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Smoking Bans in Licensed Premises

The Smoke-free Environment Act was passed in 2000 to regulate smoking in public places, and to prohibit smoking in some public places. In 2004 amendments were made which impacted upon licensed premises. Prohibitions on smoking indoors on licensed premises were gradually imposed and after 1 July 2007, there was a complete ban on smoking within enclosed areas on licensed premises (with a limited exception for the casino).

It is an offence for a person to smoke, or for an occupier to allow a person to smoke in a smoke free area. A smoke free area is any enclosed public place that is not exempt under the Act. The term "enclosed" refers to a public place which has a ceiling or roof and is completely or substantially enclosed except for doors and passageways. There is scope within this definition for argument as to what constitutes "substantially enclosed".

The regulations set out guidelines to assist in determining when places are substantially enclosed. The guidelines provide that a place is substantially enclosed if the total area of the ceiling and wall surfaces (the total actual enclosed area) is more than 75% of the total notional ceiling and wall area. The guidelines then define what constitutes the total notional ceiling and wall area.

Total Notional Ceiling and Wall Area

Total area of all wall surfaces where:

- each wall is the same height, being the lowest height of the ceiling; and,
- any gaps in the walls are filled with the minimum area required to do so.

PLUS

The floor area of the space within the walls, if the walls were continuous.

Total Actual Enclosed Area

Must include;

- Any gap in the wall or ceiling that does not open directly to the outside;
- Any door window or moveable structure (unless such door, window or moveable structure is locked fully open)

It is clear that a place is not enclosed if it does not have a ceiling. Therefore most beer garden areas and courtyards without a ceiling will generally not be enclosed. It is clear that a place is not enclosed if it does not have a ceiling. Therefore most beer garden areas and courtyards without a ceiling will generally not be considered as enclosed areas or smoke free areas. The general issue that will be faced by occupiers is how to develop venues which do not enjoy

substantial uncovered areas. Most often, when confronting such a situation, occupiers will attempt to utilise openings to the outside from external walls of the building, or will create new wall openings, so as to reduce the total actual area, as against the total notional area. Having regard to the degree of “openness” required by the law, it is apparent that reliance upon a single wall opening will not result in a very large room. Consideration should be given to the possibility of creating ceiling openings in conjunction with wall openings, and the use of additional wall openings by configuring areas proposed to be used for smoking on external corners of buildings.

Use of Louvers

Frequently, occupiers have developed areas with openings to the outside and installed louvers within such openings. There has been some contention as to whether or not louvers would be considered walls and included in the total actual area of a place. Whilst the law appears to categorise any structure or device which prevents or impedes lateral airflow to be a wall, the Department of Health has issued a publication which is to be used to assist officers in the field when making determinations as to enclosed areas. The publication essentially provides that fixed louvers which are appropriately spaced and not angled too acutely will not be considered to be a wall. The area of each louver however will need to be included in the actual enclosed area, using the thickest point of the louver as the relevant measurement for determining area.

More than One Place

The Supreme Court considered a case where a Club had been prosecuted for an offence under the Smoke-free Environment Act. The Club had an area which was covered where gaming machines were located, which opened directly onto an uncovered area. Basically, the Club argued that both the covered and uncovered areas were a single “place” for the purposes of the legislation. The Court determined that the

covered and uncovered areas were in fact two separate areas, and that the covered area was an enclosed place, in which smoking was prohibited.

Open to the Outside

The case of Blacktown Workers Club dealt with the question of whether an opening actually opened directly to the outside. The areas in question contained meshed walls which opened to areas which adjoined a covered loading dock and both covered and uncovered walkway spaces. At first instance, the Local Court Magistrate held that the walls in question opened directly to the sky, but on appeal, the decision was overturned, with the court taking a literal interpretation of the terms “open directly to the outside”

The Judge found that the mesh screens were in fact walls for the purposes of the legislation. Having arrived at that position, the relevant question was whether or not the screens constituted a “gap” in the wall which opened directly to the outside. If so, then the area of the gap would not be included in the total actual enclosed area. The Court found that the necessary assessment should be whether the “gap” opens directly to the outside and the phrase “opens directly to the outside” requires the “gap” to lead directly to the air outside the building or structure in question. The consequence is that if an opening is to be excluded from the total actual enclosed area, occupiers must ensure that such openings do not require air to travel through other areas before escaping the building. Each opening sought to be excluded from the total actual enclosed area, needs to open directly to the outside of the building.

The Department of Health notes for its officers provide that when assessing the question of “opens directly to the outside” consideration should be given to whether or not the area which the opening leads to is a genuine outside area, and that a genuine outside area will not be an area which is deemed to be unenclosed as a

result of the application of the formula in the guidelines.

Exercise Caution

We have viewed numerous sites where occupiers are permitting smoking within areas, which clearly do not comply with the requirements of the legislation. Often, significant amounts of funds are invested in the construction of areas intended to be used for smoking. Officers from the Department of Health regularly conduct inspections of licensed premises to determine compliance. Considerable financial penalties and prosecutions can result from detected breaches, however there is a significant potential economic cost for occupiers of non-compliant areas, including construction costs, demolition costs, disruption to business and usually no alternative smoking solution.

For this reason, it is important to consult with experienced advisers at the design stage to ensure that all of the required factors are considered, before investing in the construction of the smoking area. Because the Department of Health do not wish to play any part in encouragement of smoking, it is no longer possible to submit proposed designs to it for assessment prior to construction. This highlights the importance of getting it right first time.