
Sharing the Air: The Need for Strata Law Reform to Reduce Second-hand Smoke Exposure in Multiunit Housing in Australia

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There is an immediate need to reform Australian State and Territory strata laws to minimise exposure to second-hand smoke (SHS) in multiunit housing (MUH), particularly in light of the trend towards higher density living. SHS is a cause of lung cancer and other health problems in nonsmokers and no safe level of exposure has been established. Despite being a common cause of dispute in MUH, currently no strata regime in any State or Territory includes a model by-law that specifically addresses smoking, as is the case with other contentious issues like pets. Smoking disputes can currently be dealt with under general strata provisions on nuisances or hazards, but the case law in this area demonstrates that these provisions can be ineffective in dealing with the serious health issue posed by SHS. With enough votes, owners' corporations can introduce a smoking by-law. However, without legal advice it may be difficult for owners' corporations to develop a by-law they can be confident falls within their by-law making powers. With several jurisdictions currently reviewing their strata laws, there is a valuable opportunity to sensibly reform the law in the interests of public health. In this article, we survey the legal landscape and consider options for a model by-law on smoking.

Keywords: *smoking; strata law; secondhand smoke; apartments; public health; bylaws*

INTRODUCTION

For many years now, Cancer Council teams across Australia have been contacted by residents, distressed that they and their families are being exposed to second-hand smoke (SHS) emanating from neighbouring apartments. Also heard are stories of frustration from landlords and representatives of owners corporations about the difficulties in dealing with smoke infiltration in multi-unit housing (MUH). These concerns and frustrations are warranted. The health risks of SHS exposure have been well recognised since the US Surgeon General's seminal 1986 report, *The Health Consequences of Involuntary Smoking*,¹ which was reinforced by a follow-up report in 2006.² In 2014, the US Department of Health and Human Services found sufficient evidence that SHS exposure causes lung cancer, stroke, nasal irritation and coronary heart disease in nonsmoking adults; asthma, wheeze illnesses, respiratory illnesses and reduced lung

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¹ US Department of Health and Human Services, "The Health Consequences of Involuntary Smoking: A Report of the Surgeon General" (Report, US Department of Health and Human Services, Public Health Service, Center for Health Promotion and Education, Office on Smoking and Health, 1986).

² US Department of Health and Human Services, "The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General" (Report, 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, 2006).

function in children; and reduced birth weight and sudden infant death syndrome in infants.³ No safe level of exposure to SHS has been identified.⁴

Approximately 21% of Australian households live in MUH, and with demand for affordable and sustainable housing options, this proportion is increasing.⁵ With more people living in closer proximity and conclusive evidence that SHS is harmful, there has never been a more urgent need to consider how strata laws can be reformed to reduce exposure to SHS in MUH.

The need to address smoke infiltration in MUH is gaining momentum in Australia. In 2009 the National Preventative Health Taskforce acknowledged the risk of SHS exposure in MUH and recommended State and Territory governments take action to “protect residents from exposure to smoke-drift in multiunit developments”.⁶ The *National Tobacco Strategy (2012–2018)* includes an action item on monitoring the issue of smoking and smoke-drift at residential premises and consideration of policy approaches to support smoke-free homes, particularly where children are present.⁷ Responsibility for this issue lies with State and Territory governments and non-government organisations.

In a 2012 consultation on strata law in New South Wales (NSW), smoking generated more comments than any other single topic with the overwhelming majority of correspondents strongly objecting to being subjected to SHS exposure and calling for smoking restrictions.⁸ Consequently NSW passed strata law reform in which it was specifically noted that smoke-drift may cause a nuisance or hazard.⁹ In addition, the NSW Government has proposed a model by-law requiring owners, occupiers and invitees to ensure their SHS does not drift into another’s lot or common property.¹⁰

Two other jurisdictions (Queensland¹¹ and Victoria)¹² started to explore this issue in the context of strata law reform, and the Australian Capital Territory (ACT) has the issue listed as an area for

³ US Department of Health and Human Services, “The Health Consequences of Smoking – 50 Years of Progress: A Report of the Surgeon General” (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, 2014).

⁴ *Elaboration of Guidelines for Implementation of the Convention (Decision FCTC/COP1(15)) Article 8: Protection from Exposure to Tobacco Smoke*, 2nd sess, 7th pt, Provisional Agenda Item 5.3.1, UN Doc FCTC/COP2(7) (26 April 2007).

⁵ Australian Bureau of Statistics, “1301.0 – Year Book Australia, 2012: Housing – Types of Dwellings” (Report, Australian Bureau of Statistics, 24 May 2012) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Types%20of%20Dwellings~127>>.

⁶ National Preventative Health Taskforce, “Australia: The Healthiest Country by 2020: National Preventative Health Strategy – The Roadmap for Action” (Report, Australian Government, Preventative Health Taskforce, 30 June 2009) 183 <<http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/nphs-roadmap>>.

⁷ Intergovernmental Committee on Drugs, “National Tobacco Strategy 2012–2018” (Report, Commonwealth of Australia, Intergovernmental Committee on Drugs, 2012) 34, [6.8.8].

⁸ Global Access Partners Pty Ltd, “Strata Laws: Online Consultation, Final Report” (Report, Global Access Partners Pty Ltd, April 2012) 76. <http://www.globalaccesspartners.org/Strata_Laws_Online_Consultation_Final_Report_Apr2012.pdf>.

⁹ *Strata Schemes Management Act 2015* (NSW) s 153.

¹⁰ NSW Government, Fair Trading, “Strata Schemes Management Regulation 2016” (Regulatory Impact Statement, April 2016) 32.

¹¹ Commercial and Property Law Research Centre QUT Law, “Queensland Government Property Law Review Options Paper – Body Corporate Governance Issues: By-laws, Debt Recovery and Scheme Termination” (Report, Commercial and Property Law Research Centre QUIT Law, 2014) 24–27, [2.4] <http://www.justice.qld.gov.au/_data/assets/pdf_file/0003/334758/Property-law-review-Body-Corporate-Governance-Options-Paper-1.pdf>.

¹² Consumer Affairs Victoria, “Consumer Property Acts Review Issues Paper No 2: Owners Corporations” (Report, Victoria State Government, Consumer Affairs Victoria, 2016) 32–33 <<https://www.consumer.vic.gov.au/resources-and-education/legislation/public-consultations-and-reviews/consumer-property-law-review/issues-paper-2-owners-corporations>>.

investigation under its tobacco strategy.¹³ A property law reform consultation in Western Australia (WA) did not have the issue on its agenda, but it was the subject of community submissions.¹⁴

This article contributes to this momentum by surveying the current regulatory landscape applicable to strata schemes and their owners corporations¹⁵ across Australia and by assessing the extent to which they can realistically deal with smoke infiltration. In light of this discussion we contend strata laws have failed to keep pace with science on the harms of SHS, and we propose reforms with the aim of progressing further discussion in this area. There are many other important settings beyond the scope of this article where smoke infiltration is an issue, including social and public housing, retirement, aged-care and mental health settings.

After summarising the shared nature of MUH living and the scientific evidence on smoke infiltration in MUH, we discuss international trends, owners' liability and the regulatory framework¹⁶ for by-law making powers and resolution of disputes. We conclude with options for strata law reform to address smoke infiltration fairly and effectively.

THE SHARED NATURE OF MUH LIVING

Individuals, flatmates and families who live in MUH use shared infrastructure and spaces. As such, there are certain restrictions on what people living in MUH can and cannot do in their homes for the purpose of balancing the rights of all residents. There are many rules governing strata living, including on pets,¹⁷ drying of laundry items,¹⁸ garbage disposal,¹⁹ floor coverings,²⁰ parking²¹ and noise control.²²

In addition to sharing infrastructure and spaces, people living in MUH also *share the air*. As much as 60% of the air-flow in buildings can come from other units.²³ Because SHS moves between smoking and

¹³ ACT Government, Health, "Future Directions for Tobacco Reduction in the ACT 2013–2016" (Report, ACT Government, Health) 8, [2.8] <<http://health.act.gov.au/sites/default/files/Future%20directions%20for%20tobacco%20reduction%20in%20the%20ACT%202013–2016.pdf>>.

¹⁴ Government of Western Australia, Landgate, "Strata Titles Act Reform Consultation Paper – October 2014" (Report, Government of Western Australia, Landgate, October 2014) 10 <http://www0.landgate.wa.gov.au/_data/assets/pdf_file/0015/11535/1153-STAR-Consultation-Summary.pdf>.

¹⁵ State and Territory jurisdictions use different language to describe strata laws and entities. This article uses the title "Owners Corporation" to refer to such entities (Victoria, New South Wales, Australian Capital Territory), as well as equivalent entities referred to as "bodies corporate" (Queensland, Tasmania), "strata corporations" (Western Australia) and "community corporations" (Northern Territory).

¹⁶ Only the main strata title laws in each jurisdiction are considered. The authors have not considered more specific or limited strata laws, like the *South Bank Corporation Act 1989* (Qld).

¹⁷ See, eg, *Strata Schemes Management Act* (NSW) Sch 1 by-law 16; *Unit Title Schemes Act 2009* (NT) Sch 2 by-law 6; *Body Corporate and Community Management Act 1997* (Qld) Sch 4 by-law 11; *Strata Titles Act 1998* (Tas) Sch 1 model by-law 7.

¹⁸ See, eg, *Strata Schemes Management Act* (NSW) Sch 1 by-law 10; *Strata Titles Act 1985* (WA) Sch 2 by-law 7.

¹⁹ See, eg, *Owners Corporations Regulations 2007* (Vic) Sch 2 model rule 1.3; *Strata Schemes Management Act* (NSW) Sch 1 by-law 15; *Body Corporate and Community Management Act 1997* (Qld) Sch 4 by-law 10; *Strata Titles Act 1985* (WA) Sch 2 by-law 11.

²⁰ See, eg, *Strata Schemes Management Act* (NSW) Sch 1 by-law 14; *Strata Titles Act 1985* (WA) Sch 2 by-law 10.

²¹ See, eg, *Owners Corporations Regulations 2007* (Vic) Sch 2 model rule 3.2; *Strata Schemes Management Act* (NSW) Sch 1 by-law 2; *Unit Titles Schemes Act 2009* (NT) Sch 2 by-law 3; *Body Corporate and Community Management Act 1997* (Qld) Sch 4 by-law 2; *Strata Titles Act 1998* (Tas) Sch 1 model by-law 9; *Strata Titles Act 1985* (WA) Sch 2 by-law 1.

²² See, eg, *Owners Corporations Regulations 2007* (Vic) Sch 2 model rule 5.2; *Unit Titles (Management) Act 2011* (ACT) Sch 4 default rule 8; *Strata Schemes Management Act* (NSW) Sch 1 by-law 1; *Body Corporate and Community Management Act 1997* (Qld) Sch 4 by-law 1.

²³ US Department of Health and Human Services, "Healthy Homes Manual: Smoke-free Policies in Multiunit Housing" (Report, US Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Environmental Health, Division of Emergency and Environmental Health Services, Healthy Homes and Lead Poisoning Prevention Branch) 9 <http://www.cdc.gov/healthyhomes/Healthy_Homes_Manual_WEB.pdf>.

nonsmoking areas in MUH, smoking generates a serious health hazard in this setting and is a common cause of dispute among neighbours.

EXPOSURE TO SECOND-HAND SMOKE IN MULTIUNIT HOUSING

About 85% of Australian adults are nonsmokers, and almost 82% of Australian adults report that no one regularly smokes inside or outside their home.²⁴ However, the home remains a source of SHS exposure for many adults and children.²⁵ People living in MUH are more likely to be exposed to SHS than those living in separate houses.²⁶ International evidence shows that children in nonsmoking units of MUH have more SHS exposure than children in nonsmoking detached homes²⁷ and suffer respiratory symptoms as a result of neighbouring SHS sources.²⁸ Other overseas research has found associations between housing type and exposure to SHS.²⁹ A review of research from the United States has also found high rates of SHS exposure among residents in units where smoking is not permitted, ranging from 26% to 64%.³⁰

Increased exposure to SHS among nonsmoking MUH residents is likely due to the fact that SHS is not easily contained to areas where smoking occurs. Studies measuring air-nicotine concentrations and particulate matter of a diameter less than 2.5 microns (PM_{2.5}), markers for SHS, have shown corresponding air pollution increases in areas where smoking occurs and in adjacent units and common areas.³¹ These studies indicate that smoke can easily spread via door and window jambs, mechanical ventilation, elevator shafts, hallways, stairwells, cracks in walls, balconies and courtyards.³² Air sealing and ventilation changes can reduce smoke infiltration from apartments where residents smoke indoors, but it cannot be completely eliminated.³³ Partial smoking bans whereby smoking is permitted in private units only have been shown to increase, rather than decrease, SHS exposure among nonsmoking residents.³⁴

²⁴ Australian Institute of Health and Welfare, *National Drug Strategy Household Survey Detailed Report 2013*, Drug Statistics Series No 28, Cat No PHE 183 (2014). Tobacco and Smoking Tables, Supplementary Table S3.6 <<http://www.aihw.gov.au/publication-detail/?id=60129549469&tab=3>>.

