



Information Sheet

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Tobacco and the Law

Background to Australian tobacco legislation

It was not until the 1970's that Australian governments began to attempt to control the sale and use of tobacco products (other than to children). Beginning in the 1950's, research found a strong link between smoking and various diseases, which led to legislation from both the federal and state governments. Tobacco control legislation across Australia has occurred at different times in different jurisdictions.

Smoking is now recognised as the largest drug killer in Australia¹, bringing with it huge human and economic costs. Because of this, reducing the rate of smoking in the community has become a priority for Australian governments.

Changes in public policy in recent years reflect the level of community concern about smoking. Restrictions on advertising, sale of tobacco, sponsorship and bans on smoking in many public and work areas have come about because of a growing awareness of the harmful consequences of smoking both to the smoker themselves and those around them.

Some of the revenue raised through tobacco taxes is now directed towards research into smoking, funding education campaigns and sponsoring of sporting and other organisations previously supported by tobacco companies.

Advertising & promotion legislation

Federal controls

In the Tobacco Advertising Prohibition Act 1992, federal parliament decreed that there shall be no advertising or promotion of tobacco products. However, point of sale marketing remains the province of the states.

This legislation defines a 'tobacco advertisement' as any writing, still or moving picture, sign, symbol or other visual image or any audible message that publicises or promotes:

- 1 the purchase or use of a tobacco product
- 1 a trademark or brand name of a tobacco product
- 1 the name of a person who is a manufacturer of tobacco products
- 1 any other words or designs that are closely associated with a tobacco product or a range of tobacco products².

Neither does it allow any tobacco sponsorship of events, except exemptions for events of international significance that could be lost if an exemption were not granted, such as the Formula One Grand Prix. This exemption will be phased out in 2006.

Cinema and billboard advertising have also been phased out.

Advertising in the print media has been prohibited since the Smoking and Tobacco Products Advertisements (Prohibition) Act 1989 came into effect and covers advertising in magazines and newspapers, but not imported magazines. It was repealed and incorporated into the 1992 legislation.

State Controls

The federal ban on tobacco advertising described above superseded all agreements and legislation previously put in place by the states and territories.

This means that there are now uniform restrictions on the sale and marketing of tobacco products across Australia.

Exemptions to the federal ban apply in areas that are deemed to be under states' supervision, such as point of sale advertising. A number of states, including Tasmania and NSW, have recently curtailed advertising at point of sale.

In South Australia, the most recent legislative development was the South Australian Tobacco Products Regulation Act 1997 (a consolidation of previous legislation, amended March 1999).

SA Acts prohibit

- 1 sale or supply of tobacco to a child under the age of 18 years of age
- 1 sale of tobacco products in packets that do not display the prescribed health warnings
- 1 sale of cigarettes in packets of less than 20 cigarettes
- 1 sale of confectionary designed to resemble a tobacco product
- 1 tobacco advertising in public places including billboards, building and cinemas and on objects such as carry bags
- 1 offering tobacco as a gift or free sample to members of the public
- 1 sale of tobacco products from vending machines except on licensed premises
- 1 smoking in enclosed public eating areas (with some exemptions).

Retailers are required to display a notice next to each point of sale of tobacco products, including vending machines. They are also required to provide written information to customers, if requested, on tar, nicotine and carbon monoxide levels of cigarettes in an approved format.

Health warnings on cigarette packs

A health warning *Warning - Smoking is a health hazard* first appeared on cigarette packages in Australia in 1973, after state legislation introduced in 1969 was implemented. In 1985, all states revised legislation or agreements to accommodate four new warnings that would be more prominently placed on cigarette packs. *Smoking causes lung cancer, Smoking causes heart disease, Smoking reduces your fitness and Smoking damages your lungs* were to appear with equal frequency.

