

# When smoke gets in your eyes...

nose, throat  
lungs and  
bloodstream

**A guide to passive smoking and the law in NSW**



## Acknowledgments

Funding for the first edition of this guide was provided by the Health Promotion Branch of the NSW Health Department and is gratefully acknowledged.

## Key authors

Neil Francey, barrister-at-law, Wentworth Chambers, Sydney  
Greg Soulos, Project Coordinator, The Cancer Council New South Wales

## Key contributors

This guide was prepared with the assistance of the following people, whose contributions are gratefully acknowledged:

Mark Turner, Solicitor, Jones Staff & Co, Sydney;  
Brian Williamson, Partner, Gadens Ridgeway, Sydney;  
Professor Simon Chapman, Department of Community Medicine, University of Sydney; Ann Purcell, Australian Plaintiff Lawyers Association (APLA); Marguerite Schwager, Project Coordinator, The Cancer Council New South Wales.

Valuable comments were received from Peter Harley, Team Manager, Country South, WorkCover NSW; Rod Weaver, barrister-at-law; Jeanie McKenzie, Manager, Cancer Prevention Unit, The Cancer Council New South Wales; Anne Jones, Executive Director, ASH Australia; Claire Ferguson, Project Coordinator, Cancer Prevention Unit, The Cancer Council New South Wales.

Cartoons: Ron Tandberg  
Editor: Rosemary Barry  
Design: Nell Smith  
Cover photo: photolibrary.com

ISBN 1 86507 020 3

© The Cancer Council New South Wales, February 2001

This publication is intended as a guide only and should not be relied upon as a definitive or complete statement of the relevant laws or scientific evidence.

For more details or specific advice or information please refer to the primary publications or seek independent legal or medical advice.



153 Dowling Street  
Woolloomooloo 2011  
PO Box 572  
Kings Cross NSW 1340  
Tel: (02) 9334 1900  
Fax: (02) 9326 9328

**Introduction 5**

**SECTION 1: An overview 9**

What are environmental tobacco smoke and passive smoking?	11
The emergence of scientific evidence	11
Community attitudes to passive smoking and smoking restrictions	12
Litigation and passive smoking	14
The growth of smoking restrictions	14
The tobacco industry's reaction	15

**SECTION 2: The health effects of environmental tobacco smoke 17**

Overview of evidence on the major health effects of ETS exposure	19
Cardiovascular disease	19
Lung cancer	21
Stroke	22
Breast cancer	22
Respiratory health effects in adults	22
Respiratory health effects in children	24
ETS and pregnancy	25
Otitis media with effusion (glue ear) in children	25

**SECTION 3: The tobacco industry's response** 27

The domestic conspiracy	29
The international conspiracy	29
The industry's internal knowledge	30
The industry's external 'message'	31
Conclusion	33

**SECTION 4: The law relating to environmental tobacco smoke** 35

Common law	37
Workers compensation	42
Other civil remedies	44
Industrial safety laws	46
Inclosed lands	49
NSW legislation dealing with ETS	50
Commonwealth legislation dealing with ETS	53

**APPENDIX A: Legal cases on passive smoking** 55

**APPENDIX B: Where to obtain further information** 65

**APPENDIX C: Key publications** 71

**GLOSSARY** 74

**REFERENCES** 75

## Introduction



Concern over the harmful health effects of environmental tobacco smoke (ETS) began to emerge in the 1970s. In Australia, this concern culminated in the National Health and Medical Research Council (NHMRC) report *Effects of Passive Smoking on Health* (June 1986).

A further NHMRC publication, *The Health Effects of Passive Smoking – A Scientific Information Paper*, was released in 1997.

The 1986 report found that illnesses associated with passive smoking included:

- lung cancer
- respiratory disease in children
- attacks of asthma.

By 1997, further research had identified the following additional health effects:

- coronary heart disease
- asthma in children
- sudden infant death syndrome (SIDS)
- otitis media with effusion (glue ear) in children.

In the meantime, passive smoking had become the subject of increasing legal action.

- On 7 February 1991 Justice Morling, then of the Federal Court of Australia, handed down his judgment in the landmark case of *Australian Federation of Consumer Organisations v Tobacco Institute of Australia* 27 FCR 149, in which tobacco industry advertisements disputing the harmful effects of passive smoking were found to be misleading or deceptive.
- Employees have brought a number of successful actions for compensation for harm caused by ETS in the workplace. These cases include *Carroll v Melbourne Metropolitan Transit Authority* (settled out of court) and *Scholem v NSW Department of Health* (jury verdict). Cases have also been brought against airlines, cruise ships, nightclubs, restaurants and clubs.
- Legislation has been passed in a number of Australian states to limit ETS in enclosed public places.

These developments have occurred against a background in which the tobacco industry—both in Australia and overseas—has engaged in a deliberate campaign of disinformation over the harmful effects and social significance of passive smoking.

The Cancer Council New South Wales has developed this booklet to inform legal and medical professionals, businesses, trade unions, employees and the general public about the legal implications of passive smoking. While the focus is on ETS in the workplace, the booklet is a useful resource for people in all community settings.

## Abbreviations

AC	Appeal cases
AFCO	Australian Federation of Consumer Organisations
AHA	Australian Hotels Association
AR	Arbitration Reports (NSW)
ATPR	Australian Trade Practices Report
CA	Court of Appeal
CCMS	Compensation Court Monthly Summaries
CLR	Commonwealth Law Reports
CO	carbon monoxide
Cwlth	Commonwealth
ETS	environmental tobacco smoke
FCR	Federal Court Reports
ICOSI	International Committee on Smoking Issues
IR	Industrial Reports
LRI	lower respiratory illness
NHMRC	National Health and Medical Research Council
OHS	occupational health and safety
SIDS	sudden infant death syndrome
SR (NSW)	State Reports (NSW)
TIA	Tobacco Institute of Australia
USEPA	United States Environmental Protection Agency
WHO	World Health Organization