²⁵ Coral E Gartner and Wayne D Hall, "Is the Socioeconomic Gap in Childhood Exposure to Secondhand Smoke Widening or Narrowing?" (2013) 22 *Tobacco Control* 344; Australian Institute of Health and Welfare, *Tobacco Indicators Baseline Data: Reporting under the National Tobacco Strategy 2012–2018*, Drug Statistics Series No 29, Cat No PHE 189 (September 2015) 18–20.

²⁶ B Bonevski et al, "Smoky Homes: Gender Socioeconomic and Housing Disparities in Second Hand Tobacco Smoke (SHS) Exposure in a Large Population-based Australian Cohort" (2014) 60 *Preventive Medicine* 95.

²⁷ Karen M Wilson et al, "Tobacco-smoke Exposure in Children Who Live in Multiunit Housing" (2011) 127 *Pediatrics* 85.

²⁸ Lok Tung Leung et al, "Exposure to Secondhand Smoke from Neighbours and Respiratory Symptoms in Never-smoking Adolescents in Hong Kong: A Cross-sectional Study" [2015] *BMJ Open* <<http://bmjopen.bmj.com/content/5/11/e008607.full.pdf+html>>.

²⁹ Karen M Wilson et al, "Tobacco Smoke Incursions in Multiunit Housing" (2014) 104 *American Journal Public Health* 1445; Douglas E Levy, Nancy A Rigotti and Jonathan P Winickoff, "Tobacco Smoke Exposure in a Sample of Boston Public Housing Residents" (2013) 44 *American Journal Preventive Medicine* 63.

³⁰ Kimberly Snyder, Janice Hassett Vick and Brian A King, "Smoke-free Multiunit Housing: A Review of the Scientific Literature" (2016) 25 *Tobacco Control* 9.

³¹ Brian A King et al, "Secondhand Smoke Transfer in Multiunit Housing" (2010) 12 *Nicotine & Tobacco Research* 1133; T A Kraev et al, "Indoor Concentrations of Nicotine in Low-income, Multi-unit Housing: Associations with Smoking Behaviours and Housing Characteristics" (2009) 18 *Tobacco Control* 438.

³² Philip J Dacunto et al, "Identifying and Quantifying Secondhand Smoke in Multiunit Homes with Tobacco Smoke Odour Complaints" (2013) 71 *Atmospheric Environment* 399; De-Ling Liu and William W Nazaroff, "Particle Penetration through Building Cracks" (2003) 37 *Aerosol Science and Technology* 565.

³³ D L Bohac et al, "Secondhand Smoke Transfer and Reductions by Air Sealing and Ventilation in Multiunit Buildings: PFT and Nicotine Verification" (2011) 21 *Indoor Air* 36.

³⁴ Wilson et al, n 29.

OVERSEAS DEVELOPMENTS ADDRESSING SMOKE INFILTRATION IN MUH

Internationally, the United States leads the way in smoke-free MUH policy. In November 2015 the US Department of Housing and Urban Development proposed a rule making public housing smoke-free.³⁵ Once operable the 3,100 public housing authorities in the United States will be required to ban smoking in all indoor areas and outdoors within 25 feet (9 m) of a building affecting 700,000 units.³⁶ This will improve indoor air quality,³⁷ protect children from SHS exposure³⁸ and save \$153 million annually in health, fire and maintenance costs.³⁹

The US Department of Housing and Urban Development has strongly encouraged smoke-free policies in public housing since 2009⁴⁰ with over 600 public housing authorities and tribally designated housing entities taking this initiative by 2015. For example, the Boston Housing Authority made all its 64 developments – housing 27,000 people – smoke-free in 2012⁴¹ with high levels of support from residents.⁴² In addition, five US States had adopted or passed laws to prohibit smoking in private units of State-owned, managed or financed public housing.⁴³ Housing is a key socioeconomic determinant of health, and smoke-free MUH is associated with lower cigarette consumption and recent quit attempts.⁴⁴

With regard to private MUH, there are no US federal laws restricting smoking. However, US state and local governments, and private owners, are free to implement smoke-free policies that affect MUH complexes.⁴⁵ No state government in the United States requires private areas of privately owned MUH complexes to be smoke-free. However, some States have enacted laws that explicitly deal with the problem of smoking and SHS in this setting. There are currently three types of State-based laws in the United States that deal with smoking and SHS. First, Utah clarified the authority of building management to enact rules about smoking on a property in State law⁴⁶ by stating that by-law making

³⁵ US Department of Housing and Urban Development, *Smoke-free Public Housing and Multifamily Properties* (14 May 2016) HUD.GOV <http://portal.hud.gov/hudportal/HUD?src=/program_offices/healthy_homes/smokefree>.

³⁶ Department of Housing and Urban Development, *Instituting Smoke-free Public Housing*, 24 CRF Parts 965 and 966 (Docket No FR 5597-P-02) RIN 2577-AC97 <<http://portal.hud.gov/hudportal/documents/huddoc?id=smoke-freepublichousing.pdf>>.

³⁷ Brian A King et al, “National and State Estimates of Secondhand Smoke Infiltration among US Multiunit Housing Residents” (2013) 15 *Nicotine & Tobacco Research* 1316; R E Arku et al, “Seasonal Variability in Environmental Tobacco Smoke Exposure in Public Housing Developments” (2015) 25 *Indoor Air* 13.

³⁸ Anna Stein et al, “Predictors of Smoke-free Policies in Affordable Multiunit Housing, North Carolina 2013” (2015) 12 *Preventing Chronic Disease* E73.

³⁹ Brian A King et al, “National and State Cost Savings Associated with Prohibiting Smoking in Subsidized and Public Housing in the United States” (2014) 11 *Preventing Chronic Disease* E171.

⁴⁰ US Department of Housing and Urban Development (Notice No PIH-2009–21, Office of Healthy Homes and Lead Hazard Control, Issued 17 July 2009) <http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/notices/pih/09pihnotices>; US Department of Housing and Urban Development (Notice PIH-2012-25, Office of Healthy Homes and Lead Hazard Control, Issued 29 May 2012) <<http://portal.hud.gov/hudportal/documents/huddoc?id=12-25pihn.pdf>>.

⁴¹ Elizabeth T Russo et al, “Comparison of Indoor Air Quality in Smoke-permitted and Smoke-free Multiunit Housing: Findings from the Boston Housing Authority” (2015) 17 *Nicotine & Tobacco Research* 316.

⁴² Rokicki S et al, “Assessment of Residents’ Attitudes and Satisfaction before and after Implementation of a Smoke-free Policy in Boston Multiunit Housing” (2016) 18 *Nicotine & Tobacco Research* 1282.

⁴³ American Nonsmokers’ Rights Foundation, “U.S. Laws and Policies Restricting or Prohibiting Smoking in Private Units of Multi-unit Housing” (4 April 2016) <<http://no-smoke.org/goingsmokefree.php?id=519>>.

⁴⁴ Carla J Berg et al, “Smoke-free Policies in Multiunit Housing: Smoking Behavior and Reactions to Messaging Strategies in Support or in Opposition” (2015) 12 *Preventing Chronic Disease* E98.

⁴⁵ Robert L Kline, “Smoke Knows No Boundaries: Legal Strategies for Environmental Tobacco Smoke Incursions into the Home within Multi-unit Residential Dwellings” (2009) 9 *Tobacco Control* 201; Jonathan P Winickoff, Mark Gottlieb and Michelle M Mello, “Regulation of Smoking in Public Housing” (2010) 362 *The New England Journal of Medicine* 2319; Shelly L Jackson and Richard J Bonnie, “A Systematic Examination of Smoke-free Policies in Multiunit Dwellings in Virginia as Reported by Property Managers: Implications for Prevention” (2011) 26 *American Journal of Health Promotion* 37.

⁴⁶ Utah Code Ann Â§ 57-8-16(7B) (1997).

power extends to tobacco smoking on common and private parts of the building. Second, Utah law also explicitly recognises that regular “tobacco smoke that drifts into any residential unit a person rents, leases or owns, from another residential or commercial unit” is a nuisance.⁴⁷ Third, Oregon and Maine mandate that rules (or lack of rules) about smoking must be disclosed to potential renters.⁴⁸ For example, Oregon State law requires landlords to reveal to potential renters whether smoking is permitted on the premises and where smoking is allowed or not allowed on the premises.⁴⁹

A number of local governments in California restrict or prohibit smoking in some or all MUH complexes under their jurisdiction. As of October 2015, 17 Californian governments had enacted local laws to prohibit smoking in private and common areas of MUH complexes.⁵⁰ An additional 28 Californian governments had enacted laws to restrict smoking in private areas of some (but not all) MUH complexes. Some of these partial smoke-free laws prohibit smoking in all new buildings or in all newly leased units, while other partial smoke-free laws require only a proportion of units to be smoke-free.⁵¹ An increasing number of private MUH complexes are voluntarily adopting smoke-free rules.

In Canada there are no federal, State or local laws that restrict smoking in private areas of MUH. However, some municipal and provincial governments have adopted smoke-free policies in their public MUH and no law prohibits privately owned MUH complexes from voluntarily adopting 100% smoke-free policies.⁵² Laws in most States and Territories prohibit smoking in common areas of MUH.⁵³ As is the case in Australia, media reports from Canada suggest an increasing trend towards the adoption of smoke-free policies in private MUH complexes.⁵⁴

While smoke infiltration in MUH has been recognised in key public health policy documents in Australia, and NSW, Queensland and Victoria are starting to move on the issue, Australia lags behind the United States and Canada in making progress to address this critical public health issue.

OWNERS’ LIABILITY FOR INDOOR AIR QUALITY IN AUSTRALIA

While strata laws in Australia may be silent on smoke infiltration, developers and owners corporations do have to consider ventilation standards and building codes. Contaminants in air-conditioning systems affect indoor air quality and are a liability for building owners; owners corporations, therefore, have a duty of care to avoid substandard air quality caused by infrastructure they control.⁵⁵

⁴⁷ Utah Code Ann Â§ 78B-6-11-1101(3) (2010).

⁴⁸ Or Rev Stat 12.479.305(1) (2009); Me Rev Stat Ann 14-7-10-6030E (2011).

⁴⁹ Or Rev Stat 90.220(4) (2011); Or Rev Stat 12.479.305(1) (2009).

⁵⁰ American Nonsmokers’ Rights Foundation, n 49; See, eg, San Rafael Ord No 1908 § 1,10-15 (2012).

⁵¹ American Nonsmokers’ Rights Foundation, n 49; See, eg, Santa Monica Municipal Code § 4.44 (2012).

⁵² David Saltman and Kevin Coady, “Smoke-free Multiunit Housing in Canada” (2012) 14 *Annual Report Card on Cancer in Canada* 29; Global Tobacco Control Forum, *Canada’s Implementation of the Framework Convention on Tobacco Control: A Civil Society “Shadow Report”* (October 2010) Physicians for a Smoke-free Canada <http://www.smoke-free.ca/pdf_1/FCTC-Shadow-2010-Canada.pdf>.

⁵³ *Smoke-free Environment Act*, SNL 2005 S-16.2, s 4(1)(q); *Tobacco Control Act*, SNU 2003, c 13, s 14(1); *Smoke-free Places Act*, SNS 2002, c 12, s 5(1)(n); *Smoke-free Places Act*, RSNB 2011, c 222, s 1(1)(a); *Tobacco Act*, SQ 1998, c 33, s 2(7); *Smoke-free Ontario Act*, SO 1994, c 10, s 9(2)(3); *Non-smokers Health Protection Act*, CCSM 2014 c N92, s 1(1)(a)(iii); *Tobacco and Smoking Reduction Act*, SA 2005, c T-3.8, s 1(f); *Smoke-free Places Act*, SY 2008, c 8, s 4(1)(r).

