

# Achieving smoke-free apartment living

## Information Sheet 1



## Why choose smoke-free apartments?

### The health evidence

The scientific evidence that second-hand smoke exposure is a cause of ill health including serious disease in both adults and children is overwhelming.<sup>1-5</sup> Every major health and medical research agency that has reviewed the evidence has come to this same conclusion.

Tobacco smoke contains an estimated 4,000 chemical compounds including 66 carcinogens (cancer causing substances).<sup>6</sup>

Children exposed to second-hand smoke are at an increased risk of:

- sudden infant death syndrome (SIDS)
- acute respiratory infections
- ear problems and
- asthma.<sup>5</sup>

Research has demonstrated a strong association between the increasing prevalence of smoke-free homes and decreasing rates of SIDS in the United States.<sup>7</sup>

Adults exposed to second-hand smoke are at an increased risk of:

- lung cancer
- immediate adverse effects on the cardiovascular system
- coronary heart disease and
- asthma attacks.<sup>5</sup>

There is also a small but growing body of research suggesting potential health impacts of second-hand smoke exposure resulting from the infiltration of tobacco smoke into the homes of non-smokers. Most of this research has utilised air quality testing to show that second-hand smoke can spread throughout apartment block complexes to infiltrate apartments where active smoking does not occur.<sup>8-11</sup>

For example, one study found that most children without a known source of second-hand smoke exposure inside the home still showed evidence of tobacco-smoke exposure. Children living in apartments showed greater exposure than those living in detached houses.<sup>11</sup>

In another study, of 11 multi-unit housing blocks, significant second-hand smoke drift from smoke-permitted units into smoke-free units within the same building was found to have occurred via a number of pathways. It was suggested by the researchers that the implementation of a smoke-free building policy would be the most effective way to ensure that residents of units are not exposed to second-hand tobacco smoke.<sup>8</sup>

The evidence is so compelling that Australia's National Preventive Health Taskforce recommended to the Australian Government that action be taken to protect residents of multi-unit developments from exposure to smoke drift.<sup>12</sup>

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### Community support

For many years surveys have shown that the majority of Australians support smoke-free environments whether at work or at public places. A recent survey also indicated strong preferences for smoke-free domestic environments. The NSW Ministry of Health's (formerly Department of Health) *Annual Report on Adult Health* (2009) found that 92% of adults lived in homes that were smoke-free.<sup>13</sup>

These preferences are consistent with current NSW smoking prevalence statistics which show a significant decrease in the proportion of the population who are current smokers. In 2009, only 17% of NSW adults were daily or occasional smokers.<sup>13</sup>

It is reasonable to conclude from these statistics that most people would choose to live in a smoke-free apartment block over one where smoking is allowed.

### Financial benefits of smoke-free apartments

Financial benefits exist for both owners/landlords and tenants of smoke-free apartments. These benefits can result from:

- A reduced risk of fire and other cigarette-related damage such as burn marks on carpets, furniture and counters, which will reduce repair or replacement costs. In 2006/2007 there were 254 building fires in NSW as a result of "heat from smokers' materials".<sup>14</sup>
- Lower cleaning costs for owners of units who are selling or leasing their properties (tobacco smoking leaves smoke residue on walls and curtains). A report in the United States revealed that "apartment turnover costs can be two to seven times greater when smoking is allowed compared to the cost of maintaining and turning over a smoke-free unit".<sup>15</sup>

- Reduced cleaning needs may result in quicker sale or lease.<sup>16</sup>
- Eliminating the risk of legal action (see under 'Legal reasons' below).<sup>17,18</sup>
- A greater likelihood of full rental bond refund for tenants terminating a lease.
- The possibility of higher property re-sale price or rental income.<sup>16</sup>

A US report quantified the mean smoking-related cost for apartment owners and managers between 2008 and 2009 at \$US4935 for each unit without a non-smoking policy.<sup>19</sup>

## Legal reasons – A supportive legal environment

### Statutory laws

#### Smoke-free Environment Act 2000

The statutory laws that apply to residential places apply to common areas only. Smoking in enclosed common areas to which the public has access is prohibited under the NSW *Smoke-free Environment Act 2000*. Such areas may include main entrances and stairwells. They do not include secured areas within security buildings that are only accessible through invitation by an owner or occupier.

