SUBMISSION: STRATA TITLES ACT REFORM
Landgate
December 2014
Cancer Council WA, the Australian Council on Smoking and Health (ACOSH) and Heart Foundation welcome the opportunity to comment on the proposed reform of the Strata Titles Act 1985 (WA) (’Act’). The STAR Project presents a unique and valuable opportunity to correct a serious deficiency of the Act - its failure to address the issue of smoking and second-hand smoke (SHS) exposure on strata titled property. The scope of our submission is limited to this issue, which is of public health importance and elicits a high level of community concern.

Although not raised explicitly in the Consultation Paper dated 31 October 2014, the issue of smoking is relevant to two chapters of the Consultation Paper – Management and Dispute Resolution.

Cancer Council WA is a not-for-profit, incorporated association and has been the leading non-government cancer agency in Western Australia since 1958. Our vision is to achieve a cancer-free future for the people of Western Australia. Our mission is to minimise the incidence and impact of cancer on our community through advocacy, research, education and by providing people affected by cancer with support to enhance their quality of life.

ACOSH is an independent, non-government, not for profit coalition of prominent Western Australian health, education, community, social service and research bodies with a shared concern about smoking and health. ACOSH works through advocacy and collaboration on comprehensive strategies to reduce the health consequences of smoking.

The Heart Foundation saves lives and improves health through funding world-class cardiovascular research, guidelines for health professionals, informing the public and assisting people with cardiovascular disease. The Heart Foundation has worked in partnership with the Cancer Council WA, Australian Medical Association (WA Branch) and the Australian Council on Smoking and Health to reduce the prevalence of smoking in Western Australia. While the Heart Foundation’s work over the past five decades has helped reduce the number of deaths, cardiovascular disease (heart, stroke and blood vessel disease) remains one of Western Australia’s most devastating health problems.

In 2009, the National Preventative Health Taskforce recommended that State governments take action “to protect residents from exposure to smoke-drift in multi-unit developments.”1

This submission comments specifically on Proposals 147, 148, 161, 162, 163 and 164 to the extent that they relate to smoking and makes recommendations for further reforms in this area. We believe that our key recommendations are necessary to reduce harms from SHS exposure and are supported by the evidence currently available. Importantly, the recommendations aim, to the extent reasonably possible, to minimise interference with the freedoms of property owners and tenants. In addition, the recommendations below provide a fair framework for resolving disputes between neighbours about smoking.

**Summary of Key Recommendations**

1. the new Act clarify that smoke drift that enters any part of a neighbouring property may be regarded as a nuisance and a hazard for the purpose of the Act;

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2. a new Schedule 2 model by-law be included in the new Act, prohibiting tobacco smoking on all common property (inside and outside).

3. a new Schedule 2 model by-law be included in the new Act, prohibiting smoking within a lot (including on balconies and courtyards) where the smoking causes a nuisance or hazard or otherwise interferes unreasonably with the use or enjoyment of a lot by another resident.

4. landlords be required to give tenants a copy of the by-laws in force and details of any smoking policies;

5. Landgate be called on to develop and actively publicise a comprehensive resource for owners of strata properties who would like their complex to become completely smoke-free, including within lots;

6. the SAT be called on to monitor and report on the number of disputes it adjudicates each year on smoking in strata titled properties.

Health Effects of Second-hand Smoke (SHS)

Currently in Western Australia, only 10.9% of Western Australians aged 16 and over are daily smokers. Although smoking has been in decline over the past 30 years, tobacco use continues to have a major impact on public health and will continue to do so for many years to come. Smoking is a leading cause of preventable death and disease in Australia. It contributes to more drug-caused deaths than alcohol and illicit drugs combined and it has been estimated to kill about one half of all persistent users. Tobacco kills over 1,500 Western Australians each year. Lung cancer is the leading cause of cancer death for both men and women in Western Australia.

Scientific evidence is unequivocal about the serious health effects of SHS (also known as passive smoking, involuntary smoking or environmental tobacco smoke). There are at least 250 chemicals that are known to be toxic or carcinogenic in SHS. SHS is classified by the International Agency for Research on Cancer (IARC) as a known human carcinogen and there is conclusive evidence that exposure to SHS is a cause of lung cancer in non-smokers.