⁵⁴ See, eg, Carly Weeks, “The Final Frontier: Smoking Bans in Apartments, Condos”, *The Globe and Mail*, 25 January 2015 <<http://www.theglobeandmail.com/life/health-and-fitness/health/the-final-frontier-smoking-bans-in-apartments-condos/article22606645/>>.

⁵⁵ Penelope Pengilly, John Taberner and David Bridgen, “The Legal Implications of Substandard Air Quality” (1994) 38 *Australian Construction Law Newsletter* 14.

Australian Standards and building codes (discussed below) play a role in determining what care should be taken.

Australian Standards

In 2002, Standards Australia added ventilation rates for SHS into the Australian Standard for mechanical ventilation.⁵⁶ This standard was widely rejected by the National Occupational Health and Safety Commission,⁵⁷ a number of State and Territory Building Control Administrations⁵⁸ and the Australian Building Codes Board⁵⁹ because it implied indoor smoking was safe. Until the standard was revised in 2012, various building and health authorities continued to endorse the 1991 version of the standard (which did not accommodate indoor smoking). However, the 2002 standard (that included SHS ventilation rates) was convenient for entertainment and licensed premises during the period where indoor smoking was still largely permitted and continued to be applied by organisations running these types of venues.

The current 2012 Australian Standard for mechanical ventilation no longer contains ventilation rates for SHS.⁶⁰ The revised Australian Standard is now in line with the position of health and professional authorities that it is not possible to eliminate SHS within a building by air-purification, air-cleaning or mechanical air exchange and SHS in air-conditioning systems is a health hazard.⁶¹ The current Australian Standard should provide a strong impetus for owners of centrally ventilated MUH to seek to address smoke infiltration.⁶²

Building Code

The Building Code of Australia requires newly built MUH to have adequate mechanical or natural ventilation to ensure a suitable supply of fresh air to safeguard residents from a loss of amenity and habitability.⁶³ The 2012 Australian Standard for mechanical ventilation (discussed above) is now referenced in Vol 1 of the Building Code of Australia (which covers MUH).⁶⁴ While almost all residential MUH provides natural ventilation, in practice many MUH residents complain that smoke infiltration from neighbours' balconies force them to live with their doors and windows closed.⁶⁵ Being deprived

⁵⁶ Australian Standard 1668.2–2002.

⁵⁷ National Occupational Health & Safety Commission, “Guidance Note on the Elimination of Environmental Tobacco Smoke in the Workplace” (Guidance Note No 3019, October 2003) 5. This guide is currently under review.

⁵⁸ Australian Building Codes Board, “Professional Practice: Advice on the Use of AS1668 Part 2” (Advisory Notice Building, Reissue 15/03, Department for Transport and Urban Planning SA, April 2003) 3.

⁵⁹ Sean McGowan, “AS 1668.2 Is Finally Resolved” (2013) *HVAC&R Nation* 20.

⁶⁰ Australian Standard 1668.2–2012.

⁶¹ US Department of Health and Human Services, n 2; Environmental Tobacco Smoke Position Document Committee, *ASHRAE Position Document of Environmental Tobacco Smoke* (22 October 2010) American Society of Heating Refrigeration and Air-conditioning Engineers <<https://www.ashrae.org/about-ashrae/position-documents>>.

⁶² Strata laws under State and Territory jurisdictions use different language to describe model by-laws. This article uses the title “model by-laws” to refer to such provisions (Victoria, Tasmania), as well as equivalent provisions referred to as “by laws” (Queensland, New South Wales, Northern Territory, Western Australia and South Australia) and “default rules” (Australian Capital Territory).

⁶³ Government of Western Australia Department of Commerce, “Ventilation in Buildings” (Industry Bulletin No 043, Building Commission, 2014) <http://www.commerce.wa.gov.au/sites/default/files/atoms/files/industry_bulletin_043_0.pdf>.

⁶⁴ Adam Stingemore, “The Latest on Australian Standards” (Australian Building Regulation Bulletin, Australian Building Codes Board, Summer 2013) 11 <<https://www.abcb.gov.au/-/media/Files/Resources/Education.../ABRB-2013.pdf>>; Australian Institute of Refrigeration, Airconditioning and Heating, “Revision of AS 1668.2 2002” (Discussion Paper, Australian Institute of Refrigeration, Airconditioning and Heating, January 2012) <http://www.airah.org.au/iMIS15_Prod/AIRAH/Resources/Useful_Documents/AIRAH/Navigation/Resources/Useful_Documents/Useful_Documents.aspx>.

⁶⁵ Global Access Partners Pty Ltd, n 8; See, eg, *Sheath v Whitley* [2014] NSWCATCD 44; *North Shore Apartments* [2003] QBCCMCmr 505; *Heritage Village Ormiston West* [2007] QBCCMCmr 565; *Norbury v Hogan* [2010] QCATA 27.

of fresh air can cause the quality of the indoor air to deteriorate and affect health and wellbeing: heat, humidity and an accumulation of expired carbon dioxide are known amenity issues.⁶⁶ While builders and developers must comply with the Building Code of Australia specification for natural or mechanical ventilation, occupants and owners corporations share responsibility for ongoing ventilation problems.⁶⁷ The Building Code could be interpreted as the benchmark of the care that should be taken by owners corporations in maintaining adequate air quality and ventilation.

Rental Premises Fit for Habitation

In the NSW residential tenancy appeals case of *Bhandari v Laming* the NSW Civil and Administrative Tribunal upheld the decision that smoke infiltration from a neighbour below made a tenant's unit unfit for habitation.⁶⁸ The unit was unfit because of defective internal ventilation which allowed SHS to infiltrate into the unit.⁶⁹ At first instance the Tribunal found it was "unacceptable for a tenant and a child to live in an environment which smells of tobacco smoke" and "most people accept that tobacco smoke is a health hazard".⁷⁰ The tenant was awarded over \$11,000 in damages for rent reduction and moving expenses.⁷¹ In NSW the landlord's statutory obligation to provide premises "fit for habitation"⁷² was unqualified, so it did not matter that the landlord could not control or take reasonable steps to stop the smoke infiltration.⁷³ Queensland, ACT and Northern Territory (NT) also obligate landlords to provide premises that are fit for habitation from the outset.⁷⁴

Bhandari v Laming puts developers and owners corporations on notice: the landlord could sue the owners corporation and it is "inconceivable that an owner is unable to secure residential premises in an apartment block against smoke or other odours passing through common property ... causing residential premises to be uninhabitable".⁷⁵ The recalcitrance of the owners corporation in this case⁷⁶ can be contrasted with the successful prosecution of a smoke-infiltration nuisance claim in similar circumstances by the owners corporation in *Owners Corp SP 49822 v May*⁷⁷ (*Owners Corp SP 49822*).

Owners corporations can also avoid poor air quality from smoke infiltration by creating a by-law addressing smoking. However, as discussed below, by-law making powers vary between jurisdictions and it may be difficult to gauge the extent to which by-laws can restrict or prohibit smoking under current by-law making powers.

⁶⁶ HVAC&R Nation, "HVAC&R Skills Workshop. Introduction to Indoor Air Quality" (2015) Issue 081 <http://www.airah.org.au/ims15_prod/Content_Files/HVACRNation/2015/05-15-HVAC&R-004.pdf>.

⁶⁷ *Owners Corp SP 49822 v May* [2006] NSWCTTT 739, [k]–[r].

⁶⁸ *Bhandari v Laming* [2015] NSWCATAP 224, [46].

⁶⁹ *Bhandari v Laming* [2015] NSWCATAP 224, [41].

⁷⁰ *Bhandari v Laming* [2015] NSWCATAP 224, [15].

⁷¹ *Bhandari v Laming* [2015] NSWCATAP 224, [16].

⁷² *Residential Tenancies Act 2010* (NSW) s 52(1).

⁷³ *Bhandari v Laming* [2015] NSWCATAP 224, [32]–[38].

⁷⁴ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 185(2)(b); *Residential Tenancies Act 1997* (ACT) Schedule 1 item 54(1)(a); *Residential Tenancies Act 2000* (NT) s 48. In Victoria this ground for termination is only available if the tenant has not yet taken possession: *Residential Tenancies Act 1997* (Vic) s 226. Other jurisdictions allow a tenant to terminate the agreement or abate the rent if a unit becomes unfit for habitation during the tenancy: *Residential Tenancies Act 1987* (WA) s 69(1); *Residential Tenancies Act 1995* (SA) s 86B(1)(a). This type of provision would not apply in the circumstances in *Bhandari v Laming* [2015] NSWCATAP 224 where the defective ventilation was present at the outset. The *Tasmanian Residential Tenancies Act 1997* (Tas) specifies minimum structural standards not relevant to smoke-drift.

⁷⁵ *Bhandari v Laming* [2015] NSWCATAP 224, [44].

⁷⁶ *Bhandari v Laming* [2015] NSWCATAP 224, [44].

⁷⁷ *Owners Corp SP 49822 v May* [2006] NSWCTTT 739.

CURRENT POWERS TO MAKE BY-LAWS ON SMOKING

Despite strong community concerns about smoking in MUH and the public health importance of reducing exposure to SHS, only NSW has begun to address smoke infiltration explicitly in strata laws or model by-laws.⁷⁸ The failure to adequately address smoking leaves strata managers, owners and residents uncertain of their rights and responsibilities. This is in contrast to other contentious management issues, such as pet ownership and floor coverings, which are routinely included in model by-laws. The lack of a model by-law on smoking means it is up to owners corporations to go through the process of developing and seeking support for a new by-law that specifically addresses smoking. As discussed below, anticipating the kinds of smoking by-laws that fall within the powers of an owners corporation may not be a straightforward task.

Strata laws in all Australian jurisdictions empower owners corporations to make by-laws for the good management of the scheme, but these powers are drafted differently between jurisdictions and vary in scope. Model by-laws are generally found in schedules to the applicable legislation and generally apply by default, unless deleted, amended or added to by the owners corporation. The discussion below will consider the extent to which it might be within the power of an owners corporation to restrict smoking.

“Control” Powers – Banning Smoking Completely

There is 1997 Supreme Court authority⁷⁹ that owners corporations in NSW have the power to prohibit smoking in both common areas and lots (ie, individual apartments) by virtue of provisions permitting by-laws that are concerned with the “control” of common property and lots.⁸⁰ Applying this reasoning, it is possible that equivalent “control” powers under NT,⁸¹ Victoria⁸² and WA⁸³ strata laws permit by-laws prohibiting smoking anywhere on the premises.⁸⁴ By-law making powers are subject to limitations (discussed further below), and there is a lack of case law across jurisdictions examining the validity of by-laws that seek to ban smoking completely.

Owners corporations in the ACT,⁸⁵ Queensland,⁸⁶ South Australia (SA)⁸⁷ and Tasmania⁸⁸ have power of “control” over common property, but not lots. It is therefore also possible that owners corporations in these jurisdictions can create by-laws that prohibit smoking in common areas under these “control”

⁷⁸ *Strata Schemes Management Act 2015* (NSW) s 153. Section 153 (yet to commence at the time of preparing this article) includes a general nuisance and hazard provision that is accompanied by a legislative note stating that “Depending on the circumstances in which it occurs, the penetration of smoke from smoking into a lot or common property may cause a nuisance or hazard and may interfere unreasonably with the use or enjoyment of the common property or another lot.”; NSW Government, n 10.

⁷⁹ *Salerno v Proprietors of Strata Plan No 42724* (Unreported, Supreme Court of NSW Equity Division, Windeyer J, 5 April 1997). In that case, the court confirmed that such a by-law is not capable of operating to prohibit or restrict the devolution of a lot or a transfer, lease, mortgage or other dealing.

⁸⁰ See also *Casuarina Rec Club Pty Ltd v The Owners – Strata Plan No 77971* (2011) 80 NSWLR 711; [2011] NSWCA 159 for authority for the propositions that a by-law dealing with the same subject matter as a model by-law cannot be held to be ultra vires and the power to make by-laws should be generously construed; *Strata Scheme Management Act 2015* (NSW) s 136.

⁸¹ *Unit Titles Schemes Act 2009* (NT) s 95(2)(a)(i).

⁸² *Owners Corporations Act 2006* (Vic) s 138(3).

⁸³ *Strata Titles Act 1985* (WA) s 42.

