



Civil and Administrative Tribunal New South Wales

Case Name: **Pittman v Newport**

Medium Neutral Citation: [2022] NSWCATCD

Hearing Date(s): 6 July 2022

Date of Orders: 11 October 2022

Date of Decision: 11 October 2022

Jurisdiction: Consumer and Commercial Division

Before: P French, Senior Member

Decision:

- (1) The respondent Lot Owners, Desmond Newport and Carmen Traynor, must not smoke tobacco products on the balcony of their Lot (unit 201).
- (2) The respondent Lot Owners, Desmond Newport and Carmen Traynor, must not cause or permit any other person to smoke tobacco products on the balcony of their Lot (unit 201).
- (3) The respondent Lot Owners, Desmond Newport and Carmen Traynor, must not cause or permit smoke, fumes or odour of any tobacco product to be emitted from the interior of their Lot (unit 201) into the applicant Lot Owners' Lot (unit 301).

Catchwords: LAND LAW – Strata title – nuisance – hazard - tobacco smoke transmission between lots

- Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW) – s 38
 Interpretation Act 1987 (NSW) – ss 34, 35
 Smoke-free Environment Act 2000 (NSW) – ss 3, 6, 6A, Schedule 1
 Strata Schemes Management Act 2015 (NSW) – ss 153, 241
- Cases Cited: *Artique* [221] QBCCMCmr 596
Bhandari v Laming [2015] NSWCATAP 224
Bill Sheath and Rhonda Sheath v Rick Whitely and Sandra Whitely [2014] NSWCATCD 44
Briginshaw v Briginshaw [1938] 60 CLR 336
Chehelnabi v Gourmet and Leisure Holdings Pty Ltd [2020] NSWCATAP 102
Gisks v The Owners – Strata Plan No 6743; The Owners – Strata Plan No 6743 v Gisks [2019] NSWCATCD 44
Mirana Investments Pty Ltd and Ors v Coupe [2012] QCATA 187
Newport v Pittman [2022] NSWCATAP 150
Owners Corporation SP 49822 v May & Ors (Strata & Community Schemes) [2006] NSWCTTT 739
March v E & MH Stramare Pty Ltd [1991] HCA 12; (1991) 171 CLR 506
The Owners Strata Plan No 2245 v Veney [2020] NSWSC 134
- Texts Cited: Australian Standard AS1170 Structural Design Actions – Part 2 – Wind Action
 Consultation Draft National Tobacco Strategy 2022 - 2030, Commonwealth of Australia, 2022
 Grace, C, Greenhalgh, EM and Tumini, V, 15.6 Smoking bans in the home and car, Tobacco in Australia: Facts and Issues, Melbourne, Cancer Council Victoria, 2022
 Hwang, J & Lee K, Determination of outdoor tobacco smoke exposure by distance from a smoking source, Oxford Academic, 2014
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Conference of the Parties to the WHO Framework Convention on Tobacco Control, Second Session, Bangkok, 30 June – 6 July 2007: Decisions and Ancillary Documents, Geneva, 2008

Category: Principal judgment

Parties: Brenton Mark Pittman (First applicant)
Lynette Robyn Cartwright (Second applicant)
Desmond Newport (First respondent)
Carmen Traynor (Second respondent)

Representation: Solicitor:
K Hadden, Oneills Law, (First and Second applicants)

Desmond Newport (Self-represented)
Carmen Traynor (Self represented)

File Number(s): SC 22/21006

Publication Restriction: Nil

REASONS FOR DECISION

Introduction

- 1 This is an application by Brenton Mark Pittman and Lynette Cartwright (**the applicant Lot Owners**) for orders pursuant to s 241 of the *Strata Schemes Management Act 2015* (**the Act; SSM Act**) that would require Desmond Newport and Carmen Traynor (also known as Carmen Newport) (**the respondent Lot Owners**) to comply with the obligation imposed on them by s 153(1)(a) of the Act not to use or enjoy their Lot, or permit the their Lot to be used or enjoyed, in a manner or for a purpose that causes a nuisance or hazard to the applicant Lot Owners. Specifically, the applicant Lot Owners want orders that will compel the respondent Lot Owners to cease using their Lot in any way that permits cigarette smoke to drift into their Lot. This application was made to the Tribunal on 13 September 2021 (**the application**).
- 2 For the reasons set out following, I have made the orders sought by the applicant Lot Owners. I am satisfied that the respondent Lot Owners persistently use and enjoy their Lot to smoke cigarettes which generate smoke, fumes and odour that drifts into the applicant Lot Owners Lot, causing them nuisance and hazard, contrary to s 153(1)(a) of the Act.

Procedural history

- 3 The application was first heard and determined in the applicant Lot Owners favour by a Tribunal, differently constituted, on 1 December 2021. That decision was the subject of a successful appeal by the respondent Lot Owners: *Newport v Pittman* [2022] NSWCATAP 150. In a decision delivered on 24 March 2022, an Appeal Panel allowed the appeal, set aside the first instance decision of 1 December 2021, and remitted the application for redetermination either with or without further evidence.
- 4 The remitted application first came before the Tribunal, differently constituted, for Directions by AVL in a VMR on 24 May 2022. Each party attended that listing of the application. At the conclusion of the directions hearing, the Tribunal adjourned the remitted application to a Special Fixture Hearing and

issued directions to the parties for the filing and exchange of the documentary evidence that they intended to rely on at that hearing. The directions did not limit the parties to the documents they had filed and exchanged in the original proceedings. Leave was granted to both parties to be represented in the proceedings by an Australian Legal Practitioner.

