

Dear Hon Craig Farrell MLC,

Public Health Amendment (Tobacco Free Generation) Bill 2014

I thank the Honorable Members of the Legislative Council Government Administration Committee A for the invitation to make submissions on the legality and practicality of this Bill.

There are no significant legal impediments to the Bill

I have scrutinised the Bill and spent a great deal of time thinking about how it might be legally challenged. My conclusion is that there are no significant constitutional impediments to its adoption, bar some creative arguments around section 92 of the Commonwealth Constitution which I believe are unlikely to succeed.

However, I do think that the Bill breaches fundamental civil rights and should be approached cautiously by the Committee, which, as part of the Parliament, is a constitutional guardian of such rights.

The Bill disrupts national unity in the Tobacco Trade

At present the Bill ostensibly prescribes any person selling to any person of the *Tobacco Free Generation* (TFG) wherever either is located. However, the common law rules relating to extraterritorial state law, limit the operation of the Bill to sales which have a real connection to Tasmania.¹ That would likely mean that tobacco sellers in other states would be precluded from selling to TFG Tasmanians. It would also mean that Tasmanian tobacco sellers would be precluded from selling to TFG citizens of other states, notwithstanding those states permit such individuals to purchase tobacco products.

Section 92 of the Constitution requires that 'trade, commerce, and intercourse among the States ... shall be absolutely free.' There are two potential arguments based on this provision:

- Precluding Tasmanian Tobacco sellers from online sales to TFG consumers in other states is discriminatory because tobacco sellers in other states are not similarly precluded (i.e a Tasmanian online retailer cannot sell to a Victorian TFG consumer, but a WA based online retailer can);
- Online retailers in other states will now have to make special provisions to identify Tasmanian TFG purchasers (i.e. the interoperation of a geolocator AND an age restriction access system). It will arguably discriminate against interstate online vendors by placing them at a competitive disadvantage to Tasmanian vendors selling domestically.²

While I cannot say definitively that such arguments would fail, I think them to be unsustainable and weak. That is because the High Court has made it clear that for a law to breach section 92 it must, in

¹ *Peare v Florenca* (1976) 135 CLR 507, 518; *Union Steamship Co Australia Pty Ltd v King* (1988) 166 CLR 1, 14.

² *Betfair Pty Ltd v Western Australia* (2008) 244 ALR 32.

effect, 'discriminate in favor of intrastate trade'.³ As a result it does not appear to be discriminatory. The Bill makes no distinction between inter and intrastate trade and treats all persons equally no matter where situated. However, given the interests at stake a challenge on these grounds might be made, which would involve costs implications for the state.

The Bill has some practical legal issues

I believe that the extraterritorial nature of the Bill, as it relates to online sales of tobacco products, may prove costly and challenging to police and enforce, but they will not entirely undermine the operation of the Act as a whole.

Additionally, I understand that commercial or passenger vessels enter the state that sell tobacco products. Clause 67J would appear, for instance, to cover a cruise-ship anywhere in Tasmania that sold tobacco products to its passengers (regardless of its flag). It would also proscribe the sale of tobacco products by those passengers to Tasmanians. Given the unique nature of this law, it is reasonable to assume that a passenger would not know that selling such a product to a person over the age of consent would be illegal. There is no relevant defense included in the current Bill. The Committee may wish to consider the impact on tourism and tourists who may have less enlightened views about tobacco who enter the state.

The Bill breaches (non-binding) fundamental rights

The Bill breaches a range of civil and political rights, although none I can think of are constitutionally mandated. Specifically:

The source of civil rights	Why not binding
<i>Age discrimination</i>	
<ol style="list-style-type: none"> 1. <i>Age Discrimination Act 2004</i> (Cth), ss 14,28 prohibits treating a person less favorably because of age, or refuses to sell or make goods available because of age; and 2. <i>The International Convention on Civil and Political Rights</i> (ICCPR), Art 2(1) & 26, prohibit distinction based on 'status', which has been interpreted to include age status.⁴ 	<ol style="list-style-type: none"> 1. Both Acts permit such discrimination if it is done in compliance with a law of of the state.⁵ 2. The ICCPR is not directly binding on states, although it does leave the Commonwealth exposed to an international challenge similar to the case of <i>Toonen</i>.⁶
<i>Legal equality</i>	
<ol style="list-style-type: none"> 3. Our constitutional and common law system are premised on the rule of law, which by convention includes "equality before the law or the <i>equal subjection of all classes to the ordinary law</i> of the 	<ol style="list-style-type: none"> 3. The common law convention has been found not to amount to a prescribed general constitutional limit on legislative power, because there are times that the constitution has permitted citizens to be treated equally, specifically legal guardianship

³ *Cole v Whitfield* (1988) 165 CLR 360, 399.

