



Big tobacco “pull out all stops” for a landmark example: The Burswood Casino case

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REVIEW

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Abstract

Background

With the aid of internal tobacco industry documents, this paper provides a chronology of events documenting the role of the Philip Morris tobacco company in the 1993 litigation case against the Burswood International Resort Casino (BIRC). The paper also examines the implications of this case for the regulation of second hand smoke exposure.

Method

A systematic keyword search and analysis of internal tobacco industry documents was conducted using documents available on the World Wide Web through the Master Settlement Agreement.

Results

The industry documents provide comprehensive evidence that the Philip Morris tobacco company provided assistance to the BIRC in its defence against action by the Western Australian government. The Philip Morris tobacco company, along with others, sought to publicise and promote the outcome as a ‘landmark example’ to lobby against the implementation of indoor smoking bans.

Conclusion

Philip Morris’ investment in the BIRC defence demonstrated

the industry’s recognition of the potential significance of the case beyond Western Australia. Involvement in the BIRC case assisted the wider tobacco industry by helping to prolong smoking at casinos and other Australian hospitality venues. The findings contribute to our understanding of the history of tobacco industry strategies implemented in Western Australia and internationally to slow tobacco control progress, and the preparedness of the tobacco industry to exploit favourable developments originating anywhere in the world.

Key Words

Tobacco, tobacco industry, second hand smoke, Burswood Casino, policy

Background

Second hand smoke (SHS), whether referred to as ‘passive smoke’, ‘involuntary smoking’ or the industry-preferred euphemism ‘environmental tobacco smoke’,¹ is the toxic combination of ‘sidestream’ smoke emanating from the lit end of the cigarette in between puffs and exhaled ‘mainstream’ smoke from the active smoker.^{2,3} The inhalation of SHS carries serious health risks and is a cause of premature death and disease in non-smoking children and adults.³

In 1972, the US Surgeon General’s report ‘The Health Consequences of Smoking’⁴ was the first major publication to address the dangers of SHS. The work of Hirayama from 1981, was the first to demonstrate unequivocally the risk of developing lung cancer through exposure to SHS.⁵ Since that time a comprehensive body of evidence has accumulated to confirm the harmful effects of SHS. Further reports on the dangers of SHS have been published by authoritative bodies including the World Health Organization,⁶ the Centers for Disease Control and Prevention in the USA,³ the US Environmental Protection Agency,⁷ the US Surgeon General³ and the National Health and Medical Research Council.⁸



Prior to implementation of tighter restrictions on indoor smoking, workplaces presented a primary location for exposure to SHS for non-smokers.³ In 1984, the Western Australian Occupational Health, Safety and Welfare Act 1984 mandated that: "An employer shall, so far as is practicable, provide and maintain a working environment in which the employees...are not exposed to hazards".⁹ Further, the Act required employers to "consult and cooperate with...employees at the workplace, regarding occupational safety and health at the workplace".⁹ For many years these fundamental requirements have been side-stepped by hospitality establishments with strong support from tobacco and alcohol companies.^{10, 11}

At a time when most Australian workplaces were becoming smoke-free, a large sector of the Australian workforce was left behind. Employees and patrons of bars, nightclubs and casinos remained exposed to the effects of SHS, including the workers of Western Australia's only casino, the Burswood International Resort Casino (BIRC). December 1992 saw the SHS debate move from the scientific to the legal arena for the first time in Western Australia. BIRC employees and the WA Department of Occupational Health, Safety and Welfare launched a case against BIRC management to hold them accountable for lacking concern for their employees' health.¹² The case held the potential to set an international precedent for indoor smoking laws and stimulated interest in Western Australia as an important setting for consequential debate on tobacco issues.

This paper documents the role of the Philip Morris (PM) tobacco company in the BIRC case, outlines why the company was interested in the case and discusses how PM and others used the case as a landmark example to slow down the implementation of indoor smoking regulations.

