A. KEY ISSUES

A.1 Legislative Developments

1. Changes to tobacco-related legislation during 2000-01 in Queensland, New South Wales, Victoria and Tasmania bring these States into closer alignment with other jurisdictions (ACT, SA and WA) that have previously enacted and implemented legislation to prevent exposure to ETS in enclosed public places and workplaces. Much greater national consistency on ETS laws now exists. The Northern Territory does not have ETS laws for enclosed public places and workplaces but is considering reviewing its legislation.

2. All Australian jurisdictions, except for NT, now have ETS legislation in place banning workplace smoking except in exempt, designated areas in certain venues, notably bars. Processes to review ETS regulations are now underway, or are likely to be initiated shortly, in jurisdictions that have had ETS regulations in place for some time. It is logical to expect that the introduction of total bans on smoking in all workplaces will be considered, especially in light of the recent, key ETS legal findings.

3. Strengthening of ETS laws overseas, notably in Canada, have involved the introduction of total smoking bans in all workplaces.

A.2 Legal Actions

4. Two landmark ETS legal decisions during 2000-01, as well as a significant out of court settlement, established in law the recognition of the harmful effects of ETS and of the employer’s obligation to protect employees from ETS. The exposure of workers’ compensation insurers to ETS claims was also established.

A.3 ETS and Ventilation

5. The current review of AS 1668.2 The use of mechanical ventilation and air-conditioning in buildings is considering how ETS should be taken into account in the revised standard. The proposed standard, however, is still being disputed and it remains unclear as to when or if it will be finalised.

A.4 WRMC Consideration

6. The Communique from the May 2001 meeting of WRMC (tabled at PC 05 as an additional paper to Agenda Items 2 & 10) noted activities being undertaken in relation to ETS. WRMC was of the view that action on ETS should continue to be driven by Health Ministers.
ENVIRONMENTAL TOBACCO SMOKE: RECENT DEVELOPMENTS

AUSTRALIAN LEGISLATIVE DEVELOPMENTS:
SEPTEMBER 2000 – AUGUST 2001

Queensland

1. The Tobacco and Other Smoking Products (Prevention of Supply to Children) Amendment Bill 2001 was passed on 3 May 2001. It will come into force on 31 May 2002.

2. Smoking will be banned in most enclosed places or indoor areas. Outdoor areas such as footpath cafes, parks, entrances to buildings and beer gardens are not included. Also exempt are premium gaming rooms in a casino, licensed premises other than areas where meals are being eaten and secure facilities such as prisons.

3. Should a person smoke in a non-smoking area, an authorised person or their employee can direct the person to stop smoking. Failure to comply with such a direction will be an offence. Furthermore, if a person smokes in an enclosed place, the manager of the place could also be found at fault. The occupier of the place will not be held liable if they can prove that: (a) they were not aware of the contravention; or (b) they (or one of their employees or agents) had directed the person to stop smoking and informed the person it was an offence to fail to stop smoking.


New South Wales


6. It is an offence to smoke in "smoke-free areas" i.e. enclosed public places including shopping centres, malls and plazas; restaurants, cafes, cafeterias, dining areas and other eating places; schools, colleges and universities; professional, trade, commercial and other business premises; community centre or halls and places of public worship; theatres, cinemas, libraries and galleries; trains, buses, trams, aeroplanes, taxis and hire cars, and ferries and other vessels; common arrears in hostels; common areas in motels; fitness centres, bowling alleys and other sporting and recreational facilities; childcare facilities; hospitals; and at gaming tables. Exempt premises include parts of certain premises licensed or registered under the Liquor Act 1982, Registered Clubs Act 1976 or Casino Control Act 1992 etc.

7. Premises have been given 12 months to comply with the Bill. Compliance is required by 6 September 2001. A guide to the Smoke-free Environment Act 2000 is available.
Victoria

8. The *Tobacco (Amendment) Act 2000* introduced smoke-free dining in restaurants and eateries from 1 July 2001. The ban will also apply to indoor dining areas in hotels and licensed clubs, at any time when the “predominant activity in that area is the consumption of food or non-alcoholic drinks”.


