

# TOBACCO ADVERTISING PROHIBITION ACT 1991 No. 65

## NEW SOUTH WALES



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SCHEDULE 1—PROVISIONS RELATING TO THE TOBACCO ADVERTISING  
PROHIBITION COMMITTEE

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**TOBACCO ADVERTISING PROHIBITION ACT 1991 No. 65**

NEW SOUTH WALES



**Act No. 65, 1991**

An Act to prohibit the advertising of tobacco and tobacco products, trade marks, brand names and logos, and for other purposes. [Assented to 17 December 1991]

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**The Legislature of New South Wales enacts:**

**PART I—PRELIMINARY**

**Short title**

1. This Act may be cited as the Tobacco Advertising Prohibition Act 1991.

**Act binds the Crown**

2. This Act binds the Crown in right of New South Wales and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

**Purposes of Act**

3. The purposes of this Act are:
- (a) the active discouragement of the smoking of tobacco by:
    - (i) encouraging non-smokers, particularly young people, not to start smoking;
    - (ii) limiting exposure of children and young people to persuasion to smoke; and
    - (iii) encouraging and assisting smokers to give up smoking;and
  - (b) the promotion of good health and the prevention of illness.

**Definitions**

4. In this Act:

“**appointed day**” means 26 September 1991;

“**authorised officer**” means:

- (a) a health surveyor appointed by the council of a city, municipality or shire; or
- (b) a person authorised as an officer for the purposes of this Act by an order made by the Director-General of the Department of Health;

“**banned contract**” means:

- (a) a contract or arrangement that was entered into before the appointed day and anything done under which, because of Part 2, is wholly or partly unlawful; or
- (b) a contract or arrangement which the Foundation considers there to have been a reasonable likelihood would have been

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entered into after the appointed day but for the passing of this Act and anything done under which, because of Part 2, would have been wholly or partly unlawful, but only if the potential parties to the contract or arrangement have, before 26 September 1991, been parties to a contract or arrangement anything done under which, if it continued beyond the appointed day, would pursuant to Part 2 be wholly or partly unlawful;

**“banned sponsorship”** means sponsorship under a banned contract;

**“benefit”**, in relation to a banned contract or banned sponsorship, means any benefit that would have flowed to a person other than a manufacturer or wholesaler of a tobacco product as a result of a banned contract or banned sponsorship;

**“book”** includes any printed material in any language;

**“brand name”** includes any part of a brand name;

**“newspaper”** includes a copy of any magazine, journal or periodical or any other publication copies of which contain:

- (a) news, information or reports of events; or
- (b) remarks, observations or comments about any news, information or events or about any other matter of interest to the public or to any section of the public,

which are printed in any language and published at regular or irregular intervals;

**“package”**, in relation to a tobacco product, means package:

- (a) in which the tobacco product is packed by a manufacturer; and
- (b) which is in contact with the tobacco product;

**“premises”** includes any place;

**“public place”** includes a place to which the public or a section of the public ordinarily has access, whether or not by payment or by invitation;

**“racing”** includes horse racing and pacing, dog racing and motor car and motorcycle racing;

**“sell”** includes:

- (a) barter or exchange;
- (b) offer or expose for sale, barter or exchange;
- (c) supply, or offer to supply, in circumstances in which the supplier derives, or would derive, a direct or indirect pecuniary benefit; and

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- (d) supply, or offer to supply, gratuitously, but with a view to gaining or maintaining custom or otherwise with a view to commercial gain;

**“sponsorship”** includes:

- (a) scholarship, prize, gift or other benefit; and  
 (b) financial arrangement (other than a genuine contract of employment or a genuine contract for services) for the direction, promotion or publicity of one or more of the matters referred to in section 8 (1) (a) and (b) through the medium of sporting, arts, youth, educational or other like activities;

**“sporting”** includes recreational and other activities but does not include racing;

**“tobacco advertisement”** means writing, still or moving picture, sign, symbol or other visual image or message or audible message, or a combination of two or more of them, that gives publicity to, or otherwise promotes or is intended to promote:

- (a) the purchase or use of a tobacco product; or  
 (b) the trademark or brand name, or part of a trademark or brand name, of a tobacco product;