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2 Radomiljac, Ali and Joyce, Sarah 2014. Health and Wellbeing of Adults in Western Australia 2013, Overview and Trends. Department of Health, Western Australia
4 Collins DJ. and Lapsley HM. (2014) The social costs of smoking in Western Australia 2009-10 and the social benefits of public policy measures to reduce smoking prevalence: report for Cancer Council Western Australia. Perth: Cancer Council Western Australia.
smokers.\textsuperscript{10} The US Surgeon General has stated that there is no known safe level of exposure to SHS.\textsuperscript{11}

In addition to the increased risk of lung cancer from exposure to SHS in non-smokers, tobacco smoke contains substances known to affect the central nervous system, the immune system, the heart and liver, as well as cause eye, skin or respiratory problems. Exposure to second-hand smoke is known to increase the risk of coronary heart disease among non-smokers and there is limited evidence to suggest that exposure to SHS may also increase the risk of stroke.\textsuperscript{11}

Children are particularly vulnerable to the effects of SHS exposure and the costs are borne largely by them. In the financial year 2009/10 in WA, the deaths of two children aged under 15 and 7,614 hospital bed days were attributable to SHS.\textsuperscript{12} The major tobacco-attributable conditions affecting this age group are asthma, lower respiratory chest infections, otitis media (middle ear infection), low birthweight and fire injuries.

Studies have consistently shown that babies who are exposed to SHS are at an increased risk of sudden unexpected death in infancy, including SIDS. These have tended to consider the effects of a smoking parent rather than exposure to neighbours’ smoke. A review published in 2007 indicated that there had been at least 39 case-control and cohort studies on parental smoking and SIDS and the odds of dying from SIDS was twice as high if a parent smoked, after adjusting for confounding variables.\textsuperscript{13} There is a dose-response relationship, meaning that the risk of SIDS increases with the amount of cigarette smoke that the baby is exposed to.\textsuperscript{14}

**Exposure to SHS and Multi-Unit Housing**

With sustained population growth and increased demand for higher density living over the past decade, strata titles now comprise one third of new lots created in Western Australia.\textsuperscript{15} Although there are smoke-free policies and regulations relating to workplaces and public areas in WA, there are few restrictions on smoking in multi-unit residences. This has caused concern among apartment residents about the impact of smoke drifting into their homes throughout a building via door and window jambs, wall-inset air vents, mechanical ventilation

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\textsuperscript{12} Collins DJ. and Lapsley HM. (2014) The social costs of smoking in Western Australia 2009-10 and the social benefits of public policy measures to reduce smoking prevalence: report for Cancer Council Western Australia. Perth: Cancer Council Western Australia.


and air conditioning systems, elevator shafts, hallways, stairwells, cracks in walls, balconies, patios, plumbing systems and electrical systems.\textsuperscript{16}

While there are relatively few Australian studies on exposure to SHS in multi-unit housing, a recent Australian study examined the relationship between SHS exposure, socioeconomic status and housing types. Twenty-five per cent of male respondents and 21% of females reported SHS exposure of at least 1 hour per week, and 9% of males and 8% of females reported over 8 hours of exposure. Participants living in multi-unit dwellings were more likely to be exposed to SHS than participants living in houses.\textsuperscript{17}

International studies have quantified levels of SHS exposure in multi-unit dwellings, although rates of smoking and building standards may differ from Australia. In a sample of over 5,000 residents of multi-unit dwellings in Denmark, 22% reported exposure to SHS from neighbours.\textsuperscript{18} Similarly, an analysis of airborne nicotine measurements collected in 49 low income, multi-unit residences in Boston found that tobacco smoke contamination was not limited to homes with smokers. This suggested that SHS was infiltrating non-smoking homes from neighbouring units.\textsuperscript{19}

International evidence shows that children in multi-unit housing are exposed to tobacco smoke at a much higher rate than those living in detached houses. Children living in apartments in the US had an increase in cotinine (a marker of tobacco exposure) of 45% over those living in detached houses. Most children without known SHS exposure inside the home still showed evidence of SHS exposure.\textsuperscript{20} The situation in Australia could be different due to differences in housing density and smoking prevalence, but the evidence from overseas is consistent.

Air sealing and ventilation changes can reduce smoke drift from apartments where residents smoke indoors, but it cannot be completely eliminated.\textsuperscript{21}

Compared with other countries such as the United States and Canada, research on smoke drift in multi-housing is underdeveloped in Australia. With increasing levels of community concern and attention from policy-makers, it is anticipated that the body of evidence in this area will grow over time.

