

Addressing smoke infiltration in multi-unit housing

Quit Victoria's submission to Consumer Property Acts Review
Issues Paper No. 2

April 2016

Summary of recommendations

Quit Victoria makes the following three key recommendations in response to section 8.3 of the issues paper:

- 1) We recommend that the Model Rules be amended to include a specific rule addressing smoking. We believe the Model Rule should ban smoking in multi-unit housing completely. Alternatively, we recommend there be a choice of Model Rules available to owners corporations regarding the issue of smoking. All choices available to owners corporations should prohibit smoking in circumstances where smoke is able to infiltrate neighbouring private lots or common property.
- 2) In the absence of a new Model Rule banning smoking completely, we recommend that schedule 1 of the OCA be amended to make it clear that owners corporations have the power to adopt a rule banning smoking completely.
- 3) In addition, we recommend that the *Owners Corporations Act 2006* (Vic) be amended so as to give VCAT the power to impose a higher monetary penalty for breach of an owners corporation rule, where the relevant rule concerns smoking.



1.0 Introduction

Quit Victoria welcomes the Victorian Government's review of the *Owners Corporation Act 2006* ('the OCA'). The review presents an opportunity to address the limitations of the current regulatory framework around smoke infiltration in multi-unit housing in Victoria.

Quit Victoria frequently receives 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. Numerous studies indicate that exposure to second-hand smoke in the home is a cause of cancer.[1, 2] It is also clear that there is no 'safe' level of exposure to second-hand tobacco smoke.[3]

It is therefore unsurprising that smoke infiltration has previously been flagged as a national public health priority. In 2009, the National Preventative Health Taskforce recommended that State and Territory Governments take action to 'protect residents from exposure to smoke drift in multi-unit developments.'[4] In addition, the National Tobacco Strategy (2012-2018) includes an action item on monitoring the issue of smoking and smoke-drift in residential premises.[5] Quit Victoria has highlighted smoke infiltration as a key issue to be addressed as part of its current strategic plan, and has undertaken its own review of the existing regulatory framework.

Quit Victoria believes that the current framework (including the existing Model Rules for an Owners Corporation) does not provide owners corporations or occupants in multi-unit housing with an adequate means to address smoke infiltration. The existing avenues for managing this issue are complex, and are not widely utilised. In particular, it is unclear whether owners corporations are able to rely on the existing Model Rules to address complaints made by occupants about smoke infiltration. Furthermore, it is unclear whether owners corporations in Victoria have the power to make their own specific rules banning or restricting smoking in multi-unit housing.

In response to section 8.2 of the Consumer Property Acts Review Issues Paper No 2 ('the issues paper') Quit Victoria therefore recommends that the existing Model Rules be amended to include a 'default' rule specifically addressing smoking. We believe the default rule should ban smoking in multi-unit housing entirely given the seriousness of the health risks associated with exposure to secondhand smoke. Alternatively, we recommend there be a 'choice' of rules or tier of options available to owners corporations regarding the issue of smoking. All tiers or choices should prohibit smoking in private lots in circumstances where smoke is able to infiltrate neighbouring lots or common areas. If the model rule on smoking does not ban smoking completely, we believe it should at least be open to owners corporations to adopt a complete ban. We are therefore of the view that the OCA ought to be amended so as to make it clear that owners corporations have the power to ban smoking in multi-unit housing.

Finally, while we understand it may fall outside the scope of this review, we believe that the Victorian Government should also consider amending the OCA to give the Victorian Civil and Administrative Tribunal ('VCAT') the power to impose a higher monetary penalty for breach of an owners corporation rule where the relevant rule concerns smoking. This would give VCAT the power to impose penalties that are consistent with those attached to other smokefree laws contained in the *Tobacco Act 1987* (Vic).

