

Smoking in Home Units

By Gary Bugden*

A recent overseas court decision and an even more recent New South Wales survey have highlighted an increasing concern about the effects of smoking in home unit buildings.

An on-line survey undertaken recently on behalf of the NSW Government sought to identify the issues that most concern people who live in strata and community title complexes. Surprisingly, the issue of smoking in home units generated more comments than any other single topic in the survey.

The report to Government stated that the *“overwhelming majority of correspondents strongly objected to being subjected to second hand smoke in strata buildings and demanded that smoking be banned from communal areas and open air balconies”*. The Government is understood to be considering such a ban, although no commitment has been made in this regard.

During the course of that survey being undertaken, a battle was raging in British Columbia, Canada, before the Human Rights Tribunal. The applicants, who lived in a 39 unit complex, experienced second-hand smoke entering their unit as a result of other residents smoking tobacco and marijuana on the patios and decks below. They alleged that the condominium corporation failed to accommodate their complaints adequately or appropriately because they refused to enforce existing by-laws or make a new non-smoking by-law.

The Tribunal found that the applicants were physically and psychologically vulnerable and that they were treated by the condominium corporation and its managers with *“what can best be termed a patronizing or benign neglect for a period of almost three years”*. The condominium corporation was held liable and ordered to pay damages.

Although this case was based on the human rights of the applicants, North American commentators agree that there was potential for the condominium corporation to be held liable to the applicants on the grounds of “negligence”, because it failed to act to protect the unit owners. The legal system in British Columbia is based on English common law, as is the Australian system and Australian Courts often consider Canadian decisions, particularly on questions of negligence.

Both of these recent events are a timely reminder for bodies corporate to consider the health and wellbeing of unit residents when it comes to the effects of tobacco smoking (and marijuana smoking, if that fits your building) on common property and unit balconies.

There is nothing in the standard (Schedule 4) Queensland by-laws that enable a body corporate to address the problems of cigarette smoking. Even by-law 6 which regulates behaviour likely to interfere with the peaceful enjoyment of a unit or common property is of no use – because it only applies to the behaviour of “invitees” and does not apply to the behaviour of owners or occupiers. Section 167 of the BCCM Act prohibits the use of a lot or common property in a way that causes a nuisance or hazard and it could be argued that smoking may in some circumstances fall within that prohibition.

However, it would be preferable for the body corporate to make a new by-law to deal specifically with the issue. Because by-laws can regulate the use and enjoyment of both common property and units there would be no problem with the introduction of a by-law that regulated or prohibited smoking on common property and on balconies or patios of units. There are various options as to the extent of restrictions that may be applied by such a by-law.

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