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**Tobacco Control in New South  
Wales**

by

**Talina Drabsch**

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# **Tobacco Control in New South Wales**

by

**Talina Drabsch**

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# CONTENTS

## EXECUTIVE SUMMARY

1	INTRODUCTION .....	1
2	BACKGROUND INFORMATION .....	2
3	TOBACCO CONTROL .....	7
3.1	Strategies .....	7
3.1.1	National Tobacco Strategy 1999 to 2002-03 .....	8
3.1.2	NSW Tobacco Action Plan 2001-2004 .....	8
3.2	Tobacco packaging .....	9
3.3	Advertising .....	10
3.4	Juvenile smoking .....	12
3.5	Health warnings .....	15
3.6	Price .....	15
3.7	Smoking cessation .....	17
3.8	Litigation .....	19
4	SMOKE-FREE PUBLIC PLACES .....	24
4.1	Passive smoking .....	24
4.2	Smoking bans in NSW .....	25
4.2.1	Passive smoking and children .....	25
4.2.2	Local governments – NSW .....	26
4.2.3	Smoke-free Environment Act 2000 (NSW) .....	28
4.2.4	Smoke-free Environment Amendment Act 2004 .....	29
4.2.5	Opinions regarding the expansion of smoke free areas .....	32
4.3	Smoking bans in Australia .....	37
4.3.1	Commonwealth .....	37
4.3.2	Australian Capital Territory .....	37
4.3.3	Northern Territory .....	37
4.3.4	Queensland .....	38
4.3.5	South Australia .....	39
4.3.6	Tasmania .....	40
4.3.7	Victoria .....	41
4.3.8	Western Australia .....	41
4.4	International smoking bans .....	42
4.4.1	World Health Organization Framework Convention on Tobacco Control ....	42
4.4.2	Canada .....	44
4.4.3	New Zealand .....	45
4.4.4	United Kingdom .....	46
4.4.5	Ireland .....	47
4.4.6	United States of America .....	47
4.5	What are some of the repercussions of smoking bans? .....	48
5	CONCLUSION .....	51



## EXECUTIVE SUMMARY

Tobacco is a controversial product. Whilst its use is legal in Australia, it is the leading preventable cause of morbidity and premature mortality. Tobacco is responsible for more death and drug-related hospitalisations than alcohol and illicit drugs combined. Approximately 21% of male adults and 18% of female adults in Australia are daily smokers.

The arguments of the anti-tobacco lobby have changed with time from a focus on the morality of tobacco use, to health fears for the smoker and the current focus on the rights and health of non-smokers. This paper examines some of the ways governments have sought to control tobacco use.

Some background information on the incidence of smoking and the associated social and economic costs is provided in section 2 (pp 2-6). The size of the tobacco industry, governmental revenue and outlays associated with tobacco, and the household expenditure of smoking and non-smoking households are noted.

Section 3 (pp 7-23) examines the ways tobacco is controlled in Australia, with a particular focus on NSW. It explains some of the strategies that have been developed by the Commonwealth and NSW governments. It also discusses the regulation of tobacco packaging, advertising, juvenile smoking, and health warnings. This section looks at the influence of price on tobacco consumption and notes some of the ways smoking cessation is encouraged. The emergence of litigation as a means of tobacco control is also highlighted.

Greater concern about the impact of passive smoking on non-smokers has led to the enactment of laws, both in Australia and internationally, that restrict smoking in enclosed public places. Section 4 (pp 24-51) examines the emergence of smoke-free public areas. Information on the issues associated with passive smoking is provided, including the impact of passive smoking on children. Some examples of local councils that have expanded smoke-free public spaces to include such things as beaches and children's playgrounds are noted. An overview of the *Smoke-free Environment Act 2000* (NSW) is included with the *Smoke-free Environment Amendment Act 2004* (NSW) also discussed. Prior to the *Smoke-free Environment Amendment Act 2004*, licensed premises were exempt from the requirement that an enclosed public space be smoke-free. However, this exemption is to be gradually removed from 3 January 2005. Information on passive smoking claims and the 'Share the Air' agreement between the NSW Government, hospitality industry and union representatives is presented, as is an overview of the status of smoking bans at the federal, state and territory level. The growth in the number and extent of smoking bans in various countries throughout the world is discussed, with particular attention given to Canada, New Zealand, the United Kingdom, Ireland and the United States. Finally, the effectiveness of smoking bans is analysed.





## 1 INTRODUCTION

Tobacco is a controversial product. Whilst its use is legal in Australia, it is the leading preventable cause of morbidity and premature mortality.<sup>1</sup> Tobacco is responsible for more death and drug-related hospitalisations than alcohol and illicit drugs combined.<sup>2</sup> The arguments of the anti-tobacco lobby have changed with time from a focus on the morality of tobacco use, to health fears for the smoker and the current focus on the rights and health of non-smokers. Greater concern about the impact of passive smoking on non-smokers has led to the enactment of laws, both in Australia and internationally, that restrict smoking in enclosed public places. Whilst it may be argued that the decision to smoke in spite of the risks is a matter of individual choice, the element of choice may be more limited for others, such as children and hospitality workers, in relation to passive smoking.

This paper examines some of the ways governments have sought to control tobacco use. Background information on the proportion of the Australian population that smoke is included in section 2 (pp 2-6), as well as details of some of the social and economic costs associated with tobacco use. An overview is provided in section 3 (pp 7-23) of a number of the strategies that governments have developed in response to health concerns. The regulation of tobacco advertising, the sale of tobacco, tobacco product packaging and its use by minors is discussed in section 3 (pp 7-23). An assessment is also made of the relative effectiveness of some of the methods used to control tobacco use. Section 4 (pp 24-51) of this paper considers the movement towards smoke-free enclosed public places, with the position in NSW and the other Australian states and territories highlighted. Some overseas trends are also examined.

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<sup>1</sup> Public Health Division, *The health of the people of NSW. Report of the Chief Health Officer 2002*, NSW Department of Health, Sydney, 2002, p 46.

<sup>2</sup> Australian Institute of Health and Welfare, *Australia's Health 2004*, AIHW, Canberra, 2004, p 148.

## 2 BACKGROUND INFORMATION

Approximately 21% of male adults and 18% of female adults in Australia are daily smokers.<sup>3</sup> The proportion of smokers has significantly declined since the 1950s when 70% of men and 30% of women smoked daily.<sup>4</sup> In 2002-03, 25% of men aged 16 and over in NSW were current (daily or occasional) smokers, falling from 41% since 1977.<sup>5</sup> The proportion of males to have never smoked increased in the same period from 36% to 46%. 19% of females 16 years and over in NSW were current smokers in 2002-03, decreasing from 30% since 1977.<sup>6</sup> However, the proportion of never smokers has remained relatively constant at 59% throughout that period, with the proportion of ex-smokers subsequently increasing from 11% to 22%.

The following table measures the current smoking status of people in NSW by age and sex. It indicates that the proportion of male smokers peaks at 32% between the ages of 25 and 34. The peak age for women smokers also occurs in this age group with 26% being current smokers. This is a slight change from 1997-98 when the peak age for female smokers was between 16 and 24 years.<sup>7</sup>

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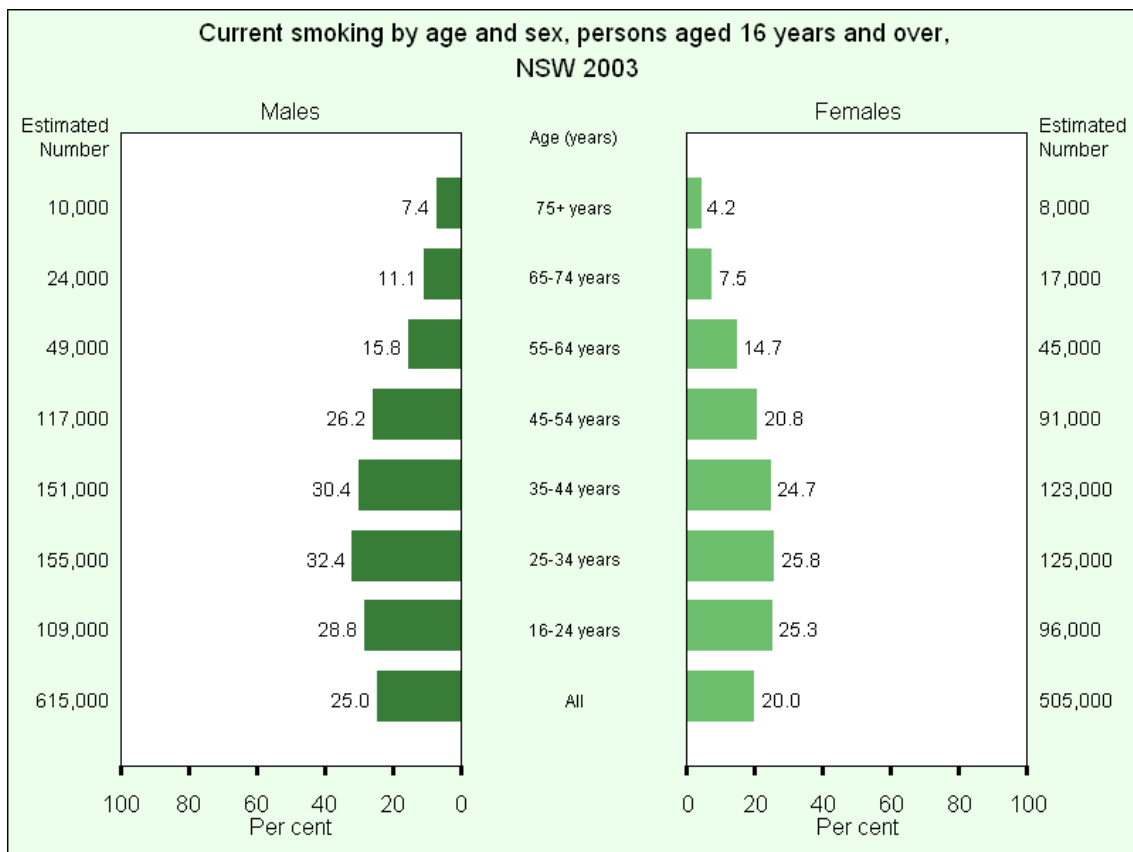
<sup>3</sup> Ibid.

<sup>4</sup> Ibid, p xii.

<sup>5</sup> Population Health Division, *The health of the people of NSW - Report of the Chief Health Officer 2004*, NSW Department of Health, Sydney, 2004. Available from [www.health.nsw.gov.au](http://www.health.nsw.gov.au)

<sup>6</sup> Ibid.

<sup>7</sup> Public Health Division, above n 1, p 42.



Source: Population Health Division, *The health of the people of NSW – Report of the Chief Health Officer 2004*, NSW Department of Health, Sydney, 2004.

The majority of long-term smokers commence whilst a teenager, and the most significant age in terms of transition from ‘experimenter’ to established smoking during adolescence is 14.<sup>8</sup> The younger a smoker commences, the more likely it is that they will be a heavier smoker and experience difficulty in quitting the habit.<sup>9</sup> In 2001, 12% of teenagers between the ages of 14 and 17 were daily smokers with another 4% smoking occasionally.<sup>10</sup> Teenage girls are more likely to be daily smokers than boys.<sup>11</sup>

The proportion of daily smokers in the Indigenous community (45% of persons aged 14 years and over) is double that of the non-Indigenous community.<sup>12</sup> This has implications for the status of Indigenous health compared to other Australians, particularly in relation to

<sup>8</sup> Population Health Division, above n 5; White V and Scollo M, ‘How many children take up smoking each year in Australia?’, *Australian and New Zealand Journal of Public Health*, 27(3) June 2003, p 359.

<sup>9</sup> Public Health Division, above n 1, p 44.

<sup>10</sup> Australian Institute of Health and Welfare, above n 2, p 149.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid, p 203.

cardiovascular disease, chronic respiratory disease and diabetes for which smoking increases the risk. Some of the risk factors for low birthweight and premature babies include smoking whilst pregnant and being under the age of 20 or over 35.<sup>13</sup> The rates of low birthweight and prematurity are higher in the Indigenous community than for Australians as a whole. In 2003, 12% of Indigenous babies in NSW were of low birthweight (compared to 6% for all NSW babies) and 12% were premature (compared to 7% for NSW overall).<sup>14</sup> In 2002, 58% of Indigenous mothers smoked in the second half of pregnancy (the time of greatest risk) in contrast to 15% of non-Indigenous mothers.<sup>15</sup>

More than three-quarters of prison inmates in NSW are smokers (78% of males and 83% of females).<sup>16</sup> A large proportion of young persons in custody in NSW also smoke. In 2003, 57% of males and 67% of females between the ages of 14 and 21 in custody were current smokers.<sup>17</sup> 25% had commenced smoking at 10 years old or younger with the average age of uptake being 12.<sup>18</sup>

Smoking kills half of its long-term users and was responsible for more than 6,500 deaths in NSW in 2000 (19% of all male deaths and 10% of all female deaths).<sup>19</sup> Most tobacco-related deaths are caused by cancer (particularly lung cancer), with ischaemic heart disease and chronic obstructive pulmonary disease also major causes.<sup>20</sup> Smoking was the direct cause of 10,807 new cases of cancer in Australia in 2000.<sup>21</sup> Smoking may contribute to additional health problems for females, including reduced fertility, menstrual problems, and difficulties with pregnancy and childbirth.<sup>22</sup>

In 1999-2000, tobacco was responsible for 43,350 hospitalisations in NSW, accounting for 295,960 bed-days at a cost of more than \$176 million.<sup>23</sup> According to Girgis and Ward,

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<sup>13</sup> Population Health Division, above n 5.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> NSW Health, *NSW Tobacco Action Plan 2001-2004*, 2001, p 5; Public Health Division, *The health of the people of NSW. Report of the Chief Health Officer 2002*, NSW Department of Health, Sydney, 2002, p 46.

<sup>20</sup> Ridolfo B and Stevenson C, *The quantification of drug-caused mortality and morbidity in Australia, 1998*, AIHW, Canberra, 2001, p 94.

<sup>21</sup> Australian Institute of Health and Welfare, above n 2, p 68.

<sup>22</sup> NSW Health, *Annual Report 2003-2004*, p 20.

<sup>23</sup> Girgis S and Ward J, 'A financial case to enable state health jurisdictions to invest in tobacco control', *Medical Journal of Australia*, 179(10) November 2003, p 541 (as corrected in *Medical Journal of Australia*, 181(6) September 2004, p 322).

smokers use inpatient hospital services more than people who do not smoke.<sup>24</sup> They also found that smokers heal at a slower rate, are more likely to use emergency services and outpatient facilities, and a greater proportion are admitted to intensive care after surgery.

According to Collins and Lapsley, the social cost of tobacco use in 1998-99 was more than \$21 billion.<sup>25</sup> This figure includes loss in terms of life, health, production in the workplace and home, and fires. Tobacco use has a large impact on federal and state budgets. According to Collins and Lapsley, tobacco revenue for governments is greater than the amount spent as a result of tobacco. In 1998-99, the total net revenue derived from tobacco via excise tax and customs duty for all governments was more than \$3.5 billion whereas the total outlay was \$885 million, a difference of more than \$2.5 billion.<sup>26</sup> Money is outlaid on such things as hospitals, medical expenses, nursing homes and pharmaceuticals. In 1998-99 state governments as a whole were in a better position (with revenue minus outlays totalling almost \$3 billion) compared to the Federal Government which outlaid more money than it received (a difference of approximately \$219 million).