5 I note that the following directions were among those the parties were required to comply with:

7. All evidence from a party and a party's witnesses in support of that party must be in the form of a witness statement, statutory declaration, affidavit or expert report as appropriate.
8. All witnesses must be available at the hearing for the purpose of cross-examination.

Evidence and hearing

6 Both parties responded to the Tribunal directions for the filing and exchange of documentary evidence. The applicant Lot Owners relied upon two bundles of documents filed on 8 and 30 June 2022. The bundle filed on 8 June 2022 was not subject to objection and was marked Exhibit A1. Exhibit A1 included an Affidavit of Brenton Pittman dated 6 June 2022 and an Affidavit of Lynette Cartwright also dated 6 June 2022. The bundle filed on 30 June 2022 comprised 5 personal references for the applicant Lot Owners. The applicant Lot Owners' solicitor, Ms Hadden, informed the Tribunal it was only to be relied upon to the extent that the character of the applicant Lot Owners was permitted to come into issue in the proceedings. It was therefore marked for identification (MFI 1), but ultimately not admitted into evidence for reasons explained following. The applicant Lot Owners also relied upon an outline of submissions filed on 30 June 2022.

7 The respondent Lot Owners sought to rely upon a bundle of documents filed on 21 June 2022. The bundle included an informal statement entitled "response to the applicant's submission" signed by both respondent Lot Owners. I allowed an objection to paragraph 6 of page 1 of that document on the basis that the persons referred to in that paragraph had not been put forward as witnesses and the hearsay assertions made could not be tested even if they were relevant

to a fact in issue which they were not. The remainder of the statement was marked Exhibit R1. I note that there were other objections to parts of this document which I determined went to weight rather than admissibility.

- 8 The bundle also included 7 informal 'statements' addressed either to one or both the respondent Lot Owners, or, 'to whom it may concern'. None of these informal statements complied with direction 7 of the directions issued to parties on 24 May 2022 in relation to the preparation of their evidence. Each statement was subject to objection on this basis and on the basis that the respondent Lot Owners advised initially that none of the authors of those statements would be available as witnesses at the hearing.

- 9 At page numbered 5 of the bundle there was an undated, unsigned letter to the first respondent addressed as "Des" from a person who identified himself as "Mark". On their cover sheet the respondent Lot Owners identified this person as Mark Cowling who is the owner of Unit 302 in the Strata Plan. I allowed the further objection to the tender of this statement in its entirety on the basis that it did not relate to a fact in issue.

- 10 At page numbered 9 there was an email addressed 'to whom it may concern at NCAAT' from Heather Thiele. On their cover sheet the respondent Lot Owners identified Ms Thiele as lot owner (or at least occupier) of unit 202 in the Strata Plan. I allowed the further objection to the tender of this document in its entirety on the basis that its' contents did not relate to a fact in issue.

- 11 At page numbered 10 was what appears to be an email attachment which is unsigned and undated, addressed to '... Des and Carmen" from 'Jill and Leigh'. On their cover sheet the respondent Lot Owners identify these persons as Leigh and Jill Cuncliffe who are lot owners (or at least occupiers) of Unit 101 in the Strata Plan. I allowed an objection to the tender of all but the second and third last sentences of that document because it otherwise did not relate to a fact in issue.

- 12 At page numbered 12 was a 'memo' to NCAT from Kathleen Burson who identifies herself as a former owner of Unit 101 in the Strata Plan and former Strata Committee Member. I allowed an objection to the tender of the entirety of that document on the basis that it did not relate to a fact in issue.
- 13 At pages numbered 13 and 14 was an unsigned letter dated 2 October 2021 addressed to "... Des and Carmen" from Kathleen Hughes "and in support, Dr C Paul Vlagsma" (whatever that may mean). Ms Hughes identifies herself as a former tenant of Unit 201 between March 2020 and March 2021. I allowed an objection to the tender of that document excepting paragraphs 3 and 7 on the basis that it otherwise did not relate to a fact in issue.
- 14 The objections I allowed related to statements that sought to impugn the character of the applicant Lot Owners on matters not related to the issues for determination in this proceeding.
- 15 I marked the remainder of the respondent Lot Owners' witness evidence for identification as follows subject to the respondent Lot Owners making arrangements for these witnesses to appear at the hearing to be available for cross-examination (as to which see following):
- (a) MFI 2: (another) letter addressed 'to whom it may concern' from Mark Cowling signed and dated 31 September 2021 (later admitted as Exhibit R2),
 - (b) MFI 3: undated and unsigned letter addressed 'to whom it may concern' from Donna Quail,
 - (c) MFI 4: (another) undated and unsigned letter addressed 'to whom it may concern' from Heather Thiele,
 - (d) MFI 5: Second and third last sentences of the undated unsigned document authored by Leigh and Jill Cuncliffe (later admitted as Exhibit R3),

- (e) MFI 6: signed document addressed 'to whom it may concern' authored by Janice Rose Michaels and Nathaniel Samuel Michaels (later admitted as Exhibit R4).
- (f) MFI 7: paragraphs numbered 3 and 7 of the unsigned letter dated 2 October 2021 addressed to "Des and Carmen" from Kathleen Hughes.

