



Information Sheet

202 Greenhill Road Eastwood SA 5063
PO Box 929 Unley 5061
Phone +61 8 8291 4141
Fax +61 8 8291 4194
www.quitsa.org.au

Tobacco and the Law

Tobacco in Australia is regulated through Commonwealth, State and Territory legislation. Legislation covers:

- advertising and promotion restrictions;
- packaging and labelling requirements;
- public smoking bans;
- and taxation.

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.

Background to Australian tobacco legislation

It was not until the 1970s 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 the largest drug killer in Australia⁽¹⁾, 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.

Advertising & promotion legislation

Advertising and promotion of smoking or tobacco products in Australia is governed by the Tobacco Advertising Prohibition (TAP) Act 1992. The TAP Act 1992 was introduced to provide a national standard for tobacco advertising. This Act is the latest in a series of restrictions on advertising that have been put in place since the 1970s.

- Bans on cigarette advertising on radio and television have been in place since 1976.
- Bans on cigarette advertising in all Australian newspapers and magazines have been in place since 1990.

The TAP Act bans most mainstream forms of tobacco advertising. However tobacco is still promoted via direct mail, the internet and at the point of sale. Despite a ban on paid product placement, cigarette and tobacco use has been increasing in the movies. The prohibitions cover:

- print media advertising,
- advertisements in films, videos, television or radio,
- advertising on tickets,
- the sale or supply of any item containing a tobacco advertisement and outdoor advertising on billboards or public transport.

Later amendments to the Act also restricted sponsorship of sporting or cultural events. The last exemption to tobacco sponsorship - the Formula One Grand Prix - ended in 2006.

Tobacco Companies are increasingly using the internet to promote their products. A review of the Act in 2004 recommended action that would restrict the sale of tobacco

products over the internet as well as curtail the proliferation of internet based advertising. However, the government has not amended the Act.

States and Territories are also free to implement tighter controls than those contained in the Act. In these cases, the State or Territory legislation takes precedence. Point of Sale marketing remains the province of the States.

Point of Sale advertising

Point of sale advertising is the advertising you see displayed in shops that sell cigarettes. Point of sale and packaging are among the last places tobacco companies can advertise legally. Point of sale advertising also appeals directly to children and young people, as cigarette displays can give the impression that smoking is normal and safe. Ready access to cigarettes is a predictor of uptake of smoking, indeed in South Australia in 2005, Over 19% of children purchased their cigarettes, with the most common place of purchase being petrol stations.

A number of states, including Victoria and Western Australia, have recently curtailed advertising at point of sale.

In South Australia, the Tobacco Products Regulation Act controls tobacco sales, distribution, display, advertising and use of tobacco, including areas where smoking is prohibited. The Act was amended (Oct 2004) and extends previous legislation. It includes

- bans on tobacco advertising in public places and retail outlets

- bans on mobile display units, a common form of marketing to young people in nightclubs
- bans on offering tobacco as a gift or free sample to members of the public
- restriction of vending machines to 1 only in licensed premises

Designated Department of Health signage must be displayed at point of sale.

In November 2007, further point of sale restrictions came into effect in SA, including point of sale tobacco display restrictions to 3 square metre + A3 graphic image OR 1 square metre plus A4 written warning and banning displays of cartons of cigarettes to no more than one packet of any particular product.

The Tobacco Control Health Alliance (AMA, The Cancer Council South Australia, Heart Foundation and Asthma Foundation) argued that the proposed restrictions were not tough enough and lobbied for all tobacco products to be out of sight.

[see www.tobaccolaws.sa.gov.au for more information]
[see also Health Alliance briefing on point of sale http://www.cancersa.org.au/cms_resources/documents/Health_Alliance.pdf]

Sale of tobacco products

Sale of tobacco products is regulated by the States. Across all States, it is illegal to sell tobacco to children under the age of 18. All States require tobacco products to be sold only in packets with prescribed health warnings, and containing 20 or more cigarettes.

In South Australia, the Tobacco Products Regulation Act also

- bans sale or supply of tobacco to a child under the age of 18 years of age
- has employer liability for sales to minors and requirements to ask for proof of age
- bans the sale of toy or confectionary cigarettes
- has detailed tobacco merchant licence conditions on the spot fines for the sale or supply of tobacco products to children.

South Australia was also the first State to ban the sale of fruit or candy flavoured cigarettes, which are designed to lure young people into smoking.

In January 2007, further restrictions came into effect in SA in addition to point of sale restrictions mentioned above, including increasing license fees to \$200 a year and increasing the number of offences that can receive an on-the-spot fine.

Packaging and labelling

A health 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 1995, six new warnings appeared on the 'flip top' of tobacco packages in black print on a white background, covering at least 25% of the front of the pack. (Smoking Causes Lung Cancer, Smoking Causes Heart Disease, Smoking Kills, Your Smoking Harms Others, Smoking

When Pregnant Harms Your Baby and Smoking is Addictive). Detailed explanations of each warning along with a tobacco information number took up one third of the back of each pack. One side panel contained information to help consumers more easily understand the tar, nicotine and carbon monoxide content of that brand.

