



8.4	FOOTPATH TRADING & TOBACCO ACT AMENDMENT
WARD:	WHOLE OF MUNICIPALITY
GENERAL MANAGER:	CLAIRE FERRES MILES, PLACE STRATEGY & DEVELOPMENT
PREPARED BY:	MARC JAY, COORDINATOR CITY PERMITS
TRIM FILE NO:	13/01/04
ATTACHMENTS:	1. Fact Sheet for Businesses- Smoke-free outdoor dining from 1 August 2017 2. Fact Sheet for Community - Smoke-free outdoor dining from 1 August 2017

PURPOSE

On 1 August 2017 amendments to the *Tobacco Act 1987* ban smoking in all outdoor dining areas across Victoria, where there is consumption of food such as cafés, restaurants, take-away shops, including beer gardens, courtyards and footpath areas during food service.

Outdoor areas where patrons can smoke could be achieved by allowing 2.1 metre high screens or transparent drop-down blinds between venues. The erection of these screens may be interpreted as actively showing support for smoking behaviour.

Council must determine the extent of changes required to the Footpath Trading Guidelines (2013) to comply with the *Tobacco Act 1987*, and if the use of 2.1 metre high screens and transparent drop-down blinds that support smoking should be actively discouraged.

1. RECOMMENDATION

That Council:

- 1.1 Amends the Footpath Trading Guidelines (2013) to:
 - 1.1.1 Remain consistent with the *Tobacco Act 1987* and the requirement to provide windproof ashtrays where smoking is permitted.
 - 1.1.2 Prohibit 2.1 metre high walls, including transparent drop-down blinds to all elevations of a footpath trading zone.
- 1.2 Gives public notice in the Victoria Government Gazette of the amendments to the Footpath Trading Guidelines (2013).

2. BACKGROUND

- 2.1 Council's Footpath Trading Guidelines were approved by Council in June 2010, and amended in 2013 in accordance with Local Law No. 1. Amongst other requirements, it is a condition of all current footpath trading permits for windproof ashtrays to be available at all times.

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- 2.2 Under the *Tobacco Act 1987*, smoking is banned in ‘outdoor dining’ areas from 1 August 2017, however smoking is permissible in ‘outdoor drinking’ areas.
- 2.3 An ‘outdoor dining’ area is used for the consumption of food on a commercial basis. This includes when food is:
- actually being eaten, or
 - available to be purchased and eaten in the area (regardless of whether anyone is actually eating).
- 2.4 An ‘outdoor drinking’ area is used predominantly for the consumption of drinks, this includes a balcony, verandah courtyard, rooftop, marquee, a street or footpath or similar outdoor area.
- Snacks can be eaten in outdoor drinking areas.
- 2.5 Local Law No. 1 allows Council to designate smoke-free areas. This provision has not been used to-date.
- 2.6 In 2014 venue operators with footpath trading permits were provided with opportunity to voluntarily become smoke-free with Council support, including signage provided for display. Three venues took up this option.
- 2.7 In readiness for the amendments to the *Tobacco Act 1987*, the Municipal Association of Victoria and Department of Health & Human Services is supporting Councils and the hospitality industry through this transition with:
- Tobacco Advisory Group meetings attended by Officers.
 - Dept. of Health & Human Services Fact Sheets. Refer Attachments 1 and 2.
 - Training for Environmental Health & Local Law Officers.
 - \$10,500 grant towards resourcing the changes.
 - ‘Smoke-free’ signage available free of charge.
- 2.8 The City Permits unit currently maintains 471 annual permits for the placement of tables, chairs and associated items to occupy the footpath.
- 2.9 Footpath trading permits are authorised under Community Amenity Local Law No. 1 (2013) and Footpath Trading Guidelines (2013) and enforced by Local Law Officers.
- 2.10 In Mid-May all footpath trading permit-holders received the Department of Health & Human Services Fact Sheet.
- 2.11 Throughout May and June consultation took place, targeting a sample of businesses with footpath trading permits. Officers also attended a Port Phillip Liquor Licencing Association and Trader Association meeting.
- 2.12 In June 2017 the State Governments advertising campaign commenced, including radio and social media.
- 2.13 Benchmarking against the footpath trading requirements took place with the cities of Melbourne, Stonnington and Yarra.



- 2.14 Also in June 2017, Council’s Environmental Health and Local Laws officers attended training provided by Department of Health & Human Services.