A NSW Ministry of Health (formerly Department of Health) fact sheet on the Smoke-free Environment Act as it relates to strata and community schemes can be accessed on the NSW Ministry of Health web site.<sup>20</sup>

#### Strata Schemes Management Act 1996

While not including a specific reference to smoking, Section 117 of the NSW *Strata Schemes Management Act 1996* requires that owners and occupiers using a lot not create a nuisance. It was this requirement that



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comprised the basis to a 2006 Consumer, Trader and Tenancy Tribunal decision - cited and summarised under the heading 'The case law' (below) – in which lot occupiers were ordered to cease causing:

*... a nuisance to occupiers of other lots by taking necessary action to prevent smoke odour from their cigarettes entering other lots and the common property.*<sup>17</sup>

### The NSW Residential Tenancies Act 2010

The NSW *Residential Tenancies Act 2010* addresses the Tenant's right to quiet enjoyment. Part 3 of Section 50 (Tenant's right to quiet enjoyment) states:

3. *A landlord or landlord's agent must take all reasonable steps to ensure that the landlord's other neighbouring tenants do not interfere with the reasonable peace, comfort or privacy of the tenant in using the residential premises.*

Part 1 (b) and (c) of Section 51 (Use of premises by tenant) states that a tenant must not do any of the following:

- (b) *cause or permit a nuisance,*
- (c) *interfere, or cause or permit any interference, with the reasonable peace, comfort or privacy of any neighbour of the tenant.*

### The case law

While there are no statutory laws that specifically regulate smoking in the private areas of residential properties, the two NSW legal cases cited and described below indicate that it is within the power of owners' corporations to act to control smoking by both occupants and visitors throughout a multi-unit housing complex.

#### **Consumer, Trader and Tenancy Tribunal (Strata & Community Schemes Division) Applications SCS 06/44767 and SCS 06/44783<sup>17</sup>**

On 6 November 2006 G. J. Durie, Strata Schemes Adjudicator at the Consumer, Trader and Tenancy Tribunal ordered particular tenants in a Strata Scheme to take action to prevent smoke odour from their cigarettes entering other lots and common property. In addition, the owner of the lot in which the tenants lived was ordered to take action to prevent smoke odour from the tenants' cigarettes entering other lots and common property. The orders had been sought by the owners' corporation on behalf of tenants who had been affected by smoke drift within the apartment complex. Copies of the Tribunal's orders in relation to this case can be obtained by contacting Cancer Council's Tobacco Control Project Officer on 02 9334 1900.

#### **Salerno v Proprietors of Strata Plan No. 42724<sup>18</sup>**

This case was decided in the Supreme Court on 8 April 1997. The judgement demonstrated that it is within the power of the owners' corporation to ban smoking by both occupants and visitors, even on individual lots (under the by-laws to Schedule 1 of the NSW *Strata Titles Act 1973* which imposes a number of positive obligations on conduct in lots). The judgement may also allow for the prohibition of smoking on unenclosed land that comes under the jurisdiction of owners' corporations, for example, balconies or gardens. So those affected by smoke drift in residential developments should raise the matter with their owners' corporation. Hard copies of the Salerno judgement can be obtained by contacting Cancer Council's Tobacco Control Project Officer on 02 9334 1900.

### Private actions under the common law

While taking a private legal action can be expensive and stressful there are a number of remedies that may be invoked under the common law. Cancer Council's booklet *When Smoke Gets in Your Eyes.....(nose throat, lungs and bloodstream) - A guide to passive smoking and the law in NSW* outlines such possible remedies to the problem of smoke drift in apartment complexes. The following information from the booklet discusses rights before common law. It should be emphasised however, that in relation to the problem of smoke drift in apartment complexes, at the time of publication of this information kit these causes of action were yet to be tested in Australian courts.

*The common law torts of trespass, nuisance and negligence may all be available to prevent or provide remedy for exposure to second-hand smoke in the home.*

*Trespass involves intentional interference with the person, invasion of land or interference with chattels (property other than land).*

*Nuisance may be public or private.*

*Public nuisance includes things like causing pollution, emitting noxious smoke and fouling the environment. A private claimant would have to show some particular or special loss beyond the ordinary inconvenience or annoyance suffered by the public at large; for example, that as a particularly sensitive person such as an asthmatic they were affected by second-hand smoke.*

*Private nuisance refers to a substantial and unreasonable interference with a person's use or enjoyment of land; for example, by smoke infiltrating into a private space (such as an apartment in a multiple occupancy building) from an adjoining common area. If this action is successful, it may be possible to recover damages or to seek an injunction to restrain the conduct.*



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*Given what is now known about the harmful effects of second-hand smoke, remedies based on these tortious actions may be available to obtain damages or prevent harm occurring in the case of persistent breach.*

*Individuals may also have the benefit of rights which may be enforced privately (private rights), either under statute or by virtue of some agreement such as a lease or covenant of quiet enjoyment of property. The rights which apply in any particular case will depend on the precise nature of the relationship between the person affected and those against whom rights may be enforced; and there may be limits to the extent to which action may be taken against a landlord or body corporate as opposed to the person who is the immediate cause of the problem.*

*Again, with what is now known about the dangers of second-hand smoke, the scope for enforcing private rights of action should be explored.<sup>21</sup>*

**it is within the power of owners' corporations to act to control smoking by both occupants and visitors throughout a multi-unit housing complex.**



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