Submission

by

Business|NZ

to the

Health Select Committee

on the

Smoke –free Environments (Enhanced Protection) Amendment Bill and Supplementary Order Paper

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PO Box 1925
Wellington
Ph: 04 496 6555
Fax: 04 496 6550

1. Introduction

1.1 This submission is made on behalf of Business New Zealand, incorporating regional employers' and manufacturers' organisations. The regional organisations consist of the Employers and Manufacturers Association (Northern), the Employers and Manufacturers Association (Central), Canterbury Manufacturers' Association, Canterbury Employers Chambers of Commerce, and the Otago-Southland Employers' Association. Business New Zealand represents business and employer interests in all matters affecting the business and employment sectors.

2. Recommendations

2.1 That the Bill proceed.

2.2 That the Supplementary Order Paper not proceed.

3. Comment

3.1 While Business New Zealand is concerned about the effects of passive smoking on employees, it is also of the view that those same employees should have the right to decide for themselves whether or not smoking will be permitted in a particular workplace. Unless, of course, there are reasons connected with the work itself why smoking should not be permitted.

3.2 Some may consider aspects of the current amendment Bill draconian since, where air conditioning is installed, it seems likely that - depending on the system in question – the amendment will require employees who want to smoke to obtain permission from all the occupants of a building, not just from those on individual floors.

3.3 Consequently, it may be that the degree of choice offered by the Bill is more apparent than real: smoking will be permissible in enclosed areas if each employee in the common air space who may be affected by it requests the employer in writing to permit smoking. But there may be many cases where obtaining the permission of all affected persons will not be possible.

3.4 Nevertheless, the Bill does offer a limited choice, with the further possibility of classifying one or more areas of the workplace as a designated smoking area.

3.5 A designated smoking area can be an area outside the workplace – probably not too difficult to achieve - but it can also be an area inside the building, provided this is able to be separately and mechanically ventilated to the building's exterior. In such a case an employer will be able to designate the indoor area as a smoking area, including a cafeteria or tearoom, where more than one such room is available, or where there are more than two such rooms, a maximum of 50% of the available space. All workers would then have to have space to take meals in the non-smoking room or rooms should they choose to do so.

3.6 Where the statutory ventilation requirements can be met, employees will also be able to state in writing that they do not object to the kind of area described above becoming a designated smoking area.

3.7 Business New Zealand acknowledges that the Bill appreciably restricts the right of employees to smoke in the workplace but believes that the encouragement to provide separately ventilated smoking areas should be beneficial to smokers and non-smokers alike. It is therefore prepared to support the Amendment Bill.

4. Recommendation

4.1 That the Bill proceed.

SUPPLEMENTARY ORDER PAPER

5. Discussion

5.1 Supplementary Order Paper Number 148 aims to impose even further restrictions on workplace smoking and Business New Zealand is pleased that contrary to usual procedure, the opportunity to comment on it is now available.

5.2. Proposed new section 5C (clause 4A) would make it difficult to staff cafeterias where smoking could be permitted since the section's introductory words state categorically: "no employee is *required"* to use a refreshment area (emphasis added). While this could be taken as referring only to employees other than those employed as cafeteria workers it is not beyond the bounds of possibility that it could also be used as an argument by cafeteria employees wanting to refuse to work in any part of a cafeteria designated as a smoking area. This would rather defeat the purpose of allowing smoking in the cafeteria in the first place. No indication is given that the exemption for cafeterias provided in clause 4 of the Amendment Bill (amending section 5 of the principal Act by means of a new section 5A) is intended to survive.

5.3 In this regard, the statutory requirement on employers to develop a smoking policy contributes to the difficulty. Both the amendment Bill and the SOP permit smoking in some, even though limited, workplace areas. However, the SOP clearly sets out, in clause 4A, that smoking is only to be permitted in a common airspace if "the public does not normally have access to any part of it". This requirement, in relation to licensed premises, casinos, and restaurants, constitutes a clear contradiction. Smoking areas in such places are inevitably areas to which the public has access. The provision merely serves to emphasise the conflict between the provision of smoking areas and the right of employees – though employed to do so - to refuse to work in such areas.

5.4 In respect to proposed new section 5C (also found in clause 4A), the meaning of paragraph (b) of subsection (1) is entirely unclear. This paragraph currently reads: "every refreshment area in which smoking is permitted is given". To what is "given" intended to refer? Is it intended that every refreshment area in which smoking is permitted must be *clearly specified*? Clarification is required.