10. Further information on Victoria’s Tobacco reform laws is available.

Tasmania

11. The *Public Health Amendment (Smoke Free Areas) Bill 2001* was passed on 10 April 2001 and came into effect on 3 September 2001.

12. Smoking will be banned in indoor public or workplace areas including shopping centres, restaurants, cafes, shops, offices, workshops, mines, factories, work vehicles, hotel foyers, corridors, pool rooms, bingo areas and private function areas (to which the public have access or which are a workplace). Smoking is also prohibited around doorways and entrances, foyers, corridors and toilets. Exemptions are gaming areas (unless food is served), bars and licensed restaurants where food is not being served, individual prison cells, individual rooms in nursing homes, and hotel rooms.

13. Occupiers and employers are liable for smoking occurring in their establishments under the Act. They have a defence, however, if they did nothing to facilitate smoking and could not reasonably be expected to know the person was smoking, or if they asked the person to stop smoking.

14. The legislation provides minimum requirements for compliance. Guidance information is available at Smokefree.

Western Australia

15. Along with SA and the ACT, WA has had ETS legislation in place for some years. These laws, *Regulations 3.44A – 3.44I of the Occupational Safety and Health Regulations 1996*, prohibit smoking by employers and employees in enclosed workplaces although there are exemptions that permit the public to smoke in designated areas within venues including bars, nightclubs, cabarets and casinos. Where the workplace is an “enclosed public place”, smoking is regulated by the *Health (Smoking in Enclosed Public Places) Regulations 1999*.

16. The exemptions that have permitted the public to smoke in designated areas run out at the end of 2001. A process to review the exemptions is underway with the objective of achieving a total ban on smoking in enclosed public and workplaces.

Northern Territory

17. There are no Northern Territory laws relating to smoking in enclosed public places and workplaces, but the Government has indicated that its legislation is under review.
**LEGAL ACTIONS**

**Sharp V Port Kembla RSL Club**

18. On 2 May 2001, $466,000 in damages were awarded by the NSW Supreme Court to a bar attendant in a case against her former employer. Similar cases have been brought and settled out of court in Australia for some years, but this is the first damages case that has been decided by a court, possibly the world.

19. A four-member jury found that the throat cancer contracted by Mrs Marlene Sharp, who had worked as a bar attendant from 1972 to 1995, was as a direct result of breathing other people’s smoke while at work. Mrs Sharp has been a life-long non-smoker.

20. In a case in common law negligence, the court found that Sharp’s former employer, the company operating the Port Kembla RSL Club, had been negligent and breached its duty of care by exposing her to unnecessary risk. The plaintiff also pleaded a breach of section 15(1) of the *Occupational Health and Safety Act* but this action was subsequently abandoned.

21. The landmark decision means that hospitality industry employers will have to seriously consider whether they should make their workplaces totally smoke-free, regardless of the lack of smoking bans in bars areas. Consequently, the NSW Registered Clubs Association has written to its 1400 members warning them to ban smoking or potentially face legal action. The finding has removed any doubt that passive smoking cases can succeed and may encourage other employees to make claims of this kind.

**Brown V The State of Victoria**

22. In July 2001, a secondary school teacher who claims that smoke-filled staff rooms caused his chronic lung disease has received a six-figure payout in an out-of-court settlement, details of which are bound by a confidentiality clause.

23. The lawsuit against the State of Victoria was brought by Mr Owen Brown who sought damages under the Workers’ Compensation Program. Mr Brown is a non-smoker who has required a double lung transplant. Case documents are understood to reveal that five doctors unanimously agreed to a causative link between Mr Brown's illness and ETS in the staff rooms of the schools in which he was employed between 1970-1989. A County Court ruling allowed him to seek a WorkCover payout under the Accident Compensation Act.

**Bowles V Canton Pty Ltd**

24. In September 2000, a sufferer of asthma was awarded $7600 in damages following a two month long bout of asthma triggered by ETS in a Melbourne restaurant. The magistrates ruled that the evidence established a clear causal connection between the restaurant conditions and the illness of the plaintiff over the following 6-8 weeks. He found the restaurant liable on three separate grounds: breach of contract; breach of duty of care in negligence; and occupier’s liability.