The three main tobacco manufacturers in Australia are British American Tobacco Australia (formed as a result of a merger between Rothmans Holdings Ltd and H O Wills Holdings Ltd), Philip Morris Ltd and Imperial Tobacco.<sup>27</sup> Sales revenue in the Australian market for British American Tobacco was \$2996 million in 2000.<sup>28</sup> At the end of June 2001, 2305 people were employed in the manufacture of tobacco products in Australia, with 'industry value added'<sup>29</sup> measured at \$498 million.<sup>30</sup> Tobacco manufacturing in NSW employed 485 people, had a turnover of \$416 million and the 'industry value added' was \$175 million.<sup>31</sup> However, tobacco production is shrinking. Whilst 18,367 tonnes of tobacco and cigarettes were produced in 2001-02, this was 13% less than in 1998-99.<sup>32</sup>

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<sup>24</sup> Ibid, p 539.

<sup>25</sup> Collins D and Lapsley H, *Counting the cost: estimates of the social costs of drug abuse in Australia in 1998-9*, Commonwealth Department of Health and Ageing, Canberra, 2002, p ix.

<sup>26</sup> The figures in this paragraph, unless otherwise stated, are sourced from Collins and Lapsley, above n 25, p 66.

<sup>27</sup> Doran C and Walsh R, 'Tobacco in Australia: still a profitable venture?', *Australian and New Zealand Journal of Public Health*, 27(5) October 2003, p 559.

<sup>28</sup> Ibid.

<sup>29</sup> The Australian Bureau of Statistics defines 'industry value added' as 'represents the value added by an industry to the intermediate inputs used by the industry. Commencing with estimates for 1997-98, IVA has replaced industry gross product as the measure of the contribution by manufacturing industries to gross domestic product'.

<sup>30</sup> Australian Bureau of Statistics, *Manufacturing Industry 2000-01*, 8221.0, 2002, p 15.

<sup>31</sup> Australian Bureau of Statistics, *Manufacturing Industry, New South Wales and Australian Capital Territory*, 8221.1, 2001, p 11.

<sup>32</sup> Australian Bureau of Statistics, *2004 Year Book Australia*, ABS, Canberra, 2004, p 40.

The following table compares the expenditure of smoking and non-smoking households in NSW. Over 6% of smoking household expenditure is directed to tobacco products, leaving less money for such things as education and health. Poorer smoking households were found to spend more than 18% of their income on tobacco, compared to 3% for the wealthiest smoking households.<sup>33</sup>

**NSW household expenditures by smoking and non-smoking households in 1998/9 (%)**

Expenditure category	NSW non-smoking households	NSW smoking households	NSW former smoking households	All NSW households
Food	12.88	12.97	13.84	12.89
Alcohol	1.80	2.82	3.01	2.15
Tobacco products	0.00	6.28	0.00	2.17
Clothing and footwear	4.04	3.54	3.78	3.86
Housing	32.48	26.03	27.77	30.37
Furnishings and household equipment	6.46	7.18	7.66	6.70
Health	4.18	3.02	3.23	3.77
Transport	13.34	13.30	14.19	13.30
Communications	2.24	2.46	2.63	2.31
Recreation and culture	6.99	6.77	7.23	6.90
Education services	1.67	1.53	1.63	1.62
Hotels, cafes and restaurants	3.93	4.01	4.28	3.95
Miscellaneous goods and services	10.00	10.08	10.76	10.01
Total	100.00	100.00	100.00	100.00
Average annual household expenditure	\$45,084	\$49,816	\$49,816	\$46,702

Source: Junor W, Collins D and Lapsley H, *The macroeconomic and distributional effects of reduced smoking prevalence in New South Wales*, The Cancer Council New South Wales, Sydney, June 2004, p 10.

<sup>33</sup>

Junor W, Collins D and Lapsley H, *The macroeconomic and distributional effects of reduced smoking prevalence in New South Wales*, The Cancer Council New South Wales, Sydney, June 2004, p 4.

### 3 TOBACCO CONTROL

The World Health Organization defines ‘tobacco control’ as ‘a range of supply, demand and harm reduction strategies that aim to improve the health of a population by eliminating or reducing their consumption of tobacco products and exposure to tobacco smoke’.<sup>34</sup> Tobacco control includes such things as: educational initiatives; restricting access to tobacco; tobacco advertising bans; the imposition of taxes to raise the price of cigarettes; and health warnings on tobacco packages.

Various governments in Australia have enacted legislation for the purpose of tobacco control. There are laws prohibiting, amongst other things: tobacco advertising and sponsorship; the sale of tobacco to minors; and smoking in enclosed public places (discussed in detail in section four of this paper). Much of the law relating to tobacco control in NSW can be found in Part 6 of the *Public Health Act 1991* (NSW). The objects of Part 6 are:<sup>35</sup>

- (a) the active discouragement of the smoking of tobacco by:
  - (i) encouraging non-smokers, particularly young people, not to start smoking, and
  - (ii) limiting the exposure of children and young people to persuasion to smoke, and
- (b) the promotion of good health and the prevention of illness.

There is some debate over the relative effectiveness of various tobacco control measures. One of the major conclusions of a report on the reduction of tobacco use by the US Surgeon General was that:

Approaches with the largest span of impact (economic, regulatory and social) are likely to have the greatest long-term, population impact. Those with a smaller span of impact (educational and clinical) are of greater importance in helping individuals resist or abandon the use of tobacco.<sup>36</sup>

#### 3.1 Strategies

A number of strategies have been developed at the national and state level that focus on both the prevention and cessation of tobacco use.

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<sup>34</sup> Article 1 *WHO Framework Convention on Tobacco Control*.

<sup>35</sup> Section 61A.

<sup>36</sup> US Department of Health and Human Services, *Reducing Tobacco Use: A Report of the Surgeon General*, US Department of Health and Human Services, Atlanta, 2000, p 6.

### **3.1.1 National Tobacco Strategy 1999 to 2002-03**

The Ministerial Council on Drug Strategy endorsed the *National Tobacco Strategy 1999 to 2002-03*<sup>37</sup> (subsequently extended to 2003-04) in June 1999. It followed the 1991 *National Health Policy on Tobacco in Australia*, the first formal and comprehensive approach to tobacco control. The four objectives of the strategy are:

1. Prevent the uptake of tobacco use in non-smokers, especially children and young people.
2. Reduce the number of users of tobacco products.
3. Reduce the exposure of users to the harmful health consequences of tobacco products.
4. Reduce exposure to tobacco smoke.

There are six key strategy areas for achieving the above objectives:

1. Strengthening community action for tobacco control.
2. Promoting cessation of tobacco use.
3. Reducing availability and supply of tobacco.
4. Reducing tobacco promotion.
5. Regulating tobacco.
6. Reducing exposure to environmental tobacco smoke.

A new national tobacco strategy has been drafted. The Health Ministers from various Australian jurisdictions met on 12 November 2004 to discuss the strategy. It is proposed that the new strategy include: greater promotion of Quit and smoke-free messages; improved services and treatment for smokers; support to parents and educators; and more efficient regulation.<sup>38</sup>

The Australian Government spent \$19 million on tobacco control in 2000.<sup>39</sup>

### **3.1.2 NSW Tobacco Action Plan 2001-2004**

The goal of the *NSW Tobacco Action Plan* is 'to improve the health of the people of New South Wales by eliminating or reducing their exposure to tobacco in all its forms'. The objectives of the plan are similar to those of the National Tobacco Strategy and include:

1. Prevent the uptake of tobacco use in non-smokers, especially children and young people.
2. Reduce the number of users of tobacco products.

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<sup>37</sup> *National Tobacco Strategy 1999 to 2002-03 A Framework for Action*, Commonwealth Department of Health and Aged Care, Canberra, 1999.

<sup>38</sup> Ministerial Council on Drug Strategy, 'Licit and Illicit Drug Issues', [www.health.gov.au](http://www.health.gov.au) 12/11/04.

<sup>39</sup> Doran and Walsh, above n 27, p 559.



3. Reduce exposure to tobacco smoke.
4. Decrease the number of deaths and level of disease caused by smoking.
5. Decrease the economic cost of tobacco-related illness.

There are six focus areas:

1. Community awareness and education.
2. Smoking cessation.
3. Availability and supply of tobacco products.
4. Marketing and promotion of tobacco.
5. Tobacco product regulation.
6. Exposure to environmental tobacco smoke.

NSW Health spent \$6 million on tobacco control in 2003/04.<sup>40</sup> It has been involved in a number of campaigns that target higher risk groups, for example, *Lady Killer – why risk it?* (launched by NSW Health and the Cancer Institute of NSW to target female smokers) and *Car and Home: Smoke-free Zone* (discussed in section 4.2.1 – passive smoking and children). It also sponsors the Rock Eisteddfod Challenge (participants are from NSW high schools) and the Croc Festival (involving students from schools in remote and rural Australia).<sup>41</sup>

### 3.2 Tobacco packaging

A number of restrictions affect the way tobacco is packaged in NSW:

- The *Public Health Act 1991* (NSW) requires tobacco products to be sold in original packaging and cigarettes must be sold in packs of no less than 20.<sup>42</sup>
- Tobacco products are not to be packaged in such a way that they: allude to sporting, sexual or business success; depict people or cartoon characters; appeal to children or youth; or include holograms.<sup>43</sup>
- The requirements relating to the display of cigarette cartons and sales units are set out in clauses 8 and 9 of the *Public Health (Tobacco) Regulation 1999* (NSW). The Cancer Institute NSW wishes to see the display of tobacco products banned in retail outlets in NSW to ensure they are completely concealed from view.<sup>44</sup>
- Health warnings and notices regarding sales to minors must be conspicuously displayed where tobacco products are sold.<sup>45</sup>

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<sup>40</sup> NSW Health, above n 22, p 20.

<sup>41</sup> Ibid, p 20.

<sup>42</sup> Section 54.

<sup>43</sup> Clause 6 *Public Health (Tobacco) Regulation 1999* (NSW).

<sup>44</sup> Cancer Institute NSW, *NSW Cancer Plan 2004-2006*, Sydney, 2004, p 39.

<sup>45</sup> Clauses 12 and 13 *Public Health (Tobacco) Regulation 1999* (NSW).

Tobacco vending machines are prohibited under section 61F of the *Public Health Act 1991* (NSW) unless they are in: a restricted area of a hotel; a bar or poker machine area in a registered club; or a staff amenity area. Vending machines have been the subject of recent debate in the Legislative Assembly for the ACT. The Assembly passed the *Tobacco (Vending Machine Ban) Amendment Act 2004* (ACT) on 4 August 2004. This Act bans the use of tobacco vending machines in the ACT from 1 September 2006. Premises that previously kept vending machines will still be permitted to sell cigarettes but will be required to sell them over the counter.

Queensland recently tightened some of its tobacco control mechanisms. The *Tobacco and Other Smoking Products Amendment Act 2004* (Qld) was introduced into the Queensland Parliament on 20 October 2004 by the Minister for Health, the Hon G Nuttall MP. The Act inserted new provisions into the *Tobacco and Other Smoking Products Act 1998* (Qld) to strengthen the requirements regarding the display of smoking products. Accordingly, smoking products in a retail outlet may only be displayed in one place. The size of the display is limited to 3m<sup>2</sup> for a tobacconist and 1m<sup>2</sup> for other retailers. Packages in a stack dispenser are not to be arranged as a display panel and retailers are prevented from including information on a smoking products display that indicates the price is discounted. The Hon G Nuttall MP claimed in his second reading speech that there was ‘considerable public support for restricting the display of smoking products at retail outlets’.<sup>46</sup> These restrictions are to apply from 31 December 2005.

### 3.3 Advertising

Tobacco companies argue that their ‘business is not about increasing the number of smokers – it is about growing our share of the market of existing smokers – and above all, the value of our share of that market’.<sup>47</sup> Nevertheless, tobacco advertising is generally prohibited in New South Wales.

Division 4 of Part 6 of the *Public Health Act 1991* (NSW) regulates tobacco advertising. A **tobacco advertisement** is defined in section 53 as:

writing, or any 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.

Particular tobacco advertisements are prohibited in NSW.<sup>48</sup> A person in NSW must not

<sup>46</sup> Hon G Nuttall MP, *QLDPD*, 20/10/04, p 3047.

<sup>47</sup> British American Tobacco Australia Limited, *Social Report 2003-2004*, p 32. Available from [www.bata.com.au](http://www.bata.com.au) Accessed 20/12/04.

<sup>48</sup> Section 61B.

display tobacco advertisements for benefit nor distribute them. There are a number of exemptions to the prohibition.<sup>49</sup> For example, tobacco advertising is permitted on packaging less than 1800cm<sup>3</sup> in size provided it was included before being sold by the manufacturer.<sup>50</sup> Should tobacco product packaging include a tobacco advertisement, a health warning of at least one-quarter the size of the advertisement must be added to the packaging.<sup>51</sup> Tobacco is not to be supplied as a prize, gift or free sample so as to promote the sale of the product.<sup>52</sup> Tobacco sponsorship is also prohibited.<sup>53</sup> It is an offence under the Act to sell confectionery, food or toys resembling tobacco products.<sup>54</sup>

The publication and broadcasting of tobacco advertisements are prohibited under the *Tobacco Advertising Prohibition Act 1992* (Cth). Cigarette advertising on television and radio has been prohibited since 1976 with the ban extended to include all tobacco in 1988. Tobacco advertising in the print media has been banned since 1990.<sup>55</sup> The Commonwealth Department of Health and Ageing is currently reviewing the *Tobacco Advertising Prohibition Act 1992* (Cth) to ‘consider the extent to which the Act has met its objective of limiting the exposure of the public to messages and images that may persuade them to start or continue smoking’.

There are various opinions regarding the effectiveness of tobacco advertising. According to the Commonwealth Department of Health and Ageing, research has found tobacco advertising increases consumption.<sup>56</sup> However, J Martin (Quit Victoria and VicHealth Centre for Tobacco Control) argues that whilst tobacco advertising bans are effective, they:

must be comprehensive, covering all media and uses of brand names and logos. Partial bans have limited or no effect, as the tobacco industry responds by moving their promotional dollar from the restricted media into areas where it is unrestricted.<sup>57</sup>

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<sup>49</sup> Section 61B(3) *Public Health Act 1991* (NSW).

<sup>50</sup> Section 61B *Public Health Act 1991* (NSW); Clause 5 *Public Health (Tobacco) Regulation 1999* (NSW).

<sup>51</sup> Clause 7 *Public Health (Tobacco) Regulation 1999* (NSW).

<sup>52</sup> Sections 61C and 61D.

<sup>53</sup> Section 61E.

<sup>54</sup> Section 61G(3).

<sup>55</sup> Commonwealth Department of Health and Ageing, *Tobacco Advertising Prohibition Act 1992: Issues Paper*, Commonwealth Department of Health and Aged Care, Canberra, 2003, p 19.

<sup>56</sup> *Ibid*, p 20.

<sup>57</sup> Martin J, ‘Controlling the promotion of smoking – a lesson in industry ingenuity’, *Cancer Forum*, 28(2) July 2004, p 65.

