focus on the statute law amendment (relationships) bill 2000.

By Hilary Doyle, Deacons

If passed, the Bill represents greater community acceptance of same-sex relationships and recognition of human diversity.

On 23 November 2000, the *Statute Law Amendment (Relationships) Bill* was read for a second time. The Attorney General, the Hon. Rob Hulls MP stated:

> "This Bill takes a significant step in implementing the government's pre-election commitment to reduce discrimination against people in same-sex relationships. This is part of the government's commitment to the creation of a socially just and cohesive community in which each person has their place, in which diversity in all its forms, including diversity of sexual orientation, is valued".

The purpose of this Bill is to amend existing legislation in Victoria to recognise the rights and responsibilities of partners in domestic relationships, irrespective of the gender of each partner.

Statutes and the legal rights and obligations of people in certain domestic relationships in Victoria are presently unclear in some respects. A discussion paper "Reducing Discrimination Against Same Sex Couples", released in July 2000, identified over 40 pieces of Victorian legislation that are discriminatory or in some way impact upon same-sex domestic partners. The Attorney General's Advisory Committee on Gay, Lesbian and Transgender Issues sought comment from significant and diverse groups. Participants included representatives from the Victorian Gay and Lesbian Rights Lobby, Transgender Victoria, The University of Melbourne, Defence for Children International – Australia, Equal Opportunity Commission of Victoria, Parents, Families and Friends of Lesbians and Gays, Fertility Rights and Access Lobby and the Victorian AIDS Council.

In response to the issues raised by the discussion paper the Bill is drafted so as to address 7 key areas where amendment to legislation is required to achieve parity. These areas are:

1. Property Related Benefits;
2. Compensation Schemes;
3. Superannuation Schemes;
4. Health Related Legislation;
5. Criminal Law Legislation;
6. Consumer Business Legislation; and
7. General Legislation.

The Bill is potentially an instrumental piece of legislation. For example, it amends statutory wording such as "spouse", "matrimonial home" and "widow or widower". Further, it redefines the term "de facto relationship" and includes all encompassing words such as "domestic relationship" and "domestic partner". If passed, this Bill represents greater legal and community acceptance of same-sex relationships and recognises the importance of human diversity.

The legal reform sought by the *Statute Law Amendment (Relationships) Bill* reflects similar reform processes taking place in other state and overseas jurisdictions. The ACT, QLD, NSW and Tasmania have all undertaken to examine the impact of existing legislation on personal and domestic relationships.

At the time of printing, the Victorian parliament was considering the Bill after it was moved in the Legislative Council on 4 April 2001.

the tobacco (amendment) act 2000 and beyond

the need for stricter legislation

by Douglas Salek Q.C.

The *Tobacco (Amendment) Act* 2000 (the ***Amendment Act***) was introduced into the Victorian Parliament on 3 May 2000. The second reading speech was completed by 25 May when it was passed. The Minister for Health, Mr Thwaites, hailed it as a major public health initiative containing the most significant achievement in tobacco control since the *Tobacco Act* 1987 (the ***Tobacco Act***) was introduced with bipartisan support in 1987.[1]

Section 2 deals with the commencement date of the Act. Originally it was intended that the smoke-free dining provisions would commence from 1 November 2000, but the Bill was altered at the behest of the restaurant industry and the ban on restaurant smoking will now commence on 1 July this year. Sections concerned with

sales to minors (inter alia) came into effect on 1 November of last year.

The legislation is in accord with the inevitable move towards restrictions on smoking that have been taking place in Victoria over many years. Many of these restrictions have been self-imposed by restaurateurs, office buildings, sporting venues, and others. Other restrictions have been imposed by both State and Commonwealth legislation. For example, the introduction of standard cigarette packet warnings in 1973, the banning of advertising of tobacco on radio and television in Australia in 1976, the reforms introduced by the Tobacco Act which increased the penalties on sales to minors and phased out cinema and outdoor advertising of tobacco, and the ban on all tobacco advertising in the print media in 1990.