**“tobacco product”** means tobacco, cigarette or cigar or any other product the main, or a substantial, ingredient of which is tobacco and which is designed for human consumption or use, but excludes nicotine or a product containing nicotine in so far as the Poisons Act 1966 applies to or in relation to nicotine or a product containing nicotine;

**“tobacco vending machine”** means machine, device or contrivance that is constructed to contain tobacco products that can be obtained from it by an operation which involves:

- (a) the insertion in that machine, device or contrivance of a coin, token or similar object; or  
 (b) any other action taken without the assistance of the vendor or his or her employee or agent;

**“trademark”** includes part of a trademark.

## PART 2—TOBACCO PRODUCTS

### Certain advertising prohibited

5. (1) A person who in New South Wales for any direct or indirect benefit displays a tobacco advertisement in, or so that it can be seen or heard from, a public place commits an offence.

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(2) A person who, after 3 months from the commencement of this section, in New South Wales:

- (a) distributes to the public any unsolicited object; or
- (b) sells, hires or supplies for any direct or indirect benefit any object to any person (other than a person, or the employee of a person, who is a manufacturer, distributor or retailer of a tobacco product),

that constitutes or contains a tobacco advertisement commits an offence.

(3) This section does not apply in relation to anything done before 26 September 1995, or such earlier date as may be prescribed by the regulations either generally or in a particular case or class of cases, under a contract or arrangement entered into before 26 September 1991.

(4) This section does not apply in relation to:

- (a) anything done by means of a radio or television broadcast;
- (b) a tobacco advertisement in or on a newspaper or book printed or published outside New South Wales, the sole or main purpose of which newspaper or book is not the promotion or publicising of the purchase or use of a tobacco product or a trademark or brand name of a tobacco product;
- (c) a tobacco advertisement in or on a package or carton containing a tobacco product;
- (d) a tobacco advertisement that is an incidental accompaniment to the subject of a film or video tape (not being a film or video tape which is wholly or mainly concerned with the promotion of tobacco products);
- (e) a tobacco advertisement that is displayed inside a shop or other retail outlet where tobacco products are offered or exposed for sale, that is directly adjacent to a place where all or any of those tobacco products are offered or exposed for sale and that complies with the regulations;
- (f) an invoice, statement, order, letterhead, business card, cheque, manual or other document that is ordinarily used in the course of the business of a manufacturer or distributor of a tobacco product; or
- (g) anything to which this section does not apply by virtue of an exemption granted under section 12.

(5) Subsection (4) (e) does not apply to a tobacco advertisement that is visible from a public place on or after 1 July 1993 regardless of when the advertisement was first displayed.

(6) In any proceedings for an offence under subsection (1), it is presumed that, if there is present in the relevant tobacco advertisement:

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- (a) the name of a person who manufactures or distributes any tobacco product;
- (b) a trademark, of which a person who manufactures or distributes any tobacco product is the registered proprietor or the registered user within the meaning of the Trade Marks Act 1955 of the Commonwealth; or
- (c) a brand name, used by a person who manufactures or distributes any tobacco product,

that person displayed that tobacco advertisement for a direct or indirect benefit, until the contrary is proved.

(7) In any proceedings for an offence under this section, if the thing that is alleged to constitute a tobacco advertisement contains the trademark or brand name of a tobacco product, it is presumed to be designed to promote or publicise the tobacco product to which it relates until the contrary is proved.

### **Competitions**

6. (1) A person who, after 3 months from the commencement of this section, in connection with the sale of a tobacco product or for the purpose of promoting the sale of a tobacco product:

- (a) supplies (whether it is sent from inside or outside New South Wales) to the purchaser, or any other person (not being a purchaser or other person who is, or is the employee of, a manufacturer, distributor or retailer of a tobacco product), in New South Wales:
  - (i) a prize, gift or other benefit; or
  - (ii) a stamp, coupon, token, voucher, ticket or other thing by virtue of which the purchaser or any other person may become entitled to, or may qualify for, a prize, gift or other benefit (whether that entitlement or qualification is absolute or conditional); or
- (b) conducts (whether from inside or outside New South Wales) a scheme:
  - (i) prescribed to be a scheme to promote the sale of a tobacco product or to promote smoking generally; and
  - (ii) the whole or any part of which is implemented in New South Wales,

commits an offence.