**The Current Act and Disputes about Smoking**

Cancer Council WA sometimes receives enquiries about smoke drift within strata complexes, with numbers usually increasing over the summer. Some complaints are referred


to Cancer Council WA via the Australian Council on Smoking and Health (ACOSH). Since ACOSH developed its resource for home owners and residents, Cancer Council WA has also referred complainants to ACOSH for further information about smoking in multi-unit housing.

In an article published in The West Australian newspaper last year, ACOSH stated that, “angered residents have reported being forced to abandon or severely limit time on their balcony or in their backyard due to smoke drift. Among those who complained were parents of newborns, asthmatics, those with a variety of other health conditions and ex-smokers.”

This issue received media coverage on Sunday, 30 November 2014, with The Sunday Times reporting that former Hamilton Hill resident, Ms Andrea Cicholas, was forced to move twice within a year because of smoke drift from neighbouring apartments. Ms Cicholas commented that in the six months she was living at the unit, there was only one occasion when she was able to use her balcony without being exposed to a cloud of smoke.

The current Act is silent on the issue of smoking, but under Schedule 1, a proprietor, occupier or other resident of a lot shall:

(a) use and enjoy the common property in such a manner as not unreasonably to interfere with the use and enjoyment thereof by others;

(b) not use the lot or permit it to be used in such manner or for such purpose as causes a nuisance to any occupier of another lot or the family of such an occupier.

Schedule 2 sets out by-laws in respect of a number of common management issues (eg. rubbish, laundry items, vehicles, floor coverings, noise) but the Act does not deal explicitly with smoking.

A proprietor or mortgagee in possession of a lot must take all steps that are reasonable in the circumstances to ensure that every occupier or other resident of that lot complies with the by-laws for the time being in force. By section 35(1), strata companies also have a duty to enforce the by-laws.

The dispute resolution mechanisms in the Act are unclear and difficult to apply, particularly in relation to disputes between neighbours about smoking.

People in Western Australia who are affected by SHS may be able to complain to their strata company council or strata manager. The smoker may then be notified that smoking is not permitted in areas where it constitutes a nuisance, but this may be contested by the smoker. Disputes about smoking within strata titled properties can be heard by the State Administrative Tribunal (SAT). A person who is affected by smoke drift may make an application for orders. The vast majority of such disputes will settle at mediation without

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going to a hearing because mediation is an integral part of the process and is ordered by default.

The SAT can make orders requiring a person to stop smoking in certain areas. For example, in 2008 the SAT ordered the proprietors, occupiers and residents of a particular unit in Woodlands to cease smoking upon their balcony or upon the common property not less than 4 metres from the doors or windows of lots within the strata complex. However, the SAT has no power to enforce its non-monetary orders. If a party does not comply, the matter must be pursued in a court of competent jurisdiction or to the Supreme Court.

As noted in the Consultation Paper, the SAT also has no power to impose a monetary penalty if the by-law does not specify a penalty for breach. It follows that a reasonable financial penalty cannot be imposed to deter a person from smoking where smoke drift is causing a nuisance or hazard to neighbouring residents.

**Community Support for Smoking Restrictions**

Extensive tobacco legislation in WA has helped shape community attitudes and reduce the proportion of daily, adult smokers to just 10.9%.

Importantly, in 2011 in WA, only 5.7% of school students had smoked in a given week.

There is a wealth of research showing the health and social benefits of smoke-free legislation, demonstrating its effectiveness as a powerful public health intervention. Limiting opportunities for smoking can be a successful strategy for reducing cigarette consumption, as well as reducing uptake of smoking among young people, especially when implemented as part of a comprehensive tobacco control program. As well as providing protection from SHS, smoke-free areas contribute to the de-normalisation of smoking and may reduce consumption of tobacco and prevent the uptake of tobacco use among young people.

Research commissioned by Cancer Council WA and conducted by the Centre for Behavioural Research in Cancer Control at Curtin University shows that more than half of non-smokers support 100% smoke-free policies for apartments and flats. Among non-smokers, women were significantly more likely than men to be strongly in favour of making flats and apartment blocks completely smoke-free (38% vs 20%, p = .000).

