



Guide for Smoke Free Strata Housing in Western Australia

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If you would like further information, or have a success story to share, we would love to hear from you.

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1. Introduction

Aims of this guide

- To increase awareness about the dangers of exposure to second-hand smoke among the strata community;
- To enable tenants, owners and owners' corporations to increase their skills and confidence to implement non-smoking by-laws in strata-titled properties; and
- To enable strata managers to facilitate and support this process.

Smoking is a common source of tension between neighbours living in strata titled properties. Second-hand smoke increases the risk of lung cancer and heart disease in adults; asthma and breathing problems in children; and sudden infant death syndrome (SIDS) in babies. In higher density housing, such as apartment blocks, tobacco smoke is notoriously difficult to contain. In many cases, residents are unsure about their rights and responsibilities when it comes to smoke drift.

This guide is a joint initiative of the Australian Council on Smoking and Health (ACOSH) and Cancer Council Western Australia (CCWA).¹ It aims to support residents to introduce a non-smoking by-law that provides clear guidance, reduce exposure to second-hand smoke and make conflicts easier to manage.

Although it is usually possible and lawful for the owners' corporation (also called the 'body corporate' or the 'strata company') to add a non-smoking by-law, there are several barriers: awareness is low, the procedure is complex and advice may be needed to prepare a by-law that is valid and enforceable.

This guide provides practical assistance in the form of sample non-smoking by-laws and detailed information about the procedure for adding a by-law. This guide is not intended as legal advice and you may need to seek legal advice for your particular circumstances.

What is the issue?

Tobacco smoking is still the leading cause of preventable disease and premature death in Australia.² Two-thirds of Australian smokers are likely to die because they smoked, and smoking will cause the deaths of 1.8 million smokers now alive.³

Second-hand tobacco smoke is a preventable cause of death and disease, and there is no safe level of exposure.⁴ In 2015, 419 hospitalisations and 829 hospital bed-days were registered in Western Australia due to exposure to second-hand smoke.⁵

Within multi-unit housing, second-hand tobacco smoke is not easily contained. Tobacco smoke can contaminate non-smoking units and common areas via open doors and windows, cracks in walls, floors and ceilings, shared ventilation, gaps around plumbing, gaps under doors or through poor insulation.⁶

¹Australian Council on Smoking & Health and Cancer Council WA are not able to give legal advice. This guide is not intended to give legal advice and should not be relied upon as advice in dealing with any particular situation. The information contained within this guide is of a general informational nature only.

²Australian Institute of Health and Welfare 2016. Australian Burden of Disease Study: Impact and causes of illness and death in Australia 2011. Australian Burden of Disease Study series no. 3. BOD 4. Canberra: AIHW.

³Banks E, Joshy G, Weber M, Liu B, Grenfell R, Eggers and Beral V. Tobacco smoking and all-cause mortality in a large Australian cohort study: findings from a mature epidemic with current low smoking prevalence. *BMC Medicine*: 2015; 13(1): 38.

⁴US Department of Health and Human Services. The health consequences of involuntary exposure to tobacco smoke: a report of the Surgeon General. US Department of Health and Human Services, Centres for Disease Control and prevention, Coordinating Centre for Health Promotion, National Centre for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2006. <http://www.surgeongeneral.gov/library/reports/secondhandsmoke/fullreport.pdf>

⁵Epidemiology Branch, Public Health Division, Western Australia Department of Health. Western Australia tobacco and passive smoking related hospitalisation in 2015 and deaths in 2013. Department of Health, Perth, Western Australia; 2016.

⁶King BA, Travers MJ, Cummings KM, et al. Secondhand smoke transfer in multiunit housing. *Nicotine & Tobacco Research* 2010; 12(11): 1133-41.

There is a small but growing body of research suggesting potential health harm from the infiltration of tobacco smoke into the homes of non-smokers. Using air quality monitoring, researchers found that second-hand smoke spreads throughout multiunit residential blocks, contaminating apartments where there is no active smoking.⁷ An Australian study also found that people living in multiunit housing are 19 per cent more likely to report exposure to second-hand smoke inside their home than people living in detached houses.⁸

A survey of Western Australian residents of strata-titled properties in 2016 found that almost 60 per cent had been exposed to second-hand smoke inside their home, and 32 per cent of those smelt cigarette smoke daily. Less than half of the respondents were aware that a by-law could be introduced to prohibit smoking anywhere on the property.⁹

A survey of Western Australian strata managers revealed some confusion about the procedures to implement smoke-free by-laws. Most (83 per cent) of the strata managers surveyed had experienced multiple smoke drift disputes in the properties they managed, but only 10 per cent had successfully implemented a smoke-free by-law.¹⁰

What are the health effects of exposure to second-hand smoke?

Second-hand smoke is a combination of thousands of chemical compounds, including at least 250 chemicals known to be toxic or carcinogenic.¹¹ More than 50 compounds are known or suspected to affect the central nervous system, the immune system, the heart and the liver, and cause eye, skin and respiratory problems.¹²

The World Health Organization recognises that second-hand tobacco smoke is a preventable cause of death and disease, and there is no safe level of exposure. Among adults it is a known cause of cancer, respiratory and cardiovascular diseases, and among infants it has been shown to contribute to SIDS, low birth weight, lower respiratory tract illness, middle ear disease and asthma.¹³

Compared with adults, children are particularly susceptible to the effects of second-hand smoke due to their higher breathing rates per body weight, their greater lung surface area relative to adults, and the comparative immaturity of their lungs. Infants and children are also generally unable to control their environment, and therefore cannot take steps to avoid exposure to second-hand smoke.¹⁴

Children are most likely to be exposed to second-hand smoke in the home, and because exposure can be so widespread, even comparatively small increases in disease risk may translate into a substantial burden of disease in infancy and childhood.¹⁵

⁷ King BA et al. Secondhand smoke transfer in Multiunit Housing. *Nicotine & Tobacco Research* 2010; 12(11): 1133-1141.