Bardsley and Olekalns suggest the regulation of advertising has less impact than appears at first.<sup>58</sup> They examined the consumption of tobacco in Australia between 1962-63 and 1995-96 to determine the effect of government policies that were designed to minimise consumption. One of their conclusions was that:

The effects of industry advertising and regulatory intervention are relatively small. Advertising bans reduce consumption, but the effect is small and may be overstated if price effects are considered. Health warnings on cigarette packs reduce consumption by a detectable but very small amount. 'Quit' anti-smoking education and advertising has had no detectable direct effect.<sup>59</sup>

The prohibition of tobacco company sponsorship may have a similar outcome to bans on tobacco advertising. A study found tobacco industry sponsorship of televised sporting events had the same impact on children as direct cigarette advertising.<sup>60</sup>

Despite the general prohibition of tobacco product advertising, there have been instances where the requirements have been breached. For example, Philip Morris and Wavenet were fined on 8 November 2002 after pleading guilty to the promotion of Alpine cigarettes at a fashion show in December 2000 in contravention of the *Public Health Act 1991* (NSW).<sup>61</sup>

### 3.4 Juvenile smoking

The overwhelming majority of secondary students in NSW are non-smokers (80%). However, 13% of students smoked at some stage in the previous week and 4% are daily smokers.<sup>62</sup> Nevertheless, the prevalence of teenage smoking is declining. The proportion of students who smoked in the last week has fallen significantly since 1984 when it was 22%, with a large decrease since 1999.<sup>63</sup> The proportion of students to have ever smoked also diminished between 1984 and 2002 from 67% to 42%.<sup>64</sup> It appears that a large proportion of teenage smokers do not want the habit to be long-term as almost half of recent smokers tried to quit within the last 12 months.<sup>65</sup> The following graph illustrates the changes in the

<sup>58</sup> Bardsley P and Olekalns N, 'Cigarette and tobacco consumption: have anti-smoking policies made a difference?', *The Economic Record*, 75(230) September 1999, pp 225-240.

<sup>59</sup> Ibid, p 238.

<sup>60</sup> Australia, Parliament, Senate, Community Affairs References Committee, *Report: The tobacco industry and the costs of tobacco-related illness* (Sen J Herron: Chair), 1995, p 37.

<sup>61</sup> Action on Smoking and Health Australia, 'Philip Morris guilty – fined over tobacco promotions aimed at young women', *Media Release*, 8/11/02.

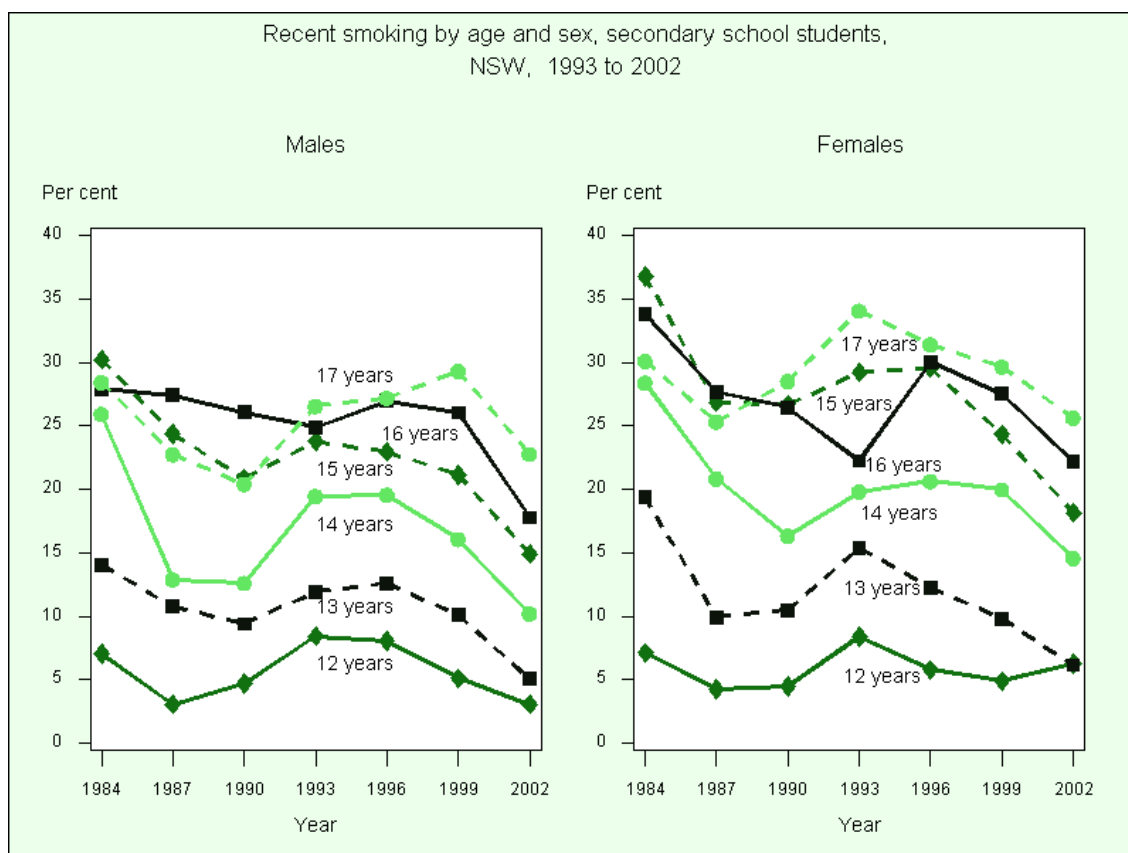
<sup>62</sup> Centre for Epidemiology and Research, NSW Department of Health, 'The health behaviours of secondary school students in New South Wales in 2002', *NSW Public Health Bulletin*, 15(s-2) 2004, pp 12, 15 and 17.

<sup>63</sup> Ibid, p 12.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid, p 19.

proportion of recent smokers in high school between 1984 and 2002.



Source: Population Health Division, *The health of the people of NSW - Report of the Chief Health Officer 2004*, NSW Department of Health, Sydney, 2004.

Division 3 of Part 6 of the *Public Health Act 1991* (NSW) is specifically concerned with juvenile smoking. A police officer is empowered by section 58 to seize a tobacco product or non-tobacco smoking product in the possession of a person in a public place who is reasonably suspected of being less than 18 years old. It is an offence to purchase a tobacco product or non-tobacco smoking product on behalf of a minor.<sup>66</sup> It is also an offence to sell a tobacco product to a minor, and an employer may in certain cases be liable for the actions of an employee.<sup>67</sup> However, the Act provides a defence for situations where the minor was over the age of 14 and had produced documentary evidence that might reasonably be accepted as proving his or her age to be at least 18.

Despite it being illegal to sell tobacco to minors, it appears that it has still been possible for adolescents to acquire cigarettes. A recent survey of high school students in NSW found that:<sup>68</sup>

<sup>66</sup> Section 58A.

<sup>67</sup> Sections 59 and 59A.

<sup>68</sup> Centre for Epidemiology and Research, above n 62, pp 17-19.

- 22% of students bought their last cigarette from a retail outlet in 2002. However, the proportion fell from 31% in six years. Most students bought their last cigarette from a petrol station, tobacconist, supermarket or convenience store.
- 37% of recent smokers bought their most recent cigarette from a friend, 17% bought it from a person they had arranged to buy it for them, and 5% took it from home without the permission of parents.
- 37% of students who tried to buy cigarettes from a retail outlet had never been refused service, 50% had been refused a couple of times and 12% had been refused frequently.
- 35% of students who tried to buy cigarettes from a retail outlet said they had never been asked for proof of age, 45% had been asked a couple of times and 19% had been asked frequently.
- 21% of students who tried to buy cigarettes from a retail outlet used either a friend's identification or false identification.
- 5% of students who smoked and bought their last cigarette in the previous week bought it from a coin-operated machine.
- 1% of recent smokers bought cigarettes over the internet.
- Less than 1% of recent smokers bought cigarettes by phone, fax or mail order.

Almost half of students who smoke do so at parties, with friends' houses another common location.<sup>69</sup>

Kidd and Hopkins have studied the pattern and main determinants of both the age of initiation to smoking and the decision to quit. They suggest that because tobacco is addictive, measures that target initiation are likely to be the most effective.<sup>70</sup> A review of tobacco legislation in the Australian Capital Territory found that the control of advertising, sponsorship and promotion of tobacco discouraged smoking by minors.<sup>71</sup> The review also noted that the prohibition of toys and food that resemble smoking might prevent the normalisation of smoking for children. Some tobacco control measures, such as the ban on sales of cigarettes in packs of less than 20, lower tobacco consumption in the community as a whole but may have a greater impact on minors.

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<sup>69</sup> Ibid, p 18.

<sup>70</sup> Kidd M and Hopkins S, 'The hazards of starting and quitting smoking: some Australian evidence', *The Economic Record*, 80(249) June 2004, p 177.

<sup>71</sup> Minter Ellison Consulting, *Report on the National Competition Policy Review of Tobacco Legislation*, For the ACT Health Protection Service Department of Health and Community Care, June 2002, p 7.

### 3.5 Health warnings

The purpose of health warnings on tobacco products, as identified by the Commonwealth Department of Health and Aged Care, is to:<sup>72</sup>

- provide information about the health risks of smoking;
- provide information on the benefits of quitting;
- motivate people to quit;
- deter people from starting to smoke or from becoming habitual users; and
- help those who have decided to quit.

Cigarette packets have been required to display health warnings for more than 30 years in NSW (section 4 of the *Cigarettes (Labelling) Act 1972* (NSW) prohibited the sale of cigarettes unless they were in a package marked with the prescribed health warning). The *Public Health Act 1991* (NSW) stipulates that tobacco products are to be marked with health warnings when packed or sold.<sup>73</sup> It is an offence under clause 12 of the *Public Health (Tobacco) Regulation 1999* (NSW) for an occupier of premises not to conspicuously display health warnings where tobacco products are sold in NSW. The health warning must have black text on a white background and be between 50 and 100 cm wide with a minimum area of 2000 cm<sup>2</sup>. Retail outlets are also required to display notices regarding sales to minors.<sup>74</sup> Health warnings are to be displayed on tobacco vending machines.<sup>75</sup>

The Commonwealth introduced a national system of health warnings in 1994 under the *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 1994* (Cth).<sup>76</sup> Clause 7 requires retail packages (defined in clause 6 as ‘a package in which tobacco is sold at retail’) to be labelled with health warnings. The regulations specify the size, style of text, graphics and positioning of the health warnings on tobacco packages. A review of health warnings on tobacco products was completed in 2004, with new graphic health warnings approved by the Australian Government in June 2004 (there is a phase-in period of 18 months).

### 3.6 Price

Governments may attempt to influence consumption levels by raising the taxes imposed on tobacco products. In Australia, the Commonwealth Government taxes tobacco.<sup>77</sup> NSW

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<sup>72</sup> Commonwealth Department of Health and Aged Care, *Review of Health Warnings on Tobacco Products in Australia*, Discussion Paper, April 2001, p 7.

<sup>73</sup> Sections 55 and 56.

<sup>74</sup> Clause 13 *Public Health (Tobacco) Regulation 1999* (NSW).

<sup>75</sup> Section 61F(2) *Public Health Act 1991* (NSW).

<sup>76</sup> Commonwealth Department of Health and Aged Care, above n 72, p 8.

<sup>77</sup> For an overview of Commonwealth taxation of tobacco products see: Australian

levied tobacco franchise fees in the past but no longer does as a result of the High Court decision in *Walter Hammond and Associates v the State of NSW and others* and *Ha and anor v the State of NSW and others* in which the Court found tobacco franchise fees to be an excise and therefore in the realm of the Commonwealth.<sup>78</sup> According to Doran and Walsh, tobacco products are the highest taxed product in Australia with more than two-thirds of the price of cigarettes being tax.<sup>79</sup>

The Australian Government estimated that it would receive \$5210 million from its excise on tobacco products in 2004-05.<sup>80</sup> This is in addition to revenue received through customs duty imposed on the importation of tobacco. The excise rate imposed on tobacco differs according to the type of product. From 2 February 2004, the excise rate for cigarettes was \$0.22 per stick and the rate for other tobacco products was \$275.55 per kilogram.<sup>81</sup>

As poorer, smoking households generally spend a greater proportion of household income on tobacco, some have argued that increasing taxes as a means of controlling consumption has a discriminatory impact on the poor. Junor, Collins and Lapsley studied the macroeconomic and distributional effects of reduced smoking prevalence in NSW. They argued that the tobacco industry allegation that the raising of tobacco taxes has a detrimental impact on the poor was without foundation as:

it is the poorest households who would stand to gain the most from reduced smoking. It is true that non-tax measures would have less economic impact on the poor than tobacco tax increases. However, tax increases have been shown in the literature to be the easiest and most effective way to discourage smoking and should certainly be used as one of the weapons in the anti-smoking armoury.<sup>82</sup>

However, there are ways in which smokers can minimise the impact of a price increase without quitting smoking. Some of the methods identified by the National Tobacco Campaign include: reducing cigarette consumption; buying cigarettes in bulk and/or from a cheaper retail outlet; and changing to a larger pack size and/or a cheaper brand.<sup>83</sup>

A number of studies have examined the impact of price on consumption. Kidd and Hopkins found price to be a significant factor in making the decision to start smoking but not in the

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Government Department of Health and Ageing, 'Tobacco – Taxation', [www.health.gov.au](http://www.health.gov.au)

<sup>78</sup> (1997) 146 ALR 355.

<sup>79</sup> Doran and Walsh, above n 27, p 559.

<sup>80</sup> Australian Government, *Budget 2004-2005 – Budget Paper No 1*, p 5-13.

<sup>81</sup> *Ibid*, p 5-15.

<sup>82</sup> Junor, Collins and Lapsley, above n 33, p 29.

<sup>83</sup> National Tobacco Campaign, *Australia's National Tobacco Campaign: Evaluation Report Volume One – Every cigarette is doing you damage*, National Tobacco Campaign, Canberra, 1999, p 50.



decision to stop smoking.<sup>84</sup> Cameron and Williams examined the price responsiveness of tobacco, and considered the extent to which it responded to the price of cannabis and alcohol, complements to tobacco use.<sup>85</sup> Cameron and Williams speculated that the demand for cannabis, alcohol and cigarettes is interrelated, as cigarettes and cannabis are both administered by smoking, and alcohol and cannabis are similar in terms of effect. They concluded that the use of each of these drugs was price sensitive in relation to its own price and the price of the others. Bardsley and Olekalns studied tobacco consumption in Australia between 1962 and 1995 and found that:

most of the variation in consumption has been driven by price (including taxes), by income and demographic effects. Our model suggests that, other factors being held constant, consumption will rise as the population ages and as real incomes rise. This suggests that if current tobacco tax and regulatory policies are held constant, then consumption may begin to rise again in the future.<sup>86</sup>

### 3.7 Smoking cessation

A number of strategies have been developed to encourage smoking cessation. They include pharmacological treatments, media campaigns, and the provision of support throughout the quitting process. Smokers may try to quit on their own, they may receive advice and support from a doctor, and/or they may utilise telephone counselling services. Research suggests that a substantial number of smokers wish to stop smoking. Approximately half of men and women aged 16 and over in NSW would like to quit the habit.<sup>87</sup>

Pharmacological treatments include nicotine replacement therapy (for example, chewing gum, patches, and inhalers). Another option is Bupropion SR (Zyban), an anti-depressant that can be prescribed to assist smoking cessation. A study by Miller and Wood found pharmacological interventions to be an effective smoking cessation method.<sup>88</sup> They noted that:

Several pharmacotherapies are safe and help to increase cessation rates by 75-150%. Because they enhance the quit rates of most other cessation methods every smoker should be offered pharmacotherapy to support cessation attempts unless contra-indicated.<sup>89</sup>

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<sup>84</sup> Kidd and Hopkins, above n 70, p 178.

