

**STANDING COMMITTEE ON
SCRUTINY OF BILLS AND
SUBORDINATE LEGISLATION**

REPORT NO 10 of 1990

14 June 1990

ROLE OF THE COMMITTEE

The Committee examines all Bills and delegated legislation presented to the Legislative Assembly. The Committee does not make any comments on the policy aspects of the Bills. The Terms of Reference contain the customary principles of scrutiny that enable the Committee to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation that have been adopted, without exception, by all scrutiny committees in Australia. Such non-partisan, non-policy scrutiny allows the Committee to assist the Assembly passing into law Acts that comply with the high ideals set out in the Terms of Reference.

**STANDING COMMITTEE FOR THE SCRUTINY OF BILLS AND
SUBORDINATE LEGISLATION**

MEMBERS OF THE COMMITTEE

Ms C Maher MLA (Presiding Member)
Mr B Stefaniak MLA
Mr T Connolly MLA

Secretary: Mr T Duncan
Legal Advisor: Emeritus Professor D Whalan

TERMS OF REFERENCE

- (1) a standing committee for scrutiny of bills and subordinate legislation shall be appointed:
- (2) the committee shall with respect to any instrument of a legislative nature (including a regulation, rule or by-law) made under an Act consider whether the instrument -
 - (a) is in accord with the general objects of the Act under which it is made;
 - (b) unduly trespasses on rights previously established by law;
 - (c) makes rights, liberties and/or obligations unduly dependent upon non-viewable decisions; and
 - (d) contains matter which in the opinion of the committee should properly be dealt with in an Act of the Legislative Assembly;
- (3) the committee shall with respect to the clauses of bills introduced into the Legislative Assembly consider whether such bills -
 - (a) unduly trespass on personal rights and liberties;
 - (b) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (d) inappropriately delegate legislative powers; or
 - (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (4) the committee shall consist of three members;
- (5) if the Assesmbly is not sitting when the Committee is ready to report on Bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing and circulation;
- (6) the majority of members constitutes a quorum of the committee;
- (7) the committee be provided with the necessary additional staff, facilities and resources; and
- (8) the foregoing provisions of the resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

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Mr W Stefaniak MLA
Deputy Speaker
ACT Legislative Assembly
CANBERRA ACT 2601

Dear Mr Stefaniak

Please find enclosed a copy of Report No. 10 of 1990 of the Standing Committee on Scrutiny of Bills and Subordinate Legislation. Under the resolution of appointment, the Committee is empowered to send a report to you while the Assembly is not sitting so that it may be circulated to Members. Accordingly, I seek your approval to print and circulate Report No. 10 of 1990.

Yours sincerely



Carmel Maher MLA
Presiding Member

14 June 1990



Approved
Bill Stefaniak
Deputy Speaker

15 June 1990

The Committee has examined the following Bills:

Ainslie Transfer Station 1990
Royal Canberra Hospital 1990
Tobacco (Amendment) 1990

In relation to the Ainslie Transfer Station Bill 1990 and the Royal Canberra Hospital Bill 1990, the Committee offers no comment.

TOBACCO (AMENDMENT) BILL 1990

This Bill imposes further restrictions on the sale, advertisement, distribution and promotion of tobacco.

(a) Date of Commencement

It is pleasing to note that clause 2(3) provides for the automatic commencement of the Act 6 months after notification in the Gazette, if it has not commenced by Ministerial notice in the Gazette given under clause 2(2). This ensures that the legislation will not lie fallow on the statute book.

(b) Disallowable Exemptions

The new ss.10 and 12, which deal with the prohibition of tobacco advertising and sponsorship respectively, provide in ss. 10(3) and 12(4) that the Minister may grant exemptions from the prohibitions by notices published in the Gazette.

However, not only are these exemptions made public by the publication, but also ss. 10(4) and 12(5) provide that such notices are disallowable instruments under the Subordinate Laws Act 1989. These provisions ensure that the exemptions are subject to the scrutiny and control of, and possible disallowance by, the Assembly.

(c) Strict Liability Offences

There is a number of offences created by the Bill and several of these are strict liability offences.

These strict liability offences appear to be created where the facts are relatively clear and an innocent explanation difficult for an alleged offender to offer.

For instance, there is strict liability for the offences created in the new ss. 7 (manufacture or sale of smokeless tobacco), 8 (selling or importing for sale confectionery or toys resembling a tobacco product), 9 (selling cigarettes in a quantity of fewer than 20), 10 (certain advertising contracts and other agreements prohibited unless exempted), and 12 (sponsorship contracts and

understandings prohibited unless exempted). This factual clarity point can also be illustrated by the terms of the new s. 10(2)(b) which provides an exception from the offence provisions of s. 10(1) where there is

"a tobacco advertisement that is an accidental or incidental accompaniment to a film or video tape."

In contrast, those offences that are created where there can be doubts about the facts, or difficulty with identification of persons or places, or where a possible innocent explanation could be offered, provide for reasonable excuse defences.

For instance, there are reasonable excuse defences in relation to the offences created by the new ss. 4(1) (selling tobacco products to persons under 18 years), 4(2) (permitting a person under 18 years to get tobacco products from a vending machine) and 6 (placing or causing, permitting or authorising the placement of, vending machines on premises other than licensed premises).

However, there seems to be one possible exception to the dual pattern of drafting of offences in the Bill. The new s.5 provides that

"A person shall not purchase a tobacco product for use by a person under the age of 18 years."

As with the offence of selling to a person under the age of 18 years, there could be doubts about the facts and circumstances of a purchase. The Committee offers the following possible example to illustrate its point. Suppose a person offers to buy another person a drink at a disco late at night. The person accepts the offer of a drink, but also requests a packet of cigarettes. The drinks and the cigarettes are bought, as the person assumes that the age of the other person, having already been admitted to the licensed disco, is such that the person is considered old enough to buy cigarettes. However, the person's age is subsequently revealed as being 17 years. Under the proposed Bill, with no reasonable excuse provisions, the person buying the cigarettes would be guilty of an offence.

Therefore, the Committee considers a reasonable excuse defence may need to be inserted in section 5, along the lines that are provided for in section 3.

(d) Tobacco Advertising for Toys

Section 8 of the Bill provides for toys and confectionery that are designed to resemble a tobacco product, or are packaged in a way that is designed to resemble a tobacco product or the packaging of a tobacco product, shall not be sold or imported into the Territory.

The Committee is aware of a number of toy cars on sale that closely resemble Formula 1 racing cars and/or rally cars. Some of these cars would display similar colours of a tobacco product (for example, red and white representing Malboro) while others may go even further and actually display the brand name of a cigarette company on the car.

The Committee would be interested to know whether these two examples of toys would be in breach of section 8 of the Bill.



Carmel Maher
Presiding Member

14 June 1990