

RESTRICTING SMOKING ON LOTS AND COMMON PROPERTY (NSW)

FREQUENTLY ASKED QUESTIONS

What is the problem?

People are smoking on lots and common property and interfering with the use and enjoyment of other lot owners. Additionally, NSW laws state owners corporations have a duty to prevent the spread of smoke to enclosed common property.

What is the solution?

The owners corporation, owner or occupier affected may want to first speak to the offender about the problem and negotiate a solution. This is recommended only where you feel that it is safe to approach the offender about the problem.

A owners corporation, owner or occupier can apply to the Consumer Trader and Tenancy Tribunal (CTTT) for an order that the offenders stop smoking on their lot and/or common property because they are causing a nuisance or interfering unreasonably with the rights of others (this is called a 'nuisance' case).

Alternatively, the owners corporation can pass and enforce a by-law restricting smoking on common property and in lots if that annoys people in their lots or while on common property. This is also consistent with the owners corporation's duty under the *Smoke-free Environment Act 2000 (NSW)*.

Why bother with a by-law?

If people see simple and reasonable smoking restrictions in the by-laws, then they will be more likely to observe the rules. A nuisance case requires an interpretation of complex provisions of the *Strata Schemes Management Act 1996 (SSMA)* that do not specifically mention smoking.

What makes the Teys Lawyers by-law unique?

- ✓ Simple language
- ✓ Applies to owners and occupiers
- ✓ Makes owners and occupiers liable for their invitees
- ✓ Catches smoke drift from private lots
- ✓ Enforceability backed by case law
- ✓ Satisfies smoke-free environment laws

Are there cases and legislation that support passing such a by-law?

Section 117 of the SSMA states that owners are entitled to the use and enjoy their lot, however owners must not use or enjoy their lot in such a manner as to cause a nuisance to another lot owner.

Owners corporations have a duty under the *Smoke-free Environment Act 2000 (NSW)* to ensure that “enclosed public spaces”, such as common property stairwells, thoroughfares and car parks, accessible to the public, are smoke free.

Under section 10 of the *Smoke-free Environment Act 2000 (NSW)* the occupier of a smoke-free area must take reasonable steps to prevent smoke caused by smoking in the other parts of those premises from penetrating the smoke-free area. Therefore, an owners corporation can regulate the drifting or penetration of smoke from lots onto common property areas under the *Smoke-free Environment Act 2000 (NSW)*.

Under strata title legislation owners corporation also have the power to restrict smoking in buildings under their control. Such a power was upheld in *Salerno v Proprietors of Strata Plan No 42724* under the *Strata Titles Act 1973* and the same power exists under the current SSMA.

In *Owners Corporation SP 49822 v May & Ors [2006] NSWCTTT 739* an adjudicator in the CTTT authorised a Sydney owners corporation to prevent tenants smoking in their unit where smoke was drifting into other units or common areas. The adjudicator in this case found the smoke caused a considerable problem for occupiers of the adjoining lots and that this problem was a nuisance and interfered with the enjoyment of other lot owners.

Where can I get more information?

‘Smoke drift in apartment blocks: what you can do.’ The Cancer Council NSW Information Sheet, January 2007:

<http://www.cancerCouncil.com.au/editorial.asp?pageid=2228&fromsearch=yes>

‘Smoke-free NSW’ – What does it mean for strata schemes and community schemes?’ NSW Health and The Cancer Council NSW.

http://www.health.nsw.gov.au/resources/publichealth/healthpromotion/tobacco/pdf/070213_strata_schemes.pdf

Smoke-free Housing Australia ASH: <http://www.ashaust.org.au/lv4/housing.htm>

How do we get a by-law that restricts smoking on lots and common property?

Call Teys Lawyers on 02 9562 6500 or email simone@teyslaverys.com.au for an estimate to prepare and register this additional by-law for your strata scheme.