<sup>85</sup> Cameron L and Williams J, 'Cannabis, alcohol and cigarettes: substitutes or complements?', *The Economic Record*, 77(236) March 2001, pp 19-34.

<sup>86</sup> Bardsley and Olekalns, above n 58, p 238.

<sup>87</sup> Population Health Division, above n 5.

<sup>88</sup> Miller M and Wood L, 'Effectiveness of smoking cessation interventions: review of evidence and implications for best practice in Australian health care settings', *Australian and New Zealand Journal of Public Health*, 27(3) June 2003, pp 300-309.

<sup>89</sup> *Ibid*, p 307.

According to a report by the US Surgeon General, ‘pharmacologic treatment of nicotine addiction, combined with behavioural support, will enable 20 to 25 percent of users to remain abstinent at one year posttreatment’.<sup>90</sup>

The National Tobacco Campaign, *Every cigarette is doing you damage*,<sup>91</sup> aimed to personalise the risk of health problems by focusing on the certain ongoing damage caused by cigarettes rather than possible long-term outcomes such as cancer. The theory behind this approach was that it would prevent people rationalising the risk of long-term disease and inspire people to quit today rather than some months down the track. The campaign focused on cessation rather than prevention and targeted 18 to 40 year old smokers.

The campaign was launched in June 1997. Television advertisements included ‘Artery’ (featured fatty deposits being squeezed from an aorta), ‘Lung’ (showed emphysematous damage), ‘Tumour’ (outlined the mechanism by which smoking damages the p53 tumour suppressor gene in lung tissue), and ‘Brain’ (explained smoking-related stroke). There were also radio advertisements, outdoor advertising, advertisements on the side of buses and trams, a campaign website, and information cards.

A follow-up evaluation survey in November 1997 found:<sup>92</sup>

- Spontaneous recall of anti-tobacco advertising increased from 25% to 46%;
- Campaign advertising was recognised by over 80% of smokers and recent quitters;
- New learning about smoking and health increased in six months from 14% to 23%;
- Increased awareness: that every cigarette is doing damage (75% to 82%); of the effects of smoking on blocking arteries (54% to 83%); and the effects of smoking on the genes in lung cells (67% to 78%);
- Increased intention to quit;
- More people were getting help to quit smoking, especially through use of the Quitline (2% to 4%) and nicotine replacement therapy (7% to 10%);
- The one year quit rate increased from 8% to 11% among smokers and recent quitters; and
- There was a statistically significant reduction of about 1.5% in the estimated adult prevalence of smoking.

Quitline (ph 131 848) is a telephone counselling and information service designed to help smokers quit. It operates 24 hours a day, seven days a week. Quitline also provides assistance to the family and friends of smokers. The National Tobacco Campaign evaluation report concluded that:

Quitline offers an effective quit smoking service to Australian smokers who are interested in quitting. It is important that the accessibility and quality of the current

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<sup>90</sup> US Department of Health and Human Services, above n 36, p 6.

<sup>91</sup> National Tobacco Campaign, above n 83.

<sup>92</sup> Ibid, p 24.

service is maintained. Such strategies to encourage more people to call the Quitline service will most likely assist more smokers to quit. As mass media advertising campaigns are closely related to the number of calls to the Quitline... it is important to continue such campaigns.<sup>93</sup>

The report examined calls to the Quitline service in NSW and found that:<sup>94</sup>

- Television activity in NSW has a direct impact upon calls to the Quitline.
- Public relations activity has the potential to impact upon call levels to the Quitline.
- Relatively low target audience rating point levels (100 per week on alternative weeks) can maintain call levels of approximately 700 calls per week.
- When target audience rating point activity ceases it could be expected that call levels will revert to pre-campaign levels within four weeks; so the effect of television advertising on call levels may be relatively short term.

Tobacco control is one of the major new programmes to be implemented by the NSW Cancer Institute in the first year of the NSW Cancer Plan.<sup>95</sup> One of the goals of the Cancer Plan is to substantially reduce smoking prevalence in NSW. The Cancer Institute NSW has recently indicated that it is to 'establish a consortium to design and fund a mass media tobacco control campaign to show smoking causes cancer and other diseases'. It will direct smokers to publicly available smoking cessation programs.<sup>96</sup>

### 3.8 Litigation

Litigation has emerged as a potential method of tobacco control. It has a long history in the United States of America where it commenced in 1954 following reports that smoking caused lung cancer.<sup>97</sup> The initial claims were made by smokers and were based on arguments of negligence and implied warranty. Later cases referred to the tobacco industry's efforts to conceal the dangerous nature of tobacco products. For example, documents discovered in the *Cipollone* case:

provided evidence that the tobacco industry had fraudulently misrepresented the safety of their products and deliberately concealed knowledge about the harmful and addictive nature of cigarettes. The evidence suggested that the tobacco industry had conspired to defraud the American public by pretending that it was conducting good faith efforts to uncover the links between smoking and health and by falsely

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<sup>93</sup> Ibid, p 85.

<sup>94</sup> Ibid, p 115.

<sup>95</sup> Cancer Institute NSW, above n 44, p 2.

<sup>96</sup> Ibid, p 39.

<sup>97</sup> Information on tobacco litigation in the United States is sourced from: US Department of Health and Human Services, *Reducing Tobacco Use: A Report of the Surgeon General*, US Department of Health and Human Services, Atlanta, 2000.

assuring the public that the results were negative or inconclusive.<sup>98</sup>

Despite tobacco litigation existing in the US for fifty years, it is only recently that some plaintiffs have been successful. Nonetheless, tobacco litigation ‘has become a significant force for regulating the tobacco industry in the United States’.<sup>99</sup> Since 1994, there has been a movement in the US towards class actions with states, health care providers and persons exposed to environmental tobacco smoke lodging claims in addition to individual smokers. On 23 November 1998, a legal settlement (known as the Master Settlement Agreement) was reached in the US between 11 tobacco companies, 46 states, the District of Columbia, and five commonwealths and territories. Numerous states had sued the tobacco industry for reimbursement of monies spent by Medicaid in relation to the care of persons injured as a result of using tobacco. The terms of the agreement included:

- The tobacco companies to pay the states \$246 billion over 25 years.
- Prohibition of direct advertising and promotion aimed at young people.
- Limited brand name sponsorship at events likely to be frequented by youth.
- Removal of street advertising.
- Restrictions on lobbying and the suppression of research findings.
- The tobacco industry is to make major contributions to the cessation and prevention of tobacco use.

Tobacco litigation is also a feature of the Australian legal system, with a number of smokers lodging claims against the tobacco companies. British American Tobacco (including its predecessors) was first sued in Australia in 1990.<sup>100</sup> There have also been a number of cases where plaintiffs have sued employers and businesses on the basis of damage suffered as a result of passive smoking (see section 4.2.4 – Smoke-free Environment Amendment Act 2004). The following two cases are recent examples of tobacco litigation in Australia.

- *British American Tobacco Australia Services Ltd v Cowell*

*McCabe v British American Tobacco Australia Services Ltd*, or *British American Tobacco Australia Services Ltd v Cowell*<sup>101</sup> as it became known on appeal, is one of the most recent tobacco cases in Australia. Ms McCabe started smoking at the age of 12. She commenced proceedings against British American Tobacco in 2001 when she was 51 and suffering from terminal lung cancer. Ms McCabe alleged that:

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<sup>98</sup> Ibid, p 228.

<sup>99</sup> Spender P, ‘McCabe: Unresolved questions about truth and justice’, *Torts Law Journal*, 12(2) June 2004, p 157.

<sup>100</sup> See *British American Tobacco Australia Services Ltd v Cowell (as representing the estate of Rolah Ann McCabe, deceased)* [2002] VSCA 197 (6 December 2002) para 25 for a brief overview of early litigation involving British American Tobacco Australia Services Ltd.

<sup>101</sup> *British American Tobacco Australia Services Ltd v Cowell (as representing the estate of Rolah Ann McCabe, deceased)* [2002] VSCA 197 (6 December 2002)

from her early teens (having commenced smoking at age 12) she became addicted to cigarettes manufactured by the defendant, and that as a result of that addiction and the properties of the cigarettes, she contracted lung cancer. The plaintiff alleges that the defendant itself or through its predecessor and affiliated companies, knew that cigarettes were addictive and dangerous to health, and by its advertising targeted children to become consumers. The plaintiff alleges that the defendant, knowing the dangers of addiction and to health of consumers, took no reasonable steps to reduce or eliminate the risk of addiction or the health risks, and ignored or publicly disparaged research results which indicated the dangers to health of smoking.<sup>102</sup>

In response, British American Tobacco argued that:

In broad terms, the defence denies that the plaintiff's illness is causally related to cigarettes, asserting that the majority of smokers do not contract lung cancer. As to the plaintiff's allegation that the defendants' cigarettes were addictive, the defendant, whilst acknowledging that some persons may find it difficult to quit smoking, denies the allegation, and asserts that smoking is a behaviour of choice, and does not impair the ability of a smoker to assess the risks of smoking and to make an informed decision. As to the plaintiff's allegation that the defendant between 23 September 1950 and 1992 knew or ought to have known about the risk of lung cancer and the addictive effect of nicotine, the defendant joins issue and expressly pleads, by par 5(d), that: 'the defendant did not have any knowledge about the risk of lung cancer or any difficulty associated with quitting smoking which was not in the public domain.'<sup>103</sup>

It argued that Ms McCabe knew smoking could cause lung cancer disease but nevertheless chose to assume the risk.

One of the major issues in the case involved the destruction of relevant documents by British American Tobacco. The documents were destroyed after previous litigation finished in 1998. In the Supreme Court of Victoria, Eames J held the destruction of documents to be part of a deliberate attempt to keep them from prospective plaintiffs. Eames J concluded that:

through the implementation of its 'document retention policy', the process of discovery in the case had been subverted by the defendant and its solicitors with the deliberate intention of denying a fair trial to the plaintiff, a strategy which had been successful.<sup>104</sup>

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<sup>102</sup> Eames J quoted in *British American Tobacco Australia Services Ltd v Cowell (as representing the estate of Rolah Ann McCabe, deceased)* [2002] VSCA 197 (6 December 2002) para 20.

<sup>103</sup> Eames J quoted in *British American Tobacco Australia Services Ltd v Cowell (as representing the estate of Rolah Ann McCabe, deceased)* [2002] VSCA 197 (6 December 2002) para 21.

<sup>104</sup> *British American Tobacco Australia Services Ltd v Cowell (as representing the estate of*

This led Eames J to strike out the defence and enter judgment for Ms McCabe. A jury subsequently awarded Ms McCabe \$700,000.

British American Tobacco appealed the decision, with the appeal allowed by the Court of Appeal. Ms McCabe died after the appeal but before judgment had been given. The Court of Appeal found Eames J to have erred in relation to the order for discovery and whether British American Tobacco had defaulted, and in his interpretation of the document retention policy. The Court of Appeal concluded that:

It seems to us that the defects or deficiencies identified by his Honour in the discovery of the defendant were not such as would ordinarily have drawn anything more than an order for a further affidavit to make plain what otherwise had not been stated expressly. In failing to mention when documents had been destroyed the defendant was not occasioning prejudice to the plaintiff, certainly if the omission was duly rectified. What motivated the judge to strike out the defence was, we have no doubt, his Honour's conclusion that there had been in place for some years a policy on the part of the defendant deliberately to destroy documents that would, or might, disadvantage the defendant and assist a plaintiff in future litigation which, although not yet on foot, could reasonably be anticipated. The judge saw such deliberate destruction of documents with a view to defeating a plaintiff as altogether improper for any prospective litigant, even before litigation was on foot – and it was that which drew the major criticism.<sup>105</sup>

Ms McCabe's estate subsequently applied for special leave to appeal to the High Court. However, the court dismissed the application.

- *Cauvin v Philip Morris Ltd & Ors*<sup>106</sup>

The plaintiff, Ms Miriam Cauvin, started smoking at 10 years old and currently suffers from emphysema. She commenced a class action on behalf of 'other persons' against Philip Morris, British American Tobacco and Imperial Tobacco. She alleged that the tobacco companies had distributed cigarettes with the knowledge that consumers would have an increased likelihood of contracting smoking related disease. She also claimed that the tobacco companies had promoted the benefits and pleasures associated with smoking whilst denying or minimizing the risks. Ms Cauvin argued, amongst other things, that the tobacco companies should:

- make available research conducted by them regarding the health consequences of cigarette smoking and nicotine addiction, and the ability to develop less hazardous cigarettes;

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*Rolah Ann McCabe, deceased*) [2002] VSCA 197 (6 December 2002) para 10.

<sup>105</sup> *British American Tobacco Australia Services Ltd v Cowell (as representing the estate of Rolah Ann McCabe, deceased)* [2002] VSCA 197 (6 December 2002) para 70.

<sup>106</sup> [2004] NSWSC 644 (24/9/04)

- fund a public education campaign regarding the public health issues of cigarette smoking and nicotine addiction;
- make available all documents relating to marketing/advertising campaigns that target minors;
- fund sustained cessation programs; and
- fund a sustained educational campaign devoted to the prevention of smoking by minors.

Bell J noted, amongst other things, that:

The plaintiff claims compensatory orders on behalf of a group that potentially includes every member of the Australian population in a proceeding that is not a representative proceeding under the *SCR* [Supreme Court Rules]. There is no means of identifying the persons on whose behalf compensatory orders are sought nor of binding the persons benefited by any such order should the Court be persuaded to make one.<sup>107</sup>

Bell J subsequently dismissed the class action, holding that the Supreme Court did not have power to make orders compensating ‘other persons’ for damage suffered under the *Trade Practices Act 1974* (Cth) and the *Fair Trading Act 1987* (NSW). However, Ms Cauvin was permitted to proceed on an individual basis for compensation for any loss or damage suffered by her.

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*Myriam Cauvin v Philip Morris Ltd & Ors* [2004] NSWSC 644 (24/9/04) at para 28.

## 4 SMOKE-FREE PUBLIC PLACES

### 4.1 Passive smoking

**Passive smoking** is defined as ‘exposure to tobacco smoke, or the chemicals in tobacco smoke, without actually smoking. It usually refers to a situation where a non-smoker breathes smoke emitted into the environment by other people smoking’.<sup>108</sup> It is in this context that the phrase ‘**environmental tobacco smoke**’ (ETS), a combination of exhaled mainstream smoke and sidestream smoke is often used. The following definitions were used by the NSW Joint Working Group for Smoke-free Licensed Premises:<sup>109</sup>

- **Mainstream smoke:** smoke directly inhaled by the smoker through a burning cigarette, cigar or pipe.
- **Exhaled mainstream smoke:** smoke breathed out by the smoker.
- **Sidestream smoke:** smoke that drifts from the burning end of a cigarette, cigar or pipe.

Tobacco smoke has been found to contain more than 4000 compounds. About 60 of these are known or suspected carcinogens.<sup>110</sup> Passive smoking contributes to respiratory and middle ear infections, the onset and worsening of asthma, reduced lung function, irritation of the eyes and nose, low birthweight and sudden infant death syndrome.<sup>111</sup>

Much of the impetus for smoke-free enclosed public areas stems from concern regarding the detrimental impact of passive smoking on health. The dangers of environmental tobacco smoke first received widespread publicity in Australia in 1986.<sup>112</sup> The Hon Ralph Willis MP made the following statement to the House of Representatives in November 1986:

The Attorney-General’s Department advised, inter alia, that, in the light of the AAT decision *Re Bishop and Commonwealth of Australia*, it could be argued 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.<sup>113</sup>

<sup>108</sup> National Public Health Partnership, Legislation Reform Working Group, *National response to passive smoking in enclosed public places and workplaces: a background paper*, National Public Health Partnership, November 2000, p 3.

