LC Paper No. CB(2)1023/05-06(03)

Subject : Smoking legislation

Bills Committee on Smoking (Public Health) (Amendment) Bill 2005
attention : Chairman Hon Andrew CHENG Kar-foo

Dear Sir,

In respect of the above Bill I provide below recent information that has just been released and which is relevant for the information of the above committee.

I also provide herewith self explanatory reports from Australia whose Occupational Health and Safety laws are similar to those in Hong Kong and which has found that workplace employers have a duty of care to their employees and patrons as regards health and safety of the workplace affected by Environmental Tobacco Smoke.

Yours faithfully,
James Middleton
Pat Heung, NT
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ftp://ftp.arb.ca.gov/carbis/regact/ets2006/isor.pdf
Reasoning

ftp://ftp.arb.ca.gov/carbis/regact/ets2006/app2.pdf
Scientific Panel report

California tobacco smoke 'toxic'
California has become the first US state to classify second-hand tobacco smoke as a toxic air pollutant.
The decision by the California Air Resources Board puts drifting smoke in the same category as diesel exhaust, and could lead to tougher regulation. The agency said many scientific studies had linked passive smoking to a range of cancers and respiratory diseases.
California pioneered smoking bans in the workplace, and later in restaurants and bars. John Froines, chairman of the Air Resources Board's Scientific Review Panel, said Thursday's ruling put "California way ahead". The decision to declare second-hand smoke as a pollutant relied on a September report that found a sharply increased risk of breast cancer in young women exposed to it. It also linked second-hand smoke to premature births, asthma, and numerous health problems in children. The study found that about 16% of all Californians smoked, but that 56% of adults and 64% of adolescents were exposed to second-hand smoke. Some health experts say the ultimate impact of California's decision to classify second-hand smoke as a toxin could reach beyond the US.
Story from BBC NEWS:

http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/4652878.stm

Published: 2006/01/27 00:58:11 GMT

Occupational Health and safety Laws - Victoria Australia

Division 2—Main duties of employers

21. Duties of employers to employees

s. 21

(1) An employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health.

Penalty: 1800 penalty units for a natural person;

9000 penalty units for a body corporate.

(2) Without limiting sub-section (1), an employer contravenes that sub-section if the employer fails to do any of the following—

(a) provide or maintain plant or systems of work that are, so far as is reasonably practicable, safe and without risks to health;

(b) make arrangements for ensuring, so far as is reasonably practicable, safety and the absence of risks to health in connection with the use, handling, storage or transport of plant or substances;

(c) maintain, so far as is reasonably practicable, each workplace under the employer's management and control in a condition that is safe and without risks to health;

(d) provide, so far as is reasonably practicable, adequate facilities for the welfare of employees at any workplace under the management and control of the employer;

(e) provide such information, instruction, training or supervision to employees of the employer as is necessary to enable those persons to perform their work in a way that is safe and without risks to health.

http://www.dms.dpc.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/a12f6f60fbd56800ca256de500201e54/91946B9DDC6E1108CA2570E40083A0B9/$FILE/04-107a003.doc

Australia Health and Safety Act 2004 - Victoria Australia

Hong Kong Laws

Chapter:	509	Title:	OCCUPATIONAL SAFETY AND HEALTH ORDINANCE	Gazette Number:	L.N. 230 of 1998
Section:	**6**	Heading:	**Employers to ensure safety and health of employees**	Version Date:	01/06/1998

PART II

RESPONSIBILITY FOR SAFETY AND HEALTH OF EMPLOYEES AT WORK

(1) Every employer must, so far as reasonably practicable, ensure the safety and health at work of all the employer's employees.

(2) The cases in which an employer fails to comply with subsection (1) include (but are not limited to) the following-

(a) a failure to provide or maintain plant and systems of work that are, so far as reasonably practicable, safe and without risks to health;

(b) a failure to make arrangements for ensuring, so far as reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage or transport of plant or substances;
(c) a failure to provide such information, instruction, training and supervision as may be necessary to ensure, so far as reasonably practicable, the safety and health at work of the employer's employees;
(d) as regards any workplace under the employer's control-
(i) a failure to maintain the workplace in a condition that is, so far as reasonably practicable, safe and without risks to health; or
(ii) a failure to provide or maintain means of access to and egress from the workplace that are, so far as reasonably practicable, safe and without any such risks;
(e) a failure to provide or maintain a working environment for the employer's employees that is, so far as reasonably practicable, safe and without risks to health.

(3) An employer who fails to comply with subsection (1) commits an offence and is liable on conviction to a fine of $200000.
(4) An employer who fails to comply with subsection (1) intentionally, knowingly or recklessly commits an offence and is liable on conviction to a fine of $200000 and to imprisonment for 6 months.

Chapter:	314	Title:	OCCUPIERS LIABILITY ORDINANCE	Gazette Number:	
Section:	**3**	Heading:	**Extent of occupier's ordinary duty**	Version Date:	30/06/1997

(1) An occupier of premises owes the same duty, the "common duty of care", to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.
(2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable **to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there**.
(3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases-
(a) an occupier must be prepared for children to be less careful than adults; and
(b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.
(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)-
(a) **where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability,**

unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and

(b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks **willingly accepted** as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

(6) For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.

Chapter:	314	Title:	OCCUPIERS LIABILITY ORDINANCE	Gazette Number:	
Section:	**4**	Heading:	**Effect of contract on occupier's liability to third party**	Version Date:	30/06/1997

(1) Where an occupier of premises is bound by contract to permit persons who are strangers to the contract to enter or use the premises, the duty of care which he owes to them as his visitors cannot be restricted or excluded by that contract, but (subject to any provision of the contract to the contrary) shall include the duty to perform his obligations under the contract, whether undertaken for their protection or not, in so far as those obligations go beyond the obligations otherwise involved in that duty.

Sharp v Port Kembla RSL Club: establishing causation of laryngeal cancer by environmental tobacco smoke

Bernard W Stewart and Peter C B Semmler

ABSTRACT

- A New South Wales Supreme Court jury has decided that environmental tobacco smoke (ETS) can cause or materially contribute to the development of laryngeal cancer.
- Evidence presented that ETS may cause or materially contribute to laryngeal cancer included the molecular genetics of tobacco-smoke-induced carcinogenesis, and two relevant epidemiological studies.
- The plaintiff's exposure to ETS was established indirectly, on the basis of occupational history involving work as a bar attendant in licensed premises.
- The jury's decision seems likely to encourage other "passive smoking" cases, and may result in measures to reduce occupational exposure to ETS.