- 16 I note that the documents that are recorded as being admitted into evidence were admitted because their authors were ultimately made available as witnesses for cross-examination. The remainder of these 'statements' were not admitted because their authors were not made available as witnesses for cross-examination.
- 17 The Special Fixture Hearing was conducted by AVL in a VMR in accordance with NCAT's COVID-19 Revised Hearing Procedure as it was in force at that time. The applicant Lot Owners were represented at the hearing by their solicitor, Ms K Hadden. Both applicant Lot Owners attended the hearing, and both were called to give evidence under oath. The respondent Lot Owners both attended the hearing in person, and both gave evidence in their own cause under affirmation. Ms Traynor was primarily responsible for the presentation of their case.
- 18 As already noted, at the start of the hearing, the respondent Lot Owners advised that they did not intend to make any of their witnesses available to give evidence at the hearing. They claimed not to know that this would be required despite the Tribunal's directions dated 24 May 2022, and complained about the inconvenience this would occasion their witnesses. When it became apparent that this would likely result in this witness evidence being rejected or given little weight, the Lot Owners requested the opportunity to arrange for their witnesses to appear. Although this was irregular and subject to objection, I allowed this to occur having regard to the Tribunal's obligations under ss 38(5)(c) and 38(6)(a) of the *Civil and Administrative Tribunal Act 2013* (NSW) to ensure that

the respondent Lot Owners had a reasonable opportunity to mount their defence, bearing in mind that they were self-represented litigants.

- 19 The respondent Lot Owners were able to arrange for Mr Mark Cowling, Ms Jan(ice) Michael, Mr Sam Michael, and Mr Leigh Cuncliffe to give evidence at the hearing.
- 20 The parties had the opportunity to present their respective cases, to ask the witnesses questions, and to make final submissions to the Tribunal.

Material facts

- 21 The applicants are the owners of Unit 301 which is a Lot in Strata Plan 94153. They have occupied Unit 301 as a residence since they purchased it in September 2016. From October 2016 until the end of July 2021 Mr Pittman was engaged in part-time employment and also used Unit 301 (principally, the 'study nook') as a work place.
- 22 The respondents are the owners of Unit 201 which is also a Lot in Strata 94153. They have occupied Lot 201 since they purchased it in or about June 2021.
- 23 Strata Plan 94153 is comprised of 6 Lots situated in a medium rise apartment block in Kingscliff. There are two Lots on each level, one of which is on the southeast face (or left side) of the building and the other on the northeast face (or right-hand side) of the building. Unit 301 is on the top level of the building. Unit 201 is on the middle level (not including the basement car park). Unit 301 and 201 are at the front of building on the left side. Unit 301 is immediately above Unit 201.
- 24 Both Units 301 and 201 have covered unenclosed large "L-shaped" balconies across the front and left side onto which doors open from the interior on each face. The balconies are constructed of glass with steel posts and are 1.8m high. There are full length gaps between each glass panel that appear to be approximately 5cm wide and there is a gap of approximately the same size

between the bottom of each glass panel and the balcony surface. The balcony doors of both Lots have ventilation panels that allow for moisture dissipation.

- 25 The Unit 301 balcony extends in front of main bedroom, and the living and dining room on two sides. The front section of Unit 301 is open plan which means that the study nook and kitchen also receive direct air flow through the balcony doors.
- 26 It is approximately 4 metres from the top of the floor of the balcony of Unit 201 and the top of the floor of the balcony of Unit 301. It is approximately 7 metres from the floor of Lot 201 into the main bedroom and open plan living room of Unit 301.
- 27 The front of the building faces a public street on the other side of which is a narrow parkland leading onto a beachfront and beach. On the right side of the building is a public street on the other side of which is another apartment complex. There is another apartment complex on the left side of the building which appears to be separated only by gardens and pathways. Behind the building is a back lane. Immediately opposite the building across that back lane is another apartment block.
- 28 The By-Laws of Strata Plan 94153 do not contain any By-Law relating to cigarette smoking on lot or common property. At the Annual General Meeting of the Owners Corporation for the Strata Plan conducted on 28 October 2021 the applicant Lot Owners sought a Special Resolution to adopt a model By-law prohibiting smoke drift/penetration. However, that motion was defeated.
- 29 It is not in issue that both respondent Lot Owners smoke cigarettes. It is in dispute how many they each smoke each day, at what times, and in what locations on their Lot. In their Notice of Appeal from the original determination of this application the respondent Lot Owners stated the following, which is recorded at paragraphs [7] and [8] of the Appeal Panel decision:

“We wish to have the order to refrain from smoking on our balcony lifted. We wish to have the order to smoke inside our apartment lifted with all doors and windows closed lifted”

[The order sought by the respondent Lot Owners on Appeal was] “We are free to smoke on our balcony provided there is a wind blowing at the velocity of over 10 km/h. We have up-to-the-minute weather conditions on our iPhones.”

30 The dispute that is before the Tribunal began to develop shortly after the respondent Lot Owners took up occupation of Lot 201.

31 On 5 July 2021 the applicant Lot Owners sent an email to the respondent Lot Owners which states as follows:

Just a very sensitive matter we need to raise in regard to cigarette smoke drift. We are regularly receiving smoke drift into our apartment. We do try now to keep our glass doors closed as much as possible, but we still catch the drift. It's making the balcony unusable for us, and we need to close up the unit regularly, and even then we get the smell. We ask if you could please prevent the smoke drifting into our apartment. We are very sorry to raise this sensitive matter with you but [it's] causing us issues
Please be aware of the following legislation [weblink to s 153 SSM Act]