⁸ Bonevski B, Paul C, Jones A, et al. Smoky homes: gender, socioeconomic status and housing disparities in second hand tobacco smoke (SHS) exposure in a large population-based Australian cohort. *Prev Med* 2014; 60: 95-101.

⁹ Australian Council on Smoking and Health (ACOSH). 'Smoking in Strata Living'. 2016

¹⁰ Australian Council on Smoking and Health (ACOSH). 'Smoke Drift Disputes in Strata-titled Properties'. 2015

¹¹ US Department of Health and Human Services. How tobacco smoke causes disease: the biology and behavioral basis for smoking-attributable disease. A report of the Surgeon General. Atlanta, Georgia: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2010. Available from: <http://www.surgeongeneral.gov/library/tobaccosmoke/report/index.html>

¹² Campbell, MA, Ford, C, & Winstanley, MH. Ch 4. The health effects of secondhand smoke. 4.2 What is in secondhand smoke? In Scollo, MM and Winstanley, MH [editors]. *Tobacco in Australia: Facts and issues*. Melbourne: Cancer Council Victoria; 2017. Available from <http://www.tobaccoaustralia.org.au/chapter-4-secondhand/4-2-what-is-in-secondhand-smoke>

¹³ World Health Organization. Tobacco Fact Sheet; 2016; Available from: <http://www.who.int/mediacentre/factsheets/fs339/en/>

¹⁴ Office of Environmental Health Hazard Assessment and California Air Resources Board. Health effects of exposure to environmental tobacco smoke: final report, approved at the Panel's June 24, 2005 meeting. Sacramento: California Environmental Protection Agency, 2005. Available from: http://www.oehha.ca.gov/air/environmental_tobacco/2005setsfinal.html

¹⁵ National Health and Medical Research Council. The health effects of passive smoking: a scientific information paper. Canberra: Australian Government Publishing Service, 1997

2. Why take action?

What are the advantages of smoke free strata housing?

There are compelling reasons to implement smoke-free housing from a health perspective. It also has financial benefits, reduces the risk of fire, avoids potential legal liability for health problems resulting from smoke drift, and is supported by the community, including many smokers.

Health benefits

The scientific evidence leaves no doubt, smoke-free building policies are the most effective way to protect residents from the devastating effects of second-hand tobacco smoke exposure.¹⁶

Smoke-free housing results in a safer, healthier living environment for everyone. Additionally, the adoption of smoke-free policies at home appears to promote anti-smoking attitudes among young people, and reduce the progression to smoking experimentation among young people who live with non-smokers.¹⁷ These policies also appear to reduce consumption of tobacco products^{18,19} as well as increase the success of quitting among adult smokers and reduce relapse.²⁰

Financial benefits

There are numerous financial benefits of smoke-free homes for both tenants and owners. These include lower cleaning costs, better re-sale value and a reduced risk of fire.

Smoke-free apartments have been shown to have lower cleaning costs for owners of units who are selling or leasing their properties as tobacco smoking leaves smoke residue on walls and curtains. Smoke can cling to surfaces long after an active smoker has left and this lingering smoke can continue to cause health hazards by releasing chemicals in to the air. This is known as third-hand smoke.

Smoke-free homes carry a reduced risk of fire and other cigarette-related damage such as burn marks on carpets, furniture and counters thereby reducing repair or replacement costs. Fires attributed to smoking still contribute substantially to the social costs of tobacco smoking.

Legal benefits

Providing smoke-free housing means that landlords may be protected from legal claims by tenants who are exposed to second-hand smoke. In a case heard by the Civil and Administrative Tribunal in New South Wales,²¹ a landlord was ordered to pay compensation because he had failed to prevent the tenant from experiencing severe smoke-penetration from a neighbouring apartment. The smoke had caused the tenant and her young daughter to feel unwell. The tribunal found that the landlord had breached the tenancy agreement by failing to provide premises fit for habitation. The landlord could have asked the owners' corporation to introduce a by-law to ban smoking, apply for an order that the smoker stop smoking or undertake repairs to prevent smoke from passing between the neighbouring units.²²

¹⁶ King, B.A., et al, Prevalence and predictors of smoke-free policy implementation and support among owners and managers of multi unit housing. *Nicotine Tob Res*, 2010. 12(2): p. 159-63.

¹⁷ Albers AB, Biener L, Siegel M, Cheng DM and Rigotti N. Household smoking bans and adolescent antismoking attitudes and smoking initiation: findings from a longitudinal study of a Massachusetts youth cohort. *American Journal of Public Health* 2008;98(10):1886-93. Available from: <http://ajph.aphapublications.org/cgi/content/full/98/10/1886?view=long&pmid=18703438>

¹⁸ Pierce J, White M and Messer K. Changing age-specific patterns of cigarette consumption in the United States, 1992-2002: association with smoke-free homes and state-level tobacco control activity. *Nicotine and Tobacco Research* 2009;11(2):171-7. Available from: <http://ntr.oxfordjournals.org/content/11/2/171.long>

¹⁹ Mills A, Messer K, Gilpin E and Pierce J. The effect of smoke-free homes on adult smoking behavior: a review. *Nicotine and Tobacco Research* 2009;11(10):1131-41. Available from: <http://ntr.oxfordjournals.org/content/11/10/1131.full>

²⁰ Hyland A, Higbee C, Travers MJ, Van Deusen A, Bansal-Travers M, King B, et al. Smoke-free homes and smoking cessation and relapse in a longitudinal population of adults. *Nicotine and Tobacco Research* 2009;11(6):614-8. Available from: <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2722236/>

²¹ Bhandari v Laming [2015] NSWCATAP 224. Available at: <https://www.caselaw.nsw.gov.au/decision/56208edae4b01392a2cd1ca0>

²² See also Cancer Council New South Wales, Fact Sheet 3: How Owners Can Take Action. Available at: https://www.cancercouncil.com.au/wp-content/uploads/2016/11/16083_CC_CAN1035_AchievingSmokeFreeAptLiving_Sheet3_WEB.pdf

Though informative of the types of cases that can occur and potentially of persuasive authority, the Tribunal decision was based on interpretation of relevant New South Wales legislation as it applied to the particular facts of that case. The same or similar result may not necessarily occur in Western Australia.

