⁰ The process was monitored by the Tobacco Institute of South Africa during 1998, when the Bill was formally introduced on August 31, 1998.

- The Bill was introduced in the National Assembly on 31 August 1998 and referred to the Joint Tagging Mechanism for classification in terms of Joint Rule 107.
- On 8 September 1998, a correction in the “Announcements, Tablings and Committee Reports” of Parliament stated that the Bill was in fact introduced in the National Council of Provinces by the relevant Select Committee (See Appendix B).
- On 9 September 1998 the Joint Tagging Mechanism classified the Tobacco Products Control Amendment Bill as a sec 76(2) Bill.
- On 15 September 1998, the Select Committee on Social Services discussed the Bill. A briefing was given by Gonda Perez, sections of the Bill were discussed and administrative arrangements finalized.
- On 17 September 1998, the Social Select Committee held further discussions on the Bill and heard input on the Bill.
- The Bill went to the Provinces in the week of 21-29 September 1998. Provinces had up to 29 September 1998 to conduct public hearings.
- Mandates from the provinces were handed in at the Social Services Committee on 30 September 1998.
- On 7 October 1998 the full NCOP voted on the Bill. Seven out of nine provinces supported the Bill. KwaZulu-Natal and the Western Cape opposed the Bill. Interesting enough, the North-West and Eastern Cape voted in favour of the Bill whereas their Legislatures had actually decided to oppose and abstain respectively. It appears, however, that these provinces did not change their positions and that their representatives had in fact presented false mandates in Cape Town on October 7, 1998.
- The Portfolio Committee on Health went on to request permission to meet during Parliamentary recess. It was granted.
- On 19 and 20 October 1998, public hearings of the Portfolio Committee were held.
- On the evening of 4 November 1998, the Bill was passed in the National Assembly.
- On 9 November 1998, the Bill was discussed at the Select Committee on Social Services.
- On 21 October 1998, the Health Portfolio Committee held a discussion on the Tobacco Products Control Amendment Bill and proposed amendment documents from the opposition parties (DP, NP, IFP and PAC) were handed out.
- On 12 November 1998, the Bill was tabled at the meeting of the NCOP, passed and handed to the President for assent.
- On 22 January, the Bill was sent back to the National Assembly by the former President Nelson Mandela. It appeared that the President had some reservations about the constitutionality of the Bill and “unintended consequences” stated in the Bill.
- On 17 February 1999, the Health Portfolio Committee gathered to reconsider the Bill and to discuss the President’s reservations about it.

- On 22 and 23 February, the Portfolio Committee and the Social Services Select Committee had a Joint Meeting in which the Tobacco Amendment Bill was reconsidered.
- On 24 February 1999, the portfolio Committee on Health and the Social Select Services voted formally on the Tobacco Products Control Amendment Bill. The amendments agreed to are those in [W 117H—98]. See appendix D.
- On 3 December 1999 the proposed anti-tobacco regulations were published in the Government Gazette with 3 March as deadline for public comment.
- On 3 March, the Portfolio Committee had a Second Reading Debate of the Tobacco Products Control Amendment Bill.
- On 14 April 1999 the President signed the Bill into an Act.
- On 24 April 1999 the Tobacco Products Control Amendment Act appeared in the *Government Gazette* (See Appendix D). Inception dates for the different regulations were to be announced in a later publication of the *Gazette*.

Clearly, the Amendment Bill went through a process of extensive discussion by the different committees in Parliament, but it is clear that opportunities for public participation were minimal. In fact, if one should compare the process of the Tobacco Bill with those of the normal procedure (See Table 1), it is clear that the Amendment Bill displayed several irregularities with regard to its policy process. The fact that it had not been introduced in the National Assembly as the initial report claimed, and the fact that it was simply corrected by stating that it was introduced in the National Council of Provinces, shows that the procedure was seriously flawed. Another flaw in the process is that there was no Green Paper or White Paper in this particular process, the significance thereof being that these documents, allow opportunities for public input. The draft legislation was merely introduced by the Department of Health. These incidents indicate that the relevant Department must have been anxious to process the Tobacco Bill. Although it is an Amendment Bill, certain regulations are simply too extensive and have such serious repercussions that the issue should have been dealt with careful consideration.

3.3.2 Public participation and Consultation

Governments of democracies should endeavour to enhance public participation through their particular ruling policy. Various studies have indicated that there is a worldwide consensus about the strong connection between democracy and public participation (Roelfs and Liebenberg, 1999:3).

Political public participation can be regarded as a two-way flow of information between the legislative bodies and the public during the policy cycle. Public participation in politics is considered an important aspect of a democracy since it is a way of obtaining information about the desirability and attitudes of certain policies. According to Bryson in Brynard, (1999:40), this information is essential for policy makers to enable them to make informed and implemental policies. Political participation thus serves as a means to inform and involve the public and relevant policy actors (Brynard, 1999:41).

The Reconstruction and Development Plan that has been drawn up by the new South African Government states that all the citizens of this country should have access to power and the right to exercise it. This means that citizens should be able to participate meaningfully in the decision-making processes of government in order for democracy to succeed (Calland, 1999:61). Section 59 of the South African Constitution deals with public access to and involvement in the activities of the National Assembly. It also states that this body must “facilitate public involvement in the legislative and other processes of the Assembly and its committees” and must “conduct its business in an open manner”. Section 57 requires the National Assembly to make rules concerning its business, with due regard for representative and participatory democracy, accountability, transparency, and public involvement (Calland, 1999:63). Public participation can be regarded as having an instrumental value since it enhances policy making as government’s decisions now are often being justified by its citizenry (Boaden, 1982:170). Ordinary citizens thus have the opportunity to take part in the making and amending of bills in part because of the existence of the Open Democracy Bill (See Calland in Kotzé, 1996:130). The rights of citizens to participate in government’s decision- making processes cannot be practiced without certain obligations. The right to participate should be accompanied by the ability to respect and uphold the legislative and executive decisions made in the democratic process. Only then can public participation strengthen and democratize representative institutions (Calland, 1999:62).

3.2.3.1 Limitations to public participation

Although portfolio committees are now open and transparent, it often depends on the accessibility thereof, states Bhabha in Kotze (1999: 136). It appears that factors like poverty and education play a major role in inhibiting effective public participation given that many people are not aware of the right to participate in certain aspects of political decision-making processes. Under the previous government, disadvantaged groups had no official participation in decision-making processes of government. Presently, the problem appears to be one of inaccessibility, seeing that many people simply cannot afford the transport and other costs to attend public hearings. (Calland, 1999:65). Public participation is also limited by the fact that it often slows down the policy-making process, in the sense that policy makers have to consider a variety of viewpoints and engage in consultative meetings. It could provide policy makers with valuable information but often is time-consuming (Boaden, 1982:196-197). Although public participation can be seen as an essential element of democracy, it could cause public institutions to transfer their responsibility, especially in instances where problems are difficult to solve (Morrow, 1980:275). Finally, public participation could, in some cases, be undesirable as some interest groups may be more well-known and better organized; leading to an imbalance in the consideration of different viewpoints (Barber, 1983:197).

In South Africa, the formulation of policy takes place mainly within the ministry and the department (Kotzé, 1996:135). The policy process usually draws organized interests into a relationship with the official players through recognized processes of consultation (Colebatch, 1998:97). Once a policy issue has been turned into legislation, portfolio committees and those interest groups that have access to parliament, get the opportunity to comment on the particular legislation (Kotze, 1996:136). As soon as a proposed bill is published in the "*Government Gazette*", any individual has the right to make comments about the bill to the committee that is going to oversee the proposed piece of legislation. This counts especially for those interest groups that are going to be affected by the proposed legislation. In each area of policy, there exist a number of people who have an interest in that specific area and they are usually a relatively well-known group of individuals (Colebatch, 1998:97). More often than not, it is interest groups rather than individuals that respond to this

opportunity. The influence that these interest groups have on the decisions of portfolio committees is difficult to determine. It should be noted that these committees are under no obligation to accept proposals or recommendations from interest groups; especially if the committees did not call upon the interest group to state their views on the proposed legislation. If, however, the interest group was called upon, their suggestions will be given serious consideration. It is not a certainty that the views of interest groups will be reflected in the revision of legislation, even if their opinion on the matter is known. The inputs of interest groups are of great importance to the functioning of committees, as the former are able to inform the committee about the practical implications of proposed legislation as they are familiar with it and would also be affected by it (Bruce, 1990:25-26).

In those instances where policy formulation deals with a complex issue, which might have a multitude of far-reaching consequences, it is normally supported by alternative decisions that might be made, the impact of those decisions, and the institutions and groups affected. The above factors can all affect the final policy decision (House, 1982:169). One should, however, also bear in mind that modern democracies are characterized by selective participation in the determination of policy (Woll, 1974:15).

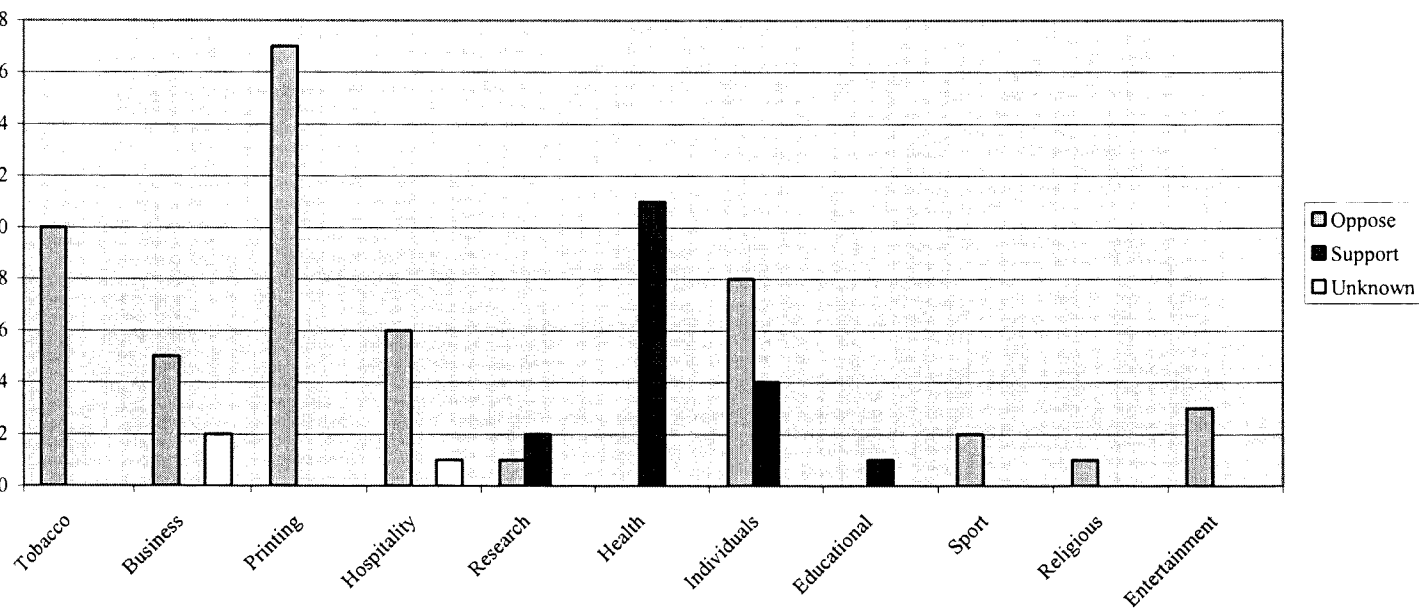
Hanekom mentions that an important aspect of public participation in the South African Parliament is the opportunity for the relevant stakeholders to express their views and at the same time attempt to influence policy makers when the latter makes decisions about policies that are going to affect them (Brynard, 1999:40). Conyers mentions that the more people are involved in the planning and preparation of a policy or programme, the more likely they are to be committed to that particular project (Brynard, 1999:41).

The next part of the chapter will give an overview of some of the views that have been expressed to the Portfolio Committee on Health by the major policy actors and relevant institutions. These submissions will serve to reveal why the debate around the Tobacco Amendment Act is such a contentious issue.

3.4 Submissions handed in to the Portfolio Committee on Health

Due to the purposes of this study, it is not possible to include the views of all the interest groups affected by the Tobacco Bill. A selection of the views of several interest groups that handed in submissions, as well as several other important stakeholders, were made. Views from the anti-tobacco lobby and the tobacco industries are mostly significant seen in light of this study. Since the particular policy deals with a health issue, the opinions of several medical and research institutions are also included. Views from other interest groups such as the print media, advertising agencies, business groups, individuals, as well as other parties that will be affected by the Tobacco Products Control Amendment Bill are also presented. It should be noted that the aim was to include a diverse range of opinions in order to avoid one-sided representations and to indicate the large number of industries and businesses that have reacted to the call for comment on the Bill. The number of oral presentations, and their views regarding the Tobacco Bill, are illustrated in Graph 1 below. The graph represents the overall views of all oral submissions that were handed in and not just

Graph 1: Number of submissions expressing support for and opposition to the draft tobacco bill



those expressed below.

3.4.1 The Tobacco Industry

(a) British American Tobacco¹¹ (South Africa)

Manufacturer and marketer of a wide range of cigarette and tobacco products in South Africa. BAT has conducted business in South Africa since 1905 and has over 800 employees worldwide. BAT is a small player in the South African market and is also a member of the Tobacco Institute of SA.

They started by saying that they have very serious concerns over the effect that a total ban on advertising and promotions will have on the competitiveness of the cigarette market in South Africa. They have therefore requested the portfolio committee to accept the hypothesis that an advertising ban will have little, if any, effect on consumption. In well-established product markets, advertising influences the brand a consumer buys rather than the product itself. The most significant effect of a total ban on advertising and promotions is the dramatic impact that it will have on competition between tobacco companies in South Africa. The ban will obviously restrict the ability of tobacco companies to promote one brand against another or to introduce new brands. In such a situation, the market stagnates, big brands remain big, small brands do not grow. According to BAT, cigarette prices will drop and cigarettes will become more accessible and could lead to an increase in under age smokers. It is also likely that products with a lower tar component and nicotine levels may become available. If tobacco advertising is outlawed, it will raise questions as to how the consumer will be made aware of the dangers of tobacco consumption. Consumers will thus remain ignorant. Retailers will also be ignorant of the lighter products and therefore unlikely to stock them. An advertising ban will not achieve the Minister's stated objective namely to reduce and prevent under age smoking. Jurgens also remarked that the company is disappointed at the treatment and lack of consultation with the industry and other stakeholders. BAT requested the withdrawal of this flawed Bill and a proper process of consultation to be embarked upon.