3. KEY INFORMATION

- 3.1 The introduction of this legislative change means there would need to be two types of outdoor areas specified:

Table 1 – Tobacco Amendment Act 2016 – Definitions

Outdoor area	Characteristics	Status
Outdoor dining	<ul style="list-style-type: none"> • Food is eaten, or is available to be eaten in the area. • Consumption of drinks 	Smoke-free
Outdoor drinking	<ul style="list-style-type: none"> • No food (other than snacks,) is eaten, or available to be eaten, in the area. • Consumption of drinks 	Smoking restrictions apply under certain conditions.

- 3.2 Outdoor dining areas will be required to display acceptable ‘No Smoking’ signage to indicate smoke-free areas. The signs must be displayed so customers can see a sign when entering or within, the outdoor area.
- 3.3 A snack is defined as pre-packaged ‘shelf-stable’ food that is sealed in the container or package in which the manufacturer intended it to be sold, or does not require any preparation prior to serving. ‘Shelf-stable’ is generally taken to mean food that can be stored for long period (months) at room temperature. Examples of snacks include pre-packaged potato chips, nuts and chocolate bars. Snacks also include uncut and unpeeled fruit.
- 3.4 Drinks include alcoholic and non-alcoholic beverages such as coffee.

Outdoor drinking areas within 4 metres of outdoor dining areas

- 3.5 To support smoke-free outdoor dining, smoking will be banned in any part of an outdoor drinking area that is within 4 metres of an outdoor dining area, unless separated by a wall of at least 2.1 metres high.
- 3.6 This means that if any part of an outdoor drinking area is within 4 metres of an outdoor dining area at the same or neighbouring venue, the occupier of an outdoor drinking area will need to:
- Ensure the outdoor drinking area is smoke-free, or
 - Separate the two areas by either:
 - a 4-metre wide buffer zone, or
 - a wall of at least 2.1 metres high.



- 3.7 It will be incumbent on any venue operator wishing to provide an area for smokers to meet the requirements, even if a new footpath trading zone is introduced at a neighbouring venue and is within 4 metres.

Liquor licencing & planning permits

- 3.8 The Victorian Commission for Gambling & Liquor Licencing has informed the hospitality industry that footpath trading areas may be used as a 'drinking area', even where only a Restaurant/Café liquor licence is held, on the basis that the predominant activity of serving meals occurs inside the venue.

Other businesses

- 3.9 All venues with outdoor dining furniture including cafes and hairdressers must also consider the consequences of this change and their ability to accommodate smokers.

2.1 metre high walls

- 3.10 Footpath Trading Guidelines (2013) currently allows for the permitting of structures associated with footpath activities. Design considerations state, "Structures associated with footpath trading should not privatise, fully enclose public spaces or adversely affect the openness of our public footpaths".
- 3.11 Removable screens can be approved at a maximum height of 0.9 metres, installed with a socket and sleeve to be removed at the close of business. Fixed glass screens can be a maximum height of 1.5 metres.
- 3.12 A request for a 2.1 metre high wall would need to demonstrate that the socket and sleeve arrangement would achieve wind-loading engineering requirements. A further challenge of such structures would be the likely weight and size of the structures that staff would be required to manually handle and store internally outside business hours. These factors would make wall structures on the footpath an unlikely option.

Transparent drop-down blinds

- 3.13 The most likely solution would be the use of transparent drop-down blinds. The Footpath Trading Guidelines (2013) allows for these to be considered subject to streetscape, heritage and urban character, infrastructure and traffic conditions.
- 3.14 Transparent drop-down blinds are subject to a Building permit and must not include advertising. They must be UV resistant to avoid break down of the material and loss of transparency. They must also be fully retractable and any fixings on the footpath must not create trip hazards.
- 3.15 Currently, transparent drop-down blinds are restricted to footpaths 6 metres wide or greater and for use between May and October or during other weather related conditions. If the use of transparent drop-down blinds were implemented to achieve compliance with the *Tobacco Act 1987* these restrictions would need to be removed from the Guidelines.
- 3.16 Any transparent drop-down blinds used for the purposes of an 'outdoor drinking area' must also not exceed the 75% notional wall area requirement of the *Tobacco Act 1987*.