<sup>109</sup> NSW Joint Working Group for Smoke-free Licensed Premises, *Final Report*, June 2004, p 7.

<sup>110</sup> National Public Health Partnership, above n 108, p 3.

<sup>111</sup> Australian Institute of Health and Welfare, above n 2, p 150.

<sup>112</sup> Arocca E, ‘Tobacco litigation: Impact and future directions’, *Journal of Law and Medicine*, 1(2) October 1993, p 110.

<sup>113</sup> Hon R Willis MP, *CPD(HR)*, 13/11/86, p 2979.



However, the concerns in relation to passive smoking have not always been widely accepted. As recently as 1987, the Tobacco Institute of Australia published advertisements in a number of newspapers that included the statement, ‘there is little evidence and none which proves scientifically that cigarette smoke causes disease in non-smokers’.<sup>114</sup>

Many people find cigarette smoke annoying and some are concerned about its impact on their health. The following table measures the extent to which non-smokers avoid places where they might be exposed to cigarette smoke. The table indicates that almost half of non-smokers aged 14 and over sometimes avoid places that risk exposure to cigarette smoke, with 38% always avoiding such places.

**Non-smokers’ avoidance of places where they might be exposed to other people’s cigarette smoke: proportion of non-smokers aged 14 years and over, by age and sex, Australia, 2001 (%)**

Avoidance	14-19	20-29	30-39	40-49	50-59	60+	All ages
<b>Males</b>							
<b>Yes, always</b>	22.9	23.8	31.9	39.4	36.4	43.5	34.2
<b>Yes, sometimes</b>	57.1	58.9	56.1	49.8	47.2	40.0	50.5
<b>No, never</b>	20.0	17.3	12.0	10.8	16.4	16.5	15.2
<b>Females</b>							
<b>Yes, always</b>	20.4	25.8	39.7	45.4	48.6	51.3	40.8
<b>Yes, sometimes</b>	58.8	60.0	52.5	46.2	41.7	37.6	47.9
<b>No, never</b>	20.7	14.2	7.8	8.3	9.7	11.2	11.3
<b>Persons</b>							
<b>Yes, always</b>	21.7	24.8	36.0	42.4	42.6	47.8	37.6
<b>Yes, sometimes</b>	58.0	59.5	54.2	48.0	44.4	38.6	49.2
<b>No, never</b>	20.4	15.7	9.8	9.6	13.0	13.6	13.2

\*Non-smokers are people who have never smoked and former smokers who have not smoked in the preceding 12 months.

Source: Australian Institute of Health and Welfare, *Statistics on drug use in Australia 2002*, AIHW, Canberra, 2003, p 88.

## 4.2 Smoking bans in NSW

### 4.2.1 *Passive smoking and children*

Some children are subjected to passive smoking in the home and car. Concern about the exposure of children to environmental tobacco smoke led NSW Health to implement such campaigns as ‘Car and Home: Smoke Free Zone’.<sup>115</sup> The campaign aims to raise awareness of the risks associated with passive smoking and to provide those who care for children

<sup>114</sup> The Federal Court of Australia subsequently held the contents of the advertisement to be misleading or deceptive conduct under the *Trade Practices Act 1974* (Cth): *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1992) 111 ALR 61.

<sup>115</sup> For information on the ‘Car and Home: Smoke Free Zone’ campaign see [www.smokefreezone.org](http://www.smokefreezone.org)

with options that minimise the exposure of children to environmental tobacco smoke. It is thought that a reduction of the extent to which children are exposed to environmental tobacco smoke at home will: decrease absenteeism from school; lift their school performance; and reduce their uptake and consumption of tobacco.<sup>116</sup> Awareness of the impact of passive smoking on children appears to have increased. A survey of adults in NSW who live with children and a smoker was completed as part of an evaluation of the effectiveness of the campaign. The survey found a 24% increase in smoke-free homes and a 14% increase in smoke-free family cars.<sup>117</sup> The proportion of households in NSW that are smoke-free grew from 70% in 1997 to 83% in 2003.<sup>118</sup> The proportion of households in Australia with children aged 14 and younger that had a person who smoked inside the house fell from 31% to 20% between 1995 and 2001.<sup>119</sup>

#### 4.2.2 Local governments – NSW

A number of councils have introduced smoking bans within their boundaries. Some examples of such bans include:

- Manly Council<sup>120</sup>

On 17 May 2004, an ordinary meeting resolution at Manly Council banned smoking within the following areas:

- on ocean and harbour beaches;
- within 10 metres of children's play areas under the care of Council; and
- on all Council playing and sporting grounds.

The smoke-free zones were extended on 18 October 2004 to include al fresco dining areas and the area within 10 metres of Council buildings.<sup>121</sup>

All events run or sponsored by Council are to develop an awareness and education campaign brief to promote the smoking ban in a staged implementation. Signs showing the international no-smoking symbol are to be immediately installed at relevant venues and locations.

Manly Council has stressed that it 'wishes to engage community support for the

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<sup>116</sup> Australian Institute of Health and Welfare, above n 2, p 150.

<sup>117</sup> Car and Home Smoke Free Zone, 'The ETS and Children Project: Project Evaluation', [www.smokefreezone.org](http://www.smokefreezone.org)

<sup>118</sup> NSW Health, above n 22, p vi.

<sup>119</sup> Australian Institute of Health and Welfare, above n 2, p 150.

<sup>120</sup> Manly Council, 'Manly's ban on smoking – update', *Media Release*, 25/10/04.

<sup>121</sup> Manly Council, 'Manly Council launches its ground-breaking 'Smoke Free' community education campaign', *Media Release*, 29/11/04.

campaign, rather than adopting a heavy handed enforcement type approach and it is envisaged compliance will be largely self-regulated’.

▪ Mosman Council<sup>122</sup>

Within the boundaries of Mosman Council it is prohibited to smoke:

- within 10 metres of children’s play areas under Council’s care;
- on or around Council playing fields, sporting grounds, bushland and foreshore reserves;
- on Mosman’s beaches;
- within 20 metres of the entrances to Council owned or managed buildings including balconies or covered areas of those buildings;
- within alfresco dining areas on public land; and
- at Council run events on its beaches, reserves, parks, ovals and playing fields.

There is a \$110 on-the-spot penalty for anyone caught smoking within a smoke-free zone.

▪ Warringah Council<sup>123</sup>

Warringah Council has also introduced smoke-free zones within Council boundaries. Smoking has been prohibited since 1 December 2004:

- at all ocean beaches;
- within 10 metres of Council owned children’s play areas;
- at constructed seating areas at sporting grounds and other public areas; and
- within 10 metres of all Council owned or managed buildings.

A \$110 on-the-spot penalty applies to any person caught smoking in a smoke-free zone.

▪ Waverley Council<sup>124</sup>

Waverley Council has introduced a ban on smoking at Bondi, Tamarama and Bronte beaches under section 632(2) of the *Local Government Act 1993* (NSW). Section 632 allows a council to erect a notice specifying the terms of use of a public place, and may relate to the doing of anything in the public place.

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<sup>122</sup> Mosman Municipal Council, *Management of Smoking in Public Places*, Program 06.04.05 [www.mosman.nsw.gov.au](http://www.mosman.nsw.gov.au) Accessed 20/12/04.

<sup>123</sup> Smoke Free Councils, ‘Warringah Council’, [www.smokefreecouncils.com.au](http://www.smokefreecouncils.com.au) Accessed 20/12/04.

<sup>124</sup> Waverley Council, ‘Beach smoking ban approved for Bondi, Tamarama and Bronte beaches’, *Media Release*, 21/9/04.

### 4.2.3 *Smoke-free Environment Act 2000 (NSW)*

The *Smoke-free Environment Act 2000* (NSW) received assent on 31 August 2000 and commenced on 6 September 2000 with the exception of section 10. The object of the Act is ‘to promote public health by reducing exposure to tobacco and other smoke in enclosed public spaces’.<sup>125</sup> A ‘public space’ is defined in section 4 to mean ‘a place or vehicle that the public, or a section of the public, is entitled to use or that is open to, or is being used by, the public or a section of the public (whether on payment of money, by virtue of membership of a club or other body, or otherwise)’.

Under section 7 of the Act, it is an offence to smoke in a smoke-free area. However, it is a defence if the offender did not know, and the lack of knowledge was reasonable, that it was a smoke-free area.<sup>126</sup> Smoke-free areas are any enclosed public places other than those exempt under section 11.<sup>127</sup> Until recently, premises that were exempt included hotels, registered clubs and nightclubs, apart from the area of the premises used as a dining area. The parts of a casino solely used for gaming machines or bars were also exempt. The *Smoke-free Environment Regulation 2000* (NSW) requires any exempt part of premises to be separated by partitions or barriers and be at least 1.5 metres from smoke-free areas.<sup>128</sup>

Some examples of public areas found in schedule 1 of the Act that are currently smoke-free include:

- shopping centres, malls and plazas;
- restaurants, cafes, cafeterias, dining areas and other eating places;
- schools, colleges and universities;
- professional, trade, commercial and other business premises;
- community centres or halls and places of public worship;
- theatres, cinemas, libraries and galleries;
- trains, buses, trams, aeroplanes, taxis and hire cars, and ferries and other vessels;
- common areas in hostels;
- common areas in motels;
- fitness centres, bowling alleys and other sporting and recreational facilities;
- childcare facilities; and
- hospitals.

The occupier of a smoke-free area will be guilty of an offence if a person smokes in the smoke-free area unless he or she can demonstrate that an ashtray, matches or a lighter were not provided and he or she was unaware (or could not reasonably be expected to know) that

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<sup>125</sup> Section 3.

<sup>126</sup> Section 7(3).

<sup>127</sup> Section 6.

<sup>128</sup> Clause 6. This clause was inserted into the regulations on 4 October 2002 by the *Smoke-free Environment Amendment (Exempt Premises) Regulation 2002*.

a person was smoking. It is also a defence if, as soon as the occupier was aware that someone was smoking, the occupier requested the person to stop smoking, informed the smoker that it was an offence, and required the person to leave if he or she persisted in smoking.<sup>129</sup>

The occupier of a smoke-free area must display 'no smoking' signs in such numbers and positions that the signs should be able to be seen by a person at a public entrance to, or within, the area.<sup>130</sup> However, signs are not necessary if it is a place people do not usually smoke and a person would reasonably be expected to know it is a non-smoking area.<sup>131</sup>

#### 4.2.4 *Smoke-free Environment Amendment Act 2004*

Concern had been expressed in relation to the impact of passive smoking on hospitality workers as licensed premises and casinos were exempt from the requirement for enclosed public places to be smoke free. Research has shown that an eight-hour shift in a smoky bar equates to smoking half a packet of cigarettes.<sup>132</sup> A report commissioned by the Cancer Council NSW, estimated that exposing the 40,000 club, pub, tavern and bar workers in NSW to environmental tobacco smoke in the work environment results in 73 deaths from lung cancer and heart disease each year.<sup>133</sup>

One of the objects of the *Occupational Health and Safety Act 2000* (NSW) is 'to secure and promote the health, safety and welfare of people at work'.<sup>134</sup> The requirements of the legislation apply to all workplaces unless otherwise provided.<sup>135</sup> Employers must ensure the health, safety and welfare at work for their employees. They are also to ensure that non-employees are not exposed to health or safety risks arising from the conduct of the employer's undertaking whilst at the workplace.<sup>136</sup> Employers must ensure that the premises, substances used, systems of work and the work environment are safe and not a risk to health.<sup>137</sup> Employees must also take reasonable care for the health and safety of

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<sup>129</sup> Section 8.

<sup>130</sup> Section 9 *Smoke-free Environment Act 2000* and Clause 4 *Smoke-free Environment Regulation 2000*.

<sup>131</sup> Clause 5 *Smoke-free Environment Regulation 2000*.

<sup>132</sup> Hon F Sartor MP, *NSWPD*, 19/10/04, p 11537.

<sup>133</sup> Repace J, *Estimated mortality from secondhand smoke among club, pub, tavern, and bar workers in New South Wales, Australia*, a report commissioned by The Cancer Council New South Wales, April 2004, p 3.

<sup>134</sup> Section 3.

<sup>135</sup> Section 5.

<sup>136</sup> Section 8.

<sup>137</sup> Section 8(1).

others in the workplace.<sup>138</sup> The presence of environmental tobacco smoke in licensed premises therefore raises a number of occupational health and safety issues for employees and employers.

The National Occupational Health and Safety Commission issued a position statement on 13 December 2002 in relation to environmental tobacco smoke.<sup>139</sup> The Commission recommended that exposure to ETS be eliminated in all workplaces as soon as possible as there is no evidence of a safe level of exposure: ‘environmental tobacco smoke is carcinogenic, increases the risk of fatal and non-fatal cardiovascular disease in non-smokers and carries substantial mortality and morbidity from other serious health effects as a result of acute and chronic disorder’.

According to the Cancer Council of NSW, there have been 22 cases in which compensation has been awarded as a result of exposure to environmental tobacco smoke.<sup>140</sup> The following two cases are examples of situations where the health of workers has suffered as a result of exposure to environmental tobacco smoke in the work environment.

- *Leisel Scholem v New South Wales Department of Health*<sup>141</sup>

Leisel Scholem was employed as a psychologist with Ryde Community Health between 1974 and 1986, where she was required to work with patients and staff who smoked whilst in her presence. Ms Scholem alleged that she contracted emphysema and experienced acute and chronic aggravation of her asthma as a result of her exposure to cigarette smoke. She sued the NSW Department of Health for breaching the *Factories, Shops and Industries Act 1962*. She also claimed the Department of Health had been negligent in failing to take reasonable care for her health because it:

1. failed to warn of the possible effects of inhaling tobacco smoke;
2. failed to provide proper and adequate ventilation in the workplace;
3. required her to work with patients and staff who smoked in her presence; and
4. failed to ensure that its employees did not smoke at the premises in Ryde.

The jury was directed to decide, amongst other things, ‘whether exposure to environmental tobacco smoke was a cause of, or a materially contributing factor to, her present asthmatic state’.<sup>142</sup> The jury found the Department of Health to have breached the *Factories, Shops and Industries Act 1962*. It also found the Department of Health to have been negligent, awarding \$85,000 to Ms Scholem. According to the Hon Dr A Chesterfield-Evans MLC,

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<sup>138</sup> Section 20.

<sup>139</sup> National Occupational Health and Safety Commission, ‘Position statement adopted by NOHSC concerning Environmental Tobacco Smoke’, *Media Release*, 13/12/02.

<sup>140</sup> Grayden R, ‘Up in smoke’, *OHS Magazine*, August/September 2004, p 30.

<sup>141</sup> District Court of NSW 40830/86 (25-27 May 1992) (unreported)

<sup>142</sup> *Scholem v NSW Department of Health*, District Court of NSW, 25 May 1992, (unreported), p 28.