2.0 Health risks of smoke infiltration

It is well known that secondhand smoke is a health hazard. A detailed fact sheet on secondhand smoke is available on the Quit Victoria website: <http://www.quit.org.au/resource-centre/facts-evidence/fact-sheets/cigarettes-and-tobacco>

It is important to understand that there is no safe level of exposure to secondhand smoke. Even brief periods of exposure can be harmful.[3] Adult exposure to secondhand smoke has immediate adverse effects on the cardiovascular system, and is also a known cause of lung cancer and coronary heart disease. Non-smokers with long term exposure to tobacco smoke have an estimated 20-30% higher risk of developing lung cancer than non-smokers who are not exposed.[3]

Children are particularly susceptible to the effects of secondhand smoke.[6] Children exposed to secondhand smoke are at an increased risk of sudden infant death syndrome (SIDS), respiratory infections, ear problems and asthma.[3] Secondhand smoke is also associated with chronic obstructive pulmonary disease (COPD), low birthweight, and childhood cancers such as leukaemia, brain cancer and lymphoma.[3]

There is evidence that smoke infiltration in multi-unit housing places people at risk of the health impacts of secondhand smoke.[7] Secondhand smoke is not easily contained within smoking areas. In multi-unit housing, infiltration of secondhand smoke can occur through windows, elevator shafts, shared hallways, holes in walls, pipes, and electrical outlets.[8-10] It can also be distributed through ventilation systems, as well as heating and cooling systems.[3]

Research indicates that involuntary secondhand smoke exposure can be reduced, but not eliminated, through modifications to existing units or apartments (such as ventilation changes and air sealing).[11] A comprehensive regulatory framework addressing the issue of smoke infiltration is therefore crucial to protecting non-smokers from involuntarily exposure to the risks of secondhand smoke inhalation.

3.0 The existing regulatory framework

3.1 The Model Rules

The existing Model Rules are set out in Schedule 2 of the *Owners Corporation Regulations 2007* (Vic). The Model Rules do not specifically address the issue of smoking. The Model Rules contain general rules which *may* cover the issue of smoking in certain circumstances. For example, Model Rule 1.1 states that a lot owner *'must not use the lot or permit it to be used, so as to cause a hazard to the health, safety and security of an owner, occupier or user of another lot.'* It may therefore be possible for an occupant or owners corporation to argue that smoke infiltration constitutes a breach of this rule on the basis that it causes a 'hazard to health'.

However, the legal position regarding whether such general rules can be relied upon to address smoke infiltration remains unclear. While there are NSW tribunal decisions which indicate that smoke infiltration can be considered a 'hazard'[12] or a 'nuisance',[13] there do not appear to be any reported Victorian court or tribunal decisions regarding whether smoke infiltration is covered by any of the existing Model Rules. The absence of a specific Model Rule regarding smoking therefore creates uncertainty for both occupants and owners corporations seeking to rely on the Model Rules to prevent smoke infiltration.

We note that the Model Rules currently contain specific rules addressing various other common causes of dispute among occupants, such as noise, parking and waste disposal. Given that smoke infiltration has the potential to pose such a serious health risk to occupants, the absence of a specific rule addressing smoking represents a significant gap in the current Model Rules.

3.2 The OCA

It is also unclear whether owners corporations currently have the power to introduce their own rules banning or limiting smoking.

Pursuant to section 138 of the OCA, an owners corporation may make rules with respect to the health, safety and security of lot owners, occupiers and visitors.[14] Furthermore, owners corporations may make rules with respect to the use of common property and the 'change of use of lots'. [15] Rules can be for the purpose of the control, management, administration, use or enjoyment of the common property or of a lot.[16] It is arguable that an owners corporation could rely on these general powers, and "control" powers in particular, to implement a rule regulating or banning smoking.¹

However, powers to make rules are subject to a number of statutory limitations under the OCA[17] and there do not appear to be any reported Victorian cases considering this point. Consequently the situation remains uncertain for owners corporations. The complexity of the rule-making powers may deter owners corporations from making a judgement as to whether a smoking related rule would be valid if contested. At present, an owners corporation seeking to implement a rule banning or regulating smoking would face the risk of costly challenges to the rule through VCAT on grounds that the rule goes beyond the rule making powers set out in the OCA.[18]

3.3 Other existing legal avenues are inadequate

Aside from relying on owners corporation rules, the options available to occupants seeking to address smoke infiltration are limited. In some circumstances occupants of multi-unit housing in Victoria *may* be able to rely on the following:

