Smoking (Prohibition in Enclosed Public Places) Regulation 2005

SL2005-21

Regulatory Impact Statement

Prepared as required under s34 of the *Legislation Act 2001*

Introduction

Section 34 of the *Legislation Act 2001* provides that the Minister must arrange for a regulatory impact statement (RIS) to be prepared for a subordinate law if it is likely to impose appreciable costs on the community, or part of the community. This RIS has been prepared to meet that requirement.

Section 35 of the *Legislation Act 2001* sets out the requirements for the content of a RIS prepared to meet the requirement under section 34. A copy of the content requirements is in Appendix 1. A brief assessment of the consistency of the Regulation with the scrutiny principles (required by s35(h) is in Appendix 2).

The Smoking (Prohibition in Enclosed Public Places) Regulation 2005 (the Regulation) is made under the *Smoking (Prohibition in Enclosed Public Places) Act 2003* (the 2003 Act). The 2003 Act (as amended by the *Smoking (Prohibition in Enclosed Public Places) Amendment Act 2005*) provides that 'enclosed public place' means a public place, or part of a public place, that is enclosed as prescribed by regulation. The Regulation prescribes the meaning of enclosed for this definition.

The Regulatory Environment

There is a substantial history of regulation of smoking in enclosed spaces in the Territory. In 1994, the *Smoke-free Areas (Enclosed Public Places) Act 1994* (the 1994 Act) prohibited smoking in public places that were 'completely or substantially enclosed' but allowed hospitality premises that met certain ventilation standards to be exempted from this prohibition. In 2004, ACT Health issued Interpretive Guidelines that set out the approach the it was taking to the meaning of substantially enclosed.

In November 2003 the ACT Legislative Assembly passed the *Smoking (Prohibition in Enclosed Public Places) Act 2003*. The parts of this Act that prohibit smoking in enclosed public places will come into force on 1 December 2006. The Regulation is therefore a key part of the regulatory scheme as it will determine the places in which smoking is prohibited.

Previous Regulatory Impact Statements

The removal of the exemption system in the 1994 Act was the subject of a RIS in 2003. This RIS was prepared by the Allen Consulting Group[1] and will be referred to as the Allens 2003 RIS. The Allens 2003 RIS estimated a $241.1 million net benefit over 50 years (in net present value terms) from the removal of the exemption regime. This estimate is considered to be a lower bound, as it does not include health savings for staff and customers of exempt premises (which could not be quantified). In this analysis, it was estimated that current exempt operators would face a decline in revenue of $185.0 million in present value terms. Those proprietors who have higher debt servicing obligations, have a disproportionately higher reliance on gaming revenue, or have space constraints, are likely to be disproportionately affected by the removal of the exemptions.

[1] The Allen Consulting Group 2003, *Removal of the Hospitality Exemptions Available in the ACT's Smoke-Free Areas (Enclosed Public Places) Act 1994: Regulation Impact Statement*, ACT Health, Canberra.

A further supplementary RIS was prepared by the Allen Consulting Group in June 2004 (the Allens 2004 RIS), considering the impact of amending the definition of enclosed and the definition of public place, and the impact of clarifying the obligations of occupiers concerning the prevention of tobacco smoke entering a non-smoking area.[2] The present RIS draws substantially on the material prepared by Allens for the 2004 RIS.

The Policy Objectives of the Act and the Regulation

The Object of the Act is set out in section 5A[3]:

> The object of this Act is to promote public health by minimising the exposure of people in enclosed public places to environmental smoke.

The reason for this object is the well known negative health effects of environmental tobacco smoke on non-smokers.

The Act prohibits smoking in enclosed public places. The purpose of the regulation is to set out what makes a place enclosed for the purpose of the Act. The Act requires that this definition be set out in a regulation.