The Amendment Act is not without its critics. On the day the second reading was completed *The Age* newspaper carried a lengthy article about restaurateurs who criticised the Amendment Act on a number of different bases including the concern that the ban on restaurant smoking would severely damage their business.[2] As pointed out by Health Minister Thwaites, however, studies in Canada and the USA reported in various health promotion and medical journals in 1998 and 1999, consistently found that restaurant revenues did not decrease after the introduction of smoking bans. Indeed, the majority of people prefer to eat in a smoke-free environment. In 1997, research undertaken by the Anti-Cancer Council of Victoria found that 97% of restaurant patrons in Victoria supported restrictions of some form in restaurants and 76% preferred to eat in non-smoking areas.[3]

Another criticism from the restaurateurs, and the Opposition in Parliament, was the lack of clarity as to the type of premises the amendment Act applies to. Section 7 of the Amendment Act provides that "a person must not smoke in an enclosed restaurant or café or in a dining area". A penalty of 5 penalty units is provided for. (Occupiers are also dealt with.) "Restaurant or café" is defined in section 4 of the Amendment Act as meaning premises that are used by the public predominantly for the consumption of food or non-alcoholic drinks. Further, in the case of a restaurant or café that is an area in premises, it includes any abutting area in those premises that is not separately enclosed from that area, 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* 1988 is in force.

"Dining area" is also defined under a new section 3D, which has been inserted in the Tobacco Act. An area used by the public in premises "in respect of which a general licence or a club licence within the meaning of the *Liquor Control Reform Act* 1988 is in force is a dining area at any time when the predominant activity in that area is the consumption of food or non-alcoholic drinks."

Mr Doyle, the chief Opposition speaker on the second reading, observed that the government definition was an attempt to differentiate the licences held by pubs and those held by restaurants. However, many restaurant owners with a general licence would operate their venues like pubs with certain defined areas: a public bar, an eating area, and a bottle shop, permitting a smoking area in the restaurant. "That may or may not be good public policy. It will be allowed under the Act. It creates two separate classes of restaurant, not because of smoking or the style of the venue but simply because of historic accident, because of two different types of licences. "Mr Doyle also suggested that there would be difficulty in defining the word "predominant".[4]

Given the intention of the Amendment Act it is suggested that a better solution would have been for the legislation to have included all premises where food or drink is served to members of the public.

In April 2001, the Minister for Health introduced a further bill, the *Tobacco (Further Amendment) Act* 2001 (the ***Bill***). The key provisions of the Bill are that all enclosed retail shopping centres in Victoria will be required to be smoke free; retailers will be required to display signs saying it is illegal to sell tobacco to minors; the sale of single cigarettes will be prohibited; the advertising of cheap smokes or discount cigarettes signs outside tobacco retail outlets will be prohibited; loopholes in the provision prohibiting the practice of providing gifts with tobacco products will be eliminated; and mobile cigarette sellers will be banned.

If the Bill is enacted, these reforms will commence on various dates, with the advertising reforms not due to commence until 1 January 2002 and the retail/shopping centres provisions due to commence from 1 November 2001. Already, further amendments to the Bill have been proposed.

Why the need for stricter legislation?

In short, the answer to this question is that in 1997 4,500 Victorians died because of their tobacco addition. That number of deaths is greater than the number of people combined who died from traffic accidents, heroin, breast cancer, alcohol, suicide and falls.[5] Tobacco smoking is the leading preventable cause of death in our society. A civilised society does all that it can to prevent the unwanted harm and death to its members, and legislation is but one means of achieving this.

One in two long-term smokers will die as a result of their smoking and half of those will die in middle age. They will lose the best years of their lives. In 1997 tobacco was responsible for 80% of all drug caused deaths, as compared to illicits (3.6%) and alcohol (16.4%).

Those that smoke and die will suffer from lung cancer (the leading killer) or cancers in the oesophagus, larynx, bladder, pancreas and kidney, or heart disease, and other diseases, such as mascular degeneration in the eyes that leads to blindness.