25. The decision was the first time a court had recognised the harmful effects of ETS and was recognised as a landmark. It also highlighted the shortcomings of designated smoking areas, as ETS may not be confined to the designated area.
NATIONAL RESPONSE TO PASSIVE SMOKING

26. In November 2000, the Australian Health Ministers’ Advisory Council (AHMAC) endorsed the National Public Health Partnership’s work on a National Response to Passive Smoking in Enclosed Public Places and Workplaces. The National Response undertaken by the Partnership’s Legislative Reform Working Group together with State and Territory Tobacco Policy Officers consists of a package of material to assist jurisdictions in developing appropriate legislation in relation to ETS. The package of materials includes:

- A Background Paper – which provides an analysis of the impact of passive smoking on public health and examines government responsibilities for public exposure to ETS and community education;

- A Statement of Guiding Principles – which were agreed as the basis for developing legislation; and

- Examples of Core Provisions – which provide a guide for decision-makers and others wishing to develop new legislation or review existing legislative approaches to passive smoking.

27. As a next step, an analysis of regulatory impacts will be undertaken as part of the National Response program.

WORKPLACE RELATIONS MINISTERS’ COUNCIL

28. At the WRMC meeting in Sydney on 18 May 2001, the activity being undertaken through the AHMAC and the National Response to Passive Smoking was noted (see WRMC 65 Communique). The WRMC were of the view that action on ETS should continue to be driven by the Health Ministers.

VENTILATION/INDOOR AIR QUALITY STANDARD

29. AS 1668.2-1991 The use of mechanical ventilation and air-conditioning in buildings – Mechanical ventilation for acceptable indoor-air quality is currently under revision and a new standard has been proposed. The proposed standard, however, is still being disputed and it remains unclear as to when or if it will be finalised.

30. The revision of the standard was initiated in 1995, prompted in part by the introduction of ETS-type legislation in a number of jurisdictions from 1994 onwards. A major issue for the Standards Australia drafting committee has therefore been ETS and how it is dealt with by the standard.

31. Building regulations in all states and territories make it compulsory to comply with AS 1668.2, which is a design standard only. The proposed revision, however, does not prescribe operational requirements. It would therefore be possible to comply with the standard, by having a mechanical and/or a natural ventilation system in place, but how and if it is operated, and its effectiveness, is not covered in the standard.

32. The proposed standard also specifies provisions for buildings and places intended for smoking and recommends a higher ventilation rate of 25 L/sec/person – however, the standard’s requirement is 10 L/sec/person.
33. The enHealth COUNCIL, the peak national body of state and territory health departments and other key environmental health bodies, has raised strong concerns that the Standards Australia review and drafting process is taking limited consideration of health issues. The Australian Building Codes Board has also objected to the proposed revised standard, as it does not satisfactorily fulfil the Board’s obligation to take account of health issues. The enHealth COUNCIL and the Building Codes Board are continuing their opposition to the proposed revised standard.

INTERNATIONAL DEVELOPMENTS 2001

Canada

British Colombia

34. Since 1998, the majority of British Columbia’s workplaces have been smoke-free. The Workers’ Compensation Board of British Colombia, however, has approved amendments to regulations that will further control workers’ exposure to ETS and make virtually all workplaces smoke-free. The amendments to Part 4 of the Occupational Health and Safety Regulations: Environmental Tobacco Smoke Provisions come into force on 10 September 2001. The new regulations have removed exemptions which had allowed smoking in public entertainment facilities including restaurants, bars and games rooms, and in long-term residential facilities including extended care facilities and prisons. They will allow smoking only in designated smoking areas that are outdoors or in separately ventilated indoor smoking rooms that workers must not enter except in an emergency or to investigate illegal activity or when the smoke has been effectively removed. The decision to revise the regulations comes after a comprehensive process of consultation with all stakeholders and public hearings.