- 3.17 If transparent drop-down blinds were to be considered, this would require a departure from the Footpath Trading Guidelines (2013) to use transparent drop-down blinds on footpaths less than 6 metres wide and to use transparent drop-down blinds all-year round to achieve an ‘outdoor drinking area’. To consider any of these variances, Officers must provide a recommendation to the Footpath Trading Panel to reach a decision.
- 3.18 Whilst using transparent drop-down blinds would be consistent with the State Government requirements, key concerns include the additional clutter and the over-privatisation of public space to the detriment of streetscapes. Allowing transparent drop-down blinds to achieve an ‘outdoor drinking area’ less than 4 metres from an ‘outdoor dining area’, may show Council support for smoking behaviour.
- 3.19 There is a small number of venues that currently have a permit for transparent drop-down blinds. Of the venues recently canvassed, only one business has declared an interest in obtaining a permit for transparent drop-down blinds to provide an ‘outdoor drinking area’ because they would be located less than 4 metres from a neighbouring venues ‘outdoor dining area’.

Compliance

- 3.20 From 1 August there will be a 3-month grace period to allow for Councils to amend policies and for venue operators to achieve compliance with new trading arrangements. Scenarios could include:

Table 2 - Compliance Examples

Scenario	Example
Existing business with an outdoor drinking area next to an existing business with an outdoor dining area.	As smoke-free outdoor dining laws commence on 1 August 2017, the existing business with the outdoor drinking area will have until 1 November 2017 to comply with the amended <i>Tobacco Act 1987</i> .
Business with new outdoor dining area starts trading next door to an existing outdoor drinking area.	If the business with the new outdoor dining area starts trading on 1 September 2017, the occupier of the outdoor drinking area has until 1 December 2017 to comply with the amended <i>Tobacco Act 1987</i> .
The same premises that operates an outdoor dining area and outdoor drinking area.	As smoke-free outdoor dining laws commence on 1 August 2017, the business will have until 1 November to comply with the amended <i>Tobacco Act 1987</i> .

- 3.21 Council’s Environmental Health Officers are automatically authorised as ‘inspectors’ but will be provided with training by the Department of Health & Human Services. Council’s Local Laws or other officers are eligible for training and authorisation following comprehensive training.
- 3.22 Inspectors, authorised under the *Tobacco Act 1987*, may provide information about the ban and enforce it when necessary. The first priority of the inspector is to make sure smokers and venues understand the legislation. Infringements can also be issued.



4. OPTIONS TO AMEND THE FOOTPATH TRADING GUIDELINES

4.1 To remain consistent with the *Tobacco Act 1987*, changes to the Footpath Trading Guidelines (2013) must be Gazetted, including the requirement to provide windproof ashtrays only for venues with an ‘outdoor drinking area’.

4.2 Council must consider the following options to the Footpath Trading Guidelines (2013):

	Issues	Benefits
<p>Recommended - Option 1</p> <p>Amend the Footpath Trading Guidelines (2013) to:</p> <ul style="list-style-type: none"> Remain consistent with the <i>Tobacco Act 1987</i> and the requirement to provide windproof ashtrays only for venues with an ‘outdoor drinking area’. Prohibit 2.1 metres high walls, including transparent drop-down blinds to all elevations of a footpath trading zone. 	<p>May result in more cigarette littering.</p> <p>May result in less accessible footpaths.</p> <p>As a bay-side Council, could disadvantage some traders occupying the footpath during inclement weather.</p> <p>A trader who chooses to accommodate smokers using a 4-metre buffer will be likely to have a reduced patron capacity.</p>	<p>This approach is largely consistent with locally benchmarked Councils that prohibit or discourage infrastructure that supports smoking.</p> <p>Protects streetscapes and activity centres from becoming overly privatised.</p> <p>Protects the community from second-hand smoke and de-normalises smoking behaviour.</p>

4.3 This recommended option continues to provide for removable screens 0.9 metres high and 1.5 metre high glass screens, used to manage trading zones and patrons, and providing a sense of safety for patrons from vehicles.

4.4 This option encourages businesses to either provide a 4 metre buffer zone from an adjacent ‘outdoor dining area’, or collaborate with neighbouring venues to nominate a time when the adjacent footpath trading zones become ‘outdoor drinking areas’. If either cannot be achieved the footpath trading zone must be smoke-free.

4.5 Prohibiting 2.1 metre high walls and transparent drop-down blinds would align with the cities of Melbourne and Yarra, and be consistent with Stonnington where infrastructure that allows smoking is not supported.

4.6 This approach protects streetscapes and minimises visual clutter.

4.7 This option is aligned to the delivery of the Council Plan 2017-27 Strategic Direction 2: We are connected and it’s easy to move around; and Strategic Direction 4: We are growing and keeping our character.

4.8 CoPP activity centres are well serviced with litter bins designed to accommodate cigarette waste, however the level of littering associated with this option would need be monitored, with the opportunity to consider additional ashtrays in any identified hot spots.