The Master Settlement Agreement was reached as a result of litigation against tobacco companies in the USA.¹³ This allowed for millions of previously internal tobacco industry documents to be made publicly available. With the aid of internal documents, the paper provides a chronology of events surrounding the trial including Philip Morris's involvement.

Method

A systematic search of tobacco document archive sites available on the World Wide Web was conducted to identify industry documents relating to BIRC and the 1993 court case. Tobacco document research guides were consulted for this process.¹³⁻¹⁶ A keyword search matrix was developed by project staff to manage and record document findings. The documents were retrieved from the following archive sources:

the Philip Morris Document Site, British American Tobacco Documents Archive, Legacy Tobacco Documents Library and the Tobacco Control Supersite. Initial search terms included 'Burswood', 'Burswood Casino' and 'BIRC'. Secondary search terms were identified using a snowball method from documents uncovered in the primary search. Secondary search terms included names of individuals (Peter Le Souef, William Musk, Julian Lee and Bryan Gandevia), organisations and consecutive Bates (reference) numbers.

Document searching was carried out between October 2007 and January 2008. All relevant documents were recorded in the keyword search matrix, printed, entered into Endnote and analysed for content. A total of 205 industry documents were retrieved with 41 being retained for this paper. Additional materials were retrieved from journal articles, reports and organisation websites to complement the industry documents and provide further context to SHS issues.

Results

Tobacco industry response to SHS

A number of reports document the tobacco industry's continuing efforts to strategise against and adapt to threats that work against them.¹⁷⁻²⁰ Strategies developed by the tobacco industry endeavour to maximise sales of tobacco products in return for profits^{20, 21} and to counter public health concerns, including the effects of SHS.²² The issue of SHS has threatened the tobacco industry in terms of the consequences it presents to the health of the wider community.²³ In this instance, the tobacco industry has defended itself by claiming that smoking only harms the smoker and that smoking should be a choice made by each individual.^{13, 24} The industry maintained there were no causative associations between SHS and lung cancer or cardiovascular disease;^{19, 20, 25} "Some epidemiological studies report that there is an association between ETS [environmental tobacco smoke] and certain diseases. However, statistical associations do not prove causation. This is particularly true for the incredibly weak association reported between ETS and disease".¹⁷ The industry position has been supported in large part through the conduct of tobacco industry funded research whereby prominent and credible researchers were recruited to present industry-friendly findings.²³ The research outcomes were used to influence the public and policy makers by downplaying the harmful effects of SHS and by proposing alternative solutions such as ventilation to control for exposure.²²



The Burswood Casino case

The tobacco document research conducted in this study demonstrates the active involvement of and interest taken by PM in defending and promoting the BIRC case. A chronology of the key events taken from tobacco documents and supporting materials is presented in Table 1.

In July 1990, the BIRC attempted to persuade new employees to sign an indemnity to clear the Casino of any responsibility for illness suffered or exacerbated by exposure to SHS.²⁶ During the early 1990s approximately 150 employees of BIRC signed a petition addressed to management regarding their concerns about exposure to SHS while at work.²⁶ Following the petition, the Department of Occupational Safety and Health of Western Australia instigated a prosecution against BIRC for failing to control employee exposure to airborne contaminants^{26, 27} as required under the Occupational Health, Safety and Welfare Act of 1984.^{9, 28} Air quality testing carried out between 28 June and 12 July 1992 concluded that BIRC had not taken effectual measures to protect its employees from SHS.²⁹ The Hearing was listed under the Occupational Health, Safety and Welfare Act at Perth Magistrates' Court for 24 February 1993 with a fine of up to \$50,000 if the casino was found at fault.^{26, 30}