⁸⁴ See also *Mackie v Henderson* (2011) 42 WAR 194, [22]; [2011] WASC 197 where it was observed “The starting point is that it is trite that by-laws frequently interfere with the property rights of the owner of a lot. They can also interfere with a myriad of personal rights in relation to the lot. The range of possible by-laws can be extremely broad. For instance, in *Sydney Diagnostic Services Pty Ltd v Hamlena Pty Ltd* (1991) 5 BPR 11,432 the New South Wales Court of Appeal upheld a by-law which prohibited the owner of a lot from engaging in any enterprise on the lot other than the medical practice of pathology. This by-law fell within the power to make by-laws ‘for the purposes of the control, management, administration, use, or enjoyment of the lots.’”

⁸⁵ *Unit Titles (Management) Act 2011* (ACT) s 16(1)(b).

⁸⁶ *Body Corporate and Community Management Act 1997* (Qld) s 169(1)(a).

⁸⁷ *Community Titles Act 1996* (SA) s 34(2)(b).

⁸⁸ *Strata Titles Act 1998* (Tas) s 90(1)(a).

provisions, although again there appears to be no reported case law on point, including on the limitations applicable to by-law making powers.

“Regulation” Powers – Restricting Smoking in Certain Circumstances

As summarised above, owners corporations in all jurisdictions have powers of “control” over common property, but not all jurisdictions have powers of control over use of lots. Owners corporations in Queensland⁸⁹ and SA⁹⁰ have powers to “regulate” the use and enjoyment of lots. ACT strata laws do not specify the nature of owners corporation functions with respect to lots,⁹¹ and Tasmanian strata laws provide that owners corporations can make by-laws “about” the “use and enjoyment of the lots”.⁹² This potentially leaves Queensland, SA, ACT and Tasmania with more limited powers to make rules on the use of lots compared to NSW, NT, Victoria and WA.

It is likely that smoking cannot be completely banned under powers limited to the “regulation” of use and enjoyment of lots or under general by-law making powers. High Court and Supreme Court authorities considering powers to “regulate” suggest that a complete prohibition of an activity altogether or subject to a discretionary licence or consent would *prima facie* be beyond a power to make by-laws “regulating” a subject matter; however, “prohibition of an activity in part, a particular case, or a particular way, may be needed to achieve effective regulation.”⁹³ In light of these judicial decisions, a by-law that restricts smoking only where it causes a nuisance or hazard, or impacts on reasonable use and enjoyment of lots or common property, could be expected to fall within such a power.⁹⁴

As there is no reported case law considering the validity of a smoking-related by-law affecting lots made under owners corporation powers to “regulate” use of private lots and/or common property, it is difficult to anticipate their validity if tested before a tribunal.

Limitations on Owners Corporations Powers to Make By-laws

In every case, even where a power to create a by-law exists under “control” or “regulation” powers, the by-law (or any aspect of it) may still be invalid or void if it breaches an applicable statutory limitation on by-law making powers. General limitations applicable to the making and operation of by-laws vary between jurisdictions. Strata laws in every State and Territory except Tasmania impose limitations relating to “consistency” with (among other things) strata laws and/or other laws.⁹⁵ Other limitations include those that relate to “discrimination” against or between unit owners or occupiers (NT,⁹⁶ Queensland,⁹⁷ SA,⁹⁸ Tasmania⁹⁹ and Victoria¹⁰⁰) or those that are oppressive and/or

⁸⁹ *Body Corporate and Community Management Act 1997* (Qld) s 169(1)(b).

⁹⁰ *Community Titles Act 1996* (SA) s 34(2)(d). In South Australia, by-laws of a community scheme must (among other things) “regulate the use and enjoyment of the community lots to the extent necessary to give effect to the scheme description”.

⁹¹ *Unit Titles (Management) Act 2011* (ACT) s 16.

⁹² *Strata Titles Act 1998* (Tas) s 90(1)(b).

⁹³ See *Mineralogy Pty Ltd v Body Corporate for The Lakes Coolool* [2002] QCA 550, [7]–[8]; *Williamson v Princess Palm Body Corporate CTS 9843* [2010] QCATA 55, [25]–[29] for discussion of relevant High Court authorities on point. See also *Body Corporate for River City Apartments CTS 31622 v McGarvey* [2012] QCATA 47, [36]–[38].

⁹⁴ As discussed below, however, by-laws that seek to regulate smoking where it causes a “nuisance” or “hazard” may come packaged with common law principles on these issues and uncertain application to instances of smoke infiltration.

⁹⁵ *Unit Titles Management Act 2011* (ACT) s 108(3)(a); *Strata Schemes Management Act 2015* (NSW) s 136(2); *Unit Titles Scheme Act 2009* (NT) s 95(3)(a); *Body Corporate and Community Management Act 1997* (Qld) s 180(1); *Community Titles Act 1996* (SA) s 41(1); *Owners Corporations Act 2006* (Vic) s 140(b); *Strata Titles Act 1985* (WA) s 42. By-laws in Tasmania will be void if they are inconsistent with the provisions of a scheme: *Strata Titles Act 1998* (Tas) s 91(3)(d).

⁹⁶ *Unit Titles Schemes Act 2009* (NT) s 95(3)(d).

⁹⁷ *Body Corporate and Community Management Act 1997* (Qld) s 180(5).

⁹⁸ *Community Titles Act 1996* (SA) s 38(1)(b).

⁹⁹ *Strata Titles Act 1998* (Tas) s 91(3)(b).

¹⁰⁰ *Owners Corporations Act 2006* (Vic) s 140(a).

unreasonable (Queensland¹⁰¹ and Tasmania¹⁰²). NSW recently amended its strata laws so that by-laws cannot be harsh, unconscionable or oppressive,¹⁰³ and by-laws in Victoria cannot limit a right or avoid an obligation under strata laws and other Acts and regulations.¹⁰⁴ There are other limitations not mentioned here, as well as general requirements about acting reasonably,¹⁰⁵ that may bear upon the validity of by-laws.

The consideration of limitations applicable to the validity of by-laws will vary according to the particular wording of strata laws and may also be informed by previously adjudicated decisions that may not have been considered by this article. Our analysis is informed by a review of reported adjudicated decisions identified by the authors as potentially relevant or informative and is intended to identify in a broad and general way, issues of potential relevance to smoke infiltration.

Consistency

On the issue of “consistency” with strata laws, it would be reasonable to expect that a by-law prohibiting smoking only where it causes a hazard or nuisance or impacts on use and enjoyment of private lots or common property would be considered consistent with strata laws, if expressed in the same way as existing statutory provisions or model by-laws covering nuisances and hazards generally.¹⁰⁶

As for consistency with other laws, various questions might come up for consideration.¹⁰⁷ One question might be whether it is possible to comply with both the model by-law restricting smoking as well as other smoke-free laws.¹⁰⁸ The authors believe that concurrent compliance would be possible because there would be no conflicting responsibilities between a by-law restricting smoking and other smoke-free laws.

It is important to recognise that tobacco control laws that create smoke-free areas concern “public” places or “workplaces” or specifically exempt residential premises,¹⁰⁹ with only a few

¹⁰¹ *Body Corporate and Community Management Act 1997* (Qld) s 180(7). Recent Queensland cases considering these issues include *McKenzie v Body Corporate for Kings Row Centre CTS 11632* [2010] QCATA 57; *River City Apartments; L’Colonial Court* [2008] QBCCMCmr 332; *Law and Property Management Pty Ltd ATF Lawand Property Family Trust v Body Corporate for Paradise Palms CTS 23869* [2012] QCATA 669.

¹⁰² *Strata Titles Act 1998* (Tas) s 91(3)(a). “Reasonableness” is considered in the case of *Taunton Enterprises Pty Ltd Appeal Against Order No C579394 Strata Title Act* [2005] TASRMPAT 76.

¹⁰³ *Strata Schemes Management Act 2015* (NSW) s 139(1). Note that these provisions had yet to commence at the time of preparing this article.

¹⁰⁴ *Owners Corporation Act 2006* (Vic) s 140(b).

¹⁰⁵ See, eg, *Unit Titles (Management) Act 2011* (ACT) s 19(2); *Unit Titles Schemes Act 2009* (NT) s 27(2); *Body Corporate and Community Management Act 1997* (Qld) s 94(2).

¹⁰⁶ See, eg, *Admiralty Towers* [2011] QBCCMCmr 264, [51]; *Mineralogy Pty Ltd v Body Corporate for The Lakes Coolum* [2002] QCA 550, [13]; *Casuarina Rec Club Pty Ltd v The Owners – Strata Plan No 77971* (2011) 80 NSWLR 711; [2011] NSWCA 159.

¹⁰⁷ See, eg, *Community Titles Act 1996* (SA) s 41(2) which provides that “[a] by-law will be taken to be inconsistent with a scheme description, the by-laws of another scheme or a development contract if, and only if, there are no circumstances in which the by-law can operate consistently with the scheme description, by-laws or development contract.” Examples of strata related cases that deal with “inconsistency” include the following: *White v Betalli* (2007) 71 NSWLR 381; [2007] NSWCA 243; *Italian Forum Ltd v The Owners – Strata Plan 60919* (2012) 16 BPR 31,685; [2012] NSWSC 895; *Noon v Owners – Strata Plan No 22422* (2014) 17 BPR 33,279; [2014] NSWSC 1260; *Williamson v Princess Palm Body Corporate CTS 9843* [2010] QCATA 55; *Owners Corp PS3313625 v Rhodes* [2011] VCAT 642; *Mackie v Henderson* (2011) 42 WAR 194, [22]; [2011] WASC 197.

¹⁰⁸ See, eg, *Sunnybrae* [2004] QBCCMCmr 393. In that case, a by-law purporting to allow occupiers the right to park their vehicles in designated visitor car parking places was considered invalid because it was inconsistent with local government regulations providing that visitor spaces could only be used for parking by genuine visitors.

¹⁰⁹ *Smoke-free Environment Act 2000* (NSW) s 6; *Tobacco and Other Smoking Products Act 1998* (Qld) s 26R(2)(a)-(b); *Tobacco Product Regulations Act 1987* (SA) s 46; *Tobacco Act 1987* (Vic) s 5A(2)(a); *Tobacco Products Control Regulations 2006* (WA) r 10; *Public Health Act 1997* (Tas) s 67B; *Tobacco Control Act 2003* (NT) s 7(1), (2)(a); *Smoke-free Public Places Act 2003* (ACT) s 6.

limited exceptions.¹¹⁰ It could therefore be argued that a by-law restricting smoking in domestic settings is inconsistent with tobacco control laws. In response however, it could be said that where a by-law prohibits or restricts smoking in circumstances that go beyond tobacco control laws, no inconsistency arises because smoking bans under tobacco control laws do not preclude the further restriction of smoking by different laws or policies, particularly where SHS exposure engages relevant rights and duties.¹¹¹ These complex issues have not been the subject of reported tribunal decisions, so it is difficult to anticipate how adjudicators across jurisdictions might approach such a question.

Oppressiveness and/or Reasonableness

It seems sensible that a by-law prohibiting smoking according to objective criteria or only where it causes a nuisance or hazard or impacts on use and enjoyment of private lots or common property would not be considered oppressive or unreasonable.¹¹² This is because such restrictions reflect existing strata obligations, including on nuisance and/or hazards, and SHS exposure is a known health hazard with no safe level of exposure. However, as noted above, tobacco control laws exempt private premises from smoke-free requirements in most circumstances. A tribunal might therefore consider that a by-law that places greater restrictions on smoking compared to those under tobacco control laws is oppressive and/or unreasonable. A blanket ban on smoking is perhaps more vulnerable to challenge on the ground of oppressiveness and/or unreasonableness because it could prevent a resident from smoking even where neighbours will not conceivably be exposed. As with the limitation on consistency, these complex issues have not been the subject of reported tribunal decisions, so it is difficult to anticipate how adjudicators across jurisdictions would approach these issues.