‘she won the first victory in a common law court in the world on the basis of passive smoking’.<sup>143</sup>

- *Marlene Sharp v Port Kembla RSL Club*<sup>144</sup>

A jury in the Supreme Court of NSW found that Ms Sharp, a bar attendant, had contracted laryngeal cancer as a result of being exposed to environmental tobacco smoke in her workplace. Ms Sharp was awarded \$466,000 in compensation. It was the first time in the world a jury accepted a causative link between environmental tobacco smoke and throat cancer.

The move towards extending smoke-free requirements to licensed premises was gradual. The ‘Share the Air’ agreement was a voluntary agreement reached in December 2002 between the hospitality industry, union representatives and the NSW Government. It was designed to extend the non-smoking areas in licensed premises to instigate cultural change in relation to smoking behaviours.<sup>145</sup> The agreement consisted of two phases:

- Phase One – From 1 July 2003 smoking was not permitted at bar or service counters. It was also agreed that there would be, at a minimum, a designated non-smoking area within one bar area.
- Phase Two – From 1 July 2004 it was agreed that there would be one full non-smoking bar in venues with more than one bar. One recreational and gambling area is to be allocated as non-smoking in venues with more than one.

The NSW Government recently took the principles embodied in the ‘Share the Air’ agreement one step further. The NSW Health Minister, the Hon Morris Iemma MP, introduced the Smoke-free Environment Amendment Bill 2004 into the Legislative Assembly on 27 October 2004 and it passed both Houses on 8 December 2004. Premier Carr claimed the decision to remove the exemption for licensed premises was ‘about protecting the long term health of club and pub workers’.<sup>146</sup> The current exemptions to smoking in enclosed public places (hotels, clubs and nightclubs) are to be phased out by 2 July 2007. However, smoking in beer gardens and in residential accommodation in hotels and motels is not prohibited. Smoking will also be permitted in the private gaming area of a casino, defined as ‘an area in a casino that is used substantially for gaming by international visitors to the casino other than an area used substantially for the purposes of gaming machines’. However, this exemption is to be reviewed annually by the Minister to

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<sup>143</sup> Hon Dr A Chesterfield-Evans, *NSWPD*, 18/11/04, p 13167.

<sup>144</sup> Information on this case is sourced from: Stewart B and Semmler P, ‘Sharp v Port Kembla RSL Club: establishing causation of laryngeal cancer by environmental tobacco smoke’, *Medical Journal of Australia*, 176, February 2002, pp 113-116.

<sup>145</sup> NSW Joint Working Group for Smoke-free Licensed Premises, above n 109, pp 13 and 19.

<sup>146</sup> Hon R Carr MP, ‘Hospitality workers protected: Premier Carr announces smoking ban for pubs and clubs’, *Media Release*, 12/10/04.

determine whether the exemption is justified on the grounds of maintaining parity with the smoking restrictions in casinos in other Australian jurisdictions.<sup>147</sup>

The exemptions are to be gradually removed. From 3 January 2005 to 4 July 2005, bar rooms, gaming machine rooms and recreation rooms in clubs, hotels, nightclubs or casinos will be exempt areas.<sup>148</sup> However, this does not include:

- dining areas;
- counters where drinks or food are ordered or served;
- one bar room and one gambling area in premises with more than one of each; and
- one recreation room in premises with more than one room offering that game or activity.

The requirements of the first phase are similar to the restrictions that operated as part of the 'share the air' agreement.

The second phase is to operate from 4 July 2005 to 2 July 2007.<sup>149</sup> In this phase, one room or one part of a room of a club, hotel, nightclub or casino can be set aside as an exempt area. From 4 July 2005 to 3 July 2006, the exempt area is not to exceed 50% of the total area of all the rooms, with the proportion reduced to 25% between 3 July 2006 and 2 July 2007. According to the Hon Frank Sartor MP, 90% of the health benefits will be achieved from 4 July 2005, 'when smoking is banned in thoroughfares, dance floors, auditoriums, toilets, and all but one bar or gaming area in each premise'.<sup>150</sup>

The exemptions will not affect duties owed under the *Occupational Health and Safety Act 2000* (NSW).<sup>151</sup> The *Smoke-free Environment Amendment Act* also protects the NSW Government, as it will not be liable for compensation for any outcomes that result from the enactment of the new laws.<sup>152</sup> An extensive advertising campaign is to accompany the introduction of the *Smoke-free Environment Amendment Act*.<sup>153</sup>

#### **4.2.5 Opinions regarding the expansion of smoke free areas**

The reaction to the *Smoke-free Environment Amendment Act* varied. Whilst the NSW Opposition did not oppose it, various members of the Opposition had a number of concerns, namely in relation to the economic impact of the legislation and a perceived lack

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<sup>147</sup> Section 11C.

<sup>148</sup> Section 11A.

<sup>149</sup> Section 11B.

<sup>150</sup> Hon F Sartor MP, *NSWPD*, 27/10/04, p 12095.

<sup>151</sup> Section 12(3) *Smoke-free Environment Act 2000* (NSW).

<sup>152</sup> Section 21A.

<sup>153</sup> Hon F Sartor MP, *NSWPD*, 27/10/04, p 12096.



of consultation with the hospitality industry, which they highlighted in the second reading debate. The response of other members of the Legislative Assembly and Council was overwhelmingly in favour of the Act. Nonetheless, concerns were voiced in relation to some of its features. A number of members acknowledged the positive impact the legislation would have on the health of employees and patrons. However, some disagreed with the timetable in the Act, arguing that the ban should be fully implemented as soon as possible. Others expressed their support for the Act, as it would reduce the potential liability of owners of licensed premises. Whilst some members expressed fears regarding the expense of compliance, the potential impact on revenue, and the inconvenience the laws would cause to some patrons, others disputed the credibility of evidence that suggested the economic outcome would be negative. Arguments were made that the smoking prohibition would hinder hotels and clubs from continuing to provide services to sporting and community organisations. The second reading debate highlighted the potential for increased congregation of smokers on footpaths outside venues. Some members also expressed their disapproval of the continued exemption for the private gaming area of Star City, viewing it as inconsistent with the policy behind the legislation.<sup>154</sup>

A number of organisations have voiced an opinion regarding the introduction of further smoking bans. Some have expressed concern over the economic impact of banning smoking in licensed premises. Others have indicated their unease at the health implications of an implementation date that is still some time away.

- ClubsNSW

David Costello, Chief Executive Officer of ClubsNSW, warned of gaming revenue losses as occurred in Victoria. He claimed that, ‘NSW will soon be faced with the Victorian syndrome; that is banished smokers fortressing themselves in their homes so they can continue to smoke, drink and gamble, an isolated, unsupervised environment’.<sup>155</sup> Nevertheless, he had previously noted that the objective of ClubsNSW is:

a solution which protects staff and non smoking patrons but also provides patrons who wish to smoke the opportunity to do so in a safe and secure environment... A sheltered outdoor smoking area will largely achieve this for the significant proportion of club patrons who choose to exercise their right to smoke.<sup>156</sup>

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<sup>154</sup> For the context of the debate in the Legislative Assembly see *NSWPD*, 16/11/04, pp 12903-12923. For the Legislative Council see *NSWPD*, 18/11/04, pp 13154-13180.

<sup>155</sup> ‘The debate: will the new smoking bans encourage people to go to pubs and clubs’, *Daily Telegraph*, 14/10/04, p 30.

<sup>156</sup> ClubsNSW, ‘Common sense sees club outdoor smoking areas retained’, *Media Release*, 12/10/04.

- Australian Hotels Association (NSW)<sup>157</sup>

The Australian Hotels Association (NSW) has estimated, based on evidence from Ireland and New York, that there will be a 10% reduction in jobs following the implementation of a smoking ban in pubs and clubs from July 2007. John Thorpe, President of the Australian Hotels Association (NSW), believes the ban goes too far. He is concerned about the impact on country and regional hotels where the majority of patrons are smokers. The AHA(NSW) believes that both smokers and non-smokers should be accommodated in pubs and clubs.

- Star City Casino

Star City Casino argued that an exemption for its private gaming rooms was justified on the following grounds:<sup>158</sup>

- the private gaming areas are not open to the general public and are mainly attended by international 'high rollers';
- the Victorian Government recognised the need to grant an exemption for the private gaming rooms in Crown Casino;
- an exemption is necessary to ensure Star City Casino remains competitive;
- a large number of the players in private gaming areas are smokers and would not frequent Star City if smoking was banned; and
- every Australian casino permits smoking in private gaming rooms.

However, further smoking bans are to be introduced in some casinos. Smoking is to be banned in all areas of casinos in Tasmania (from January 2005), the ACT (from December 2006) and South Australia (from October 2007).<sup>159</sup>

- British American Tobacco Australia

British American Tobacco Australia believes in the availability of choice for smokers and non-smokers. Accordingly, it advocates the provision of a non-smoking area in hospitality venues in addition to well-ventilated areas in which people may elect to smoke as opposed to complete smoking bans.<sup>160</sup>

- Cancer Council of NSW

Dr Andrew Penman, Chief Executive Officer of the Cancer Council of NSW, has argued that business is booming following the introduction of smoking bans in New York and

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<sup>157</sup> Australian Hotels Association (NSW), 'Smoking bans gone too far', *Media Release*, October 2004.

<sup>158</sup> NSW Joint Working Group for Smoke-free Licensed Premises, above n 109, p 39.

<sup>159</sup> G Gallop and J McGinty, 'Delivering a healthy WA – smoking banned in pubs and clubs', *Media Release*, 28/11/04.

<sup>160</sup> British American Tobacco Australia Limited, above n 47, p 15.

Ireland.<sup>161</sup> A survey commissioned by the Cancer Council found that almost two-thirds of adults in NSW were in favour of the NSW Government introducing smoking bans in pubs and clubs within 12 months.<sup>162</sup>

- Australian Medical Association (New South Wales)

Whilst the Australian Medical Association (New South Wales) supports a total smoking ban in licensed premises, it is disappointed with the implementation date of July 2007, preferring a date in the more immediate future.<sup>163</sup>

- Miscellaneous

Walsh and Tzelepis support the introduction of a ban on smoking in bar and gaming areas because:<sup>164</sup>

1. A ban is the quickest way of reducing exposure to environmental tobacco smoke.
2. Partial restrictions are not feasible as it would require compliance with massively impractical increases in ventilation to control exposure to environmental tobacco smoke.
3. Bars and gaming areas are workplaces and staff are exposed more than patrons to environmental tobacco smoke.
4. Smoking bans in hospitality venues are consistent with the broader smoking control agenda.

The National Occupational Health and Safety Commission deem many of the alternatives to smoking bans to be ineffective.<sup>165</sup> Such controls include designated smoke-free areas and ventilation controls. The Commission found separate smoking and non-smoking areas to have a limited impact on the concentration of ETS in non-smoking areas. It also deemed mechanical dilution ventilation inappropriate as residual ETS levels still exceed the level of acceptable risk.

A survey of members of the Victorian Branch of the Australian Liquor, Hospitality and Miscellaneous Workers Union found 56% of hospitality workers were exposed to

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<sup>161</sup> 'The debate: will the new smoking bans encourage people to go to pubs and clubs', *Daily Telegraph*, 14/10/04, p 30.

<sup>162</sup> Cancer Council NSW, 'NSW public wants pub smoking ban within 12 months', *Media Release*, 1/9/04.

<sup>163</sup> Australian Medical Association (NSW), 'Smoking ban a breath of fresh air – pity about the wait', *Media Release*, 12/10/04.

<sup>164</sup> Walsh R and Tzelepis F, 'Support for smoking restrictions in bars and gaming areas: review of Australia studies', *Australian and New Zealand Journal of Public Health*, 27(3) June 2003, p 310.

<sup>165</sup> National Occupational Health and Safety Commission, *Guidance Note on the Elimination of Environmental Tobacco Smoke in the Workplace*, October 2003, pp 5-6.

secondhand smoke during a typical day at work. They reported a higher level of concern about exposure to smoke compared to other workers. Almost three-quarters of hospitality workers claimed to be ex-smokers or to have never smoked.<sup>166</sup>

The NSW Joint Working Group for Smoke-free Licensed Premises<sup>167</sup> reported the results of a NSW Health Survey that measured support for a total smoking ban in licensed venues. The results indicate that support for smoking bans is growing, with less than one-quarter of survey participants strongly disapproving of them.

#### Attitudes to smoking bans (2004)

Venue	Strongly or somewhat approve	Strongly approve	Strongly disapprove
Gaming areas	69.0%	55.1%	15.1%
Registered clubs	61.7%	51.1%	20.9%
Pubs/Hotels	57.8%	47.4%	22.5%
Nightclubs and bars	60.9%	57.2%	20.4%

Source: NSW Joint Working Group for Smoke-free Licensed Premises, *Final Report*, June 2004, p 15.

The 2003 NSW Health Survey found that 24% of people would be more likely to go to hotels and bars if there was a total ban on smoking and only 10% would be less likely to attend. A smoking ban would have no impact on attendance for 66% of people.<sup>168</sup>

Walsh and Tzelepis found that support for smoking bans in licensed premises has increased by almost 20% in the last ten years. They suggest that a number of factors have contributed to this change including: greater regulation of tobacco advertising; a decline in the prevalence of smoking; publicity about the dangers of passive smoking; the introduction of smoking bans in the work environment; and the positive experience with restaurant bans. They predict that support will increase to at least 80% within six months of total smoking bans being introduced in pubs and clubs. This will be the result of a smooth transition, high compliance, and no negative economic impact overall.<sup>169</sup>

<sup>166</sup> Cameron M, Wakefield M, Trotter L and Inglis G, 'Exposure to secondhand smoke at work: a survey of members of the Australian Liquor, Hospitality and Miscellaneous Workers Union', *Australian and New Zealand Journal of Public Health*, 27(5) October 2003, pp 496-501.

<sup>167</sup> Members included representatives from: Australian Hotels Association (NSW); ClubsNSW; Star City; Restaurant and Catering NSW; Labor Council of NSW; Liquor, Hospitality and Miscellaneous Workers' Union; Cancer Institute NSW; Department of Health; Cabinet Office; Department of Gaming and Racing; and WorkCover.

<sup>168</sup> Population Health Division, above n 5.

<sup>169</sup> Walsh and Tzelepis, above n 164, pp 310, 320-1.

### 4.3 Smoking bans in Australia

#### 4.3.1 Commonwealth

The Commonwealth Health Department has prohibited smoking since December 1986 with all other government departments and buildings smoke-free since March 1988. Smoking is prohibited on buses and coaches registered under the Federal Interstate Registration Scheme, on domestic flights, on all flights of Australian carriers anywhere in the world, and on international flights within Australia.<sup>170</sup>

#### 4.3.2 Australian Capital Territory

The ACT was the first jurisdiction in Australia to prohibit smoking in enclosed public places when it enacted the *Smokefree Areas (Enclosed Public Places) Act 1994*.<sup>171</sup> In 2003, the Legislative Assembly for the ACT passed the *Smoking (Prohibition in Enclosed Public Places) Act 2003*. From 1 December 2006, it will be an offence to smoke in an enclosed public place, and/or to continue to smoke in an enclosed public place despite a direction to the contrary.<sup>172</sup> The occupier of an enclosed public place in which a person is smoking can be found guilty of an offence unless he or she did not provide anything to facilitate smoking and he or she was not aware of the offence or had asked the person to cease smoking.<sup>173</sup> It is also an offence under the Act for the occupier of neighbouring premises where smoking is permitted, to fail to take reasonable steps to prevent smoke from entering an enclosed public place at a time when the public has access to the place.<sup>174</sup>

#### 4.3.3 Northern Territory

It is an offence to smoke in a smoke-free area in the Northern Territory.<sup>175</sup> Smoke-free areas include (unless part of domestic premises or an otherwise exempt area):<sup>176</sup>

- an enclosed public area;
- an enclosed workplace area;
- an outdoor public venue;
- a food service area;
- public transport;
- a public transport area;

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<sup>170</sup> National Public Health Partnership, above n 108, p 21.

