

## Addisons FocusPapers

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### **Smoking Ban in NSW – What does it mean in respect of Outdoor Areas for Pubs, Clubs and Other Gambling Venues?**

#### **Overview**

ClubsNSW commenced proceedings in the NSW Supreme Court<sup>1</sup> in a bid to obtain certainty on whether the outdoor area of a club was an area where club patrons could smoke legally.

This action was brought following the issue by the NSW Department of Health of warning letters to registered clubs relating to the design of their outdoor areas.

The Court was required to determine which parts of the outdoor area constituted an “outside area” for the purposes of the legislation (where patrons could smoke). ClubsNSW maintained that the legislation applied to the entire outdoor area, which comprised both covered and uncovered sections. In contrast, the Health Department considered that the definition applied only to the uncovered section of the outdoor area.

Any club in breach of the smoking restriction in the legislation is subject to a penalty of \$5,500 for each person smoking in the area at the time. Members of the public who smoke in a non-smoking area are also subject to a \$550 fine.

This decision is of considerable relevance to the industry, as registered clubs invested more than \$422 million between 2006-07 in constructing outdoor areas in anticipation of the indoor smoking bans which commenced in July 2007.

#### **Background**

The *Smoke-free Environment Act 2000* (“the Act”) was introduced in NSW to promote public health by reducing exposure to tobacco and other smoke in enclosed public places.

The effect of the Act is to prohibit all pubs and clubs from having any indoor smoking areas. However, to counter the restriction contained in the legislation, clubs and pubs have spent in excess of \$750 million dollars to provide facilities for their smoking patrons. For example, Dubbo RSL Club spent \$4 million in renovations to establish an outdoor area where patrons could smoke while playing a wide range of poker machines.

In this case, the plaintiffs sought declarations and other relief relating to the status of two areas of the Dubbo RSL Club. These areas were referred to as:

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- (a) “outdoor gaming terrace”; and
- (b) “TAB outdoor area”.

The “outdoor gaming terrace” comprised two areas being:

- an area covered by a roof in which gaming machines and other facilities were provided; and
- an area beyond the roof which comprised an open terrace area.

The covered area comprised approximately 75 square metres, while the open area was approximately 84 square metres.

The “TAB outdoor area” comprised:

- an area covered by a roof in which there were recreational facilities including television screens and other equipment to facilitate betting; and
- an area beyond the roofed area which comprised an open terrace.

The area covered by the roof comprised approximately 125 square metres, while the open area beyond the roof was approximately 75 square metres.

In both cases, the roofed area which had been constructed housed flowed seamlessly from the enclosed areas of the Club. Both the gaming facilities in the “outdoor gaming terrace” and the TAB related facilities in the “TAB outdoor area” were located under cover. Each of those areas was configured as a large room with folding doors which could be secured back to the walls leaving unimpeded access to the uncovered area. The floor covering had also been made continuous from within the enclosed area to the outside area.

## Legislation

“Public place” is defined to mean:

*“A place ... that the public, or a section of the public, is entitled to use or that is open to, or is being used by, the public or a section of the public...”*

“Enclosed” is defined as follows:

*“In relation to a public place, means having a ceiling or roof and, except for doors and passageways, completely or substantially enclosed, whether permanently or temporarily.”*

Section 7 of the Act prohibits a person from smoking in a “smoke-free area”. Section 8 extends this obligation to owners of the relevant premises.

“Smoke-free area” means any enclosed public place (s 6(1)) while a “smoke-free area” includes “any place, or part of a place”, (e.g. part of any club premises), that is an enclosed public place. The name by which the particular place is known is not relevant. In other words, a Club’s identification of an area as an “outdoor area” is not relevant in considering its classification under the Act.

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Clause 6(2) of the Regulations gives guidance in determining whether places are enclosed. It provides:

*“A public place shall be deemed to be substantially enclosed if the total area of the ceiling and wall surfaces (the total actual enclosed area) of the public place is more than 75 per cent of its total notional ceiling and wall area.”*

## **Trial**

The key issue to be resolved was whether smoking was allowed in some covered areas of premises which adjoin uncovered, but walled, areas of those premises.

In accordance with section 6(2) of the Act, Justice McClellan found that each of the disputed areas was a public place. McClellan J then went on to consider how the disputed areas should be considered for the purposes of the Act.

The plaintiffs submitted that the whole of each of the disputed areas constituted a single public place.

In relation to the “outdoor gaming terrace area”, the plaintiffs submitted that there were five considerations which suggested it was a single public place:

- (a) the existence of continuous walls along the covered and uncovered portions;
- (b) the whole area has a significant uniformity of purpose, i.e. an area for drinking and playing gaming machines;
- (c) the area had no internal obstacles or barriers to prevent movement;
- (d) the whole area was a single designated place in which patrons may smoke while playing gaming machines or drinking; and
- (e) the whole terrace area appeared to be a single place.

McClellan J rejected the plaintiffs’ submission on the basis that the area did not have uniformity of purpose. It was clear that the area comprised two distinct spaces, being gaming facilities which were confined to the covered area, and the uncovered area which could only be utilised as an outdoor area for socialising.

In relation to the “TAB outdoor area”, the plaintiffs made similar submissions. Justice McClellan likewise found that the area comprised two places, namely:

- (a) a covered area for viewing races on television, playing gaming machines, and for dancing; and
- (b) an uncovered area that was used primarily for drinking and socializing.

Justice McClellan then considered whether the identified areas could be considered to be “enclosed”.

McClellan J agreed with the submission by the State of New South Wales that only areas of a building with a ceiling or roof could be places which are “completely or substantially enclosed.” As such, places without a roof could never be enclosed places.

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In applying the guidelines in clause 6 of the Regulations to determine whether a public place is “substantially enclosed”, Justice McClellan held it was only necessary to undertake the calculation if the relevant area were enclosed, (i.e. by a ceiling or roof). As a result, he held that he did not need to consider how the uncovered areas should be treated.

McClellan J ultimately held that, within the disputed areas, there were two separate covered areas in the Club which were subject to smoking restrictions, namely:

- the covered section of the “outdoor gaming terrace”; and
- the covered section of the “TAB outdoor area”.

The existence of walls for the uncovered areas did not change the status of the adjacent covered areas.

For these reasons, Justice McClellan dismissed the plaintiffs’ claim with costs, and made the following orders:

- A declaration that the internal roofed area of the Outdoor Gaming Terrace is an “enclosed public place” for the purpose of the definition of “smoke-free area” in s 6 of the Smoke-free Environment Act 2000.
- A declaration that the roofed area of the TAB Outdoor Area of the first plaintiff’s premises is an “enclosed public space” for the purpose of the definition of “smoke-free area” in s6 of the *Smoke-free Environment Act 2000*.

## **What’s next?**

Clubs NSW has filed a notice of intention to appeal the decision. As the industry has spent \$450 million in outdoor smoking renovations, there is an incentive to obtain clarification of the issue from a higher court. However, we are not aware whether a final decision relating to the lodgement of the appeal has been made.

## **For more information please contact:**

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*The assistance of Kelly Tomasich, paralegal and Fiona Smith, paralegal in writing this article is appreciated.*

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<sup>1</sup> Dubbo RSL Memorial Club Limited & The Registered Clubs Association of NSW v Steppat & Ors [2008] NSWSC 965 (19 September 2008)