¹¹ Presentation made by S R D Jurgens, Managing Director of British American Tobacco on October 20, 1998.

(b) Rothmans International¹²

Rothmans is the largest player in the South African tobacco industry with an approximately 85% share in the market. It also sponsors various sporting events in South Africa.

Rothmans International was convinced that the process, through which the bill has gone, was dominated by the health issue. Consequently, supporting evidence was accepted without critical assessment; the most extreme measures available were adopted; and it seems as if there was a failure in determining and considering the full impact of the bill. The process was characterized by a lack of consultation with stakeholders other than the anti-tobacco lobby, a rejection of contradicting evidence as well as the refusal to consider less restrictive means. The bill was therefore flawed, despite it having good intentions. The section on the proposed ban on smoking in public places consists of several difficulties that will result in endless legal disputes, enforcement problems and civil disobedience if not reviewed. Since there seems to be so much conflicting evidence and substantive difficulties, we request the Committee to allow more time to study the evidence and the issues as well as to involve all stakeholders in drafting a well balanced tobacco control policy.

(c) Tobacco Institute of Southern Africa

TISA represents several role players directly involved in the tobacco industry. Members of the Tobacco Institute are farmers, co-operatives and manufacturers.

TISA acknowledged the right of the Government to introduce measures on tobacco control, but called for a more balanced approach and recognition of constitutional principles. The Institute is convinced that the drafting process of the Bill excluded participation by the tobacco industry as well as requests for consultation with the Minister. According to TISA, the proposed legislation showed a lack of clarity and legal certainty and there is an inconsistency between the content of the Bill and its stated objectives. TISA believes that the Bill will eventually result in several unintended consequences and therefore proposed a consultative process in order to

¹² Rothmans International merged with British American Tobacco on July 31, 1999. The amalgamation became official on August 1, 1999.

address the above concerns. The Institute believed that the process should have included all stakeholders and should have aimed at achieving a balanced tobacco policy.

3.4.2 Business and Marketing Institutions

(a) Afrikaanse Handelsinstituut

The AHI is an employer organization consisting mainly, but not exclusively, of Afrikaans speaking business people, involved in all sectors of the economy, except agriculture. Membership is open to every business supporting its mission and objectives.

The AHI acknowledges the right to legislate on tobacco control. However, it aimed to voice its concern about the impact of the bill on basic social and economic policy as well as its direct and indirect cost implications. The Institute believes that the tobacco bill will add to the current disrespect for the law since it criminalizes smoking in public that, up until now, was perfectly legal. They furthermore argued that the police, the criminal courts and the penitentiary system do not have the capacity to deal with this new law. AHI was convinced that the prescribed penalties are extremely severe and will contribute to wide disrespect of the law when it officially becomes law. AHI disagreed with the fact that the Minister, and not Parliament have the right to selectively enforce the proposed legislation. According to AHI, the Bill showed poor adoption of foreign systems, a lack of understanding of the consequences as well as bad governance. The AHI has attempted to make the Department of Health aware that the bill will have a negative effect on the economy, and especially on employment as it will be taking away R250 million per year from advertising agencies and the media and R40 million per year from sporting bodies, having a definite impact on economic activity as well as employment. AHI added that South Africa has a successful tobacco farming community which employs about 30 000 rural people. They stated that about 99% of the country's cigarettes are manufactured locally. Since the bill aimed to ban tobacco advertising, the possibility exists that the bill could move this economic activity to another, possibly SADC, country while not succeeding in lowering tobacco consumption. It could lead to cheap imports replacing most of the locally manufactured cigarettes, and result in huge job losses. The AHI considered the bill as

exceptional as the Department of Health has excluded it and other relevant stakeholders from the drafting process. The bill was also considered as “draconian”, possibly unconstitutional and opens the door for a witch-hunt against a legal industry. The AHI therefore insisted on a more balanced legislation that takes the business communities’ interests at heart and shows an understanding of the rule of law and good governance.

(b) The Association of Marketers

The ASOM represents the major marketers and advertisers in South Africa and has 188 members. Members are responsible for 82% of the total above-the-line advertising expenditure in South Africa.

The ASOM was gravely concerned about certain aspects of the Tobacco Products Control Amendment Act and urges the Minister to reconsider the Act. The Association was especially concerned about the far-reaching and negative effects on the marketing and advertising industry in the country and on the economy as a whole. The Constitution guarantees the right to freedom of speech that includes commercial speech and advertising. ASOM therefore supported the tenet that if a product is legal then it has the right to be promoted responsibly. In countries that have enacted the ban on advertising, it has not been demonstrated that there was a decline in youth smoking. Since the Act sought to ban all use of “tobacco trade marks” on any other product than tobacco, the Act will unlawfully remove intellectual property rights belonging to third parties who have no connection whatsoever with tobacco companies. Companies will go out of business, the media will suffer, smaller newspapers and magazines may have to close down, and jobs will be lost.

ASOM therefore questioned the legality of the Minister to “selectively” enforce sections of the Act which is seen as *ultra vires*. The Association had doubts about the wisdom of passing poorly drafted legislation, which is deemed necessary to start ‘amending’ by press release even before it becomes law. The ASOM urged the Minister to reconsider the Tobacco Draft Bill in light of the severe impact that it will have on the economy. In addition, the association requested the Minister to engage in a process of open consultation and co-operation with the ASOM and other

stakeholders in the communications industry to work towards a policy of balanced and reasonable tobacco control.

(d) Free Market Foundation

The Free Market Foundation is an independent policy research and education organization founded in 1975 to promote the principle of limited government, economic freedom and individual liberty.

The anti-smoking campaign has thus far been filled with pro-prohibition propaganda, falsifications and cover-ups and has ignored contradicting evidence. It is clear that the anti-smoking phenomenon is a modern aberration of the most dangerous kind. South African lawmakers should therefore take care not to legitimize policies that are not grounded on empirical evidence from both sides of the debate. Policies should be functional in the real world. The government should have abandoned the bill or delayed the process until all relevant issues were addressed satisfactorily. The evidence on behalf of the anti-tobacco movement is inconclusive and existing laws are adequate to protect the legitimate rights of non-smokers. The Bill should not have been implemented, whether revised or not. It is fundamentally flawed and contradicts the spirit of the Constitution. The Bill is particularly inappropriate for South Africa at a time when there are so many other more serious matters to attend to.

(e) Freedom of Commercial Speech Trust

The Freedom of Commercial Speech Trust was formed to defend the right to freedom of speech in the commercial sense, on behalf of the marketing and communication industries in South Africa. The Trust is an authorized body representing, inter alia, the Association of Marketers, the Association of Advertising Agencies, the Print Media Association, the Council of South African Banks, the National Consumer Forum as Direct Marketing Association, the Grocery Manufacturers Association, the International Advertising Association, the "Afrikaanse Handelsinstituut", the South African Chamber of Business, the Institute of Directors, the Public Relations Institute of South Africa, etc. Membership exceeds 85 000.

The Freedom of Commercial Speech Trust was formed to defend the right, as enshrined in the Constitution, to freedom of speech in the commercial sense, on behalf of the marketing and communications industries in South Africa. The organization is supported through association by a variety of organized business and consumer bodies, as Associate Members. It exists to defend a principle, not individual products, and to defend the legitimate business interests of our members. The Freedom of Commercial Speech Trust believes, that it is necessary to consult adequately with interested parties during the process of preparing legislation, and certainly prior to the tabling of such legislation. Although such consultation has apparently taken place, it seems that it was done in a deficient manner. This was illustrated by the fact that Cabinet has approved the proposed legislation even before the comments of the public and all interested parties were being sought. The Bill was published on the same date as the closing date for comments on the Bill and inadequate attention were given to the immediate economic effects of the Bill. A total ban on advertising would have a negative effect on the objectives of the Bill, in the sense that health warnings will disappear that could result in increased smoking. Enforcement, especially in the workplace, will be impossible, which means that it will have to take place on a selective basis. This is in itself unjust and inequitable. Section 4 in the Constitution clearly indicates the right of freedom of expression to companies registered in terms of the Companies Act, whether in common law or in terms of a specific act.

3.4.3 Printing, Advertising and media industry

(a) Airport Advertising

Airport Advertising is a wholly owned subsidiary of Corpcom Limited; a JSE listed company with a market capitalization in excess of one billion Rand. It is the industry leaders in Airport Advertising with a market share in excess of 95% in the nine Airports owned by the Airports Company South Africa.

Tobacco advertising generates approximately 12% of the Company's turnover and the proposed ban on advertising would have a negative impact on the company's financial affairs as well as its suppliers and Subcontractors, as they would lose work as a result of the ban. Tobacco advertising currently provides government the free opportunity to

advertise the health effects of smoking which would cost the latter about R30 million to replace this opportunity. Although the company recognizes the need for clean air, it also recognizes the individual's right, according to the Constitution, to smoke in the appropriate place. The company shared the Minister's concern for public health but believed that educating the "vulnerable" to the harmful effects of tobacco smoking and the restriction of the availability thereof would be more beneficial than the banning of its advertisement. While government is seeking to generate larger foreign earnings and ways to encourage tourists to South Africa, it cannot afford to offend those who smoke. It is the view of Airport Advertising that the proposed bill will render visitors liable to huge fines for smoking in public places and will forbid them to wear certain branded fashion goods whilst in the country. Airport Advertising therefore has appealed to Government to provide an inspired and responsible approach to the issue, instead of a total ban of tobacco advertising.

(b) Anchor Outdoor Displays

Anchor Outdoor Displays is a company responsible for tobacco advertising on billboards and any other outdoor advertising.

It is the company's belief that there is no relationship between the amount spent on advertising a product and the actual demand thereof. The consumption of tobacco is not related to the amount spent on advertising or the actual advertisement. The proposed ban on advertising was therefore seen as creating a new form of autocratic censorship and it is the company's belief that this sets a dangerous precedent. The proposed ban would seriously affect the business. Due to the importance of the outdoor advertising industry, amongst other beneficiaries, Anchor Outdoor Displays recommends that the phase-in period of such should be at least five years.

(c) Independent Newspapers Cape

Independent Newspapers Cape publishes the Cape Argus, Weekend Argus, Cape Times and twelve community newspapers in the Cape Peninsula.

The organization wished to state that it operates on the principle of editorial independence and the committee will therefore understand when legislation is

proposed that will further restrict the rights of a group of advertisers to promote their products. Independent Newspapers wish to emphasize that it does support the notion that tobacco should remain a legal product for adults. Broadly speaking, the association supported the minister's view that there should be legislation that protects children from the harmful effects of tobacco. Independent Newspapers' real concern, however, is not the health risks of smoking, but rather about how far Parliament would go to restrict the rights of those using tobacco products. A total ban on all tobacco advertising in newspapers would not achieve the goal of the Minister to protect children since most of the newspaper readers are over the age of 18. The entire Independent Newspaper group will lose approximately R14, 5 million in national advertising revenue. This will be a severe setback to the media, whose role is to educate and inform. As a result, a precedent will have been set to deny advertisers their right to promote their products. Independent Newspapers believe that the Committee's focus should be on the content of tobacco advertising rather than banning it completely.

(d) Print Media Association of South Africa

The PMA is a voluntary association of publishers of daily newspaper weekend and weekly newspapers, community papers, consumer magazine's, special interest magazines, trade and technical publications, of which there are approximately 600 titles in the membership. Member organizations include the Newspaper Association of SA, the Magazine Publishers Association of SA, the Community Press Association of SA, and the Specialist Press Association of SA. The PMA is also involved in the educational process through Print Media in Education (PMIE).

The Print Media Association supported the Bill in terms of controlling the places of smoking; control sale to minors and to limit the content lifestyle advertising but cannot accept the outright banning of the advertising and promotion of the product. Such banning will drastically reduce the opportunity of the launching new publications. It is also a contravention of the constitutional freedom to conduct business within a market driven economy. PMA is convinced that statutory regulation is not the solution but more attention should be given to self-regulation, which is the

worldwide solution. It is also PMA's belief that the Department of Health should work together with the Advertising Standards Authority of South Africa (the world-recognized body of self regulation in this country) as well as the freedom of Commercial Speech Trust and all other parties to protect the youth and create a better-informed society.

3.4.4 Educational Institutions

(a) Alexander Sinton high school

Three students from the Alexander Sinton High School in the Western Cape presented the youth's point of view about tobacco advertising.

Tobacco advertisements convey a false message about smoking. It portrays an image of people being happy, successful and most of all healthy even though they smoke. This false image influences not only adults, but teenagers and children as well. Children are unconsciously being manipulated into thinking that smoking is their key to being an adult. Tobacco sponsorship of sport creates the illusion that the sportsperson can enjoy a healthy, exciting and successful lifestyle while continuing to smoke. Athletes at school see these advertisements and believe they can do the same. They are therefore manipulated by these false advertisements.

3.4.5 Independent Research Organizations

(a) Medical Research Council (MRC)

The MRC is an independent statutory body, which was established on 1 July 1969 to co-ordinate medical research activities throughout the country. The MRC's main task is to improve the health status and quality of life of the population of South Africa through excellence in scientific research.

The Council fully supported the proposed Tobacco products control amendment bill. Successful implementation of the proposed Bill will bring South Africa in line with the World Health Organization (WHO) and the World Bank's recommendations for tobacco control for all the countries of the world. The MRC reported that tobacco is the major preventable cause of death in the twentieth century and that tobacco use in South Africa is causing ever increasing health problems as the number of tobacco-

related deaths reported, increase annually. Recent surveys on smoking prevalence indicate that there is a strong suggestion that the Department of Health's efforts to reduce smoking in the country is yielding some results. Analyses of tobacco advertising and related promotions demonstrate that women and youth are the main targets in the developing countries. Content analyses of South African tobacco advertisements show that companies here have applied the same tactics in targeting women. According to the MRC's submission, studies on tobacco consumption and smoking in South Africa clearly demonstrate the need for the full implementation of WHO recommendations for comprehensive tobacco control in South Africa. This also include providing effective protection from involuntary exposure to tobacco smoke in transit vehicles, public places and workplaces; and a ban on all forms of tobacco advertising, promotion and sponsorship to protect the nation. The Bill was in line with legislation from many other countries, as government realizes the importance of complete bans on tobacco advertising, promotion and sponsorship; creating smoke-free public places; prohibiting free distribution of cigarettes and reducing the harmful substances in tobacco. The MRC therefore supported the Bill.

