



# Smoke Drift &

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# Nuisance Owners/Occupiers



# Topics

1. Smoke drift – Artique [2021] QBCCMCmr 596
2. How should Committees deal with nuisance correspondence from owners/occupants

# Smoke drift

Why is this an issue?

Cancer Council Qld:

- Surveys of smoke-drift in multi-unit housing suggest that:
  - Between 28 and 53 per cent of residents in non-smoking units are exposed to second-hand smoke drift.
  - Between 9 and 25 per cent of residents reported smoke-drift often or daily
- Recent review of strata law in NSW – smoke drift into non-smoking units - most common complaint received in the review
- There is no safe level of exposure to second-hand smoke.

# Smoke drift

- It causes lung cancer, coronary heart disease, stroke, nasal irritation and reproductive effects in women.
- In children it causes middle ear disease, respiratory symptoms, impaired lung function, lower respiratory illness and sudden infant death syndrome (SIDS)
- Second-hand smoke has substantial and rapid effects on the cardiovascular system.
- As little as 30 minutes of exposure can affect blood and vascular function to almost the same extent as active smoking.
- Infants, children, and adults with asthma or respiratory problems can also have acute reactions from brief exposures

Not dumping on smokers – but it needs to be properly regulated.

# Smoke drift

Artique [2021] QBCCMCmr 596

## Allegations:

- Respondent is chain smoker.
- Spends about 5 minutes smoking a cigarette and can do so every 20 to 40 minutes.
- It is relentless and unbearable.
- The applicant is concerned about the smoke drift and its impact on her health.
- The smoke is interfering with her use and enjoyment of her lot and her balcony - she is continually closing the doors to her balcony, but that is her only means of fresh air and it makes her feel 'suffocated and trapped'.

# Smoke drift

As noted by the decision:

- The Tobacco and Other Smoking Products Act 1998 prohibits smoking in an enclosed place, including the common areas of multi-unit residential accommodation which specifically includes community titles schemes.
- ‘Common areas’ include areas that are accessible to all or a class of residents or employees.
- Not all common property will necessarily be an ‘enclosed place’, or otherwise covered by the other restrictions in that legislation.
- Queensland legislation does not expressly prohibit smoking within a community titles lot.

# Smoke drift

## (Active Law ) - Bylaw 5. SMOKING

(a) An Occupier must not –

(i) cause a nuisance or a **hazard**, or

(ii) interfere unreasonably with the use or enjoyment of another Lot, or

(iii) interfere unreasonably with the use or enjoyment of the Common Property by persons lawfully on the Common Property,

by smoking –

(iv) anywhere on the Common Property,

(v) on the balcony of a Lot in circumstances where another person's use or enjoyment of another Lot is unreasonably interfered with by the smoke drift and

(vi) in a Lot in circumstances where another person's use or enjoyment of another Lot is unreasonably interfered with by the smoke drift.

(b) An Occupier must not dispose of cigarette butts or ash by throwing such items from the balcony of a Lot and must dispose of cigarette butts or ash by putting such items in a closed container in their Lot.

# Smoke drift

## Basis of the decision:

- Previous cases regarding smoking in community titles lots/balconies, focused on whether the conduct constitutes a nuisance or an unreasonable interference to the use and enjoyment of another lot (section 167 of the Act).
- *Norbury v Hogan* [2010] QCATA 27 - objective test – whether the volume or frequency of smoke permeating the lot would unreasonably interfere with the use and enjoyment of a lot by a person of ordinary sensitivity.
- Often Adjudicators have not been satisfied that the conduct complained of constituted a nuisance or an unreasonable interference.
- Admiralty Towers [2011] QBCCMCmr 264 - included a ‘register’ of smoke drifting into the Lot - listed the time, day and date of occurrences - for some it listed the ‘effect’, for example that it ‘disturbed’ a meal or sleep.



# Smoke drift

Previous successful decisions – eg Sun Crest [2009] QBCCMCmr:

**I hereby order** that with respect to smoking cigarettes on Lot 2 or common property of Sun Crest community titles scheme 1272, Cleis Norbury, the owner of Lot 2 must give consideration to the effect resulting tobacco smoke has on John Hogan, the owner and occupier of Lot 5 and take reasonable steps to ensure smoking cigarettes on Lot 2 or common property does not cause a nuisance to Mr Hogan or interfere unreasonably with Mr Hogan's use or enjoyment of Lot 5 in breach of [section 167](#) of the [Body Corporate and Community Management Act 1997](#).

# Smoke drift

## Artique decision recognised:

- The issue of whether smoking constitutes a hazard, contrary to section 167(a) of the Act, has not been specifically canvassed in Queensland.
- The harm from second hand tobacco smoke is sufficiently widely accepted that the applicant does not need to provide medical evidence to establish it.
- Second hand tobacco smoke is a ‘hazard’ in that it presents a risk of harm.
- The risk of harm is serious, and that there does not appear to be a safe level of exposure to second hand smoke.

### ORDERS MADE:

1. The respondent, Debra Allen, is in breach of By-law 5 and [section 167](#) of the Act.
2. The respondent, Debra Allen, **must not smoke tobacco products on the balcony of Lot 805.**
3. The respondent, Debra Allen, may only smoke tobacco products elsewhere within Lot 805 if she takes reasonable steps to ensure that tobacco smoke emanating from her lot does not affect any person lawfully using another lot, for example by closing windows and doors within Lot 805.