MJA 2002; 176: 113-116

IN A RECENT DECISION of the Supreme Court of New South Wales, *Sharp v Port Kembla RSL Club Ltd*, an employee recovered damages from her employer on the basis that exposure to environmental tobacco smoke (ETS) in the course of her employment caused, or materially contributed to, the development of laryngeal cancer (see Box 1 for the plaintiff's occupational and clinical history). The plaintiff had brought her claim against two employers; one claim was settled out of court and the other proceeded. The decision is noteworthy not so much because it extends medicolegal recognition of cancer causation by ETS beyond the lung, but because of the kind of evidence presented to prove causation.

The case was decided by a jury and, as in all jury cases, no reasons for the decision were given. Thus, it is impossible to determine which parts of the evidence influenced the jury's decision. It may be, for example, that they preferred the evidence of the experts called by the plaintiff simply because they found them to be more believable than the other experts. The credibility of two American scientific witnesses called in the defence case came under attack by reason of their association with the tobacco industry.[1]

Nevertheless, the trial judge (whose role was to decide issues of law in the case, leaving issues of fact — including what caused the cancer — to the jury) gave the jury detailed directions over more than two days as to the way in which they were obliged by the law to assess the evidence on causation.

Having heard that summing up, the jury decided that the plaintiff's cancer was caused, or materially contributed to, by the negligence of her employer. For our discussion of the medical issues in the case we have assumed, as the law assumes, that the jury's answer to the causation question properly reflects the directions by the judge as to how causation must be determined according to law.

The law's requirement for proof of causation

To succeed in her claim for damages, the plaintiff had to prove, on the balance of probabilities, a causal connection in the legal sense between her exposure to ETS and her laryngeal cancer. The plaintiff did not have to prove that her cancer was caused solely by the defendant's wrongful conduct; it was sufficient to show that such conduct materially contributed to her injuries. A contribution is regarded as "material" for legal purposes if it is more than minimal, trivial or insignificant.

As was recently emphasised by the NSW Court of Appeal,[2] the legal concept of causation requires the court to approach the matter in a manner distinctly different from that of philosophy or science, including the science of epidemiology.

In the realm of negligence, the High Court of Australia has determined that causation is essentially a question of fact, to be determined as a matter of common sense.[3,4] This commonsense approach can be quite different to a scientist's approach. An inference of causation for the law's purposes may well be drawn when a scientist, including an epidemiologist, would not draw such an inference.[5]

In philosophy and science, the concept of causation has been developed in the context of explaining phenomena by reference to the relationship between conditions and occurrences. In law, problems of causation arise in the context of ascertaining and apportioning legal responsibility for a given occurrence.[6] In some cases, medical science cannot determine the existence of a causal relationship. However, for the purpose of attributing legal responsibility, a causal relationship might still be found to exist.

Accordingly, when the aetiology of disease is uncertain, the courts can decide as to causation on the balance of probabilities. Nevertheless, this common-law test is not satisfied by evidence which establishes only a possibility.

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Epidemiology is concerned with human populations, not individual circumstances. Therefore, in determining whether exposure to a particular substance is the legal cause of disease in a particular plaintiff, epidemiology only provides evidence of possibility.[7]

However, causation can be established in court by a process of inference that combines primary facts like "strands in a cable". An inference as to probabilities may be drawn from a number of pieces of evidence, each of which does not rise above the level of possibility.[8] Epidemiological studies and expert evidence based upon such studies can form the strands in the cable of a circumstantial case.

In the *Sharp* case, because of the rarity of this kind of cancer, the epidemiological strands of the cable were tenuous. The trial judge instructed the jury on the issue *inter alia* as follows:

> The epidemiology may prove useful to you, but you have heard how the scientists approach those studies and how many studies may be required before the scientists are able to say that the issue has been proved. [*Sharp*, summing up, p 21]

However, when combined with evidence of the current understanding of the molecular mechanisms by which the disease develops, the cable of causation became sufficiently strong for the law's purposes; the totality of the evidence showed a connection which was close enough to justify the jury's conclusion that the possible was the actual cause.

As the judge went on to direct the jury:

> You must have regard to all of the evidence, the opinions for and against, which includes the clinicians and the scientists. It is open to you to determine the issue in favour of the plaintiff or the second defendant, even if the epidemiological evidence does not confirm that outcome. [*Sharp*, summing up, p 21]

Case for the plaintiff

Cancer in an individual is attributable to the impact of a particular agent or environment upon determination of two issues:

- that the agent or environment presents a carcinogenic hazard to humans, and (if so)
- that the individual in question was exposed to the carcinogenic hazard in such circumstances as may result in the development of the malignancy.

Thus, the first issue is whether ETS causes laryngeal cancer. In addition to lung cancer, smoking causes cancer of the larynx, pharynx, oral cavity, oesophagus, kidney, bladder and pancreas.[9] Other malignancies associated with smoking include stomach cancer, cervical cancer and leukaemia.[10] Of all the types caused by smoking, laryngeal cancer appears to exhibit the highest attributable risk. In Australia, 83% of laryngeal cancer in men and 78% in women is attributable to active smoking[11] and similar figures have been consistently reported worldwide.[12]

In the *Sharp* case, the epidemiological evidence was augmented by an explanation of the current understanding of carcinogenesis. The argument was predicated on biological mechanisms responsible for malignant transformation and the consideration that tobacco smoke is known to be carcinogenic via processes now understood at the molecular level (Box 2).[13-15]

1: Plaintiff's occupational and clinical history

The plaintiff was born in 1939 in Sydney and moved to Port Kembla when aged nine years. At age 18, she was diagnosed with pernicious anaemia and treated with vitamin B_{12} injections. She had an appendicectomy in early life, and was taking hormone replacement therapy at the time of recent surgery. She was employed from 1963–1972 at a Wollongong factory making brassieres, which did not involve any significant exposure to environmental tobacco smoke. From 1972 to 1984, she was employed (17 hours/week) as a bar attendant at the Port Kembla Hotel. The plaintiff was similarly employed 25 hours per week at Port Kembla RSL Club during 1984–1995. The building was air conditioned, but the plant was often out of service. There were no windows in bar areas and no smoke-free zones; the atmosphere was described as "smoky". She variously attributed eye irritation, dry throat and intermittent cough to conditions at work, and her children noted that after she returned from work she smelt of cigarettes. The plaintiff did not smoke. Her father had been a light smoker, but did not smoke in the house. Her second husband smoked "casually" between 1978 and 1984, but not in her presence. Her alcohol intake was 2–3 drinks per week.