32 The respondent Lot Owners did not reply to this email (they claim not to have received it).

33 On 18 July 2021 the applicant Lot Owners wrote to the respondent Lot Owners again by email stating as follows:

We are sorry to again raise this sensitive and delicate matter with you. We are having difficulty coping with smoke-drift that is entering our apartment and balcony. We are now keeping our doors and windows closed more than 95% of each day. What we are not able to block is the scores of weep holes in our glass panes, the minimal and occasional gap between some of the glass panes, the minimal gap in our front door and the weather proof air vent in our bathroom ensuite into the hot water balcony that helps dry out that bathroom. We rarely use our balconies now, and are trying our best to mitigate smoke drift into our apartment. There is nothing we can do on our balconies to stop smoke drift. However, with these mitigation strategies, we are still noting and suffering numerous smoke-drift most days, from early morning to late at night. Between us, we are having irritated eyes, irritated and runny noses, previously unusual sneezing and coughing, and for Brenton, previously unusual, mild headaches. In our living room after 7:00pm and in our bedroom there is smoke drift present. In our bedroom at night, this is causing one or both of us sleeplessness and

irritability. The musty and stale smell persists in the main bedroom, kitchen and living area.

[personal health information is set out]

We again ask if you could please fully prevent any smoke-drift from your lot and apartment into our lot and apartment. Again, we are very sorry to raise this very sensitive matter with you.

...

[A Cancer Council Queensland brochure "Smoke-drift in multi-unit housing" was attached]

- 34 The respondent Lot Owners replied to this second email later on 18 July 2021 stating as follows:

We have received and read your email, though we must have missed the first one as I do not recall it having been raised earlier.

While we are very sorry to hear about your health issues, we are surprised to hear the smoke is causing you a problem upstairs, given the constancy of the wind here.

We will consider our position and get back to you.

- 35 The respondent Lot Owners made no further response to the applicant Lot Owners email of 18 July 2021.

- 36 On 27 July 2021 the applicant Lot Owners wrote to the respondent Lot Owners again by email to reiterate their complaint about smoke drift and to again draw attention to s 153 of the SSM Act. That email states:

Our sincere apologies for again having to raise this issue.

We are still experiencing cigarette smoke drift into our lot and apartment, while continuing to mitigate the entry into our apartment as much as possible. However, over the last week, since we last requested that you prevent the cigarette smoke drifting into our apartment, we have experienced more than 70 cigarette smoke drift events into our apartment, with some events being noted early in the morning and some late at night. We have rarely used our ocean facing balcony for the entire week due to cigarette smoke drift.

The cigarette smoke drift is penetrating through our unit into the living area, bedrooms and family room at the rear of the apartment. We have attempted to get rid of the cigarette smoke drift using fans and air-conditioner, but to little or no effect. Our windows and doors are now closed more than 95% of the day due to cigarette smoke drift.

We are experiencing health and concentration issues from this cigarette smoke drift, including the onset of headaches and increase in migraines, irritated eyes, irritated and running nose, sneezing and coughing events, sore throats, dense air, sleeplessness, irritability and loss of concentration while working. We have exhausted all blocking avenues that we can think of, to fully enjoy our apartment absent of cigarette smoke drift.

...

We again ask if you could please, and immediately, eliminate cigarette smoke drifting into our lot and apartment.

37 Mr Newport replied to this email later that day stating as follows:

I am very surprised by your email this morning. Since your second email (we seem to have missed the first one) I have not had a single cigarette within this building, either our apartment or common areas. This is not to say I agree with what you assert is the affect I am having on your lives but simply as effort on my part to be reasonable.

I am not offering this as a plausible reason for smoke in your place, but Carmen and I have often smelt smoke of an evening and wondered if some household nearby had a combustion heater.

Carmen does smoke but has reduced her intake to four (4) per day with the first one at about 9:30 in the morning and the last one at 9:30 at night. This begs the question how you could be detecting 70 events in the past week

I feel we have been very reasonable here but do not want to continue this exchange of emails. If you like to nominate a time, we [are] happy to meet you, say across the road in the park, and see if we can resolve this.

38 Both the applicant and respondent Lot Owners copied Michelle Baker, the Strata Manager for Strata Plan 94153, into their emails of 27 July 2021. The applicant Lot Owners later requested Ms Baker's assistance to facilitate a meeting between them and the respondent Lot Owners, which she agreed to do. That meeting took place on 28 July 2021, but discussions broke down without any resolution being reached.

39 On 5 August 2021 the applicant Lot owners requested the Strata Committee, via its Strata Manager to issue a notice to comply with s 153 of the SSM Act on the respondent Lot Owners. However, the Strata Committee declined to adopt a resolution authorising that action.

40 On 11 August 2021 the applicant Lot Owners applied for mediation of the dispute by a Community Justice Centre. However, the respondent Lot Owners declined to participate in mediation.

The applicant Lot Owners' witness evidence

41 In his affidavit made under oath Mr Pittman states:

4. I am not aware of residents from nearby buildings who smoke. I have on two occasions only, being 12 and 13 August 2021 observed a person

in the adjacent building on the north side of our property ... to be smoking on the patio of a south side apartment and on the ground floor. It is more than 12 meters diagonally from the lower level of our balcony. At that time, I could not smell the smoke, it did not permeate into our lot. In addition, I know that two other residents in our lot (sic, Strata Plan) are occasional smokers. It has been described to me that they may smoke a cigarette or similar approximately, once every six months, but I have not seen or smelt them do so over 6 years.