(2) It is a defence in proceedings for an offence under subsection (1) to prove that the benefit or thing supplied, or participation in the relevant scheme, was only incidentally connected with the purchase of a tobacco



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product and that equal opportunity to receive that benefit or thing, or to participate in that scheme, and to buy products other than tobacco products, was afforded generally to persons who purchased products, whether or not they were tobacco products.

**Free samples**

7. A person who, for the purpose of inducing or promoting the sale of a tobacco product, offers, gives or distributes to another person (not being a person who is, or is the employee of, a manufacturer, distributor or retailer of a tobacco product) a free sample of a tobacco product commits an offence.

**Prohibition of sponsorships**

8 (1) A person who promotes or publicises, or agrees to promote or publicise, in New South Wales:

- (a) a tobacco product or a trademark or brand name, or part of a trademark or brand name, of a tobacco product; or
- (b) the name or interests of a manufacturer or distributor of a tobacco product (whether or not that manufacturer or distributor also manufactures or distributes a product other than the tobacco product) in association directly or indirectly with the tobacco product,

under a contract, or an arrangement (whether or not legally binding), under which a sponsorship is provided, or to be provided, by another person commits an offence.

(2) A person who provides, or agrees to provide, a sponsorship under a contract or arrangement of a kind referred to in subsection (1) commits an offence.

(3) For the purposes of subsection (1) (b), the name or interests of a manufacturer or distributor of a tobacco product are taken to be in association directly or indirectly with the tobacco product if that name or those interests are commonly associated by members of the public in New South Wales with the tobacco product

(4) This section does not apply in relation to:

- (a) anything done before 26 September 1995, or such earlier date as may be prescribed by the regulations either generally or in a particular case or class of cases, under a contract or arrangement entered into before 26 September 1991; or
- (b) anything to which this section does not apply by virtue of an exemption granted under section 12.

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(5) Nothing in subsection (1), (2) or (3) applies to the giving of, or an agreement to give, a scholarship by a manufacturer or distributor of a tobacco product to an employee, or a member of the family of an employee, of the manufacturer or distributor.

**Tobacco vending machines**

9. (1) A person who places, or causes or permits to be placed, in any premises in New South Wales a tobacco vending machine for operation by members of the public commits an offence unless the premises are:

- (a) licensed premises within the meaning of the Liquor Act 1982; or
- (b) premises set aside by an employer as a staff amenity area.

(2) A person, who:

- (a) owns or is the lessee of a tobacco vending machine in New South Wales; and
- (b) does not ensure that a statement in the prescribed form is kept conspicuously displayed on the front of the vending machine,

commits an offence.

**Packages of cigarettes**

10. A person who sells cigarettes in New South Wales:

- (a) in a package containing less than 20 cigarettes; or
- (b) otherwise than in a package,

commits an offence.

**Smokeless tobacco and confectionery**

11. (1) A person who manufactures or sells in New South Wales a tobacco product other than a tobacco product prepared for smoking commits an offence.

(2) Subsection (1) does not apply to the manufacture or sale of prescribed tobacco products in prescribed circumstances.

(3) A person must not, after 3 months from the commencement of this section, sell any confectionery or other food that resembles a tobacco product.

Maximum penalty (subsection (3)): 25 penalty units.