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25 Radomiljac, Ali and Joyce, Sarah 2014. Health and Wellbeing of Adults in Western Australia 2013, Overview and Trends. Department of Health, Western Australia
These results are similar to those from international studies. In a much larger study of multi-unit housing residents in New York,\textsuperscript{31} nearly half of respondents in that study had experienced a SHS incursion in their home and a majority (55.6%) supported a total smoking ban. Support was significantly higher among CALD respondents and those living with children. Support for smoking restrictions in multi-unit housing also tends to be higher among people who have been personally affected by the issue. In Denmark, 58% of persons exposed to SHS from neighbours preferred smoke-free buildings, compared with 37% of persons not so exposed.\textsuperscript{32}

It is expected that levels of support in Australia would be higher for policies that limit SHS exposure without prohibiting all smoking on strata titled properties.

The American Lung Association has identified the following types of smoke-free multi-unit housing policies (other than 100% smoke-free policies):

(a) smoking disclosure laws: these require owners to inform prospective residents of smoking policies but do not mandate smoke-free units or buildings;
(b) policies that designate some but not all buildings or units as smoke-free;
(c) smoke-free common areas;
(d) certain areas designated smoke-free eg. balconies, patios, common areas.

According to the American Lung Association, the availability of smoke-free multi-unit housing in the United States has increased dramatically as a result of greater awareness of the risks of SHS, increased consumer demand, state and legal advocacy efforts and recommendations by the US Department for Housing and Urban Development (HUD) and Environmental Protection Agency (EPA).\textsuperscript{33} In addition, as at January 2011, at least 230 local housing authorities in 27 states of America had adopted smoke-free policies. This was an increase from 2 in the year 2000.

Smoke free apartments are gaining momentum in Australia but are still considered fairly novel. Taskers in North Fremantle is an apartment complex that is currently under development and will be 100% smoke free. The development will be Perth’s first non-smoking apartment complex, consisting of 110 apartments spread over four buildings. In a recent news story, property developer Gary Dempsey said that he was motivated to make the complex smoke-free because he lost his mother, uncle and aunt to lung cancer.\textsuperscript{34}

In April this year, an apartment complex in Subiaco achieved a smoke free policy by way of special resolution under Schedule 2. There were 6 property owners, with 4 in favour of the

\textsuperscript{31} King BA, Cummings MK, Mahoney MC, Juster HR, Hyland AJ. ‘Multiunit housing residents’ experiences and attitudes toward smoke-free policies’ (2010) Nicotine & Tobacco Research 6: 598-605.


resolution, 1 opposed and 1 abstaining. We are aware of other complexes that plan to undergo the same process to achieve the same outcome.

Cancer Council New South Wales has reported that a number of apartment buildings have become smoke free in Sydney and in the ACT.35

The Current Act and Barriers to Adopting Smoking Restrictions

Section 42(1)(c) of the current Act provides that a strata company may make by-laws, not inconsistent with the Act, for matters relating to the management, control, use and enjoyment of the lots and any common property. We support Proposal 148, which is for the Act to “provide guidance around the nature of Schedule 1 and Schedule 2 by-laws, in order to assist strata companies to correctly classify any new by-laws as being in one or the other, and accordingly to use the correct voting protocols for their repeal or amendment.” As a by-law on smoking relates to the behaviour of proprietors and occupiers and not the operation of the strata company, our understanding is that a new, Schedule 2 by-law on smoking can be added by the strata company by special resolution: see s 42(2)(c).

There is case law to support the proposition that it is within the power of the strata company to prohibit smoking by occupants and visitors, even within individual lots. In Salerno v Proprietors of Strata Plan No.4272436, the Supreme Court of New South Wales considered whether a by-law that prohibited smoking anywhere on the premises was invalid. The by-law had been added by the strata company by special resolution. It was conceded that the by-law was a proper exercise of power because it was concerned with control management, administration, use or enjoyment of the lots and common property. The issue, however, was whether the by-law was capable of operating to prohibit or restrict the devolution of a lot or a transfer, lease, mortgage or other dealing, contrary to s 58(6) of the Strata Titles Act 1973 (NSW). Justice Windeyer stated that, “any person whatsoever is free to purchase or take a lease of the lots; what those persons are not free to do is to smoke or allow smoking within the lot.” Whilst the by-law may have reduced the number of potential transferees or lessees, it could not be regarded as a restriction on transfer or leasing and its validity was upheld by the court.