Discrimination

Various considerations may come into play with respect to discrimination. For example, it may be that only discrimination that is unlawful under equal opportunity laws can render a by-law void or invalid.¹¹³ In this case, it is unlikely that smoking would be considered to fall under one of the protected attributes¹¹⁴ (ie, such as “disability”), and in any event it could be expected that restricting smoking where it risks harm to others would be considered reasonable in all the circumstances.¹¹⁵ Where discrimination¹¹⁶ or adverse and/or unfair discrimination is relevant,¹¹⁷ the serious health risks associated with SHS make it difficult to envisage such a by-law applying to everyone being considered discriminatory against a smoker, including in an adverse and/or unfair way. Indeed, SHS exposure might preclude access in a

¹¹⁰ See, eg, *Tobacco and Other Smoking Products Act 1998* (Qld) s 26R(2)(a)-(b); *Tobacco Act 1987* (Vic) s 5A(2)(a); *Tobacco Control Act 2003* (NT) s 7(1)(b); *Public Health Act 1997* (Tas) s 67B(1)(b); *Tobacco Products Regulation Act 1997* (SA) s 46(1); *Occupational Safety and Health Regulations 1996* (WA) regs 3.44B, 3.44D.

¹¹¹ See, eg, *Sheath v Whitley* [2014] NSWCATCD 44, [20], where it was held that smoking in strata is subject to a mandatory prohibition on causing a nuisance or hazard to the occupier of another lot.

¹¹² Commercial and Property Law Research Centre QUT Law, n 11, [2.4.3].

¹¹³ See, eg, the *Unit Titles Schemes Act 2009* (NT) s 95(3)(d).

¹¹⁴ See, eg, the Anti-discrimination Commission Queensland advises that smoking is not a protected attribute or an impairment: Anti-discrimination Commission Queensland, *Frequently Asked Questions* <<http://www.adcq.qld.gov.au/resources/faqs>>.

¹¹⁵ See, eg, the *Statement of Compatibility to the Corrections Amendment (Smoke-free Prisons) Bill 2014* (Vic) and the discussion regarding “recognition of equality before the law” in particular: Victoria, *Parliamentary Debates*, Legislative Assembly, 7 May 2014, 1450–1451 (Kim Wells).

¹¹⁶ See, eg, the *Body Corporate and Community Management Act 1997* (Qld) s 180(5).

¹¹⁷ See, eg, the *Community Titles Act 1996* (SA) s 38(1)(b); *Strata Titles Act 1998* (Tas) s 91(3)(b); *Owners Corporation Act 1996* (Vic) s 140(a).

discriminatory way to nonsmokers with asthma or other respiratory conditions.¹¹⁸ Again, there appears to be no reported strata decisions on point, so it is difficult to predict how discrimination issues might be approached by adjudicators across jurisdictions.

Procedures for Adding or Amending By-laws

Although our analysis shows that owners corporations may lawfully introduce by-laws to restrict smoking (though to differing degrees), low levels of awareness may have contributed to limited uptake of this option.¹¹⁹ In addition, those advocating for the addition of a by-law on smoking may face difficulties navigating the complex procedural requirements. Generally, the proponent must first arrange for the issue of smoking to be added to the agenda for the Annual General Meeting or call for an extraordinary meeting. At this stage, the proponent may be advised by the strata manager that a lawyer is required to draft the by-law. In order to attract support for a proposed special resolution, the proponent should provide the owners with information on the health, legal and financial benefits. Generally a by-law must be proposed as a special resolution and have support of at least 50% the eligible votes of owners. In most jurisdictions a special resolution is not carried if more than 25% of lots in the scheme oppose it.¹²⁰ Unless assisted by a supportive strata manager with a thorough knowledge of the procedural requirements, proponents may face significant procedural barriers.

RESOLVING DISPUTES ABOUT SMOKE INFILTRATION IN STRATA SCHEMES

In the absence of a specific provision or by-law on smoking, people affected by smoke infiltration in MUH must rely on a general prohibition (either under a statutory provision or within a model by-law) on causing a “nuisance” or “hazard” or “interfering unreasonably” with the use or enjoyment of another lot or common property (Table 1).

TABLE 1. Use of the Terms “Nuisance”, “Hazard” and “Unreasonable Interference” in General Prohibitions

Legislation	Use of a lot that is prohibited	Use of common property that is prohibited
NSW		
<i>Strata Schemes Management Act 2015</i> (NSW) s 153	Nuisance or <i>hazard</i> to occupier of another lot with an explanatory note that depending on the circumstance SHS penetration may be a nuisance or hazard	Interfere unreasonably with use and enjoyment of another lot or common property with an explanatory note that depending on the circumstance SHS penetration may be a unreasonable interference

¹¹⁸ For a disability discrimination case related to exposure to second-hand smoke, see the decisions of *Francey v Hilton Hotels of Australia Pty Ltd* [1997] HREOCA 56; *Meuwissen v Hilton Hotels of Australia Pty Ltd* [2000] HREOCA 9.

¹¹⁹ Michelle Havill, Rae Fry and Scott Walsberger, “Enabling Smoke-free Apartment Living in NSW” (2014) 3 *ACT Population Health Bulletin* 27 <<http://www.health.act.gov.au/sites/default/files/ACT%20Population%20Health%20Bulletin%20-%20Volume%203%20Issue%204%20-%20November%202014.pdf>>.

¹²⁰ *Strata Titles Management Act 2015* (NSW) ss 5, 141 (passed at a meeting with not more than 25% of the value of the votes cast against); *Body Corporate and Community Management Act 1997* (Qld) s 106 (66% in favour and the votes against is no more than 25% of the number of lots and total contribution schedule in the scheme); *Owners Corporation Act 2006* (Vic) s 96(a)-(b) (if a ballot or poll is taken, 75% of the total lot entitlements of all the lots affected by the owners corporation; or in any other case, 75% of the total votes for all the lots affected by the owners corporation); *Community Titles Act 1996* (SA) ss 3(1), 12(2) (50% in favour and number of votes against the resolution is 25% or less of the total number of votes that could be cast at a meeting at which all members are present and entitled to vote); *Strata Titles Act 1985* (WA) ss 3B(2), 42(2)(c) (passed by 50% of the aggregate unit entitlement and 50% of the proprietors of the lots in the scheme and votes against are no more than 25% of the aggregate unit entitlement or proprietors of the lots in the scheme); *Strata Titles Act 1998* (Tas) s 92 (ordinary resolution); *Unit Titles (Management) Act 2011* (ACT) s 108(1) Sch 3 s 3.16 (more than 50% votes in favour and votes against is less than one-third of votes by people present at the meeting).

TABLE 1. *Continued*

Queensland		
<i>Body Corporate and Community Management Act 1997</i> (Qld) s 167	Nuisance or <i>hazard</i> or interfere unreasonably with use and enjoyment of another lot or common property	Nuisance or <i>hazard</i> or interfere unreasonably with use and enjoyment of another lot or common property
SA		
<i>Community Titles Act 1996</i> (SA) s 133	Nuisance or interferes unreasonably with the use or enjoyment of another lot or the common property	Nuisance or interferes unreasonably with the use or enjoyment of another lot or the common property
Victoria		
<i>Owners Corporation Regulations 2007</i> (Vic), Sch 2 – Model Rules for an Owners Corporation	<i>Hazard</i> to the health, safety and security of an owner, occupier or user of another lot	Obstruct the lawful use and enjoyment of the common property
WA		
<i>Strata Titles Act 1985</i> (WA) Sch 1 – By-laws	Nuisance to any occupier of another lot or their family	Interfere unreasonably with the use and enjoyment of common property
Tasmania		
<i>Strata Titles Act 1998</i> (Tas) Sch 1 – Model By-laws	Nuisance to the owner or occupiers of any other lot	Likely to interfere with the reasonable use and enjoyment of another lot or common property
NT		
<i>Unit Title Schemes Act 2009</i> (NT) Sch 2 – By-laws	Unreasonably affect a person’s lawful enjoyment of the scheme land (scheme land includes units and common property)	Unreasonably affect a person’s lawful enjoyment of the scheme land
ACT		
<i>Unit Titles (Management) Act 2011</i> (ACT) Sch 4 – Default Rules	<i>Hazard</i> or nuisance or substantial annoyance to an owner, occupier of user of another unit	Interfere unreasonably with the use and enjoyment of common property

As discussed below, strata laws do not define “nuisance”, “hazard” or any of the variations on “unreasonable interference”, leaving it to tribunals and courts to determine their meaning. Although, the *Strata Schemes Management Act 2015* (NSW) now contains an explanatory note to the nuisance provision that “depending on the circumstances in which it occurs” SHS infiltration may be considered a nuisance or a hazard.¹²¹ All jurisdictions except Victoria have a general prohibition on use of a lot that causes a nuisance to an occupier of another lot.¹²² Victoria has a model by-law prohibiting use of a lot

¹²¹ *Strata Schemes Management Act 2015* (NSW) s 153.

¹²² *Strata Schemes Management Act 2015* (NSW) s 153; *Body Corporate and Community Management Act 1997* (Qld) s 167; *Community Titles Act 1996* (SA) s 133; *Strata Titles Act 1985* (WA) Sch 1 by-law 1(2)(b); *Strata Titles Act 1998* (Tas) Sch 1 by-law 2;

that causes a “hazard to health”.¹²³ NSW,¹²⁴ Queensland¹²⁵ and the ACT¹²⁶ also prohibit use of a lot that causes a “hazard” to another lot.

With regard to use of common property, NSW,¹²⁷ Queensland¹²⁸ and SA¹²⁹ have a general prohibition on use that “unreasonably interferes” with the use and enjoyment of another lot or common property. Tasmania lowers this threshold to “likely to interfere”.¹³⁰ In WA¹³¹ and ACT¹³² use of common property causing an unreasonable interference is only prohibited when it affects another’s use of common property. In Victoria, use of common property must not “obstruct the lawful use and enjoyment” of the common property by any other person entitled to use it.¹³³

The procedure for resolving disputes about smoking in strata titled properties depends on whether nuisances and hazards are prohibited in the Act (as is the case in NSW, Queensland and SA) or in model by-laws (as is the case in Victoria, WA, Tasmania, SA, NT and ACT) or a smoking by-law is adopted by the owners corporation.

In the first instance, however, in all jurisdictions except the NT,¹³⁴ some form of self-resolution,¹³⁵ internal dispute resolution,¹³⁶ conciliation¹³⁷ or mediation¹³⁸ is either mandatory or strongly encouraged¹³⁹ before a dispute will be adjudicated. Therefore, owners and occupiers need to discuss the issue with their neighbour, check their by-laws for dispute resolution procedures or write to their owners corporation asking for assistance.¹⁴⁰

Unit Title Schemes Act 2009 (NT) Sch 2 by-law 1(1)(a). In Northern Territory nuisance is expressed as conduct in a lot or common property that would “unreasonably affect a person’s lawful enjoyment” of lots or common property; *Unit Titles (Management) Act 2011* (ACT) Sch 4 r 7. In Australian Capital Territory use of a lot that causes a “substantial annoyance” is also prohibited.

¹²³ *Owners Corporation Regulations 2007* (Vic) Sch 2 r 1.1.

¹²⁴ *Strata Schemes Management Act 2015* (NSW) s 153.

¹²⁵ *Body Corporate and Community Management Act 1997* (Qld) s 167. Queensland is the only jurisdiction to the prohibit use of a lot or common property in a way that causes a hazard to another lot or common property.

¹²⁶ *Unit Titles Management Act 2011* (ACT) Sch 4 r 7.

¹²⁷ *Strata Schemes Management Act 2015* (NSW) s 153(1)(b)-(c).

¹²⁸ *Body Corporate and Community Management Act 1997* (Qld) s 167.

¹²⁹ *Community Titles Act 1996* (SA) s 133.

¹³⁰ *Strata Titles Act 1998* (Tas) model by-law 5 Sch 1.

¹³¹ *Strata Titles Act 1985* (WA) model by-law 1(2)(a) Sch 1.

¹³² *Unit Titles Management Act 2011* (ACT) model rule 5 Sch 4.

¹³³ *Owners Corporation Regulations 2007* (Vic) model rule 3 Sch 2.

¹³⁴ *Unit Title Schemes Act 2009* (NT) s 85. A person may apply to the Local Court for adjudication of a dispute. The Court may settle the matter through mediation or arbitration or make orders.

¹³⁵ *Body Corporate and Community Management Act 1997* (Qld) s 238.

¹³⁶ *Owners Corporation Act 2006* (Vic) ss 153, 164; *Strata Titles Act 1985* (WA) ss 42, 77B; Department of Primary Industries and Water, *Strata Living in Tasmania* (February 2008) <<http://dpiwwe.tas.gov.au/Documents/strata.pdf>>.

¹³⁷ *Body Corporate and Community Management Act 1997* (Qld) s 241.