Identification of the Problem, and Rationale for Regulatory Intervention

It is not proposed to provide a detailed analysis of the case for regulating where smoking is allowed to take place. This is more than adequately covered in the Allens 2004 RIS, which relevantly finds:

- There exist severe and persistent information asymmetries that justify the regulation of where smoking is allowed to take place;
- The inadequacy of the required ventilation standard to reduce the exposure of non-smokers to environmental smoke suggests that there is a regulatory failure that requires correction;
- Market failures act to limit the ability of the market to provide the correct signals about environmental tobacco smoke;
- Both information disclosure and persuasion are limited options because of entrenched views among key stakeholders (i.e. proprietors of exempt premises and smokers). At best, information disclosure and persuasion are complementary strategies.

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[2] The Allen Consulting Group 2004, *Possible Amendments to the Smoking (Prohibition in Enclosed Public Places) Act 2003: Regulation Impact Statement*, ACT Health, Canberra.

[3] The provision will be inserted into the Act from 1 December 2006.

Possible Alternative Regulatory Proposals – Definition of 'enclosed'

The Allens 2004 RIS identifies three options for defining the meaning of enclosed. These were:

Option One: Maintain the Status Quo;
Option Two: Codifying the current understanding of enclosed based on the Interpretive Guidelines; and
Option Three: Tightening the definition of enclosed.

The Allens 2004 RIS considered each of these in detail. This RIS will provide some additional commentary and reproduce some of the analysis set out by Allens.

Option One – Maintain the Status Quo

The 1994 Act provides that smoking is prohibited in places that are completely or substantially enclosed. No clear indication is given as to the meaning of that phrase, leaving the required degree of enclosure to legal interpretation. ACT Health has legal advice that suggests that the phrase means "almost completely" enclosed. This option proposes that this approach be maintained for the purposes of the 2003 Act.

This option is considered in detail on pages 18 to 23 of the Allens 2004 RIS. It is not proposed to reproduce that analysis in its entirety, although for convenience, some of the main points are set out.

The Allen 2004 RIS outlines the costs and benefits associated with the removal of the exemption system under the 2003 Act (refer to table 1.1 and 1.2 below). The 'costs previously identified' are derived from findings in the 2003 RIS. These initial costs are based on the assumption that smoking would be prohibited in enclosed public places, and the only allowable ETS exposure in public places was to be in completely open places (where there are no surrounding walls or cover overhead). The column headed 'possible changes under the status quo' refers to the (negative) impact on the respective costs and benefits if the status quo is chosen as the preferred option – the status quo being to allow smoking in 'substantially enclosed' structures as defined by the 1994 Act.

It is worthwhile to note the point made in the Allens 2004 RIS that the legislation does not create an obligation to provide for smoking *per se*, and so any costs incurred by operators of hospitality venues in constructing spaces that allow for smoking are voluntary costs incurred in the normal course of business, and cannot be attributed to the legislative regime: see the Allens 2004 RIS at page 31.

TABLE 1.1: EFFECT OF PARTIALLY OPEN SMOKING AREAS ON THE PREDICTED *COSTS* OF REMOVING EXEMPTIONS

Stakeholder affected	Costs Previously Identified	Possible Changes Under the *Status Quo*
ACT Government	$83.8 million reduction in gaming tax	Reduction in identified costs — To the degree that proprietors seek to take advantage of partially open spaces as a response to the abolition of the exemption there may be a slight reduction in the forecast gaming reductions, and so there may be a corresponding slight reduction in forecast tax revenue declines
	$2.1 million in foregone exemption-related fees	No change
Energy and cleaning industries	A $40.4 million reduction in revenue	Reduction — Partially open spaces may require additional heating and cleaning, although not to the degree that a fully enclosed space would
Exempt proprietors	A $227.7 million gaming revenue reduction	Reduction — To the degree that proprietors seek to take advantage of partially open spaces as a response to the abolition of the exemption there may be a slight reduction in the forecast gaming reductions

Source: Derived from The Allen Consulting Group 2003.