	Issues	Benefits
<p>Option 2</p> <ul style="list-style-type: none"> Amend the Footpath Trading Guidelines (2013) to remain consistent with the <i>Tobacco Act 1987</i> and the requirement to provide windproof ashtrays only for venues with an ‘outdoor drinking area’, and Do not alter the Guidelines for considering removable screens and transparent drop-down blinds. <p>Under this option traders could still request 2.1 metre high walls or transparent drop-down blinds to achieve an ‘outdoor drinking area’.</p>	<p>Consistent with the State Government requirements.</p> <p>May show support for smoking through the provision of infrastructure.</p> <p>2.1 metre high walls and drop-down blinds may create additional clutter and privatisation of public space.</p> <p>Inconsistent with locally benchmarked Councils that either prohibit or discourage infrastructure that supports smoking.</p>	<p>Maximises patron capacity by not providing a 4-metre buffer where a trader chooses to accommodate smokers.</p> <p>May result in less impact of smokers occupying surrounding public areas.</p> <p>May result in less cigarette littering.</p>

- 4.9 Option 2 would allow officers to consider requests for 2.1 metre high walls and transparent drop-down blinds on a case-by-case basis, taking into account streetscape, heritage, urban character and traffic conditions.
- 4.10 This option would also require the Footpath Trading Panel to consider requests on footpaths less than 6 metres wide and to use transparent drop-down blinds all-year round to achieve an ‘outdoor drinking area’.
- 4.11 This option would be contrary to the position taken by neighbouring benchmarked Councils that either do not support, or positively discourage infrastructure that supports smoking.
- 4.12 Officers are currently aware of one venue that has indicated it may choose to apply for a transparent drop-down blind to achieve an ‘outdoor drinking area’. This anecdotally suggests that the overall number of future requests would be low.



FURTHER SUPPORTING INFORMATION

5. ALIGNMENT TO COUNCIL PLAN AND COUNCIL POLICY

- 5.1 The impacts of smoking on health of the community including second-hand smoke are well known and the number of adults that smoke continues to decline. According to the VicHealth Indicators Survey (2014) only 13.14% of Victorian adults smoke.
- 5.2 One of the key objectives of the *Tobacco Amendment Act 2016* is to de-normalise smoking behaviour. By making it less acceptable to smoke in public places discourages smoker up-take and encourages existing smokers to quit.
- 5.3 Council has been committed to promoting good health by supporting smoke-free initiatives, introducing all Council owned and operated buildings, doorways and surrounding grounds as 'smoke-free' in May 2014.
- 5.4 A strategy of Council's Municipal Public Health and Wellbeing Plan 2013 - 2017 is to reduce smoking rates by implementing tobacco bans in licenced premises and other public venues.
- 5.5 The Council Plan 2017-2027 supports this recommendation with the following outcomes:
 - 5.5.1 Our streets are designed for people.
 - 5.5.2 Liveability in a high density City.
 - 5.5.3 A City of diverse and distinctive neighbourhoods and places.
- 5.6 By prohibiting the use of 2.1 metre high walls and transparent drop-down blinds to achieve 'outdoor drinking areas', Council can further discourage smoking, as advocated by the Council Plan and Public Health and Wellbeing Plan.

6. CONSULTATION AND STAKEHOLDERS

Council-wide strategy

- 6.1 Officers from across the organisation, including City Permits, City Business, Health and Local Laws units have collaborated ahead of 'smoke-free dining' to ensure the hospitality industry are engaged and informed. This has included the sharing of Fact Sheets with all footpath trading permit-holders, Health newsletters to all food premises, online information and through officer interactions with venue operators.

Benchmarking local Councils

- 6.2 Three local Councils were surveyed on the position of 'smoke-free' footpath trading and the permitting of infrastructure to achieve 'outdoor drinking areas'.
- 6.3 City of Melbourne – Street trading permits are only considered for cafés and restaurants. 2.1 metre high screens or transparent drop-down blinds would not be supported. City of Melbourne's Street Trading Policy will be amended to remove the requirement for windproof ashtrays
- 6.4 City of Stonnington – Drop-down blinds to the side of venues are prohibited by Stonnington's Planning Scheme. The Chapel Street and Toorak Road Precinct allows for blinds to be considered to the kerb-side only. Venues operators are encouraged to



work-together and agree on hours when adjacent footpath trading areas become 'outdoor drinking areas'. If this cannot be achieved, and there is no 4 metre buffer, the footpath trading zone must be smoke-free. Stonnington's Footpath Trading & Awnings Policy will be amended to remain current with the use of windproof ashtrays where smoking is permitted under the *Tobacco Act 1987*.