How can current disputes about smoke drift be resolved?

Exposure to second-hand smoke in strata housing can cause considerable distress and tension between neighbours. In the first instance, the owner or tenant may be able to discuss the issue with the neighbour, but only if they feel safe and comfortable approaching them. The neighbour may not have been aware that their smoking was affecting others and may be able to take action to prevent further exposure.

In some cases, however, the exposure will continue even though the smoker is aware that their cigarette smoke is penetrating other lots or drifting onto common property. In this situation, it would be advisable to contact the council of owners or the strata manager, if one has been appointed to manage the property. They may wish to see a log book recording the frequency and extent of the exposure to second-hand smoke. If satisfied that the smoke is causing a nuisance, the council of owners or the strata manager (on behalf of the council) can send a letter to the resident notifying them of the issue and requesting that the smoking stop.

If the smoking continues, a formal notice of breach letter can be sent. If the dispute remains unresolved, the strata company can make an application to the State Administrative Tribunal (the Tribunal), which now hears all strata title matters. This process is relatively informal and inexpensive, compared to commencing proceedings in court. Parties are usually required to attend mediation and disputes may be resolved through this process. If, however, the matter progresses to a Tribunal hearing and the Tribunal finds the smoking is a nuisance and/or breaches a by-law, the Tribunal can make an order to resolve the dispute. For example, the smoker could be ordered not to smoke on their balcony, on common property or within a certain distance of other lots.

Strata Law Reform in Western Australia²³

Western Australia's strata laws have recently undergone significant reform, and changes to the *Strata Titles Act 1985* (WA) (the Act) came into effect on 1 May 2020.

Three of the main reforms, relevant to introducing smoke free by-laws to a strata property are:

- A new requirement to consolidate all strata by-laws into a single document, every time a by-law is added, changed or deleted. The consolidated by-laws must be registered with Landgate;²⁴
- All new strata disputes will now be heard in the State Administrative Tribunal (the Tribunal). Existing disputes that have already commenced in a court, will continue in that forum;
- Strata by-laws are now categorised as either 'governance by-laws' (Schedule 1 of the Act) or as 'conduct by-laws' (Schedule 2 of the Act). Governance by-laws are rules for how the strata company regulates itself, and conduct by-laws are the rules for how owners, occupiers and visitors must behave on strata property. Governance by-laws are harder to introduce than conduct by-laws because they require a resolution without dissent to be passed. Conduct by-laws require at least 50% of votes in favour of the proposed by-law, and less than 25% opposed (also known as a special resolution under s 123(4) of the Act). Strata reforms provide that by-laws must not be unfair, discriminatory, oppressive or unreasonable and these criteria will be important if a dispute arises.

²³ This information is based on Landgate's 'Making strata better: what's changing' guide. Available from <https://www.strata.wa.gov.au/>.

²⁴ See *Strata Titles (General) Regulations 2019* (WA), reg 56.

Another reform is that strata managers now have a range of statutory duties, which define their role and responsibilities.²⁵ These include that strata managers must:

- Act honestly, with reasonable care and skill;
- Have professional indemnity insurance and relevant educational qualifications;
- Have good knowledge of the amended *Strata Titles Act 1985* (WA);
- Not improperly use information or their position;
- Inform the strata company of any conflict of interest as soon as practical; and
- Disclose any benefit/remuneration that is more than \$100 from one source in a year.

Schemes can still have a volunteer strata manager. Volunteer strata managers are subject to the same duties as paid strata managers, but some conditions apply. For instance, volunteer strata managers must have a written agreement or contract setting out their role and responsibilities with the strata company; they cannot be appointed unless they own one of the strata lots; and they cannot earn more than \$250 for each lot in the scheme, over a full year.

²⁵ *Strata Titles Act 1985* (WA), ss 144 and 146, and Part 13 of the *Strata Titles (General) Regulations 2019* (WA).

3. How can smoke free strata housing be achieved?

Adding a smoke-free by-law can provide guidance and clarity to residents, prevent smoking disputes and make it easier to deal with them if they occur.²⁶

If you are an owner and are concerned about smoke drift in a strata-titled complex, you could consider following the steps below.

If you are an occupier (a tenant), you will need to advocate to an owner to take the steps below.

STEP 1: Check current by-laws

Default by-laws apply to all strata titles schemes, unless they are changed by the strata company. The default by-laws are set out in Schedule 1 (governance by-laws) and Schedule 2 (conduct by-laws) of the *Strata Titles Act 1985* (WA).

Schedule 2 conduct by-laws deal with how owners, occupiers and visitors must behave on the strata titled property. Conduct, such as the drying of laundry items, garbage disposal, floor coverings and the parking of vehicles is covered in Schedule 2. There are no conduct by-laws specifically restricting or prohibiting smoking. Schedule 2 conduct by-law 2 does, however, require owners and occupiers to:

- use and enjoy the common property in a way that does not unreasonably interfere with the use and enjoyment of the common property by other owners, occupiers, or their visitors;
- not use or permit the lot to be used in way, or for a purpose that causes nuisance to an occupier (whether an owner or not), or the family of an occupier;
- take all reasonable steps to ensure that his/her visitors do not behave in a manner likely to interfere with the peaceful enjoyment of another owner or occupier, or any person lawfully using common property; and
- not obstruct the lawful use of common property by any person.

Many strata titled properties prohibit smoking on common property (e.g., foyers, corridors, stairwells, pool areas, elevators, gyms, etc) by relying on these default by-laws, without enacting specific non-smoking by-laws. In this case, non-smoking signs may be in place to make all users of the common property aware of any non-smoking rules.

