

Ryan Commercial
Lawyers

Level 3, 353
Flinders Lane
Melbourne VIC 3000
Phone: 96289600
Fax: 96141299

Website:
www.ryancommlaw.com.au

Paul Ryan
Principal
Ph: 96289600
Email:
pryan@ryancommlaw.com.au

Roger Johnson
Special Counsel
Phone: 96289600
Email:
rjohnson@ryancommlaw.com.au



ISSUE NO. 1

New Smoking Laws and the Consequences for your Licensed Business

On July 1 2007 amendments to the Tobacco Act 1987 (Tobacco Act) come into effect requiring all enclosed areas, and areas that have a roof and the surface area of the walls exceeds 75% of the total wall space ("Enclosed Premises") to be smoke free.

Enclosed Premises include an area, room or premises that is substantially enclosed by a roof and walls, regardless of whether the roof or walls which are permanent or temporary or open or closed. Examples of outdoor or drinking areas which are not Enclosed Premises include: balcony or veranda, a courtyard, a rooftop, or a street or footpath.

New Licensed Premises

In relation to applications to have premises licensed as "licensed premises" under the Liquor Control Reform

Act 1998 ("Liquor Act"), VCAT has recently ruled that unless a 'suitably designed and located Outdoor Area' for smoking can be provided



"on site", the use of the premises as licensed premises may not be permitted (*Ryan v Port Phillip City Council [2006] VCAT 1923*) (Ryan).

Ryan requires that the use of an outdoor dining or drinking area for smoking ("Smoking Area/s") must not

be adverse to the amenity of the surrounding area. The relocating of smokers "off site" could well create noise and behavioural issues.

In the light of the decision in *Ryan*, prior to making an application to licence premises where it may be difficult to provide a Smoking Area, it is essential that town planning and legal advice is obtained.

Existing Licensed Premises

In *Maisano v Port Phillip CC [2007] VCAT 62*, VCAT referring to *Ryan* stated "We consider that a similar approach (to that of new applications) would also apply to existing uses...although this may not always be possible.

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Good Friday and ANZAC Day Trading

With Good Friday (6th April 2007) and ANZAC Day (25th April 2007) fast approaching, it is important for you to be familiar with the entitlements to supply liquor on these days.

If the "trading hours" condition on your licence permits trading past midnight (and does not have a condition excluding trading to the mornings of Good Friday and ANZAC Day) the supply of liquor must cease as on

any other Saturday or Wednesday morning.

Where your licence permits trading past midnight (and does have a condition that excludes trading on Good Friday and ANZAC Day) you must close at midnight on the preceding days.

"Ordinary Trading Hours" for opening on ANZAC day and Good Friday is at 12 noon (unless otherwise stated on your licence).

Temporary permission to open prior to 12 noon may be approved where early trading relates to the observance of ANZAC day.





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As yet there is no indication as to whether or not a Smoking Area must be provided “on site”.

VCAT concedes that additional costs will be necessarily incurred by an Applicant in complying with the new laws by providing a Smoking Area “on site”. For example the cost of providing an “on site” Smoking Area at Young and Jacksons Hotel is estimated to exceed \$500,000.

In the VCAT decision *Whittaker v Port Phillip CC* [2007] VCAT 413 planning permission was sought to create an open area on the first floor of an existing licensed premises to accommodate smokers “on site”. The application for a planning permit was refused by the council on the “amenity grounds” that were of concern in Ryan.

VCAT considered the activities that would be generated as a result of the alteration to the use of part of the premises as a Smoking Area was not unreasonable. It was relevant to VCAT that the Applicant’s business was relatively small and did not operate as a late night venue.

**The decision in Whittaker is summarised in full on Page 3.



Penalties

The penalties for allowing smoking in an Enclosed

<u>Offence</u>	<u>Fine</u>	<u>Max Penalty</u>
Person smoking in an Enclosed Area	1 Penalty Unit	5 Penalty Units
Person in charge of Licensed Premises when Person is Smoking	1 Penalty Unit	5 Penalty Units
Person in charge of Licensed Premises where acceptable No smoking signs are not displayed.	1 Penalty Unit	5 Penalty Units