TABLE 1.2: EFFECT OF PARTIALLY OPEN SMOKING AREAS ON THE PREDICTED *BENEFITS* OF REMOVING EXEMPTIONS

Stakeholder affected	Costs	Possible Changes Under the *Status Quo*
Exempt operators	$1.9 million Savings associated with reduced overtime, improved productivity, reduced staff payments and lower staff turnover and retraining costs associated with fatalities	Reduced — To the degree that smoking is shifted from enclosed spaces to partially open spaces, rather than to completely open spaces as was previously assumed, the benefits will be reduced. This is due to increased ETS concentration in partially open spaces compared to completely open spaces.
	$2.1 million exemption in fees removed	No change
	$40.4 million in reduced cleaning and energy costs	Reduced — Due to the costs of cleaning in partially open areas.
Nonsmoking employees of exempt operators	$7.0 million in avoided lost future earnings, legal costs, pain and suffering, and loss of income associated with fatalities	Reduced — Due to the increased ETS exposure through smoking in partially open areas as opposed to completely open areas.
Governments generally	$1.3 million avoided lost taxes and additional health costs associated with fatalities	Reduced — Due to the increased ETS exposure through smoking in partially open areas as opposed to completely open areas.
ACT Government	$27.9 million in additional tax revenue on expenditure diverted from gaming	Reduced — To the degree the proprietors seek to take advantage of partially open areas as a response to the abolition of the exemption regime the estimated reduction in gaming revenue, and subsequent diversion of expenditure may be reduced
Community at large	$3.2 million in avoided lost gross domestic product associated with fatalities	Reduced — Due to the increased ETS exposure through smoking in partially open areas as opposed to completely open areas.
	$70.9 million in community benefits associated with a decline in tobacco consumption	Reduced — Due to the increased ETS exposure through smoking in partially open areas as opposed to completely open areas.
	$156.8 million in reduced social costs associated with a reduction in problem gambling	Reduced — Due to the increased ETS exposure through smoking in partially open areas as opposed to completely open areas.
Non-hospitality industries	$283.6 million in increased revenue that would have otherwise been spent on gaming and gaming taxes	Reduced — To the degree that proprietors seek to take advantage of partially open spaces as a response to the abolition of the exemption there may be a slight reduction in the forecast gaming reductions and hence the transfer of revenue from the hospitality industry to other industries will be reduced

Source: Derived from The Allen Consulting Group 2003.

This estimate of benefits is considered to be lower bound as it does not include all health savings for staff and customers of exempt premises (as they could not be quantified). On the other hand, the greater the exposure to ETS (by the allowance of smoking in almost completely enclosed structures as proposed in this option) the less the health savings for this population.

The 2003 RIS made the point that many of the costs and benefits identified with the introduction of the *Smoking (Prohibition in Enclosed Places) Act* are transfers (i.e. a benefit for one sector represents a corresponding cost to another, and *vice versa*). The same is true of the costs and benefits associated with any move by the hospitality industry to rely on partially open places to avoid the prohibition on smoking (i.e. the costs and benefits shown in tables 1.1 and 1.2).

That said, a move by the hospitality industry to seek to rely on partially open places to avoid the prohibition on smoking will:

- increase the costs associated with the public administration and enforcement of the *Act* because of the uncertainty surrounding the definition of what precisely is an enclosed place. However, the inadequate enforcement noted in sections 2.2 and 2.3 of the Allens 2004 RIS suggests that these costs may be avoided by taking a risk-averse regulatory enforcement approach and providing inadequate enforcement so as to avoid the additional enforcement costs. Thus, in practice, additional enforcement costs may be low;
- increase the investment risks faced by proprietors who wish to construct new areas that are not considered to be enclosed — there is a risk that some proprietors may make investments on the basis of their understanding of the definition of enclosed under 1994 Act, but that this may be threatened by subsequent judicial testing and reappraisal of the definition; and
- reduce the direct and indirect health benefits associated with move to prohibit smoking — the previous RIS adopted the approach, consistent with the literature, of analysing the regulatory change as a move from a smoking to non-smoking environment, but the degree to which industry moves to a compromise middle position will undermine the health benefits achievable.