- 6.5 City of Yarra - Footpath Trading policy requires the primary activity to be the service of food. The maximum height of barriers permitted is 1.7 metres. The use of 2.1 metre high screens or transparent drop-down blinds are not being investigated. This Council does not support infrastructure that promotes smoking, but will consider requests on a case-by-case basis.

Consultation with hospitality industry

- 6.6 Officers attended a Port Phillip Liquor Licensees Association Forum and a Trader Association meeting, and spoke with a host of business operators across the municipality, targeting those trading on the footpath within 4 metres of another venue.

- 6.7 Feedback included:

- A high level of awareness of the smoking ban for outdoor dining areas.
- A high expectation of declaring the footpath trading zones to be 'outdoor drinking' areas in the evenings where 4 metre buffers can be achieved.
- Where footpath trading zones are within 4 metres of each other, concerns that a consensus between traders may not be reached when nominating times to use as an 'outdoor drinking area'.
- One trader believes approximately 70% of their patrons are smokers.
- To-date, one venue operator has been identified, who may choose to apply for a transparent drop-down blind to one side of the trading zone. This is desired to provide flexibility with an outdoor drinking area if an adjoining restaurant is operating.

7. LEGAL AND RISK IMPLICATIONS

- 7.1 To remain consistent with the Tobacco Act 1987 changes to the Footpath Trading Guidelines (2013) must be Gazetted.
- 7.2 The permitting of 2.1 metre high screens would be a risk to Council's reputation by supporting smoking behaviour through the provision of infrastructure.
- 7.3 The risk of increased littering will be managed by the location of existing litter bins that accommodate cigarette waste, and the monitoring of locations where additional ashtrays may be required.

8. SUSTAINABILITY – Triple Bottom Line

8.1 ENVIRONMENTAL IMPLICATIONS

- 8.1.1 With a reduced number of businesses required to provide ashtrays, there is the risk of a potential increase in the amount of cigarette litter entering the stormwater network and subsequently Port Phillip Bay. There is opportunity for Council to address any potential hot spots with the provision of ashtrays in



identified locations. Health Officers will continue to monitor smoker's behaviour and report back to the Department of Health & Human Services.

8.2 SOCIAL & CULTURAL IMPLICATIONS

8.2.1 European-style, alfresco dining has been part of Melbourne's café culture for many years. The activation of footpath areas provides businesses with additional exposure and patron capacity, but also contributes to vibrancy and perceptions of safety.

8.3 ECONOMIC IMPLICATIONS

8.3.1 Victoria is the last State to introduce this ban. Officers have canvassed interstate Council's including tourist destinations of Bondi and Manly in New South Wales, and Adelaide, South Australia which did not suggest negative economic impacts on business from the banning of smoking in 'outdoor dining areas'.

8.3.2 A State-led education program for the hospitality industry has prepared venue operators ahead of the change, with a 3-month transition period until 1 November 2017.

8.3.3 Consultation with affected businesses suggests a high-level of awareness within the hospitality industry. With 69.8% of Victorians supporting the ban in 2014, this may positively impact outdoor dining experiences for locals and visitors.

8.4 FINANCIAL IMPLICATIONS

8.4.1 A State Government grant of \$10,500 has been provided to each metropolitan Council to resource programs resulting from the ban. This grant is planned to resource a Health Officer to visit all venues that operate with a footpath trading permit, to provide information, advice and smoke-free signage.

9. IMPLEMENTATION STRATEGY

9.1 TIMELINE

9.1.1 As a result of this decision, amendments to the Footpath Trading Guidelines would be publicly advertised and Gazetted.

9.2 COMMUNICATION

9.2.1 Footpath trading permit-holders will be notified of amended permit conditions in relation to the provision of windproof ashtrays, only where smoking is permitted under the *Tobacco Act 1987*.

9.2.2 Officers will continue to use trader engagement opportunities to discuss the smoking ban including fact sheets and online resources.

9.2.3 Venue operators will receive visits from Health Officers to educate, inform, and provide 'smoke-free' signage.

9.2.4 Officers will continue to attend Trader Association and Port Phillip Liquor Association Forums.



10. OFFICER DIRECT OR INDIRECT INTEREST

- 10.1 No officers involved in the preparation of this report have any direct or indirect interest in the matter.