

Addressing smoke infiltration in multi-unit housing

Joint submission from Quit Victoria and Heart Foundation (Victoria) regarding proposed options for reform of the *Owners Corporations Act 2006*

December 2016

Summary of recommendations

Quit Victoria and Heart Foundation (Victoria) make the following comments in response to sections 2.2 and 4.2 of the options paper:

- (a) We support Option 6D – Schedule 1 of the *Owners Corporations Act 2006* (Vic) should be amended to give owners corporations a specific power to adopt rules regarding smoking. For the avoidance of doubt, we believe Schedule 1 should specifically state that this power extends to banning smoking in both common areas and private lots.
- (b) We support Option 6E – The existing Model Rules should be amended to include a specific rule addressing smoking. We recommend there be a ‘tier’ of options or choice of rules available to owners corporations, with the ‘default’ choice banning smoking in both common areas and private lots. All choices available to owners corporations should impose an obligation on occupiers to ensure that smoke does not penetrate common areas or other lots.
- (c) We support Option 12A – The maximum civil penalty for breach of owners corporation rules should be increased to \$1100.00. This would give VCAT the power to impose penalties consistent with those attached to smoke-free laws contained in the *Tobacco Act 1987* (Vic).

A. Introduction

Quit Victoria ('Quit') and Heart Foundation (Victoria) welcome the opportunity to comment on the potential options for reform of the *Owners Corporations Act 2006* ('the OCA') which have been outlined in the options paper released in November 2016.

We refer to Quit's submission to the Consumer Property Acts Review Issues Paper No 2 ('the issues paper'), and reiterate our concern that the current legislative framework does not provide owners corporations or occupants in multi-unit housing with adequate means to address smoke infiltration.

The health risks associated with smoke infiltration and the specific problems with the existing regulatory framework were outlined in Quit's previous submission, a copy of which is **attached**. This joint submission responds to sections 2.2 and 4.2 of the options paper, and should be read in conjunction with Quit's previous submission.

B. Section 2.2 – Duties and rights of occupiers

(a) Proposed Option 6D – Expansion of rule-making powers to enable rules to be made regarding smokedrift

Option 6D on page 25 of the options paper proposes that the OCA be amended so that owners corporations have a clear power to make rules regarding smokedrift from private lots.

As noted in Quit's previous submission, it is currently unclear whether owners corporations have the power to make rules banning or regulating smoking. Although it is arguable that an owners corporation could rely on the more general rule-making powers set out in Schedule 1 of the OCA (such as the general power to make rules with respect to the 'health, safety and security' of lot owners, occupiers and invitees), the absence of a *specific* power to make rules banning or regulating smoking has created uncertainty for owners corporations. At present, an owners corporation seeking to implement a rule regarding smoking would face the risk of costly challenges through VCAT on grounds that the rule may go beyond the rule-making powers set out in the OCA. The risk of costly challenges is likely to deter owners corporations from creating specific rules to address smoke infiltration.

We therefore support Option 6D. Schedule 1 of the OCA should be amended to give owners corporations a specific power to implement rules regarding smoking. As noted in Quit's previous submission, Schedule 1 should explicitly state that this power extends to banning smoking completely in both common areas and private lots.

(b) Proposed Option 6E – Make Model Rules for smokedrift

Option 6E on page 26 of the options paper proposes that the existing Model Rules be amended to include a specific rule (or rules) for 'controlling smokedrift from private lots'. It is proposed that any Model Rule regarding smokedrift would require occupiers to ensure that smoke does not penetrate common property or any other lot.



Quit and Heart Foundation (Victoria) broadly support Option 6E. We agree that the existing Model Rules should be amended to include a specific rule addressing smoking. The inclusion of a specific rule regarding smoking would remove the uncertainty faced by owners corporations and occupiers seeking to rely on the current Model Rules to address smoke infiltration.

However, we note that Option 6E refers to controlling 'smokedrift from private lots', and does not appear to make reference to the need to control smoking in common areas. We believe that any new rule regarding smoking should address smoking both in private lots and on common property.

