



The Hon Jarrod Bleijie MP
Attorney-General and Minister for Justice

In reply please quote: FTP-01272, FTP-01283
Your Ref: 10.4 petitions

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Dear Mr Laurie

Thank you for your letters dated 22 May 2012 forwarding petitions numbered 1806-11 and 1861-12, tabled on 17 May 2012, about the need for protection in the *Body Corporate and Community Management Act 1997* (BCCM Act) against exposure to second-hand smoke in community titles schemes.

Smoking is a serious public health issue and I appreciate the concerns these petitions raise. While cigarette smoking is subject to legislative control, it is not illegal. The *Tobacco and Other Smoking Products Act 1998* prohibits smoking in an enclosed space. However, for residential accommodation comprising lots in a community titles scheme, this prohibition only applies to common areas. Officers of Queensland Health have advised that at this stage, there are no plans to further regulate smoking in community titles schemes under this Act.

Community titles schemes are typically characterised by reduced living spaces and close proximity between neighbours. In recognition of this, section 167 of the BCCM Act provides that an occupier of a lot in a community titles scheme must refrain from using their lot, or the common property, in a way that causes a nuisance, hazard or interferes unreasonably with the use and enjoyment of another lot, or the common property, in the scheme.

The question of whether or not smoking could constitute a nuisance for the purposes of section 167 was tested in the Queensland Civil and Administrative Tribunal (QCAT) decision of *Norbury v Hogan* [2010] QCATA 27. There it was determined that to establish nuisance, the objective test of unreasonable interference with use and enjoyment of the property must be satisfied. Therefore, nuisance will only be established under section 167 where an ordinary person, irrespective of particular sensitivities, would find the smoke constitutes an unreasonable interference.

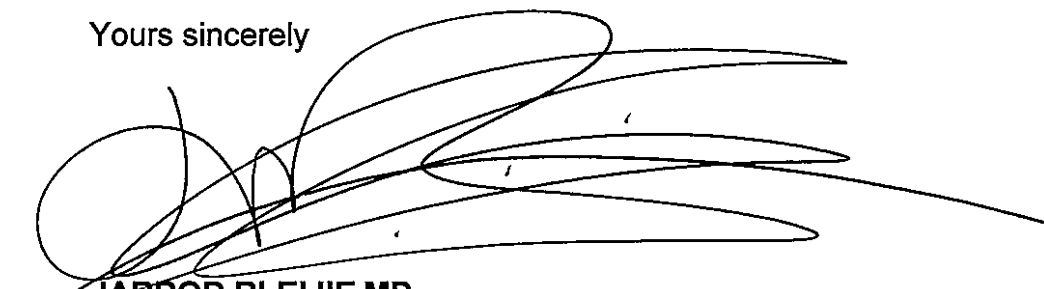
Although there is a natural sympathy for those who may be particularly sensitive to cigarette smoke, the use of an objective test is conducive to balancing the right to peaceful enjoyment of one's own lot, the rights of other lot owners and, the right to enjoy the common property. Therefore, smoke emanating from another lot in the scheme may well amount to nuisance but the smoke would have to be of such volume or frequency that it would interfere unreasonably with the life of another lot owner of ordinary sensitivity.

Notwithstanding the above, I understand that at this time there is an ongoing appeal to QCAT concerning the appropriateness of the section 167 test.

Petition 1861-12 also calls for legislative amendment under the *Residential Tenancies and Rooming Accommodation Act 2008*. In this regard, officers of the Residential Tenancies Authority have advised that it is preferable that any rules about smoking in community titles schemes should apply regardless of someone's tenure. Therefore, it is not appropriate to regulate smoking behaviour under this Act, as it would only affect tenants and not occupants generally.

I trust this information has been of assistance.

Yours sincerely



JARROD BLEIJIE MP
Attorney-General and Minister for Justice