5. I am aware of the property directly behind our building ... The owner in one of the apartments smokes cigarettes, and I am aware he spends the majority of his time in Sydney. He was here last year consistently up until September 2021 and did not return again until April 2022 and stayed for approximately 11 days. I have always been aware of his smoking as I can see him from the rear of our residence. The smoke drift from his smoking has never caused a nuisance or hazard to me. His property is separated from ours by a lane way and is approximately 15metres from the rear of our lot, and approximately 29 meters from our living area and main bedroom.
6. Since I lived at the property, I am aware of sugar cane burn off. I know that the burning off generally occurs between July and December of each year. When the burn off occurs, there is a distinct smell of kerosene. In addition, our balcony is often covered with black cane ash, that is commonly called 'Kinky Snow'. This smell is distinct from cigarette smoke and does not account for any of the smoke drift that is causing and has caused a nuisance and hazard to me.
7. In approximately July 2021, I began noticing a constant and intolerable cigarette smoke drift that permeated our lot. At that point Lynette and I had been away for a few weeks and only just returned. We waited approximately one week upon our return before we said anything. However, during that time we were forced to close our doors as much as possible and restricted our use of the balcony. As a result, I could not sleep properly as the smoke drift was so dense it affected my sense of smell.
8. Lot 201 was vacant between 15 March 2021 and 31 May 2021, during this time there was no smoke drift nuisance or hazard. July 2021 was the beginning of when I noticed the smoke drift permeating our property and from which point it continued and remains intolerable and a nuisance and hazard to this day, it is affecting my health.
9. Mr and Ms Newport moved in approximately 31 May 2021. Upon our return from Queensland in June 2021, I have observed them to smoke on their balcony, and in the park across the road. Whilst I cannot see them smoking from our balcony, or see into their balcony, I have seen them on many occasions smoking on their balcony when we are walking, riding or driving past the front of the property. Both Lynette and I are keen bike riders, and we enjoy walking. We are often on foot or bicycle and pass in front of the property....
10. As a result, I was sure the smoke drift was coming from them as it directly correlated with them moving in and on numerous occasions, I can hear moving furniture on the balcony, and closing the balcony doors at the same time smoke drift occurs.

42 The applicant Lot Owners rely on a diary they maintained to record the incidence and impact of smoke drift into their Lot. A copy of that diary is in

evidence (Exhibit A1 at pages 65 to 90). In his affidavit, Mr Pittman states the following in relation to this diary:

19. Between 12 July 2021 and 9 September 2021, 6 October to 13 October 2021, and 1 December 2021 to 31 May 2022 I kept a record of the dates and times the smoke drift events occurred. The diary entries record observations from both of us of the impact of the smoke drift. On some occasions we experience the impact differently, and there are some occasions where one or both of us were home.
20. During this time the smoke drift permeated the living room, study nook, main bedroom and balcony. The impacts differed over the various occasions, which included the following:
 - (a) irritated eyes and nose,
 - (b) frequent sneezing, and blocked nose
 - (c) headaches and irritability,
 - (d) coughing and tingly/irritated throat,
 - (e) taste of cigarette smoke in my mouth,
 - (f) restless sleep and sleeplessness,
 - (g) persistent cigarette odour in the apartment.
 - (h) soft furnishings, fabric and clothing smell like cigarette odour,
 - (i) loss of concentration,
 - (j) persistent noise from the fan and Air Purifier
21. In addition to the diaries, I collated the data into a matrix spread sheet which identifies smoke drift events recorded in an hourly block. A smoke drift event refers to time, it could last anywhere from 5 minutes up to 30 minutes. A smoke drift event is not referring to one cigarette or one person smoking.
22. The first matrix refers to 12 July 2021 to 9 September 2021, the second relates to 1 December 2021 to 31 May 2022. Both matrixes include comments, a record of the wind direction, and a record of the cane burn off and our neighbour at the rear premises and the two occasions I observed a person at [apartment on right hand side] to be smoking.

43 The matrix for the period 12 July 2021 to 9 September 2021 records a total of 414 smoke drift events plotted hourly over a 24-hour period. These range from a nil recording between 12midnight and 1:00am, up to 37 between 6:00am and 7:00am, 45 between 8:00pm and 9:00pm, and 40 between 9:00pm and 10:00pm. Smoke drift events are also reported in relation to each other hour between 1 (1:00am to 2:00am) up to 27 (4:00pm to 5:00pm). The matrix for the period from 1 December 2021 to 31 May 2022 records a total of 381 smoke drift events plotted over a 24-hour period. These range from nil recordings between 12midnight and 5:00am, up to 33 between 2:00pm and 3:00pm, 37 between 3:00pm and 4:00pm, and 35 between 4:00pm and 5:00pm. Smoke drift events are also recorded in relation to each other hour between 3 (11:00pm to 12midnight) and 27 (9:00pm to 10:00pm).

44 In relation to wind direction as recorded on the matrixes, Mr Pittman gives the following evidence in his affidavit:

27. During [between?] July 2021 and May 2022, the wind in the morning is either calm, or predominately a southwest, southeast or southerly wind approximately 61% of the time. Lot 201 and 301 apartments are North facing and as such, the building blocks the southwest, southeast and southerly wind. In addition, the wind has been from a northerly direction 18% of the time. The building adjacent to us [address] protects us from a northerly breeze. Similarly, the lane way behind us [address] wind direction is predominately south to southwest and southeast, or calm in total 61% of the time, which means the wind from that direction is blowing away from our building.
28. Because of the way in which our building is protected, the lack of wind means the smoke drift drifts up into our lot and remains.

45 In relation to the applicant Lot Owners attempts to mitigate the impact of the smoke drift on them, Mr Pittman states the following in his affidavit:

23. From approximately early July 2021, because the ongoing smoke drift was and is still so intolerable, Lynette and I have been doing the following things in an attempt to mitigate the impact:
 - (a) We have our external windows [and] doors closed approximately 95% of the day and 100% at night,
 - (b) We have reduced our use of our ocean view balcony,
 - (c) We now constantly run our overhead fans in the apartment,
 - (d) We purchased an air purifier on 9 August 2021.

