



Guide for Smoke Free Strata Housing in Western Australia

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1. Introduction

Aims of this guide:

- To increase awareness about the dangers of exposure to secondhand 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. Secondhand smoke increases the risk of lung cancer and heart disease in adults; asthma and breathing problems in children; and 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)*. It aims to support residents to introduce a non-smoking by-law that provides clear guidance, reduces exposure to secondhand smoke and makes conflicts easier to manage.

Although it is usually possible and lawful for the owners' corporation (also called 'body corporate') 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.

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

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Strata Law Reform in Western Australia

This guide is based on the requirements of the legislation current at February 2018. The *Strata Titles Act 1985 (WA)* is being reformed and the drafting of an amendment Bill is underway. ACOSH and CCWA have been advocating for a model by-law on smoking to be included in the new legislation. We have recommended a model by-law that prohibits smoking in common areas, and prohibits smoking within lots where smoke is penetrating to other lots.¹

*ACOSH and CCWA 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.

¹ Bell, J, Dale, B, Kameron, C, Havill M. Sharing the air: the need for start law reform to reduce second-hand smoke exposure in multiunit housing in Australia. *Journal Law and Medicine*. 2018; 25, 465.

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

Secondhand 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 secondhand smoke.⁵

Within multi-unit housing, secondhand 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

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 secondhand 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 secondhand 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 secondhand 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 secondhand smoke?

Secondhand smoke is a combination of thousands of chemical compounds, including at least 250 chemicals known to be toxic or carcinogenic. More than 50 known or suspected carcinogens¹¹ have been found in secondhand smoke and include substances known 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 secondhand 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 sudden infant death syndrome (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 secondhand 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 secondhand smoke.¹⁴

Children are most likely to be exposed to secondhand 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

² Australian 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.

³ Banks 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.

⁴ US 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, Centers 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>

⁵ Epidemiology 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.

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

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: US 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.tobaccoinaustralia.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 secondhand 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 reduces 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.²¹

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 secondhand smoke. In a case heard by the Civil and Administrative Tribunal in New South Wales,²² 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.²³

Though informative of the types of cases that can occur and being potentially of persuasive authority, it is noted that the Civil and Administrative Tribunal in New South Wales based its decision under legislation different to that which applies in Western Australia and with regard to the terms of the lease that applied in that case. The same or similar result may not necessarily occur in Western Australia.

¹⁶ King, B.A., et al, Prevalence and predictors of smoke-free policy implementation and support among owners and managers of multiunit 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 Collins, D.J. and Lapsley, H.M. (2007). The costs of tobacco, alcohol and illicit drug abuse to Australian society in 2004/05, National Drug Strategy Monograph Series No. 64. Available from: <http://www.nationaldrugstrategy.gov.au/publications-monographs>.

²² *Bhandari v Laming* [2015] NSWCATAP 224. Available at: <https://www.caselaw.nsw.gov.au/decision/56208edae4b01392a2cd1ca0>

²³ 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_

How can current disputes about smoke drift be resolved?

Exposure to secondhand 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 secondhand smoke. If satisfied that the smoker is causing a nuisance, the Council of Owners or the Strata Manager (on behalf of the Council) can send a letter to the resident alleging a breach of the by-laws and seeking compliance.

If the nuisance continues, a formal notice of breach letter can be sent. If the dispute remains unresolved, the person affected by the smoking can make an application to the State Administrative Tribunal, which hears strata title matters. This is relatively informal and inexpensive. Parties are usually required to attend mediation and disputes are often resolved through this process. If, however, the matter progresses through to a hearing, and the applicant is successful in proving a nuisance, the Tribunal is able to make a range of orders 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.

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 schedule two by-law. The schedule two 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 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 6 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.

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 in the future.²⁵

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 a tenant, you will need to advocate to an owner to take the steps below.

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 secondhand 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, just 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 Schedule Two by-law at their Annual General Meeting. The Schedule Two 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.

²⁵ 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>

STEP 1: Check current by-laws

Standard by-laws (which are deemed to apply unless they are changed by the strata company) are set out in Schedule One and Schedule Two to the *Strata Titles Act 1985 (WA)*. The standard by-laws deal with common management issues such as the drying of laundry items, garbage disposal, floor coverings and the parking of vehicles. Your strata manager should be able to provide you with a copy of the by-laws. Check whether there are already any smoking restrictions included in the by-laws.