In July 1992, a memo from an unknown source addressed to Gary Berson, corporate litigator and partner in the Clayton Utz law firm, regarding "Witness Development File No: 706168" listed a number of Australian and New Zealand doctors including Dr Julian Lee and Dr Bryan Gandevia.³¹ The list represented a number of possible witnesses to appear for the defence in the Burswood case. It is apparent through the documents that the Clayton Utz law firm have acted for PM³² and the Tobacco Institute of Australia (TIA).³³

Dr Julian Lee's involvement in medicine included his membership of the Australian College of Physicians and the American College of Chest Physicians, and roles as President of the Australian Thoracic Society, Senior Vice-President of the Asthma Foundation of New South Wales (NSW) and, controversially, President of Australian Medical Association (AMA) in NSW in 1996.³⁵ Lee's AMA presidency was short-lived due to objections over his involvement with (TIA) through which he convened the Independent Working Group (IWG).³⁶ The IWG was commissioned by the TIA³⁶ and consisted of eight Australian members including physicians, statisticians and scientists that evaluated around 500 scientific papers, concluding "...that the data in relation to passive smoke and adverse health effects is weak and inconclusive".³⁷

Bryan Gandevia was primarily a respiratory physician, who was appointed Associate Professor in Thoracic Medicine at the University of New South Wales in the 1960s.³⁵

The trial was held over nine days from 2 to 13 August 1993.^{38, 39} Leading Perth respiratory physicians Associate Professor Peter Le Souef and Dr William (Bill) Musk were the expert witnesses for the prosecution.³⁸ Dr Julian Lee and Dr Bryan Gandevia appeared for the defence. At the time of the Burswood case, Dr Lee and Dr Gandevia were based in NSW as respiratory physicians.^{40, 41} They both testified that there was no evidence to suggest SHS caused disease in adults.⁴¹ Dr Gandevia claimed that if smoking was banned in public places "it wouldn't make the slightest bit of difference. There would be exactly the same number of people turning up with respiratory symptoms".⁴⁰ It has been reported that Dr Lee was paid \$64,500 for his appearance as an expert witness for the case;⁴² it is unclear whether PM or the BIRC paid for Dr Lee's appearance.⁴³

Geoffrey Bible was the Managing Director of PM International in New York at that time. Bible's handwritten notes on a PM memo sent in January 1993 signify the company's interest in and involvement with the Burswood case.²⁷ Bible suggested offering help to BIRC and the involvement of PM's US law firm, Shook, Hardy & Bacon, in the case: "It's these types of cases that blindside us. I think we should pull out all stops to help [the] defendant".²⁷ Document research by Mandel and Glantz⁴³ uncovered a "privileged and confidential" five year plan for the PM legal department (1994-1998) outlining the company's involvement with the BIRC defence: "Assisted in the defense [sic] of Burswood Casinos [sic] in Australia against a claim by the state of Western Australia that employees were exposed to unsafe amounts of ETS".⁴⁴ Further evidence of PM's involvement includes the drafting of 'Win' and 'Loss' scenarios by PM and the TIA ready for distribution prior to the final decision being handed down.^{41, 45}

On 17 September 1993 the final decision was delivered by Magistrate RJ Gething: "My initial persuasion is confirmed and I find at this point that the prosecution has not proved beyond reasonable doubt that ETS causes harm to health and therefore has not proved that the defendant has failed in its duty not to expose its employees to risk as alleged".³⁸ The Court concluded that even during BIRC's busiest times, the levels of SHS did not present a risk to the health of Burswood employees.⁴⁶ Magistrate RJ Gething found the evidence of the prosecution to be



“very general” stating evidence from the defence experts was “more convincing”.³⁸ Inter-office correspondence distributed by PM noted that “After analyzing the evidence that had been presented by both sides, the court concluded that the defendant’s experts were more credible than those offered by the government”.⁴⁷