In May 1995, she noted a small lump on the right side of her neck. Biopsy showed malignant cells. Further investigation indicated a primary tumour involving the right side of the epiglottis. In August 1995, she underwent right neck dissection and a supraglottic laryngectomy. The tumour was described as a moderately differentiated squamous cell carcinoma of the base of the tongue, with extension into the base of the epiglottis and right epiglottic vallecula. She received postoperative radiotherapy over six weeks. The patient was seen regularly in the course of follow-up. She is described as having rehabilitated very well, has excellent oral function and has a good voice.

Thus, cancer induced by genotoxic carcinogens is a consequence of critical changes in gene structure and expression. One corollary of this understanding is that there is no level of exposure below which an increased risk of cancer cannot be anticipated (the "no safe dose" principle[16]). As it is established that cigarette smoke is carcinogenic for humans, the molecular genetic data suggest that inhalation of tobacco smoke presents a carcinogenic hazard irrespective of the amount inhaled. Exposure to ETS results in inhalation of a lesser amount of smoke than is inhaled by a smoker.[17] A large body of epidemiological evidence, and its evaluation, has provided confirmation of the expected increased risk of lung cancer among non-smokers who share breathing space with smokers at home and/or at work.[18]

On the same basis, ETS is reasonably expected to cause laryngeal cancer, although the risk can be expected to be less than that for a smoker.[17] Moreover, as there are fewer laryngeal cancers in comparison with lung cancers among smokers, the number of cases of laryngeal cancer caused by ETS will be small. Accordingly, quantification of the risk by epidemiology is difficult. Funding for such studies may be difficult to obtain for this reason and because no additional data are necessary to justify public health measures to reduce exposure to ETS.

Nevertheless, the impact of ETS has been investigated in squamous-cell carcinoma of the head and neck (HNSCC),

which includes the larynx. In 1997, a retrospective analysis comparing 59 non-smoking HNSCC patients with matched non-HNSCC non-smoking control subjects showed that the HNSCC patients had a significantly higher risk of ETS exposure both in the home and workplace.[19] Subsequently, a study of 173 HNSCC patients and 176 cancer-free controls returned a crude odds ratio for ETS exposure of 2.4 (95% CI, 0.9–6.8) after controlling for age, sex, race, education, alcohol consumption and other variables. Dose response was evident after categorisation to either moderate (crude OR, 1.8) or heavy (crude OR, 4.3) ETS exposure.[20]

Therefore, a relationship between exposure to ETS and increased risk of head and neck cancer, anticipated on the basis of the carcinogenicity of ETS and the susceptibility of the upper respiratory tract to this carcinogen, is supported by the available epidemiology.[21,22]

On the issue of whether the plaintiff was exposed to sufficient ETS to cause cancer, the evidence was indirect. Direct evidence of such exposure is exemplified by the presence of nicotine metabolites in urine.[23] Indirect evidence is provided by the occupational history (Box 1). Levels of tobacco-derived pollutants have been measured in various indoor spaces. Typical amounts of particulate matter are < 120 $\mu g/m^3$ in aircraft, 130–960 $\mu g/m^3$ in workrooms and 233–986 $\mu g/m^3$ in taverns.[12] The plaintiff was exposed to ETS as a bar attendant in a hotel between 1972 and 1984, and between 1984 and 1995 in a licensed club.

The plaintiff and other employees and patrons of the club gave evidence of their observations of a high level of ETS in the plaintiff's workplace. There was no evidence before the jury of comparable, consistent exposure of the plaintiff to ETS anywhere else. Accordingly, it was submitted to the jury that the more than 11 years of employment at the club in a bar room situation provided the necessary duration and intensity of exposure for it to be concluded that ETS materially contributed to the development of her malignancy.

2: Elucidation of the carcinogenicity of tobacco smoke[13-15]

Whole organism (1950s)

- Association between smoking and lung cancer based on analysis of groups.
- Causation of tumours in rodents by polycyclic aromatic hydrocarbons, *N*-nitroso compounds and other chemicals in tobacco smoke.

Cell and tissue (1970s)

- Metabolism of polycyclic hydrocarbons and *N*-nitroso compounds demonstrated in rodent and human tissue.
- Malignant transformation of human cells in culture by polycyclic hydrocarbons and *N*-nitroso compounds.

Macromolecule (1970s)

- Covalent binding of polycyclic hydrocarbons and *N*-nitroso-derived alkyl groups to DNA.
- Persistence of carcinogen adducts in DNA caused by failure of DNA repair processes, correlated with the site of tumour development.

Gene (1980s)

- Activation of *ras* oncogene following alkylation by *N*-nitroso compounds able to cause malignant transformation in cultured cells.
- Evolution of malignant cells in human cancer, via hyperplastic premalignant and benign lesions, correlated with multiple discrete changes in oncogenes and tumour-suppressor genes.

Codon (1990s)

- Role of p53 tumour-suppressor gene ("Guardian of the Genome") in mediating cell-cycle arrest and apoptosis established.
- Inactivation of p53 by mutation (or chromosome deletion) recognised as the most common specific genetic alteration encountered in human malignancy.
- Sequence-specific mutation of p53 in cultured cells exposed to a polycyclic hydrocarbon described.
- Sequence-specific mutation of p53 in lung cancer from individual smokers is the same as that observed in cultured cells exposed to a tobacco-smoke-derived polycyclic aromatic hydrocarbon.

Arguments of the defence

Apart from denying that there was sufficient ETS at the club to cause cancer, the principal defence was that the plaintiff's malignancy was not correctly categorised as "laryngeal". Rather, it was contended that it was "oro-pharyngeal". It was therefore suggested that epidemiological evidence regarding the association between laryngeal cancer and cigarette smoke was irrelevant. Alternatively, if the tumour were indeed "laryngeal", other risk factors which could be established from the plaintiff's history provided a more likely explanation for carcinogenesis and/or reduced confidence that the disease resulted from the effects of ETS.