In order to ensure that there was uniform labelling of cigarette packets, federal legislation required that from 1st January 1995, all cigarette packs must carry:

- 1 health warnings on the 'flip top' in black print on a white background, covering at least 25% of the front of the pack

- 1 detailed explanations of each warning along with a tobacco information number taking up one third of the back of each pack
- 1 information on one entire side panel about the tar, nicotine and carbon monoxide content of that brand.

Current warnings

The six warnings now appearing on cigarette packs are:

Smoking Causes Lung Cancer
Smoking Causes Heart Disease
Smoking Kills
Your Smoking Harms Others
Smoking When Pregnant Harms Your Baby
Smoking is Addictive.

The Commonwealth Department of Health & Ageing is currently reviewing Health Warnings on tobacco products in Australia.

[See www.health.gov.au/pubhlth/strateg/drugs/tobacco]

Smoking in public places

Recently there has been considerable public and government support for moves to restrict smoking in public places. It is now accepted that passive smoking (breathing in other people's cigarette smoke) poses a risk to everyone's health, not just to those who smoke.

Federal controls ban smoking in

- 1 all commonwealth departments
- 1 all domestic flights and international flights out of Australia, and in airport buildings operated by the Federal Airports Corporation.

Smoke-free public places

The South Australian *Tobacco Products Regulation Act 1997* prohibits smoking in enclosed public dining or café areas, with some exemptions, and came into effect on 4th January 1999. Follow-up surveys have found a both high level of community acceptance of the bans, and a high level of compliance^{3,4}.

In Nov 2003, the SA government promised to introduce legislation which provides for a four-phase smoking ban in pubs and clubs, including gaming areas from early 2004, with a total ban by Oct 2007.

In the ACT, there has been a staged introduction of smoke-free areas, beginning in 1994 with the final phase in 1999. In March 1999, WA introduced legislation that banned smoking in all enclosed public places with the exception of the Burswood Casino. This included restaurants, cafes, bars and clubs. NSW restaurants went smoke-free just prior to the Sydney 2000 Olympic Games, and Victorian and Tasmanian legislation implemented smoke-free dining mid 2001. Queensland followed suit in 2002, and NT in 2003.

Smoking in workplaces

Many workplaces around Australia are implementing smoke-free policies. Under the principles of Occupational Health & Safety legislation, employers have a duty to provide, as far as possible, a working environment that is free from hazards to health for employees and others entering their premises. Employees also have a duty to look after their own health and safety in the workplace, and to avoid affecting the health of others in the workplace.

In Oct 2003, the National Occupational Health and Safety Commission released a new Guidance Note on Environmental Tobacco Smoke, which recommends that ETS exposure '...should be excluded in all Australian workplaces. [and]...implemented as soon as possible.'

[See NOHSC Guidance Note 3019 (2003) www.nohsc.gov.au]

Employers are increasingly recognising their duty of care to employees, and the possibility of litigation should they not provide a smoke-free environment for workers.

The proposed new SA legislation will also include a requirement for all workplaces (not pubs and clubs) in SA to be smoke-free by 3 months following the passing of the legislation in 2004.

Sports and arts sponsorship

In South Australia, the Tobacco Products Control Act 1988 established a health promotion foundation - originally called Foundation SA, then Living Health - which provided sports and arts sponsorships to organisations previously reliant on tobacco sponsorship. Living Health was disbanded in 1997. Sponsorships are now provided through Health Promotion SA, in collaboration with the Department of Recreation and Sport and Arts SA.

Sports and arts funding through Living Health provided the impetus and support for the extension of smoke-free areas at sporting and cultural events. For instance, in 1998, ETSA Park, SA's Netball stadium was the first Australian sports venue to be 100% smoke-free indoor and out. Football Park also provides 100% smoke-free outdoor seated viewing. All other major sporting venues have large areas that are designated smoke-free. Many SA Government sponsored events are now required to be smoke-free (eg Festival of Arts). The Department of Human Services requires that sponsored organisations meet a number of criteria with regard to provision of smoke-free areas, and provides support for organisations in meeting those criteria.