(b) Applied Fiscal Research Centre (AFREC)¹³

The Economics of Tobacco Control in South Africa (ETCSA) is a research project sponsored by the IRDC and UCT.

It is important to note that ETCSA is not an anti-tobacco campaign. It is a scientific research project whose result and methodologies are made public and subject to scrutiny by all relevant actors on both sides of the debate. According to AFREC, there had been a decline in the real retail cigarette price over the period 1971-95 that will have negative effects on cigarette production and employment. It would, however, be offset by gains to society through amongst others, job creation in the other sectors of the economy, and lower health costs from treating patients for smoking-related illnesses.

¹³ Professor Iraj Abedien leads the ETCSA project. The project's final report was made public in June 1998.

The research findings suggest that the advertising expenditure of cigarette companies, does play a role in generating additional cigarette consumption. It also suggests that anti-smoking advertising is becoming a significant factor in the consumer's decision not to smoke. In light of the above findings, and in the absence of any credible evidence to the contrary, AFREC submitted that the proposed Bill is compatible with its own and similar international research findings. From a public health perspective, the Bill was exactly on the right path and from a fiscal perspective; it is a sound and sustainable approach to improving social welfare. AFREC therefore strongly supported the Bill, and offered to provide Parliament with any further research support that they may need in this regard.

(c) Corporation for Economic Research

According to its Director, Professor Black, the tobacco industry contributed 10 billion rands to the GDP of the country in 1997. During that year, approximately 99 thousand jobs were created and supported by the industry in 1997. Prof. Black illustrated to the Portfolio Committee that the tobacco and related industries contributed R4, 6 billion to government revenue in 1997. He emphasized that a drop in demand for tobacco-related products would cause a loss of about 15 000 jobs.

3.4.6 Individuals

(a) I.S. Banner

This submission was made by individual capacity, with 12 years experience in sponsorship marketing and management both in South Africa and abroad.

Banner declared a vested interest in the proposed bill given his responsibility to manage a portfolio of sponsorship activities for both tobacco and non-tobacco companies, however the motivation for making this submission is as a citizen concerned that the proposed legislation was inappropriate at this time given South Africa's status as an emerging nation. The tobacco industry is currently targeted with draconian restrictions on sponsorship activities. The business, arts and sports communities see this as an unwelcome trend that will eventually end in the decline in the overall level of private sector involvement in sponsorship. With the prudent fiscal

discipline of the country, the suggestion that government will step in to fill the vacuum of sponsorships is unrealistic and improbable. Banner has therefore appealed to the Portfolio Committee to allow time for an effective transition period that would, according to him, greatly reduce the negative socio-economic impact that will be experienced in the absence of such a transition period.

(b) G. Erasmus

Prof Gerhard Erasmus is Head of the Department of Public Law at the University of Stellenbosch.

The Preamble of this Bill claimed to “align the health system with the democratic values of the Constitution and to enhance and protect the fundamental rights of citizens.” Erasmus therefore questioned the constitutionality of the bill. The rights of all citizens and all constitutional values and principles should be respected. Other constitutional values such as the rule of law, the supremacy of the Constitution, individual freedom and constitutional requirements with respect to legislative procedures are equally valid and worthy of protection. Their recognition and protection are not sufficiently reflected in this Bill. Erasmus called for a more balanced and reasonable approach to be adopted.

(c) Daniel Leach

Prof. Leach is a lecturer in the Department of Business Economics, University of Witwatersrand.

This submission was a comment on the “findings” of the Economics of Tobacco Control Project that declared that restricting advertising by cigarette manufacturers, and anti-tobacco advertising are both effective in reducing aggregate cigarette consumption. According to Leach, there is reason to believe that the data used by the Control Project is seriously deficient. He remarked that it is clear that the Control Project made up their advertising data. On the third update of the Control Project, the researchers conclude that limiting advertising by cigarette manufacturers and promoting anti-cigarette awareness are both effective weapons in discouraging growth in the demand for cigarettes. This strong conclusion is misleading, as it is more

consistent with an earlier statement that there is some ambiguity as to the effect of cigarette advertising on the demand for cigarettes.

(d) Hugh, S. High

Hugh S. High is an economist, lawyer, and teaches Business Science Law, and Economics at UCT.

According to Mr. High, the proposed Bill was unconstitutional since it would cause a fundamental civil liberty, i.e. free speech, to be restricted. With regards to tobacco advertising, the United Kingdom Department of Health indicated that there is no reliable evidence that tobacco advertising increases consumption. On the other hand, other factors such as the smoking behaviour of parents and siblings are more important, and it is also possible that those children who react most positively to advertising are already disposed to smoke. The Department of Health has not satisfactorily demonstrated that tobacco advertising has an effect on consumption, or that advertising restrictions and bans have reduced consumption where they have been applied. Some of the literature on tobacco advertising suggests that there is no relationship between tobacco advertising and tobacco consumption. It also suggested that the major function of tobacco advertising is to induce smokers to switch brands. The Portfolio Committee and Parliament should therefore be sure to have clear, convincing and compelling evidence that the proposed Bill was a restriction on the right to speak and the right to hear.

3.4.7 Entertainment Industry

(a) Cinemark

Cinemark is a media sales company that provides advertising income to all cinemas in South Africa.

Cinemark felt that they were not given the opportunity to consult anyone in the Department of Health about the bill. Cinemark reported that if this had been done, the content of the bill would have been more acceptable to all interested parties. Cinemark also felt that freedom of expression as entrenched in the Constitution was severely restricted by the bill. Should the Bill be passed, Cinemark will support the

Freedom of Commercial Speech Trust in taking the issue to the Constitutional Court, since the business expects tobacco companies to invest about R 20 million rand on cigarette advertising in cinemas in South Africa, which accounts for a huge percentage of the operating income of cinemas. According to Cinemark, the new tobacco legislation could result in job losses; closing down of cinemas; an increase in cinema tickets; pressure on employers to increase salaries; and a slowdown in the development of new cinemas and, consequently, a slowdown in job creation.

Cinemark has therefore proposed that all interested parties should have been allowed to comment on the bill in order to draft a new Bill together with the Department of Health. Cinemark also suggested a phased introduction of the new restrictions, which would allow them time to replace the loss of income to the cinema industry. The company has suggested the formation of an industry body that regulates the content of all cigarette marketing without the need for a legislated regulatory bill. As Cinemark has access to a lot of international commercials to educate the youth about the dangers of smoking, it will be happy to flight these commercials in order to achieve the department's stated objective. Cinemark has urged the Department to withdraw this legislation so as to undertake proper consultation with interested parties.

3.4.8. Tourism and Hospitality Industry

(a) Durban Turf Club

The Durban Turf Club is an organization aimed at facilitating the sponsoring by tobacco companies of certain sporting events, like the Rothmans July and several other tourism attractions.

The bill to restrict tobacco product advertising and marketing was aimed at protecting the youth and is therefore not applicable to the sponsorships of the horseracing industry. The Rothmans July is a "horseracing event" which bears no direct relationship to tobacco or cigarette advertising. The Rothmans July horseracing event results in significant revenues being generated by not only the horseracing industry, but also a broad spectrum of services, which support the event and those that benefit from the event. If one calculates the spending power of these tourists through funds expended on airfares, accommodation, food, etc., it is clear that the Rothmans July is central to the tourist industry of Durban during July of each year.

(b) Federated Hospitality Association of South Africa (“FEDHASA”)

FEDHASA is a non-governmental organization representing members of the hospitality industry. Memberships include hotels, B & Bs, Guest Houses, Game Lodges, Restaurants, Clubs, Taverns, Shebeens, Cigar Bars, Conference Centres, Gaming and Gambling Establishments and Pubs.

FEDHASA was not challenging or arguing the health aspects of the Bill. However, FEDHASA believed that the Bill should not have contained prescriptive and or restrictive measures that have or may have the effect of undermining business confidence, reducing the potential for international and local investment and ultimately reducing both urban and rural employment opportunities, more especially in the informal and SSME sectors. FEDHASA’s immediate concern was that the implementation of a total smoking ban in “public places” as defined, would have a significant and negative economic impact on the Industry. It therefore requested that the Committee and the Department of Health exclude Hotels, B & Bs, Guest Houses, Game Lodges, Restaurants, Clubs, Taverns, Shebeens, Cigar Bars, Conference Centres, Gaming & Gambling establishments and Pubs from the definition of a “Public Place” under section 6 - “Regulations”-, and to establish provisions that will allow the Tourist and Hospitality Industry the option of making an informed economic decision based on customer profiling. FEDHASA believed that such a decision would not have a detrimental effect on the industry that will result in economic hardship.

(c) International Hotel and Restaurant Association

The International Hotel and Restaurant Association is the official mouthpiece for the hospitality industry worldwide. It operates in 155 countries and represents 700 000 establishments.

A lot can be gained from the experiences of other countries and therefore the hospitality industry would have liked to assist government in the decision-making process of this Bill. The hospitality industry would like to satisfy the needs of their customers and therefore recommended self-regulation on the issue of smoking in their outlets. It is clear that a total smoking ban will have a negative economic impact as well as a negative effect on tourism. As the official mouthpiece for the hospitality industry worldwide, the International Hotel and Restaurant Association implemented

the “Courtesy of Choice” programme, which is currently running in 49 countries. This programme has become the most successful ever undertaken by the hospitality industry. It has also proved to be an effective solution to the problem of smoking and non-smoking for the hospitality, the customer and legislative bodies. Its success is also due to the fact that it is based on three principles - customer information, effective ventilation and in-depth staff training. The “Courtesy of Choice” programme advocates:

- sensible and flexible seating arrangements that ensure that natural air flows from non-smoking to smoking areas.
- adequate ventilation and encouraging correct maintenance
- regular and complete ventilation checks by specialists

This submission is aimed at demonstrating that there are other options with which to deal with the issue of smoking in the hospitality arena.

3.4.9 Medical and Health Organizations

(a) Cape Town No Tobacco Forum

The Forum is a non-governmental, anti-smoking organization with representatives from various local authorities in Cape Town, as well as from the Heart Foundation and the Cancer Association of South Africa. It also has representatives from the Health Committees Forum of Cape Town.

The Cape Town No Tobacco Forum supports the Bill as it has health, commercial and strategic benefits for all South Africans and tourists. The Forum supported the Bill mainly because of the fact that passive smoking or Environmental Tobacco Smoke (ETS) can affect non-smokers. ETS causes lung cancer. With a legislative framework that supports restrictions of smoking in public places, on-going concerted public health measures of education, information and awareness will achieve high rates of success in changing knowledge, attitudes and behaviours regarding tobacco consumption to healthier lifestyles. An evaluation of the 1995 Regulations of the Cape Town Municipality, which bans smoking in public places, has shown that:

- less smoking occurred, especially in public places and at our workplaces;

- private enterprises continually contacted the Forum to find out how to implement a smoke-free policy in the work place;
- smokers have displayed greater tolerance; and
- smokers have contacted the Department asking where to obtain help to quit smoking

(b) Cancer Association of South Africa

The Cancer Association of South Africa (CANSA) is a non-governmental organization, representing 366 staff, 500 members and over two thousand volunteers. It is a non-profit organization, which is wholly funded by public donation. The mission of the Cancer Association is to prevent and fight cancer and its consequences in partnership with all South African communities.

CANSA has wholeheartedly supported the proposed amendments to the Tobacco Products Control Bill, as it believes these measures will prevent many people from developing cancer in the future. Tobacco smoke is thought to cause about one third of all cancers. CANSA has collected a total of 55 688 signatures from members of the public in support of the ban on tobacco advertising. These signatures have been collected from diverse communities in all provinces. CANSA has also received a total of 678 phone calls from people wishing to state their support for a ban on tobacco advertising. CANSA has been convinced that a ban will have the following positive outcomes as the experience of other countries has shown advertising bans has been successful, as tobacco consumption has declined in these countries. It will help to protect the children since the release of secret, internal industry documents in the USA has shown companies deliberately target young children in their marketing campaigns because of the fact that:

- the vast majority of smokers start before the age of 18 and develop brand loyalty which is critical for tobacco campaigns to secure a large share of the teenage market;
- children are the chief source of new consumers for the industry.

CANSA was convinced that a ban on tobacco advertising would enhance the freedom of speech by removing the financial incentive for the media to avoid reporting on the health risks of tobacco. The sponsorship of sport by the tobacco industry has a similar

effect- contractual obligations and fear of losing financial support effectively prevent sports personalities and role models from supporting tobacco control measures or becoming logical and willing spokespeople for health education campaigns. The Department of Health cannot ever hope to compete with the industry's expenditure on tobacco marketing. By banning tobacco advertising, health education will have a much greater impact. The tobacco industry often defends tobacco advertising by arguing that if tobacco products are legal, it should be legal to advertise them. Tobacco is only legal today because it was introduced before its health dangers were understood. Given current standards of product safety regulation, it would be virtually impossible to bring tobacco products on to the market today. No other product of comparable danger remains so unregulated and so vigorously promoted through the mass media. It is CANSA's opinion that it would not make sense to outlaw a product used by approximately 7 million South Africans, but every effort should be made to subject the industry to strong regulations. Given the substantial harm caused by tobacco, banning its advertising and promotion is a reasonable middle ground.

(c) Clothing Bargaining Council Health Care Fund¹⁴

The Clothing Bargaining Council Health Care Fund is an organization that assists those working in the Clothing and Textile industry with medical funds.

