



By-laws regulating smoking in Queensland community title schemes

Limits of by-law making powers in Queensland community title schemes

A by-law in Queensland community titles schemes cannot validly ban smoking completely: a by-law can *regulate* but *cannot prohibit* an activity.^{1,2}

Options for regulating smoking in community title schemes are also limited because a by-law that attempts to regulate smoking by imposing greater restrictions on residents than exist under the *Tobacco and Other Smoking Products Act 1998 (Qld)* is likely to be regarded as oppressive or unreasonable. A by-law cannot be inconsistent with the *Body Corporate and Community Management Act 1997 (Qld)* or another Act.³

Smoking nuisance by-law

A body corporate can pass a smoking nuisance by-law in terms that are consistent with the general nuisance provision of the *Body Corporate and Community Management Act 1997 (Qld)*^{4,5}, for example:

The occupier of a lot included in a community titles scheme must not smoke a tobacco product, or permit the smoking of a tobacco product, on the lot or the common property in a way that—

- (a) causes a nuisance or hazard; or*
- (b) interferes unreasonably with the use or enjoyment of another lot included in the scheme; or*
- (c) interferes unreasonably with the use or enjoyment of the common property by a person who is lawfully on the common property.*

While not banning smoking, this by-law ensures residents understand that smoking may cause a nuisance and will increase awareness that smoke-drift may be regarded as an unreasonable interference.

By-laws that re-state the Tobacco and Other Smoking Products Act

A by-law can re-state the ban on smoking in common areas set out in the *Tobacco and Other Smoking Products Act*:

A person must not smoke in enclosed common areas.

A common area, for the purposes of this smoking ban, means an area accessible to all, or a specified class of, residents of, or persons employed at, the community titles scheme.

An enclosed common area, for the purposes of this smoking ban, has a ceiling or roof and, except for doors and passageways, is completely or substantially enclosed, whether permanently or temporarily.

Regardless of whether such a by-law is included in the community management statement, the body corporate, as the occupier of the common areas, must take steps to direct people to stop smoking in enclosed common areas.⁶

If the community titles scheme has children's play equipment that could be regarded as ordinarily open to the public, a by-law can reinforce the relevant ban in the *Tobacco and Other Smoking Products Act*:

A person must not smoke within 10m of any part of children's playground equipment.

Banning smoking when it harms the health of another occupier or invitee

A by-law drafted in such a way that it attempts to regulate smoking where it increases the risk of harm to occupiers and invitees of other lots is unlikely to be valid in Queensland. If smoke drifts from one lot to another, it would be impossible for the smoker to prove they do not increase the risk of harm to the health of their neighbour, as there is no safe level of exposure to second-hand smoke. If the criteria and conditions an occupier has to meet to be granted permission to smoke, or be able to continue to smoke, in their lot are so difficult or impossible to

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satisfy, the by-law will likely be regarded as one which has the effect of prohibiting smoking in a lot, and be invalid.

Also, an adjudicator is unlikely to view favourably a by-law where consent from the body corporate to smoke depends upon the smoker collecting evidence and demonstrating that either their smoke does not escape their lot or does not harm a neighbour's health. It may be viewed as oppressive and unreasonable to require a smoker go to considerable expense to prove these matters when they are currently entitled to smoke in their home.

Aside from echoing the general nuisance provision of the *Body Corporate and Community Management Act* or re-stating the relevant provisions of the *Tobacco and Other Smoking Products Act*, a by-law regulating smoking is unlikely to withstand challenge.

The options available to body corporates in Queensland to create by-laws regulating smoking will remain limited until the *Tobacco and Other Smoking Products Act* is amended to address smoking in the units of multi-unit residential accommodation or the *Body Corporate and Community Management Act* is amended to permit body corporates to ban smoking.

Introducing new by-laws

To include a new by-law in an existing community management statement, the body corporate must pass a special resolution at a general meeting. At least two-thirds of the votes cast on the motion must be in favour of the motion and the number of votes against the motion cannot exceed 25 per cent of the number of lots in the scheme.⁷

Tenants are not part of the body corporate, but they can ask the owner to propose a new by-law. They can also ask the owner to appoint them as a proxy to vote at general meetings. (Tenant's rights are discussed in the Information Sheet *Smoke-*

drift in multi-unit housing: Tenancies, rooming accommodation, discrimination and litigation.)

Once a body corporate has passed and recorded a by-law regulating smoking on their community management statement, the offending conduct may be pursued by the body corporate, rather than necessitating an application to the Body Corporate and Community Management Office.⁸

By-laws for new developments

A developer may include a by-law regulating smoking in the first community management statement and potential buyers would be put on notice prior to entering into the scheme. However, if the by-law seeks to prohibit, is oppressive or unreasonable, or is inconsistent with the existing Acts, or it violates the by-law making limitations in any other way, it may still be challenged.

Enforcing a by-law

If the community management statement has a by-law regulating smoking, an occupier or owner can formally ask the body corporate to enforce the by-law.⁹ If the body corporate does not advise the owner or occupier within 14 days that they have issued a contravention notice, they may take the matter to the Body Corporate and Community Management Office.

How to quit

Call Quitline 13 QUIT (13 7848) for free information, practical assistance and support.

Discuss quitting smoking with a health professional and plan your quitting strategy together.

Consider using pharmacotherapy such as Nicotine Replacement Therapy (NRT), Bupropion Hcl or Varenicline.

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Endnotes: ¹ Section 169 Body Corporate and Community Management Act 1997 (Qld). ² Body Corporate for River City Apartments CTS 31622 v McGarvey [2012] QCATA 47. ³ Section 180(1) and 180(7) Body Corporate and Community Management Act 1997 (Qld). ⁴ Section 167 and 180(1) Body Corporate and Community Management Act 1997 (Qld). ⁵ Admiralty Towers [2011] QBCCMCmr 264 (23 June 2011) at 51. ⁶ Section 26U and 26V Tobacco and Other Smoking Products Act 1998 (Qld). ⁷ Fact Sheet: General meetings. Body Corporate and Community Management. Department of Justice and Attorney-General. May 2010. Available at: <http://www.justice.qld.gov.au/justice-services/body-corporate-and-community-management>. ⁸ Body Corporate and Community Management. <http://www.justice.qld.gov.au/justice-services/body-corporate-and-community-management>. ⁹ Fact Sheet: By-laws. Body Corporate and Community Management. Department of Justice and Attorney-General. May 2010. Available at: <http://www.justice.qld.gov.au/justice-services/body-corporate-and-community-management>