- Rights under the *Residential Tenancies Act 1997* (Vic) ('the RTA') – The RTA provides that a landlord has a duty to take all reasonable steps to ensure their tenant has quiet enjoyment of the rented premises. The 'quiet enjoyment' duty may in some circumstances require the landlord to take all reasonable steps to ensure that a tenant is not exposed to smoke infiltration. However, this avenue appears to only be available where neighbours share the same landlord.[19-21] Furthermore, this option is obviously only available in rental situations.
- Complaints to local councils – Occupants experiencing smoke infiltration may be able to lodge a complaint with their local council on the basis that the smoke constitutes a 'nuisance' within the meaning of the *Public Health and Wellbeing Act 2008* (Vic) ('the PHW Act'). Local councils have a duty to remedy *as far as reasonably possible* all nuisances existing within their municipal district. However, where a local council investigates a complaint, and ultimately forms the view that the smoke infiltration is not a 'nuisance', there does not appear to be any avenue available to the occupant under the PHW Act to pursue the matter further.² Furthermore, it is our experience that local councils are often reluctant to act on nuisance complaints regarding smoke infiltration.
- Reliance on equal opportunity laws – In some circumstances, it may be argued that allowing occupants or visitors in multi-unit housing to smoke amounts to a form of 'indirect' discrimination against people who are particularly susceptible to harms caused by secondhand smoke exposure (e.g. children, pregnant women or people experiencing certain illnesses).³ However, again there are no Victorian reported court or tribunal decisions considering the issue of whether smoke infiltration in multi-unit housing can give rise to indirect

¹ See for example, the NSW case of *Salerno v Proprietors of Strata Plan No 42724* (1997) 8 BPR 15457.

² Arguably, the occupant could attempt to bring a common law action for private nuisance against the smoker. However, this avenue is likely to be both expensive and time consuming for the occupant. In addition, it is unclear how the courts are likely to approach such cases (given the lack of reported Victorian court decisions considering the issue of whether smoke infiltration can constitute a private nuisance).

³ See for example, the Australian Human Rights and Equal Opportunity Commission case of *Neil Francey and Sue Meeuwissen v Hilton Hotels of Australia Pty Ltd* where secondhand smoke exposure in a hotel venue was found to give rise to indirect discrimination. Available at: <https://www.humanrights.gov.au/neil-francey-and-sue-meeuwissen-v-hilton-hotels-australia-pty-ltd-0>.

discrimination. It is therefore difficult to predict how a court or tribunal would approach the issue.

As the above avenues are only available in limited circumstances and do not provide comprehensive regulation of smoke infiltration, it is Quit Victoria's view that amendment to the OCA and Model Rules presents an appropriate avenue for addressing the issue.

4.0 Approaches to addressing smoke infiltration in other States/Territories

Of all jurisdictions within Australia, NSW is set to have the most comprehensive regulatory framework regarding smoke infiltration in multi-unit housing.

The *Strata Schemes Management Act 1996* (NSW) ('the SSMA') contains a general provision which prohibits an owner or occupier from using or enjoying a lot in such a manner as to '*cause a nuisance or hazard to the occupier of another lot.*' In 2015, the *Strata Schemes Management Amendment Bill 2015* was passed which amends the SSMA to make it clear that smoking can fall within the scope of the general nuisance provision. The amendment inserts a note to the general nuisance provision which states:

'Depending on the circumstances in which it occurs, the penetration of smoke from smoking into a lot or common property may cause a nuisance or hazard or interfere unreasonably with the use or enjoyment of the common property or another lot.'

The amendment is due come into effect in the second half of 2016.[22]

It is Quit Victoria's view that the words 'depending on the circumstances' are likely to create some uncertainty regarding when the provision can be relied upon to address smoke infiltration. We therefore recommend this wording not be adopted in Victoria. Nevertheless, it is clear that residents in NSW will be able to rely on the general nuisance and hazard provision to address smoke infiltration in some circumstances. Even before the inclusion of this legislative note, there had been a number of tribunal cases in NSW where smoke infiltration was found to constitute a hazard.[12, 13]

In addition, the NSW government has indicated that a model by-law addressing smoke infiltration will be included as part of strata reform in NSW. [23] The specific wording of the by-law has not yet been settled.

5.0 Suggested amendments to the existing framework

5.1 Include a specific Model Rule regarding smoking

We recommend that the existing Model Rules be amended to include a specific rule addressing smoking. The inclusion of a Model Rule addressing smoking would remove the uncertainty faced by owners corporations and occupiers seeking to rely on the current Model Rules to address smoke infiltration.

