

Don't be a Nuisance

What is "nuisance"?

Nuisance is defined by the Oxford Dictionary as: "a person or thing causing inconvenience or annoyance."

In NSW, private nuisance laws are generally derived from case law (the common law), rather than statutes and legislation.

Nuisance can be used to address a number of environmental concerns including interference with your enjoyment of property caused by dust, noise, vibration, sewerage, odours, light and the flow of water.

The issue of nuisance in strata schemes has always been a controversial and hotly contested issue. Section 153(1) of the Strata Schemes Management Act 2015 (NSW) sets out provisions regarding nuisance in strata schemes.

General Principles

There are many instances where you may be causing a nuisance or the victim of nuisance. Generally speaking, the following must be established in order to sue someone for nuisance:

1. You have a legal interest in the land (you own the property);
2. The wrongdoer has interfered with your use and enjoyment of that land; and
3. The interference was both substantial and unreasonable (*Hargrave v Goldman* [1963] HCA 56).

If the wrongdoer has not created the situation which results in the suffering party sustaining damage or liability in nuisance, but the wrongdoer has adopted or continues the nuisance with knowledge of its effect, then nuisance is established (*City of Richmond v Scantelbury* [1991] VicRp 44; *Montana Hotels Pty Ltd v Fasson Pty Ltd* (1986)).

It must be reasonably foreseeable that there is a risk of damage if the use of the wrongdoer's land which amounts to the nuisance is continued (Kaye J in *City of Richmond v Scantelbury* [1991] VicRp 44).

In determining 'unreasonable interference' the Court considers:

1. the locality in which the interference occurs and the ordinary use of the land: *Sturges v Bridgman* (1879);

2. the duration, time of day, frequency and extent of the interference: *Halsey v Esso Petroleum Co Ltd* [1961]; and
3. any malice on the part of the person causing the interference: *Christie v Davey* [1893].

There may be some exceptions, but fault of some kind is now usually necessary for liability in nuisance: *Sutherland Shire Council v Becker* [2006]; *Gales Holdings Pty Ltd v Tweed Shire Council* [2011].

In *Torette House Pty Ltd v Berkman* [1940] the Court determined the following principle: “A person is liable for a nuisance constituted by the state of his property ... if, when it has arisen without his own act or default, he omits to remedy it within a reasonable time after he did or ought to have become aware of it.”

According to s14(b) of the Limitation Act 1969 NSW, you must commence proceedings within 6 years of the date the nuisance began.

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.

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.

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