If your strata company has adopted its own conduct by-laws, your strata manager should be able to provide you with a copy. The new requirement to consolidate and register by-laws into one document, every time a by-law is made, changed or deleted, should make it easier for everyone to access and understand the by-laws that apply to them. If you cannot obtain a copy of your strata title scheme by-laws from your strata manager, you can apply for a copy of the Scheme plan directly from Landgate (fees apply).²⁷ The by-laws will be found at the back of the plan, on a sheet labelled 'Form 8', listed under 'Schedule of Encumbrances'. The by-laws can be found under headings 'Management Statement' or 'Notification of change of by-laws'.²⁸ What you find will depend on what by-laws your strata company has introduced. Once you obtain a copy of the consolidated by-laws, check whether any explicit smoking restrictions already exist and how they apply. If none exist, the following steps can be taken to introduce them.

²⁶ Kameron C. Apartment residents need better protection from secondhand smoke. The Conversation. 26 February 2018. <https://theconversation.com/apartment-residents-need-better-protection-from-secondhand-smoke-84261>

²⁷ See *Strata Titles (General) Regulations 2019* (WA), Schedule 5.

²⁸ Landgate, 'Guide to consolidating by-laws for strata titles schemes in Western Australia' (2020). Available from https://strata.wa.gov.au/assets/documents/Landgate_Guide_to_Consolidating_By-Laws.pdf

STEP 2: Assess level of support for non-smoking by-law

Contact your strata manager and advise him or her that you are concerned about smoke drift in the complex. You can also ask for the issue to be discussed at the next meeting of the council of owners (the next strata company meeting).

If you are on the council of owners, at the next meeting you could provide the others with the information in this guide, about the health effects of second-hand smoke and the advantages of smoke-free strata housing. This approach may help you gauge the level of support for introducing a non-smoking by-law.

Alternatively, you may decide to circulate this guide more informally, by email or other correspondence, but doing this may make it difficult to discuss smoke drift and second-hand smoke in person.

STEP 3: Put smoking on the agenda

You will need to get smoking on the agenda for the strata company's next general meeting. This may be the next annual general meeting, or an extraordinary general meeting.²⁹

Ensure you contact your strata manager to let him or her know that you are advocating for a new non-smoking by-law, at least eight weeks in advance. If you cannot wait until the next annual general meeting, you will need to call for an extraordinary general 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.³⁰

Write to the strata manager to advise that you wish to have smoking restrictions included as an item of special business on the agenda for the general meeting. It can be raised either as:

1. an item for discussion only; or
2. a motion (on which there will be a vote on a resolution).

STEP 4: Propose a resolution

If smoking is included on the agenda as an item for a motion rather than discussion, then the motion should propose a special resolution (for a Schedule 2 conduct by-law) on which the quorum can vote. This means that you will need to propose a valid non-smoking by-law. You can use or adapt any of the example non-smoking by-laws set out in this guide. The strata manager might insist, however, that the non-smoking by-law be drafted by a qualified lawyer.

The motion should state that the proposed by-law would be added as a Schedule 2 conduct by-law, and not as a Schedule 1 governance by-law.³¹ Making this distinction confirms the voting requirement is by special resolution (not resolution without dissent) and may help eligible voters decide to support or reject the proposal. We recommend that you read the Legal Considerations below before beginning to prepare a non-smoking by-law.

Schedule 2 conduct by-law

If the proposed by-law is for a blanket ban on smoking within lots (including on balconies and private courtyards), then it should be added as a Schedule 2 conduct by-law. This requires that the by-law is passed by special resolution.³² That is, the by-law can only be passed if at least 50% of the votes favour the proposal, and less than 25% oppose it.

²⁹ An 'extraordinary general meeting' is any meeting of the strata company that: (a) is not an annual general meeting, (b) has been convened by the council of the strata company, (c) one that has been convened by the council of the strata company on the written request of owners entitled to 25% or more of the unit entitlements of the lots in the strata scheme, or (d) one that has been convened by owners entitled to more than 50% of the unit entitlements when the council fails to call a meeting within 21 days of the written request by owners with more than 25% unit entitlement: *Strata Titles Act 1985* (WA), s 128.

³⁰ *Strata Titles Act 1985* (WA), s 128(2)(b).

³¹ If the resolution is passed as a by-law, the application to register the new by-law must state whether it is a conduct by-law or a governance by-law (*Strata Titles (General) Regulations 2019* (WA), reg 56(2) (a)). It is helpful to make this distinction clear from the outset.

³² *Strata Titles Act 1985* (WA), s 123.

Example A) Non-smoking by-law

The Owners of [insert the name of the scheme as shown on the strata plan] Strata Plan [insert the number of the strata plan) resolve pursuant to s 44 of the *Strata Titles Act 1985*(WA) to make an additional Schedule 2 conduct by-law in the following terms:

1. The proprietor or occupier of the lot must not smoke nor allow smoking within a lot or within the common property.
2. Without limiting para (1), the proprietor or occupier of a lot must not allow any invitee to his lot to smoke within the lot or upon the common property.

Example B) Non-smoking by-law

The Owners of [insert the name of the scheme as shown on the strata plan] Strata Plan [insert the number of the strata plan) resolve pursuant to s 44 of the *Strata Titles Act 1985*(WA) to make an additional Schedule 2 conduct by-law in the following terms:

1. For the purposes of this by-law:
 - a) all words and phrases that are defined in s 3(1) of the *Strata Titles Act 1985*(WA) (Act) have the meaning ascribed to them therein, unless the contrary intention appears;
 - b) “to smoke” means to draw into the mouth and puff out the smoke of ignited tobacco or the like, as from a cigarette, pipe or cigar;
 - c) “Private Balcony” means a balustraded or raised and railed platform projecting from the wall of a Lot and with access from an upper-floor window or door;
 - d) “Private Courtyard” means an outdoor space partially or completely enclosed by walls adjoining a Lot.
2. Proprietors and Occupiers must not smoke or permit any invitee to smoke on Common Property, or on Private Balconies or Private Courtyards.