46 Mr Pittman gives the following additional evidence in his Affidavit in relation to the impact of the smoke drift on him:

- 24 I suffer from atrial fibrillation (irregular heart beat), and congestive cardiac failure (ccf). I am concerned about the impact the effects (sic) the smoke drift is having on my health, particularly the toxicity of tobacco smoke entering our lot, and the ongoing coughing and tingly/irritated throat. I know the smoke drift is a serious health hazard and that there is no safe level of passive/second hand smoking.
25. On 28 July 2021, I was suffering with loss of concentration from the effects of the smoke drift, that I had to contact my employer and advise that I could not work as my work environment was no longer safe. As a result, my employment was suspended until such time as my workplace was safe and would comply with the company's occupational health and safety requirements.
26. On 20 September 2021, my employment was terminated as I was not able to work due to the effects of the smoke drift, and that the hazard had rendered my workspace unsafe and unable to meet the company's occupational health and safety standards.

47 Mr Pittman appends to his Affidavit a medical certificate dated 16 October 2019 and two letters from his former employer dated 13 August 2021 and 20 September 2021 in support of these paragraphs.

48 Ms Cartwright's Affidavit made under oath substantially deposes equivalent evidence to that contained in Mr Pittman's Affidavit. However, she gives the following distinct evidence in relation to the impact of smoke drift on her:

21. I have a history of migraines in which I see a GP and take medication. The number of migraines is managed by the medication and the number of times they occur was consistent. Since June 2021 they have increased dramatically, up to double. I went to see the Doctor on 19 August 2021 in regard to migraines, one to rule out any other cause for the increase and two to find a way to reduce them. There was no medical reason for the increase, and it was put down to a potential 'irritant rhinitis.'
22. The most significant effect for me is the irritated eyes. I took a photo of my eyes on or around 28 August 2021, as my eyes were particularly irritated. Irritation to my eyes most often correlates with a smoke drift event.

49 Ms Cartwright appends to her Affidavit a medical certificate dated 19 August 2021 and a facial photograph depicting an inflamed red eye in support of these paragraphs.

50 Mr Newport and Ms Traynor had the opportunity to cross-examine Mr Pittman and Ms Cartwright. However, it became apparent from their response to this opportunity being given that they wanted to make statements in support of their defence rather than ask questions. The hearing therefore progressed to the presentation of their defence.

The applicant Lot Owners reference material

51 The applicant Lot Owners rely on the World Health Organisation's *Framework Convention on Tobacco Control 2003*, United Nations Treaty Series vol. 2302, p 166 (**FCTC**), which has been ratified by Australia. Article 8 of the FCTA states:

Article 8
Protection from exposure to tobacco smoke

1. Parties recognise that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability.

...

52 I also note the following recital from the Preamble to that treaty:

Recognising that scientific evidence has unequivocally established that tobacco consumption and exposure to tobacco smoke cause death, disease and disability and that there is a time lag between exposure to smoking and the other uses of tobacco products and the onset of tobacco-related diseases,

53 The applicant Lot Owners also rely upon Principle 1 of the “Statement of principles and relevant definitions underlying protection from exposure to tobacco smoke”, which was adopted at the Conference of the Parties to the WHO FCTA, Second Session, Bangkok 30 June – 6 July 2007 (found in Conference of the Parties to the WHO Framework Convention on Tobacco Control, Second Session, Bangkok, 30 June – 6 July 2007: Decisions and Ancillary Documents, Geneva, 2008):

Principle 1

6. Effective measures to provide protection from exposure to tobacco smoke, as envisioned by Article 8 of the WHO Framework Convention, require the total elimination of smoking and tobacco smoke in a particular space or environment in order to create a 100% smoke-free environment. There is no safe level of exposure to tobacco smoke, and notions such as a threshold value for toxicity from second-hand smoke should be rejected, as they are contradicted by scientific evidence. Approaches other than 100% smoke-free environments, including ventilation, air filtration and the use of designated smoking areas (whether with separate ventilation systems or not), have repeatedly been shown to be ineffective and there is conclusive evidence, scientific and otherwise, that engineering approaches do not protect against exposure to tobacco smoke.

54 Additionally, the applicant Lot Owners rely upon the Australian Government’s National Tobacco Strategy. The 2022-2030 Strategy is still in development, and consequently the 2012-2018 Strategy continues in force (Intergovernmental Committee on Drugs, *National Tobacco Strategy 2012-2018*, Commonwealth of Australia, 2012). The 2012-2018 strategy includes as “priority area 8” “the reduction in exceptions to smoke free workplaces, public places and other settings”. It includes as an action item in this priority area:

- 8.8 Monitor the issue of smoking and smoke-drift at residential premises and consider policy approaches to support smoke-free homes, particularly where children are present.

55 The Consultation Draft National Tobacco Strategy 2022 (Commonwealth of Australia, 2022) includes as priority area 10 “the elimination of exceptions to smoke free workplaces, public places and other settings”. It includes as a proposed action item in this priority area:

- 10.4 Monitor the issue of smoking and smoke-drift at residential premises and consider policy and regulatory approaches to encourage smoke-free homes, including for public housing and multi-unit housing.