¹³⁸ *Strata Schemes Management Act 2015* (NSW) s 227.

¹³⁹ ACT Government Office of Regulatory Services, *Guide to Unit Titles Dispute Resolution* (March 2012) Access Canberra <<https://www.accesscanberra.act.gov.au/ci/fattach/get/47515/1435729416/redirect/1/filename/Unit%20titles%20dispute%20resolution%20guide.pdf>>; Legal Services Commission South Australia, *Law Handbook Community Titles* <<http://www.lawhandbook.sa.gov.au/ch23s07s02.php>>.

¹⁴⁰ The owners corporation may delegate the matter to an executive committee or strata manager. Strata managers, depending on the powers and functions delegated to them, generally act as professional administrators, carrying out the owners corporation resolutions and may provide advice and guidance. The permissible delegations that may be made to strata managers vary between jurisdictions.

If the smoke infiltration continues, residents in Queensland may go to a government dispute resolution service,¹⁴¹ in NSW they may apply to a Tribunal¹⁴² and in SA to a court.¹⁴³ If the owners corporation in these states has adopted a by-law on nuisances, hazards or smoking then the by-law enforcement process,¹⁴⁴ similar to those described for other jurisdictions below, should be pursued first.

In all other jurisdictions nuisance and/or hazards are addressed in the model by-laws, so residents (including occupiers) should approach the owners corporation to pursue by-law enforcement procedures.¹⁴⁵ If a compliance notice does not resolve the matter, the owners corporation may seek to enforce it and obtain an order for a penalty.¹⁴⁶

If the owners corporation declines to issue or enforce a compliance notice and the smoke infiltration continues, an owner or occupier may apply to have the matter resolved.¹⁴⁷ Owners corporations also have the option of pursuing an alleged by-law contravention through dispute resolution rather than a by-law compliance process.

If the complainant or owners corporation is successful in establishing a nuisance or hazard, the adjudicator or tribunal may make orders to restrict smoking. If orders are sought against the owner as well as the occupier,¹⁴⁸ follow-up compliance may be more easily addressed through rental agreements. These determinations may be appealed.¹⁴⁹

Although filing fees are nominal, tribunal proceedings are often considered a last resort and some residents may opt to move premises or put up with the smoke infiltration rather than take legal action.¹⁵⁰ For both the residents and the owners corporation, the dispute resolution process can be time consuming

¹⁴¹ *Body Corporate and Community Management Act 1997* (Qld) s 267.

¹⁴² *Strata Schemes Management Act 2015* (NSW) s 218.

¹⁴³ *Community Titles Act 1996* (SA) s 142.

¹⁴⁴ *Strata Schemes Management Act 1996* (NSW) s 146, compliance notice; *Body Corporate and Community Management Act 1997* (Qld) s 182, contravention notice; *Community Titles Act 1996* (SA) s 34(6), notice of penalty.

¹⁴⁵ *Owners Corporation Act 2006* (Vic) s 155, notice to rectify breach; *Strata Titles Act 1985* (WA) s 35(1)(a), strata company shall enforce the by-laws; *Strata Titles Act 1998* (Tas) s 95, compliance notice; *Unit Titles Management Act 2011* (ACT) s 109, rule infringement notice; *Unit Title Schemes Act 2009* (NT) s 96, contravention notice.

¹⁴⁶ *Owners Corporation Act 2006* (Vic) ss 165(1)(b), 166; *Strata Titles Act 1985* (WA) ss 42A, 103I; *Strata Titles Act 1998* (Tas) s 96; *Unit Titles Management Act 2011* (ACT) ss 109, 110; *Unit Title Scheme Act 2009* (NT) s 96. The maximum penalty ranges from \$7,700 in Tasmania to \$250 in Victoria.

¹⁴⁷ *Owners Corporation Act 2006* (Vic) ss 160, 161, Consumer Affairs Victoria and Victorian Civil and Administrative Tribunal; *Strata Titles Act 1998* (Tas) s 105, Recorder of Titles; *Strata Titles Act 1985* (WA) s 77, 77B, State Administrative Tribunal; *Unit Titles Management Act 2011* (ACT) ss 125, 128, ACT Civil and Administrative Tribunal; *Unit Title Schemes Act 2009* (NT) s 85, Local Court.

¹⁴⁸ Queensland is the only jurisdiction where the prohibition on use of a lot that causes a nuisance or hazard or interferes unreasonably with the use or enjoyment of another lot applies only to the occupier, and not to an owner as well: *Body Corporate and Community Management Act 1997* (Qld) ss 164, 167. Therefore, it is not possible to seek an order against an owner to prevent smoke infiltration in Queensland: for example, see *Bacala Park* [2006] QBCCMCmr 412. In all other Australian jurisdictions, except Australian Capital Territory, the prohibition applies to both owners and occupiers, who are both also obligated not to “permit” use of a lot that causes a nuisance or hazard. In the Australian Capital Territory, the prohibition only applies to an owner, but the owner is obligated not to permit use of a lot that causes a nuisance or hazard: *Unit Titles (Management) Act 2011* (ACT) Sch 4 rr 6, 7.

¹⁴⁹ *Strata Schemes Management Act 1996* (NSW) s 177, where adjudicator acted unreasonably; *Body Corporate and Community Management Act 1997* (Qld) s 289, on a question of law; *Community Titles Act 1996* (SA) s 142, seek leave to appeal to District Court; *Supreme Court Act 1986* (Vic) s 14A, seek leave to appeal on a question of law; *State Administrative Tribunal Act 2004* (WA) s 105, seek leave to appeal on question of law to Supreme Court; *Strata Titles Act 1998* (Tas) s 144, must specify grounds of the appeal to the Resource Management and Planning Appeals Tribunal; *Civil and Administrative Tribunal Act 2008* (ACT) s 77, a ruling on a question of law may be requested.

¹⁵⁰ See, eg, Annabel Hennessey, “Smoked Out: Andrea Cicholas Is Fed Up with Neighbours Smoking and Wants Smoke-free Apartment Blocks” *The Sunday Times*, 30 November 2014 <<http://www.perthnow.com.au/realstate/news/smoked-out-andrea-cicholas-is-fed-up-with-neighbours-smoking-and-wants-smoke-free-apartment-blocks/story-fnhlgriv-1227139627239>>.

to pursue and be costly when legal or other professional services are sought. Crucially, successful outcomes in litigation are never guaranteed, and the application of smoking nuisance and hazard case law to each jurisdiction's strata regime has to be considered.

HOW TRIBUNALS HAVE APPROACHED “NUISANCE” AND “HAZARD” COMPLAINTS ON SMOKE-INFILTRATION

There is limited case law on smoke infiltration under strata laws and by-laws. There are a small number of cases from Queensland and NSW dealing with smoke infiltration under nuisance and hazard provisions – the conflicting approaches of which illustrate the need for strata by-laws that explicitly deal with smoking.

Queensland

All seven Queensland strata smoke infiltration cases have been dismissed.¹⁵¹ The application of the principles of nuisance to disputes about smoke infiltration exposes a fundamental tension between the legal concept of nuisance and scientific evidence on the harms of SHS.

In the key decision of *Norbury v Hogan (Norbury v Hogan)*¹⁵² Mr Hogan sought to stop smoke infiltrating from Ms Norbury's balcony, which was below his bedroom window. He provided a medical certificate describing his “severe allergies from cigarette smoking” causing him “severe and chronic sinusitis” for which “he needs frequent medical attention after exposure to smoking from his neighbours”.¹⁵³ On appeal, the Queensland Civil and Administrative Tribunal (the Tribunal) accepted Ms Norbury's SHS frequently permeated Mr Hogan's unit,¹⁵⁴ and, from Mr Hogan's subjective point of view, this was an unreasonable interference with his use and enjoyment of his unit.¹⁵⁵ The Tribunal also found that Mr Hogan was medically sensitive to SHS.¹⁵⁶ However, in considering the meaning of “nuisance” and “unreasonable interference” in s 167 of the *Body Corporate and Community Management Act 1997* (Qld), it was held that this provision could only be offended if SHS from a neighbour's lot “is of such volume or frequency that it would interfere unreasonably with the life of another lot owner of ordinary sensitivity”.¹⁵⁷

Mr Hogan (in his original application) asked that Ms Norbury comply with s 167,¹⁵⁸ claimed her SHS was a hazard to his health and provided a medical certificate verifying the harm to his health.¹⁵⁹ The adjudicator noted that Ms Norbury did not deny smoking or “knowledge of the harm cigarette smoke has to the Applicant's health”. Despite this, neither the adjudicator nor the Tribunal on appeal characterised SHS as a hazard.¹⁶⁰ SHS is, of course, a known human carcinogen and toxin and has

¹⁵¹ *North Shore Apartments* [2003] QBCCMCmr 505; *Villas Mermaid* [2005] QBCCMCmr 582; *Bacala Park* [2006] QBCCMCmr 412–417; *Heritage Village Ormiston West* [2007] QBCCMCmr 565; *Norbury v Hogan* [2010] QCATA 27 and the adjudicator's decision according to law in *Sun Crest* [2010] QBCCMCmr 524; *Admiralty Towers* [2011] QBCCMCmr 264; *Carson Place* [2012] QBCCMCmr 503.

¹⁵² *Norbury v Hogan* [2010] QCATA 27.

¹⁵³ *Sun Crest* [2009] QBCCMCmr 303.

¹⁵⁴ *Norbury v Hogan* [2010] QCATA 27, [25].

¹⁵⁵ *Norbury v Hogan* [2010] QCATA 27, [26].

¹⁵⁶ *Norbury v Hogan* [2010] QCATA 27, [14].

¹⁵⁷ *Norbury v Hogan* [2010] QCATA 27, [28].

¹⁵⁸ *Body Corporate and Community Management Bill 1997* (Qld). Explanatory Notes. “Clause 129 prohibits the occupier of a lot from using or permitting the lot to be used for particular nuisances. The clause has particular application when the use is hazardous.”

¹⁵⁹ *Sun Crest* [2009] QBCCMCmr 303.

¹⁶⁰ *Norbury v Hogan* [2010] QCATA 27, [3], [10], [28].

been recognised in consumer,¹⁶¹ workplace,¹⁶² negligence¹⁶³ and discrimination¹⁶⁴ litigation as a health hazard.

The Tribunal held that nuisance claims will be made out only if there has been a substantial degree of interference according to reasonable standards for the enjoyment and use of a lot.¹⁶⁵ These standards are determined objectively, and an ordinary and accustomed use of a home will not be a nuisance, even if there is inconvenience to a neighbour.¹⁶⁶ Further, reasonableness is determined through the prism of an ordinary, healthy person who does not have any abnormal sensitivities.¹⁶⁷

It is difficult to reconcile these nuisance principles with scientific evidence of harms at even very low levels of exposure to SHS. Tribunals are essentially tasked with determining “reasonable standards” of exposure to SHS in circumstances where there is no known safe level of exposure. While the harms of SHS are well understood by community members, the principles of nuisance are not, creating an exasperating stalemate between what residents affected by smoke infiltration regard as common sense and the legal precedent tribunals apply. It is also difficult to reconcile the readiness of Queensland adjudicators to endorse an owners corporation decision to ban a dog because of a neighbour’s allergy,¹⁶⁸ while not taking a similarly medically informed position on SHS.

Interestingly, while the Tribunal noted that “reasonable standards” are a matter of “common sense” and the “ideas of reasonable people” provide objectivity,¹⁶⁹ in reality the approach of Queensland adjudicators considering smoke infiltration cases has been at odds with data on community views on smoking.¹⁷⁰ Population surveys on attitudes and behaviour show the overwhelming majority of people know SHS is harmful,¹⁷¹ avoid places where they may be exposed to SHS,¹⁷² consider smoking at home around children and pregnant women unacceptable,¹⁷³ and consequently few people smoke in or around their home,¹⁷⁴ and even fewer do so when children are present.¹⁷⁵

Instead, adjudicators in Queensland have focused on the need for objective evidence of volume and frequency of smoke and, in doing so, have created serious evidentiary barriers. In *Norbury v Hogan*, Mr Hogan’s complaint was returned to the adjudicator to decide the matter according to law,¹⁷⁶ and he was

¹⁶¹ *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* [1993] FCA 88.

¹⁶² *Sharp v Guinery* [2001] NSWSC 336.

¹⁶³ *Scholem v NSW Department of Health* (1992) 3 APLR 45, NSW District Court, 27 May 1992.