Note: It is preferable not to provide a designated smoking area on common property. This is because designated smoking areas tend to attract litter and noise. A designated smoking area might also lead to certain units being exposed to second-hand smoke much more than others. In this way, it may displace the issue rather than address it. It is therefore important to consider whether a designated smoking area is really necessary for the non-smoking by-law to be accepted by the council of owners.

Legal considerations

For completeness, it is important for the strata company to be aware of certain legal considerations concerning non-smoking by-laws. The addition of any new by-law, whatever its subject, does carry some legal risk because it may be challenged in the State Administrative Tribunal by an aggrieved owner or occupier. A valid non-smoking by-law must:³³

- be made with power;
- be made in accordance with the *Strata Titles Act 1985* (WA);
- not be inconsistent with the *Strata Titles Act 1985* (WA);
- not be inconsistent with a restricted use condition (i.e., a condition noted on the Scheme plan that restricts the purposes for which the land can be used);
- not be capable of operating so as to prohibit or restrict the devolution of lots or any transfer, lease, mortgage or other dealing therewith;
- have regard to the interests of all proprietors in the use and enjoyment of their lots and the common property; and
- not be unfairly prejudicial or unfairly discriminatory against one or more of the owners of the lots, or be oppressive or unreasonable.

These requirements are discussed further below.

Consistency with the Strata Titles Act 1985 (WA)

The by-laws must not contradict the provisions of the *Strata Titles Act 1985* (WA) or *Strata Titles (General) Regulations 2019* (WA). It is unclear how the requirement for consistency might apply in the case of a non-smoking by-law. Non-smoking by-laws that adopt the existing language in the Act around 'nuisances' and 'hazards' are more likely to be seen as consistent with the Act.

Power of the strata company to make a non-smoking by-law

Section 44 of the *Strata Titles Act 1985* (WA) empowers the strata company to 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. The 'control' power suggests that strata companies in WA have power to completely prohibit smoking in both common areas and within lots, but there is no clear case authority for this proposition.

Although not binding in Western Australia, in New South Wales the Supreme Court upheld the validity of a by-law that prohibited smoking within lots and common property, by owners, occupiers or invitees.³⁴ The court held that the by-law did not operate so as to prohibit or restrict the lease of a lot within the strata plan. Although the potential pool of tenants was reduced as a result of the non-smoking by-law, any person whatsoever was still free to purchase or to take a lease of the lots. Those persons were not allowed, however, to smoke or allow smoking within the lot.

Procedural validity

The *Strata Titles Act 1985* (WA) outlines the procedure for adding a Schedule 1 or Schedule 2 by-law. This procedure (see **Appendix 1**) must be followed correctly to ensure that any non-smoking by-law is added lawfully.

³³ *Strata Titles Act 1985* (WA), s 46.

³⁴ *Salerno v Proprietors of Strata Plan No 42724* (Unreported, Supreme Court of New South Wales, Equity Division, Windeyer J, 5 April 1997).

Discrimination

A non-smoking by-law does not prevent smokers from residing in the strata complex, but they must be willing and able to abide by the by-laws. Smokers are not a protected class under anti-discrimination legislation. However, there may be room for legal argument that addiction suffered by smokers could be considered an 'impairment' and, persons having that impairment ought not be discriminated against in relation to accommodation under the *Equal Opportunity Act 1984* (WA). There is uncertainty, however, about whether the *Equal Opportunity Act 1984* (WA) applies to strata schemes at all. Strata schemes are groups of private properties that are not open to members of the general public. Unlike individual landlords, it could be argued that owners' corporations do not offer or provide 'accommodation' for the purposes of anti-discrimination legislation. The proper application of principles regarding 'discrimination' in this area remains unclear.

Having regard to the interests of all proprietors in the use and enjoyment of their lots and the common property

The phrase 'use and enjoyment' is not defined in the Act but has recently been interpreted by the State Administrative Tribunal as being understood by the ordinary meaning of the words [and must] include consideration of property rights and obligations. The proprietor in a strata scheme does not only own his or her individual lot [but is] also a proprietor of the common property as a tenant in common in shares proportional to unit entitlement.³⁵

If a strata company proposed a total prohibition on smoking 'within' a lot where that does not impact on others, the by-law may be invalidated by the Tribunal for not having regard to the interests of all owners in the use and enjoyment of their lots or the common property.

Therefore, it may be possible to 'ban' smoking outright (whether it potentially affects others or not) in a strata complex to create a truly 'smoke-free' building but the legal position remains unclear. A more cautious approach might be to simply seek to control smoking only to the extent it has the potential to cause harm to other occupiers. In any case it would be useful to test and, if necessary, gather evidence of whether the smoking sought to be regulated (e.g., from within a lot or on balconies) might or will affect other persons in other lots or common areas.

The appropriate process will depend on the individual circumstances of the strata complex but can range from obtaining an expert opinion, to installing smoke detectors to record second-hand smoke creep, to taking statements from occupants or keeping a record of complaints about smoking.

³⁵ Member Quinlan, Hutchison and Canciullo [2020] WASAT 22 at [44].

Example Optional Clauses

Grandfathering Clause

A grandfathering clause may assist with the transition to a smoke-free complex. It means that people who were residents before a non-smoking by-law was introduced can be granted permission to smoke in certain circumstances, notwithstanding the by-law. In some cases, it might be considered unfair to prevent smokers who were resident before the by-law was introduced from smoking if their smoking does not impact on other residents. In this way, a grandfathering clause might make a blanket ban on smoking more reasonable and acceptable to current residents. As those smokers eventually leave the premises, the complex moves gradually towards being completely smoke-free. New residents have notice of the by-law before they move in, so are aware of the need to comply.

