# smoke free dining -

# the tobacco (amendment) act 2000

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### introduction

Have you ever felt the annoyance of tucking into your favourite meal in a restaurant, then looking up to breathe in a lungful of cigarette smoke wafting over from the next table? Annoyance is one thing but for staff members and people such as asthma sufferers, allowing people to smoke in restaurants is a health hazard. As a result, the Victorian Parliament passed the Tobacco (Amendment) Act 2000 ('the Act') earlier this year. The amendments it contains were described by the Health Minister, John Thwaites, as 'the most significant achievement in tobacco control since the Victorian Tobacco Act 1987 was introduced with bipartisan support in 1987". The object of the Tobacco Act was to actively discourage tobacco smoking through, among other things, the prohibition of certain tobacco advertising and sponsorships. Tobacco Act also established the Victorian Health Promotion Foundation.

The Act aims to control smoking and tobacco in several key ways:

- To make provision for 'smoke free dining' in Victoria;
- To further regulate advertising of tobacco products; and
- To increase penalties for selling tobacco products to minors<sup>2</sup>.

This article will focus on the 'smoke free dining' provisions, which are due to commence operation on 1 July 2001.

## key provisions

The Act provides that 'a person must not smoke in an enclosed restaurant or cafe, or in a dining area'. If smoking does occur and the smoker fails, without reasonable excuse, to comply with a direction from an inspector to cease smoking, he or she commits a further offence.

The occupier of the restaurant, cafe or dining area is also guilty of an offence if smoking occurs in their venue. 'Occupier' means a person who appears to be of or over the age of 16 and who is or appears to be in control of the area or premises.

However, it is a defence for the occupier if the occupier can prove that he or she:

- did not provide ashtrays or anything designed to facilitate smoking; and
- was not or could not reasonably be expected to have been aware that the contravention was occurring; or
- requested the person to stop smoking and informed the person that he or she was committing an offence.

### definitions

### 1. Restaurant/cafe:

This means premises that are, or an area of premises that is, used by the public, or a section of the public, predominantly for the consumption of food or non-alcoholic drinks purchased on the premises and:

- where the restaurant or café forms only part of the premises, includes any abutting area in those premises that is not separately enclosed from the restaurant or cafe, (irrespective of the purpose or purposes for which the abutting area is used); but
- does not include premises in respect of which a general licence

or a club licence within the meaning of the Liquor Control Reform Act 1998 (Vic) is in force.

### 2. Dining area:

A dining area is defined as an area (other than an outdoor area) used by the public or a section of the public ir premises which operate under a general licence or a club licence, wher the predominant activity in that area is the consumption of food or non-alcoholic drinks.

### 3. General/club licences:

There are three main licences under which restaurants operate under: onpremises licences, general licenses and club licences.<sup>3</sup>

An on premises licence allows the licensee to supply liquor on the premises during ordinary trading hours and at other times specified in the licence<sup>4</sup>. Restaurants with on premises licences must have, as their predominant activity, the preparation and serving of food for consumption on the licensed premises and must also be able to seat 75% of their patrons at tables at any one time<sup>5</sup>.

A general licence allows the supply of liquor for consumption on or off the premises during ordinary trading hours and at any other time specified in the licence.

A club licence allows the sale of liquor to members for consumption on or off the licensed premises and to guests of members for consumption on the licensed premises.<sup>7</sup>

For those restaurants with general/club licences, the predominant activity test applies only to the dining area, and therefore smoking will be permitted in

all other areas of the restaurant, regardless, it appears, of the layout of the restaurant. The dining area of these premises will not necessarily be, and is not required by the Act to be, an enclosed area. In addition, if food is only served at certain times of the day, then smoking may be permitted even in the dining area outside these times, leaving smoke in the atmosphere.

The distinction between restaurants, which have general or club licences, and those which do not has been described as unfair by Opposition health spokesman Robert Doyle. This is because many restaurants operate with general licences and will consequently not be caught by the definition of 'restaurant'.

In addition, smoking will still be permitted in public bars and gaming venues (but not in the dining area, if any, of these premises). Mr Doyle has also stated that this distinction between the licences held by pubs (general licences) and those held by restaurants and cafes (usually onpremises licences) is also unfair<sup>8</sup>.

### other issues

The predominant activity test, which applies to restaurants, cafes and dining areas, has also caused some confusion. 'Predominant activity' is not defined in the Act, and Opposition health spokesman Robert Doyle has questioned whether predominance refers to volume of sales or the number of patrons<sup>9</sup>.

Owners of certain cafe bars have also claimed that the Act 'lacks clarity for cafe bar venues that do not fit neatly into the restaurant or bar category'10. For cafe bars whose licences describe them as a bar, but where cafe style food is also served, problems arise over whether or not they need to be smoke free. Nevertheless, the intent of the legislation is clear, and hopefully the importance of the reforms will not be overtaken by confusion.

### penalties

If an infringement notice is served on a person who smokes in an enclosed restaurant, cafe or dining area, or on the occupier of the premises, the penalty is one penalty unit or \$100.

A penalty of five penalty units or \$500 applies to the smoker and the occupier if they are prosecuted under the Act. It is also an offence for an occupier not to display the prescribed no-smoking signs. The restaurant proprietor will bear the penalties if he or she is considered to be the occupier, that is, the person who is or appears to be in control of the premises.

### conclusion

Smoke free dining is not a new concept. It has been introduced in the ACT, Western Australia and South Australia and parts of the USA". Smoking results in an enormous cost to our society in terms of illness and loss of life, and research over the past two decades has revealed the dangers of passive smoking. The Act aims to protect both the public and staff from environmental enduring tobacco smoke, and hopefully any confusion over its application will have been resolved by the time the Act comes into effect in the middle of next year.

### NOTES

- 1 Hansard, 4 May 2000
- 2 Section 1 of the Act
- 3 There are also other licences such as BYO permits.
- 4 Liquor Control Reform Act 1998 (Vic) s.9.
- 5 Bourke's Liquor Laws: Victoria: 1502.
- 6 Liquor Control Reform Act 1998 (Vic) s.8.
- 7 Liquor Control Reform Act 1998 (Vic) s.10.
- 8 Hansard 25 May 2000 p.5.
- 9 Ibid p.6.
- 10 Farrah Tomazin, 'New Smoke Rules put owners in a haze' The Age, 25 May 2000.
- 11 Hansard 4 May 2000.

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