¹⁶⁴ *Francey v Hilton Hotels of Australia Pty Ltd* [1997] HREOCA 56.

¹⁶⁵ *Norbury v Hogan* [2010] QCATA 27, [15].

¹⁶⁶ *Norbury v Hogan* [2010] QCATA 27, [17].

¹⁶⁷ *Norbury v Hogan* [2010] QCATA 27, [18].

¹⁶⁸ *Pacific Vistas* [2014] QBCCMCmr 433, [55]–[56].

¹⁶⁹ *Norbury v Hogan* [2010] QCATA 27, [15]–[16], [26].

¹⁷⁰ *Sun Crest* [2010] QBCCMCmr 524; *Admiralty Towers* [2011] QBCCMCmr 264; *Carson Place* [2012] QBCCMCmr 503, [27]–[28], [31]–[33].

¹⁷¹ Andrew Hyland et al, “Attitudes and Beliefs about Secondhand Smoke and Smoke-free Policies in Four Countries: Findings from the International Tobacco Control Four Country Survey” (2009) 11 *Nicotine & Tobacco Research* 642.

¹⁷² Trish Cotter et al, “NSW Smokers’ Attitudes and Beliefs: Changes over Three Years” (Monograph, Cancer Institute NSW, February 2008); Queensland Health, “The Health of Queenslanders 2012: Advancing Good Health” (Report of the Chief Health Officer Queensland, No 4, Queensland Government, 2012).

¹⁷³ Jeff Dunn et al, “Community Knowledge, Attitudes and Behaviours about Environmental Tobacco Smoke in Homes and Cars” (2008) 19 *Health Promotion Journal Australia* 113. At least 65% of Queenslanders supported smoking bans in homes around children and pregnant women.

¹⁷⁴ Australian Institute of Health and Welfare, n 24. Almost 82% of Australians report no one regularly smokes in or around their home.

¹⁷⁵ Australian Institute of Health and Welfare, n 24. Only 3.7% of households with dependent children report that someone smokes inside the home.

¹⁷⁶ *Sun Crest* [2010] QBCCMCmr 524.

advised that to meet the objective test for nuisance he should consider engaging a person with appropriate qualifications or expertise to assess or monitor air quality. Neither Mr Hogan nor the applicants in the subsequent cases¹⁷⁷ were able to provide air quality monitoring evidence.

The requirement for evidence from air monitoring experts is a significant obstacle for complainants because air quality monitoring is costly and may be difficult to carry out where neighbours are hostile to one another. In US academic studies, various methods for measuring SHS exposure in MUH have been used ranging from measurement of passive nicotine and air exchange rates;¹⁷⁸ real-time monitoring of particulate matter in smoking and nonsmoking units with nicotine verification;¹⁷⁹ and measurement of volatile organic compounds, nicotine and the use of six real time instruments, with a temperature and humidity logger.¹⁸⁰ The services of private occupational hygienists¹⁸¹ tend to focus on industrial settings. While there may be less expensive solutions, these would need to be verified for use in the Australian MUH context.

New South Wales

While Queensland nuisance cases were all applications from a resident concerning smoke infiltrating from a balcony or patio,¹⁸² the NSW case of *Owners Corp SP 49822* was an application from an owners corporation about smoke infiltrating a building and its air-conditioning system. In contrast to *Norbury v Hogan*, *Owners Corp SP 49822* accepted “informal” evidence (series of emails, letters, written submissions from the neighbours and the owners corporation, owners corporation minutes and results of the earlier mediation process)¹⁸³ and found “on the balance of probabilities that smoke penetration” caused “a considerable problem for the adjoining lots”.¹⁸⁴ Remarks of the Applicants in particular to the effect that they were experiencing bad smells in their main bedroom and bathrooms despite earlier improvements, and that smoke infiltration had been an ongoing issue for over five months and was affecting their “health and lifestyle”,¹⁸⁵ satisfied the Tribunal member that “smoke odours cause considerable interference with their enjoyment of their lot”, and that “the odours constitute a nuisance”.¹⁸⁶ Likewise, in *Bhandari v Laming* (discussed above), it was held that evidence from a third person was not necessary to satisfy the objective test for the habitability of a rental unit.¹⁸⁷

Owners Corp SP 49822 had different factual circumstances¹⁸⁸ to *Norbury v Hogan* in that the former case involved smoke infiltration through internal air-conditioning systems whereas the latter involved smoke infiltration emanating from outside a premises. By comparison, *Norbury v Hogan* and the NSW decision in *Sheath v Whitley (Sheath v Whitley)*¹⁸⁹ had the task of applying practically the

¹⁷⁷ *Admiralty Towers* [2011] QBCCMCmr 264, [53]; *Carson Place* [2012] QBCCMCmr 503, [33].

¹⁷⁸ Kraev et al, n 31; Bohac et al, n 33.

¹⁷⁹ King et al, n 37; Russo et al, n 42.

¹⁸⁰ Dacunto et al, n 32.

¹⁸¹ *Australian Institute of Occupational Hygiene* <www.aioh.org.au>.

¹⁸² See the orders sought by the applicants in *North Shore Apartments*, *Villas Mermaid*, *Bacala Park*, *Heritage Village Ormiston West*, and *Admiralty Towers*. See the “Investigation” in *Sun Crest* [2009] QBCCMCmr 303. *Carson Place* [2012] QBCCMCmr 503, [8] is the only Queensland case that mentions indoor and balcony smoking.

¹⁸³ *Owners Corp SP 49822 v May* [2006] NSWCTTT 739, [g]–[n].

¹⁸⁴ *Owners Corp SP 49822 v May* [2006] NSWCTTT 739, [o].

¹⁸⁵ *Owners Corp SP 49822 v May* [2006] NSWCTTT 739, [h].

¹⁸⁶ *Owners Corp SP 49822 v May* [2006] NSWCTTT 739, [s]; Likewise, Queensland adjudicators would probably regard circulation of SHS through ducted air-conditioning as a nuisance too, especially upon the application of an owners corporation. This suggests that SHS through internal building ventilation could possibly be regarded as a nuisance in all Australian states and territories. See *North Shore Apartments* [2003] QBCCMCmr 505.

¹⁸⁷ *Bhandari v Laming* [2015] NSWCATAP 224, [48]–[49].

¹⁸⁸ *Sheath v Whitley* [2014] NSWCATCD 44, [17].

¹⁸⁹ *Sheath v Whitley* [2014] NSWCATCD 44.

same prohibition on nuisance and hazards, to very similar circumstances, based on similarly informal evidence, but arrived at very different findings.

Just as Mr Hogan was particularly susceptible to SHS due to health issues, Mr Sheath suffered from bronchitis and his eldest daughter had asthma. In both cases the Applicants were therefore residents with a sensitivity to SHS. Like Mr Hogan's experience, Mr Sheath's family living space was polluted when Mr Whitley and his invitees regularly and continually smoked in their courtyard and their SHS blew in his direction, which was frequently during spring and summer.¹⁹⁰ While the Tribunal in *Norbury v Hogan* (and the adjudicator in the original adjudication) did not explain why they did not characterise SHS a hazard, the Tribunal in *Sheath v Whitley* easily found SHS was a "hazard" according to the scientific and medical evidence that SHS increases the risk of adverse health effects, especially for people with respiratory conditions,¹⁹¹ and because public health legislation regards SHS as a hazard.¹⁹²

Evidence in *Sheath v Whitley* was similarly informal to that provided in *Norbury v Hogan*: health evidence, photographs of a screen which failed to block the smoke and submissions from the neighbours.¹⁹³ Unlike the approach of adjudicators in Queensland, the NSW Tribunal in *Sheath v Whitley* again accepted less formal evidence. Mr Whitley was found to have caused a hazard and consequently ordered not to smoke within 4 m of the boundary line.¹⁹⁴

In another contrast to *Norbury v Hogan*, which emphasised smoking in one's unit is lawful,¹⁹⁵ *Sheath v Whitley* found that smoking anywhere in a lot (including its outdoor areas like balconies and courtyards) is subject to a "mandatory prohibition" on causing a nuisance or hazard to the occupier of another lot.¹⁹⁶

A TENANT'S RIGHT TO QUIET ENJOYMENT

Alongside the strata laws, tenants are also given a right to quiet enjoyment in each jurisdiction's Residential Tenancies Act. However, this is only enforceable between the contracting parties and not against a third-party neighbour.¹⁹⁷ When neighbours have the same landlord, the tenant suffering smoke infiltration may be able to seek to enforce the landlord's obligation to grant quiet enjoyment by getting them to regulate the smoking of their other tenant.¹⁹⁸ Dispute resolution services in each jurisdiction are available in these limited circumstances.

STRATA LAW REFORM – AN OPPORTUNITY TO ADDRESS SHS IN STRATA

A number of Australian jurisdictions are currently undergoing strata law reform, which presents an opportunity to address the issue of SHS in MUH.

In October 2015 the NSW Parliament amended its strata laws to provide the following explanatory note to the general prohibition on nuisance:

Depending on the circumstances in which it occurs, the penetration of smoke from smoking into a lot or common property may cause a nuisance or hazard or interfere unreasonably with the use or enjoyment of the common property or another lot.¹⁹⁹

¹⁹⁰ *Sheath v Whitley* [2014] NSWCATCD 44, [7].

¹⁹¹ *Sheath v Whitley* [2014] NSWCATCD 44, [19].

¹⁹² *Sheath v Whitley* [2014] NSWCATCD 44, [22].

¹⁹³ *Sheath v Whitley* [2014] NSWCATCD 44, [7]–[12].

¹⁹⁴ *Sheath v Whitley* [2014] NSWCATCD 44, [24].

¹⁹⁵ *Norbury v Hogan* [2010] QCATA 27, [27].

¹⁹⁶ *Sheath v Whitley* [2014] NSWCATCD 44, [20].

¹⁹⁷ For example, *Residential Tenancies Act 2000* (NT) s 65; *Residential Tenancies Act 1995* (SA) s 65.

¹⁹⁸ See, eg, *Director of Housing v Andrew* (2009) VSC 441, [45]; *Director of Housing v IF* [2008] VCAT 2413, [41].

¹⁹⁹ *Strata Schemes Management Act 2015* (NSW) s 153.

Further, at the time of writing, a draft model by-law addressing smoke infiltration had recently been released in NSW. The draft provision provides for three different options that can be selected by the owners corporation. In summary:

- Option A (which would apply automatically if no other option is selected) requires owners and occupiers to ensure that their SHS caused from smoking within their lot does not penetrate the common property or any other lot. It appears however to still permit smoking on the common property without limits so would probably not be effective in preventing SHS exposure.
- Option B again requires owners and occupiers to ensure that SHS from smoking within their lots does not penetrate common property or other lots but adds that occupiers and invitees cannot smoke on common property unless it is a designated smoking area or where they have written approval of the owners corporation. Where smoking is permitted on common property, there is a duty to ensure that smoke does not penetrate other lots.
- Option C again requires owners and occupiers to ensure that SHS from smoking within their lots does not penetrate common property or other lots. It goes further than Options A and B by prohibiting smoking on the common property entirely.²⁰⁰

WA,²⁰¹ Queensland²⁰² and Victorian²⁰³ Governments are also in the process of reviewing strata laws. Though not specifically canvassed in the recent WA strata law consultation paper, smoke infiltration was the subject of a number of submissions.

Given the unsatisfactory treatment of the issue of SHS in current legislation, we contend that State and Territory governments should:

- Introduce strata provisions prohibiting hazards (if not already included). All jurisdictions should clarify that nuisance, hazard and unreasonable interference provisions (as set out in Table 1) apply to SHS.
- Like NSW, develop model by-laws that address smoking to varying degrees so that owners corporations can select a model appropriate to their circumstances.
- Specify in law that owners corporations have the power to either restrict or ban smoking completely.
- Prohibit smoking in specific common areas and building entrances.²⁰⁴

Clarifying That SHS Can Be a Nuisance or Hazard

Clarifying that the existing prohibitions on nuisance and hazards apply to SHS would bring strata laws in line with the scientific evidence on the harms of SHS. It may also help overcome the inconsistent tribunal approaches seen on these issues between jurisdictions. Any SHS that enters another's lot should be considered a hazard, and (for States and Territories that only prohibit nuisances) any SHS that prevents the use and enjoyment of any part of a lot or common property should be considered a nuisance. This reform would allow residents to smoke in their unit if it does not affect a neighbour (if there is no other by-law that further restricts smoking).