**Exemptions**

12. (1) Subject to this section, the Minister may, by notice published in the Gazette:

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- (a) exempt a person or class of persons either wholly or in part from the operation of section 5 or 8 subject to such conditions (if any) as are set out in that notice or prescribed for the purposes of this paragraph; or
  - (b) amend or repeal an exemption granted under this section.
- (2) An exemption may be granted under this section only:
- (a) after consultation between the Minister and the appropriate Minister, and having regard to the nature and background of the event, function or series concerned and to the purposes of this Act, to facilitate the promotion and conduct of
    - (i) a sporting, racing or arts event or function; or
    - (ii) a series of sporting, racing or arts events or functions, of national or international significance; or
  - (b) in any case of significant hardship to persons other than manufacturers or wholesalers of tobacco.
- (3) The “**appropriate Minister**” is:
- (a) in relation to an exemption to facilitate the promotion and conduct of a sporting or racing event or functions or a series of such events or functions, the Minister for Sport, Recreation and Racing; or
  - (b) in relation to an exemption to facilitate the promotion and conduct of an arts event or function or a series of such events or functions, the Minister for Arts.
- (4) The Minister must, when deciding whether or not to grant an exemption under this section for the purpose referred to in subsection (2) (a), have regard to:
- (a) any substantial connection between the relevant event or function or series of events or functions and other significant events or functions outside the State; and
  - (b) any reasonable efforts that have been made to obtain sufficient financial or other support for the relevant event or function or series of events or functions from sources other than the advertising of tobacco products to render the exemption unnecessary.
- (5) An exemption granted under this section has no effect after 1 November 1995.
- (6) However, subsection (5) does not have effect unless there is legislation in force in all States, the Northern Territory and the Australian Capital Territory, by 1 June 1992, which has the effect of totally banning by no later than 1 November 1995, all sponsorship of:

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- (a) any sporting, racing or arts event or function; or
  - (b) any series of sporting, racing or arts events or functions,
- of national or international significance, by a manufacturer or distributor of tobacco products.

**PART 3—TOBACCO ADVERTISING PROHIBITION  
COMMITTEE**

**Tobacco Advertising Prohibition Committee**

**13. (1)** The Tobacco Advertising Prohibition Committee is established.

**(2)** The Committee is to consist of 5 persons appointed by the Minister, of whom:

- (a) 1 is to be appointed as Chairperson;
- (b) 2 are to be appointed on the nomination of the Director-General of the Department of Health;
- (c) 1 is to be appointed on the nomination of the Chairman of the Board of the Tobacco Institute;
- (d) 1 is to be a person nominated by the Chief Executive Officer of the Outdoor Advertising Association of Australia.

**(3)** Schedule 1 has effect with respect *to* the members **and** meetings of the Committee.

**Functions of the Committee**

**14. (1)** The Tobacco Advertising Prohibition Committee is to prepare and submit to the Minister a code which provides for the regular and progressive stages in accordance with which advertisements to which section 5 applies should be removed or obscured and sponsorships to which section 8 applies should be terminated.

**(2)** The code is to provide for the removing or obscuring of advertisements and the termination of sponsorships by 26 September 1995.

**(3)** The Committee's initial advice concerning the provisions of the code is to be given within 3 months after the commencement of this section.

**(4)** The Committee has such other advisory functions as the Minister may determine.

**Responsibility of the Minister**

**15. (1)** The Minister is required to recommend to the Governor the making of regulations which will ensure:

- (a) the removal or obscuring of advertisements to which section 5 applies; and
- (b) the termination of sponsorships to which section 8 applies, by regular and progressive stages.

**(2)** The Minister, in making any recommendation under this section, must consider any code submitted and any advice given by the Tobacco Advertising Prohibition Committee.

**(3)** This section does not apply to an advertisement or sponsorship which is the subject of an exemption under section 12.

**Provision of assistance to the Committee**

**16.** For the purpose of the exercise of its functions, the Director-General of the Department of Health is to provide the Tobacco Advertising Prohibition Committee with such assistance as it may reasonably require.

**PART 4—ENFORCEMENT****Removal of certain advertisements**

**17. (1)** This section applies to a tobacco advertisement:

- (a) if the advertisement was placed or displayed in contravention of this Act or the regulations; or
- (b) after 26 September 1995 or such other date as may be prescribed by the regulations either generally or in a particular case or class of cases, whether or not the advertisement was placed or displayed in contravention of this Act or the regulations.

**(2)** If a tobacco advertisement is situated in a public place or on any premises from which it can be seen from a public place, a Local Court constituted by a Magistrate sitting alone may order:

- (a) that the advertisement be removed or obscured by an authorised officer; and
- (b) if any person has been convicted of an offence against this Act or the regulations relating to the placing or displaying of the advertisement, that the person pay the reasonable costs incurred by the authorised officer in removing or obscuring the advertisement.