35. In re-issuing these regulations, the Workers’ Compensation Board also issued a report that firmly rejected the use of ventilation systems as being effective in protecting workers from air contaminated by ETS. A second report also issued by the Workers’ Compensation Board evaluated the potential economic impact of the regulations on restaurants and bars and found there would be no long-term negative effects, and, instead, there would probably be lower operating costs for businesses.

City of Ottawa

36. Ottawa City Council’s Smoke-Free By-laws, designed to protect all citizens of Ottawa from the dangers and discomfort of ETS, came into effect on 1 August 2001. The By-laws ban smoking in all public places and workplaces, with no allowances for designated smoking rooms or areas. Public places are defined as any place to which the public has access. Workplaces are defined as any enclosed area of a building or a structure in which an employee or employer works and includes corridors, eating and lounge areas, washrooms, underground parking garages and common areas. Enforcement of the By-laws will be through the City of Ottawa By-law Services Branch, in conjunction with the Ottawa Police Service.

37. A year before the introduction of the new By-laws, the Ottawa Restaurant Association had opposed the ban and suggested that designated smoking areas should be allowed. However, the Association eventually concluded that this might be unfair to smaller restaurants with the result that even restaurant owners supported the ETS laws.
Germany

38. Coinciding with World No Tobacco Day on 31 May 2001, the German Parliament voted for a regulation that requires employers to protect non-smokers from ETS in their workplaces. The law does not forbid smoking in the workplace as such and the hospitality industry is excluded from the regulation, however, the introduction of smoke restrictions is seen as a major break-through in Germany.

Hong Kong

39. In an effort to tighten existing anti-smoking laws, and to improve its image as a world-class city, Hong Kong’s Department of Health has launched a raft of proposals that if enacted, will ban smoking in most indoor places including shops, factories, offices, restaurants and bars. The legislative proposals were released for a three-month period of public consultation in July 2001. The government has indicated that it wishes to present proposals for new laws to the legislative council before July 2002. The Hong Kong Federation of Restaurants and Related Trades is currently leading opposition to the proposed new regulations.

Israel

40. New ETS regulations came into effect on 1 August 2001 that significantly expand and strengthen existing laws to prohibit smoking in public places. Smoking had been previously permitted in designated areas of public places.

New Zealand

41. Changes to the Smoke-Free Environments Act 1990 aimed to further restrict exposure to ETS have been proposed via the Smokefree Environments (Enhanced Protection) Amendment Bill and a Supplementary Order Paper (no. 148). The changes proposed by the Amendment Bill and Supplementary Paper were released for a period of public comment on 31 May 2001.

Russia

42. In July 2001, following approval by the Duma and the upper house of parliament, Russia’s President Putin signed into law a Bill Of Tobacco Smoking Limitation that prohibits smoking in a variety of settings including workplaces, airplane flights of less that 3 hours duration, on public transport, and in indoor sporting, healthcare and cultural facilities.

The Netherlands

43. In May 2001, the High Court in The Netherlands ruled that all employees have a legal right to be protected from smoke at work in a test case against the Dutch Post Office. The court upheld a postal workers complaint that her exposure to tobacco smoke at work infringed her right to work in a smoke-free environment. The court ruled that her employers were bound by the constitutional rights of citizens, to protection of “physical integrity and health”, to provide such condition. The Post Office had failed to satisfy this right under employment law.
United Kingdom

Health and Safety Commission Initiative

44. In September 2000 the HSC proposed an Approved Code of Practice (ACOP) for ETS and passive smoking in workplaces. This followed a process of public consultation beginning in July 1999 that canvassed, among other proposed actions, the introduction of an ACOP.

45. The ACOP was intended to clarify the way in which the *Health & Safety at Work Act 1974* should be applied regarding ETS at work and give authoritative guidance on employers’ obligations under health, safety and welfare law. The proposed ACOP would have special legal force. Failing to follow the Code would not be an offence in itself, but an employer would need to demonstrate that equally effective methods have been adopted to signal compliance with the law. In the light of the ACOP, employers should determine what is the most reasonably practical way of controlling ETS.

