

## 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 and therefore treated differently include: balcony or veranda, a courtyard, a rooftop, or a street or footpath. The affect of the new laws on these outdoor or drinking areas is that smoking will not be permitted if there is more than 75% of the wall area covered.

### 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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## Infringement Notices

Most Licensees will be aware of the power of the Victoria Police to issue Infringement Notices for breach of a Licensees Liquor Licence or the Liquor Control Reform Act 1998 ("the Act").

It is imperative the Infringement Notices be treated seriously and that, where appropriate, the Notice is defended.

Whilst the penalty imposed by an Infringement Notice may appear minimal, the consequence of paying the penalty is

the Licensee has pleaded guilty to the alleged breach.

A guilty plea on one or more Infringement Notice can have ramifications for the Licensee, the Directors of a Licensee Company and for the Liquor Licence where a history or record of breaches can be established by the Victoria Police.

As you are aware, the Victoria Police are able to take proceedings under the Act for breaches of a Liquor Li-

cence or the Act and these guilty pleas would become relevant in any such action.

Ryan Commercial Lawyers has extensive experience in dealing with disciplinary proceedings by the Victoria Police, Infringement Notices and Liquor Licensing generally and would be happy to assist you further if required.



Paul Ryan  
Principal  
Ph: 96289600  
Email:  
[pryan@ryancommlaw.com.au](mailto:pryan@ryancommlaw.com.au)

Roger Johnson  
Special Counsel  
Phone: 96289600  
Email:  
[rjohnson@ryancommlaw.com.au](mailto:rjohnson@ryancommlaw.com.au)



## New Smoking Laws Continue from Page 1

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.

### Enforcement

It is understood Local Councils will undertake the majority of the enforcement of these new laws. Victoria Police, authorised transport officers and Work-Safe Victoria will also have roles in enforcing the laws.

It is important to note that all authorities have been instructed to closely follow the recent decisions made by VCAT.



Consequently, a new or current Licensee must make themselves aware of their premises’ situation regarding the implementation and enforcement of the new smoking laws under the Tobacco Act.

### Penalties

The penalties for allowing smoking in an Enclosed Area from 1 July 2007 are:

<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

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

It may be a defence to a charge of allowing smoking in Enclosed Premises, if the person in charge of the Premises can prove that ashtrays, matches, lighter or any other thing designed to facilitate smoking were not provided and:

- The Licensee was not aware, and could not reasonably be expected to have been aware that smoking was occurring; or
- 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](http://www.health.vic.gov.au/tobaccoreforms)**

## Where There's A Will There's A Plan

To even consider making a will is something which makes many people feel uncomfortable and inevitably it is left for another day. However the importance of making a will to ensure your estate is divided and distributed in accordance with your wishes and to your families and friends who will be left to sort out your affairs if there is no will should not be underestimated.

Dying without leaving a valid will, especially if you have assets or structures such as trusts or particular wishes for distribution, can cause complications and added heartache for your family. Most importantly, if you die without leaving a will (known as being intestate) you will have lost the chance to have your assets distributed according to your wishes. In these circumstances, your property will be distributed according to a set formula applying in your state.

By not leaving a valid will, the deceased leaves the potential for a rift in their family and may create unnecessary capital gains tax and/or stamp duty liabilities. The process is much more straightforward, and less stressful for your family and friends, if you make the effort, take the time and leave a valid will.



A will appoints a personal representative(s) known as an executor and trustee or personal representative, who is responsible for carrying out your final instructions. The personal representative might be a friend or relative, a private trustee company or a professional such as a lawyer or an accountant. Their responsibilities cannot be taken lightly, since they are personally liable for the administration of the estate and the decisions made.

Among other things, the personal representative may have to arrange the funeral, locate and examine the will, determine debts and tax liabilities, manage estate assets and establish lawful beneficiaries. This is obviously an important role with onerous responsibilities. You should ensure you communicate with a potential personal representative to ensure they are capable and willing to take on the role.

Making a will is a vital part of ensuring your assets are dealt with in accordance with your wishes and ensuring any potential problems are avoided through the uncertainty created by the failure to make a will.