56 The applicant Lot Owners also cite research published by the Cancer Council Victoria in support of the following propositions (Grace, C, Greenhalgh, EM and Tumini, V, *15.6 Smoking bans in the home and car, Tobacco in Australia: Facts and Issues*, Melbourne, Cancer Council Victoria, 2022):

- Air-nicotine air pollution increases in homes and common areas located adjacent to areas where smoking occurs because cigarette smoke spreads easily via gaps in doors, windows, cracks in walls, balconies, and court yards, as well as internal mechanical ventilation and air conditioning systems, elevator shafts, hallways, and stairwells.
- There is some evidence to suggest that residents living on higher floors in multi-level apartment buildings may be at risk of increased levels of second-hand smoke exposure, as smoke tends to accumulate at higher floors.

57 The applicant Lot Owners also rely upon a publication produced by Physicians for a smoke-free Canada (*Smoke-Free Outdoor Public Spaces: A Community Advocacy Toolkit*, Ottawa, 2010) to support the following propositions:

- Where there is no wind, tobacco smoke will permeate the local area, rising and falling, and where there is wind, spread in many directions
- Tobacco smoke can be detected between 25 – 30 feet away from its source.

58 Additionally, they rely upon an Oxford Academic publication (Hwang, J & Lee K, *Determination of outdoor tobacco smoke exposure by distance from a smoking source*, Oxford Academic, 2014) which concluded that outdoor tobacco smoke was detectable with only one cigarette source at 9 meters away, and that consequently, the minimum distance the outdoor tobacco source should be is 9 meters.

The respondent Lot Owners' evidence

59 In Exhibit R1, with respect to Mr Pittman's heart condition, the respondent Lot Owners refer to "a paper" which they have not put in evidence, published in January 2016 by the U.S. National Centre for Biotechnology which it is said states: "[c]igarette smoking is a risk factor for atrial fabulation but whether secondhand smoke impacts the risk of AF is unknown". They also refer to "other papers" which are not identified, and to the British NHS website, which it is said state that atrial fabulation has other causes. With respect to Ms Cartwright's rhinitis, they refer to a paper published by the 'John Hopkins Medicine in the US', which they have not placed in evidence, which it is said states various causes for rhinitis, including 'smoke (from all sources)".

60 In Exhibit R 1, the respondent Lot Owners state that there are other sources of cigarette smoke in the vicinity, being smokers in units in the building to the left of the strata plan and in the building behind it. They also state that there is frequently smoke in the air due to sugar cane burn offs in the locality. They say that it is impossible to know in these circumstances whether they are the source of any smoke that may enter Unit 301.

61 The respondent Lot Owners reject the diary maintained by Mr Pittman to indicate when the applicant Lot Owners were affected by cigarette smoke emanating from their Lot. In this respect it is submitted at paragraph 12 of their 'statement':

Diary notes on times of alleged smoking are clearly not attributable to us. Friday 16/7/21 records smoking at 6:30am. We never smoke that early in the morning. Tuesday 20/7/21 records smoking at 4:00 and 6:00am. Definitely not from Unit 201. Thursday 22/7/21 at 3:51am.

Definitely not from Unit 201. Friday 23/7/21 we are alleged to have been smoking at 12:51am. This is not true. On 6/8/21 the Applicants have diarised the detection of smoke from our apartment at 2:55am. On that day, at that time NN was out of our home on an appointment in Kingscliff and DN was in Brisbane all day for work. Both returned about 4:00pm. On Friday 10 December 2021 the Applicants claim to have recorded smoke in the main bedroom and study nook at 9:15am. At that time of the day, DN was at the gym and CN was at yoga. On Monday 13th December the applicants have recorded 6 instances of smoke annoyance from 12:34 in the afternoon till 9:10 at night. DN left at 6:00am to work in Brisbane and did not return to Kingscliff until approximately 5:00pm. CN can affirm that she only smoked in the areas specifically designated in the Tribunal's ruling. Diary entries record smoke drift in the Applicants' apartment at midnight, 1:00am, 2:00am, 3:00am, 4:00am, 5:00am, 6:00am, and 7:00am and are clearly not attributable to us. This exemplifies the Applicants' lack of credibility.

- 62 The respondent Lot Owners refer to the "4 Metre Law", which they contend "exists in NSW, prohibiting smoking with 4 metres of a shopping centre, school, public building etc". They contend that 4 metres "is the distance deemed by the Department of Health to be the safe distance for the isolation of smokers from others". They contend that the distance between their balcony and the interior of the applicant Lot Owners' unit is at least 7 metres and that it is "fanciful" that smoke rising upwards from their balcony "would reverse back" through the gaps between the glass panels on the applicant Lot Owners' balcony.
- 63 Additionally, the respondent Lot Owners contend that any cigarette smoke is rapidly dispersed by wind "which is always blowing as we live 100 metres from the beach". They reject the applicant Lot Owners contention that the wind predominantly comes from the south, south/east and south/west and is blocked by the building allowing cigarette smoke to rise from the balcony of their Lot to the applicant Lot Owners Lot. They refer to 'Australian Standard AS1170 Structural Design Actions – Part 2 – Wind Action', which they have not placed into evidence, which they contend supports the proposition 'buildings do not stop wind. They alter the course and create eddies. Direct winds blow smoke away but eddies disperse smoke'.
- 64 In their oral evidence, given under affirmation, and together, Mr Newport and Ms Traynor denied that smoking on their balcony was the source of any cigarette smoke nuisance experienced by the applicant Lot Owners. They

stated that the likely source of any such nuisance is the occupants of units across the laneway from the building, or from the unit in the apartment block behind the building. They expressed the opinion that it was smoke from sugar cane burn-offs that the applicant Lot Owners could smell. They said that no other owner or occupier of a unit with the Strata Plan had ever complained about cigarette smoke drift. They expressed the view that any cigarette smoke generated on the balcony of Lot 201 would be dissipated by wind and was incapable of rising to and entering the balcony and interior of Lot 301.