Optional – Grandfathering Clause

A Proprietor or Occupier who smoked and was a resident before this by-law came into effect may apply in writing to the Strata Company for consent to smoke in areas in which smoking is prohibited. In exercising its discretion, the Strata Company must take into account the following factors:

- a) the period that the Proprietor or Occupier smoked prior to the making of the non-smoking by-law;
- b) the frequency of the Proprietor or Occupier's smoking;
- c) the extent to which smoke generated by the Proprietor or Occupier's smoking is discernible in nearby Lots;
- d) the extent to which smoke generated by the Proprietor or Occupier's smoking drifts onto Common Property;
- e) the extent to which children or adults with special vulnerabilities are exposed to the Proprietor or Occupier's smoke.

The Strata Company may place conditions on any consent given pursuant to this clause.

Penalties

A non-smoking by-law does not have to prescribe a financial penalty (i.e., a particular sum of money) for non-compliance. If a penalty is included, however, it must meet the requirements in the Act. In particular, s 47(7)(a) and reg 58 of the Regulations provide that the maximum penalty for breach of any provision of a by-law is \$2000. The strata company or strata manager is unable to directly impose the penalty and must instead seek an order from the State Administrative Tribunal (the Tribunal).

An application to the Tribunal, for an order enforcing scheme by-laws can only be made if:³⁶

- the contravention has had serious adverse consequences for a person other than the person alleged to have contravened the scheme by-laws; or
- the person has contravened the particular scheme by-laws on at least three separate occasions; or
- the person has been given the required notice and has contravened the notice.

³⁶ *Strata Titles Act 1985*(WA), s 47(1)(b).

Optional – Penalty Clause

The managing agent of the Strata Company has delegated authority to serve a compliance notice (Notice) on any Proprietor or Occupier who appears to have breached this by-law, requiring him or her to comply with this by-law within two weeks.

If the Proprietor or Occupier continues to breach this by-law two weeks after the Notice was served, he or she is liable to pay a penalty of \$[amount not exceeding \$2000].

The managing agent of the Strata Company has delegated authority to commence proceedings in the State Administrative Tribunal for an order under s 103 of the Act requiring the Proprietor or Occupier to pay the penalty specified in item 5 above for breach of this by-law, and to seek to recover the costs of the Strata Company in making the application.

STEP 5: Attend the general meeting

You will need to attend the strata company's general meeting. There will need to be a sufficient quorum, as defined in s 130 of the *Strata Titles Act 1985* (WA). Your strata manager should be familiar with the requirements for a quorum.

Attendees at the general meeting will then vote on the special resolution concerning smoking. A special resolution for a Schedule 2 conduct by-law is passed if it is supported by at least 50% of the lots in the scheme or owners whose votes have a value of at least 50% of the aggregate unit entitlement, 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 voting requirements for strata schemes that have 3, 4 or 5 lots.³⁷

A vote can only be properly made if people were given the required notice of the non-smoking by-law proposal, which is a minimum of 14 days before voting on the resolution opens.³⁸

See **Appendix 1** for detailed meeting and voting procedures.

STEP 6: Apply to Landgate to register the new non-smoking by-law

The strata company must wait at least 28 days after the meeting for all eligible votes to be cast,³⁹ before applying to Landgate to register the new by-law.

The new non-smoking by-law will not have effect until the strata company has registered the new by-law with Landgate and the Registrar of Titles includes it on the registered strata/survey-strata titles scheme plan.⁴⁰ The strata company will need to complete the Scheme by-laws 'Application to Amend' form, available at: <https://www0.landgate.wa.gov.au/for-individuals/forms-and-fees/survey-and-strata-forms>. A lodgment fee must accompany the completed form.

To be registered, the Application to Amend must be lodged with Landgate within three months after the passing of the special resolution.⁴¹

It is important to note that even when the new by-law is registered on the strata scheme plan by the Registrar of Titles, it will not be presumed to be valid or enforceable if a dispute arises.⁴²

³⁷ *Strata Titles Act 1985* (WA), s 123.

³⁸ *Strata Titles Act 1985* (WA), s 123.

³⁹ *Strata Titles Act 1985* (WA), s 121.

⁴⁰ *Strata Titles Act 1985* (WA), ss 56-58.

⁴¹ *Strata Titles Act 1985* (WA), s 48(1).

⁴² *Strata Titles Act 1985* (WA), s 59.

STEP 7: Enforce the non-smoking by-law

All owners, occupiers and invitees are required to comply with any non-smoking by-law implemented by a strata company.⁴³

Section 45(3) of the *Strata Titles Act 1985* (WA) provides that a lease of a lot or common property shall be deemed to contain an agreement by the tenant that he will comply with the by-laws in force. This means tenants leasing a strata property must abide by the strata company by-laws, including any non-smoking by-laws.

The strata company (or strata manager on the strata company's behalf) may be required to enforce the non-smoking by-law in cases of non-compliance by residents.⁴⁴

See **Appendix 2** for detailed instructions on enforcing a non-smoking by-law.

Additional Resources

WA Legislation

Strata Titles Act 1985 (WA): https://www.slp.wa.gov.au/legislation/statutes.nsf/law_a796.html

Strata Titles (General) Regulations 2019 (WA):
https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_s51705.html

Residential Tenancies Act 1987 (WA):
[https://www.slp.wa.gov.au/pco/prod/filestore.nsf/FileURL/mrdoc_32252.pdf/\\$FILE/Residential%20Tenancies%20Act%201987%20-%20%5B06-c0-00%5D.pdf?OpenElement](https://www.slp.wa.gov.au/pco/prod/filestore.nsf/FileURL/mrdoc_32252.pdf/$FILE/Residential%20Tenancies%20Act%201987%20-%20%5B06-c0-00%5D.pdf?OpenElement)

Other Resources

Cancer Council New South Wales: Achieving smoke-free apartment living. An information kit for strata title accommodation owners, agents and tenants: <https://www.cancerCouncil.com.au/cancer-prevention/smoking/smoke-free-apartments-nsw/>

Make Smoking History: <https://makesmokinghistory.org.au/>

Strata Community Australia: <http://wa.strata.community/>

Tenancy WA: <http://www.tenancywa.org.au/>

Landgate, 'Guide to consolidating by-laws for strata titles schemes in Western Australia' (2020):
https://strata.wa.gov.au/assets/documents/Landgate_Guide_to_Consolidating_By-Laws.pdf

⁴³ *Strata Titles Act 1985* (WA), s 45.