Many strata titled properties prohibit smoking on common property (eg. foyers, corridors, stairwells, pool areas, elevators, gyms etc) but may not have a by-law that specifically deals with this issue. Schedule 1 by-law 1(2)(a) requires owners and occupiers to use and enjoy the common property in such a manner as not to unreasonably interfere with the use and enjoyment thereof by other owners, occupiers, residents or their visitors. Many strata companies rely on this by-law to adopt a non-smoking policy in common areas. Non-smoking signs are used to make all users of the common property aware of this policy.

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.

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 secondhand smoke and the advantages of smoke free strata housing.

STEP 3: Put smoking on the agenda

You will need to get smoking on the agenda for the strata company's next annual general meeting.

If possible, it is easiest to wait until eight or so weeks before the strata company's annual general meeting before contacting your Strata Manager to let him or her know that you are advocating for a new non-smoking by-law. 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.

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 by-law) or a resolution without dissent (for a Schedule 1 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 resolution should clarify whether the by-law is to be added as a Schedule 1 or Schedule 2 by-law. It is important to make this distinction because there are different voting requirements depending on which Schedule is used. We recommend that you read the Legal Considerations (next page) before beginning to prepare a non-smoking by-law.

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 resident. In summary, a valid non-smoking by law must:

- not be inconsistent with the *Strata Titles Act 1985 (WA)*
- be made with power
- be made in accordance with the *Strata Titles Act 1985 (WA)*
- 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
- not unlawfully discriminate

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 Regulations. 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 42 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 precedent 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.²⁶ 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)* provides a detailed procedure for adding a Schedule 1 or 2 by-law. This procedure (**See Appendix 1**) must be followed correctly to ensure that any non-smoking by-law is added lawfully.

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.

²⁶ Salerno v Proprietors of Strata Plan No 42724 (Unreported, Supreme Court of New South Wales, Equity Division, Windeyer J, 5 April 1997).

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

There is also room for argument that if a Strata Company proposed to impose a total prohibition on smoking 'within' a lot where that does not impact on others, the by-law may be liable to 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 is as yet 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 in which it is sought to limit smoking within an owner's lot, it would be useful for processes to be put in place 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.

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

Schedule 1

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 under Schedule 1 of the Act. If the strata company is small and the by-law has full support of all the owners, adding the by-law under Schedule 1 could be a suitable option. This requires that the by-law is passed by resolution without dissent.

Example A) Schedule 1 non-smoking by-laws

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 without dissent pursuant to s 42 of the *Strata Titles Act 1985 (WA)* to make an additional Schedule 1 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) Schedule 1 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 without dissent pursuant to s 42 of the *Strata Titles Act 1985 (WA)* to make an additional Schedule 1 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.

Schedule 2

A Schedule 2 by-law can be added to prohibit smoking in common areas and to prohibit smoking in private lots (including on balconies and in courtyards) only where it causes a nuisance or interferes with the peaceful enjoyment of another owner or occupier. Unlike the Schedule 1 examples, there is no blanket ban on smoking on private property. Smoking is only prohibited on private property where it impacts on other residents. A schedule 2 by-law must be passed by special resolution.

Example A) Schedule 2: non-smoking by-laws

The Owners of [insert the name of the scheme as shown on the strata plan] Strata Plan [insert the number of the strata plan] specially resolve pursuant to s 42 of the *Strata Titles Act 1985 (WA)* to make an additional Schedule 2 by-law in the following terms:

1. An owner or occupier, and any invitee of the owner or occupier, must not and, must not permit invitees to smoke tobacco or any other substance on the common property.
2. An owner or occupier of a lot must ensure that smoke caused by the smoking of tobacco or any other substance by the owner or occupier, or any invitee of the owner or occupier, on the lot does not penetrate to the common property or any other lot.

Example B) Schedule 2: non-smoking by-laws

The Owners of [insert the name of the scheme as shown on the strata plan] Strata Plan [insert the number of the strata plan] specially resolve pursuant to s 42 of the *Strata Titles Act 1985 (WA)* to make an additional Schedule 2 by-law in the following terms:

Non-Smoking By-Law

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.
2. Proprietors and Occupiers must not smoke or permit any invitee to smoke on Common Property.
3. Proprietors and Occupiers must not smoke or permit any invitee to smoke in their lots if their smoking unreasonably interferes with the use and enjoyment of another lot or causes a nuisance.