Characterisation of the neoplasm as "laryngeal" cancer was disputed on anatomical grounds. The tumour was described as a squamous-cell carcinoma of the base of the tongue with extension into the base of the epiglottis and the right epiglottic vallecula. Differences between the epithelia at various sites in the upper respiratory tract were subject to detailed discussion. The distinctions drawn were arguably of little application, as no part of the upper respiratory or upper alimentary tract is considered refractory to smoke-induced carcinogenesis and the relative sensitivities are difficult to establish because data (for both "active" and "passive" smoking) are often based on "cancer of the head and neck".

The defence argued that the plaintiff should be considered at above average risk of HNSCC because she lived at Port Kembla, specifically on the basis of the "Wollongong leukaemia cluster".[24] Cross-examination was predicated on the cluster investigation being concerned with levels of particular atmospheric pollutants in the area (which is true) and argument that the cluster itself, among other things, was evidence that Port Kembla residents are at increased risk of pollution-associated cancer (which is false[25]). In cross-examination, which focused wholly on the plaintiff, there was scant opportunity to refute generalisations about the whole population, and any resident could have been left with serious concerns. The irony is that the effect of local pollution on cancer risk is almost impossible to discern against the background level of cigarette-induced disease. Head and neck cancer (in men or women) is no more common in the Illawarra region than it is in the whole of NSW.[25]

Alcohol drinking is a risk factor for laryngeal cancer.[26] The plaintiff drank only very moderately. Virtually all data concerning alcohol-associated cancer involve consumption at a level of several drinks per day. More importantly, the risk of laryngeal cancer in people who both smoke and drink alcohol daily increases multiplicatively compared with the risk from either factor operating alone.[27] The most reasonable conclusion was that any impact of alcohol would have been to increase the risk that may be inferred from the two studies of the impact of ETS on HNSCC.

The plaintiff was exposed occupationally to significant levels of ETS between 1972 and 1995. However, because she settled her case against the first employer, the jury was only concerned with the exposure between 1984 and 1995. The defendant argued that carcinogenesis could be wholly attributed to ETS exposure during the earlier period, 1972 to 1984. However, among active smokers who quit, the risk of lung cancer decreases within five years.[12] This finding is crucial to an understanding of tobacco smoke carcinogenesis. The relatively immediate decrease of risk upon quitting suggests a progressive process in which each year of exposure increases the likelihood of tumorigenesis, a scenario which is incompatible with tumorigenesis being the irreversible outcome of exposure during some initial period. Accordingly, exposure to ETS up to the point when cancer was diagnosed may be judged as contributing to the plaintiff's risk.

The verdict and its implications

By their verdict, the jury showed they accepted that, more probably than not, ETS at the Port Kembla RSL Club caused, or materially contributed to, Mrs Sharp's cancer. No appeal has been lodged by the club. The insurance and licensed clubs industries have already taken steps to reduce the likelihood of similar cases and the extent of future human exposure to ETS. The decision will undoubtedly encourage other "passive smoking" cases, although there is unlikely to be a deluge owing to the cost of such litigation and the difficulties of proving causation given the current epidemiology.

Because juries do not give reasons for their decisions, it is impossible to say how much the *Sharp* jury was influenced by epidemiological as opposed to biological, mechanistic considerations in determining causation. However, given the state of the evidence and the judge's directions to the jury, it is likely that both played a significant part.

Acknowledgement

The occupational and clinical histories were summarised from certain more comprehensive accounts by Dr G R W Davies (Wollongong), Professor C J O'Brien (Sydney), Dr J B Phillips (Sydney), Dr S Vaughan (Geelong), Dr I H Young (Sydney) which were made available in the course of proceedings

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http://www.xen.net.au/Smokescreen%20lifted%20Phil%20Edge.htm

MEDIA RELEASE

NICK XENOPHON M.L.C.

INDEPENDENT NO POKIES MEMBER

OF THE LEGISLATIVE COUNCIL

20 November 2005

Revealed: The amazing story of a gutsy 29 year old hotel worker who survived a horrific passive-smoking cancer, won his landmark case by risking everything- after refusing to be gagged by the insurer.

SMOKESCREEN LIFTED

Plea by cancer survivor, his surgeon and Australia 's leading anti-tobacco advocate for pubs to go smoke free without further delay.

In 1998 then 21 year old **Phil Edge** began working as a 'bar and gaming room attendant' at southern suburbs pub Mick O'Shea's. A non-smoker, Phil was continuously subjected to the tobacco smoke of others, especially in the pokies room were he noticed it was particularly concentrated.

By June 2001 Phil had been diagnosed with tongue cancer, with secondaries in his lymph nodes. A 12 hour operation on the 4th July 2001 involved half his tongue being removed, and radical

surgery to remove cancerous lymph nodes, followed by over 6 weeks of radiotherapy and a 2 year recovery period.

Phil's landmark case against the insurer has only recently been won, following 3 year of outright denial of his claim by SA's WorkCover Corporation. His trial before the SA Workers Compensation tribunal commenced on the 18th July 2005 , with damning evidence (against the insurer) given on the 19th July by his treating ENT surgeon. Following that evidence the insurer sought an adjournment and initially offered a lump sum to get rid of all its future liabilities to Phil, which he rejected. The insurer then offered to accept his claim on the basis that Phil **signed a confidentiality agreement**, which Phil refused, and by doing so risked losing his case by the trial proceeding.

On Friday the 7th October (the trial was due to resume the following Monday) WorkCover caved in and caved in on its demand for the confidentiality agreement. On the 10th October Auxiliary Justice Olsson made orders accepting Phil's claim, including arrears of wages and medical expenses.

Pokies venues in SA and the Casino aren't due to be smoke-free until 31st October 2007- reflecting the power of the hotel and gambling lobby and that pokies turnover and taxes are expected to fall by up to 15 per cent as a result.

No Pokies MLC Nick Xenophon, who was contacted by Mr. Edge after he won his case said:

'This young man has shown incredible courage and principle by refusing to be gagged - despite tremendous legal risks - so he can tell his story in the hope it will help others. If only politicians in SA and around the country had just half of his courage and principle and did the right thing to implement smoking bans in pokies venues and pubs without further delay.'