We recommend that the Rules be amended to include a tier of options, or 'choice of rules' available to owners corporations regarding the issue of smoking (similar to the current position in New South Wales). We recommend that the tiers be comprised of the following:

Tier One – Smoking is prohibited in all common areas and private lots (including private balconies)

Tier Two – Smoking is prohibited in all common areas. Smoking is permitted in private lots, provided the smoke does not infiltrate common areas or other private lots.

The default tier should ban smoking in both common areas and private lots. This would ensure that people living in multi-unit housing (particularly children) are afforded maximum protection against the adverse health effects of exposure to secondhand smoke.

As outlined in our previous submission, and as above, a less restrictive tier could be available which prohibits smoking in all common areas (but not private lots). We agree that this less restrictive tier should still impose an obligation on occupiers to ensure that smoke from private lots does not infiltrate common areas or other private lots.⁽³⁾ Furthermore, the less restrictive tier should not operate as the 'default' tier.

(c) Response to question 18(a) – If it is desirable to expand the rule-making power to include rules on smokedrift, should Model rules also be made on those subjects?

As noted further above, we believe it would be desirable to expand the rule-making powers of owners corporations to include a specific power to make rules regarding smoking.

In addition to expanding the rule-making powers of owners corporations, we are of the view that the existing Model Rules should be amended to include a specific Model Rule regarding smoking.

Given the time it can take for owners corporations to negotiate and adopt their own sets of rules, expansion of the rule-making powers alone without amendment of the Model Rules may result in prolonged and unnecessary exposure of occupants to secondhand smoke.

Amendment of the Model Rules to include a specific rule regarding smoking would ensure that unless and until an owners corporation adopts its own rules, the 'default' Model Rules would apply to offer occupiers protection against secondhand smoke. We believe this is an



appropriate approach, given that there is no 'safe' level of exposure to secondhand smoke. As detailed in Quit's previous submission, secondhand smoke is not a mere annoyance. It is a serious health hazard, and even brief periods of exposure to secondhand smoke can cause immediate harm.(4)

(d) Response to question 18(b) – Are the proposed Model Rules based on reasonable presumptions about what most lot owners in owners corporations would regard as unobjectionable, and are they adequate?

Please see response to Option 6E (above) for our views on the proposed Model Rule regarding smokedrift.

We believe that a Model Rule banning smoking in common areas and private lots would be reflective of current community attitudes towards smoking. As noted in Quit's previous submission, we regularly receive queries from members of the public who are concerned about the issue of smoke infiltration and the health risks it poses to them and their families. In particular, we are frequently contacted by individuals with health issues, as well as recent quitters who are experiencing distress as a result of smoke infiltration in the home.

Victoria continues to successfully create smoke-free public places, and studies across Australia demonstrate strong levels of community support for these types of measures.(5-9) Regulating smoking in private spaces is not without precedent in Victoria, as the *Tobacco Act 1986* currently bans smoking in cars when children are present, and prohibits smoking in homes used as workplaces in certain circumstances.(10)

We note that Australian survey data suggests the community is ready for regulatory change to address smoke infiltration in multi-unit housing. According to the 2013 National Drug Strategy Household Survey, 81.9% of Australian adults report that no one at home regularly smokes (up from 77.5% in 2007).(11) In addition, Cancer Council Victoria data on smoking in the home shows a significant increase in the proportion of smokers reporting that they always or usually smoke inside the home – up from 53% in 1998, to 84% in 2013.(12)

Although there has been very little research on the subject in Australia, international research has also shown high levels of interest by owners and managers in adopting smoke-free policies.(13) Landlords have tended to over-estimate the negative commercial impact of proposed smokefree policies.(14) However, research indicates that following implementation, the actual impact of smoke-free policies on vacancy and turnover is generally negligible, neutral or positive.(15, 16)

We therefore believe that a 'tier' of rules (with the 'default' tier banning smoking in common areas and private lots) would be in line with current community attitudes, and would be regarded by most lot owners as unobjectionable.

C. Section 4.2 – Civil penalties for breaches of owners corporations rules

Option 12A on page 39 of the options paper proposes that the maximum civil penalty for a breach of the owners corporation rules be increased to \$1,100.00.



As noted in Quit's previous submission, the current maximum penalty attached to breach of an owners corporation rule (\$250) is inconsistent with those attached to various smoke-free laws contained in the *Tobacco Act 1987 (Vic)* (many of which currently exceed \$700.00).