Example C) Schedule 2: non-smoking by-laws

The Owners of [insert the name of the scheme as shown on the strata plan] Strata Plan [insert the number of the strata plan] specially resolve pursuant to s 42 of the *Strata Titles Act 1985 (WA)* to make an additional Schedule 2 by-law in the following terms:

1. An owner or occupier of a lot, and any invitee of the owner, must not smoke tobacco or any other substance on the common property, except:
 - a) in an area designated as a smoking area by the owners corporation, or
 - b) with the written approval of the strata company.
2. A person who is permitted under this by-law to smoke tobacco or any other substance on common property must ensure that the smoke does not penetrate to any other lot.
3. An owner or occupier of a lot must ensure that smoke caused by the smoking of tobacco or any other substance by the owner or occupier, or any invitee of the owner or occupier, on the lot does not penetrate to the common property or any other lot.

Note: It is generally considered 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 secondhand 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.

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

- a) the period in which the Proprietor or Occupier has smoked regularly 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 for non-compliance. If a penalty is included, it must meet the requirements in the Act. In particular, s 42A provides that by-laws made by a strata company may provide for penalties, not exceeding \$500, for a breach of any provision of the by-laws. The Strata Company or Strata Manager is unable to directly impose the penalty and must instead seek an order from the State Administrative Tribunal.

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 \$100.

The managing agent of the Strata Company has delegated authority to commence proceedings in the State Administrative Tribunal for an order under s 103I 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 3C 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 resolution for a Schedule 1 by-law is passed if no person entitled to vote opposes it. A special resolution for a Schedule 2 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 requirements for strata schemes that have only 3, 4 or 5 lots.

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

STEP 6: Notify Landgate of the new non-smoking by-law

The Strata Company must wait for a period of at least 28 days after the meeting to allow any persons to serve a written vote.

The new non-smoking by-law will 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](#). You can annex the new by-law if it will not fit within the space provided on the Landgate form. The Strata Company's common seal will need to be affixed to the form in the presence of two witnesses from the Council of Owners.

This must be lodged **within 3 months** after the passing of the special resolution.

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: s 42(6).

Section 42(5) 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.

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.

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

Additional Resources

WA Legislation

[Strata Titles Act 1985 \(WA\)](#)

[Residential Tenancies Act 1987 \(WA\)](#)

Other Resources

[Cancer Council New South Wales: Achieving smoke-free apartment living. An information kit for strata title accommodation owners, agents and tenants.](#)

[Make Smoking History](#)

[Strata Community Australia](#)

[Tenancy WA](#)

4. By-Law resources

Appendix 1: Detailed procedure for adding a non-smoking by-law

1. A Strata Company may adopt a Schedule 1 by-law by a resolution without dissent or a Schedule 2 by-law by way of a special resolution.²⁷
2. To pass a resolution without dissent or a special resolution, a Strata Company must first convene a general meeting by providing sufficient written notice of at least 14 days to all owners specifying the proposed no-smoking resolution.²⁸
3. Sufficient written notice is given when:
 - a) at least 14 days' prior to the general meeting, a Strata Company gives each proprietor a notice of such meeting along with a copy of the proposed resolution no-smoking resolution²⁹ ; and
 - b) the notice is served on each proprietor either³⁰ :
 - i) personally; or
 - ii) by post at the proprietor's address for service appearing on the roll maintained by the strata company (if applicable); or
 - iii) to the lot address, if a roll is not maintained by a Strata Company; or
in any other manner specified in the by-laws.
4. At a general meeting, a resolution is passed if:
 - a) in case of Schedule 1 by-law³¹, against which no vote is cast by a person entitled to vote ; and
 - b) in case of Schedule 2 by-law³², 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.
6. Any person entitled to vote on a resolution without dissent or 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.³³
7. A written vote is made and served by³⁴ :
 - a) the person signifying in writing (whether signed or not) that they agree or disagree with the resolution; and
 - b) sending it by pre-paid post to the Strata Company's address; or
 - c) in case of strata schemes with up to 5 lots, personally handing it over to an owner or sending it by pre-paid post at the address specified for the owner appearing on the roll maintained by the Strata Company (if applicable).