46. The HSC recommendation for the introduction of a ACOP was referred to the Government for final decision. In October 2000 the Government released a response to the Health Select Committee’s Second Report on the Tobacco Industry and the Health Risks of Smoking. The response acknowledge the HSC recommendation stating it would be taken into account before making a final decision on ETS and the workplace. The Government also stated that “further research and high quality scientific advice on passive smoking is necessary” and that the Scientific Committee on Tobacco and Health, which had previously considered the issue of ETS, would be reconstituted to consider further work.

47. On 24 April 2001 a bill was moved in the British House of Commons – Protection From Smoking (Employees and Young Persons) – that called on the Government to approve the draft ACOP. Despite a second reading being scheduled for 8 June 2001, the bill was dropped after its first reading.

48. Further Government action on ETS has not been forth coming, despite over 155 MPs indicating support for the ACOP in May 2001. Representatives of the hospitality industry have protested to the Government about the proposed Code and it is reported that Ministers, officials and members of the Government’s Panel for Regulatory Accountability have acted to slow developments on ETS, including the possible implementation of the ACOP, to protect the interests of pubs, clubs and the hospitality sector.

49. In agreement with the Government, the hospitality industry has issued a Public Places Charter in response to the ETS issue. The charter envisages increasing provision of facilities for non-smokers, a written policy on smoking - available to customers and staff, and a range of practical improvements to ensure that consumers are better able to choose whether to eat, drink or socialise in smoky atmospheres. Compliance with the charter is voluntary but a target of 50% of venues complying with the charter by 2002 has been set. Early in 2001 only 1% were charter-compliant. The HSC has suggested that where the charter applies, compliance with it will count as complying with the proposed ACOP for a transitional period of two years. Critics of the charter see it as an attempt to keep ETS legislation at bay.

50. In July 2001 the Health & Safety Executive released a booklet *Passive Smoking at Work*. The booklet contains information on good practice and gives advice to employers on action to prevent ETS exposure at work. It recommends that all employers introduce a policy to control smoking in the workplace following full consultation with their employees, and provides guidance on what the policy should achieve.
United States of America

National Institute of Occupational Safety and Health, Centre for Disease Control and Prevention Publications

51. A range of new and update publications is available online as part the Tobacco Information and Prevention Source program including information on state tobacco control laws and best practices for tobacco control programs, as well as a weekly citation service that tracks publications from behavioural, scientific and technical literature.

State Legislated Action on Tobacco Issues (SLATI)

52. The American Lung Association has released SLATI 2000, a comprehensive guide to state tobacco control laws in the USA.

World Health Organisation

53. World No-Tobacco Day (31 May 2001) focussed on ETS with the theme Second hand smoke kills. Let’s clear the air. As part of this theme, the WHO promoted the release of the second edition of its Air quality guidelines for Europe that states there is no safe exposure levels for ETS.

54. A report from a WHO Working Group, Policies to reduce exposure to environmental tobacco smoke, was also featured at World No-Tobacco Day events. The report provides specific recommendations for reducing and eliminating ETS, made by a panel of experts from 26 European countries and WHO representatives. Recommendations relate to legislation, litigation, education and the promotion of smoke-free environments. The report also details a range of European national policies currently employed for reducing exposure to ETS.

International Labour Organization

55. As part of the InFocus Programme on Safety and Health at Work and the Environment a website is under development which disseminates knowledge and good practice examples relating to areas of workplace health and well-being, including tobacco control.

ETS Research Findings 2001

Australia

56. A review of the epidemiological evidence for the association between passive smoking and lung cancer has recommended that the only acceptable public health policy on ETS is to totally ban smoking in enclosed public places and work sites.