We support Option 12A, on the basis that it would give VCAT the power to impose penalties that are more consistent with those attached to other Victorian smoke-free laws.

REFERENCES:

1. See the *Strata Schemes Management Regulation 2016* (NSW); Schedule 3, Rule 9.
2. The NSW Model By-laws are set out in Schedule 3 of the *Strata Schemes Management Regulation 2016* (NSW). Rule 9 of Schedule 3 sets out a tier of by-laws regarding smoking. The 'default' by-law for smoking prohibits smoking on common property, but not in private lots. However, an owner or occupier has an obligation to ensure that smoke from a private lot does not penetrate to common property or any other lot.
3. This 'less restrictive' tier would be similar to the 'default' tier in NSW, as described in the above reference.
4. News release, *New Surgeon General's Report Focuses on the Effects of Secondhand Smoke*. 27 June 2006; Available from: <http://wayback.archive-it.org/3926/20131029134811/http://archive.hhs.gov/news/press/2006pres/20060627.html>.
5. Chapman S, Freeman B. *Markers of the denormalisation of smoking and the tobacco industry*. *Tob Control* 2008. Feb; 17(1): 25-31 [Abstract available at <https://www.ncbi.nlm.nih.gov/pubmed/18218803>].
6. Cancer Institute New South Wales. *New South Wales Smoking and Health Survey 2009*. Sydney: Cancer Institute NSW; 2009 Nov. Available from <https://www.cancerinstitute.org.au/about-us/news/smoking-and-health-survey-2009>.
7. Queensland Government. *2007 Review of Smoke-free laws - Public Consultation Summary of Feedback*. 2007, page 11.
8. Rosenberg M, Pettigrew S, Wood L, Ferguson R, Houghton S. *Public support for tobacco control policy extensions in Western Australia: a cross-sectional study*. *BMJ Open* 2012; 2(2) [Abstract available at <https://www.ncbi.nlm.nih.gov/pubmed/22382124>].
9. World Health Organisation. *WHO Report on the Global Tobacco Epidemic, 2009: implementing smoke-free environments*. Geneva; WHO; 2009. [Available from: http://www.who.int/tobacco/mpower/2009/gtcr_download/en/].
10. See *Tobacco Act 1987* (Vic); sections 5A and 5S.
11. Australian Institute of Health and Welfare. *National Drug Strategy Household Survey detailed report 2013*. Canberra: AIHW, 2014 Drug statistics series no. 28. Cat. no. PHE 183.
12. Hayes L. *Trends over time in Victorians' attitudes towards smoking in public places, around children and within the home*. Melbourne, Australia: Centre for Behavioural Research in Cancer, Cancer Council Victoria, 2014 Contract No.: Topline Research Report.
13. Farley SM, Waddell EN, Coady MH, Grimshaw V, Wright DA, Mandel-Ricci J, et al. *Correlates of smoke-free housing policies and interest in implementing policies among multiunit housing owners in New York City*. *J Urban Health* 2015. April; 92(2): 291-303. [Abstract available at <https://www.ncbi.nlm.nih.gov/pubmed/25670210>].
14. Burdette LK, Rowe GC, Johansen L, Kerkvliet JL, Nagelhout E, Lewis K, et al. *A statewide assessment of smoke-free policy in multiunit housing settings*. *Nicotine Tob Res* 2014. Dec; 16(12): 1593-8 [Abstract available at <https://www.ncbi.nlm.nih.gov/pubmed/25059499>].
15. Hewett MJ, Sandell SD, Anderson J, Niebuhr M. *Secondhand smoke in apartment buildings: renter and owner or manager perspectives*. *Nicotine Tob Res*. 2007 Jan; 9 Suppl 1. [Abstract available at: <http://www.ncbi.nlm.nih.gov/pubmed/17365725>].
16. Cramer ME, Roberts S, Stevens E. *Landlord attitudes and behaviours regarding smoke-free policies: implications for voluntary policy change*. *Public Health Nurs* 2011. Jan;28(1): 3-12. [Abstract available at <https://www.ncbi.nlm.nih.gov/pubmed/21198809>].