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(3) Subsection (2) does not apply to an advertisement that is displayed inside a shop or other retail outlet where tobacco products are offered or exposed for sale and that complies with the regulations.

(4) An authorised officer does not commit a civil wrong and is not liable for damages for anything done or omitted to be done while removing or obscuring a tobacco advertisement with reasonable care under the authority of such an order.

(5) Any tobacco advertisement in the form of an article that is removed in accordance with such an order is taken to be the property of such person as is specified in the order.

(6) If any costs are payable under such an order, they may be recovered in a court of competent jurisdiction as a debt due to the Crown or a council, as the case requires.

(7) This section does not apply to a tobacco advertisement while it may be lawfully displayed in accordance with an exemption provided by this Act or the regulations.

**Power of entry**

18. (1) An authorised officer may enter any premises to remove or obscure a tobacco advertisement under the authority of an order made by a Local Court.

(2) This section does not allow the entry of any premises or part of premises used as a dwelling.

**Intimidation or obstruction of authorised officer**

19. A person must not in any way intimidate or obstruct an authorised officer who is removing or obscuring a tobacco advertisement under the authority of an order made by a Local Court or who is attempting to do so.

Maximum penalty:

50 penalty units for a first offence; or

100 penalty units for a second or subsequent offence.

**Consent required for prosecutions**

20. Proceedings for an offence against this Act shall not be commenced without the consent in writing of the Director-General of the Department of Health or a person authorised by him or her in writing for the purpose of this section.

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**Penalties**

**21. (1)** A person who commits an offence under a provision of this Act specified in the Table to this subsection is liable:

- (a) in the case of an individual, to a penalty of not more than:
  - (i) 50 penalty units for a first offence; or
  - (ii) 100 penalty units for a second or subsequent offence; or
- (b) in the case of a body corporate, to a penalty of not more than:
  - (i) 200 penalty units for a first offence; or
  - (ii) 400 penalty units for a second or subsequent offence.

**TABLE**

Section 5 (1) or (2), 6 (1), 7, 8 (1) or (2), 9 (1) or (2), 10 or 11 (1).

**(2)** If a continuing state of affairs is created by an offence referred to in subsection (1), the offender is liable to a penalty of not more than:

- (a) 50 penalty units in the case of an individual; or
- (b) 200 penalty units in the case of a body corporate,

in respect of each day on which that offence continues, in addition to the penalty specified in that subsection.

**Proceedings for offences**

**22. (1)** Proceedings for an offence against this Act or the regulations may be disposed of in a summary manner before a Local Court constituted by a Magistrate sitting alone.

**(2)** An offence against this Act may be dealt with as an indictable offence, but only if the prosecutor proposes that the offence be so dealt with.

**(3)** If proceedings for an offence against this Act or the regulations are disposed of in a summary manner before a Local Court, the maximum penalty that may be imposed is 50 penalty units, or the maximum penalty for the offence (whichever is the lesser), despite any other provision of this Act.

**(4)** If proceedings for such an offence are taken on indictment, the maximum penalty that may be imposed is the maximum penalty for the offence.

**(5)** Proceedings for such an offence may be commenced at any time within 12 months after the date on which the offence is alleged to have been committed.

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**Offences by bodies corporate**

**23.** (1) When a body corporate commits an offence under this Act or the regulations, every officer of the body corporate commits the same offence unless he or she proves that:

- (a) the offence was committed without his or her consent or connivance; and
- (b) he or she exercised all such due diligence to prevent the commission of that offence as he or she ought to have exercised, having regard to the nature of his or her functions in that capacity and to all the circumstances.

(2) In subsection (1):

“**officer**”, in relation to a body corporate, means:

- (a) a director, secretary or executive officer of the body corporate;
- (b) a receiver, or receiver and manager, of property of the body corporate, or any other authorised person who enters into possession or assumes control of property of the body corporate for the purpose of enforcing any charge;
- (c) an official manager or a deputy official manager of the body corporate;
- (d) a liquidator of the body corporate; and
- (e) a trustee or other person administering a compromise or arrangement made between the body corporate and another person or other persons,

and any other person, by whatever name called and whether or not a director of the body corporate, who is concerned, or takes part, in the management of the body corporate.

