

## Clubs Legal Update: In Brief September 2011

### Smoke Free Environment Act and Regulation: Blacktown Workers' Club Decision

On 6 September 2011, the New South Wales Court of Appeal handed down its judgment on whether Blacktown Workers' Club had breached the *Smoke Free Environment Act 2000 (Act)* and *Smoke Free Regulation 2007 (Regulation)*.

The case was prosecuted against the Club by the Department of Health. The Club was represented by Thomsons Lawyers.

The Club was successful and the Court of Appeal reinstated the Magistrate's original decision that the Club's smoking terrace did not breach the Act or Regulation.

The Court of Appeal also awarded costs against the Department with respect to both appeals.

#### Purpose of the Act and key question

The purpose of the Act is to promote public health by reducing exposure to tobacco and other smoke in enclosed public places.

The key question in the case was whether an area of the Club known as the "Western Terrace" was substantially enclosed as defined in Guidelines contained in the Regulation.

If the Western Terrace was determined to be substantially enclosed, then the Club committed an offence of permitting patrons to smoke in the area. If the Western Terrace was not completely or substantially enclosed, the offence was not committed.

#### Chronology of the case

The case was initially prosecuted in Blacktown Local Court in 2008. The Court dismissed the charge on the ground that the Western Terrace was not substantially enclosed.

The Department of Health appealed the decision of Blacktown Local Court to the Supreme Court of New South Wales. The Supreme Court in December 2009 upheld the Department of Health's appeal, finding that the Western Terrace was an enclosed public space in which smoking was prohibited mainly on the ground that the mesh screens were "walls" which enclosed the area.

The Club appealed the Supreme Court's decision to the Court of Appeal. The Court of Appeal upheld the Club's appeal and set aside the Supreme Court's decision.

#### Guidelines contained in the Regulation

The Guidelines contained in the Regulation set out a formula for determining whether a public place is substantially enclosed.

Briefly, a public place is considered to be substantially enclosed if the total area of the ceiling and wall surfaces (**total actual enclosed area**) of the public place is more than 75 percent of its total notional ceiling and wall area.

The "**total notional ceiling and wall area**" is the sum of:

- (a) what would be the total area of the wall surfaces if:
  - (i) the walls were continuous (any existing gap in the walls being filled by a surface of the minimum area required for that purpose), and
  - (ii) the walls were of a uniform height equal to the lowest height of the ceiling, and

In the Blacktown Workers' Club Decision, the Court of Appeal upheld the Club's appeal.

- (b) what would be the floor area of the space within the walls, if the walls were continuous as referred to in paragraph (a).

Among the things which are to be included as part of the total actual enclosed area:

- (a) any gap in a wall or ceiling that does not open directly to the outside,
- (b) any door, window or moveable structure that is, or is part of, a ceiling or wall, regardless of whether the door, window or structure is open (other than the area of any locked open door or window).

A **gap in a wall** or ceiling that opens directly to the outside (other than a gap caused by a door, window or moveable structure being open) is not to be included as part of the total actual enclosed area.

A gap, door, window or moveable structure required to be included as part of the total actual enclosed area is to be included as if the wall or ceiling were continuous and the gap, or the space occupied by the door, window or moveable structure, were filled by a surface of the minimum area required for that purpose.

**“Wall”** is defined in the Regulation to include any structure or device (whether fixed or moveable) that *prevents or impedes lateral airflow*.

Ceilings were not relevant and therefore not considered in the case. However, **“ceiling”** is defined in the Regulation to include a roof or any structure or device (whether fixed or moveable) that prevents or impedes upward airflow.

## The Western Terrace

The Western Terrace is an irregular oblong shape with internal walls of the building on three sides and five sides being covered with mesh screens. The mesh screens open to the entrance of a loading dock and to a partially covered walkway. Both these areas are within the footprint of the building.

The total actual enclosed area of the Western Terrace will be less than 75 percent of its total notional ceiling and wall area – and therefore the Western Terrace will not be substantially enclosed – if the meshed screens are excluded from the consideration of total actual enclosed area.

Conversely if the meshed screens are included as part of the total actual enclosed area, then the total actual enclosed area will exceed 75 percent of the total notional ceiling and wall area and the area will be deemed to be substantially enclosed.

## What the Court of Appeal decision means for Clubs

The following important findings can be drawn from the Court of Appeal decision:

- In determining whether a structure is a wall within the meaning of the Act, the overall purpose of the Act is to be taken into account. That purpose is to prevent smoking in public places unless the public place qualifies as not being an enclosed public place.

Some important findings for Clubs can be drawn from the Court of Appeal decision.

- Mesh screens or other structures which do not impede lateral airflow are not considered to be walls. The Magistrate at first instance had held, that, ‘It is clearly the evidence (of the expert) that the screens do not obstruct or hinder airflow and whilst any solid however minor in an airstream could be said to be an ‘obstacle’ it would need to have some discernible diminishing impact on the airflow before it could be said to ‘impede’ that airflow. No such impact is demonstrated in the present case.’ Therefore the mesh screens were held not to be walls.
- The definition of ‘wall’ in the Regulation, as including structures that do not prevent or impede lateral airflow is an exhaustive definition. It was not open to the Supreme Court to also consider the general meaning of a ‘wall’. The meaning of ‘wall’ under the Act and Regulation is determined by the purpose of the Act.
- The Court of Appeal also held that not only were the mesh screens not walls, they were not ‘gaps in a wall’ as had been argued by the Department of Health. The Court said, ‘The absence of a wall on one side would be just that and not a gap in a wall’.
- If the mesh had been held to be ‘gaps in a wall’ then the Regulation also required them to ‘open to the outside’, otherwise they would be included in the calculation of the enclosed public space. The Court held that in the Club’s circumstances, the mesh screens did ‘open to the outside’, even though they opened across a driveway and walkway, that were within the Clubhouse footprint.

- Although ceilings were not relevant and not considered in the Blacktown case, in determining whether a ceiling structure conforms with the Guidelines contained in the Regulation, the purpose of the Act should be taken into account in determining that issue. In the absence of any other case law, the question of whether or not there is a ceiling or a gap in a ceiling which opens directly to the outside may be subject to the same considerations as above.

Role of the Guidelines in determining what is an enclosed public space

Although the Club has been successful in defending the prosecution of its smoking terrace as not breaching the Act or Guidelines, the Court of Appeal decision has left unclear whether the Guidelines are mandatory in determining what is an enclosed public space.

The Club and the Department of Health in all the legal hearings have regarded the Guidelines as mandatory – described as being ‘prescriptive, exhaustive and valid’.

If your Club has a public place in which smoking is permitted but you are unsure as to whether it complies, please contact our team for advice.

The Magistrate at first instance held that the Guidelines were a guide and stated that a party that complied with the Guidelines would definitely not commit an offence, however non-compliance would not definitely found a conviction.

The Supreme Court held that the Guidelines should be treated as mandatory and failure to comply with the Guidelines will necessarily found a conviction.

The primary Judge in the Court of Appeal decision noted that the parties in the Blacktown Workers case accepted the Guidelines were prescriptive and exhaustive, so the case was determined on that basis.

The other two judges in the Court of Appeal decision left open whether the Guidelines were mandatory, however this would not be determined in the Blacktown Workers case.

Therefore the status of the Guidelines under the Regulation is a very important issue needing certainty, and such certainty can probably only be conclusively resolved by a legislative amendment that clearly states that the Guidelines are mandatory.

## Further information

If your Club has a public place in which smoking is permitted but you are unsure as to whether it complies with the guidelines under the Regulation, please contact our team for advice.

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