

Don't be a Nuisance

What is "nuisance"?

We are all familiar with the concept of something or someone being a nuisance, in the sense of acceptable behaviour and manners. However, nuisance can also be the basis for a legal claim (a.k.a. tort), which can be extremely useful in resolving certain kinds of dispute, particularly disputes between adjoining landowners. In this sense, it will generally involve substantial and unlawful interference with another person's enjoyment of their land, short of entry onto their land (a.k.a. trespass), say by noise, light, fumes, odours or water run-off. This will have particular application in a strata context.

One difficulty with establishing occurrence of an actionable nuisance is that the requirements can be unclear, being somewhat subjective and context specific. This was largely the result of courts historically attempting to address the wide range of possible scenarios by adopting a test based on reasonableness. However, a recent High Court case has taken a different path and in doing so provided useful guidance on what is required. Key aspects:

- The case involved nuisance from construction work involving the light rail project in George Street Sydney, but has much broader application than that. The nuisance involved noise, dust and restricted access, aggravated by a contractual framework that had the effect of prolonging the duration of the disruption.
- The High Court did not apply a "reasonableness" test, rather applying an older (19th-century) test based on "ordinary uses of land", essentially finding that an actionable nuisance required:
 - substantial interference with enjoyment of land; and
 - the defendant using the defendant's land either:
 - for a purpose that is "not common and ordinary"; or
 - in a manner not convenient to the plaintiff, e.g. failing to take all reasonable steps to minimise interference with the plaintiff's land.
- The decision was a close thing and leaves some questions. In particular:
 - Two of the five High Court judges hearing the case (and the Court of Appeal before it) actually applied a "reasonableness" test, so there may well still be some life in that, at least in relation to how future judges construe "common and ordinary use".

Also, note that Section 153 of the Strata Schemes Management Act 2015 contemplates a tribunal action based on nuisance (which would now presumably require application of a "common and ordinary use" test), as well as a tribunal action based on a "reasonableness" test, suggesting the likelihood of a "lowest common denominator" approach in such applications.

- One of the three High Court judges applying the "common and ordinary use" test considered a light rail project to be a common and ordinary use (at least for a commercial property in George Street, where trams had run historically), finding for the plaintiff on the alternative "convenience" criteria, i.e. only two judges decided the case on the basis of the construction works alone. This will not greatly assist a plaintiff asserting nuisance based on construction works (particularly construction works involving more commonplace works than construction of a light rail project), necessitating greater reliance on the alternative criteria, i.e. failing to take all reasonable steps to minimise interference with the plaintiff's land.

There are some other difficulties with pursuing a nuisance claim, particularly:

- Some statutory provisions exclude a common law action, replacing it with a statutory alternative, e.g. Section 5 of the Trees (Disputes between Neighbours) Act 2006.
- Some statutory provisions permit an action, which is essentially a nuisance action, but with different scope and requirements, e.g. Section 153 of the Strata Schemes Management Act 2015.
- The Limitations Act 1969 imposes a time limit for actions, essentially providing that the right to bring an action is lost if not exercised within six years of the cause of action arising, which in this context will generally mean commencement of the nuisance. That can be a real problem, as it is not unusual for a nuisance to increase in severity over time, for an affected owner to gradually lose patience or for ownership to change.

This means that an owner or occupant who has lost patience with an ongoing nuisance will face difficult questions, which will likely require legal advice. In particular

- Is a nuisance action (under common law) available at all?
- If not, is an alternate action available? This will generally be the case in a strata context.
- Would an alternative action be available and be preferable? This may well be the case in a strata context.

Examples of Nuisance

Construction Dust – Dust and materials being blown from your site to neighbouring properties.

In *The Owners Strata Plan No. 72250 v Letmin Pty Limited t/as Dubbo Powder Coating [2020] NSWDC 378*, the NSW District Court found in favour of an owners corporation seeking damages from a lot owner.

The lot owner was carrying out an abrasive blasting and powder coating business from his lot.



T: (02) 9929 0226 M: 0403 738 996 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

The Court found that the lot owner was causing a nuisance by allowing the dust created by the business to enter the common property and other lots in the strata scheme.

Trees – Tree branches or roots encroaching on neighbouring properties.

Trees (Disputes Between Neighbours) Act 2006 (NSW) generally applies to any trees causing nuisance to neighbouring properties on urban land.

If the Trees (Disputes Between Neighbours) Act 2006 (NSW) applies, then you cannot make a claim under the common law action of nuisance in relation to damage caused by that tree.

Therefore, an action of nuisance is only applicable for trees on Council land and/or rural land.

In the case of *Dimitrios Michos & Another v Council of the City of Botany Bay* [2012], the NSW Supreme Court held that a council was liable in nuisance (and in negligence) for damage to private land caused by tree roots originating from council owned land. The Court awarded damages (compensation) to the owners of the private land against the council and also granted a mandatory injunction requiring the council to take steps to prevent the ongoing nuisance caused by the tree roots.

Noise – for example, noise coming from the lot upstairs since they installed hard floors or the noise coming from a nearby property.

You may have an action in nuisance if there is noise coming from a lot upstairs due to the installation of hard floors or the noise coming from a nearby property.

In the case of *Vincent v Peacock* [1973] 1 NSWLR 466, the Court held a person's conduct was in nuisance and granted an injunction restraining a person from engaging in conduct comprised of singing, shouting, whistling and using unseemly words in his own premises, in the street and in a public park when his conduct affected the amenity and reasonable enjoyment of tenants of a house on the opposite side of the street.

Smoke – for example a lot owner smoking on the balcony of their lot upsetting other lot owners who can smell the smoke in their lot.

You may have an action in nuisance if a lot owner smoking on the balcony of their lot upsets you and/or other lot owners who can smell the smoke in their lot.

In the case of *Gisks v The Owners – Strata Plan No 6743; The Owners – Strata Plan No 6743 v Gisks* [2019] NSWCATCD 44 (28 May 2019), the NSW Civil and Administrative Tribunal (NCAT) held that the smoke drift from one lot into another lot was a hazard and that the smoke drift was a nuisance as it was “an interference with the lot owner's use and enjoyment of their lot which is substantial and unreasonable”. In this case, NCAT made orders preventing the lot owner from smoking on her balcony and requiring her to close windows when smoking indoors.

Hazard – for example toxic mould being in a lot which may spread to other lots.

You may have an action in nuisance if there is toxic mould or other hazardous materials in a lot which may spread to other lots.

In *The Owners Strata Plan No. 72250 v Letmin Pty Limited t/as Dubbo Powder Coating* [2020] NSWDC 378, the NSW District Court found in favour of an owners corporation seeking damages from a lot owner for causing nuisance by allowing hazardous materials created by the lot owner to enter the common property and other lots in the strata scheme.

Strata Legislation

Section 153(1) of the Strata Schemes Management Act 2015 (NSW) specifically sets out provisions regarding nuisance in strata schemes and provides strata owners or occupiers with certain rights.

What does the above mean for you?

If you and/or your family has recently or is currently suffering from any of the above, then you may have an action in nuisance.

We have considerable experience with these issues and would be pleased to help if you need assistance with them, particularly if an owner or occupant of an adjoining property is using that property in a way which undermines your enjoyment of your own property. In a strata context, this may involve amenity issues such as noise and smoking and be capable of resolution by a relatively straightforward and inexpensive Tribunal application.

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Prepared by Bannermans Lawyers

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T: (02) 9929 0226 M: 0403 738 996 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

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