From March 1st 2006, all packs were required to have new pictorial warnings that cover 30% of the front of the pack and 90% of the back of the pack.

There are two sets of seven warnings that will be used in alternate years. Packs are also required to display the Quitline number. The side panel with levels of tar, nicotine and carbon monoxide was replaced with more relevant and accurate information.

The new warnings can be seen at: www.quitsa.org.au

Taxes and pricing

According to the World Bank, raising taxes on tobacco is one of the most effective ways of reducing the amount of people smoking.⁽²⁾ When the Government raises its tax on tobacco, this pushes up the price of cigarettes in the shops. The more expensive cigarettes become, the less likely children are to take up smoking and the more likely people are to quit smoking, particularly those on low incomes.

In Australia, tobacco is taxed through an excise paid per stick for cigarettes; by weight for loose tobacco, and through GST. Prices increase in line with CPI in February and August each year. Excise revenue on tobacco for 2005-2006 was \$5.296 billion. (<http://www.vctc.org.au>)

[see www.health.gov.au/tobacco for more information]

Smoking in public places and Workplaces

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. Smoke-free areas have become the norm and are now expected by the majority of people to be available when they go to work or to a public place such as an entertainment venue.

The issue of smoking in public places and workplaces is another area that comes within the jurisdiction of the States and Territories.

Federal controls ban smoking in

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

Across all States, smoking is prohibited in enclosed dining areas, enclosed public places, pubs, clubs and gaming areas, making all of Australia's enclosed workplaces and public places smoke-free. Some jurisdictions have even legislated for smoke-free outdoor dining and outdoor areas.

South Australia was the first State in Australia to propose laws banning smoking in all pubs, clubs and the casino. South Australian legislation was passed in October 2004, amending the Tobacco Products Regulation Act. However, South Australia was one of the last states to fully enact the ban, in November 2007.

	Enclosed Work-places	Enclosed Dining & Public areas	Pubs and Clubs	Outdoor Dining
ACT	✓	✓	Dec 2006	Proposed
QLD	2002	2002	Jul 2006	Jul 2006
NSW	Sep 2000	Sep 2000	Jul 2007	-
NT	May 2003	May 2003	-	-
SA	Jan 1999	Jan 1999	Nov 2007	-
TAS	Sep 2001	Sep 2001	Jan 2006	Jan 2006 (partial)
VIC	Jul 2001	Jul 2001	Jul 2007	-
WA	2000	2000	Jul 2006	Proposed

Overseas, smoking bans are gaining momentum too. For instance, smoking is banned in pubs and clubs in New Zealand, Ireland, California, New York, and Scotland with much of Europe moving towards smoke-free pubs and clubs.

[see Smoke-free World
<http://www.ashaust.org.au/pdfs/SFworldBMA06.pdf>]

Smoke-free Workplaces

As well as being bound by smoke-free legislation, 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.

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 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 concessions⁽³⁾.

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.
[\[http://www.cdc.gov/tobacco/industrydocs/index.htm\]](http://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). The Victorian Supreme Court awarded Mrs McCabe damages of \$700,000. 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:

- destroying tens of thousands of potentially damaging documents under a pretext of innocent reorganisation;
- misleading the court as to what had become of material BATA claimed it could not find; and
- 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. In November 2006, after internal documents leaked from Clayton Utz were published in The Age and the Herald about the conduct of its solicitors during the case, Victoria's Attorney-General asked for legal advice on reopening the case.

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
<http://www.vctc.org.au/>

*Rolah McCabe died 26 Oct 2002

In September 2004, the NSW Supreme Court rejected a class action claim by emphysema sufferer Myriam Cauvin, denying her the right to take legal action against tobacco companies on behalf of others who have suffered harm from their products. Cauvin still has the right to proceed on her own behalf and to obtain orders to remedy the effect of alleged misleading and deceptive conduct by the tobacco industry.

In a separate Equity action, Ms Cauvin sought the \$230 million 'windfall' from invalidated tax in a fight to make tobacco companies fund health support.

[See the ASH Australia website www.ashaust.org.au for updates on tobacco litigation]

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 deceptive⁽⁴⁾. 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.

South Australian bar worker Phil Edge, 29 and a non-smoker, won an undisclosed sum as compensation in October 2005 for tongue cancer caused by working for three years in a smoky Adelaide pub. Edge had part of his tongue removed and endured years of radiation therapy, speech therapy and more.

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*⁽⁵⁾

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 General⁽⁶⁾, the United States Environmental Protection Agency⁽⁷⁾ and Australia's National Health and Medical Research Council⁽⁸⁾.

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 behaviour⁽³⁾. This case did not proceed.

Light and Mild cigarettes

As part of court-enforceable undertakings obtained by the Australian Competition and Consumer Commission (ACCC), the tobacco industry agreed to stop using some misleading terms such as light and mild. In the ACCC's view, the claimed health benefits of low yield cigarettes compared to high yield cigarettes were misleading and likely to breach section 52 of the *Trade Practices Act 1974*.

The ACCC required the tobacco industry to contribute to a \$9 million consumer awareness campaign advising smokers that 'light' and 'mild' cigarettes are not a healthier option.

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