

Commissioner Foreword



Dear Subscribers,

Welcome to the September edition of Common Ground.

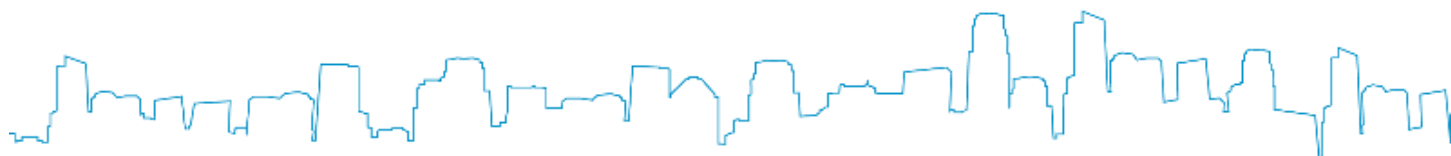
This month's Common Ground includes an article about smoking in community titles schemes, which is a common concern of a number of owners and occupiers living and working in schemes across Queensland. As mentioned in last month's newsletter, the Community Titles Legislation Working Group has recently discussed the recommendations made by QUT's review of property law about making and enforcing smoking by-laws. Our article aims to give you information about how to address smoking-related issues in your scheme under current arrangements.

We are sending our newsletter out a little earlier this month to advise you that the Government recently passed the *Public Health and Other Legislation (Further Extension of Expiring Provisions) Amendment Act 2021*. The Act extends the operation of temporary legislative frameworks still required to respond to the impacts of the COVID-19 public health emergency until 30 April 2022, or an earlier date prescribed by regulation.

In particular, the Act further extends the range of temporary measures in place to protect the health, safety and welfare of those in the community titles sector and to assist bodies corporate and owners suffering financial stress caused by the public health emergency. More information about these measures and [COVID 19 in bodies corporate](#) can be found on our website.

If you would like to find out more information on either of these topics, please don't hesitate to call our Information and Community Education Unit on 1800 060 119 and leave a message for a call back between the hours of 8.30 and 3pm. Alternatively you can lodge an online enquiry anytime at www.qld.gov.au/bodycorporatequestion.

Michelle Scott
Commissioner for Body Corporate and Community Management




Smoking in community titles schemes

Smoking in community titles schemes (CTS) is the subject of many enquiries received by our information and community education unit. This article aims to provide information to owners and occupiers who may be having a dispute with someone else in their scheme about second-hand tobacco smoke drifting from somewhere else in the scheme. There are a number of things you might want to consider when dealing with this issue in your CTS.

Nuisance

Section 167 of the [Body Corporate and Community Management Act 1997](#) (the Act) provides that occupiers must not use a lot or common property in a way that causes a nuisance or hazard or interferes unreasonably with another person's use or enjoyment of another lot or the common property.



While an occupier of a lot may contravene section 167 of the Act by allowing second-hand cigarette smoke to drift into another lot or the common property, it is also important to note that past decisions by adjudicators and the Queensland Civil and Administrative Tribunal (QCAT) about smoking have found that:

- Smoking is considered to be an ordinary use of a lot.
- The degree of nuisance, hazard or interference caused by second-hand smoke must be more than minor. Smoking is not unlawful simply because a person finds it annoying or unpleasant.
- Each case must be judged objectively, from the point of view of a reasonable ordinary person and taking into account all of the circumstances.

Past decisions on smoking and nuisance are sometimes thought to allow owners and occupiers to smoke without restriction in a lot. However, adjudicators must determine each dispute application on its merits. Adjudicators may consider the unique circumstances of a particular case, new medical evidence about the harmful effects of second-hand smoke and changing community attitudes about the impacts of second-hand cigarette smoke on non-smokers.

By-laws

By-laws are legally enforceable rules specific to a scheme. The Act provides that a by-law may regulate how owners and occupiers use their lots and common property. However, in past decisions about by-laws, adjudicators and QCAT have determined that a by-law cannot completely prohibit an ordinary domestic activity. The Act also provides that a by-law must not be oppressive or unreasonable, having regard to the interests of all owners and occupiers. Therefore, smoking can be regulated, but not entirely prohibited, by a by-law.