The economic cost of smoking is massive. In current prices, the total smoking-attributable social costs in Victoria were $2.5 billion in 1988, rising to $3.2 billion in 1992.[6]

It is important that new measures to curb tobacco deaths are constantly being introduced. Recent economic modelling by the University of Melbourne shows that if tobacco policies remain constant, tobacco consumption

will rise again. Novel ways of addressing the problem should be looked at, and young lawyers should be and are involving themselves in this, including the possibility of bringing criminal charges against tobacco companies.

NOTES

1 Legislative Assembly, Hansard, 4 May 2000, page 1309
2 The Age, 25 May 2000, page 6
3 "Behind The Smokescreen" published by Quit and Anti-Cancer Council of Victoria
4 Legislative Assembly, Hansard, 25 May 2000, page 1771
5 "Behind the Smokescreen" (supra)
6 "The Social Costs of Tobacco in Victoria and The Social benefits of Quit Victoria" by D. J. Collins and H. M. Lapsley, published by the Victorian Smoking and Health Programme, 1999

Editor's note

This issue was explored on 17 May 2001 in a moot competition titled "The Inaugural Vichealth Legal Issues In Public Health Challenge".

Two teams, from the Melbourne and Monash University Law Schools, argued whether tobacco companies are criminally liable for the harm their products cause.

The case was argued before a bench sitting as the Supreme Court of Victoria, Court of Appeal constituted by Professor Hapel, Monash University, Professor Marcia Neave AO, Victorian Law Reform Commissioner and Emeritus Professor Louis Waller AO, Monash University.

The Court heard an appeal by a fictional tobacco company convicted of a count of conduct endangering life under section 22 of the *Crimes Act 1958 (Vic)*.

mapping the way for doing business

by Emma Cunliffe, Deacons

A recent High Court decision has confirmed the right of companies to organise and maintain their business in ways appropriate to their business needs. In the decision of *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (15 March 2001) ("***Melway***"), the majority of the High Court held that the actions of a company in maintaining its distribution system did not contravene the *Trade Practices Act 1974*.

Melway, the publisher of the famous Melbourne Street Directory, maintains a distribution system that is divided along industry lines. For example, one distributor has responsibility for wholesaling to service stations, whilst another has responsibility for wholesaling to newsagencies and bookshops. Robert Hicks Pty Ltd was one of the distributors responsible for supplying automotive shops. In 1995, Melway decided to terminate Robert Hicks Pty Ltd's distributorship and to appoint a new distributor.

Robert Hicks Pty Ltd then placed an order for 30,000 – 50,000 Melways and advised Melway of its intention to sell these Melways in competition with Melway's distributors and to some new customers. Melway indicated that it would not supply the street directories and Robert Hicks Pty Ltd commenced proceedings against Melway, alleging a breach of section 46 of the *Trade Practices Act*.

Section 46 of the *Trade Practices Act* provides that a person with a substantial degree of market power must not take advantage of that power for the purpose of preventing or deterring competition in that or any other market. Robert Hicks Pty Ltd alleged that, had Melway been operating in a competitive market, it would not have been commercially viable for it to refuse an order for 50,000 street directories.

The trial judge found that Melway and its distributors operated in the market for the wholesale and retail of street directories in Melbourne. Melway commanded 80 – 90% of the market as defined. In addition, the trial judge found that there were substantial barriers to entry faced by new competitors. These were posed by the enormous cost of researching and compiling maps for street directories. Somewhat surprisingly, Melway did not challenge these findings before the High Court.

The High Court found that the order for Melways was refused because Melway intended to prevent Robert Hicks Pty Ltd from engaging in competitive conduct with its existing distributors. However, the High Court held that Melway's actions did not amount to "taking advantage" of its market power.

The High Court drew a distinction between actions designed to reduce inter-brand competition and actions designed to restrict intra-brand competition. It held that a restriction of intra-brand competition through distributorship arrangements such as those used by Melway may in fact promote competition between brands. A majority of the High Court held that "if Melway was otherwise entitled to maintain its distribution system without contravention of the Act, it is not the purpose