Again, the degree to which these costs are borne will also be a function of the hospitality industry's response to the ban on smoking.

There will also be distributional impacts because the costs and benefits centre around the uncertainty created by the ambiguity of the definition and the industry participants' response to that ambiguity. For industry, there are benefits from keeping the definition ambiguous for those operators who are willing to test the enforcement of the legislation. There are costs for those operators who are more risk averse, who are not willing to test the definition. This represents a net transfer of benefits within the industry towards less risk averse operators.

To the degree to which industry seeks to migrate patrons from non-smoking areas to partially open smoking areas:

- the benefits of the prohibition on smoking will be reduced, enforcement costs will increase and investment risks created; and
- these proprietors can expect to reduce some of the financial costs – i.e. reduce gaming revenue – otherwise associated with the introduction of the 2003 Act.

This conclusion suggests that the definition in the 1994 Act is less than optimal, and provides a rationale for considering whether there is a more appropriate definition of enclosed.

Option Two - Codifying the current understanding of enclosed based on the Interpretive Guidelines

This option is analysed in the Allens 2004 RIS on pages 23 and 24. Allens found that there may be marginal improvement over the status quo by taking this approach, it would not be possible to codify the guidelines without being seen to actually change the requirements.

Accordingly, this option is not preferred. However, for the convenience of readers, some further information about the interpretive guidelines is included below.

In 2004 Interpretive Guidelines were developed to assist in providing further clarity around the term 'substantially enclosed' as well as providing greater capacity to assess compliance with the 1994 Act. As set out in the Interpretive Guidelines a public place will be considered enclosed if it is *75% or more enclosed by perimeter surrounds and an overhead cover*. This approach represents considerable progress from the 1994 Act in the shift towards moving to a smoke-free environment. Embedding the Guidelines in the Regulation would improve their legal status.

The Guidelines are an administrative instrument, and therefore do not have the same legal status as a law. They provide operational guidance to enforcement officers as well as members of the public. They must be read in the light of what a reasonable person would consider 'substantially enclosed':

- Roof/ceiling: If a public place has no roof or ceiling, it will *not* generally be considered substantially enclosed.

- Proportion of the place that is 'open': If the proportion of the public place that is 'open' (open to the outdoors) is greater than 25% of the total surface area of the ceiling or roof (assuming that this is flat) and the walls and windows (whether fixed or able to be opened), then the premises will *not* be considered 'substantially enclosed' and therefore, the smoking prohibition in the Act does not apply.

- Layout of the walls and windows, including partial walls: If an area has a ceiling or roof and is enclosed on all sides by a wall which is only 1m high, the area will generally *not* be considered substantially enclosed.

- Material of the surrounding walls and roof/ceiling: Generally, enclosures comprised of materials that allow free and unimpeded air flow (e.g. a fly screen/security mesh) will not be regarded as walls or overhead covers. A public place completely surrounded by such material will generally *not* be considered substantially enclosed.

- Walls and windows: Windows are always assumed to be closed and are considered to be a 'wall' for the purposes of determining the extent to which a public place is unenclosed. If the public place is completely or substantially enclosed by windows, it will normally be considered to be *enclosed* even if the windows are open.

- Temporary or permanent structures: The temporary or permanent nature of a public place is not relevant to whether or not it may be enclosed. Public places may be enclosed or unenclosed at various times. The occupier must ensure that smoking is prohibited at times when the area is substantially enclosed. However, when temporary walls are removed and the area is more than 25% 'open', the smoking prohibition under the Act does not apply.

It can be seen that the precise requirements of the guideline are not clear, and that any attempt to codify them will, as Allens found, really amount to changing the requirements.

Option Three - Tightening the definition of enclosed

This option was analysed in detail in the Allens 2004 RIS on pages 24 through to 28. Allens conclude that there is likely a net benefit in tightening the definition, but there is no clear answer as to the degree to which the definition should be tightened.

