

Smoke drift in apartment blocks – What you can do

There are a number of options available to potentially address this problem.

Statutory laws

The statutory laws that do apply to residential places apply to common areas only. There are no statutory laws that regulate smoking in the private areas of residential places. Smoking in common areas that are accessible by the public is prohibited under NSW legislation (*Smoke-free Environment Act 2000*). Examples of such areas include main entrances and stairwells. The Act does not apply to security buildings that have secured areas that are only accessible through invitation by an owner or occupier. A NSW Health Department fact sheet on the *Smoke-free Environment Act* as it relates to strata and community schemes can be accessed on the NSW Health Department internet site at <http://www.health.nsw.gov.au/health-public-affairs/smokefree/strata&comm.pdf#search=%22%20%22The%20same%20law%20applies%20to%20strata%22%22>.

Smoke drift from private lots

There are a number of ways to potentially address the problem. They are as follows:

- **Speaking to the smoker about the problem**

CAUTION: Speaking directly to the smoker should only be done if you feel comfortable about your safety in doing so.

- **Options related to Strata Schemes legislation (Strata Schemes Management Act 1996) and action by owners' corporations**

It would appear from the following case that it is within the power of owner's corporations to prohibit smoking by both occupants and visitors.

Case Study - Salerno v Proprietors of Strata Plan No. 42724

This case was settled in the Supreme Court on 8 April 1997. The judgement ruled that it was within the power of the Owner's Corporation to ban smoking by both occupants and visitors, even on individual lots. The judgement may also allow for the prohibition of smoking on unenclosed land that comes under the jurisdiction of owners' corporations e.g.

balconies or gardens. So those affected by smoke drift in residential blocks should raise the matter with their owners' corporation. Hard copies of the Salerno judgement can be obtained by contacting The Cancer Council's Tobacco Control Project Officer on 02 9334 1900.

Case study – Consumer, Trader and Tenancy Tribunal (Strata & Community Schemes Division) Applications SCS 06/44767 and SCS 06/44783

On 6 November 2006 G. J. Durie, Strata Schemes Adjudicator at the Consumer, Trader and Tenancy Tribunal ordered particular tenants in a Strata Scheme to take action to prevent smoke odour from their cigarettes entering other lots and common property. In addition, the owner of the Lot in which the tenants lived was ordered to take action to prevent smoke odour from the tenants' cigarettes entering other lots and common property. The orders had been sought by the Owners' Corporation on behalf of tenants who had been affected by smoke drift within the apartment block. Copies of the Tribunal's orders in relation to this case can be obtained by contacting The Cancer Council's Tobacco Control Project Officer on 02 9334 1900.

It is suggested that your apartment block's Owners Corporation be informed about these legal cases.

- **Private legal actions**

While private legal actions can be expensive and stressful there are a number of possible remedies under the common law. The Cancer Council's publication *When Smoke Gets in Your Eyes.....(nose throat, lungs and bloodstream) - A guide to passive smoking and the law in NSW* outlines such possible remedies to the problem of smoke drift in apartment blocks etc. A relevant extract follows. This extract talks about rights before common law. It should be emphasised though that these remedies are yet to be tested in common law actions. The full document can be found at:

<http://www.cancercouncil.com.au/editorial.asp?pageid=713> .

The torts of trespass, nuisance and strict liability for allowing dangerous things to escape may all be invoked to prevent exposure to environmental tobacco smoke (ETS), or to obtain compensation where damage has occurred.

Trespass involves intentional interference with the person, invasion of land or interference with chattels (property other than land).

Nuisance may be public or private.

Public nuisance includes things like causing pollution, emitting noxious smoke and fouling the environment. A private claimant would have to show some particular or special loss beyond the ordinary inconvenience or annoyance suffered by the public at large; for example, that as a particularly sensitive person such as an asthmatic they were affected by ETS.

Private nuisance is confined to invasions of a person's use or enjoyment of land; for example, by smoke infiltrating into a private space (such as an apartment in a multiple occupancy building) from an adjoining common area.

Strict liability involves liability for damage caused by the escape of something inherently dangerous, such as an explosive gas.

Given what is now known about the harmful effects of ETS, all three of these remedies may be available to obtain damages or prevent harm occurring in the case of persistent breach.

PRIVATE RIGHTS

Individuals may also have the benefit of rights which may be enforced privately, either under statute or by virtue of some agreement such as a lease or covenant of quiet enjoyment of property. The rights which apply in any particular case will depend on the precise nature of the relationship between the person affected and those against whom rights may be enforced; and there may be limits to the extent to which action may be taken against a landlord or body corporate as opposed to the person who is the immediate cause of the problem.

Again, with what is now known about the dangers of ETS, the scope for enforcing private rights of action should be explored.

Developments in the United States

The problem of smoke-drift in apartment blocks has given rise to interesting developments in the United States. See the MIsMOKE-free Apartment web site (<http://www.mismokefreeapartment.org/>) which has interesting advice on legal options, although of course, this is within the context of the US legal environment. Still, the common law possibilities discussed on the site are similar to those in Australia. A related site can be accessed at <http://www.tcsg.org/sfelp/apartment.htm>. In California, tobacco control advocates are pushing for local ordinances that would require a certain percentage of apartment blocks to be designated smoke-free.

Discussion at the 2006 World Conference on Tobacco or Health

The following links to abstracts from presentations from the recent World Conference on Tobacco or Health held in the US may also be of interest to enquirers:

<http://2006.confex.com/uicc/wctoh/techprogram/P6719.HTM>

<http://2006.confex.com/uicc/wctoh/techprogram/P8145.HTM>

<http://2006.confex.com/uicc/wctoh/techprogram/P8880.HTM>