⁴⁴ The power to enforce scheme by-laws is found in section 47 of the *Strata Titles Act 1985* (WA).

Case Study 1: Large strata building in Victoria Park

Several occupiers at Centre Park complained to the strata manager about constant exposure to second-hand smoke, concerned about the health effects the exposure was causing.

The strata manager was familiar with the smoke-free by-law process and contacted ACOSH.

The best option for Centre Park was a smoke-free by-law. The by-law prohibits the use of all tobacco products on common property and states that owners and occupiers shall ensure that the use of any tobacco products on their lot does not interfere with the peaceful enjoyment of others.

The owners were notified of the proposed by-law through the Annual General Meeting (AGM) agenda, 21 days prior to the meeting. To pass, the by-law needed to be approved by at least 50% of the voters and opposed by no more than 25%. All present at the AGM passed the motion and a 28-day waiting period was required for any who were unable to attend. No owner opposed the by-law during the following 28 days.

Minutes included a letter noting the new by-law and an email was sent to all owners, property managers and tenants after the AGM. Smoke free signage was installed within six weeks of approval.

The by-law was enforced through council of owners monitoring and subsequent contact via email or phone to anyone found offending against the by-law. Information about the by-law is provided to property managers and to anyone who buys a unit in the complex.

The aim of the smoke free by-law was to create clean and healthy air in a shared environment. It is not intended to isolate people who smoke. The strata manager and the council of owners acted on behalf of the 90 occupiers at Centre Park and the numerous daily visitors.

Case Study 2: Oceanside Apartments

Oceanside is a strata complex in Perth, Western Australia. Residents enjoy its beach-side location, with great views and sea breezes. This enjoyment, however, was being compromised for a number of residents by the smoking of neighbours. The units are very close together and most smokers don't smoke inside, so the smoking happens just outside the units. Tobacco smoke was regularly drifting into the units of non-smokers.

After being contacted by a number of concerned residents, over many years, the council of owners decided to consider introducing a smoke-free by-law. The Chair of the council was put in touch with ACOSH. The council was already familiar with the dangers and discomforts of second-hand smoke, though the information ACOSH provided was still sobering. This, along with the news of other efforts all around the country to go 'smoke-free', and the small grant ACOSH offered to cover the costs of introducing such a by-law, affirmed the council's wish to act.

The council of owners deemed it their responsibility to ensure that the complex was a safe and healthy environment in which to live and enjoy, including for the young children that live there or visit and play on the common grounds. They also believed it would enhance the value of the property, given the increasing concern around this issue. And it would ensure any future liability for not acting, having become aware of the issues, was avoided.

At the same time, the council remained conscious of those who wished to smoke. So they sought to introduce the by-law gradually, allowing time for people to adjust and get used to the new arrangements. This wasn't about vilifying or making things difficult for smokers, but was about making sure everyone had the ability to enjoy their home without the dangers and discomforts of second-hand smoke. There remain places outside the east and west boundaries of the property that are available for people to smoke, and within each unit, if owners are inclined to permit that.

With assistance from ACOSH to cover some costs, the council of owners successfully adopted a smoke-free by-law at their Annual General Meeting. The by-law prohibits the use of all tobacco products on common property and also states that proprietors and occupiers shall ensure that the use of any tobacco products on their lot does not interfere with the peaceful enjoyment of others.

The council was successful in making the complex a safer and healthier environment for all, protecting the residents and visitors from the harmful effects of second-hand smoke.

4. By-Law resources

Appendix 1: Procedure for adding a non-smoking by-law

1. A strata company may adopt a Schedule 1 governance by-law by resolution without dissent or a Schedule 2 conduct by-law by special resolution.⁴⁵ Strata law reforms suggest that a non-smoking by-law would constitute a Schedule 2 conduct by-law, which must be passed by special resolution.
2. To pass a resolution, a strata company may convene a general meeting by providing sufficient written notice of at least 14 days to all lot owners outlining the general nature of the proposed no-smoking resolution.⁴⁶ We suggest a detailed proposal be given so voters can fully consider the effects of the proposed non-smoking by-law. A proposed resolution can also be put to members of the strata company, outside of a general meeting,⁴⁷ provided it is proposed by a member who is entitled to vote on it. If the non-smoking by-law proposal is put to members outside of a general meeting, the notice of resolution must specify:⁴⁸
 - a) how the vote will be conducted;
 - b) how a vote may be submitted;
 - c) the closing date for submitting a vote;
 - d) how the owner of a lot will know their vote has been cast;
 - e) how the results of the vote will be published.
3. Sufficient written notice is given when:
 - a) at least 14 days' prior to the general meeting, a strata company gives each proprietor notice of the date, time and venue of the meeting along with a copy of the proposed no-smoking resolution.⁴⁹
4. At a general meeting, a special resolution is passed if:
 - a) it is supported by:
 - (i) at least 50% of the lots in the scheme or owners whose votes have a value of at least 50% of the aggregate unit entitlement; and
 - (ii) is not opposed by more than 25% of the votes.

The value of each vote is calculated based on the unit entitlement of each lot.

5. The voting requirements for a special resolution for strata schemes with only 3, 4 or 5 lots are different. In those schemes, not less than half the lots must vote in favour of the resolution and the total of lots voting in favour of the resolution must have a value of at least 50% of the aggregate unit entitlement of all the lots.⁵⁰
6. Any person entitled to vote on a special resolution may also vote in support of or against the special resolution by serving their vote, in writing, to the strata company or all other owners within 28 days of the meeting.⁵¹ Voting by proxy is also permitted in certain circumstances.⁵²

⁴⁵ *Strata Titles Act 1985* (WA), ss 44(2)(b) and 59.

⁴⁶ *Strata Titles Act 1985* (WA), ss 123 and 129.