Grammar stated that the tobacco industry has deliberately sought to distort and confuse the issue of passive smoking and health. According to the Tobacco Industry, Environmental Tobacco Smoke (ETS) is harmless. World health experts, on the other hand, unanimously agree that environmental smoke is a killer. Grammar said that ETS is a common phenomenon in the workplace and that a smoke-free policy seems to be the easiest, cheapest and most rational step to take on the ground of public health and would benefit everybody, smokers and non-smokers alike. It would also be easy to implement, enforce and monitor, especially in a factory environment, on the basis of occupational health and safety. International studies prove that smokers decrease their daily cigarette consumption after a smoke-free indoor policy is established. There are

¹⁴ Presentation made by Dr Kathryn Grammar, Principal Medical Officer at the Clothing Bargaining Council Health Care Fund, October 20, 1998.

also more successful quitters in smoke-free workplaces. Grammar reiterated her call for total smoke-free workplaces.

(d) Democratic Nursing Organization of South Africa (DENOSA)

DENOSA is a member of the International Council of Nurses. The ICN states that the fundamental responsibilities of the nurse is to promote health and to prevent illness and, in addition, to share with citizens the responsibility of initiating and supporting actions to meet the health and social needs of the public.

The Democratic Nursing Organization supported the Tobacco Amendment Bill. The Code for Nurses, adopted by the International Council of Nurses (ICN), states that two of the fundamental responsibilities of the nurse are to promote health and to prevent illness, and, that, in addition, the nurse shares with other citizens the responsibility for initiating and supporting action to meet the health and social needs of the public. Health problems caused by smoking are regarded as being highly preventable. DENOSA acknowledges that employment and poverty are important factors that impact on the health of the nation. However, the argument that the right of employment in the tobacco industry may eventually be restricted by this Bill, is not supported. It is evident from the media that it is being argued that this amendment Bill impacts on individual rights. These arguments are not supported. Notwithstanding these important issues, DENOSA supports the Amendment Bill and efforts with other international anti-smoking groups to bring to the attention of their governments the negative effects of tobacco on health and encourage their governments to reduce, discourage and eradicate the use of tobacco.

(e) National Council Against Smoking

The National Council Against Smoking (NCAS) is a non-governmental organization established in 1976, with the mandate of promoting public health through encouraging nonsmoking as a societal norm.

The Council supported the Amendment Bill and considers it to be sound economic health policy, as it will promote the important gains that have already been made in lowering tobacco consumption since 1994. Public policy decisions should be guided

by the public interest and not pressure groups. According to the NCAS, the World Health Organization (WHO) and the World Bank is convinced that the interest here is undeniable. The majority of South Africans do not smoke. It is clear to the NCAS that passive smoking is both unpleasant and harmful to non-smokers. Surveys indicate that the majority of smokers and non-smokers are in favour of restrictions on smoking in public places. NCAS is convinced that designating areas for smokers will reduce conflict between smokers and non-smokers, which will assure both parties of their rights. The council believes that ventilation and other air-cleaning devices are not the solution to passive smoking.

The Council was convinced that the Bill will make a significant contribution to reducing the burden of cancer, heart disease and complications of pregnancy in South Africa. It will also, ultimately, be beneficial to the economy since a healthy economy needs a healthy workforce. It is the Council's hope that the Portfolio Committee will put the freedom of children to grow up healthily above the freedom of an industry to market a deadly drug.

(f) National Health Committee: ANC

The National Health Committee of the African National Congress is a governmental organization that is responsible for the drafting, coordination and monitoring of the National Health Plan for South Africa.

The National Health Committee has welcomed the introduction of the Tobacco Products Control Amendment Bill by the Minister of Health, Dr Nkosazana Zima. The committee felt that by enacting this legislation, the Minister is fulfilling the promises to the people of this country in terms of health, as outlined in the document of the African National Congress entitled, *A National Health Plan for South Africa*. This plan had gone through a process of four years of discussions with various stakeholders including communities whose views often are not heard. The committee thinks that the effects of tobacco are well documented and that research has shown that passive smoking causes lung cancer as well as heart disease in non-smokers. As a result of this research, the National Health Committee supports the ban on smoking in public places. According to the committee, tobacco use resulted in lost productivity of

R 2.5 billion, a staggering 16% of the health budget in 1994. Already the tobacco industry in the United States has had to pay out millions of dollars in lawsuits brought against the industry and to recover smoking related health care costs. There is no doubt that the advertising of tobacco products has a huge impact on the youth and encourages them to smoke. This Committee therefore supported a total ban on tobacco advertising and sponsorship. The Committee believed that the Bill would reduce the harmful effects of tobacco consumption.

(g) National Progressive Primary Health Care Network (NPPHCN)

The NPPHCN is a national non-governmental organization founded in 1987 to advocate for the implementation of a national health system for South Africa based on the principles of the Primary Health Care (PHC) approach. NPPHCN has a membership of more than 1 100 health and development programmes, projects, and individuals.

The need for restrictive legislation in the control of tobacco products in order to promote public health is regarded as necessary, given the impact on tobacco-related illnesses and diseases. The NPPCHN supported the proposal to ban advertising of tobacco products as well as the proposed restriction on tobacco company sponsorship of events. NPPCHN would like to recommend that a continuous and comprehensive assessment of the economic impact of the legislation be carried out, including an evaluation of the impact on neighboring tobacco-producing countries. NPPCHN thus would have liked to see a phased approach to the implementation of the legislation as it will provide a deeper analysis of the impact of the legislation on different aspects of the economy, as well as allowing for phasing in of alternatives in farming and sponsorship, in particular.

(h) Reference Group for Health Promoting Schools in the W.Cape

The Reference Group for HPS is an organization based in the Western Cape which strive to promote health in schools in line with the World Health Organization's Global School Health Initiative.

The Reference Group for HPS fully supported the proposed tobacco products control amendment bill. It is their opinion that the bill will contribute towards the development of healthier schools and that the restriction on smoking in public places will lead to policy formulation to create “smoke-free” schools. Current practices of smoking in staff rooms, classrooms, corridors and the creation of “smoking rooms” for learners, etc. will be reviewed. Successful implementation of smoking policies at school will contribute to an environment optimal for learning and development. The school could serve as a catalyst to adopt smoke-free practices in homes and surrounding community structures. The group felt that the Bill is significant in refocusing priorities from curative interventions to preventive interventions. The Reference Group for HPS sees it as their obligation to provide children with an environment that fosters the health, dignity and self-respect of the child.

(i) Western Cape Department of Health

The Provincial Department of Health of the Western Cape is committed to providing quality healthcare to all people of South Africa, to achieve a unified National Health System (NHS) and to implement policies that reflect its mission, goals and objectives. The Western Cape Department of Health strives to provide leadership and guidance to the National Health System (NHS) in its efforts to promote and monitor the health of all people in South Africa.

The Health Department of the Western Cape Province supported the Bill as it believes that it will lead to the reduction of tobacco related deaths and improve the health of generations to come. The Department has had numerous complaints from workers that experience problems with Environmental Tobacco Smoke (ETS) at their workplaces over the past five years. Many of these callers were desperate and were looking for assistance from the Tobacco Products Control Act (1993) to bring about change in unpleasant workplaces. The Health Department believes that the Bill will bring about that change, as workplace is included under the definition of public place. The department mentioned that the World Health Assembly has adopted 14 resolutions from 1970 to 1995, which strongly urge Member States to implement comprehensive tobacco control measures. The World Bank, at the World Conference on Tobacco held in China in 1997, stated that, “tobacco use causes profound health and economic

losses. Controlling it should be efficient and cost-effective and governments must lead those controls by aggressively adopting fiscal and regulatory policies". Research suggests that it has been shown globally, that simple measures against tobacco advertising only leads to increases in indirect advertising and sponsorship. There is thus a need for total, comprehensive bans on all tobacco promotion. It is the department's opinion that tobacco advertising is also incompatible with any policy of government that seriously wants to reduce tobacco consumption. Attempts by government, to reduce smoking, have only been counteracted by tobacco advertising.

3.5 Concluding Remarks

It is evident that there is much more than the health issue at stake in the enacted legislation. The debate remains complicated but one clearly observes that it becomes an issue of public health versus retrenchments in various industries in the South African economy. These issues are both equally important and therefore remain contentious. The economy of the country, as well as those organizations and businesses that will be affected by the Tobacco Products Control Amendment Act, could experience serious setbacks which could, albeit indirectly, impinge on people's lives. It is also clear that many interest groups feel that there has been a general lack of consultation and disregard for constitutional principles which might, in the long run, threaten the freedom of commercial speech as well as legitimacy in the policy proceedings of government. The next section of this study will give an overview of the debate surrounding the Tobacco Act and observe the concerns of the key role players on various issues of the policy process.

CHAPTER FOUR: AN ASSESSMENT OF THE OUTCOME OF THE TOBACCO PRODUCTS CONTROL AMENDMENT ACT.

4.1 Introduction

It is evident from the previous chapter that the introduction of the new tobacco regulation can be considered as consisting of many different views. The large number of interest groups that had input into the making of the new Act, indicate that the Tobacco Products Control Amendment Act will have an effect on many different sub dimensions of society. Submissions that were made during the public hearings of the Portfolio Committee on Health also show that it was an Act which could have serious repercussions for many interest groups when several other regulations came into effect in 2001. This chapter will therefore aim to provide a careful assessment of the characteristics of this particular policy process. In addition, it will give a brief summary of the arguments surrounding the tobacco legislation. By giving an overview of the outcome of the legislation, one should be able to gain some insight into the process of policy making in the democratic government of South Africa.

4.2 Public Hearings and the debate around the Tobacco Act

4.2.1 Arguments presented in support of the Bill

The arguments that have been given here were derived from largely medical perspectives that have served to substantiate the government's position on the Tobacco Control Amendment Act. As Graph 1 (p.51) indicates, one can clearly see that medical and other health promoting institutions in the country have given strong support to the Bill. These arguments suggest that the new Tobacco Act will:

- protect the constitutional right of non-smokers to a smoke-free environment;
- reduce tobacco consumption;
- reduce the exposure to advertising and the pressure on young people to start smoking by banning tobacco advertising and sponsorship;
- lead to the development of “smoke-free” schools through restrictions on smoking in public places which include schools;
- reduce tobacco-related deaths;
- lower the health costs of treating patients for smoking-related illnesses;

- prevent premature deaths of unborn babies;
- decrease incidence of passive smoking as well as cardiovascular, cancer and other smoking-related diseases;
- ensure smoke-free environments at the workplace;
- promote public health.

All of these arguments in favour of the new Tobacco Act seem to put the health of South African citizens above any other issue. The legislation is very much in favour of non-smokers and young children.

4.2.2 Arguments presented against the Bill

The arguments that have been presented against the Bill have mainly come from the industries that will be affected by the Bill. The various industries that will be affected by the implementation of the Tobacco Bill are presented in Graph 1 (p51). Those not in favour of the Act, have made several valid claims as to why they were opposing the Bill. One important factor that stood out is that those not in favour of the Bill, have acknowledged the importance of such a policy for public health and to protect young children from smoking. These groups have claimed that they were not against the moral objectives of the Bill, but they believed that there were less restrictive means to achieve the objectives of the Tobacco Bill. In response to the strict regulations those not in favour thereof, have claimed that it:

- would cause disrespect for the law as it criminalizes behaviour which was tolerated up till now;
- would be difficult to enforce since the courts, the police and the penitentiary system do not have the capacity to deal with this type of law;
- is unconstitutional as it restricts the right to free speech and takes away the right of owners, consumers and employees to decide whether or not to allow smoking in restaurants and results in a form of censorship from government;
- restricts commercial activity;
- sets a dangerous precedent for other activities that may be considered to be harmful;

- would cause a loss of employment in various industries; not only in the tobacco industry;
- would reduce economic growth;
- would have no effect on the use of tobacco, as tobacco advertising has little or no effect on tobacco consumption;
- ignores the fact that the money from sport sponsorships is mostly spent on sport and the development of young talent, as well as other social activities;
- does not take cognisance of the fact that health warnings about the effects of tobacco would disappear if tobacco advertising were banned;
- was badly drafted, is unreasonable and would have unintended consequences
- will affect tourism as tourists will be subjected to huge fines and will not be able to wear certain branded fashion goods; and
- shows a lack of consultation with all interested parties

Those not in favour of the Bill have suggested several proposals in order to avoid the harsh implications thereof. Submissions that have been made to the Portfolio Committee on Health show that these groups have repeatedly urged the Department of Health and the Health Minister to allow an opportunity for a proper debate on the regulations of the Bill. They were, however, unsuccessful in this regard.

As policy-makers and stakeholders are directly involved in the policy-making process of the Tobacco Amendment Act, their perceptions of the policy process are invaluable. The opinions of both parties allow one to gain insight to both sides of the debate surrounding the Tobacco Amendment Act. Interviews were thought to be the best way to assess the opinions of major stakeholders concerning the policy process and each other. The following section will therefore give an overview of the perceptions of the two major policy actors (See list of interviewees: p. 96).

4.3 Views of role players on aspects of the policy process

The two major policy actors in the process were Members of Parliament (MPs) belonging to the relevant Portfolio Committee on the one hand, and the major stakeholder, the tobacco industry, on the other. These two parties' perceptions were

thought best to provide some insight to the policy process in view of their involvement at the time. Several role players were thus interviewed according to a set of standardized questions (See Appendix A). Open-ended questions were used in order to gather information regarding several aspects of the policy process. The questions were structured to reveal the different views of key role players and political parties regarding aspects such as the outcome, content, constitutionality and degree of consultation of the new tobacco control policy. The objective of these questions was to gain insight into the nature of the policy process and the perspectives of the major role players and parties. The views of the two major policy actors are discussed under the following headings.

(a) Outcome of Tobacco Act

According to Mr. Andre Van Pletzen at British American Tobacco (BAT), the Tobacco Act is regarded as “draconian” and possibly the strictest tobacco policy in the world (January 24, 2001). In addition, he mentioned that it was the product of various first world tobacco regulation policies that has been put together into one bill. Mr Edward Shalala from the Tobacco Institute of Southern Africa (TISA) described the policy process as one that was flawed and added that the principles of democracy, were not advocated in this particular case. He remarked that the outcome of the Tobacco Amendment Act is problematic but that it was to be expected given that the consultation process was insufficient (January 31, 2001,).

