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By E-mail

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To whom it may concern

**Submission by Arnold Bloch Leibler
Consumer Property Law Review: Options for reform of the Owners
Corporations Act 2006 (Options Paper)
Model rule for smoking**

Executive Summary

- 1 Arnold Bloch Leibler makes submissions only in relation to Part 2.2.4 - "Rule-making powers and Model Rules" of the Options Paper.
- 2 In Part 2.2.4, question 18 asks, if it is desirable to expand the rule-making power of Owners Corporations to include rules on smoke drift, then:
 - (a) should Model Rules also be made on those subjects; and if so
 - (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?
- 3 On 29 April 2016, Arnold Bloch Leibler made submissions in relation to the Consumer Property Acts Review Issues Paper No. 2: Owners corporations advocating for the introduction of model rules regulating smoking (**Previous Submissions**).
- 4 As set out in the Previous Submissions, Arnold Bloch Leibler submits that:
 - (a) it is desirable to expand the rule making power of Owners Corporations to include rules on smoke drift;
 - (b) there should be model rules made on that subject in the form set out in the Previous Submissions (and repeated at paragraph 12 below) (**Proposed Model Rules**);

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- (c) for the reasons set out at paragraphs 13 to 19 below, the Proposed Model Rules are based on reasonable presumptions about what most lot owners in Owners Corporations would regard as unobjectionable, and are adequate.

Is it desirable to expand the rule-making power of Owners Corporations to include rules on smoke drift?

- 5 As a party to the WHO Framework Convention on Tobacco Control (FCTC), Australia has agreed to recognise that “*scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability.*” This statement encompasses the effects of smoking and of exposure to smoke drift.
- 6 The Options Paper at page 24 notes that it is unclear whether the existing rule-making powers of Owners Corporations extend to regulating smoke drift from private property. As a result of that uncertainty, Owners Corporations may not have the confidence to make rules regarding smoke drift, even if the majority of lot owners would support such rules.
- 7 In light of the internationally acknowledged danger of tobacco smoke and Australia’s commitment to the FCTC, it is unacceptable that Owners Corporations are not clearly empowered to protect lot occupiers and invitees against exposure to smoke drift.
- 8 At present, Owners Corporations and their majority lot holders may be left without practical recourse when confronted with significant and reoccurring smoke drift into common areas and private lots. This lacunae in the current legal framework is out of line with community expectations and Australia’s international and domestic commitment to public health.

Should Model Rules also be made on those subjects?

Current Model Rule

- 9 The current model rules state, in relation to health and safety (at Rule 1.1):
- A lot owner or occupier 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.*
- 10 Smoke drift constitutes a hazard to the health of others. As such, it is arguable that lot owners and occupiers may be able to derive some protection under the current rules. However, as the law stands and as set out above, this is an unnecessarily uncertain and circuitous route for lot owners to obtain protection from an acknowledged danger.
- 11 The introduction of model laws regarding smoke drift would clarify the situation and give practical effect to any extension of the rule making power. Such model laws would give confidence to those Owners Corporations wishing to specifically regulate smoke drift, while allowing

those who do not to opt out. They would also provide a clear and unambiguous framework for Owners Corporations to do so, without the need to waste unnecessary time and resources in formulating their own rules in reliance upon the existing or any extended rule-making power.

Proposed Model Rules

- 12 As set out in the Previous Submissions, Arnold Bloch Leibler's proposal is that the model rules should include the following three options for Owners Corporations:
- (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
 - (ii) smoking within the common property or in such a way that smoke permeates the common property or another lot,(if no rule is selected, this is to be the default rule) (**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;
 - (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 (**Extended Rule**).

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?

The Proposed Model Rules are based on reasonable presumptions of lot owners' expectations

- 13 As acknowledged in the Options Paper at page 24, the stakeholder feedback received by Consumer Affairs Victoria shows that there is community support for model rules which cover smoke drift from private lots.
- 14 That community support is already widely recognised in Australia's legal framework both on a domestic scale and an international scale.
- 15 Domestically, there is increasing regulation of smoking, including in relation to private property. For example, in 2009, the Tobacco Act 1987

was amended to include section 5S which makes it an offence to smoke in a motor vehicle with a child.

- 16 Internationally, Australia's status as a party to the FCTC recognises our international commitment to public health and tobacco control and is reflective of broader community values regarding tobacco smoke exposure.

The Proposed Model Rules are adequate

- 17 Arnold Bloch Leibler submits that, in practice, to control smoke drift from private lots, Owners Corporations must, necessarily, be clearly and unambiguously empowered to regulate smoking in private lots. Any model law which does not provide for this power would be inadequate and ineffective to address the serious health hazard posed by smoke drift.
- 18 For that reason, the Proposed Model Rules envisage a minimum Default Rule, which regulates both smoking on common property and smoke drift into common property or other lots.
- 19 However, the Proposed Model Rules also provide for an Extended Rule which prohibits smoking within a lot, that is, on private property. Arnold Bloch Leibler submits that this further rule is required, as an option, to ensure that Owners Corporations have the ability to clearly and effectively protect lot owners and occupiers from exposure to smoke, should they chose to do so.

Conclusion

- 20 Smoke drift is detrimental to the quiet enjoyment of one's own home and is an internationally acknowledged health hazard. It is therefore imperative that Owners Corporations not only have the ability to regulate smoke drift, but also that the issue is expressly addressed in the model rules.
- 21 It is time that our current legal framework for Owners Corporations was amended to reflect community standards and Australia's broader international and domestic commitment to public health and tobacco control.

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

Yours sincerely



Leon Zwier
Partner