LEGISLATIVE COUNCIL

Thursday 24 November 2005

The PRESIDENT (Hon. R.R. Roberts) took the chair at 11.03 a.m. and read prayers.

STANDING ORDERS SUSPENSION

The Hon. P. HOLLOWAY (Minister for Industry and Trade): I move:

That standing orders be so far suspended as to enable petitions, the tabling of papers and question time to be taken into consideration at 2.15 p.m.

Motion carried.

WORKCOVER

http://www.parliament.sa.gov.au/catalog/hansard/2005/lc/wh241105.lc.htm

The Hon. NICK XENOPHON: I seek leave to make a brief explanation before asking the Minister for Aboriginal Affairs and Reconciliation, representing the Minister for Industrial Relations, questions about WorkCover, passive smoking claims and confidentiality agreements.

Leave granted.

The Hon. NICK XENOPHON: Last Sunday I had the privilege of meeting 29 year-old Phil Edge who, as a 21 year-old, began working as a bar and gaming room attendant at southern suburbs pub, Mick O'Shea's. A non-smoker, Mr Edge was continuously subjected to the tobacco smoke of others, especially in the pokies room, where he noticed that it was particularly concentrated.

By June 2001, Mr Edge had been diagnosed with cancer of the tongue, with the cancer spreading into his lymph nodes. A 12-hour operation on 4 July 2001 involved half of his tongue being removed and radical surgery to remove cancerous lymph nodes, followed by over 6½ weeks of radiotherapy and a two-year recovery period. He then brought a case against his employer through, I presume, the WorkCover Corporation. His trial went before the South Australian Workers Compensation Tribunal and commenced on 18 July 2005. Following quite damning evidence in his favour by his treating ear, nose and throat specialist, Dr Guy Rees, the insurer sought an adjournment.

Following that evidence, the insurer initially offered a lump sum to get rid of all its future liabilities for Mr Edge, which he rejected. The insurer offered to accept his claim on the basis that Mr Edge sign a confidentiality agreement. Mr Edge refused, as he wanted people to know what had happened to him and about the risks involved with passive smoking. By doing so, he risked losing his case, and costs were increased because of the delay. Eventually, on Friday 7 November (the trial was due to resume on the following Monday) WorkCover caved in on its demand for the confidentiality agreement. On 10 October, Auxiliary Justice Olsson made orders accepting Mr Edge's claim, including arrears of wages and medical expenses.

On 26 August 2002, I obtained a number of answers from the minister in relation to passive smoking. One question was, `How many WorkCover claims have been made with respect to health conditions caused by passive smoking since inception of the WorkCover scheme?' The response was as follows:

There have been 15 claims for registered employers and 10 claims for self-insured employers for passive smoking related conditions since inception of the WorkCover Scheme. The types of conditions include migraine, respiratory complaints such as asthma and bronchitis, rhinitis, sinusitis and vocal cord sensitivity. Occupations and industries involved include nurses, waiters, barpersons, welders and drivers.

My questions are:

1. How many WorkCover claims have now been made with respect to health conditions caused by passive smoking since inception of the WorkCover scheme, and how many such claims are continuing?

2. In the answer of 26 August 2002, why was no reference made to the claim lodged by Mr Edge for cancer of the tongue and resulting secondary cancers? Was there a claim lodged at that time?

3. How much has been paid or is payable in relation to such accepted claims?

4. What is the policy of the WorkCover Corporation in relation to requesting such confidentiality agreements (some would call them a `shut up' clause) in relation to passive smoking claims?

5. In what circumstances does WorkCover, either directly or through its agents, request or insist on confidentiality agreements in settlement of claims?

6. Will the minister review such arrangements when the injured worker wishes the circumstances of his or her injury to be made public?

7. Given the terrible consequences of environmental tobacco smoke, as evidenced by Mr Edge's case, what steps have been taken and what resources have been made available, through the minister's department and Safework SA, for inspectors to monitor complaints. What level of monitoring exists for environmental tobacco smoke in the workplace?

The PRESIDENT: That is an extensive raft of questions.

The Hon. CARMEL ZOLLO (Minister for Mental Health and Substance Abuse): I will refer those questions in relation to WorkCover and WorkSafe to the minister in the other place and bring back a response. The honourable member might be interested in information relating to compliance and tobacco smoke. He obviously knows that from November 2007 smoking will only be allowed in outdoor areas that meet the criteria of being at least 30 per cent unenclosed but, since smoking bans were introduced in workplaces, hotels and clubs last December, officers from the Department of Health's Environmental Surveillance Unit have conducted over 800 inspections at hotels, sports clubs, community clubs, nightclubs, wine clubs, lounge clubs, live music venues, adult entertainment, function centres, cafes and workplaces throughout metropolitan and regional South Australia.

Until 30 June the focus of these inspections was education and awareness of the new laws, and helping premises and individuals to comply. Although an educative approach is still being taken, particularly with any first-time visits, the grace period for the new laws ended on 30 June, with venues and individuals that do not comply now being subject to fines. It is anticipated that, by 31 December 2005, every hotel in South Australia will have been inspected at least once. Evening hotel inspection runs are being carried out from time to time to test compliance. The inspection run of 17 hotels on 27 October resulted in breaches being detected at four different locations, resulting in 10 expiations in total being issued for the offence of smoking in a non-smoking area under sections 46(2) and (3) of the Tobacco Products Regulation Act 1997.

Five patrons were expiated for smoking within 1 metre of a bar counter; two patrons expiated for smoking in a smoke-free foyer; and one patron expiated for smoking within 1 metre of a non-smoking gaming machine, with a penalty of $75. Two hotel proprietors were expiated for allowing smoking to occur in non-smoking areas, and the penalty there is $160. A further evening inspection run of 15 hotels on 11 November detected no offences.

On the whole, most hoteliers appear to be making a consistent, thorough and proactive effort to monitor and manage smoking within their premises. Eighteen fines of $315 have been issued pursuant to section 38A(1) of the Tobacco Products Regulation Act 1997 in the past eight months to retailers who sell cigarettes to minors by means of the department officers conducting controlled purchase operations whereby minors are engaged in an attempt to buy cigarettes. Fifteen of those expiations were issued to the person who sold the cigarettes to the minor, while the other three were issued to the proprietor of the business where the sale had occurred. As I said to the honourable member, I will refer those questions in relation to WorkCover and bring back a response for him.