South Australia was one of the first states to provide a wide range of smoke-free environments.

Tobacco Litigation

In Australia as in other countries, litigation against tobacco companies, brought by either individuals, classes or corporations and organisations, is seen as a way of making the tobacco industry accountable for its past and present actions. In 1997, tobacco companies in the United States of America began bargaining with states' attorneys over a number of

lawsuits which resulted in settlements totalling about \$10bn/year in perpetuity, an agreement to ban most outdoor advertising, and a few other public health concessions⁵.

There are a number of benefits of bringing tobacco lawsuits. Firstly, it enables individuals, governments and others to claim the costs associated with tobacco related illness, and secondly, it puts the tobacco industry on the defensive. In addition, successful legal ventures often provide the impetus for changes to corporate behaviour and government legislation, as the examples below show.

Finally, rulings on a number of lawsuits (Minnesota, Minneapolis in the US and Guildford, UK) have included provisions for public access to millions of pages of internal tobacco industry documents. These can be searched via a web interface at a number of locations, including from the Center for Disease Control in the USA. [www.cdc.gov/tobacco/industrydocs/index.htm].

In April 2002, 51 year old lung cancer sufferer Rolah McCabe* became the first Australian smoker to win case against a tobacco company, in this case British American Tobacco Australasia (BATA). Mrs McCabe was awarded damages of \$700,000 by the Victorian Supreme Court. The most remarkable thing about it is that Justice Eames struck BATA's defence because they had acted in a way to deny Mrs McCabe a fair trial.

Justice Eames ruled that W.D. & H.O. Wills (Australia Ltd) - later BATA - and their solicitor, Clayton Utz, had 'subverted' the process of discovery 'with the deliberate intention of denying a fair trial' to Mrs McCabe by:

- 1 destroying tens of thousands of potentially damaging documents under a pretext of innocent reorganisation;
- 1 misleading the court as to what had become of material BATA claimed it could not find; and
- 1 warehousing documents, placing them in locations more difficult for courts to access.

BATA appealed this decision and on 9 Dec 2002 it was overturned with damages to be returned. Further legal action is likely.

[The VicHealth Centre for Tobacco Control, has produced a summary report of the findings of this case and its implications, and the appeal. They can be seen via their website www.vctc.org.au]

*Rolah McCabe died 26 Oct 2002

Currently, 41 year old NSW emphysema sufferer Myriam Cauvin has won the right to proceed with Australia's first class action against cigarette companies. Ms Cauvin started smoking when she was just 10, and now says Philip Morris and British American Tobacco should be made to set up a national compensation scheme to pay for their misleading and deceptive conduct in breach of the Trade Practices Act. NSW Supreme Court judge Bell ruled that even though Ms Cauvin was broke, her claim was bona fide and she had an arguable case.

In a separate Equity action, Ms Cauvin seeks \$230m

"windfall" from invalidated tax in a fight to make tobacco companies fund health support. This is now headed for appeal to the High Court at a future date.

Passive smoking litigation

In 1986, the Attorney-General provided advice to the House of Representatives regarding passive smoking. It stated that:

An employer has a common law duty of care to take all reasonable steps to protect its employee's health and safety, including the provision and maintenance of safe workplaces. The Attorney-General's Department advised...that injury from passive smoking is reasonably foreseeable and that consequently such an injury could give rise to an action for damages at common law. (House of Representatives, Hansard 1986, November 13: Advice from the Attorney-General)

A number of legal decisions have reinforced the need for employers to provide a smoke-free working environment. A landmark decision by Justice Trevor Morling in 1992 in the Federal Court found that an advertisement disputing the harmful effects of passive smoking was misleading and deceptive⁶. A subsequent appeal upheld Justice Morling's findings on the evidence that passive smoking causes disease, especially lung cancer, asthma, respiratory illnesses in young children and middle ear infection.