The lawfulness of introducing smoke-free by-laws was confirmed recently by Landgate General Manager, Mr Bruce Roberts, who was reported as stating that, “there is nothing in the Strata Titles Act now that prevents the creation of smoke-free zones by the owners of the strata scheme, if they agree to do so.”

Smoking restrictions in multi-unit housing do not offend anti-discrimination legislation at a Commonwealth or State level because smokers are not a protected class of persons. The Australian Human Rights Commission has stated that, “smokers may often be addicted to nicotine, but this does not mean that restrictions or bans on smoking are discriminatory – for one thing, it is possible to deal with the nicotine addiction by wearing patches rather than smoking.”37 With smoking restrictions in place, smokers are not prevented from taking up

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residence but must abide by the by-laws and smoke only where it does not contravene any by-law.

Despite the existence of several precedents, there is very little awareness in WA among home owners, residents and even property managers about the lawfulness of a strata company introducing a by-law to restrict smoking in strata titled complexes. Anecdotal evidence suggests that even those who are aware of this possibility are likely to face difficulties in navigating the complex legal requirements. Proponents of smoking restrictions are often told by their strata manager that lawyers must draft the by-laws, sometimes for a substantial fee. Some strata managers may be reluctant to act for fear of bringing residents into conflict with each other. At a minimum, proponents of a new smoking by-law must precisely follow these steps:

1. Contact the strata manager around 6-8 weeks before the Annual General Meeting, or call for an extraordinary meeting by writing a letter to the Strata Manager, which has been signed by owners entitled to a quarter or more of the aggregate unit entitlement of the lots.
2. Draft the proposed smoking by-law or engage a lawyer to do so and ask for it to be included on the agenda as an item of special business.
3. The Strata Manager must distribute the agenda with the proposed special resolution to all owners at least 14 days before the general meeting.
4. Attend the strata company’s general meeting, where there must be a sufficient quorum.
5. Provide the owners at the general meeting with information on the health, legal, and financial benefits of adopting the proposed by-law.
6. Attendees at the general meeting will then vote on the special resolution. A special resolution only passes if the requirements in s 3B of the Act are met. In summary, a special resolution is passed if it is supported by at least 50% the votes of eligible owners and proxies present at the meeting, and is not opposed by 25% or more. The value of each vote is calculated based on the unit entitlement of each lot. There are different requirements for strata schemes that have only 3, 4 or 5 lots.
7. If the special resolution is passed with amendment, the strata company must, within 7 days, serve a copy of the amended resolution on each owner who was not present at the meeting.
8. The new by-law does not have effect until the strata company has lodged a notice of the additional by-law with Landgate and the Registrar of Titles has made reference to the new by-law on the registered strata/survey-strata plan. The strata company will need to complete a Form 21- Notification of Change of By-Laws within 3 months of the general meeting.

Not surprisingly, we are aware of several unsuccessful attempts to bring about smoking restrictions in multi-unit housing due to the complexity of the procedural requirements. Given the difficulty in adding a new by-law, there is a clear need for a model schedule 2 by-law to be included in the new Act and adopted by default by new strata schemes.

We are in favour of Proposals 147 and 164, which prevent the making of by-laws that are oppressive or unreasonable and enable the SAT to amend or repeal such by-laws. In the current Act, s 93 of the Act empowers the SAT to repeal a by-law that, “should not have been made having regard to the interests of all proprietors in the use and enjoyment of their lots or the common property.” The concern is that this provision could be used to defeat a reasonable by-law that aims to minimise the risk of exposure to SHS. The language adopted by Proposals 147 and 164 provide necessary protections against by-laws that are oppressive or unreasonable, but without limiting the right of the strata company to put in place reasonable public health protections.
Recommendation 1: the new Act clarify that smoke drift that enters neighbouring property may be regarded as a nuisance and a hazard for the purpose of the Act

The current Act and regulations do not define the terms ‘nuisance’ and ‘hazard’, as these take their meaning from the common law. However, to avoid any doubt, it is submitted that the legislation should state that smoke drift that enters neighbouring property may be regarded as a nuisance and a hazard.

The strata law reforms made by New South Wales include an amendment to clarify that “cigarette smoke can be a nuisance or a hazard to other residents.”

This amendment would provide greater certainty and empower strata managers to resolve disputes about smoke drift. It is also a formal recognition of the public health benefits of preventing SHS exposure in residential settings.