²⁷ Section 42(2)(c) of STA.

²⁸ Section 3B(1) and 3AC(1) of the STA.

²⁹ Section 3C of STA.

³⁰ Section 125 of the STA.

³¹ Section 3AC of the STA.

³² Section 3B(2) of STA.

³³ Section 3(B)(5),(6), 3AC(2) and (3) of STA.

³⁴ Section 125 of STA.

8. Any amendment or repeal to the by-laws or an additional by-law is not effective until³⁵ –
 - 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;
 - b) within 3 months after passing the special resolution adopting the by-law, the Strata Company has lodged a notice in the prescribed form with the Registrar of Titles; and
 - c) the Registrar of Titles has made a reference to the amendment, repeal or additional by-law on the appropriate registered strata/survey-strata plan.
9. The the prescribed form to lodge a notice with Landgate.
[https://www0.landgate.wa.gov.au/docvault.nsf/web/PS_STRATAFORMS/\\$file/FOR_DLI_Form21.pdf](https://www0.landgate.wa.gov.au/docvault.nsf/web/PS_STRATAFORMS/$file/FOR_DLI_Form21.pdf)

Appendix 2: Enforcing a non-smoking by-law

All owners, occupiers and invitees are required to comply with any non-smoking by-law implemented by a strata company. Section 42(5) 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.

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

1. A Strata Company will need to monitor activities of owners, occupiers and invitees on common properties and notify, in writing, such owners or occupiers who are found breaching the by-law.
2. If an owner or occupier continues to breach a non-smoking by-law, a strata company may serve a notice for breach of a by-law on the owner demanding payment of the prescribed penalty, if any.
3. The *Strata Titles Act 1985 (WA)* and Regulations do not provide any prescribed form for a breach notice. A strata company may consider inserting details of the date, place and time of the breach in a breach notice to substantiate any claim in any future enforcement action it may be required to undertake.
4. Any correspondence to an owner or occupier relating to a breach of the new by-law must be signed by a person duly authorised by a Strata Company to sign on its behalf.
5. A Strata Company should retain records of any correspondence sent to an owner or received from such owner in relation to this issue as evidence for any future action, which may be required to be undertaken.
6. If the owner or occupier fails to pay the prescribed penalty, Strata Companies may enforce a non-smoking by-law by commencing proceedings before the Tribunal.³⁶
7. 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.
8. In any application before the Tribunal, the strata company may seek orders that an owner pay:
 - a) the prescribed penalty if the non-smoking by-law specifies a penalty for its breach; and
 - b) the costs of making the application.³⁷
9. The Tribunal will make orders for payment of penalty if ³⁸:
 - a) the by-law specifies a penalty for breach of it;
 - b) the Strata Company has authorised making the application to the Tribunal; and
 - c) the owner has willfully and persistently breached the by-law.
10. The Tribunal will serve a copy of any orders made by it on the Strata Company and the owner.³⁹

³⁵ Section 3B(5)

³⁶ Section 42(4) of STA.

³⁷ Section 35 of STA.

³⁸ Section 103(2) of STA.

³⁹ Section 103(3) of STA.

11. If an owner fails to pay monies to a strata company pursuant to the Tribunal's order, the Strata Company may enforce the order by filing, in the court of competent jurisdiction ⁴⁰:

- a) a true copy of the order; and
- b) a person's affidavit stating that the monies have not been paid under the order.

12. The Court to enforce the order depends on the value of the dispute. For example, for disputes below \$75,000 it is the Magistrates Court WA.

Owners need to be mindful that credit rating companies in Australia maintain records of people who are listed as debtors by the Magistrates Court. If a strata company files enforcement proceedings against an owner in the Magistrates Court, the credit rating of the owner is likely to be adversely affected.

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);
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. ⁴¹

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 more than one occasion he acted in a manner that will amount to a breach of the by-law. Some examples of the evidence, which will assist the strata companies in substantiating its 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;
- c) Copies of any correspondence sent to the owner or occupier notifying him of the breach;
- d) Copies of any correspondence received from the owner; and
- e) Photographs of any signage erected on the strata property.

⁴⁰ Section 85 of STA.

⁴¹ The Owners of Freshwater Strata Plan 634548 and Chen [2017] WASAT 120.