Responses from the tobacco industry regarding the magistrate’s decision were widely disseminated, particularly by the PM Companies and also across the industry.⁴⁸⁻⁵⁰ Joe Robertson, PM employee and consultant for Healthy Buildings International in Australia (an organisation working for the tobacco industry that promoted accommodation and ventilation solutions for SHS and largely funded by PM) was thanked by the BIRC Director of Plant Operations for his assistance with the case.^{51, 52} In October 1993, Chris Proctor, from the Smoking Issues Department of the British American Tobacco Group forwarded a memo to Peter Blanchard (of Wills Australia) referring to the Burswood case: “a judge has seemingly come to a balanced decision --- one that we would wish to have publicised widely”.⁵³ An immediate media release distributed by the TIA on the day of the Court’s decision explained, “This landmark Court decision, is consistent with the view of many international experts that there is no conclusive scientific or medical evidence that ETS causes chronic respiratory diseases in adults”.⁴⁶

The Burswood case and the resulting decision, as one of the rare court decisions supporting tobacco industry positions, albeit from a magistrate sitting alone, provided the tobacco industry with increased confidence. The resultant positive publicity encouraged the industry to press for the rights of smokers to smoke in public places, with a particular emphasis on efforts to consider workplace smoking policies to accommodate both smokers and non-smokers.^{34,54} A document on ‘ETS Statements’ developed by PM and reviewed by Shook, Hardy & Bacon, noted that the Burswood decision reinforced “the view that the rush to impose smoking bans in the workplace, restaurants and public places is not based on conclusive scientific or medical evidence”.⁵⁵ A further document from the PM archives highlights how the successful case has slowed down tobacco control initiatives.⁴⁷

Despite this setback, the tobacco control community continued in its pursuit to implement smoking bans. In 1999, the Australian Council on Smoking and Health (ACOSH) along with the Liquor, Hospitality and Miscellaneous Workers’ Union began to monitor the impact of SHS exposure on BIRC employees.⁵⁶ Lung function and blood cotinine level tests were conducted by Professor Bill Musk, a senior respiratory physician who had appeared for the prosecution in the 1993 BIRC court case.⁵⁷ Significant reactions to smoke among the

BIRC employees were found.⁵⁶ PM showed an interest in these potentially damaging results for the tobacco industry. Bruce Davies (PM USA Worldwide Scientific Affairs) contacted Nerida White (Corporate Communications Manager, PM Australia, New Zealand and South Pacific) asking to be kept informed regarding the progress of the cotinine measurements and offered scientific assistance regarding the outcomes.⁵⁸

Despite the attempts of the tobacco industry to slow down the implementation of smoking bans, BIRC was eventually required, under the Health (Smoking in Enclosed Public Places) Regulations 1999 (WA) Act, to ban smoking in food service areas. From 1 January 2000, 50% of BIRC floor space became smoke-free,⁵⁹ and the main gaming room of the BIRC went smoke-free on 21 December 2001.⁵⁶ Further developments saw regulations made under the Tobacco Products Control Act 2006 prohibit smoking in all enclosed public places from 31 July 2006.⁶⁰ Under the Act the BIRC was required to become a smoke-free venue with the exception of the International Gaming Room.⁶⁰

The landmark example

The Burswood decision was widely referred to as a “landmark” event by the tobacco industry.^{29,39,46,55,61-63} The recurrence of this term throughout industry documents encourages a consideration of how the Burswood case qualified as a “landmark” example. The decision stood as a notable exception where the tobacco industry emerged successful against evidence from health authorities. To the tobacco industry, this “landmark” decision was of considerable national and international significance. Collaborative efforts were sought by PM and the TIA to ensure prompt and adequate media coverage of the decision were framed in industry terms.^{41,45,64} Media releases were circulated “far and wide”.⁵⁰

Internal documents suggest tobacco companies worked collectively to “make good press worldwide...on this success”⁴⁹ and “exploit news events” in regard to the Burswood case.⁶⁵ Letters and copies of the court’s decision were sent by John J Boltz Consulting (former PM Media Affairs Regional Manager, who later worked as a media consultant for PM) in September 1993 to at least 22 international high profile media commentators and senior journalists.⁶⁶ The letters summarised the Burswood case, “The case represents a significant victory for the tobacco industry. Knowing of your interest in this subject area, I wanted to share this material with you”.⁶⁶ PM clearly intended that the recipients, known to be sympathetic to the tobacco industry’s cause, would



disseminate the information further through their respective media.