⁴⁷ *Strata Titles Act 1985* (WA), 120(3).

⁴⁸ *Strata Titles (General) Regulations 2019* (WA), reg 89.

⁴⁹ *Strata Titles Act 1985* (WA), s 129.

⁵⁰ *Strata Titles Act 1985* (WA), s 123.

⁵¹ *Strata Titles Act 1985* (WA), s 121.

⁵² *Strata Titles Act 1985* (WA), ss 124 and 125.

7. Any amendment or repeal to the by-laws or an additional by-law is not effective until⁵³–
 - a) a strata company has allowed a period of 28 days after the meeting to lapse or expire for any person to serve his written vote on the strata company;⁵⁴
 - b) within three months after passing the special resolution adopting the by-law, the strata company has lodged an Application to Amend with the Registrar of Titles and paid the prescribed fee; and
 - c) the Registrar of Titles has made a reference to the amendment, repeal or additional by-law on the registered strata/survey-strata titles scheme plan.
8. The prescribed form (Scheme by-laws - 'Application to Amend') to apply for the new by-law to be registered with Landgate may be found at <https://www0.landgate.wa.gov.au/for-individuals/forms-and-fees/survey-and-strata-forms>.

Appendix 2: Enforcing a non-smoking by-law

All owners, occupiers, lessees and invitees are required to comply with any non-smoking by-law implemented by a strata company.⁵⁵ Owners, and occupiers lessees must take all reasonable steps to ensure anyone they permit to use or invite onto the lot or common property complies with the non-smoking by-laws.⁵⁶

If any owner, occupier, lessee or invitee does not comply with a non-smoking by-law, the strata company may take the following steps to enforce it:

1. Monitor whether owners, occupiers, lessees or invitees are smoking on lots or common property and notify them, in writing, if they are breaching the by-law. Keep a copy of the notice and record the date it was sent.
2. There is no prescribed form for a breach notice. However, the notice must specify:⁵⁷
 - a) the particular scheme by-law that is alleged to have been contravened;
 - b) the particular facts relied on as evidence of the contravention;
 - c) the action that must be taken or refrained from, to avoid a continuing or further contravention of the particular scheme by-law; and
 - d) that failure to correct the breach may result in further action being taken in the State Administrative Tribunal (the Tribunal).
3. Any correspondence to the alleged offender relating to a breach of the new by-law must be signed by a person duly authorised by the strata company to sign on its behalf.⁵⁸
4. Retain records of any correspondence in relation to this issue as evidence for any future action.
5. If the alleged offender fails to change their behavior in accordance with the notice, the strata company may commence enforcement proceedings in the Tribunal.⁵⁹
6. Importantly, before making an application to the Tribunal, a strata company must have complied with any procedure for dispute resolution (if any) contained in the by-laws of the strata company.
7. An application to the Tribunal can only be made on the following grounds:⁶⁰
 - a) the contravention has had serious adverse consequences for a person other than the alleged offender;
 - b) the scheme by-law has been contravened on at least three separate occasions;
 - c) notice of the contravention has been given to the alleged offender and the notice has been contravened.

⁵³ *Strata Titles Act 1985* (WA), ss 39 and 48.

⁵⁴ *Strata Titles Act 1985* (WA), s 121.

⁵⁵ *Strata Titles Act 1985* (WA), ss 45(2) & (3).

⁵⁶ *Strata Titles Act 1985* (WA), s 45(4).

⁵⁷ *Strata Titles Act 1985* (WA), s 47(2).

⁵⁸ *Strata Titles Act 1985* (WA), s 47(1).

⁵⁹ *Strata Titles Act 1985* (WA), s 47(1)(b).

⁶⁰ *Strata Titles Act 1985* (WA), s 47(4) and *Strata Titles (General) Regulations 2019* (WA), reg 57 and Schedule 2.

8. If satisfied that a by-law has been breached, the Tribunal may make any orders it thinks appropriate in the circumstances, including an order to:⁶¹
- a) pay a specified amount, not exceeding \$2000, to the strata company by way of penalty for contravention of the by-law;
 - b) take specified action within a period stated in the order to remedy the contravention or prevent further contraventions of the scheme by-laws;
 - c) refrain from taking specified action to prevent further contravention of scheme by-laws.

When making an application to the Tribunal, a strata company is required to provide the following documents to the Tribunal:

1. A recent copy (search) (not older than 10 days) of the whole of the relevant strata plan or survey-strata plan, which is obtainable from the Western Australian Land Information Authority (Landgate) at Midland;
2. A copy (search) of each "notification" that is registered on the strata plan or survey-strata plan, which is obtainable from Landgate;
3. Evidence that the application to the Tribunal was authorised at a meeting of the council of the strata company, or at a general meeting of the members of the strata company; and
4. All other evidence which substantiates the claims by a strata company.

It is important for strata companies to understand that the Tribunal will make orders for any owner to pay a penalty only if he or she has 'wilfully and persistently' breached the by-law. An owner or occupier will be held to be wilfully and persistently breaching a by-law if a strata company notifies him or her of its concerns relating to breach of the by-law and, he or she fails to comply with that by-law.⁶²

Therefore, strata companies need to gather and provide evidence, which demonstrates that an owner or occupier was aware of the new non-smoking by-law and on at least three, separate occasions acted in a manner that breached the by-law. Some examples of the evidence, which will assist in substantiating a claim are:

- a) a copy of the new non-smoking by-law;
- b) copies of correspondence sent to all owners notifying them of the new by-law, including distribution date;
- c) copies of any correspondence sent to the owner or occupier notifying him or her of the breach;
- d) copies of any correspondence received from the owner or occupier in response to the notice; and
- e) photographs of any signage erected on the strata property.

⁶¹ *Strata Titles Act 1985* (WA), ss 47(5)-(7)); *Strata Titles (General) Regulations 2019* (WA), reg 57 and Schedule 2.

⁶² *The Owners of Freshwater Strata Plan 634548 and Chen* [2017] WASAT 120.