The Regulation continues the '75/25 rule' established in the Interpretive Guidelines (as discussed above). That is, a place will be considered enclosed if the area of openings to the outside air is 25% or less of the total of the those openings and the rest of the surface area of the walls and overhead cover. It refines the approach taken in the Guidelines by treating some permeable surfaces as closed (whereas all were considered open by the guideline) and explains more comprehensively the way the calculation is made to determine whether a place is 75% or more enclosed.

The available evidence provides no guidance on the relative costs and benefits of this way of implementing the 75/25 rule in terms of the health impact of environmental tobacco smoke in areas where smoking would be permitted, as there is no evidence of the extent to which the degree of openness is associated with reduced risk from ETS exposure.

This approach does provide some continuity with the Interpretive Guidelines, which is of benefit to a wide range of those affected by the Regulation. Further, the change of approach to some kinds of permeable surfaces means that there may be some configurations where smoking was not prohibited under the guidelines, but will be prohibited now.

The overall costs and benefits of this option, where smoking is allowed in areas that are more than 25% open to the outdoors, would be more favourable than the status quo scenario discussed in Option One. That is, the net benefit of Option Three is probably less than elimination of smoking in previously exempt areas identified in the Allens 2003 RIS, but probably more than the net benefit identified as the outcome of adopting Option One. It is difficult to quantify exactly where on this continuum the impact of this option would lie due to the scientific ambiguity of the degree of ETS exposure and how this relates to the degree of 'enclosedness' and the subsequent impact on health.

As Option Three represents the greatest net public benefit, it is preferred, and is the approach taken in the Regulation.

Appendix 1
Section 35 of the *Legislation Act 1991*

35 Content of regulatory impact statements

A regulatory impact statement for a proposed subordinate law or disallowable instrument (the ***proposed law***) must include the following information about the proposed law in clear and precise language:

(a) the authorising law;

(b) a brief statement of the policy objectives of the proposed law and the reasons for them;

(c) a brief statement of the way the policy objectives will be achieved by the proposed law and why this way of achieving them is reasonable and appropriate;

(d) a brief explanation of how the proposed law is consistent with the policy objectives of the authorising law;

(e) if the proposed law is inconsistent with the policy objectives of another territory law—

(i) a brief explanation of the relationship with the other law; and

(ii) a brief explanation for the inconsistency;

(f) if appropriate, a brief statement of any reasonable alternative way of achieving the policy objectives (including the option of not making a subordinate law or disallowable instrument) and why the alternative was rejected;

(g) a brief assessment of the benefits and costs of implementing the proposed law that—

(i) if practicable and appropriate, quantifies the benefits and costs; and

(ii) includes a comparison of the benefits and costs with the benefits and costs of any reasonable alternative way of achieving the policy objectives stated under paragraph (f);

(h) a brief assessment of the consistency of the proposed law with the scrutiny committee principles and, if it is inconsistent with the principles, the reasons for the inconsistency.

Appendix 2

The Scrutiny Principles

Section 35(h) of the *Legislation Act 2001* requires that this RIS contain a brief assessment of the consistency of the proposed law with the scrutiny committee principles and, if it is inconsistent with the principles, the reasons for the inconsistency.

As set out in the terms of reference of the Assembly's Standing Committee on Legal Affairs (when performing the duties of a scrutiny of bills and subordinate legislation committee). the relevant scrutiny principles are:

> (a) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
>
> (i) is in accord with the general objects of the Act under which it is made;
>
> (ii) unduly trespasses on rights previously established by law;
>
> (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
>
> (iv) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;

To briefly answer these (using the same numbering system):

(i) the Regulation accords with the general objets of the Act;

(ii) the regulation does not trespass on rights previously established by law;

(iii) there are no non-reviewable decisions made under the regulation; and

(iv) the Act requires that this matter be dealt with by Regulation, so it cannot sensibly be said to be a matter properly to be dealt with in an Act of the Legislative Assembly.