Mr. Kobus Gouws, spokesperson on health at the NNP at the time, feels that government’s reasoning in terms of the legislation is questionable, since government officials have admitted that they might have exaggerated in terms of the data which they have used to substantiate their proposals (January 24, 2001). Mr. Louis Green, n health spokesperson of the African Christian Democratic Party (ACDP) at the time, believes that the Bill reveals noble intentions, as the health of the nation should receive priority. However, he remarked that the implementation of the regulations of the Bill could become problematic in the long term (January 26, 2001).

Rev. Stanley Magoba, leader of the Pan African Congress, (PAC) commented that he is, on the whole, satisfied with the outcome of the new tobacco act, but he indicated

that the absence of a Green Paper and a White Paper is a clear shortfall in the process (January 29, 2001). Dr. Cwele, portfolio member of the Health Committee of the ANC, regards the Tobacco Act as "... legislation that is very necessary as the first priority of the Department of Health is to protect the rights of the non-smoker to clean air and to promote the public health as well as a smoke-free environment..."(January 23, 2001). Mrs Baloyi, member of the ANC and Health Portfolio Committee, is convinced that the Act was handled appropriately up to its final adoption by Parliament (February 1, 2001).

(b) Contents

Mrs Baloyi (ANC) declared that the content of the Act reflects a balanced tobacco control policy that has been applauded by the International Public Health Organisations and non-smokers, as important legislation in support of public health. Mr Van Pletzen (BAT), on the other hand, feels that the Tobacco Act simply cannot be regarded as a balanced tobacco control policy.

According to Mr. Shalala, the contents of the Tobacco Amendment Act are "not reasonable, not sensible and not based on tolerance". Mr. Gouws (NNP) shares this sentiment on the issue, and added that he finds it strange that the Bill focuses on third generation rights while there are so many first generation rights that the government needs to address. In response to the question of a balanced tobacco control policy, Mr Green (ACDP) has mentioned that he is not sure whether a balanced tobacco control policy is likely to exist. He remarked that he is convinced that the concept of "balance" is problematic, in view of various contentious issues pertaining to the tobacco legislation. The Bill seems to be "more in favour of non-smokers than smokers", he said.

Rev. Magoba of the PAC regards the Tobacco Act as an imbalanced tobacco control policy as he believes that objective healthy advertising should be allowed. Dr Cwele (ANC) responded to the issue of balance by saying that the Tobacco Act seems reasonable, seeing that the Act that was "long overdue".

(c) Main Purpose

Mrs Baloyi (ANC) commented that the new tobacco legislation is first and foremost aimed at protecting the rights of non-smokers and children. The tobacco industry has a different view of the legislation. According to the Mr Van Pletzen (BAT), the main purpose of the Bill is not to protect the rights of smokers, but to ban tobacco advertising and sponsorships. Mr Shalala of the TISA has commented on this issue by saying that the Department “based, sold and advocated the legislation on the issues of protecting children from exposure to tobacco products” and that the tobacco industry does not criticize this. He commented that it is the Bill’s regulations rather than its principles that have caused concern among the tobacco industry and other industries. PAC leader, Rev. Magoba, however, is convinced that the Tobacco Act’s main purpose is to restrict smoking in public places and to influence young people in a healthy way.

(d) Consultation

As one might expect, most stakeholders feel that there was a general lack of meaningful consultation on behalf of the Department of Health. Mr Shalala (TISA) claimed “the most competent and complete principle of consultation lies in the making of the Constitution in 1996. This was, however, two years later, to be taken away by a totally flawed process”. In addition, he remarked that TISA has been monitoring the political process of the Tobacco Amendment Act against the guiding principles of democracy. They have found that the process did not reflect transparency, credibility or inclusivity. He claimed that some of these principles were present, if only to a certain degree. Mr Shalala commented, “there was consultation in order to prove that there has been consultation”. Mr Shalala claimed that it is was not so much the issue of consultation that was problematic, but the process itself that raised concern.

According to Mr. Gouws (NNP), the consultation that took place was extremely one-sided. It took place mainly between the Department of Health and those who supported its views, i.e., the other medical and health organizations that were in favour of the Bill, he remarked. Mr Van Pletzen from the tobacco industry confirmed

that that there was a serious lack of consultation, especially on behalf of the relevant department to consult with the tobacco industry, the main challenger of the Bill. He mentions that he would have liked there to be more negotiations, in view of the fact that the tobacco industry had several proposals to replace the harsh regulations which would have severe effects on various industries not related to the tobacco industry.

Mr. Green of the ACDP regards the process as fair given that interest groups were able to participate, through public hearings that were held in Parliament. He added that his experiences with the Department of Health has taught him that it is possible that they did not want to consult with other stakeholders since they have already “made up their minds about the issue”. PAC MP, Rev. Magoba, remarked that claims that there was a lack of consultation are not fully justified. He did however, remark that an open debate is an important part of a democratic society. Rev. Magoba mentioned that the Tobacco Act has brought about an extensive debate that did not satisfy all viewpoints, as it did not allow for sufficient time to come to a reasonable decision.

According to Dr Cwele the whole process was limited due to time-constraints. He also said that there could have been more public hearings and that many people thought that the consultation process was not adequate but in reality, according to him, it was reasonable. Dr Cwele also stated that he was not sure what purpose a full debate with stakeholders would have served, since the issue has been extensively debated in Parliament.

Mrs Baloyi of the ANC claimed that public hearings were advertised and interest groups or individuals who responded to the adverts were given the opportunity to appear before the Portfolio Committee on Health in order to make their oral or written presentations and submissions. She also remarked that all presentations and submissions were considered and that discussions were held before the final decision was made.

(e) Constitutionality

Mr Van Pletzen considers the constitutionality of the Act to be a technical issue. He did, however state that he does believe that the Tobacco Act is violating the rights of smokers and owners of restaurants. He believes that the owners of the latter should have the right to decide whether or not to allow smoking in their restaurants, coffee shops, et cetera.

Mr. Shalala also mentioned that the majority's views that represented a large range of industries in South Africa, were not taken into account since the majority of those involved, had serious doubts over the constitutionality of the Tobacco Amendment Act. He also remarked that the Bill is not an amendment, but rather a whole new policy that should have been dealt with accordingly.

Mr. Gouws remarked that the fact that the President declined to sign the Act at first, indicated that even he had some doubts about the Constitutionality thereof, especially regarding the restrictions placed on tobacco advertising. He is, however, aware that the Constitution makes provision for the limitation of rights, especially in cases such as this, where the reason for such a limitation is in the interest of the public.

In response to the issue of infringing upon the rights of smokers, Mr Green declared that a clause in the constitution states that no one has absolute rights and that "rights can be limited when they infringe upon those of others".

With regards to the claims that have been made that smokers have rights too. Dr. Cwele said that he regards it as a "privilege" to smoke, and not a right as such. On the subject of "limiting the principle of freedom of commercial speech", Dr Cwele responded that the Act is impacting upon the way that it is advertised, in other words the Act wants to get rid of tobacco ads that portrays it in a glamorous way. He remarked that tobacco advertising needs to be regulated so government will have the ability to protect the public. PAC MP, Rev. Magoba stated that the Tobacco Act is not directly violating constitutional rights, but feels that there might be some validity to

the fact that the Tobacco Act might be limiting the “freedom of commercial speech”, i.e. commercial activity.

(f) Access to Documents

There were also claims that the government did not make their scientific evidence, upon which their proposals were based, available to the major role-players (De Waal et al, 1999:32-33). Mr Van Pletzen stated that if one party incriminates another, the former should at least make available whatever evidence they had. In the case of the Tobacco Bill, the tobacco industry has requested this information but was refused access to it by the government. Dr Cwele, on the other hand, declared that he was not aware of the fact that the state has withheld information from stakeholders. In fact, he mentioned that it is the tobacco industry that has withheld information. Dr. Cwele commented that he was not aware of the fact that the Health Ministry withheld evidence from the major stakeholder, the tobacco industry.

(g) Hastiness of Tobacco Bill

Those not in favour of the Tobacco Bill have made various claims that the Tobacco Bill was “bulldozed” through Parliament. In response to the statement, Mr Green commented that the Tobacco Bill is not an exceptional case in Parliament. According to him, it is not unusual for bills to go through Parliament at a speedy pace. He also mentions that this is not done intentionally, but that Members of Parliament has to adhere to certain deadlines.

Mr. Shalala of the Tobacco Institute commented that 1998 was an exceptionally busy legislative year and that he did not understand the rush to get the Bill through Parliament. Most of the regulations only came into effect in 2000, he said.

Mr. Gouws (NNP) remarked that the Bill has gone through Parliament at quite a pace during that particular session. Dr Cwele stated that the process was subjected to time constraints and that there was various other issues that MP’s had to deal with. He added that there are always deadlines that members have to adhere to. Mrs Baloyi (ANC) remarked that those interest groups not in favour of the Bill were protecting

their own interests and profits and have thus made claims about minimum consultation and “rushing” the Bill. In addition, she remarked that disagreement does not mean that the Bill was steamrolled or, that there was a lack of consultation. Rev. Magoba of the PAC remarked that the bill has not been rushed through Parliament as the issue has been, according to him, fully debated.

(h) Cabinet’s approval of Bill before public comment

Dr Cwele commented that if Cabinet has approved a Bill before the public has had a chance to voice their concerns, it should not cause a great deal of concern if one is familiar with the legislation processes. According to him, the Cabinet has approved of the principle, and not of the content thereof. Dr. Cwele remarked that the Bill is not final if Cabinet has approved of it. Mr. Gouws, on the other hand, said that Cabinet’s approval of the Bill before the deadline for public comment, clearly demonstrated that they had already decided to pass the Bill. Mr Green’s response was that Cabinet’s approval before the deadline did not mean anything significant. He stated that it could still be appealed against. PAC MP, Rev. Magoba commented that Cabinet’s approval of the Bill, was unusual.

(i) Impact on economy

Strange enough, according to Mr Van Pletzen, the Tobacco Act will not have such a harsh impact on tobacco companies in South Africa, seeing that tobacco consumption in the country is relatively low. He added that other industries would be more severely affected since economic development will decrease. Van Pletzen remarked that the Tobacco Institute does not anticipate any major disruptions to the tobacco industry. Mr. Green, on the other hand, commented that other industries and especially businesses would be affected, but that the health of the nation should be prioritized.

Dr Cwele, however, commented that businesses should not be affected that harshly since they have been given enough time to restructure. The regulations of the Act have been known since the introduction of the Tobacco Bill in 1998, he says. PAC MP, Mr Magoba, stated that the critical point of the debate was the effect that the new legislation will have on several businesses. He added that the effects of the new tobacco legislation could be severe, particularly upon the problem of unemployment

and sports sponsorship. ACDP spokesperson, Mr Green, commented that the Act would have a negative financial impact on other businesses.

(j) Implementation

According to Mrs Baloyi (ANC) the Tobacco Act will be as effective as in many countries where similar Acts are in place. She also remarked that, together with the police, the general “non-smoking” public should assist in monitoring compliance with the Act in order to protect their rights to a smoke free environment in the interest of their own health and that of the public at large. Green commented that, although the Bill favours the public’s health, the implementation aspects thereof are entirely another matter.

Mr Shalala of the Tobacco Institute has commented that the Bill is not enforceable, particularly in terms of smoking in public places. Mr Shalala stated that he believes that the hospitality industry is finding it especially difficult to comply with the Tobacco Act’s regulations and that this will indeed affect the industry negatively. According to the Tobacco Institute, successful enforcement of tobacco legislation of this kind has not been adapted to the South African context yet. Mr Gouws said that the implementation of the Bill would be problematic since some of the regulations are impractical. ANC MP, Dr Cwele, on the other hand, is convinced that the policing of the Tobacco Act should not be “a major headache”. According to him, he has been to several public places that are enforcing the law without any problems.

The responses from the interviews clearly indicate two very different views of the same process. The responses from these policy actors reflect the ongoing debate that the media has portrayed for the last couple of. On the one hand, there is the tobacco industry that is discontented with the way in which the legislative process was dealt with. On the other, there are the decision-makers who claim that the process was handled appropriately. One can however, also detect that members of the opposition parties agreed with the tobacco industry on certain aspects of the policy process. This could be perceived as a threat to the incumbent regime seeing that some may feel that their views were excluded and loose faith in government’s conduct of policy

processes. It is disappointing that certain members of the portfolio committee were not even aware of issues such as the fact that valuable information was withheld from relevant stakeholders. In addition, members of the Health Portfolio Committee seemed to have had doubts about the constitutionality and haste with which the Bill was dealt with. It appears as if some members of the Portfolio Committee have chosen to be vague about certain aspects of the legislation. Members and stakeholders also seem to differ significantly on aspects of implementation of the new tobacco legislation. It seems as if government relies quite heavily on the public's ability to prevent people to smoke in public places.

4.4 Conclusion

If one look closely at the process that the Tobacco Bill has followed it in Parliament, it is seen that:

- there were doubts about the constitutionality thereof; not only among stakeholders but among opposition parties in the relevant Committee, as well;
- there was no Green Paper or White Paper;
- it was published for comment after the deadline thereof had expired; and the deadline was extended by one week;
- insufficient notice was given to the public;
- no meaningful or adequate consultation took place with the tobacco industry;
- the relevant department withheld vital scientific evidence from the tobacco industry; thereby violating section 32 of the Constitution;¹⁵
- during the public hearings, the 74 interested parties had two days in which they were allowed 15 minutes each to make their presentations;

¹⁵ The Tobacco Institute of Southern Africa (TISA) went to Court due to the fact that the Minister of Health withheld important scientific evidence that was needed to participate in the legislative process, from the organization, thereby violating section 32 of the Constitution. TISA lost the case in the Cape High Court on the grounds that they could not yet prove that the regulations would, in fact, be damaging to the tobacco industry.

- according to the Hansard, the relevant Portfolio Committee had one day to deliberate on the more than hundred submissions;
- the stakeholders received no feedback whatsoever with regard to their submissions;
- the stakeholders' concerns and objections to the Bill were not taken into consideration;
- the President's concerns were not attended to, especially with regard to the section of "unintended consequences";
- there also were irregularities, for example, with regard to the fact that the mandates of two provincial legislatures did not concur with those of their representatives during the NCOP's public hearings¹⁶.