**PART 5—GENERAL**

**Certain civil proceedings barred**

**24.** An action at law or in equity does not lie against a person for:

- (a) the omission to do any thing the doing of which; or
- (b) the doing of any thing the omission to do which,

would constitute an offence under this Act.

**Regulations**

**25.** (1) The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are



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necessary or convenient to be prescribed for giving effect to the purposes of this Act, and, in particular:

- (a) prescribing the labelling of packages containing tobacco, including the position of labels on packages and the size, colour, style and nature of labels or labelling;
- (b) prescribing statements or warnings for the purpose of labelling of any such packages;
- (c) prescribing the size, colour, style, position and nature of tobacco advertisements displayed inside shops and other retail outlets where tobacco products are offered or exposed for sale, and any statements or warnings to be included in those tobacco advertisements;
- (d) prescribing the labelling of tobacco vending machines;
- (e) prescribing the duty of persons packing, or causing other persons to pack, specified tobacco products prepared for smoking to label those tobacco products in a specified manner;
- (f) prohibiting the sale of packages containing specified tobacco products prepared for smoking unless those packages are labelled in a specified manner; and
- (g) creating offences and providing in respect of any such offence a penalty not exceeding 10 penalty units.

(2) In this section, “**specified**” means specified in regulations made under this section.

**Continuation of voluntary agreement**

26. The agreement dated 14 April 1989 made between the Minister for Health of the Government of New South Wales and Phillip Moms (Aust.) Limited, Rothmans of Pall Mall (Aust.) Limited, W.D. and H.O. Wills (Aust.) Limited and R.J. Reynolds Tobacco (Aust.) Inc. in relation to the marketing of tobacco products continues to apply to the extent to which it is not inconsistent with this Act or the regulations.

**Review of Act**

27. (1) Within a period of 12 months commencing on the third anniversary of the appointed day, the Minister must cause an investigation and review to be conducted, and a report prepared, concerning the operation of this Act.

(2) The Minister must cause a copy of the report referred to in subsection (1) to be laid before each House of Parliament as soon as is practicable after the completion of that report.

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**SCHEDULE 1—PROVISIONS RELATING TO THE TOBACCO  
ADVERTISING PROHIBITION COMMITTEE**

(Sec. 13 (3))

**Nominations**

1. (1) A nomination of a member of the Committee must:
  - (a) be submitted in writing to the Minister at the request of the Minister, and
  - (b) be in respect of a person who is prepared to be a member.
- (2) If a person does not submit a nomination within 30 days after the making of the relevant request, the Minister may appoint a person to be the member concerned to represent the interests of the person or body in default until the relevant nomination is submitted.

**Term of office**

2. A member has such term of office, not exceeding 4 years, as may be specified by the Minister in the instrument appointing the member.

**Quorum**

3. Three members constitute a quorum for a meeting of the committee.

**Presiding member**

4. (1) The Chairperson is to preside at each meeting of the Committee at which the Chairperson is present.
- (2) In the absence of the Chairperson from a meeting of the Committee, the members present are to select from among their number a member to preside at the meeting.

**Decisions of the Committee**

5. (1) A decision supported by the votes of the majority of the members present and voting at a meeting of the Committee is the decision of the Committee.
- (2) Each member present at a meeting of the committee is entitled to one vote on a matter arising for determination at the meeting.

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SCHEDULE 1—PROVISIONS RELATING TO THE TOBACCO ADVERTISING  
PROHIBITION COMMITTEE—*continued*

**Calling of first meeting**

6. The Minister is to call the first meeting of the Committee in such manner as the Minister thinks fit.

**Procedure**

7. The Committee is to decide its own procedure for the conduct of its meetings, except as provided by this Schedule.

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*[Minister's second reading speech made in—  
Legislative Assembly on 3 December 1991*

*Member's second reading speech made in—  
Legislative Council on 26 September 1991]*