Bodies corporate must enforce their by-laws. If you live in a CTS with a by-law that regulates smoking and you are exposed to second-hand smoke from another occupier, you could consider giving your body corporate a notice advising of the breach ([BCCM Form 1](#)). The body corporate will then be required to consider taking action about the matter with the smoker. If the body corporate does not take action you may be entitled to apply for conciliation with our office to address your complaint. Alternatively, if you can demonstrate your attempt to resolve the matter directly with the offending party you may consider lodging a conciliation application directly against them.

Lodging a dispute application

If you have an issue with someone smoking in your scheme or with smoke drift, it may be possible to lodge a dispute resolution application with our Office. Our Office has exclusive jurisdiction to resolve body corporate disputes in Queensland. Before you lodge an application, there are several steps you should try to address the issue, which are outlined below.

Self-resolution

Often the quickest way to address the issue of smoke drift is to resolve the problem directly with the smoker. This is known as [self-resolution](#). Sometimes a smoker may not be aware of the issues they are causing. It might also be possible to come to an arrangement about smoking, e.g. smoking in a certain place or at a certain time, which might reduce its impacts.

If self-resolution is unsuccessful, you may apply to our Office for resolution of the dispute, through conciliation or adjudication. However, you should be aware that the Commissioner may reject your application if you cannot show that you have firstly made a reasonable attempt at self-resolution.



Self-resolution may involve the following:

- as noted above, having a conversation with the smoker is a good first step in attempting to resolve the issue. The conversation may include discussing specifically when the smoking is an issue, including the frequency and location of the smoking;
- describing the specific health impacts the smoke is having on you as a way of conveying to the smoker the harm that the smoke is causing;
- if the problem is not resolved, writing to the person using non-confrontational language and offering suggestions for mutually beneficial solutions; and
- as noted above, if you consider the smoking is in breach of smoking by-laws, such as a by-law about smoking on common property, and your conversation and correspondence has not resolved the issue, your next step is to issue a notice to the body corporate advising them of the breach using the [BCCM Form 1](#).

Conciliation

If attempts at self-resolution have been unsuccessful and a dispute application is lodged, conciliation is usually the next step. [Conciliation](#) is a process where parties to the dispute come together to try and reach an agreement. Our conciliators are also trained in body corporate legislation. They help educate the parties in an attempt to resolve their dispute. Some successful examples of conciliation outcomes involving smoke drift have included:

- a smoker moving to the other side of the backyard to smoke;
- a smoker shutting the door when smoking to prevent smoke drift; and
- the use of a fan to blow the smoke away from the other lots.


Adjudication

Adjudication for a dispute about smoking may be possible if self-resolution and conciliation have been unsuccessful or are not appropriate. [Adjudication](#) is a more formal process than conciliation. An adjudicator makes a decision after considering the application, the evidence and written submissions from all those affected by the dispute.

Considerations

If a dispute application is lodged with us, objective evidence of how a nuisance or hazard is being caused may be required. This evidence may need to demonstrate the volume and frequency of the smoke drift. Some examples of how this could be proved may include:

- CCTV footage of the person smoking;
- witness statements from other owner/occupiers;
- air quality tests; and
- a diary of exposure times.




If you suspect an owner or occupier from a neighbouring lot is smoking an illegal substance, this is a matter best referred to the Queensland Police Service.

While the [Tobacco and Other Smoking Products Act 1998](#) (Qld) prohibits smoking in a CTS in common property areas that are enclosed (for example, indoor gyms, games rooms or shared cooking facilities), smoking in a residential unit or lot is not subject to this ban and remains a lawful activity under that Act.

There are [fees](#) associated with conciliation and adjudication applications.

Further information

If you have further questions regarding [dispute resolution](#), and [making](#) or [enforcing by-laws](#), please contact us on 1800 060 119 or visit the BCCM website www.qld.gov.au/bodycorporate. You can also read more about by-law disputes in [Practice Direction 6 – By-law enforcement applications](#).



Body Corporate and Community Management

www.qld.gov.au/bodycorporate

1800 060 119

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