



Guide for Smoke Free Strata Housing in Western Australia

**How can smoke free strata housing
be achieved?**

Australian Council on Smoking and Health
334 Rokeby Road Subiaco WA 6008
acosh@acosh.org
(08) 6365 5436
www.acosh.org

ACOSH would like to
acknowledge the support of:



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](#)