57. The review conducted by the Department of Public Health and Community Medicine at The University of Sydney was published in the Australian and New Zealand Journal of Public Health (Vol 25, No 3). It drew together the results of 43 studies published in the refereed literature between 1981-99 from a range of countries including USA, the UK, China, Japan, Russia and Greece. Although there have been no studies examining the link between ETS and lung cancer in Australia, the Sydney University team concluded that it was reasonable to base policy on research conducted in America and Europe.
58. In a study released in the *Medical Journal of Australia* (174, 2001), researchers examined compliance with smoking bans in restaurants in Sydney and Melbourne. Around 3,000 diners were observed in both Sydney and Melbourne with no restaurant patrons smoking in Sydney, where a legal ban exists, while 176 people were observed smoking in Melbourne, where no legal ban existed at the time. The study, *Has the ban on smoking in New South Wales restaurants worked? A comparison of restaurants in Sydney and Melbourne*, found that smoke-free restaurants do not require “smoking police” to gain compliance with ETS laws and attract more favourable than unfavourable comments from patrons. Also, it was found that ETS laws do not adversely affect customer patronage in restaurants.

**Canada**

59. Timed to coincide with the implementation of revised ETS regulations in British Colombia, a report released in August 2001 (Deadly Fumes: British Columbia Workplace Death Toll Attributable to Secondhand Smoke, 1989 to 1998) concludes that about 3000 workplace deaths occurred in the province during a 10-year period.

60. On 16 May 2001, the Ontario Tobacco Research Unit at the University of Toronto released a detailed report that reviewed the evidence regarding best practices to protect citizens from the dangers of ETS. The researchers examined the scientific literature, as well as Ontario laws, and concluded that there is no safe level of exposure to ETS and that there is no basis for concluding that ventilation systems provide adequate protection. Based on their review and analysis of the evidence, they concluded that full compliance with the Ontario Occupational Health & Safety Act requires that all tobacco smoke be eliminated from Ontario workplaces.

**Hong Kong**

61. A study conducted by the Hong Kong Council on Smoking and Health, the University of Hong Kong and the Chinese University of Hong Kong has found that the majority of catering workers in Hong Kong are exposed to ETS in their workplace and most of them have markedly raised urinary cotinine concentration which indicated heightened health risks for chest and heart disease and cancer. The study estimates that among 200,000 catering workers, 6,000 will die from ETS related heart disease and lung cancer. Sixty-four percent (3,800) of these deaths will be in life-long non-smokers.

62. The study concludes that there are no effective practical or engineering solutions to the problem of ETS and that the only safe and the most cost-effective strategy is to introduce smoke-free regulations in all catering facilities and in other workplaces.

**New Zealand**

63. An investigation into the knowledge of, and perceptions, attitudes and exposure to ETS of workers in the hospitality industry has found that the majority of interviewees were at risk of premature death and disease because of ETS exposure, and had an incomplete knowledge of the dangers to which they were exposed. The study, Second-hand smoke at work: The exposure, perceptions and attitudes of bar and restaurant workers to environmental tobacco smoke, was based on 435 interviews with 59% of those interviewed exposed to ETS. The findings of the study are published in the *Australian New Zealand Journal of Public Health* (2001:25).
Scotland

64. Published in the Journal of Occupational Environmental Medicine (September 2001), the Scottish MONICA study: Environmental tobacco smoke and lung function in employees who never smoked project found an exposure-response relation showing a reduction in pulmonary function of workers associated with passive smoking, mainly at work. Three hundred and one never-smokers in employment were the subject of the study.

USA

65. The findings of a comprehensive study of workplace smoking protection were published in the August 2001 issues of the Journal of Occupational and Environmental Medicine. The study, State-specific trends in smoke-free workplace policy coverage, examined trends in workplace smoking restrictions in each of the 50 states and the District of Colombia. The study found that 68.6% of all indoor workers reported working under a smoke-free policy in 1999, compared to 46% in 1993. In 1993, only two states had 60% of their workforce reporting a smoke-free policy. Forty-seven states and Washington D.C. have now reached or bettered 60% of the workforce employed under a smoke-free policy. The study findings are based on interviews with over 270,000 private sector workers who were questioned about the existence of official workplace smoking rules by the U.S. Census Bureau for the National Cancer Institute.

66. Published in the American Journal of Public Health (February 2001), The new battleground: California’s experience with smoke-free bars, examines attempts to subvert ETS laws and countermiling efforts to uphold them. The study concludes that it is possible to enact and defend smoke-free bar laws, but doing so requires a substantial and sustained commitment by health advocates.