<sup>171</sup> Ibid, p 22.

<sup>172</sup> Sections 6 and 7.

<sup>173</sup> Section 8.

<sup>174</sup> Section 9.

<sup>175</sup> Section 9 *Tobacco Control Act 2002* (NT).

<sup>176</sup> Section 7 *Tobacco Control Act 2002* (NT).

- shared accommodation;
- an educational facility;
- an entrance area;
- an air conditioning inlet area.

Dance floors, food service areas in an enclosed public space or workplace, common access areas, entrances and the area surrounding an air conditioning inlet cannot be exempt from the prohibition on smoking.<sup>177</sup> The *Tobacco Control Regulations 2002* (NT) specify the requirements in relation to smoke-free areas. Since 31 May 2003, an occupier of licensed premises may designate part of the premises as an exempt area provided there is a smoke-free area of equal amenity to the exempt area and reasonable measures are in place to minimise the exposure of employees to environmental tobacco smoke.<sup>178</sup> Similar provisions apply to casinos and the occupier of licensed premises with gaming machines. Educational facilities, outdoor food service areas and shared accommodation may have designated exempt areas.<sup>179</sup> At least 50% of the fixed seating of outdoor venues is to be smoke-free.<sup>180</sup>

#### 4.3.4 Queensland

The Queensland Parliament recently passed the *Tobacco and Other Smoking Products Amendment Act 2004* (Qld).<sup>181</sup> From 1 July 2006, a total ban on smoking is to apply to enclosed areas of licensed premises. This ban is to be phased in over 18 months commencing 1 January 2005. At least one-third of the total enclosed area of licensed premises and one-third of gaming machines have been non-smoking since 1 January 2005.<sup>182</sup> The proportion is to increase to two-thirds by 30 September 2005.

The *Tobacco and Other Smoking Products Amendment Act 2004* (Qld) inserted part 2C – smoke-free outdoor places – into the *Tobacco and Other Smoking Products Act 1998* (Qld). Smoking has been prohibited since 1 January 2005 at major sports facilities,<sup>183</sup> in the patrolled beach area of beaches,<sup>184</sup> at prescribed outdoor swimming areas,<sup>185</sup> within four metres of the entrance to a non-residential building,<sup>186</sup> and within 10 metres of children’s

<sup>177</sup> Section 11 *Tobacco Control Act 2002* (NT).

<sup>178</sup> Clause 9 *Tobacco Control Regulations 2002* (NT).

<sup>179</sup> Clauses 10, 12 and 13 *Tobacco Control Regulations 2002* (NT).

<sup>180</sup> Clause 11 *Tobacco Control Regulations 2002* (NT).

<sup>181</sup> For a detailed discussion of the Tobacco and Other Smoking Products Amendment Bill 2004 see: Giskes R, *Reform of Queensland’s Smoking Laws: The Tobacco and Other Smoking Products Amendment Bill 2004 (Qld)*, Research Brief No 2004/15, p 1.

<sup>182</sup> Clauses 16 and 17 *Tobacco and Other Smoking Products Regulation 1998* (Qld).

<sup>183</sup> Section 26ZE.

<sup>184</sup> Section 26ZH.

<sup>185</sup> Section 26ZI.

playground equipment.<sup>187</sup>

New section 26X will prohibit a person smoking at an outdoor eating or drinking place from 1 July 2006.<sup>188</sup> However, a licensee will be able to designate part of the outdoor area as a smoking area provided that it has buffers on the borders it shares with other sections accessible to patrons.<sup>189</sup> The smoking area is not to constitute more than half of the entire outdoor area of the premises. Food or drink must not be served (and food must not be consumed) in the outdoor smoking area and entertainment or gaming machines are not permitted.<sup>190</sup>

According to the Minister for Health, the Hon G Nuttall MP, the *Tobacco and Other Smoking Products Amendment Act* ‘proposes public health reforms to reduce the incidence of smoking and improve the health of Queenslanders’ resulting in ‘the toughest restrictions in Australia’.<sup>191</sup> In his second reading speech, the Minister claimed ‘there was overwhelming public support for a ban on smoking inside hotels and clubs... and considerable public support for... banning smoking in some outdoor areas’.<sup>192</sup>

#### 4.3.5 South Australia

The *Tobacco Products Regulation (Further Restrictions) Amendment Act 2004* (SA) received assent on 4 November 2004 and largely commenced on 6 December 2004. Accordingly, smoking is now banned in enclosed public places, workplaces and shared areas in South Australia under section 46 of the *Tobacco Products Regulation Act 1997* (SA). However, a number of exceptions apply to the hospitality and gaming industry. Smoking bans for bars, nightclubs and gaming areas are to be phased in from 6 December 2004 with a complete ban to operate from 31 October 2007. The following exceptions to the smoking ban currently apply:<sup>193</sup>

- the space within one metre of service areas is to be smoke-free.
- venues with two or more bar rooms must designate one as non-smoking;

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<sup>186</sup> Section 26ZJ.

<sup>187</sup> Section 26ZK.

<sup>188</sup> New section 26X.

<sup>189</sup> New section 26ZA.

<sup>190</sup> New section 26ZB.

<sup>191</sup> Hon G Nuttall MP, *QLDPD*, 20/10/04, p 3046.

<sup>192</sup> Hon G Nuttall MP, *QLDPD*, 20/10/04, p 3047.

<sup>193</sup> Section 47 *Tobacco Products Regulation Act 1997* (SA); South Australia Department of Health, *New non-smoking laws in pubs and clubs: Information sheet*, [www.tobaccolaws.sa.gov.au](http://www.tobaccolaws.sa.gov.au)

- venues with one bar room must set aside a minimum of 50% of bar room floor space as non-smoking;
- 25% of gaming machines are to be non-smoking; and
- half of the bar rooms and one-quarter of the gaming floor area at the casino is to be non-smoking.

Further restrictions will apply from the end of October 2005.

#### **4.3.6 Tasmania**

Section 67B of the *Public Health Act 1997* (Tas) requires the following areas to be smoke-free:

- an enclosed public place;
- an enclosed workplace;
- any area not within private premises designated by the occupier of the area as a smoke-free area;
- any area of an outdoor sporting or cultural venue containing reserved seating;
- an area within three metres of an entrance to or exit from any non-domestic building or multiple-use building;
- an area within 10 metres of any airtake for ventilation equipment on or in a multiple-use building or a non-domestic building;
- a reasonable area of a bar area, including an area in the immediate vicinity of the bar.

The Tasmanian Parliament passed the *Public Health Amendment Act* in October 2004. The Act extends the areas that are to be smoke-free in two phases. Since 1 January 2005 smoke-free areas have also included:

- a nightclub or cabaret;
- a gaming area;
- in an outdoor dining area where tables are provided, an area consisting of not less than 50% of those tables, grouped together in one part of that dining area; and
- in an outdoor dining area where no tables are provided, an area consisting of not less than 50% of the seating in that dining area, grouped together in one part of that dining area.

New section 67F requires licensees and occupiers of outdoor dining areas to ensure that smoke-free areas are not of inferior amenity to any area in which smoking is permitted.

Smoke-free areas will be extended again from 1 January 2006 when smoking is to be prohibited in all bars.



#### 4.3.7 Victoria

It is an offence under the *Tobacco Act 1987* (Vic) for a person to smoke in:<sup>194</sup>

- an enclosed restaurant, café or dining area;
- an enclosed area of a retail shopping area;
- a bingo area or centre;
- a casino (apart from a declared smoking area);
- a gaming machine area in a venue with only one room; or
- a gaming room in a venue with two or more rooms.

Licensed premises with two or more rooms are required to designate one of those rooms as non-smoking.<sup>195</sup>

On 12 October 2004, Premier Bracks announced that pubs, clubs and other licensed premises in Victoria would be smoke-free from 1 July 2007.<sup>196</sup> The reforms are to be planned in a three month consultation period involving industry, health professionals and the community.

#### 4.3.8 Western Australia

Smoking is prohibited in enclosed public places in Western Australia under the *Health (Smoking in Enclosed Public Places) Regulations 2003* (WA).<sup>197</sup> However, there are exemptions to the prohibition which include, subject to a number of conditions:<sup>198</sup>

- a bar or lounge area;
- an allocated room in a restaurant;
- a cabaret or nightclub (80% of the floorspace must be set aside as non-smoking);
- a covered area (one or more of the windows, doors or retractable coverings must be open so the area is not substantially enclosed); and
- the international room at Burswood Casino.

With the exception of the international room at Burswood Casino, smoking is prohibited in all but two enclosed public places located in the same premises at any one time until 31 October 2005.<sup>199</sup> From 1 November 2005, smoking is to be prohibited in all but one enclosed public place in such premises. However, a duty is imposed on the occupier of the

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<sup>194</sup> Sections 5A to 5N.

<sup>195</sup> See sections 5O to 5R.

<sup>196</sup> S Bracks, 'Smoking in Victorian pubs and clubs to end by 2007', *Media Release*, 12/10/04.

<sup>197</sup> Clause 4. Section 289F of the *Health Act 1911* (WA) empowers the Governor to make regulations that manage or prohibit smoking in enclosed public places.

<sup>198</sup> Schedule 1.

<sup>199</sup> Clause 7.

premises, in which smoking is permitted in part, to prevent the spread of smoke.<sup>200</sup>

The Western Australian Parliament passed the *Health Legislation Amendment Act 2004* on 19 November 2004. It amends the *Health Act 1911* (WA) to require tobacco controls to be reviewed as soon as possible after 1 January 2005.<sup>201</sup> The review will consider the issue of smoking in the International Room at Burswood Casino.<sup>202</sup>

The Premier, the Hon Geoff Gallop, and the Health Minister, the Hon Jim McGinty, released a joint statement on 28 November 2004 announcing that new smoking restrictions would come into effect from 1 January 2005 with a total ban on smoking in enclosed places to apply from July 2006.<sup>203</sup> A smoking ban is to be implemented in three phases:

1. From 1 January 2005, an industry code of practice in licensed venues prohibited smoking within one metre of the bar.
2. Smoking is to be limited to one room in licensed premises by 1 November 2005.
3. A total smoking ban will apply in all enclosed public places by July 2006.

#### 4.4 International smoking bans

The last decade has experienced much growth in the number of countries with smoking bans in public places, as well as an increase in the extent to which the bans apply. Five countries currently have smoke-free workplace legislation: Ireland, Norway, Sweden, Bhutan and New Zealand.<sup>204</sup> Bhutan has also recently implemented a ban on the sale of tobacco.<sup>205</sup>

This section provides an overview of the *World Health Organization Framework Convention on Tobacco Control*. It also discusses measures introduced in Canada, New Zealand, the United Kingdom, Ireland, and the United States of America.

##### 4.4.1 *World Health Organization Framework Convention on Tobacco Control*

Article 8 of the *World Health Organization (WHO) Framework Convention on Tobacco Control* states:

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<sup>200</sup> Clause 13.

<sup>201</sup> Section 289I *Health Act 1911* (WA).

<sup>202</sup> G Gallop and J McGinty, 'Delivering a healthy WA – smoking banned in pubs and clubs', *Media Release*, 28/11/04.

<sup>203</sup> *Ibid.*

<sup>204</sup> Action on Smoking and Health Australia, 'Smokefree New Zealand Starts on Friday', [www.ashaust.org.au](http://www.ashaust.org.au) Accessed 14/12/04.

<sup>205</sup> Bhaumik S, 'Bhutan to stub out tobacco sales', *BBC News*, 15/11/04. <http://news.bbc.co.uk>

1. Parties recognize that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability.
2. Each Party shall adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places.

The object of the *WHO Framework Convention on Tobacco Control*, as stated in article 3, is:

to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke.

According to the Preamble, the Parties to the Convention:

- Recognise that the spread of the tobacco epidemic is a global problem with serious consequences for public health that calls for the widest possible international cooperation and the participation of all countries in an effective, appropriate and comprehensive international response.
- Recognise that scientific evidence has unequivocally established that tobacco consumption and exposure to tobacco smoke cause death, disease and disability, and that there is a time lag between the exposure to smoking and the other uses of tobacco products and the onset of tobacco-related diseases.
- Acknowledge their concern for the burden increase tobacco consumption and production places on families, the poor and on national health systems.

The major demand reduction provisions are found in articles 6 to 14 and include:

- Price and tax measures to reduce the demand for tobacco.
- Protection from exposure to tobacco smoke.
- Regulation of the contents of tobacco products.
- Regulation of tobacco product disclosures.
- Packaging and labelling of tobacco products.
- Education, communication, training and public awareness.
- Tobacco advertising, promotion and sponsorship.
- Demand reduction measures concerning tobacco dependence and cessation.

The core supply reduction provisions are located in articles 15 to 17 which deal with:

- Illicit trade in tobacco products.
- Sales to and by minors.
- Provision of support for economically viable alternative activities.

The Convention is to come into force 90 days after it has been ratified by 40 member states. Peru was the fortieth country to ratify the treaty, doing so on 30 November 2004.<sup>206</sup> The Convention will accordingly enter into force on 27 February 2005.

Australia signed the *Framework Convention on Tobacco Control* on 5 December 2003. The Joint Committee on Treaties in the Australian Parliament examined the Convention and reported that, 'No new legislation or administrative action would be required to give effect to the Convention, as Australia already has comprehensive tobacco control policies'.<sup>207</sup> It also noted that the Convention held no financial implications for the Commonwealth, state and territory governments as well as for business or industry. Accordingly, the Committee indicated its support for ratification. Australia subsequently ratified the Convention on 27 October 2004.

#### 4.4.2 Canada

18% of Canadians were protected by 100% smoke-free regulations in July 2004.<sup>208</sup> The following table compares the smoke-free public place legislation in Canadian provinces and territories.

**Smoke-Free Public Place Legislation in Canadian Provinces and Territories**

Jurisdiction	Smoke free	Date in effect	Specifications
British Columbia	●	5/2002	WCB regulates smoking in all workplaces including restaurants, bars, bingo halls, bowling alleys, and casinos; DSRs allowed.
Alberta			Smoking restrictions only apply to government work sites; definitions and requirements for DSRs not specified.
Saskatchewan	Passed	1/2005	Smoking prohibited (no DSRs) in all places where the public has access to including restaurants, bars, bingo halls, bowling alleys, private clubs, and casinos.
Manitoba	●	10/2004	Smoking prohibited (no DSRs) in all enclosed public places and indoor workplaces including restaurants, bars, stadiums, bingos, bowling and casinos, excluding First Nations reserves and hotel rooms.
Ontario			Smoking prohibited in certain places including hospitals, schools and colleges, day nurseries, pharmacies, financial institutions,

<sup>206</sup> The United States of America has signed the Convention but has yet to ratify it. New Zealand ratified the Convention in January 2004 and Canada ratified it on 26 November 2004. It was ratified by the United Kingdom of Great Britain and Northern Ireland on 16 December 2004.

<sup>207</sup> Commonwealth, Joint Committee on Treaties, *Report 62: Treaties tabled on 30 March 2004*, p 27.