If one studies the process closely, it appears that the policy process of the Tobacco Products Control Amendment Act demonstrated quite a few irregularities. The process started off with a flawed parliamentary procedure that, in itself, is questionable and even unthinkable. The process also highlights uncertainties over the constitutionality of the Bill that is reflected in former President, Nelson Mandela's letter to the portfolio committee. These uncertainties were not given any further consideration by the decision-makers. The absence of a Green Paper and White Paper, which usually provides ample opportunity for stakeholders to have input into the process, appears to have lessened further debates of the new Act. The extension of the deadline for public comment is also troublesome since it may have prevented submissions from those people who failed to notice the announcement. Insufficient notices to the public may have caused the general public to be uninformed and under false impressions. With regard to the principle of consultation, the tobacco industry, which is the major stakeholder, felt excluded from the debate about the Bill in Parliament. They were given the opportunity to voice their concerns, but not to debate the issue. The fact that vital information was withheld from a major stakeholder sets a dangerous precedent for future legislative processes. There is also reason to doubt that the consequences of the Bill were thoroughly considered since the Portfolio

¹⁶ TISA monitored the public hearings of the Tobacco Amendment Bill held on 19-20 October 1998 and discovered this particular inconsistency.

Committee had one day to deliberate on the more than hundred submissions that were handed in. Government should be held accountable to the principles of the Constitution and take sufficient time to consider the consequences that the Bill would have on important sectors of the economy. Although Parliament did have a particularly busy session at the time, it is no reason for bills to be rushed through without being thoroughly deliberated. The irony remains that the tobacco industry will not experience any negative financial impact. According to the tobacco industry, it is other sectors like the advertising, media and hospitality industries that will be hit the hardest.

The importance of participation and inclusivity is explicitly recognized in the Constitution. It is said that allowing and encouraging direct and participatory forms of democracy strengthen democracy. Participatory forms of democracy allow individuals and institutions the opportunity to take part in decisions that affect them (De Waal et al. 1999:13). According to the major stakeholders in this process, there was no meaningful participation.

A study conducted by Roelfs and Liebenberg found that three of the nine provinces (Free State, Northern Cape and Western Cape) indicated relatively low levels of participation. The study has also found that participation in policy-making processes is normally more likely among those South Africans who trust the government than those who do not trust the government¹⁷. The legislative process of the Tobacco Act seems to have disregarded the importance of public participation and consultation for a sustainable democracy. This finding is not encouraging in a country where levels of political participation are already less than optimal. It might, in the long run, also have a negative impact on the levels of trust that citizens have in the political system.

¹⁷ See Roelfs and Liebenberg (1999:3) "Notes on Public Participation in South Africa" at <http://www.hsrc.ac.za/delivered/mrjcr12.html>>

4.5 Recommendations

This is a single case study, but it illustrates that the policy process of the tobacco legislation showed insufficient consultation and participation. It also implies that there might be similar cases like this. It could also indicate that the degree of participation and consultation during legislative processes are ill-defined and confusing. These issues should, therefore, be more clearly defined in order to avoid further complaints in this regard. I, therefore, recommend that the country's decision-makers should seriously review the policy-making process in terms of incorporating principles such as transparency, credibility and inclusivity. Clearly these were the main concerns in the policy process of the Tobacco Act. The amount of time that goes into deliberations and discussions should be stipulated so that this can be referred to when it is needed. Some sort of planning or forecasting should be done in order to avoid possible negative consequences. The new Bill makes no provision for "unintended consequences" which is essential in efficient policy planning. The fact that this process portrayed a serious lack of elements that are regarded as indicators of a true democracy, such as transparency, is disappointing, to say the least. These policies will ultimately affect the lives of millions of South Africans, and decisions about such issues cannot be made hurriedly to meet deadlines. Policy-makers should be held accountable for not adhering to the principles of democracy.

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Mr Edward Shalala, Tobacco Institute of Southern Africa (TISA), Cape Town, 31 January 2001.

Mrs SF Baloyi, ANC-Member of Portfolio Committee on Health, Parliament, 1 February 2001.

Dr SC Cwele, ANC Member of Portfolio Committee on Health (NCOP), Parliament, 23 January 2001.

Mr Kobus Gouws, NNP spokesperson (1998), Parliament, 24 January 2001.

Mr MS Magoba, PAC Member of Portfolio Committee on Health, Parliament, 29 January 2001.

Mr Louis Green, ACDP, Marks Building, Parliament, 26 January 2001.

APPENDIX A

QUESTIONNAIRE

Actors in the policy process of the Tobacco Amendment Bill were asked the following :

1. How do you feel about the outcome of the new tobacco act?
2. Do you think that it can be regarded as a balanced tobacco control policy?
3. What are your views regarding the consultation process
4. With whom, would you say, were not consulted?
5. What about those businesses that will be affected by the new tobacco law?
6. What is your opinion about claims that the Department of Health did not want to consult with the tobacco industry?
7. Do you feel that the concerns of all interest groups were taken seriously?
8. What is your sentiment on claims that the Bill was steamrolled through Parliament?
9. How do you respond to the fact that there was no Green and White Paper?
10. How do you react to claims of government's dismissal of requests for full debates on the issue?

11. Do you think that sufficient time was allowed for a discussion of possible alternatives?
12. How do you react to claims that role-players had no access to the information which government used to substantiate their proposals?
13. Are you of the opinion that the Tobacco Act is violating certain constitutional rights?
14. What is your opinion regarding the fact that government made use of overseas data to back arguments for which there were no local statistics?
15. Some people have suggested that by banning tobacco advertising, it comes down to limiting the principle of “freedom of commercial speech” ?
16. How do you respond to the fact that the Tobacco Bill has been approved by Cabinet before the August 14 the 1998 deadline for public comment?
17. What is your sentiment about the fact that the former President declined to sign the Act and referred it back to the National Assembly?
18. What is your response about the impact of the Tobacco Act on the economy?
19. How easy or difficult will it be to monitor the act?

APPENDIX B

Tuesday, 8 September 1998]

776

No 107—1998] SECOND SESSION, SECOND PARLIAMENT

PARLIAMENT

OF THE

REPUBLIC OF SOUTH AFRICA

**ANNOUNCEMENTS,
TABLINGS AND
COMMITTEE REPORTS**

TUESDAY, 8 SEPTEMBER 1998

ANNOUNCEMENTS:*National Assembly and National Council of Provinces:**Bills:*

1. The Speaker and the Chairperson:

- (1) The following Bill was introduced in the National Assembly on 31 August 1998:

(i) *Liquor Bill* [B 115—98] (National Assembly—sec 76(1)).

On Friday, 4 September 1998, an announcement appeared in the Announcements, Tablings and Committee Reports (ATC), indicating that the Bill should in fact have been introduced in the National Council of Provinces by the relevant select committee. That announcement was wrong, as, in terms of section 44(2), read with section 76(1), of the Constitution, a Bill of this nature may only be introduced in the National Assembly.

The entry on the ATC of 31 August, as well as the information reflected on the title page of the Bill, are therefore correct.

2. The Speaker and the Chairperson:

- (1) The following Bill was introduced in the National Assembly on 31 August 1998:

(i) *Tobacco Products Control Amendment Bill* [B 117—98] (National Assembly—sec 76(1)).

The entry should have read as follows:

(i) *Tobacco Products Control Amendment Bill* [B 117—98] (National Council of Provinces—sec 76(2))—(Select Committee on Social Services—National Council of Provinces).



The title page of the Bill, stating that it was introduced by the Minister in the National Assembly, is accordingly incorrect as the Bill was in fact introduced in the National Council of Provinces by the relevant Select Committee.

National Assembly:

Bills:

1. The Speaker:

(1) The Speaker has in terms of rule 168(2) referred the following legislative proposal which was submitted to her, together with the memorandum thereon, to the Portfolio Committee on Private Members' Legislative Proposals and Petitions:

(1) *Protection and Promotion of South African Indigenous Knowledges Bill*, submitted by Dr M W Serote on 7 September 1998.

National Council of Provinces:

1. The Chairperson:

Message from National Assembly to National Council of Provinces:

Bill passed by National Assembly on 8 September 1998 and transmitted for concurrence:

(1) *Executive Members' Ethics Bill* [B 64B—98] (National Assembly—sec 75).

COMMITTEE REPORTS:

National Assembly:

1. Report of the Portfolio Committee on Justice on the *Magistrates' Courts Amendment Bill* [B 33—98] (National Assembly—sec 75), dated 2 September 1998, as follows:

The Portfolio Committee on Justice, having considered the subject of the *Magistrates' Courts Amendment Bill* [B 33—98] (National Assembly—sec 75), referred to it, reports the Bill with amendments [B 33A—98].

The Committee further wishes to report as follows:

1. In the process of considering the Bill, the Committee was mindful of the advantages and disadvantages of the lay assessor system, and duly considered all submissions made in this regard. The Committee also paid specific attention to the judgement of the High Court in *S v Gambushe* [1997 (1) SACR 638 N] and the guidelines contained therein.

2. The Committee is of the view that the assessor system can be extended successfully to enhance community involvement in the administration of justice, by ensuring that—

(1) cases where the appointment of assessors will be compulsory will mostly, at this stage, be limited to matters which will be adjudicated upon by experienced magistrates;

(2) extensive training of assessors will take place;

(3) the possibility is created for the system to be implemented

[Wednesday, 9 September 1998]

- (2) On 9 September 1998 the Joint Tagging Mechanism (JTM), in terms of Joint Rule 107, classified the following Bills as section 76 Bills:
- (i) *Tobacco Products Control Amendment Bill* [B 117—98] (National Council of Provinces—sec 76(2))—(Select Committee on Social Services—National Council of Provinces).
 - (ii) *National Veld and Forest Fire Bill* [B 122—98] (National Assembly—sec 76(1))—(Portfolio Committee on Agriculture, Water Affairs and Forestry—National Assembly).

National Council of Provinces:

1. The Chairperson:

Message from National Assembly to National Council of Provinces:

Bills passed by National Assembly on 9 September 1998 and transmitted for concurrence:

- (1) *Public Protector Amendment Bill* [B 79B—98] (National Assembly—sec 76)—(Select Committee on Security and Justice—National Council of Provinces).
- (2) *Magistrates' Courts Amendment Bill* [B 33B—98] (National Assembly—sec 75)—(Select Committee on Security and Justice—National Council of Provinces).

TABLINGS:*National Assembly and National Council of Provinces:**Papers:*

1. The Speaker and the Chairperson:

Reports of the Auditor-General on the—

- (1) Financial Statements of the Dried Fruit Board for 1997 [RP 143—98];
- (2) Financial Statements of the Lucerne Seed Board for 1996-97 [RP 144—98];
- (3) Financial Statements of the Canning Fruit Board for 1996-97 [RP 142—98].

Referred to the Portfolio Committee on Public Accounts.

2. The Minister of Environmental Affairs and Tourism:

List relating to Government Notice for 2 September 1998.

COMMITTEE REPORTS:*National Assembly:*

1. Report of the Portfolio Committee on Finance on the *National Development Agency Bill* [B 91—98] (National Assembly—sec 75), dated 1 September 1998, as follows:

The Portfolio Committee on Finance, having considered the subject of the *National Development Agency Bill* [B 91—98]

(viii) *Sterilisation Bill* [B 78B—98]—Act No 44 of 1998 (assented to and signed by President on 27 August 1998).

2. The Speaker and the Chairperson:

- (1) The following Bills were introduced in the National Assembly on 31 August 1998 and referred to the Joint Tagging Mechanism (JTM) for classification in terms of Joint Rule 107:
- (1) *Pan South African Language Board Amendment Bill* [B 107—98] (National Assembly—sec 75)—(Portfolio Committee on Arts, Culture and Language, Science and Technology—National Assembly).
 - (2) *Conversion of Sasria Bill* [B 108—98] (National Assembly—sec 75)—(Portfolio Committee on Finance—National Assembly).
 - (3) *Amendment of Customary Law of Succession Bill* [B 109—98] (National Assembly—sec 75)—(Portfolio Committee on Justice—National Assembly).
 - (4) *Recognition of Customary Marriages Bill* [B 110—98] (National Assembly—sec 75)—(Portfolio Committee on Justice—National Assembly).
 - (5) *Reconstruction and Development Programme fund Amendment Bill* [B 111—98] (National Assembly—sec 75)—(Portfolio Committee on Finance—National Assembly).
 - (6) *South African Geographical Names Commission Bill* [B 112—98] (National Assembly—sec 76(1))—(Portfolio Committee on Arts, Culture and Language, Science and Technology).
 - (7) *National Sport and Recreation Bill* [B 113—98] (National Assembly—sec 75)—(Portfolio Committee on Sport and Recreation—National Assembly).
 - (8) *South African Medicines and Medical Devices Regulatory Authority Bill* [B 114—98] (National Assembly—sec 75)—(Portfolio Committee on Health—National Assembly).
 - (9) *Liquour Bill* [B 115—98] (National Assembly—sec 76(1))—(Portfolio Committee on Trade and Industry—National Assembly).
 - (10) *Medical Schemes Bill* [B 116—98] (National Assembly—sec 75)—(Portfolio Committee on Health—National Assembly).
 - (11) *Tobacco Products Control Amendment Bill* [B 117—98] (National Assembly—sec 76(1))—(Portfolio Committee on Health—National Assembly).
 - (12) *Prevention of Organised Crime Bill* [B 118—98] (National Assembly—sec 75)—(Portfolio Committee on Justice—National Assembly).

