



Private nuisance in Queensland community title schemes

Pursuing a nuisance claim with the Body Corporate and Community Management Office

The Body Corporate and Community Management Office has a dispute resolution service. This service is available if an owner or occupier believes a neighbour has caused a nuisance by smoking in contravention of the *Body Corporate and Community Management Act 1997 (Qld)*. The Office encourages self-resolution and conciliation first. Adjudication may be available if these processes are unsuccessful.¹

Court and adjudicators decisions on smoking nuisance claims in Queensland

Private nuisance is an interference with your property rights. The type of private nuisance being considered here is a reduction of the amenity value (i.e. your use and enjoyment) of your lot because of something a neighbour is doing on their lot.

People living in a community title scheme in Queensland must not use their lot or the common property in such a way that they cause a nuisance, hazard or interfere unreasonably with the use and enjoyment of another lot or common property.²

While smoking may be a nuisance, there have been no successful smoking nuisance cases in Queensland to date.³ In *Norbury v Hogan*⁴ it was held that the test to determine nuisance is an objective, not a subjective test⁵ and a resident bears the onus of presenting evidence that:

- the smoke complained of is **caused by the respondent** (that is, the neighbour claimed to be the source of the nuisance), and
- the smoke is of such a **volume or frequency** that it would **interfere unreasonably** with a resident of **ordinary sensitivity**.⁶

While there was sufficient basis for finding Ms Norbury's cigarette smoke permeated Mr Hogan's unit, and it was unsurprising that Mr Hogan's use and enjoyment of his lot was, from his point of view

(i.e. subjectively), being interfered with⁷, the adjudicator's original finding of nuisance was set aside.

In residential areas the principle of "give and take, live and let live" applies to nuisance cases. Therefore, smoking, which is a lawful and an 'ordinary and accustomed' use of a lot, will not be considered a nuisance even if there is some inconvenience to a neighbour.⁸ The interference must be substantial according to reasonable standards for the use and enjoyment of a lot.⁹

Nor can a nuisance be established because a resident has an abnormal sensitivity to second-hand smoke, for example asthma or a respiratory condition. The court said:

"Although there is natural sympathy for Mr Hogan's particular circumstances it does not follow that an ordinary person, without his sensitivities, would also find that cigarette smoke constitutes an unreasonable interference."¹⁰

Also, while the circumstances of each case must be considered, a nuisance has to be something that materially interferes with the use and enjoyment of a reasonable and rational person and not delicate or fussy person.¹¹

Based on *Norbury v Hogan* and the subsequent decisions of *Admiralty Towers*¹² and *Carson Place*¹³, a smoking nuisance cannot be proved by:

- The mere existence of smoke or the fact that a resident has been affected by smoke.¹⁴
- A subjective statement from a resident that smoke is unreasonable to them.¹⁵
- Evidence on the health hazards of second-hand smoke.¹⁶
- A medical certificate from a doctor describing a resident's asthma or allergic or 'abnormal' sensitivity to smoke.¹⁷
- A diary that does not adequately quantify the volume and frequency of smoke or detail the way in which smoke has interfered with use and enjoyment of a lot.¹⁸

Smoke-drift in multi-unit housing

It was suggested to Mr Hogan that he consider engaging a person to monitor air quality in his lot and the findings of a person with appropriate qualifications or expertise may be relevant to determining whether the smoke-drift was a nuisance.¹⁹

Admiralty Towers and *Carson Place* confirmed the applicant bears the onus of presenting objective evidence. While acknowledging the difficulty of getting scientific measurement of smoke the adjudicators said the applicants did not even provide any description or subjective quantification of the smoke they experienced.²⁰ If a diary is kept in an endeavour to prove a smoking nuisance, at the minimum, it should:

- show that the smoke complained of is in fact caused by the respondent
- record the frequency (date, time and duration) of the smoke infiltration
- quantify the volume (extent, degree or intensity) of smoke entering the lot, and²¹
- describe how the smoke interfered with the use and enjoyment of the lot (e.g. odour, physical or health effects, odour removal or cleaning, or other impact on use and enjoyment of the lot)

Such a diary would also complement and support air quality monitoring evidence.



How to quit

Call Quitline 13 QUIT (13 7848) for free information, practical assistance and support.

Discuss quitting smoking with a health professional and plan your quitting strategy together.

Consider using pharmacotherapy such as Nicotine Replacement Therapy (NRT), Bupropion Hcl or Varenicline.

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Endnotes: ¹ Information on the Body Corporate and Community Management dispute resolution service is available at: <http://www.justice.qld.gov.au/justice-services/body-corporate-and-community-management/dispute-resolution>. ² Section 167 Body Corporate and Community Management Act 1997 (Qld). ³ North Shore Apartments [2003] QBCCMCmr 505 (13 May 2003); Villas Mermaid [2005] QBCCMCmr 582 (20 October 2005); Bacala Park [2006] QBCCMCmr 412 to 417 (31 July 2006); Heritage Village Ormiston West [2007] QBCCMCmr 565 (20 September 2007); Norbury v Hogan [2010] QCATA 27; Sun Crest [2010] QBCCMCmr 524 (24 November 2010); Admiralty Towers [2011] QBCCMCmr 264 (23 June 2011); Carson Place [2012] QBCCMCmr 503 (8 November 2012). ⁴ Norbury v Hogan [2010] QCATA 27. ⁵ Norbury v Hogan at 26. ⁶ Norbury v Hogan at 28. ⁷ Norbury v Hogan at 25 and 26. ⁸ Norbury v Hogan at 17. ⁹ Norbury v Hogan at 15. ¹⁰ Norbury v Hogan at 27. ¹¹ Norbury v Hogan at 14. ¹² Admiralty Towers [2011] QBCCMCmr 264 (23 June 2011). ¹³ Carson Place [2012] QBCCMCmr 503 (8 November 2012). ¹⁴ Norbury v Hogan at 45. ¹⁵ Norbury v Hogan at 46. ¹⁶ Carson Place at 26. ¹⁷ Norbury v Hogan at 18 and 27. ¹⁸ Admiralty Towers at 47 and 48. ¹⁹ Sun Crest [2010] QBCCMCmr 524 (24 November 2010) Sun Crest was the determination of the adjudicator after the matter was returned following the Tribunal's decision in Norbury v Hogan. ²⁰ Carson Place at 29. Admiralty Towers at 49. ²¹ While Norbury v Hogan refers to "volume or frequency" both Admiralty Towers and Carson Place refer to "volume and frequency".