It would be advantageous for SA, WA, Tasmania and NT, that do not currently prohibit hazards (see Table 1), to include that term in laws and by-laws regulating the conduct of owners and occupiers. Hazard has a common law meaning, at least according to *Sheath v Whitley*, more akin to most people's understanding that SHS poses a threat to their health.

²⁰⁰ Public consultation draft, *Strata Schemes Management Regulation 2016* (NSW), Sch 3 draft model by-law 9.

²⁰¹ Government of Western Australia, Landgate, n 14.

²⁰² Commercial and Property Law Research Centre QUT Law, n 11.

²⁰³ Consumer Affairs Victoria, n 12.

²⁰⁴ These recommendations are largely consistent with those put forward by Cancer Council Australia and the National Heart Foundation of Australia: *Position Statement – Addressing Smoke Infiltration in Multi-unit Housing* <http://wiki.cancer.org.au/policy/Position_statement_-_Addressing_smoke_infiltration_in_multi-unit_housing#_ga=1.45541348.1724753688.1462404753>.

Develop Option Model By-laws Addressing Smoking

While it is important to clarify that nuisance and hazard provisions apply to smoke infiltration, proactive prevention of disputes through sensible model by-laws is more desirable: it is better to address the cause of disharmony than resolve disputes as they arise.²⁰⁵ To achieve this strata reform should include a range of model by-laws addressing smoking, ranging from a minimum standard through to a complete ban on smoking where owners corporations wish to go smoke-free. Owners corporations could choose from different options and adapt those options.

The options included in the NSW public consultation draft of the *Strata Schemes Management Regulation 2016* (NSW) set out a potential model to work from. It could be improved by omitting Option A and instead including an option that bans smoking completely in both lots and on common property. In some jurisdictions, there may need to be changes to owners corporations powers around controlling smoking or health hazards more generally, in order for owners corporations to be able to adopt this kind of by-law (discussed further below).

As already discussed, a significant advantage of by-laws is that owners corporations are empowered to enforce them with compliance notices. This may expedite the resolution of smoke infiltration disputes, through more direct and immediate enforcement than is presently possible in NSW, Queensland and SA, which have statutory nuisance provisions (requiring residents to either apply to an external dispute resolution body (Queensland), tribunal (NSW) or the local court (SA)).

Specifying in Law That Owners Corporations Have the Power to Either Restrict or Ban Smoking Completely

Owners corporations have long been able to regulate health and amenity issues like noise, pets, parking, floor covering, laundry and so on, in ways that are not regulated in nonstrata properties. This is because in strata schemes, where people live in close proximity, the behaviour of residents can affect the comfort, enjoyment and health of others. Just as these other aspects of life are entrusted to the good governance of owners corporations, regulation of smoking should be placed clearly and explicitly within their ambit. It is reasonable to specifically empower owners corporations to regulate smoking given the shared indoor and ambient air of many strata living circumstances. It is also reasonable to provide clear authority for them to ban smoking entirely on scheme land, so they may achieve smoke-free homes.

As discussed below, it is important that owners corporations be empowered to ban smoking both inside and outside lots. Powers that only permit smoking to be banned on balconies may encourage people to smoke inside, which would have grave health consequences for people living with smokers, particularly children and pregnant women, and would also perpetuate smoke infiltration internally.

Prohibit Smoking in Specific Common Areas and Building Entrances

Queensland and SA tobacco control laws specifically prohibit smoking in enclosed common areas.²⁰⁶ In WA,²⁰⁷ NSW²⁰⁸ and ACT²⁰⁹ smoking is prohibited in an enclosed public place that is open to, or entitled to be used by, the public, but the laws do not specify whether or not this includes common areas of MUH. There is a strong case for all jurisdictions to extend their tobacco control laws to common areas in MUH given the shared nature of these areas.

In the meantime, a model by-law prohibiting smoking in shared internal areas like lifts, stairwells, laundries and undercover car parks as well as certain outdoor areas like pools, and (when on scheme

²⁰⁵ Sharon Christensen and Anne Wallace, "Links between Physical and Legal Structure of Community Title Schemes and Disputes" (2006) 14 *Australian Property Law Journal* 90.

²⁰⁶ *Tobacco and Other Smoking Products Act 1998* (Qld) s 26R(2)(b),(4); *Tobacco Products Regulation Act 1997* (SA) s 46(1).

²⁰⁷ *Tobacco Products Control Regulations 2006* (WA) reg 10.

²⁰⁸ *Smoke-Free Environment Act 2000* (NSW) s 6.

²⁰⁹ *Smoke-Free Public Places Act 2003* (ACT) s 6.

land) at building entrances, would likely have strong community acceptance and would contribute to the denormalisation of smoking. At least in NSW, a small proportion of apartment complexes already choose to ban smoking in these areas.²¹⁰

By-laws banning smoking within 4 m of a common entrance to MUH are reasonable for the same reasons that such a ban applies to entrances to public places under tobacco control laws.²¹¹ Smoking near entrances is likely to result in smoke infiltrating into the enclosed place.²¹² Where several smokers re-enter indoor common areas the exhaled smoke after their last puff increases the SHS in the indoor area.²¹³

While a model by-law that prohibits smoking in common areas has merit, it should be considered in conjunction with the other options for reform explored in this article.

Inappropriate Ways of Addressing SHS in MUH

Smoke emanating from balconies is a common source of conflict between neighbours because proportionately fewer people are smoking indoors. While the prevalence of Australian adult smokers with dependent children smoking inside the home dropped from 31.3% to 3.7% between 1995 and 2013, smoking outside the home has increased from 16.7% to 26% in the same period.²¹⁴

A model by-law that prohibits smoking on balconies and patios was considered in the NSW²¹⁵ and Queensland property law review²¹⁶ and has appeal because of its simplicity and because it may reduce disputes between neighbours. However, it would likely encourage smoking inside the home.²¹⁷ A smoker cannot isolate SHS within a room in a home in an attempt to protect nonsmoking members of the household: across nine smoking homes the average SHS exposure within the primary smoking area and in the rooms further away from this area were 84 µg/m³ and 63 µg/m³ (micrograms per metre cubed) of respirable particulate matter (PM_{2.5}) respectively, which far surpassed the US Environmental Protection Agency's annual standard of 15 µg/m³ for outdoor air quality and the average of 9 µg/m³ in smoke-free homes.²¹⁸ Family members of smokers, including children, would be at a greater risk of exposure to SHS as an unintended result of such a policy.

²¹⁰ Michelle Havill et al, "Strata Data Highlight Limited Availability of Smoke-free Multi-unit Housing in NSW" (Paper presented at Oceania Tobacco Control Conference, Perth, 22 October 2015).

²¹¹ Tobacco control laws in New South Wales, Queensland, Victoria, Tasmania and Northern Territory prohibit smoking within 3–4 m of entrances to nondomestic buildings: *Smoke-free Environment Act 2000* (NSW) s 6A(1)(i),(2); *Tobacco and Other Smoking Products Act 1998* (Qld) s 26ZJ(1),(2); *Tobacco Act 1987* (Vic) s 5RH; *Public Health Act 1997* (Tas) s 67B(1)(e); *Tobacco Control Act 2003* (NT) s 7(1)(i). In Western Australia, the *Tobacco Products Control Regulations 2006* (WA) reg 13 makes the occupier responsible for taking reasonable steps to ensure that SHS does not enter their place.

²¹² Sureda Xisca et al, "Secondhand Smoke Levels in Public Building Main Entrances: Outdoor and Indoor PM_{2.5} Assessment" (2012) 21 *Tobacco Control* 543; Pamela Kaufman et al, "Not Just 'a Few Wisps': Real-time Measurement of Tobacco Smoke at Entrances to Office Buildings" (2010) 20 *Tobacco Control* 212.

²¹³ See, eg, Jacques J Prignot, "Recent Contributions of Air- and Biomarkers to the Control of Secondhand Smoke (SHS): A Review" (2011) 8 *International Journal of Environmental Research and Public Health* 648 [3.1.7]. With 10 smokers re-entering after their last puff, indoor particulate matter increased from low background levels of 0.56–3.32 µg/m³.

²¹⁴ Australian Institute of Health and Welfare, n 24, online table 3.11.

²¹⁵ NSW Government, *Making NSW No 1 Again: Shaping Future Communities: Strata & Community Title Law Reform Discussion Paper* (15 September 2012) NSW Fair Trading, 55 <http://www.fairtrading.nsw.gov.au/pdfs/About_us/Have_your_say/Making_nsw_no_1_again_shaping_future_communities.pdf>.

²¹⁶ Commercial and Property Law Research Centre QUT Law, n 11, 26–27, [2.4.4].

²¹⁷ Susan Burton et al, "'Smoking is bad, it's not cool ... yet I'm still doing it': Cues for Tobacco Consumption in a 'Dark' Market" (2015) 68 *Journal Business Research* 2067, [3.4].

²¹⁸ Amy Van Deusen et al, "Secondhand Smoke and Particulate Matter Exposure in the Home" (2009) 11 *Nicotine & Tobacco Research* 635.

Other Areas for Strata Reform

In addition to the law reforms suggested above, consideration should also be given to:

- allowing by-laws that affect health and safety of residents to be passed by a simple majority rather than special resolution;
- permitting a tenant representative to vote of health and safety by-laws;
- providing a government guide on the benefits of smoke-free MUH; and
- requiring owners and owners corporations to declare to potential tenants and buyers the smoking status of the premises.

These additional reforms will help ensure that tenants and residents living in disadvantaged areas with higher smoking rates will have a fair opportunity to create smoke-free living in their MUH. Importantly, government guidance on the health benefits of reducing SHS in MUH will encourage adoption of by-laws on SHS and galvanise community commitment to healthy smoke-free MUH.

CONCLUSION

SHS at any level is an established health hazard, yet Australian strata laws are limited in their capacity to effectively manage the problem of SHS exposure in strata schemes. This review identified two principal weaknesses. First, the extent to which owners' corporations may be able to regulate smoking varies between jurisdictions and is unclear. These ambiguities create uncertainty among owners corporations regarding their authority to make and enforce rules about smoking. Second, the principles of nuisance and hazard with respect to SHS have been applied inconsistently between jurisdictions often failing to provide recourse for those affected by involuntary home-based exposure to SHS. State and Territory governments should reform their respective strata laws to provide legislative recognition that SHS may be considered to be a nuisance or a hazard and include a model by-law on smoking and give owners corporations explicit powers to make by-laws that regulate or completely ban smoking. We believe that such reforms would help to reduce ambiguity and provide fair and timely avenues for addressing smoke infiltration.

We recognise that it is important to address SHS for all residents of MUH, whether they live in government or community housing, boarding houses, retirement villages, aged care facilities or mental health settings. However these MUH types were beyond the scope of this paper. Research is needed to explore the problem of smoke infiltration in these settings and to assess options for reducing residents' unwanted exposure to SHS.

There is an immediate need to reform Australian State and Territory strata laws to minimise exposure to second-hand smoke (SHS) in multiunit housing (MUH), particularly in light of the trend towards higher density living. SHS is a cause of lung cancer and other health problems in nonsmokers and no safe level of exposure has been established. Despite being a common cause of dispute in MUH, currently no strata regime in any State or Territory includes a model by-law that specifically addresses it. CONTINUE READING. View PDF. Save to Library. Create Alert. Cite. Medical bills from the fires and smoke haze could also run into the hundreds of millions. And one analysis suggests disruptions caused by the fire and smoke haze could cost Sydney as much as A\$50m a day. The bushfires have killed eight people and destroyed 700 homes. There appears to be no reprieve in sight, as temperatures are expected to hit 40C on the weekend, stoking fears of more fires. "Flying in another water bomber's going to cost sixty million bucks, but you're going to lose that every day in the economy," he said. PM Morrison apologises for US holiday amid crisis. All-time temperature record broken again. Smoke-free policies in multi-unit housing are emerging as an important strategy to address smoking and exposure to tobacco smoke in homes where children, adolescents, the elderly and the disabled are especially vulnerable. Research has documented the transfer of second-hand smoke in the air, and transfer of second-hand smoke constituents through heating, ventilation, air conditioning systems and other connections between units.6,, As many as half of multi-unit housing residents report that smoke has entered their unit from elsewhere in the building or complex, and detectable levels of nicotine have been documented in. Second-hand smoke is a carcinogen to children and adults who do not smoke and