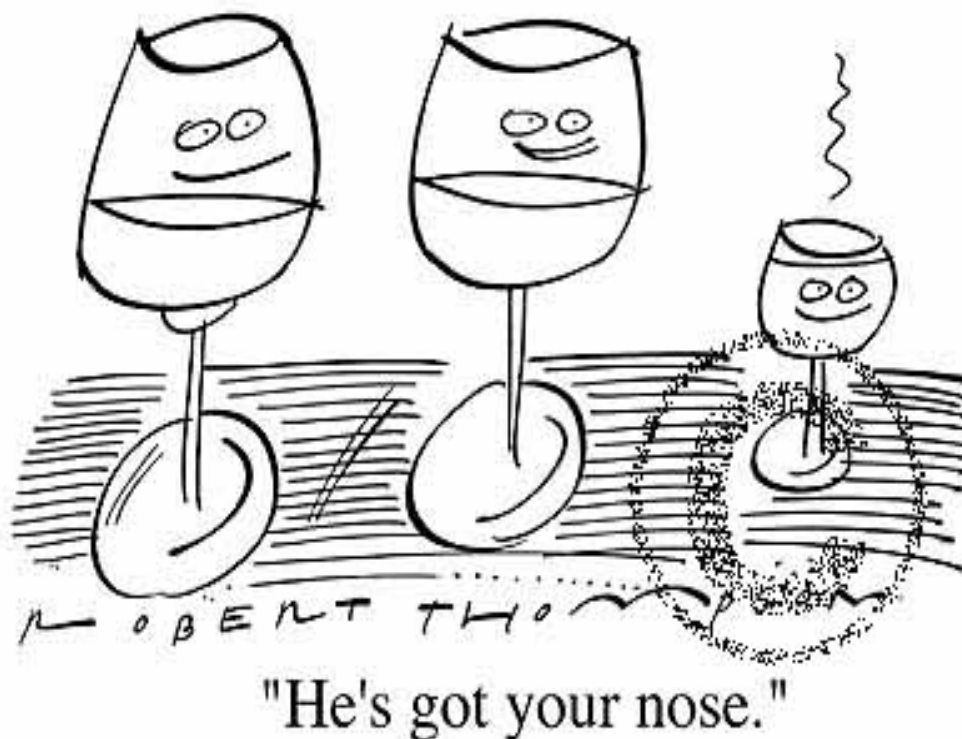
Area from 1 July 2007 are:

**One penalty unit for 2006/07 is \$107.43.

It is a defence to a charge of allowing smoking in Enclosed Premises, if:

- Ashtrays, matches, lighter or any other thing designed to facilitate smoking were not provided
- The Licensee was not aware, and could not reasonably be expected to have been aware that smoking was occurring
- The Licensee requested the smoker to stop smoking and informed that person of the penalties that apply if the request is ignored.

For Further information go to
www.health.vic.gov.au/tobaccoreforms



Summary of VCAT Decision: Whittaker v Port Phillip Council [2007] VCAT 413

Background

The Applicant sought a planning permit to alter the use of the first floor at the existing café/bar known as "The King of Tonga", to provide a small enclosed seating area, and an open deck area where smokers could be accommodated after the changes to the tobacco laws from 1 July 2007.

The application was refused by the Council on grounds that include:

- The proposed use is contrary to various policies and orderly planning.
- The amenity of the area would be detrimentally affected by the escape of noise and cigarette smoke from the deck.

The Applicant appealed to VCAT requesting the Council's decision be set aside and a permit granted.

Key Issue

Whether the proposed use would impact unreasonably on the amenity of adjoining properties due to noise and smoke resulting from the proposed change in the use of the Premises.

Decision

VCAT ordered the Council to grant the permit as:

- Nothing was presented to show how and why the generated activities (noise and smoke) on the deck would be unreasonable.
- With the erection of a suitable barrier to be undertaken the level of noise escaping from the deck would not be unreasonable. While this 'reasonable noise level' is difficult to determine, it was decided that with the guidance of an acoustic consultant, it could be readily achieved.
- The current operation is relatively modest, the maximum number of patrons is 18 and the subject premises is not a late night venue. The potential for substantial noise problems resulting from the proposed use is therefore limited.
- Smoke entering the adjacent properties is not relevant due to:
 - the small number of people that can be accommodated on the deck
 - the buffer provided by the barrier to be constructed on the deck
 - the proximity of the deck to windows in adjacent properties.



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Level 3, 353 Flinders Lane
Melbourne Vic 3000
PO BOX 530
Collins Street West
Melbourne 8007
Phone: 96289600
Fax: 96141299
E-mail: pryan@ryancommlaw.com.au

A BOUTIQUE FIRM DELIVERING BIG FIRM LEGAL SOLUTIONS

Ryan Commercial Lawyers was established in February 2005. Ryan Commercial Lawyers focus and commitment is in and to liquor licensing, property, commercial and sports law, and the tourism and hospitality industries. Our firm has a strong and growing client base in these areas and it is our goal to further develop these areas of the firm.

We provide expert legal services in a personalized, efficient and cost effective manner. The consideration of the commercial realities for our client's business are always of paramount importance to our team at Ryan Commercial Lawyers.



'Sometimes I think, why am I here?
Whats the point?'