Cancer Helpline 13 11 20

- Check-ups and screening
- Healthy eating and physical activity
- Cancer risks fact sheets
- Cancer registers
- Smoking and tobacco
  - Quit smoking tips
  - Resources
    - When smoke gets in your eyes
    - When smoke - Acknowledgments
    - When smoke - Introduction
    - When smoke - An overview
    - When smoke - Tobacco industry's response
    - When smoke - 1. Law relating to ETS
    - When smoke - 3. Law relating to ETS
    - When smoke - Appendix A
    - When smoke - References
    - Journal Article - Promoting tobacco to young
  - Information fact sheets
  - Smoking in movies
  - Recommendations for the Workplace
  - Useful links
  - ETS and children project
- Sun protection
- Workplace protection
- Local government protection

How you can help

- Volunteer
- Make a donation
- Fundraising Events
- Download a Banner

Keyword Sea

When Smoke Gets in Your Eyes...Nose, Throat, Lungs and Bloodstream

Legal cases on passive smoking

Australia

***Blechynden v The Commonwealth Government (Western Australia)* 1982**

- Claim: sinusitis
- Compensation: undisclosed (1982)

***Bishop v The Commonwealth of Australia* (Administrative Appeals Tribunal, A84/109, 14 1985)**

- Claim: allergy and nausea from exposure to smoke
- Compensation: $16,000

***Bishop v The Commonwealth of Australia (Department of Defence)* (Commonwealth Emp Redeployment and Retirement Appeals Tribunal. Administrative Appeals Tribunal, A85/1 March 1986)**

- Claim: allergic reaction to smoke
- Compensation: undisclosed

Note: The two Mr Bishops in these cases (Roy and Ken) are unrelated.

***Burchmore v Queen Elizabeth Hospital (South Australia)* (listed for hearing in the South Local Court, April 1986)**

- Claim: lung damage
- Compensation: settled out of court; conditions confidential but believed to involve a minimum o

Roland v Telecom Australia

- Claim: severe respiratory complaints
- Compensation: undisclosed

***Hart v Ansett Airlines of Australia* (Compensation Court of NSW, 23 September 1986)**

- Claim: nausea, headache, respiratory symptoms
- Compensation: $20,000 out of court settlement

***Victorian Secondary Teachers Association v Ministry of Education* (Workcare claim, Janu**

- Claim: severe aggravation of sinusitis and acute infection of nasal passages, throat and facial bc
- Compensation: undisclosed

***Unnamed v SA TAB* (Workcover claim, April 1991)**

- Compensation: unknown

***O'Brien v Muree Golf Club (NSW)* (workers compensation claim, Compensation Court of N 1987)**

- Claim: emphysema
- Compensation: $36,500 out of court settlement

Unnamed v Adelaide Casino

An Adelaide Casino employee has apparently been on Workcover payments since June 1988, due t caused by passive smoking at work.

Carroll v Melbourne Metropolitan Transit Authority **(Workcare claim, Victorian Accident Compensation Tribunal, July 1988)**

- Claim: lung cancer
- Compensation: $65,000 out of court settlement

Sean Carroll was a bus driver employed by the Melbourne Transit Authority. Over his 35 years of e he had been exposed to his passengers' tobacco smoke, and that of his co-workers in the tea room breaks. Towards the end of 1987 Mr Carroll developed a severe cough that was aggravated by dies and on the basis of this cough was declared unfit for work by his doctor in January, 1988. A claim f compensation was lodged.

Before his claim was heard Mr Carroll was diagnosed with small cell carcinoma of the lung, a type c that has an above average strength of association with smoking—both active and passive. When M case came to arbitration his solicitors amended the original claim to include a claim for lung cancer passive smoking. The arbitrator felt that the issue was too difficult to determine at that level, and t was referred to the Accident Compensation Tribunal for hearing. In the meantime Mr Carroll receiv compensation for his cough.

Mr Carroll had two claims, a statutory compensation claim under the *Victorian Accident Compensat* and a common law claim. For the first claim Mr Carroll had to show on the balance of probabilities disease was contracted in the course of his employment, whether at or away from the place of emp that the employment was a contributing factor. To establish the common law claim, Mr Carroll had again on the balance of probabilities, that the injury was caused by his work and that it was reasor foreseeable—which would demonstrate that his employer had been negligent in exposing him to th injury without warning or protection.

The State Insurance Office (insurers for the Melbourne Transit Authority), obviously felt that Mr Ca strong chance of succeeding, and offered to settle out of court for $65,000. Mr Carroll, unsurprising diagnosis of a possibly terminal illness, accepted.

O'Keefe v seven hotel employers **(Workcare claim, June 1991)**

- Claim: lung cancer
- Compensation: $20,000 out of court settlement

George O'Keefe died in 1987 at the age of 64, having worked as a barman in various Victorian hote 28 years. He developed lung cancer in 1984. Although he was a light smoker himself, it was argue heavy exposure to smoke in the workplace had contributed to the development of his cancer.

Voss v Victorian Government **(Workcare claim, August 1991)**

- Claim: throat cancer
- Compensation: unknown

In this case the issue was the contribution of passive smoking in the workplace to the development an active smoker.

Scholem v NSW Dept of Health (NSW District Court, Sydney, May 27, 1992)

- Claim: exacerbation of asthma; emphysema (chronic obstructive lung disease)
- Compensation: $85,000

This was a world-first jury verdict on an employer's negligence in regard to passive smoking.

Liesel Scholem worked for the NSW Department of Health between 1974 and 1986 as a psychologi community health centre counselling mental health patients. As the Department of Health's smoke workplace policy was not applied to her workplace until 1984, she was often exposed to passive sm work environment. Apart from one other worker, all the staff at the centre where she worked were were most of the patients. Initially Mrs Scholem had tolerated smoking in her own room, although asked people not to smoke while in her room. Her representations to management in favour of a sı workplace had been well known.

Mrs Scholem claimed that exposure to environmental tobacco smoke had exacerbated her asthma, previously been entirely reversible by bronchodilators but became irreversible, causing her conside

disability.

The Government Insurance Office offered to settle before the hearing for $60,000 including costs. I a board member of the Australian Consumer's Association, felt that it was important to set a legal p she refused.

