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# WAKE UP AND SMELL THE SMOKE – PROHIBITING SMOKING

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## WAKE UP AND SMELL THE SMOKE – PROHIBITING SMOKING

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There has been considerable media attention recently focusing on the question of smoking in strata buildings. Why the sudden interest?

### Introduction

Smoking in strata buildings has been around for years. It has never received much attention. This is surprising considering the statistics. Research has shown that between 28 - 53 per cent of residents in non-smoking units are exposed to second-hand smoke drift and 61 - 82 per cent of non-smoking unit residents support a ban on smoking.

The recent reform of NSW strata laws generated some media interest in smoking in strata buildings. This is because the NSW Government said that the new strata laws would make clear that smoking and second hand smoke exposure could constitute a nuisance that could be outlawed.

But media attention concerning smoking in strata buildings reached a fever pitch when NCAT recently ordered the landlord of a strata unit in Potts Point to pay compensation to his tenant because second hand smoke from a chain smoking resident in a neighbouring unit made it impossible for the tenant to continue to live in the building.

So, what can be done about smoking in strata buildings? Can smoking be prohibited? Let's find out.

### Can smoking be prohibited?

In 1997 the NSW Supreme Court said that an owners corporation can make a by-law prohibiting smoking within the lots and on the common property within a strata building. That case concerned a commercial building in the Sydney CBD. The owners corporation made a by-law prohibiting smoking in the lots and on the common property. The owners of a commercial lot on the ground floor of the building claimed that the by-law was invalid. The strata legislation says that a by-law cannot prohibit or prevent an owner from leasing a lot. The owners claimed the no-smoking by-law did just that because it prevented them from leasing their lot to a commercial tenant whose customers would smoke in the lot.

But the Supreme Court did not accept the owners' argument. The Court said that whilst the by-law might restrict the number of people who might want to take a lease over the commercial lot, it did not prohibit or restrict the owners from leasing the lot. In the end result, the Supreme Court said that the by-law was valid and enforceable: see *Salerno -v- Proprietors of Strata Plan No. 42724* (1997) 8 BPR 15, 457.

The Salerno case did not gain any media attention. Many people are not aware of it. Indeed, many strata managers and owners corporations still do not realise that they are able to make a by-law prohibiting smoking. This includes a by-law prohibiting smoking not just on the common property, but inside lots as well.

### **Can smoking be prohibited without a by-law?**

The problem of smoking in strata buildings gained some media attention in late 2006 as a result of a decision made by a Strata Schemes Adjudicator in the Consumer, Trader and Tenancy Tribunal. In that case, the residents of a strata building were complaining about the toxic effects of second hand smoke drifting from one unit into others. The owners corporation of the building wanted to put an end to the problem, but there was no by-law prohibiting smoking in the building.

So the owners corporation needed to be creative. It relied on a provision in the strata legislation which prevents an owner or occupier of a unit from using the unit, or permitting the unit to be used, in a way that causes a nuisance to the occupiers of other units. The owners corporation claimed that second hand smoke exposure was a nuisance and it applied to the Adjudicator for an order to require the smokers (who were tenants) to stop smoking in their unit, and for the landlord to stop allowing the tenants to smoke in the unit, to prevent the unit from being used in a way that caused a nuisance to other residents.

The owners corporation won. The Adjudicator agreed that the drifting of second hand smoke from the smokers' unit into adjacent units constituted a nuisance that he was able to restrain. In the end result, the Adjudicator ordered the tenants to take all necessary action to prevent smoke odour from their cigarettes entering other units and the common property. The Adjudicator also ordered the landlord to stop allowing the unit to be used in a way that created a nuisance for other residents by taking necessary action to prevent smoke odour from his tenants' cigarettes entering other units or the common property: see Owners Corporation SP49822 -v- May & Ors [2006] NSWCTTT 739.

This case shows that action can be taken to stop second hand smoke drift in a strata building against both landlords and tenants even without an anti-smoking by-law.

### **The recent media attention**

The recent media attention devoted to smoking in strata buildings follows a decision made by the NSW Civil and Administrative Tribunal earlier this year. In that case, Ms Laming moved into and rented a unit in a strata building in Potts Point. From the time she moved into the unit it smelt of smoke. This was because an elderly resident, in the unit below, was a chain smoker. Ms Laming complained to her



landlord about second hand smoke exposure. She was concerned about the impact the smoke drift would have on her and her child. The landlord was not able to fix the problem. The elderly resident downstairs would not stop smoking and the building was constructed in a way that allowed smoke to drift from one unit into another. So Ms Laming got fed up. She took her landlord to the Tribunal claiming compensation for breach of the residential tenancy agreement. She won.

The Tribunal held that the residential tenancy agreement required the landlord to provide premises which were fit for habitation. The Tribunal agreed with Ms Laming that her unit was not fit for habitation. The Tribunal found that it was not acceptable for a tenant and a child to live in an environment which smelt of tobacco smoke, particularly where the smoke was so strong that it caused them to feel unwell. The landlord was ordered to pay Ms Laming \$11,681 in compensation for breaching the residential tenancy agreement. The compensation included a 40% rent reduction from the commencement of the lease and compensation for packing and removalist costs Ms Laming incurred when she was forced to move out of the unit.

The Tribunal did not accept the landlord's argument that his hands were tied and that he could do nothing about the smoke drift problem. The Tribunal said that the landlord could have asked the owners corporation to introduce a by-law prohibiting smoking or made a claim against the chain smoker downstairs to obtain an order to stop her smoking or take action against the owners corporation to undertake repairs to the common property to prevent smoke passing from one unit to another.

The outcome of the case was disastrous for the landlord. He lost his tenant and had to pay her compensation. The case shows that an owner can be held liable to a tenant for second hand drift smoke caused by a neighbour: see *Bhandari -v- Laming* [2015] NSWCATAP 224.

## **Conclusion**

The wash up from these cases is clear:

1. An owners corporation can make a by-law banning smoking throughout an entire strata building.
2. Orders can be made against residents who smoke or allow their cigarette smoke to drift into other units.
3. Landlords can be held liable to their tenants for second hand smoke exposure.

And the lessons to be learned from these cases are equally clear. If smoking is a problem in a strata building, the owners corporation should make a by-law prohibiting smoking. This type of by-law is simple to prepare and enforce. Orders can be obtained to stop residents smoking and put an end to second hand smoke drift.

The attention devoted to smoking in strata buildings is likely to continue. Support for smoke-free multi-unit living is on the rise particularly among people living with children. It is only a matter of time before most strata buildings go smoke free.

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**About JS Mueller & Co Lawyers**

JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for almost 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.

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