In 1992, Mrs Liesel Scholem sued her workplace for aggravation of her asthma during the period 1974 to 1986 to the extent that it caused permanent disability. The awarding of compensation worth \$85,000 set a common law precedent, which other workers have followed.

Notably, in 2001 Marlene Sharp, a non-smoking bar worker, sued a NSW RSL club for common law damages relating to her throat cancer, which she asserted was due to passive smoking. She was awarded \$450,000. This case is likely to substantially increase insurance premiums for bar areas, and will hopefully encourage legislative efforts in this area.

Similarly, a Melbourne teacher, Owen Brown, who sued for damages relating to his chronic lung disease, received a substantial out of court settlement. Mr Brown, a non-smoker, asserted that his condition was caused by years of exposure to passive smoke in school staff rooms.

[For a list of Australian legal cases on passive smoking see NSW Cancer Council publication *When smoke gets in your eyes...nose, throat, lungs and bloodstream*]⁷ [www.nswcc.org.au/cncrinfo/cncrsmrt/tobasmok/resource_index.htm]

Litigation in this area is succeeding because medical evidence strongly supports the idea that breathing environmental tobacco smoke (passive smoking) can be harmful to health. This is supported by major reports from the United States Surgeon General⁸, the United States Environmental Protection Agency⁹ and Australia's National Health and Medical Research Council¹⁰.

Retrieving the costs of smoking

A number of other cases have been brought against the tobacco industry in Australia, seeking to recover the costs associated with the health effects of smoking. In March 2000, the Federal Court ruled that a representative class action brought by six smokers who had suffered loss as a result of smoking related disease on the grounds that all smokers were different, and did not constitute a 'class'. This was unsuccessfully appealed. The ruling does not apply to individual cases.

In 1999, a Sydney doctor successfully sued for costs incurred while quitting smoking.

In September 1999, a second representative proceeding was filed in the Federal Court on behalf of public and medical organisations. This case sought to reimburse money spent on tobacco control measures since 1992, along with judicial orders (injunctions) to change the industry's behaviour¹¹. This case did not proceed.

References

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2. Tobacco Advertising Prohibition Act 1992. Handbook, Canberra: Information Solutions Group, 1996.

3 Miller C & Wakefield M Compliance survey and inspection of enclosed public dining premises in South Australia: report to the South Australian Anti-Tobacco Ministerial Advisory Taskforce and the Department of Human Services. Adelaide, DHS, 1999.

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5 Daynard R, Bates C & Francey. Tobacco litigation worldwide. BMJ 320, 8 Jan 2000, pp111-113.

6 Australian Federation of Consumer Organisations Inc v The Tobacco Institute of Australia Ltd. 1992 38 FCR 548.

7 Francey N & Sulous G. Smoke gets in your eyes...nose, throat, lungs, and bloodstream: A guide to passive smoking and the law in NSW. Sydney, The Cancer Council New South Wales, 2001

8 US Department of Health and Human Services. The health consequences of involuntary smoking. A report of the Surgeon General. Rockville, Maryland: US Department of Health and Human Services, Public Health Service, Centers for Disease Control, Center for Health Promotion and Education, Office on Smoking and Health, 1986. DHHS Publication no (CDC) 87-8398.

9 United States Environment Protection Agency. Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders. Washington DC: US Environment Protection Agency, 1992.

10 National Health and Medical Research Council. The health effects of passive smoking: A scientific information paper. Canberra: AGPS, 1997.

11 Daynard R, Bates C & Francey N. Tobacco litigation worldwide. BMJ 320, 8 Jan 2000, pp111-113.

Useful web links

ASH Australia -great for updates on litigation and legislation in Australia
www.ashaust.org.au

Quit SA
www.quitsa.org.au

OxyGen
www.OxyGen.org.au

Tobaccopedia
www.tobaccopedia.org

ASH UK
www.ash.org.uk