

STRATUM

LEGAL

what a nuisance

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Cigarette smoke can be more of a nuisance for some people than others. In the QCAT decision of *Norbury v Hogan [2010] QCAT 296* the President of the Tribunal had to consider the effect of Ms Norbury's smoking on her neighbor Mr Hogan. The QCAT decision was an appeal on a question of law from a departmental adjudication.

Smoking as a nuisance

Mr Hogan had originally taken his complaint about Ms Norbury's smoking to departmental adjudication. At the adjudication he led evidence of his medically diagnosed sensitivity to cigarette smoke. Mr Hogan alleged that cigarette smoke from Ms Norbury in Lot 2 drifted into his Lot 5, causing him a significant nuisance. Mr Hogan asserted that Ms Norbury's smoking amounted to a breach of Section 167 of the *Body Corporate and Community Management Act 1997* ("**BCCM ACT**") which provides that:

"The occupier of a lot included in a community titles scheme must not use or permit the use of, the lot or the common property in a way that –

- (a) causes a nuisance or hazard; or*
- (b) interferes unreasonably with the use or enjoyment of another lot included in the Scheme; or*
- (c) interferes unreasonably with the use or enjoyment of the common property by a person who is lawfully on the common property."*

The Adjudicator's decision

In the first instance the Adjudicator found there was a reasonable likelihood that persons smoking on Lot 2, including Ms Norbury, or the adjacent common property, might cause nuisance to Mr Hogan, including by unreasonably interfering with his use of his lot. The Adjudicator also found that Ms Norbury was aware of the harm the cigarette smoke was causing Mr Hogan, due to his medical

sensitivity, and that she did not take reasonable steps to minimise the effects of her smoking.

Taking this into account the Adjudicator ordered that Ms Norbury give consideration to the effects of cigarette smoke on Mr Hogan, that she take reasonable steps to ensure that smoking in Lot 2 or adjacent common property did not cause a nuisance to Mr Hogan or to cause unreasonable interference with his use and enjoyment of Lot 5.

The Adjudicator's orders were based on two key findings:

1. That the cigarette smoke emanating from Lot 2 was, on a subjective test (that is, with specific regard to Mr Hogan) unreasonably interfering with his use and enjoyment of his lot; and
2. Because of Mr Hogan's particular sensitivity there was a reasonable likelihood that the cigarette smoke would, in fact, cause nuisance or unreasonable interference with Mr Hogan's use and enjoyment of his lot.

The law of nuisance

Cigarette smoke is just one of a number of different types of nuisance that can arise in a community titles scheme context. Noxious fumes, dust, noise, vibration, sewerage, odours and light are all types of nuisance which can also arise. While considering Mr Hogan's plight, the Tribunal President also considered the application of the common law principles of nuisance within the community titles scheme context. The resulting decision provides a useful précis of the law including:

1. While the BCCM Act does not expressly confer a right on an owner to use the common property in a manner, or for a purpose, that does not unreasonably interfere with the exercise of similar rights by others, that is implicit in section 167.
2. There is no statutory definition of 'nuisance' or 'unreasonable interference' and therefore recourse to the common law is required.
3. Private nuisance is an unlawful and unreasonable interference with an occupier's use and enjoyment of their land or some other right over, or in connection with, it.
4. Unreasonable interference will depend on the circumstances of each case but the inconvenience must materially interfere with the ordinary notions of "plain and sober" persons and not merely the "elegant or dainty" habits of a complainant.
5. The nuisance must result in a substantial degree of interference according to reasonable standards for the enjoyment of the affected premises.
6. Give and take will apply in residential areas so that an ordinary and accustomed use of premises will not be considered a nuisance even if inconvenience to a neighbour is caused.
7. Nuisance does not necessarily arise because the complainant is abnormally sensitive to the nuisance being complained of.

8. Where nuisance is unreasonable, liability will normally only be imposed where the harm or risk to the complainant is greater than ought be borne by them.

The correct tests for nuisance

Applying these principles to Mr Hogan's complaint the President found that the Adjudicator erred in two critical respects. The first is that the cigarette smoke emanating from Ms Norbury's Lot 2 or the adjacent area of common property had to be of such a character or quantity that it would affect the use and enjoyment of Mr Hogan's Lot 5 even if Mr Hogan was not overly sensitive to cigarette smoke. In other words, an *objective test* of whether the cigarette smoke constituted an unreasonable interference was required and not a *subjective test*.

Secondly, the Adjudicator's decision was not retrievable because, in effect, the Adjudicator had made no finding with reference to an objective test. In other words, the Adjudicator had only made findings in relation to the likelihood of the nuisance in light of Mr Hogan's particular sensitivities and not a "normal" person using and occupying Lot 5.

So when is smoking a nuisance?

The decision is useful because it provides some certainty to smokers and non-smokers alike. If cigarette smoke emanating from a lot is of such a volume, quality or character as to be an unreasonable interference to the use and enjoyment of another "normal" owner's lot then that smoking will be caught under Section 167. Unfortunately it may take clouds of noxious smoke over prolonged periods, in high concentrations. The additional benefit of the decision however is the President's dissertation on the common law principles of nuisance, which may be relevant in the application of Section 167 to other disputes. Body Corporate Managers, Resident Unit Managers and Lot Owners should take note of those principles if they are ever party to a complaint that may be caught by Section 167.

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