APPENDIX C

1. Afrikaanse Handelsinstituut
2. Airport Advertising
3. Alexander Sinton High School
4. Anchor Outdoor Displays
5. Applied Fiscal Research Centre (AFREC)
6. Ad Agencies
7. Associated Printing
8. Association of Marketers
9. Axxess Big Concerts
10. Banner, I.S.
11. British American Tobacco (South Africa)
12. Cape Town No Tobacco Forum
13. Cancer Association of South Africa
14. Castle Premier Soccer League
15. Clarion Printed Products
16. Clothing Bargaining Council Health Care Fund
17. Cinemark
18. Cooperative Tobacco Exchange
19. Corpcom
20. Corin, Reid
21. Corporation for Economic Research
22. Council for Apostolic and Zion Churches in South Africa
23. Democratic Nursing Organisation of South Africa (DENOSA)
24. Design Initiatives
25. Durban Turf Club
26. Erasmus, Gerhard (Faculty of Law, University of Stellenbosch)
27. Federated Hospitality Association of South Africa (FEDHASA)
28. Food and Allied Workers Union (FAWU)
29. Free Market Foundation
30. Freedom of Commercial Speech Trust
31. Gilbeys
32. Grey Advertising
33. Gretton, Keith (expert on environmental tobacco smoke)
34. Heart Foundation

35. High, S. Hugh (Depts. of Business Science and Economics, UCT)
36. Kenny, H
37. Independent Newspapers Cape
38. International Hotel and Restaurant Association
39. Langeberg
40. Leach, Daniel (Dept. of Business Economics, University of Witwatersrand)
41. Lowveld Golden Leaf
42. National Council Against Smoking
43. National Health Committee: ANC
44. MKTV Tobacco Cooperative
45. Marks, Amy Seidel (Graduate School of Business, UCT)
46. Media Co-ordination
47. Medical Research Council (MRC)
48. Music Industry Development Initiative (MIDI)
49. Mosime, S.M. (University of the North West)
50. National Progressive Primary Health Care Network
51. Potgietersrus Tobacco Corporation
52. Print Media Association of South Africa
53. Publicis
54. Ocean Action
55. Reference Group for Health Promoting Schools in the Western Cape
56. Restaurant and Food Services Association of South Africa
57. Robertsons Food
58. Rothmans International
59. SACCAWU
60. Sinamandla Advertising and Marketing
61. Site Aquisitions
62. South African Medical Association
63. Sowetan
64. Swart, D
65. Store Ads
66. Tobacco Exchange
67. Tobacco Institute of Southern Africa
68. Tobacco RSA
69. Tobacco Vending Machine Association

70. Ucko, Peter (Independent Councillor)
71. Vukani Outdoor Advertsing
72. Woest, Dennis
73. Western Cape Department of Health
74. Worldwide Brands Incorporated

APPENDIX D

REPUBLIC OF SOUTH AFRICA

TOBACCO PRODUCTS CONTROL AMENDMENT BILL

(Referred back to the National Assembly by the President in terms of section 79 of the Constitution, and amended by the Portfolio Committee on Health (National Assembly))

(MINISTER OF HEALTH)

[B 117H—98]

REPUBLIEK VAN SUID-AFRIKA

WYSIGINGSWETSONTWERP OP DIE BEHEER VAN TABAKPRODUKTE

(Deur die President ingevolge artikel 79 van die Grondwet na die Nasionale Vergadering terugverwys, en gewysig deur die Portefeuljekomitee oor Gesondheid (Nasionale Vergadering))

(MINISTER VAN GESONDHEID)

[W 117H—98]

ISBN 0 621 29007 6

GENERAL EXPLANATORY NOTE:

- [] Words in bold type in square brackets indicate omissions from existing enactments.
- Words underlined with a solid line indicate insertions in existing enactments.
-
-

BILL

To amend the Tobacco Products Control Act, 1993, so as to amend and insert certain definitions; to provide for the prohibition of advertising and promotion of tobacco products; to provide further, for the prohibition of advertising and promotion of tobacco products in relation to sponsored events; to prohibit the free distribution of tobacco products and the receipt of gifts or cash prizes in contests, lotteries or games to or by the purchaser of a tobacco product in consideration of such purchase; to provide for the prescription of maximum yields of tar, nicotine and other constituents in tobacco products; to increase fines; and to provide for matters connected therewith.

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

Insertion of Preamble in Act 83 of 1993

1. The following preamble shall be inserted in the Tobacco Products Control Act, 1993 (hereinafter referred to as the principal Act): 5

“PREAMBLE

ACKNOWLEDGING that tobacco use—
is extremely injurious to the health of both smokers and non-smokers and warrants, in the public interest, a restrictive legislation;
is a widely accepted practice among adults, which makes it inappropriate to ban completely; 10

REALISING that the association of smoking with social success, business advancement and sporting prowess through the use of advertising and promotion may have the particularly harmful effect of encouraging children and young people to take up smoking; 15

CONSIDERING that the extent of the effects of smoking on health calls for strong action to deter people from taking up smoking and to encourage existing smokers to give up smoking; and

RESOLVING to align the health system with the democratic values of the Constitution and to enhance and protect the fundamental rights of citizens by discouraging the use, promotion and advertising of tobacco products in order to reduce the incidence of tobacco-related illness and death;” 20

Amendment of section 1 of Act 83 of 1993

2. Section 1 of the principal Act is hereby amended—

- (a) by the substitution for the definition of “advertisement” of the following definition:
- “ ‘advertisement’, in relation to any tobacco product, means any **[statement, communication, representation or reference distributed to members of the public or brought to their notice in any other manner and which is intended]** drawn, still or moving picture, sign, symbol, other visual image or message or audible message aimed at the public and designed to promote [the sale of such] or publicise a tobacco product or [encourage the use thereof or draw attention to the nature, properties, advantages or uses thereof] to promote smoking behaviour and includes the use in any advertisement or promotion aimed at the public of a tobacco product manufacturer’s company name where the name or any part of the name is used as or is included in a tobacco product trade mark, and ‘advertise’ has a corresponding meaning;”;
- (b) by the insertion after the definition of “advertisement” of the following definition:
- “ ‘Constitution’ means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996);”;
- (c) by the substitution for the definition of “hazardous constituent” of the following definition:
- “ ‘constituent’, in relation to any tobacco product, means nicotine, tar and any other constituent of a tobacco product or of tobacco smoke which the Minister may by notice in the Gazette declare to be a constituent for the purposes of this Act;”;
- (d) by the substitution for the definition of “Director-General” of the following definition:
- “ ‘Director-General’ means the Director-General: **[National] Health [and Population Development];**”;
- (e) by the insertion after the definition of “Director-General” of the following definition:
- “ ‘employed’ or ‘employment’ means employed or employment as an employee as defined in section 1 of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997);”;
- (f) by the substitution for the definition of “Minister” of the following definition:
- “ ‘Minister’ means the Minister of **[National] Health;**”;
- (g) by the insertion after the definition of “officer” of the following definition:
- “ ‘organised activity’—
- (a) means any activity or event—
- (i) which the public attend or participate in;
- (ii) which is organised for the purposes of entertainment, sport or recreation or for educational or cultural purposes; and
- (iii) where a tobacco product, or brand name, trade mark, logo or company name in relation to a tobacco product, is used in the name of or portrayal of the activity or event; but
- (b) excludes any private activity or event arranged by a manufacturer, importer, distributor or retailer of a tobacco product where only its shareholders or its employees or their spouses or partners attend;”;
- (h) by the insertion after the definition of “prescribe” of the following definition:
- “ ‘private dwelling’ means any part of—
- (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;”;
- (i) by the substitution for the definition of “public place” of the following definition:
- “ ‘public place’ means any indoor or enclosed area which is open to the public or any part of the public and includes a workplace and a public conveyance;”;

- (j) by the substitution for the definition of “smoke” of the following definition:
 “ ‘smoke’ [**includes sniff, suck, or chew a tobacco product, and also have**] means to inhale, exhale, hold or otherwise have control over an ignited tobacco product [for any device containing an ignited tobacco product], weed or plant, and ‘smoked’ and ‘smoking’ have corresponding meanings;” 5
- (k) by the substitution for the definition of “tobacco product” of the following definition:
 “ ‘tobacco product’ means any product manufactured from tobacco and intended [**to be smoked**] for use by smoking, inhalation, chewing, sniffing or sucking;” 10
- (l) by the insertion after the definition of “tobacco product” of the following definition:
 “ ‘trade mark’ includes—
 (i) any mark whether registered or registrable for trade purposes or any recognised version thereof that is likely to be taken as, or confused with, that trade mark; 15
 (ii) certification trade mark or collective trade mark; and
 (iii) ‘trade mark’ as defined in section 1 of the Trade Marks Act, 1993 (Act No. 194 of 1993);” 20
- (m) by the insertion after the definition of “trade mark” of the following definition:
 “ ‘workplace’—
 (a) means any indoor or enclosed area in which employees perform the duties of their employment; and 25
 (b) includes any corridor, lobby, stairwell, elevator, cafeteria, washroom or other common area frequented by such employees during the course of their employment; but
 (c) excludes any private dwelling, and any portion of an area mentioned in paragraph (a) specifically designated by the employer as a smoking area and which complies with the prescribed requirements.” 30

Amendment of section 2 of Act 83 of 1993

3. Section 2 of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection:
 “(1)(a) The smoking of tobacco products in any public place is prohibited. 35
 (b) Notwithstanding the provisions of subsection (1)(a), the Minister may by notice in the *Gazette* declare specified public places permissible smoking areas, subject to any conditions that may be specified in such notices. 40
 (c) Notwithstanding the fact that a private dwelling is excluded from the definition of “workplace”, if a private dwelling is used for commercial child care activities or for schooling the smoking of tobacco products in such dwelling or on the terrain of such dwelling is prohibited, except in an area of the private dwelling which is specifically designated by the employer, owner, tenant or possessor as a smoking area and which complies with the prescribed requirements.” 45
- (b) by the substitution for subsection (2) of the following subsection:
 “(2) The Minister may at the request of any local authority, but subject to subsection (3), grant any or all of his or her powers contemplated in subsection (1) to such local authority.” 50
- (c) by the insertion after subsection (5) of the following subsections:
 “(6) A local authority which has made regulations relating to the control of smoking in public places in terms of this Act shall have the power, duty and obligation to enforce the regulations in its area of jurisdiction. 55
 (7) A local authority which has not made regulations relating to the control of smoking in public places in terms of this Act shall have the power, duty and obligation to enforce any national regulations in connection therewith in its area of jurisdiction.”

Substitution of section 3 of Act 83 of 1993

4. The following section is hereby substituted for section 3 of the principal Act:

“Advertising, sponsorship, promotion and required information in respect of packages of tobacco products

3. (1) No person shall— 5
- (a) advertise, including the use of tobacco trade marks, logos, brand names or company names used on tobacco products; or
 - (b) use tobacco trade marks, logos, brand names or company names used on tobacco products for the purposes of advertising any organisation, service activity or event. 10
- (2) No manufacturer, importer, distributor or retailer of tobacco products shall—
- (a) organise or promote any organised activity that is to take place in whole or in part in the Republic;
 - (b) make any financial contribution to any organised activity that is to take place, or is taking place, or has taken place in whole or in part in the Republic; 15
 - (c) make any financial contribution to any person in respect of—
 - (i) the organisation or promotion of any organised activity in the Republic by that person; 20
 - (ii) the participation, by that person, in any organised activity that is to take place, or is taking place in whole or in part, in the Republic.
- (3) A retailer of tobacco products may post in accordance with the regulations passed in relation to this Act, signs at the point of sale that indicate the availability of tobacco products and their price. 25
- (4) No person shall sell or import for subsequent sale any prescribed tobacco product, unless—
- (a) such product is in a package;
 - (b) the package in which the tobacco product is sold bears the prescribed warning concerning the health hazards incidental to the smoking of tobacco products; and 30
 - (c) the quantities of the constituents present in the tobacco product concerned are stated on the package.
- (5) Notwithstanding the provisions of section 3, the Minister may, by regulations, provide for exemptions for unintended consequences or the phasing out of existing sponsorship or contractual obligations.”. 35

Insertion of section 3A in Act 83 of 1993

5. The following section is hereby inserted after section 3 of the principal Act:

“Maximum yields of tar and other constituents in a tobacco product 40

3A. The Minister may, by notice in the *Gazette*, declare the maximum permissible levels of tar, nicotine and other constituents which tobacco products may contain and the maximum yield of any such substance that may be obtained therefrom.”. 45

Amendment of section 4 of Act 83 of 1993

6. Section 4 of the principal Act is hereby amended by the deletion of subsection (2) and subsection (3).

Insertion of section 4A in Act 83 of 1993

7. The following section is hereby inserted after section 4 of the principal Act:

“Free distribution and reward prohibited

4A. (1) No manufacturer, distributor, importer or retailer of a tobacco product shall for free, or at a reduced price, other than a normal trade discount— 5
 (a) distribute any tobacco product; or
 (b) supply any tobacco product to any person for subsequent distribution.
 (2) No person shall offer any gift, cash rebate or right to participate in any contest, lottery or game, to any person in consideration of the purchase of a tobacco product, or the furnishing of evidence of such a purchase.”. 10

Amendment of section 5 of Act 83 of 1993

8. Section 5 of the principal Act is hereby amended— 15
 (a) by the substitution for subsection (1) of the following subsection:
 “(1) The sale of tobacco products from vending machines shall be restricted to places in which purchases from such machines are inaccessible to persons under the age of sixteen years.”;
 (b) by the substitution for subsection (2) of the following subsection:
 “(2) It shall be the responsibility of any person during such time as he or she is responsible for or has control of the premises in which any vending machine is kept to ensure that no person under the age of sixteen years makes use of any such machine.”;
 (c) by the deletion of subsection (4). 20

Substitution of section 7 of Act 83 of 1993 25

9. The following section is substituted for section 7 of the principal Act:

“Offences and penalties

7. (1) Any person who contravenes or fails to comply with any notice issued in terms of section 2 (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R200 or to such penalties as may be determined. 30
 (2) Any person who contravenes or fails to comply with the provisions of section 4(1) or 5 shall be guilty of an offence and liable on conviction to a fine not exceeding R10 000 or to such imprisonment as may be determined. 35
 (3) Any person who contravenes or fails to comply with the provisions of section 3 or 4A or any notice issued in terms of section 3A shall be guilty of an offence and liable on conviction to a fine not exceeding R200 000 or to such imprisonment as may be determined.”.

Extension and application of Act 83 of 1993 40

10. The Tobacco Products Control Act, 1993, and all amendments thereof shall apply throughout the Republic.

Short title and commencement

11. (1) This Act shall be called the Tobacco Products Control Amendment Act, 1999, and shall come into operation on a date fixed by the President by proclamation in the *Gazette*. 45
 (2) Different dates may be fixed in respect of different provisions of this Act.

MEMORANDUM ON THE OBJECTS OF THE TOBACCO PRODUCTS CONTROL AMENDMENT BILL

1. INTRODUCTION

The Bill seeks to extend the application of the Tobacco Products Control Act, 1993 (Act No. 83 of 1993), hereinafter referred to as the "principal Act", to the territories of the former Republics of Transkei, Bophuthatswana, Venda and Ciskei and of the former self-governing territories.