A solicitor can advise on drafting a will and estate planning, while accountants and financial planners will be able to help with tax advice and asset protection.

**Should you wish to make a will or discuss estate planning generally please contact Paul Ryan at Ryan Commercial Lawyers on: (03) 9628 9600 or email on [pryan@ryancommlaw.com.au](mailto:pryan@ryancommlaw.com.au)**

## Are you Aware?

Every Licensee and Nominee of a Licensed Premises should be aware of their obligations and responsibilities under the *Liquor Control Reform Act 1998*. Those of particular note include:

- A Licensee must not supply liquor to a person in a 'state of intoxication'. In Victoria the definition of a state of intoxication is if a person's speech, balance, coordination or behaviour is noticeably affected and there are reasonable grounds for believing that this is the result of the consumption of liquor. (Section 108(c))
- Licensee must not permit drunken or disorderly persons to be on the licensed premises. (Section 108(e))
- Licensee must not supply liquor to minors. (Section 119)
- Refreshments must be made available upon request at any time liquor is supplied. (Section 99).
- A copy of the licence must be displayed in a conspicuous place on the licensed premises which invites public attention to the licence. (Section 101).
- A copy of the plans must be kept on the licensed premises at all times. This copy must be produced for inspection if requested by the police. (Section 101B)
- A Licensee who sells liquor outside the trading hours authorised by the licence is guilty of selling liquor without a licence. (Section 107).
- A Licensee must not permit a minor to supply liquor on the licensed premises. (Section 122)
- The Licensee shall not cause or permit undue detriment to the amenity of the area. The licensee must limit noise and negative patron behaviour during the trading hours and immediately afterwards.



## Ryan Commercial Lawyers

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](mailto:pryan@ryancommlaw.com.au)

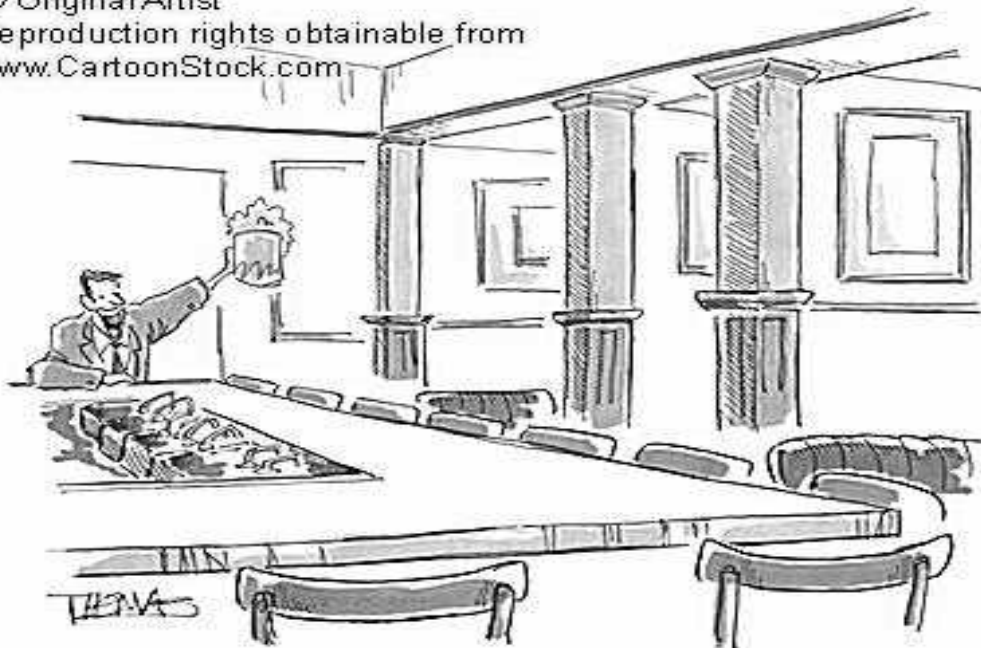
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Ryan Commercial Lawyers was established in February 2005. Ryan Commercial Lawyers focus and commitment is in and to liquor licensing, property, commercial and sports law, and the tourism and hospitality industries. Our firm has a strong and growing 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.

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*"Drinks are on me!"*