# Smoke drift

Points of interest - Body Corporate's position – dispute between Lot Owners not a body corporate matter – Lot Owner made the Application. Adjudicator commented:

*The body corporate has said this is a matter between the applicant and the respondent and it declined to make a submission on this application.*

*It did not issue a by-law contravention notice in response to the applicant's complaints...*

*The body corporate is not obliged to enforce section 167 of the Act, but it does have a statutory obligation to enforce the by-laws, including By-law 5.*

*Moreover, it must act reasonably in undertaking its functions and in making decisions.<sup>[31]</sup> If the body corporate did not reasonably believe the respondent was in breach of By-law 5, it did not need to issue a by-law contravention notice to her.*

*If it was unsure if the by-law had been breached, it could have asked the applicant for more evidence to assist it in making a decision. However, I do not consider that it could fail to act simply because it thought it was not its responsibility to decide if the by-law had been breached or that it was just a matter between residents.*

# Smoke drift

## Point of interest – Public areas vs Community Title Scheme (Tobacco Act)

- Playground - Smoking is banned within 10 metres of children's outdoor playground equipment situated at a place that is ordinarily open to the public – on the spot fine \$270; and
- Entrance to building - Smoking within 5 metres of a non-residential building entrance – on the spot fine \$270;
- Outdoor eating - Allowing smoking in an outdoor eating or drinking area – court fine \$19,800; whereas
- You can smoke on a balcony immediately adjacent to someone's window/door – onus on the affected person to establish unreasonable interference/nuisance/hazard - Nonsense

# Smoke drift

Any Questions?

# Committee dealing with nuisance correspondence

Talking about - The rambunctious keyboard warrior (“RKW”)

- Excessive/Constant demands for action
- Excessive/Constant demands for records
- Questions/challenges the position adopted by the Committee
- Complains they were not given an opportunity to ask questions or discuss matters when attending a Committee Meeting as an observer
- Issues multiple Form 1s for bylaw enforcement

What can the Committee do?

# Committee dealing with nuisance correspondence

With:

- Complaints of not being given an opportunity to ask questions when attending a Committee Meeting as an observer – no entitlement unless asked to
- Excessive/Constant demands for records – understand the thresholds to produce a document:
  - Document been adequately identified? – if not then they search (<https://www.activelaw.com.au/activated-29-august-2017/>)
  - Prescribed fee paid for the documents? Charging for downloading of CCTV footage – passing on the cost??

# Committee dealing with nuisance correspondence

Demands for action/challenges – note:

1. Owner entitled to submit up to 6 Committee motions in any 12-month period – but only submit any particular motion once in that period; and
2. Owner can submit motions at general meetings.

Otherwise:

- BCCM legislation doesn't place any obligations on the Body Corporate/Committee in respect of general correspondence received from Owners; however
- Prudent to review that correspondence to ascertain whether or not it raises issues the Body Corporate needs to address – but there is no specific obligation to do so



# Committee dealing with nuisance correspondence

Don't engage – just acknowledge receipt and store it on the body corporate records.

Options to regulate RKW correspondence include:

1. Bylaws - a suitable bylaw can be included in the bylaws for the scheme which regulates the number/nature/ length of correspondence that Owners/Occupiers may send to the Committee – eg “Tank Tower”;
2. By enforcing rights under s167 of the Act, where the correspondence is considered to be a nuisance – needs nexus to the use of the Lot or common property though; and/or
3. By way of the Committee resolving to establish rules as to how an Owner/Occupier may correspond with the Committee.

# Committee dealing with nuisance correspondence

Committee resolving to establish rules:

1. Subject to an overriding obligation to act reasonably in doing so, a Committee is entitled to impose restrictions on/regulate the sending of correspondence to the Committee by an Owner/Occupier;
2. In Tank Towers decision (Adjudicator Rosemann) said:

*“a committee is entitled to set conditions on how owners communicate with the body corporate to ensure that correspondence is handled efficiently and to minimise the resource impacts”.*

## Committee dealing with nuisance correspondence

*“Whether they are volunteer committee members or paid agents of the Body Corporate, the Body Corporate cannot reasonably expect the recipients of this correspondence to be exposed to voluminous, repetitive and abusive tirades such as those sent by Mr Covey. It is unfair on other lot owners and occupiers to have the resources of the Body Corporate exhausted by the lengthy, repetitive and offensive communications of a single lot owner.*

*In that context, I consider that the Committee is entitled to decide to impose restrictions on unreasonable and excessive communications even if those communications were not in breach of a by-law or section 167 of the Act.*

# Committee dealing with nuisance correspondence

- Each approach option has strengths and weaknesses –
  - Bylaw approach:
    - Requires appropriate bylaw to be inserted;
    - Ability to enforce for breach;
  - S167 Nuisance provision:
    - Nuisance can be difficult to prove; and
    - Requires nexus to use of the Lot/common property (eg sent from the Lot?);
  - Committee resolution:
    - Flexible/adaptive;
    - But repercussions if RKW still send?
- Seek advice on case-by-case basis - understand the options exist – don't put up with bad behaviour

# Committee dealing with nuisance correspondence

## Issuing Form 1s for bylaw enforcement:

- Committee should consider whether:
  - It is reasonably satisfied a contravention has been established; AND
  - In the circumstances, it is reasonable to enforce the bylaws in respect of the contravention.
- If so - issue a contravention notice against the offending occupier and provide a copy to the requesting owner within 14 days.
- If not:
  1. If appropriate request further information from complainant; or
  2. Resolve not to issue the contravention notice.
- After the 14 days – the requesting owner then entitled to personally enforce the bylaws.

Any Questions?