⁴ *Love v Australia*, *Communication No 983/2001* (25 March 2003).

⁵ *Age Discrimination Act 2004* (Cth), s 39(4) and *Anti-Discrimination Act 1998* (Tas), s 24,

⁶ *Human Rights Committee Communication No. 488/1992* (*Toonen v Australia*).

land administered by the ordinary law courts".⁷

4. The High Court has noted that "equality before the law ... [is]the starting point of all other liberties".⁸
5. ICCPR Article 5 guarantees "equality before the law" and requires states ensure that all citizens are afforded that right.

(children / intellectual impairment), (aboriginal) race, incarceration for an indictable offence etc.⁹

4. As a common law right, legal equality can be limited by express legislation.
5. As above, this is not directly binding, but may result in Commonwealth intervention if an international complaint is brought.

Personal liberty

6. Personal liberty is "jealously guarded by the common law" and forms the basis for property rights, freedom of movement, freedom of association, freedom of speech and, arguably freedom to purchase and consume such things that are not prohibited by law.¹⁰

7. As a common law right it may, quite clearly, be limited by a legal prohibition.

This Bill therefore breaches fundamental rights, but the Parliament is technically competent to extinguish these rights. The question for debate is whether it should.

A Bill such as this would, arguably, not be permitted in other jurisdictions with Bills or Charters of rights. In our case, we have resisted a bill/charter of rights both at the state and federal level because we believe that Parliament is the most appropriate body to represent the rights and interests of citizens at any one time. This places a special duty on any Parliament considering a Bill which limits or extinguishes rights to be cautious, measured about that proposed law.

The Bill is disproportionate (irrational and unjustified)

Whilst I personally support the public health basis for the Bill, its legal basis is irrational and unjustified. There is no justifiable reason why, at 1 January 2030 a 29 year old person – born 31 December 1999 – can purchase cigarettes, but 30 year old person – born a day later on 1 January 2000 – cannot. Both persons are otherwise autonomous, competent adult individuals, but one has liberty to legally purchase a product and the other doesn't. In those circumstances the rational basis for the law cease being about public health and can only be justified by their age difference. There is an inequality in the application of the law.

I note that the reason the High Court has refused to impose a general constitutional right of equality is because society has historically permitted some specific categories of inequality to be built into our legal system. However, those affected by the Bill will (when they come of age) not be members of those historical categories (by design at least). That is, the Bill is not targeted at prisoners, children, intellectually incompetent persons, or people of a special race (none of which are included within the exception now the racist provisions of the Commonwealth Constitution have been removed). This Bill will create a new category of persons treated *unequally* based *solely on their date of birth*.

⁷ AV Dicey, *Introduction to the Study of the Law of the Constitution*, (7th ed (1908)) at 198.

⁸ *Green v The Queen; Quinn v The Queen* (2011) 244 CLR 462, per French CJ & Kiefel J.

⁹ *Leeth v Commonwealth* (1992) 174 CLR 455; *Kruger v Commonwealth* (Stolen Generations Case) (1997) 190 CLR 1.

¹⁰ *Kruger v Commonwealth* (Stolen Generations Case) (1997) 190 CLR 1.

I agree that tobacco products present a serious public health risk. I wholly support the protection of public health by statutory means. However, I believe the protection of fundamental rights is a more significant consideration. In this case the obligation to protect civil rights, pursuant to the conventions of responsible government and the rule of law, are undermined by the manner and form in which this otherwise laudable endeavour has been framed. Another approach to achieving the aims of this Bill must be found.

The Parliament is the sole and final arbiter of rights in our system. It should not deprive people of rights for arbitrary reasons. Tasmanians should not, once they have passed the age of consent, be treated unequally to their peers. They should not be deprived rights that other citizens have. We should not be segregating our society based only on the fortune or misfortune of the day they were born.

Sincerely,



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