5.5 While it is understood that there is concern that children should not be led into smoking by example, it is unlikely that the provision in proposed new section 7C(1)(d)(ii) (to be inserted by clause 6) will have the hoped for effect. This subparagraph provides that young people being taught at a school should not be able to see anyone smoking in a room set aside for this purpose, presumably on the assumption that if they do not see people smoking they will not know that smoking is taking place. However, not only is that a highly unlikely state of affairs but the "forbidden fruit" aspect of this provision is rather more likely to encourage an interest in smoking than to discourage it.

5.6 The proposal in clause 6 to phase in over a period of years new requirements in respect to smoking in licensed premises, restaurants and casinos may appear reasonable at first glance. The cost implications are, however, far-reaching. The fact that the phase-in period applies only to premises (or casinos) licensed under an application made before a stated period (currently, in the SOP, 1 January 2002) or used as restaurants during the week ending 31 December 2001, would mean considerable huge potential expense for anyone hoping to open a business in premises that are currently unlicensed. It would also mean, particularly as the 2007 date draws closer, that anyone wishing to sell such an existing business would either have to make sure the required changes had been made before sale or accept a far lower purchase price than they might otherwise have expected to receive.

5.7 As a consequence of the above, the hospitality industry would face massive compliance costs with the further probability of a decline in employment levels in what has to date been a growth employment area. Moreover it is arguable that the expense involved in developing the kind of separate smoking room envisaged would not achieve its intended purpose since smokers would not necessarily want to spend all their time with other smokers and might well have non-smoking companions who did not wish to be confined to the smoking room. A better solution, therefore, would be to require the installation of effective ventilation systems and to decide on an appropriate air standard, providing for an appropriate phase-in period. Business owners, on the other hand, should be left free to decide for themselves whether or not they wish to make their premises entirely smoke-free.

5.8 Clause 6B purports to amend section 15(6) of the principal Act, requiring an employer to notify the Director General of Health within 40 days of receiving a complaint. However, the earlier part of this section provides for an initial attempt at complaint resolution at workplace level. In the event of implementation, it would be more appropriate were the 40-day period to run only from the date on which failure to achieve resolution at workplace level was acknowledged by both the employee and employer parties to the complaint.

5.9 Of further concern, particularly to many small businesses, are the provisions of clause 8A of Part 2 of the SOP regarding “Tobacco products control”. Tobacco products are legal products which shop owners should be entitled to display without the imposition of undue limitations of the kind envisaged. Proposed limitations simply mean that the product of major suppliers is more likely to achieve greater prominence than that of smaller competitors, resulting in an absence of choice that may well lead buyers to move away from smaller retailers to the larger supermarkets.

5.10 The above is not a situation that can be supported, since, as many shop owners have indicated, what is provided for would be highly likely to damage business viability without doing anything at all to reduce smoking levels.

5.11 The proposed amendment to subsections (2) and (2A) of section 30 (clause 9) pose problems of a different kind. While (2A)’s intention is clear – to provide a defence to anyone who has sold a tobacco product to someone under the age of 18 – it is difficult to see how the “due diligence” requirement of amended subsection (2) can be complied with if the person concerned has been deceived either by an age document relating to some other person or by a tampered-with version of the purchaser’s own age document. Should the SOP proceed the “due diligence” threshold should be removed. “Reasonable precautions” is a perfectly adequate standard.

5.12 Clause 8B purports to disallow the use of vending machines in places to which the public has access, a provision presumably intended to discourage the purchase of tobacco products. Since the effect of this will be to make vending machines illegal in such circumstances it would be better to say so in plain terms. However, given that tobacco products are not themselves illegal, to allow vending machines in private areas (such as clubs) but not in public places would be to legislate for a perceived problem in an inconsistent and unacceptable way. The use of vending machines is currently well controlled by the Smoke-free Environment Regulations (1990/79, clause 35). Rather then introduce a further restriction of the kind proposed these regulations should be properly enforced. Any further restriction is not necessary.

5.13 With respect to the labelling proposals of clause 9C, it is entirely invidious that tobacco producers should be expected not only to provide health warnings on their products but to disparage the products themselves, particularly, as has previously been noted, these are legal products.

5.14 It is also the case that prospective regulations relating to ingredient disclosure could lead to a requirement for manufacturers to disclose proprietary information – trade secrets – to competitors, undermining business viability. Again, the consequences would likely be perverse. There is already evidence of a developing trade in cheaper, substitute products, illicitly sold, over which there is no quality control whatsoever.

5.15 There are good grounds for believing that the SOP, good intentions notwithstanding, goes too far in its attempt to impose further regulation on what is already a highly regulated legal industry, both at the manufacturing and retail levels. For reasons set out in this submission, Business New Zealand is not able to support the Supplementary Order Paper.

6 **Recommendation**

6.1 That the Supplementary Order Paper not proceed.

21 November 2001