It is anticipated that this reform would benefit residents who seek orders from the SAT to prevent smoke drifting into their property. Although the existence of a nuisance or hazard ultimately depends on the circumstances of the case, there is need to recognise in the legislation that smoke drift may be both a nuisance and a hazard. This may assist applicants to meet their evidentiary burden and guide judicial reasoning on this issue.

Recommendation 2: a new Schedule 2 by-law be included in the new Act, prohibiting tobacco smoking on all common property (inside and outside)

Regulation 10 of the Tobacco Products Control Regulations 2006 (WA) prohibits smoking in an enclosed public place, but there is confusion about whether the definition applies to common areas in strata titled property. Although it could arguably apply to stair wells, foyer areas and hallways, it would be unlikely to cover open pool and barbecue areas.

In 2009, the National Preventative Health Taskforce advised that legislation should specify that, “all shared areas (lifts, stairwells, walkways, car parks) in multi-storey public housing developments be smoke-free.”

The final report of the 2011 review of the Tobacco Products Control Act 2006 (WA) also recommended that smoke-free legislation include common shared areas of boarding and lodging houses and residential strata complexes. Seventy-two percent of submissions to the review supported or partially supported this proposal.

The prohibition of smoking in common areas already appears to have widespread community acceptance, with many apartment blocks choosing to ban smoking in stairwells, pool areas, gym areas, hallways and foyers. For the source of power, strata companies that choose to implement this policy rely on the general duty of residents not to cause a nuisance.

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Tobacco legislation in WA prohibits smoking in enclosed public places,\(^{40}\) outdoor eating areas, between the flags at patrolled beaches, near children’s playground equipment\(^{41}\) and on public transport.\(^{42}\) This reflects the community sentiment that smoking in highly frequented public areas is not acceptable. It follows that smoking in common areas of strata titled property is not likely to be met with high social approval.

Further, this recommendation to prohibit smoking in common areas is not without Australian precedent. Under the *Smoke Free Environment Act 2000* (NSW), smoking is prohibited in common areas of a strata development that are accessible by the public. Similarly, in Queensland, the *Tobacco and Other Smoking Products Act 1998* (Qld) s 26R prohibits smoking in common areas.

**Recommendation 3: a new Schedule 2 by-law be included in the new Act, prohibiting smoking within a lot (including on balconies and courtyards) where the smoking causes a nuisance or hazard or otherwise interferes unreasonably with the use or enjoyment of a lot by another resident**

The aim of this recommendation is to make it easier for the strata company council to address smoking in strata titled properties where it is impacting on neighbours, and to resolve disputes between neighbours. It is our view that this will best be achieved by adding a model by-law that deals exclusively with the issue of smoke drift. Such a model by-law would be adopted automatically by most new strata developments and would also provide standard wording for existing strata schemes that wished to adopt a smoking by-law by special resolution.

The proposal is based on that in the position paper released by NSW Fair Trading for its strata title law reform.\(^{43}\) The rationale for the proposal was stated as follows:

“The model by-law will reflect the provisions that are already set out in section 117 of the Act. That is, the model by-law will ban smoking in a lot or on any part of the common property where the smoke causes a nuisance or hazard or otherwise interferes unreasonably with the use or enjoyment of a lot by another resident.

Incorporating these provisions into a model by-law will help to ensure that everyone in a strata scheme is aware of their rights and responsibilities. The owners’ corporation will be able to issue a notice to the offending resident if the by-law is breached and seek an order in the Tribunal if the behavior continues.”

We are supportive of **Proposals 161, 162 and 163**, which would apply in the case of disputes about smoking. The strata company would serve a notice on any person who has contravened the by-law by smoking in a way that causes a nuisance or hazard or otherwise interferes unreasonably with the use or enjoyment of a lot by another resident. Following such a warning, the strata company could only apply to the SAT for an order imposing a penalty if the person continued to contravene the smoking by-law. Rather than specifying a penalty in the smoking by-law itself, the SAT should be left to exercise its discretion in all the circumstances. This approach, which is facilitated by **Proposal 161**, is more likely to do

\(^{40}\) Tobacco Products Control Regulations 2006 (WA).
\(^{41}\) *Tobacco Products Control Act 2006* (WA).
\(^{42}\) Public Transport Authority Regulations 2003 (WA).
justice to all those concerned and prevent any penalties from being oppressive or unreasonable in the circumstances.

