# Last Gasp for Smokers

**SMOKING IN STRATA BUILDINGS**

Smoking is one of the major sources of disputes in strata schemes. It can cause numerous problems for strata schemes, potentially undermining the amenity of the building, increasing common property repair and cleaning costs and causing fire hazards. It can even result in compensation orders being made against owners of tenanted strata lots owned as an investment property.

The issue is regulated by various laws, which are not entirely consistent. The most important of these laws are:

- The smoke-free environment legislation, which establishes smoke-free areas and imposes penalties for specified conduct relating to use of those areas. This has limited relevance to residential schemes, but is relevant to commercial schemes or mixed use schemes containing licensed premises, restaurants or outdoor dining areas.

- The residential tenancies legislation, which imposes duties on lessors to provide habitable premises and to not permit interference with the tenant's reasonable peace, comfort or privacy in using the premises and provides for compensation orders in the case of breach of those duties. This has caused some anxiety, as there have been situations in which a tenant has pursued a lessor for compensation in relation to smoke drift emanating from other premises , which the lessor was unable to prevent, but for which the lessor was liable anyway, on the basis of an argument that the smoke drift made the premises uninhabitable and that the lessor had failed to provide habitable premises.

- The strata management legislation, which takes a two-pronged approach of imposing a duty not to cause nuisance and permitting by-laws restricting smoking. This has also caused some anxiety, as there appear to be widespread misconceptions as to how these laws work and how effectively to use them.

As to the strata management legislation, the key points are:

- The Strata Schemes Management Act 2015 ("Act") provides some assistance with regulating smoking, as compared with the previous legislation, but does not represent a ban on smoking.

- The Act permits the making of by-laws restricting smoking and such a by-law is included in the model by-laws contained in Schedule 3 of the Strata Schemes Management Regulation

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2016 (“Regulation”). However, this has no impact on a particular strata scheme unless and until it adopts the model by-laws or an alternate smoking by-law.

- By-law 9 of the model by-laws is framed so as to permit a choice between two options, either (A) to prohibit smoking on common property and smoke drift from a lot to another lot or common property or (B) prohibiting smoking outside designated smoking areas or written approval of the owners corporation, again also prohibiting smoke drift from a lot to another lot or common property. Either way, this is not a ban on smoking within lots and more about prohibiting smoke drift from the lot to other lots or common property.

- An alternate smoking by-law could go further than model by-law 9. Decided cases make it clear that an owners corporation is competent to make a by-law restricting smoking in lot property, so the main restriction is going to be Section 139 of the Act, which provides that a by-law must not be “harsh, unconscionable or oppressive”. Possibly, that would be the case where a by-law seeks to restrict smoking within a lot which has no impact on other lots or common property, but otherwise this is not likely to be a significant restriction.

- The Act also creates the possibility of restricting smoking without a by-law. Section 153 of the Act provides that an occupier must not use a lot in a manner that causes a nuisance or hazard to the occupier of any other lot or use common property in a manner which interferes unreasonably with another persons’ use of another lot or the common property. This does not expressly prohibit smoke drift or establish definitively that smoke drift is a nuisance, but it represents a potential basis for tribunal action in the absence of a by-law.

- The Act contains much more effective enforcement mechanisms than the previous legislation. In particular:

    - In case of breach of the by-law, the owners corporation can issue a notice to comply to the relevant occupant and if the relevant occupant does not comply with that, apply to the New South Wales Civil and Administrative Tribunal (“NCAT”) for a civil penalty. Such a civil penalties are substantial, being up to $1,100 for the first breach and $2,200 for a second breach within 12 months.

    - An owners corporation could also apply to NCAT for an order prohibiting specified conduct, which in the case of non-compliance could lead to a penalty of up to $11,000 for an individual or $22,000 for a company. Please note that at present the legislation has a flaw and that a penalty for an order issued after 29 November 2016 cannot be issued.

Accordingly, where an owners corporation is experiencing difficulties with smoking, it should consider the following:

- Do the issues relate to premises which may be subject to the smoke-free environment legislation, e.g. commercial outdoor dining areas in commercial or mixed-use schemes? In


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that case, it may be possible to obtain assistance from NSW Health or Council.

- Do we have smoking by-law and if so are we happy with it? It would normally be a relatively straightforward matter to implement a by-law or review an existing by-law.

- Are we having difficulty enforcing an existing by-law? If so, it could be helpful to adopt a clear enforcement policy and advise occupants of the policy.

We have considerable experience with these issues and could help you pre-empt difficulties in this area.

**Key takeaways**

- Smoking in strata buildings can lead to disputes and increased costs.
- The Strata Schemes Management Act 2015 allows for by-laws to restrict smoking.
- Tenants may seek compensation for smoke drift affecting their living conditions.
- By-law 9 provides options for managing smoking on common property.
- Owners corporations can create stricter by-laws as long as they are not oppressive.

****The information contained in this article is general information only and not legal advice. The currency, accuracy and completeness of this article (and its contents) should be checked by obtaining independent legal advice before you take any action or otherwise rely upon its contents in any way.*

**Prepared by Bannermans Lawyers**
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