

Can you Ban Smoking without a By-Law?

Restricting or Banning Smoking in Strata

As of 1 May 2024 body corporate's in Queensland are permitted to introduce by-laws that specifically prohibit or restrict smoking or inhaling of smoking products on common property of strata buildings.

As Queensland grapples with these changes, in NSW there are still many buildings that do not have a by-law concerning smoking, even though they are permitted to do so. This has raised questions such as:

- Is it possible to stop people smoking in a strata building without a by-law that bans smoking?
- If it is possible to stop smoking without a by-law, is it still necessary or desirable to have a by-law that bans or restricts smoking and, if so, why?

Banning Smoking without a By-Law

Somewhat surprisingly, it is possible to stop residents of a strata building smoking in their lots or on common property without a specific by-law that prohibits smoking. Section 153 of the *Strata Schemes Management Act 2015* prohibits residents from using or enjoying their lots in a manner or for a purpose that causes a nuisance or hazard to another resident. There have been several cases over the past years in which NCAT has made orders prohibiting residents in strata buildings from smoking on the basis that smoke caused by smoking constituted a nuisance to other residents in contravention of section 153.

NCAT Smoking Cases

In May 2019, a lot owner, Martin Gisks, succeeded in obtaining an order from NCAT prohibiting the resident of another lot in his building smoking on her balcony or in her bedrooms and requiring that resident to close all exterior doors and bedroom and bathroom windows when smoking inside her lot (*Gisks v The Owners – Strata Plan No. 6743* [2019] NSWCATCD 44).

In October 2022, lot owners in a different building, Mr Pittman and Ms Cartwright, obtained orders from NCAT prohibiting the owners of another lot smoking or permitting any other person to smoke tobacco products on the balcony of their lot, and prohibiting them from permitting smoke from any tobacco product to be emitted from the interior of their lot into the lot of Mr Pittman and Ms Cartwright (*Pittman v Newport* [2022] NSWCATCD 173).

More recently, in June 2023, an owner in a strata building, Haydn Shaw, obtained an NCAT order prohibiting the owner and resident of another lot permitting the smoking of tobacco products in the courtyard of their lot (*Shaw v Euen* [2023] NSWCATCD 68).

In each case, NCAT concluded that the smoke caused by the smoking of cigarettes or tobacco products by residents constituted a nuisance which interfered with the amenity of other residents in contravention of section 153 of the Act. It was on that basis that NCAT made orders prohibiting or restricting smoking in each of these cases.

Is a By-Law Banning Smoking Desirable?

These NCAT cases beg the obvious question: does an owners corporation need to bother introducing a by-law prohibiting or restricting smoking? The answer is “Yes” if the owners corporation wants to make it easier to ban or restrict smoking

in its building.

This is because without a by-law that bans or restricts smoking:

- the owners corporation may not have standing to apply to NCAT for orders to prohibit residents smoking in a way that causes a nuisance to other residents because the owners corporation itself has not suffered from that nuisance (*The Owners – Strata Plan No. 2245 v Veney* [2020] NSWSC 134); and
- there is a need to prove that not only particular residents are smoking but also that the smoke from cigarettes or tobacco products has caused a nuisance to other residents by unreasonably and substantially interfering with the use and enjoyment of their lots (something which may be difficult to do).

In other words, if a by-law exists that bans smoking the owners corporation is able to enforce that by-law and to succeed it does not need to show that smoke from cigarettes constitutes a nuisance to other residents. The owners corporation just needs to prove that particular residents are smoking in breach of the by-law. That is much easier to do.

Conclusion

It is possible to stop residents smoking without a by-law that bans smoking. However, it is much more difficult to do so because it requires proof that the smoking causes a nuisance to other residents. And, there is real doubt that an owners corporation can apply to NCAT for an order to stop residents smoking in those circumstances.

Introducing a by-law prohibiting or restricting smoking overcomes those problems, gives the owners corporation the right to take steps through NCAT to prevent residents smoking and makes it easier for the owners corporation to win the case

and put an end to smoking in its building.

[DO YOU NEED A BY-LAW THAT PROHIBITS OR RESTRICTS SMOKING?
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Since 2002 Adrian has specialised almost exclusively in the area of strata law. His knowledge of, and experience in strata law is second to none. He is the youngest person to have been admitted as a Fellow of the ACSL, the peak body for strata lawyers in Australia. [Profile](#) I [Linked](#)

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