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By E-mail

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To whom it may concern

Submission by Arnold Bloch Leibler *Consumer Property Acts Review Issues Paper No. 2: Owners corporations* Model rule for smoking

Overview

Arnold Bloch Leibler makes submissions only in relation to Part 8.2 - "*Model Rules: pets and smoke drift*" of the issues paper. In Part 8.2, question 44 asks whether there should be Model Rules regarding pets and smoking, and if so, whether there should be a choice of rules such as is allowed in New South Wales (with or without a default option).

Arnold Bloch Leibler submits that there should be a model rule in relation to smoking. The permeation of smoke in apartment complexes is a serious health concern. Home owners have a legitimate interest in regulating such hazards. Having model rules relating to smoking simplifies the process for owners corporations, clearly informs every one of their rights and responsibilities and means that any decision to allow smoking will be a conscious one, rather than an accidental omission.

Proposed model rules

Arnold Bloch Leibler's proposal is that owners corporations should be able to select from rules in the general form of:

- (a) a rule prohibiting a lot owner or occupier from:
 - (i) using the lot so as to cause a hazard to the health, safety and security of or nuisance to an owner, occupier, or user of another lot; and

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- (ii) smoking within the common property or in such a way that smoke permeates the common property,

(if no rule is selected, this is to be the default rule);
- (b) a rule prohibiting a lot owner or occupier from using the lot so as to cause a hazard to the health, safety and security of or nuisance to an owner, occupier, or user of another lot; and
- (c) a rule prohibiting a lot owner or occupier from:
 - (i) using the lot so as to cause a hazard to the health, safety and security of or nuisance to an owner, occupier, or user of another lot; and
 - (ii) smoking within a lot or within the common property.

Justification for the proposed model rules - Position in New South Wales

The implementation of such model rules is supported by the New South Wales legislation, *Strata Schemes Management Bill 2015* which received royal assent on 5 November 2015. Section 153 of the bill states that owners and occupiers are not to create a nuisance. The section notes that *"the penetration of smoke from smoking into a lot or common property may cause a nuisance or hazard and may interfere unreasonably with the use or enjoyment of the common property or another lot"*. This shows recognition of the harm smoking can cause and the legitimate interests of other lot owners in controlling the smoke to which they are exposed.

In the *Strata Title Law Reform* paper (published by NSW Fair Trading, November 2013) it was recognised that incorporating model by-laws regarding smoking would assist everyone to know their rights and responsibilities. The earlier discussion paper,¹ recognised that in a strata scheme, as with any community living, there is a need to balance individual freedoms and the common good. Smoking was highlighted as an example where there is a conflict between a personal right to smoke in your own home and the rights of others not to suffer health risks associated with second hand smoke.

Need for model rules relating to smoking

The discussion paper, referred to above, acknowledged that pregnant women, young children and those with chronic respiratory illnesses are particularly vulnerable to second hand smoke. The paper noted that the law and model by-laws (in New South Wales) were silent on the issue of smoking. It was suggested that clearer statements in the law and introducing smoking related by-laws would be of assistance.

Owners corporations have the power to make rules generally, and as such can currently make rules relating to smoking. However, it would simplify the process to provide options within the model rules. Further, it would clarify the legal

¹ *Making NSW No. 1 Again: Shaping Future Communities - Strata & Community Title Law Reform Discussion Paper* (NSW Fair Trading, 15 September 2012).

position as to the power of the owners corporations to regulate smoking. This would give confidence to owners corporations to make such rules.

Conclusion

Smoking is a health hazard. Its detrimental impact extends beyond the smoker to those sharing common property and in neighbouring lots. Owners corporations must therefore make a conscious decision about where smoking may be permitted in the lots and the common property. Additionally, the process for owners corporations to regulate such a hazard should be as straightforward as possible. These aims will be achieved by introducing model rules in the general form of those above.

We would be pleased to expand on any of the matters addressed in this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Leon Zwier', written over the words 'Yours sincerely'.

Leon Zwier
Partner