On 27 May a jury in the District Court in Sydney found in her favour. The verdict covered both com negligence and a violation of the NSW *Factories, Shops and Industries Act* 1962 (the legislation wh the *Occupational Health and Safety Act*). She was awarded $85,000 in damages. When previous w compensation payments were deducted, and interest payments from a nominal date in the past ad received a total of $64,136. Her costs were awarded against the Health Department.

Unnamed v Tasmanian Government **(Tasmanian Workers' Compensation Court, No. 277 c**

- Claim:breathlessness and subsequent development of chronic obstructive airways disease

The employee claimed that her illness was caused by her being subject to ETS while employed as a domestic. Before 1989, smoking had been allowed anywhere in the hospital. She was awarded com from the date on which she became disabled.

Gill v Electricitry Trust of South Australia **(South Australian Workers' Compensation Revi No. 94-0103)**

- Claim: reduced ventilatory capacity
- Compensation: $19,981

The plaintiff, a truck driver, claimed that his substantial reduction in ventilatory capacity and perma sensitivity to cigarette smoke were attributable to working for nearly 25 years with smokers who sl truck cabin.

Unnamed v radio station 3RRR **(1994)**

- Claim: contraction of pneumonia
- Compensation: out of court settlement believed to be some thousands of dollars

The plaintiff was a Victorian woman who claimed that she contracted pneumonia as a result of atte lectures at a radio station. The settlement was a landmark, in that compensation was offered for a illness as a result of exposure to ETS in a public venue.

Beasley v P & O Cruise Lines **(NSW Local Court)**

- Claim: misleading conduct—smoke-free areas claimed in a promotional brochure not enforced o ship
- Compensation: settlement of $3500

Sharp v Stephen Guinery t/as Port Kembla Hotel & Port Kembla RSL Club [2001] NSWSC

- Claim: laryngeal cancer
- Compensation: Award of $466,048, including a settlement of $166,00 against another employer prior to the Award. Jury decision with no reasons given, although Mrs Sharp was able to show th was caused by ETS in the workplace.

The plaintiff is a bar attendant exposed to ETS. This is the first NSW Supreme Court common law d action over passive smoking.

Koliha v Coles Myer **(Victorian County Court, 1997)**

- Claim: damages for smoke exposure in a shopping centre
- Compensation: settlement of $20,000

Meeuwissen v Hilton Hotels of Australia Pty Ltd **(Human Rights and Equal Opportunity Co complaint Nos H97/50 & H97/51; 25 September 1997 and 10 March 2000)**

- Claim: discrimination under the *Disability Discrimination Act* 1992 (Cwlth)
- Compensation: $2000 and $500

This was a world-first disability discrimination claim. The principal complainant and an associated p required to leave a hotel nightclub venue following the onset of an asthma attack attributed to ETS had no policy to provide a smoke-free area. Commissioner Innes found that the failure to provide a venue constituted unlawful discrimination under the *Disability Discrimination Act* and ordered comp the sum of $2000 to the complainant and $500 to the other person.

Ultimately, no further orders were made because of pending legislation to ban smoking in public er

venues. The finding of unlawful discrimination was confirmed, however, and it was concluded that t practical way to prevent the discrimination was to declare that the respondent should no longer all the venue.

Andrea Bowles v Tien Tien Cafe Bar **(Melbourne Magistrates Court, 13 September 2000)**

- Claim: Breach of contract/agreement, breach of duty of care and occupiers liability
- Compensation: $7,000

This was a precedent-setting case involving a Melbourne restaurant diner who had suffered a debili attack as a result of exposure to environmental tobacco smoke (ETS). The complainant alleged tha restaurant had failed to enforce the no-smoking rule in the non-smoking area, failed to adequately smoking and non-smoking areas and did not adequately ventilate the premises.

This is the first case in Australia in which judgment has been passed on the rights of restaurant cus affected by ETS and the obligations of restaurants that offer non-smoking sections.

Salerno v Proprietors of Strata Plan No 42724 **(NSW Supreme Court Equity Division No 1(Windeyer J. 8 April 1997, BC 9701114)**

- Claim: That a body corporate by-law prohibiting smoking was invalid.
- Result: Claim dismissed. The by-law was held to be valid under the Strata Titles Act 1973

Myriam Cauvin v Philip Morris & Others **(NSW Supreme Court, Common Law Division No 2002)**

- Claim: That tobacco companies have engaged in misleading conduct, including over passive smo
- Result: Decision pending

Britain

Kanal v British Airways PLC **(UK County Court, Chichester)**

- Claim: breach of contract
- Compensation: settlement of £300

An aircraft passenger and family who booked non-smoking seats were exposed to smoke drift.

Bland v Stockport Metropolitan Borough Council **(UK High Court, Queens Bench Division, 12647)**

- Claim: chronic bronchitis
- Compensation: settlement of £15,000 (28 January 1993)

The plaintiff was exposed to ETS at work.

Farren v Reading Council **(UK Local Court)**

- Claim: negligence
- Compensation: £100 plus court costs and £50 loss of wages

The respondents failed to enforce a smoking ban at a music festival.

Canada

Ivo Gasson v Air Transat **(Court of Quebec, 150-32-000012-951)**

- Claim: breach of contract
- Compensation: $750 plus costs and interest

The plaintiff was exposed to ETS on an aircraft contrary to health regulations.

Italy

Maria Sposetti v Italian Ministry of Education (Judgment No. 723/1997: President Mr Pas

- Claim: lung cancer
- Compensation: benefits from a state pension ordered

The plaintiff contracted through exposure to ETS while working as a public employee.

Netherlands

Nanny Nooijen v PTT Post (Breda District Court; BMJ 2000; 320: 1227, 6 May)

- Claim: health problems, including asthma, because of an extreme sensitivity to tobacco smoke
- Outcome: employer ordered to establish a smoking ban within fourteen days, and allow smokin separate well isolated smoking areas

The action was taken to enforce the constitutional rights of citizens to protection of 'physical integr 'health' by provision of a smoke-free workplace.

Dutch Non-smokers' Association (CAN) v Local Council

- Claim: non-compliance with tobacco laws in neighbourhood centre
- Outcome: council required to make the centre smoke-free within three months (with the possibi smoking in a closed area)

Norway

Reidun Kaland Sandsted v Vesta Insurance Company (Norwegian Supreme Court, 30 Oct

- Claim: lung cancer.
- Compensation: NOK 2.4 million (equivalent US$260,000) plus court costs

Although a smoker, the plaintiff claimed that her exposure to ETS at a night club at which she work contributed to her development of cancer. The claim for compensation was made against her empl insurance company.