<sup>208</sup> Ontario Tobacco Research Unit, *The Tobacco Control Environment: Ontario and Beyond*, Ontario Tobacco Research Unit, Toronto, 2004, p 7.

			stores, arcades, laundries, transit structures, hairdressing salons; exceptions to places not open to public; restaurants and bars exempt.
Quebec			Smoking prohibited only in public places accessed by youth; DSRs required in public places, not including restaurants and bars.
New Brunswick	☉	10/2004	Smoking prohibited in enclosed public places and indoor workplaces, including restaurants and bars; smoking areas only allowed in group living facilities and hotel rooms.
Nova Scotia	☉	1/2003	Smoking prohibited in many enclosed public places; DSRs required in restaurants and before 9pm in bars.
Prince Edward Island	☉	6/2003	Smoking prohibited in many public places and workplaces; smoking areas or DSRs required in other workplaces including restaurants and bars.
Newfoundland	☉	1/2002	Smoking prohibited in public places open to youth and all provincial government work sites; smoking areas or DSRs permitted in other public places.
Yukon			No territorial legislation.
Northwest Territories	☉	5/2004	WCB banned smoking in all public places and workplaces (no DSRs) including restaurants, bars, bingo halls, bowling alleys and casinos; smoking prohibited within 3m of entrances/exits.
Nunavut	☉	5/2004	WCB banned smoking in all public places and workplaces (no DSRs) including restaurants, bars, bingo halls, bowling alleys and casinos; smoking prohibited within 3m of entrances/exits.
Federal			Smoking is regulated in financial buildings, on public transit, commercial aircrafts, and government workplaces.

Passed = Legislation passed but not yet implemented.

WCB = Workers Compensation Board

DSR = enclosed and separately ventilated Designated Smoking Room.

☉ = Provincial/territorial-wide smoke-free legislation with or without DSRs.

☉ = Partial provincial/territorial-wide smoke-free legislation.

Source: Ontario Tobacco Research Unit, *The Tobacco Control Environment: Ontario and Beyond*, Ontario Tobacco Research Unit, Toronto, 2004, p 6.

#### 4.4.3 New Zealand

The *Smoke-free Environments Amendment Act 2003* (NZ) received assent on 10 December 2003. Smoking in workplaces has subsequently been prohibited since 10 December 2004, except for vehicles in which smoking is permitted and dedicated smoking rooms in hospital care institutions, residential disability care institutions, and rest homes.<sup>209</sup> Smoking is also restricted: in taxis; within an enclosed travel terminal that is a booking area, passenger queuing area, passenger waiting room or passenger lounge; on licensed premises, in restaurants, in casinos, or in certain gaming machine venues (other than in open areas).<sup>210</sup> These restrictions are tighter than those that applied prior to 10 December 2004. Smoking has been prohibited at schools and early childhood centres since 1 January 2004.<sup>211</sup>

<sup>209</sup> Sections 5 to 6 *Smoke-free Environments Act 1990* (NZ).

<sup>210</sup> Sections 9, 11, 12, 13, 13A and 13B *Smoke-free Environments Act 1990* (NZ).

<sup>211</sup> Section 7A, *Smoke-free Environments Act 1990* (NZ).

#### 4.4.4 *United Kingdom*

##### *England*

The UK Department of Health recently released a white paper that considered, amongst other things, the issue of smoke-free public places.<sup>212</sup> Despite survey results that indicated only 20% of people in favour of no smoking at all in pubs, the Government announced its intention to shift the balance significantly in favour of smoke-free environments.<sup>213</sup> It is proposed that:

- All enclosed public places and workplaces be smoke-free except for licensed premises.
- Restaurants are to be smoke-free as are pubs and bars preparing and serving food. However, other bars can elect whether to be smoking or non-smoking.
- The members of membership clubs can choose the smoking status of their club.
- Smoking in the bar area of licensed premises will be banned.

The Government intends to introduce smoke-free environments in three stages:

1. By the end of 2006: all government departments and the NHS will be smoke-free.
2. By the end of 2007: all enclosed public places and workplaces other than licensed premises will be smoke-free.
3. By the end of 2008: arrangements for licensed premises will be adopted.

The Government believes that:

these measures respond to what we have heard, striking the right balance between responsibilities and freedoms. They will represent a major advance, making smoke-free public places the norm.<sup>214</sup>

##### *Scotland*

The Scottish Government announced on 10 November 2004 its plans for a comprehensive ban on smoking in public places to come into force in 2006. First Minister Jack McConnell argued that the ban will 'reduce smoking, save lives and help transform our national health... No longer will Scotland be the place in Europe most associated with poor health'.<sup>215</sup> The ban is to be enforced by Environmental Health and Local Licensing Officers, with licensees and employers in breach of the ban facing fines of up to £2500. Persistent offenders risk losing their liquor licence.

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<sup>212</sup> United Kingdom, Department of Health, *Choosing Health: Making Healthier Choices Easier*, 2004.

<sup>213</sup> *Ibid*, p 99.

<sup>214</sup> *Ibid*, p 100.

<sup>215</sup> Scottish Executive, 'Ministers move to break the smoking habit', *Media Release*, 10/11/04.

#### 4.4.5 Ireland

Workplaces in Ireland, including pubs, have been smoke-free since 29 March 2004. The Office of Tobacco Control released a report on compliance with the legislation in its first month of operation.<sup>216</sup> According to the report, 97% of premises inspected in the first month were found to comply with the smoking ban.<sup>217</sup> The proportion of compliant premises varied from 95% for hotels to 99% for restaurants.

Initial reviews indicated that pub attendance increased once the smoking ban commenced. 71% of people surveyed reported visiting a pub within the last fortnight compared to 68% prior to the introduction of the legislation.<sup>218</sup> This was due to an increase in patronage by non-smokers, from 67% to 70%, with the attendance of smokers stable at 74%. The research also found that one in five smokers did not smoke at all (even outside) when socialising in a pub in the last fortnight.<sup>219</sup> This supports the supposition that smoking bans influence levels of tobacco consumption.

#### 4.4.6 United States of America

Legislation to protect people from environmental tobacco smoke has existed in various parts of the USA for 30 years. The first statewide ban on smoking in public places was enacted in Arizona in 1973, with similar laws enacted in 10 states within two years.<sup>220</sup> By 31 December 1999, smoke-free indoor air was required to some degree or in some public places in 35 states and the District of Columbia.<sup>221</sup> California, Connecticut, Delaware, Maine, Massachusetts and New York have implemented statewide laws that ban smoking in indoor workplaces and public places.<sup>222</sup> Rhode Island has also passed such a law to be implemented from March 2005.<sup>223</sup>

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<sup>216</sup> Ireland, Office of Tobacco Control, *Smoke-Free Workplace Legislation Implementation Report*, May 2004. A copy of the report is available from the Office of Tobacco Control website [www.otc.ie](http://www.otc.ie)

<sup>217</sup> Ibid, p 3.

<sup>218</sup> Ibid, p 5.

<sup>219</sup> Ibid, p 5.

<sup>220</sup> US Department of Health and Human Services, above n 36, p 47.

<sup>221</sup> Ibid, p 200.

<sup>222</sup> US, Centers for Disease Control and Prevention, 'Indoor air quality in hospitality venues before and after implementation of a clean indoor air law – western New York, 2003', *Morbidity and Mortality Weekly Report*, 53(44) November 2004, p 1041.

<sup>223</sup> Ontario Tobacco Research Unit, above n 208, p 5.

#### 4.5 What are some of the repercussions of smoking bans?

Smoke-free workplaces have health benefits for smokers as well as non-smokers. The tobacco company, Philip Morris, assessed smoke-free workplace laws to determine how they influence cigarette sales:

Smokers facing these restrictions consume 11-15% less than average and quit at a rate that is 84% higher than average. Milder workplace restrictions, such as smoking only in designated areas, have much less impact on quitting rate and very little effect on consumption.<sup>224</sup>

Research has found that the introduction of smoking bans in the Australian Public Service resulted in a reduction of 5.2 cigarettes per smoker on a working day.<sup>225</sup>

The NSW Joint Working Group for Smoke-free Licensed Premises discussed the impact of smoking bans in gaming areas that were introduced in Victoria in 2002.<sup>226</sup> It was found that the smoking ban caused a 23% decline in gambling expenditure within the first month, with a 9% decline in gaming machine expenditure across the year. According to ClubsNSW, there was a gap of 24% between projected revenues before the ban and actual revenues 19 months after the ban. Crown Casino claims that patronage of the bars where smoking is banned dropped by 40% to 50% whilst it increased for the bar areas that permitted smoking.<sup>227</sup>

On 31 October 2003, *The Age* reported that smoking bans in Victoria had caused Tabcorp to lose \$70 million in revenue in the financial year ending 2003.<sup>228</sup> It also noted some of the innovative ways venues had adapted to the ban. For example, 178 venues had introduced gaming machine reservation systems to enable customers to take a 10 minute cigarette break. Tabcorp's revenue started to rise again in September and October 2003.

The Victorian Premier, the Hon Steve Bracks, claims that smoking bans in Victorian restaurants increased patronage by 5%, as non-smokers were more willing to eat at restaurants.<sup>229</sup> The Minister for Health, the Hon Bronwyn Pike, referred to the results of a Cancer Council Victoria survey that suggested support for smoking bans in Victoria was

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<sup>224</sup> Quoted in Harper T and Martin J, 'A smoke-free Australia – but when?', *Cancer Forum*, 28(2) July 2004, p 78.

<sup>225</sup> Winstanley M, Woodward S and Walker N, *Tobacco in Australia: Facts and Issues 1995*, Victorian Smoking and Health Program, Carlton South, 1995, p 255.

<sup>226</sup> Information in this paragraph is, unless otherwise stated, sourced from NSW Joint Working Group for Smoke-free Licensed Premises, above n 109, pp 33-37.

<sup>227</sup> 'Smoking banned in all pubs and clubs', *The Australian*, 13/10/04, p 4.

<sup>228</sup> 'Tabcorp rides out smoking ban losses', *The Age*, 31/10/03.

<sup>229</sup> 'Smoking banned in all pubs and clubs', *The Australian*, 13/10/04, p 4.



increasing.<sup>230</sup> Between 2001 and 2002:

- Support for smoking bans in bars increased from 63% to 68%.
- Support for smoking bans in nightclubs increased from 63% to 66%.
- Support for smoking bans in gambling venues increased from 75% to 78%.

Trotter and Mullins conducted a random telephone survey of Victorians in 2000 and 2001 to ‘measure public opinion and behaviour in Victoria in relation to environmental tobacco smoke in public places and the home’.<sup>231</sup> The survey found a marked increase in support in 2001 for complete smoking restrictions in restaurants, bars and gaming venues (62%, 42% and 51% respectively).<sup>232</sup> This was significantly higher than 1997, when only 46% of people surveyed believed there should be no smoking at all in restaurants and cafes; 30% believed there should be no smoking at all in bars; and 37% believed there should be no smoking at all in gambling venues.<sup>233</sup> Support of smoking bans was higher if they were the result of legislation prohibiting smoking in restaurants (84%), bars (63%), nightclubs (63%) and gaming venues (74%). Trotter and Mullins concluded that, ‘smokefree policies enjoy high and increasing levels of public support, even among smokers. Smokefree policies that would ban smoking in bars, gambling venues and nightclubs would be likely to be well received by the majority of Victorians’.<sup>234</sup>

20 hospitality venues in western New York were assessed following the introduction of the smoking ban to measure any changes in indoor air quality. Respirable suspended particles (an indicator of second hand smoke levels) decreased by 84%, on average, after the law was implemented, leading the report to conclude that ‘comprehensive clean indoor air policies can rapidly and effectively reduce SHS [second hand smoke] exposure in hospitality venues’.<sup>235</sup> Within one year of the smoking ban being introduced in New York:<sup>236</sup>

- Business tax receipts were up by 9%;
- Employment was up by 10,600;
- 97% of restaurants and bars were smoke-free;
- Community support for the ban was overwhelmingly positive; and

<sup>230</sup> B Pike, ‘Support for smoke-free venues at a record high’, *Media Release*, 22/7/03.

<sup>231</sup> Trotter L, Mullins R, ‘Environmental tobacco smoke: public opinions and behaviour in 2000-01’, in Letcher T and Trotter L (eds) *Quit Victoria Research and Evaluation Studies No 11: 2000-2001*, Victorian Smoking and Health Program, Melbourne, 2003, pp 113-136.

<sup>232</sup> *Ibid*, p 114.

<sup>233</sup> *Ibid*, pp 121-2, 126.

<sup>234</sup> *Ibid*, p 114.

<sup>235</sup> US, Centers for Disease Control and Prevention, above n 222, p 1038.

<sup>236</sup> Quoted in NSW Joint Working Group for Smoke-free Licensed Premises, above n 109, p 37.

- Smoking rates fell by 11% between 2002 and 2003.

A report in the *Sydney Morning Herald* dated 26 February 2003 claimed that an analysis of 97 studies in eight countries regarding the impact of smoking bans on the hospitality industry found that studies that revealed business as suffering were: supported by the tobacco industry; did not use objective measures; and were not peer-reviewed. However, the more rigorous and independent studies found smoking bans to have no negative impact on business.<sup>237</sup>

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‘Smoking bans do not damage pub trade: study’, *Sydney Morning Herald*, 26/2/03, p 5.

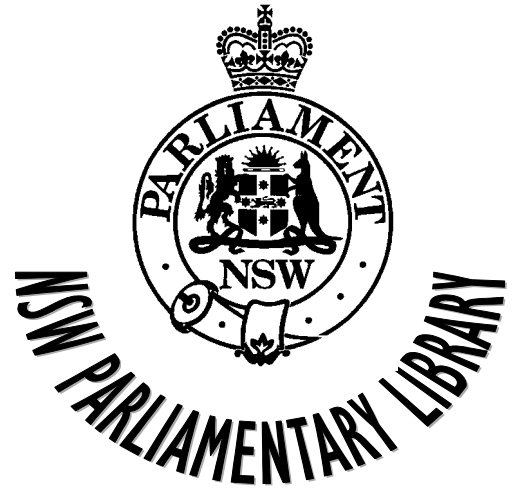
## 5 CONCLUSION

The current focus of the anti-tobacco lobby on the rights and health of non-smokers has led to a proliferation of smoking bans in enclosed public places. The NSW Parliament only recently passed the *Smoking Environment Amendment Act 2004* which will gradually phase-in an extension of smoking bans to include licensed premises in NSW. The support for such smoking bans has been growing and the implementation of similar restrictions in Ireland and New York appears to have been successful.

Smoking bans are only one method of tobacco control. The use of tobacco is also controlled through restrictions on the way it is packaged and advertised. Particular strategies are applied to minors such as prohibiting the manufacture and sale of toys and confectionery that resemble tobacco or the act of smoking, as well as prohibiting the sale of tobacco to persons under the age of 18. Health warnings have been included on tobacco packages for thirty years but have continued to adapt to contemporary requirements with graphic warnings the most recent development. The price of tobacco may be influenced by taxation policies and smoking cessation can be encouraged through media campaigns, and the availability of nicotine replacement therapy and telephone counselling. Litigation may also affect the activities of tobacco companies.

Tobacco continues to be the cause of much death and disease not only in Australia but also worldwide. The damage attributed to tobacco has been recognised by the World Health Organization and by the numerous countries to have signed and/or ratified the *Framework Convention on Tobacco Control*. Accordingly, governments continue to seek strategies that will encourage the minimisation, prevention and cessation of tobacco use.

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