For a significant period of 1993, PM launched Western Australia into the international tobacco industry spotlight as a result of the additional media coverage from the case. On 4 October 1993, Jan Goodheart (Manager of Worldwide Regulatory Affairs, PM Asia) further publicised the Burswood decision by disseminating the court's decision to all PM USA and PM International regional and Corporate Affairs directors encouraging them to distribute the information.⁶⁷ This request would see the outcome of the Burswood case publicised as widely as the European Economic Community, Eastern Europe, Middle East, Africa, USA, Asia, Japan and Latin America.⁶⁸ As industry allies, the American Smokers' Alliance and the "Australian Hospitality Association" [sic; Australian Hotels Association] actively applauded the decision.⁶⁷ US casino and entertainment complex operators were targeted by PM and AHA, with a press release sent to international allies to be used in "markets where smoking restrictions are currently in place or under consideration".⁶⁷

It is clear that the mass media coverage of the Burswood decision was important to the tobacco industry as an opportunity to gain both financially and by strengthening industry morale. Publicising the outcome gave the industry an opportunity to sway public opinion on indoor smoking and intimidate governments away from attempting similar litigation. Persuasive communications delivered to international government and bureaucratic decision makers further strengthened the tobacco industry's positioning.^{50, 69, 70} A WD & HO Wills (Australia) memo noted that since the decision, each company and the TIA were "seeking every opportunity to speak at public forums and make submissions on E.T.S and regulatory issues in Australia".⁷¹ These actions were described as "especially vital" in anticipation of the release of the WorkSafe draft Code of Practice on ventilation for hospitality premises the following March.⁷¹ For example, the TIA noted the Burswood case as key evidence in its 1993 submission to the Australian Capital Territory Department of Health proposing legislation for smoke-free enclosed public places⁷² and its submission on the Draft Code of Practice and Guidance Notes on Passive Smoking in the Workplace.⁴⁰ The Burswood case was widely cited in internal documents as a significant part of the tobacco and hospitality industry's rationale for accommodation, ventilation, 'courtesy' and 'common sense' strategies.^{39, 45, 61} These policies left responsibility with employers and the AHA (a drinks industry organisation with a history of tobacco funding), rather than with independent regulatory bodies.¹¹

PM's Senior Vice President and General Counsel, Murray Bring, suggested in a memo to fellow PM executives that the Burswood litigation was prompted by the 'agitation' of Australian anti-smoking groups and thus the case was "considered by them to be of major significance".⁴⁷ He continued, "the court's decision should be viewed as a major victory for the industry and a significant setback for the anti's".⁴⁷ The tobacco industry was optimistic that the Burswood decision would effectively slow down tobacco control.

Conclusion

The BIRC case was the first time an Australian government body had launched a prosecution of its kind against an employer under the Occupational Safety and Health legislation.^{9, 30} PM recognised the importance of the litigation and supported BIRC management to strengthen their defence for a successful outcome. The tobacco industry's involvement in the Burswood defence further provided an opportunity to develop the trust of the WA hospitality industry and build an alliance with the AHA. Internal tobacco industry documents illustrate that the Burswood case had the highest level of attention from PM International in New York, demonstrating the potential significance of the legal action well beyond Western Australia.