United States

McCarthy v State of Washington Department of Social and Health Services (Washington S Court, 759 P.2d 351, 110 Wash.2d 812)

- Claim: breach of employer's common law duty to provide a safe workplace reasonably free from smoke
- Compensation: settled for $US27,000 (1989)

Johannesen v Department of Housing Preservation and Development (New York Workers Compensation Board and New York Supreme Court, Appellant Division, 546 N.Y.S.2d 40)

- Claim: sustained bronchial asthma as a result of exposure to tobacco smoke and dust
- Compensation: awarded compensation benefits, affirmed on appeal

Kufahl v Wisconsin Bell Inc (Wisconsin Labour and Industry Review Commission)

- Claim: dismissal from employment due to cigarette smoke allergy
- Compensation: awarded $US23,400, affirmed on review

County of Fresno v Fair Employment and Housing Commission of the State of California (Court of Appeal, 226 Cal.App.3d 1541)

- Claim: failure of County Department to accommodate two workers whose lung ailments were ag cigarette smoke
- Compensation: awarded over $US70,000, reinstated on appeal and affirmed by California Supre

Broin v Phillip Morris Inc *(*Florida County Court case No. 91/49738 CA (22)

Class action by non-smoking flight attendants (and their survivors) who are suffering or have suffe diseases and disorders claimed to be caused by exposure to second hand cigarette smoke in airline

- Compensation: $US300m settlement to establish a research foundation

Julie Duncan v Northwest Airlines (pending) (US District Court)

Class action by flight attendant on behalf of past and present employees exposed to second hand s international flights.

Husain v Olympic Airways (US District Court, 28 August 2000)

- Claim: severe asthmatic reaction after exposure to ETS leading to death
- Compensation: $US700,000 awarded to survivors of deceased

MEERKIN & APEL

LAWYERS

PASSIVE SMOKING AND THE LAW

You might have problems with people smoking in your workplace, or smoke filtering in to your home from your neighbour's house. Perhaps you are an asthmatic and feel that you cannot attend certain bars and nightclubs because of the smoke.

There are possible legal remedies available to you if you are affected by passive smoking. In the workplace, employers need to consider the contract of employment and workplace legislation regulating conditions and safety. At home, smoke from your neighbour may be a nuisance, which is a breach of the common law. If nightclubs and bars allow conditions on their premises which stop asthmatics attending, that may be discriminatory and a breach of equal opportunity legislation. Below is a clear example of one of our clients bringing a successful claim against a restaurant for harm caused to her by passive smoking.

LANDMARK PASSIVE SMOKING CASE

In September 2000 Meerkin & Apel won an important case in the Magistrates' Court of Victoria. Magistrate Michael Smith handed down a landmark judgment awarding damages against a restaurant that caused a patron to suffer an asthma attack from the environmental tobacco smoke (commonly referred to as ETS or passive smoking) whilst dining at the restaurant.

Brief facts
Our client, Ms Bowles was part of a group dining at the restaurant (Tien Tien) where a friend of hers had booked a table and specified a non-smoking table. Early in the evening Ms Bowles advised the staff at Tien Tien that she suffered from asthma, but was seated adjacent to the smoking section. The division of the smoking and non-smoking sections was arbitrary and ineffective. The atmosphere became smoky and Ms Bowles asked to be moved deeper into the non-smoking section. The waiter advised that this was not possible and used instead the air-conditioning system, which was later turned off after a customer complaint.

After some time in the smoky environment, Ms Bowles suffered an asthma attack. Approximately one week later she suffered a further asthma attack and was compelled to seek medical help.

What did the Court decide?
The Court agreed with our submissions in determining that a contractual relationship existed between Ms Bowles and Tien Tien and that part of the contract required Ms Bowles to be seated in a non-smoking area, which would be safe and not harmful to her health. The Court found that there was a breach of contract by Tien Tien.

The Court also found that Tien Tien had been negligent in breaching its duty of care owed to Ms Bowles and that the possibility of someone suffering an asthma attack as a result of Environmental Tobacco Smoke was reasonably foreseeable.

Meerkin & Apel was also successful in obtaining an award of damages for Ms Bowles for the harm caused to her by the Environmental Tobacco Smoke.

Why was this a landmark decision?
As far as can be determined, the Tien Tien case was the first time that a Court in Australia (and possibly the world) had found that a person who enters onto a premises and is harmed by Environmental Tobacco Smoke can hold the occupier of the premises responsible for damages. Damages have previously been awarded for harm caused by Environmental Tobacco Smoke only in circumstances where employees, over a long period of time, had contracted a disease caused by that smoke.

Relevant areas of smoke-related law
The Tien Tien case was decided on the grounds of contract law, negligence and the Wrongs Act (Victoria). However there are many other areas of law which may be applicable in regard

to Environmental Tobacco Smoke such as:

- The common law tort of nuisance (where smoke infiltrates from one premises to another);
- The Trade Practices Act (Commonwealth);
- The Fair Trading Act (Victoria) and similar legislation in other States;
- Tobacco legislation such as the Victorian Tobacco (Amendment) Act of 2000, the Tobacco (Further Amendment) Act 2001 and the Tobacco (Miscellaneous Amendment) Act 2002;
- Discrimination laws such as the Equal Opportunity Act (Victoria) and equivalent legislation in other States and the Commonwealth (in regard to asthmatics and other persons with disabilities);
- Statutory duties, such as section 56(2) of the Labour and Industry Act 1958 (relating to factories and the ventilation required);
- Occupational Health and Safety legislation in various States;
- Workplace legislation and regulations, workplace Awards and other industrial relations matters, all of which affect the terms and conditions of contracts between employers and employees in Australia.

Conclusion
Smoke-related law and the rights of workers and other individuals being exposed to Environmental Tobacco Smoke is a complex and ever-changing area of the law, as indicated by this landmark case. The above summary is a brief summary only and is not intended to be exhaustive.

Anyone who may require legal assistance, advice or has further enquiries in relation to the issues raised in this document should contact David Pringle, Partner, Meerkin & Apel Solicitors by email: dp@meerkinapel.com.au or telephone +613 9867 4911.

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