We propose the following two options for amendment to the existing Model Rules:

- 1) Option 1 - The Rules be amended to include a specific Model Rule banning smoking in multi-unit housing completely.

- 2) Option 2 - The Rules be amended to include a tier of options, or 'choice of rules' available to owners corporations regarding the issue of smoking (as suggested in question 44 of the issues paper).

We note there is some evidence to suggest that partial smoking bans (which permit smoking in private lots, but not in common areas) may actually increase, rather than decrease secondhand smoke exposure among non-smoking residents. A US study undertaken in 2014 used data from the 2011 Social Climate Survey on Tobacco Control, and found that partial smokefree policies in multiunit housing were associated with a higher likelihood of secondhand smoke incursion in individual lots of non-smoking residents.[24] It is thought that restricting smoking to private lots only may increase smoking behaviour inside these lots, and therefore increase the likelihood of smoke drifting into neighbouring lots. The results of the study indicate that the most effective way to minimise smoke infiltration in multi-unit housing is a comprehensive ban that prohibits smoking in both common areas and private lots.

In view of this evidence, we consider Option 1 to be the preferred approach, as this option would ensure that non-smokers living in multi-unit housing (particularly children) are afforded maximum protection against the adverse health effects of exposure to secondhand smoke.

In the event that Option 2 is adopted, we are of the view that it would be preferable for the tiers or choices to consist of the following:

- (i) Tier 1 – Smoking is prohibited in all common areas and private lots (including private balconies);
- (ii) Tier 2 – 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.

In other words, the 'less restrictive' tiers should still prohibit smoking in private lots where smoke is capable of infiltrating neighbouring lots or common property. This is intended to avoid a situation whereby partial bans adopted by owners corporations have the unintended consequence of increasing secondhand smoke exposure among non-smoking residents. It would be preferable for 'Tier 1' in the above example to operate as the 'default' tier where an owners corporation has not made a choice between the two tiers.

As an alternative to amending the Model Rules, we support amendment to the OCA itself to include a statutory prohibition against smoking in multi-unit housing. Again, for the reasons outlined above, we recommend that any statutory provision introduced ban smoking completely (including in private lots).

5.2 Amend schedule 1 of OCA to give owners corporations a specific power to make rules regarding smoking

In the absence of a Model Rule banning smoking completely, it should at least be made clear that owners corporations have the power to implement their own rules banning or regulating smoking.

We therefore recommend that schedule 1 of the OCA be amended to include reference to the power of an owners corporation to make rules with respect to smoking. For the avoidance of doubt, schedule 1 should specifically state that this power extends to banning smoking completely (in both common areas and in private lots).

5.3 Amend section 166 of OCA to give VCAT power to impose higher penalties

Where an owners corporation rule is breached, section 166 of the OCA currently gives VCAT the power to make an order imposing a civil penalty not exceeding \$250.00.⁴

The penalties attached to smokefree laws contained in the *Tobacco Act 1987* (Vic) ('the Tobacco Act') exceed this amount. For example, breach of section 5S of the Tobacco Act (which prohibits smoking in a motor vehicle if a person under the age of 18 is present) attracts 5 penalty units. This currently equates to a fine of \$758.65. Similarly, breach of section 5A (which prohibits smoking in an enclosed workplace) attracts 5 penalty units.

We therefore recommend that section 166 of the OCA be amended to give VCAT the discretion to impose higher monetary penalties for breach of an owners corporation rule, where that rule concerns smoking. This would give VCAT the power to impose penalties that are consistent with those attached to other smoke-free laws contained in the Tobacco Act.

⁴ This figure does not appear to be subject to indexation.

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13. *Owners Corporation SP 49822 v May & Ors (Strata & Community Schemes)* [2006] NSWCTT 739 (6 November 2006).
14. *Owners Corporations Act 2006 (Vic)* section 138 and schedule 1, item 1.
15. *Owners Corporations Act 2006 (Vic)*, schedule 1, items 4 and 5.
16. *Owners Corporations Act 2006 (Vic)*, section 138(3).
17. *Owners Corporations Act 2006 (Vic)*, section 140.
18. *Owners Corporations Act 2006 (Vic)*, sections 138 and 162.
19. *Residential Tenancies Act 1997 (Vic)*, section 67.
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