While the documents reviewed reveal that PM invested in the case, the entire tobacco industry benefited from the outcome. The decision was promoted as a 'landmark example' to support tobacco industry interests and provide ammunition to fight against indoor smoking bans, advocate for ventilation and accommodation policies, further publicise the inconclusiveness of the scientific evidence and exploit the lack of consensus among scientists. The outcome of the trial effectively prolonged smoking at the casino and other Australian hospitality venues. A maverick decision in the most remote capital in the world by a relatively low-level judicial officer (magistrate) that was inconsistent with worldwide trends and conclusions reached by health and medical authorities was seized on by the major international tobacco companies and widely promoted, in contrast to their approach to the vast mass of countervailing evidence.

A review of ACOSH office correspondence from 1993 and 1994^{73, 74} gives no indication of any slowing down of progress or reduced willingness of that agency or other health groups to act on the available evidence that exposure to SHS is harmful. The Western Australian tobacco control community continued to advocate for



smoke-free, enclosed public places in the face of opposition. Tobacco control advocates have been successful in influencing decision makers and the public to recognise SHS as a major health hazard, supported by yet further evidence on the dangers of passive smoking. However, we are left to wonder if this understanding and subsequent smoke-free legislation would have occurred earlier had the prosecution won. Owing to the power of the tobacco industry lobby and their allies in the hospitality industry, the Burswood Casino's International Gaming Room remains exempt from smoke-free legislation. Continued pressure from public health advocacy groups is necessary to ensure stronger regulations and to counter the legal and media efforts of tobacco companies.

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PEER REVIEW

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CONFLICTS OF INTEREST

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ETHICS COMMITTEE APPROVAL

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Table 1: Chronology of events surrounding BIRC case

1972	U.S. Surgeon General report ‘The Health Consequences of Smoking’ included discussion about consequences of exposure to SHS
1975	Evidence that the tobacco industry were aware of harm caused by SHS
1981	Hirayama research linked SHS exposure to lung cancer
1984	Western Australian Occupational Safety and Health Act 1984 included protection of employee exposure to hazards
1990	BIRC persuaded new employees to sign indemnity to clear the Casino of any responsibility for illness caused by SHS exposure
	Employees of BIRC signed a petition to management regarding concerns about exposure to SHS while at work
1992	
June	Air quality testing concluded that BIRC had not taken appropriate measures to protect employees from SHS
	BIRC employees and the WA Department of Occupational Health, Safety and Welfare launched a case against BIRC management
July	Memo to Clayton Utz law firm listed Dr Julian Lee and Dr Bryan Gandevia in “Witness Development File”
1993	
January	PMI memo documents offer to help BIRC and involve US law firm Shook, Hardy & Bacon with the case
August	BIRC Trial 2–13 August
	Dr Julian Lee paid \$64,500 for appearing as a witness
	“Loss” and “Win” scenarios were written by PM ready to be distributed upon court decision
September	Final decision handed down in favour of the BIRC
	Fax from BIRC to Joe Robertson, PM employee and consultant for Healthy Buildings International thanked him for his involvement
	Letters and copies of the court’s decision were sent by John J Boltz Consulting (former PM Media Affairs Regional Manager, and later media consultant for PM) to at least 22 international high profile media commentators and senior journalists
October	Jan Goodheart (Manager of Worldwide Regulatory Affairs, Philip Morris Asia) publicised the Burswood Case and disseminated the court’s decision to all PM USA and PM International regional and Corporate Affairs directors and encouraged them to distribute the information further
	Chris Proctor, from the Smoking Issues Department of the British American Tobacco Group sent a memo to Peter Blanchard of Wills Australia and suggested the BIRC case be publicised widely



1994	Philip Morris five year plan referred to previous involvement with the BIRC case
1998	Master Settlement Agreement
1999	Australian Council on Smoking and Health and Liquor, Hospitality and Miscellaneous Workers' Union monitored SHS at the BIRC
2000 January	BIRC required to ban smoking in 50% of floor space
2001 December	BIRC main gaming room became smoke free
2006	WA Tobacco Products Control Act 2006 included regulation to prohibit smoking in all enclosed public places
July	All enclosed public places smoke free with exception of BIRC international gaming room