2. IMPORTANT PROVISIONS OF THE BILL

- (a) In order to control smoking in public places, clause 2 provides a local authority with the power, duty and obligation to enforce the regulations relating to smoking in such places within its area of jurisdiction, whether such regulations are national or not.
- (b) Clause 3 prohibits the display or use of tobacco trade marks, logos, brand names or company names in relation to a sponsored event. The use of a tobacco trade mark for the purpose of advertising any organisation, service, activity or event is also prohibited. The prohibition does not relate to point of sale advertising provided the regulations are adhered to.
- (c) The distribution of free tobacco products and the offering of gifts or cash rebates or the right to participate in a contest, lottery or game in consideration of the purchase of a tobacco product is prohibited in clause 6.
- (d) It is proposed in clause 8 that the sale of tobacco products from vending machines be restricted to places which are inaccessible to persons under the age of 16 years. It is the responsibility of the person who has control of the premises where machines are kept to ensure that children do not make use of such machines.

3. CONSULTATION ON THE BILL

The following parties were consulted:

- * National Council Against Smoking
- * Cancer Association of South Africa
- * Heart Foundation
- * National Cancer Registry
- * Medical Research Council
- * Human Sciences Research Council
- * UCT School of Economics—Economics of Tobacco Control Project
- * NPPHCN
- * Tobacco Action
- * South African Medical Association
- * DENOSA
- * City of Cape Town
- * South Peninsula Metro Council
- * Freedom of Commercial Speech Trust
- * Tobacco Institute
- * Vending Machine Association
- * FEDHASA—Federated Hospitality Association of South Africa
- * All relevant government departments were consulted.

4. CONSTITUTION

The Bill was published for comment in terms of section 154(2) of the Constitution on 14 August 1998. Notice 1682 of 1988. Volume 398/No. 19158.

Responses: 112

Support: 80

Oppose: 27

Unsure: 2

Comments for changes: 14

5. PARLIAMENTARY PROCESS

The Department of Health and the State Law Advisers are of the opinion that the procedure established by section 76 of the Constitution should be followed with regard to this Bill.

APPENDIX E



REPUBLIC OF SOUTH AFRICA

GOVERNMENT GAZETTE

STAATSKOERANT

VAN DIE REPUBLIEK VAN SUID-AFRIKA

Registered at the Post Office as a Newspaper

As 'n Nuusblad by die Poskantoor Geregistreer

CAPE TOWN, 23 APRIL 1999

KAAPSTAD, 23 APRIL 1999

No. 19962

OFFICE OF THE PRESIDENT

KANTOOR VAN DIE PRESIDENT

No. 494.

23 April 1999

No. 494.

23 April 1999

It is hereby notified that the President has assented to the following Act which is hereby published for general information:—

Hierby word bekend gemaak dat die President sy goedkeuring geheg het aan die onderstaande Wet wat hierby ter algemene inligting gepubliseer word:—

No. 12 of 1999: Tobacco Products Control Amendment Act, 1999.

No. 12 van 1999: Wysigingswet op die Beheer van Tabakprodukte, 1999.

Act No. 12, 1999 TOBACCO PRODUCTS CONTROL AMENDMENT ACT, 1999

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

(English text signed by the President.)
(Assented to 14 April 1999.)

ACT

To amend the Tobacco Products Control Act, 1993, so as to amend and insert certain definitions; to provide for the prohibition of advertising and promotion of tobacco products; to provide further, for the prohibition of advertising and promotion of tobacco products in relation to sponsored events; to prohibit the free distribution of tobacco products and the receipt of gifts or cash prizes in contests, lotteries or games to or by the purchaser of a tobacco product in consideration of such purchase; to provide for the prescription of maximum yields of tar, nicotine and other constituents in tobacco products; to increase fines; and to provide for matters connected therewith.

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

Insertion of Preamble in Act 83 of 1993

1. The following preamble shall be inserted in the Tobacco Products Control Act, 1993 (hereinafter referred to as the principal Act):

“PREAMBLE

ACKNOWLEDGING that tobacco use—

is extremely injurious to the health of both smokers and non-smokers and warrants, in the public interest, a restrictive legislation;
is a widely accepted practice among adults, which makes it inappropriate to ban completely;

REALISING that the association of smoking with social success, business advancement and sporting prowess through the use of advertising and promotion may have the particularly harmful effect of encouraging children and young people to take up smoking;

CONSIDERING that the extent of the effects of smoking on health calls for strong action to deter people from taking up smoking and to encourage existing smokers to give up smoking; and

RESOLVING to align the health system with the democratic values of the Constitution and to enhance and protect the fundamental rights of citizens by discouraging the use, promotion and advertising of tobacco products in order to reduce the incidence of tobacco-related illness and death;”.

Amendment of section 1 of Act 83 of 1993

2. Section 1 of the principal Act is hereby amended—

- (a) by the substitution for the definition of "advertisement" of the following definition:
- " 'advertisement', in relation to any tobacco product, means any **[statement, communication, representation or reference distributed to members of the public or brought to their notice in any other manner and which is intended]** drawn, still or moving picture, sign, symbol, other visual image or message or audible message aimed at the public and designed to promote **[the sale of such]** or publicise a tobacco product or **[encourage the use thereof or draw attention to the nature, properties, advantages or uses thereof]** to promote smoking behaviour and includes the use in any advertisement or promotion aimed at the public of a tobacco product manufacturer's company name where the name or any part of the name is used as or is included in a tobacco product trade mark, and 'advertise' has a corresponding meaning;"
- (b) by the insertion after the definition of "advertisement" of the following definition:
- " 'Constitution' means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996);"
- (c) by the substitution for the definition of "hazardous constituent" of the following definition:
- " 'constituent', in relation to any tobacco product, means nicotine, tar and any other constituent of a tobacco product or of tobacco smoke which the Minister may by notice in the *Gazette* declare to be a constituent for the purposes of this Act;"
- (d) by the substitution for the definition of "Director-General" of the following definition:
- " 'Director-General' means the Director-General: **[National] Health [and Population Development]**;"
- (e) by the insertion after the definition of "Director-General" of the following definition:
- " 'employed' or 'employment' means employed or employment as an employee as defined in section 1 of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997);"
- (f) by the substitution for the definition of "Minister" of the following definition:
- " 'Minister' means the Minister of **[National] Health**;"
- (g) by the insertion after the definition of "officer" of the following definition:
- " 'organised activity'—
- (a) means any activity or event—
- (i) which the public attend or participate in;
- (ii) which is organised for the purposes of entertainment, sport or recreation or for educational or cultural purposes; and
- (iii) where a tobacco product, or brand name, trade mark, logo or company name in relation to a tobacco product, is used in the name of or portrayal of the activity or event; but
- (b) excludes any private activity or event arranged by a manufacturer, importer, distributor or retailer of a tobacco product where only its shareholders or its employees or their spouses or partners attend;"
- (h) by the insertion after the definition of "prescribe" of the following definition:
- " 'private dwelling' means any part of—
- (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;"
- (i) by the substitution for the definition of "public place" of the following definition:
- " 'public place' means any indoor or enclosed area which is open to the public or any part of the public and includes a workplace and a public conveyance;"

- (j) by the substitution for the definition of "smoke" of the following definition:
 " 'smoke' [**includes sniff, suck, or chew a tobacco product, and also have**] means to inhale, exhale, hold or otherwise have control over an ignited tobacco product [**or any device containing an ignited tobacco product**], weed or plant, and 'smoked' and 'smoking' have corresponding meanings;" 5
- (k) by the substitution for the definition of "tobacco product" of the following definition:
 " 'tobacco product' means any product manufactured from tobacco and intended [**to be smoked**] for use by smoking, inhalation, chewing, sniffing or sucking;" 10
- (l) by the insertion after the definition of "tobacco product" of the following definition:
 " 'trade mark' includes—
 (i) any mark whether registered or registrable for trade purposes or any recognised version thereof that is likely to be taken as, or confused with, that trade mark;
 (ii) certification trade mark or collective trade mark; and
 (iii) 'trade mark' as defined in section 1 of the Trade Marks Act, 1993 (Act No. 194 of 1993);" 15 20
- (m) by the insertion after the definition of "trade mark" of the following definition:
 " 'workplace'—
 (a) means any indoor or enclosed area in which employees perform the duties of their employment; and
 (b) includes any corridor, lobby, stairwell, elevator, cafeteria, washroom or other common area frequented by such employees during the course of their employment; but
 (c) excludes any private dwelling, and any portion of an area mentioned in paragraph (a) specifically designated by the employer as a smoking area and which complies with the prescribed requirements." 25 30

Amendment of section 2 of Act 83 of 1993

3. Section 2 of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection:
 "(1)(a) The smoking of tobacco products in any public place is prohibited.
 (b) Notwithstanding the provisions of subsection (1)(a), the Minister may by notice in the *Gazette* declare specified public places permissible smoking areas, subject to any conditions that may be specified in such notices.
 (c) Notwithstanding the fact that a private dwelling is excluded from the definition of "workplace", if a private dwelling is used for commercial child care activities or for schooling the smoking of tobacco products in such dwelling or on the terrain of such dwelling is prohibited, except in an area of the private dwelling which is specifically designated by the employer, owner, tenant or possessor as a smoking area and which complies with the prescribed requirements;" 35 40 45
- (b) by the substitution for subsection (2) of the following subsection:
 "(2) The Minister may at the request of any local authority, but subject to subsection (3), grant any or all of his or her powers contemplated in subsection (1) to such local authority;" 50
- (c) by the insertion after subsection (5) of the following subsections:
 "(6) A local authority which has made regulations relating to the control of smoking in public places in terms of this Act shall have the power, duty and obligation to enforce the regulations in its area of jurisdiction.
 (7) A local authority which has not made regulations relating to the control of smoking in public places in terms of this Act shall have the power, duty and obligation to enforce any national regulations in connection therewith in its area of jurisdiction." 55

Substitution of section 3 of Act 83 of 1993

4. The following section is hereby substituted for section 3 of the principal Act:

“Advertising, sponsorship, promotion and required information in respect of packages of tobacco products

3. (1) No person shall— 5
- (a) advertise, including the use of tobacco trade marks, logos, brand names or company names used on tobacco products; or
- (b) use tobacco trade marks, logos, brand names or company names used on tobacco products for the purposes of advertising any organisation, service activity or event. 10
- (2) No manufacturer, importer, distributor or retailer of tobacco products shall—
- (a) organise or promote any organised activity that is to take place in whole or in part in the Republic;
- (b) make any financial contribution to any organised activity that is to take place, or is taking place, or has taken place in whole or in part in the Republic; 15
- (c) make any financial contribution to any person in respect of—
- (i) the organisation or promotion of any organised activity in the Republic by that person; 20
- (ii) the participation, by that person, in any organised activity that is to take place, or is taking place in whole or in part, in the Republic.
- (3) A retailer of tobacco products may post in accordance with the regulations passed in relation to this Act, signs at the point of sale that indicate the availability of tobacco products and their price. 25
- (4) No person shall sell or import for subsequent sale any prescribed tobacco product, unless—
- (a) such product is in a package;
- (b) the package in which the tobacco product is sold bears the prescribed warning concerning the health hazards incidental to the smoking of tobacco products; and 30
- (c) the quantities of the constituents present in the tobacco product concerned are stated on the package.
- (5) Notwithstanding the provisions of section 3, the Minister may, by regulations, provide for exemptions for unintended consequences or the phasing out of existing sponsorship or contractual obligations.”. 35

Insertion of section 3A in Act 83 of 1993

5. The following section is hereby inserted after section 3 of the principal Act:

“Maximum yields of tar and other constituents in a tobacco product 40

3A. The Minister may, by notice in the *Gazette*, declare the maximum permissible levels of tar, nicotine and other constituents which tobacco products may contain and the maximum yield of any such substance that may be obtained therefrom.”. 45

Amendment of section 4 of Act 83 of 1993

6. Section 4 of the principal Act is hereby amended by the deletion of subsection (2) and subsection (3).

Insertion of section 4A in Act 83 of 1993

7. The following section is hereby inserted after section 4 of the principal Act:

“Free distribution and reward prohibited

4A. (1) No manufacturer, distributor, importer or retailer of a tobacco product shall for free, or at a reduced price, other than a normal trade discount—
 (a) distribute any tobacco product; or
 (b) supply any tobacco product to any person for subsequent distribution.
 (2) No person shall offer any gift, cash rebate or right to participate in any contest, lottery or game, to any person in consideration of the purchase of a tobacco product, or the furnishing of evidence of such a purchase.”

Amendment of section 5 of Act 83 of 1993

8. Section 5 of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection: 15
“(1) The sale of tobacco products from vending machines shall be restricted to places in which purchases from such machines are inaccessible to persons under the age of sixteen years.”;
 (b) by the substitution for subsection (2) of the following subsection: 20
“(2) It shall be the responsibility of any person during such time as he or she is responsible for or has control of the premises in which any vending machine is kept to ensure that no person under the age of sixteen years makes use of any such machine.”;
 (c) by the deletion of subsection (4).

Substitution of section 7 of Act 83 of 1993

9. The following section is substituted for section 7 of the principal Act:

“Offences and penalties

7. (1) Any person who contravenes or fails to comply with any notice issued in terms of section 2 (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R200 or to such penalties as may be determined. 30
 (2) Any person who contravenes or fails to comply with the provisions of section 4(1) or 5 shall be guilty of an offence and liable on conviction to a fine not exceeding R10 000 or to such imprisonment as may be determined. 35
 (3) Any person who contravenes or fails to comply with the provisions of section 3 or 4A or any notice issued in terms of section 3A shall be guilty of an offence and liable on conviction to a fine not exceeding R200 000 or to such imprisonment as may be determined.”

Extension and application of Act 83 of 1993

10. The Tobacco Products Control Act, 1993, and all amendments thereof shall apply throughout the Republic.

Short title and commencement

11. (1) This Act shall be called the Tobacco Products Control Amendment Act, 1999, and shall come into operation on a date fixed by the President by proclamation in the *Gazette*. 45

(2) Different dates may be fixed in respect of different provisions of this Act.