This recommendation addresses the issue of smoke drift without completely prohibiting smoking in strata titled properties. There is the potential for a resident to be penalised for smoking within the walls of his or her unit, but only where the smoking is causing a nuisance, hazard or otherwise unreasonably interfering with the use or enjoyment of a neighbour’s lot. At this stage, it is our view that the Australian evidence on smoking in multi-unit housing is not sufficient to support a total ban on smoking in such properties, although our position could evolve over time as more evidence comes to light. Further, a total ban on smoking in such properties would likely be met with greater community resistance.

We are also mindful that strata properties in WA are diverse and differ in terms of density and design. For this reason, a total ban on smoking could interfere unreasonably with the freedoms of occupants in cases where their smoking would be very unlikely to impact other people. This is prevented by retaining the ‘nuisance/hazard’ connection, which is in keeping with the language of the current Act.

It has been suggested that there should be a blanket prohibition on smoking on balconies and courtyards, even where these form part of a lot and not the common property. Whilst this proposal has merit because smoke drift can be difficult to contain, there is a risk that family members (including children) could be further exposed to SHS if smokers retreat indoors. Whilst the proposal would likely reduce disputes about smoking between neighbours, it is harder to justify from a public health perspective because of these possible unintended consequences.

**Recommendation 4: landlords be required to give tenants a copy of the by-laws in force and details of any smoking policies**

The National Preventative Health Taskforce advised that “people would be better able to choose accommodation free of smoke-drift if legislation required that the smoking policy in shared and indoor areas be specified in residential lease agreement in multi-unit apartments.”

The REIWA Contract for Sale of Land or Strata Title requires the seller of strata titled property to give the buyer a Form 28 Disclosure Statement. This includes disclosure of the by-laws that apply to the property.

A lease of a lot or common property is deemed to contain an agreement by the lessee that he or she will comply with the by-laws in force: s 42(5). However, there is no express requirement that the landlord provide the lessee with a copy of the current by-laws.

This is unlike in New South Wales, where pursuant to s 46 of the *Strata Schemes Management Act 1996* (NSW), the landlord of a strata property must provide the tenant with a copy of the by-laws and any management statement affecting the lot or common property, within 7 days. There is a penalty for non-compliance with this provision.

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In cases where there are no by-laws on smoking, landlords should be required to provide to tenants any information about self-enforced smoking policies that apply; for example, restrictions on smoking in pool or other outdoor areas.

This recommendation would ensure that tenants are made aware of the provisions governing smoking in the lot and common areas, and that landlords face financial consequences if they fail to provide this information directly or through their agent.

**Recommendation 5: Landgate be called on to develop and actively publicise a comprehensive resource for owners of strata properties (new and existing) who would like their complex to become completely smoke-free, including within lots**

There is an urgent need for an authoritative and comprehensive resource to assist strata proprietors in WA to adopt a 100% smoke-free policy for their new and already existing buildings. As discussed above, there is a lack of awareness about how to lawfully bring about such a change. Such a resource could include information about the health benefits of 100% smoke-free buildings, the procedure for amending or adding a by-law and suggested wording for valid by-laws on smoking.

If necessary, Cancer Council WA would be pleased to offer assistance to Landgate in the development of this resource. In particular, we are well placed to advise on the public health benefits of smoke free housing and the significant advances made by other countries over the past decade.

**Recommendation 6: the SAT be called on to monitor and report on the number of disputes its adjudicates each year on smoking in strata titled properties**

Information from the SAT about the volume of neighbour smoking disputes would be useful to inform policy and future initiatives in this area. Under the proposed reforms, the SAT will be a ‘one-stop-shop’ for disputes relating to strata titles. The SAT should be required to report on the number of applications it receives for an order imposing a penalty on a person who has continued to cause a nuisance or hazard by smoking after receiving a compliance notice from the strata company. In addition, the SAT should report on the number of applications for a non-monetary order to prevent a person from smoking in particular areas.

We thank Landgate for considering the recommendations set out above. If you require clarification of comments or matters raised in this submission, please contact Terry Slevin on 9388 4345 (terry@cancerwa.asn.au) or his colleague, Caitlin Kameron, Legal Policy Advisor on 9388 4315 (ckameron@cancerwa.asn.au).

Yours sincerely,

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