65 I note that the thrust of the evidence Mr Newport and Ms Traynor sought to give was that the applicant Lot Owners were not genuinely motivated to eliminate cigarette smoke nuisance and hazard, but instead wanted to 'control' them and everyone else in the strata scheme. In this respect it was asserted that the applicant Lot Owners stance was 'aggressive' and 'dictatorial'. Although I allowed the respondent Lot Owners to make this point in their defence, I also allowed objections to various of Mr Newport and Ms Traynor's assertions about the character and alleged conduct of the applicant Lot Owners that was unrelated to the alleged cigarette smoke nuisance and hazard on the basis that these assertions were not relevant to the issues to be determined.

66 Under cross examination, Mr Newport and Ms Traynor agreed that they are cigarette smokers and that they have smoked and want to continue to smoke on the balcony of Lot 201. They agreed that they have done so after the first decision in this application was made. It was put to them that they each smoked 16 to 18 cigarettes a day. They denied that they smoked as many as this but could not say how many cigarettes that they did smoke each day. It was put to them that the emails sent to them by the applicant Lot Owners in July 2021 and the applicant's Lot Owners' two attempts to resolve the dispute via mediation were not consistent with their claims that the applicant Lot Owners were 'aggressive', 'dictatorial', 'controlling' or otherwise unreasonable. Ms Traynor did not agree, stating that she considered the emails to be dictatorial and the whole process to be one aimed at 'control'.

The respondent's other witness evidence

Mark Cowling

67 In his letter addressed 'to whom it may concern' dated 31 September 2021 Mr Cowling states that the "smoke drift" complaint "seems unfair and unjustifiable" because "no other unit ... has ever mentioned the issue". He contends that if smoke drift from Unit 201 was a problem the occupants of other adjacent unit Units, which he contends are Units 101, 202 and 302 (his unit), would also be impacted. He also states:

I can personally vouch for the fact that the residents in Kingscliffe Lane across from our apartment smoke regularly (every day) on their verandahs and have smelt their cigarette smoke when entering the lift. I can only surmise that the residents of 301 are also experiencing this and have continued to blame Des and Carmen.

68 In his oral evidence, given under oath, Mr Cowling stated that he had never smelt smoke drift from Unit 201 despite his balcony doors being usually open. Under cross-examination Mr Cowling accepted he had once smelt tobacco smoke on the common property near the lift well at the rear of the building, which he believed came from the apartment block behind the building, which he accepted was about 15 to 20m away.

Janice and Samuel Michaels

69 In their undated signed written statement 'addressed to whom it may concern' Ms Janice Michaels and Mr Samuel Michaels state that they are joint owners of Unit 102 in the Strata Plan and that they have occupied that Lot since 2016 when the development was completed. They state that during their period of occupancy they "have not experienced any smoke drift from Unit 201 or any other apartments ... even those adjacent where smoking has occurred". In his oral evidence given under affirmation Mr Michael stated that he had never noticed any evidence of smoke in his lot or in the foyer of the building since the respondent Lot Owners moved in. Under cross-examination Mr Michaels accepted that his apartment was on the opposite side of the building and on the level below Unit 201. In her oral evidence given under affirmation Ms Jan Michael also stated that she had never noticed smoke drift into Lot 102. She

stated that the only time she had ever smelt cigarette smoke was at the back of building, which was coming from the apartment block across the road. She also stated that sometimes visitors to her Lot smoke, but she was not aware of any complaint about that.

Leigh Cuncliffe

70 In the section of their undated, unsigned statement I admitted into evidence Ms Jill and Mr Leigh Cuncliffe state:

Current smoking issue

Regarding this matter, we consider this has been discussed and resolved (June 2020). We live directly below Unit 201 and have never experienced any smoke drift. We consider that the cause of the smell and ash are cane field burn offs.

71 In his oral evidence to the Tribunal Mr Leigh Cuncliffe stated that he had never smelt cigarette smoke coming from Unit 201, despite being directly opposite that Unit, and that he had only ever smelt smoke coming from sugar cane burn offs. He stated that he had noted that an occupant of an apartment in the building opposite the rear of the building smoked. He said that this may be the source of cigarette smoke that the applicant Lot Owners are complaining about. Under cross-examination Mr Cuncliffe accepted that the smell of smoke generated from cane burn offs was different to the smell of cigarette smoke.

Contentions of the parties

72 The applicant Lot Owners contend cigarette smoke drift emanates from lot 201 to 301 and in doing so causes a nuisance and a hazard to them. They contend that this occurs most days, on multiple occasions, from the early morning to late at night. They contend that the smoke drift has a seriously adverse impact on their comfort, sense of well-being, and health. They contend that they have tried to mitigate the impact of the smoke drift by various lifestyle changes which are restrictive of their use and enjoyment of their lot and which have been unsuccessful in any event. They contend that they have tried repeatedly, and unsuccessfully, to resolve the problem with the respondent Lot Owners directly, and through the Strata Committee and Owners Corporation.

73 The respondent Lot Owners deny that the applicant Lot Owners are exposed to cigarette smoke because of them smoking on their balcony or otherwise. They contend that the ocean breezes immediately disburse any cigarette smoke. They contend that even if there is some minor exposure to cigarette smoke it incapable of constituting a nuisance or a hazard. They deny that there is any relationship between their cigarette smoke and the applicant Lot Owners' health conditions. They contend that the reference material relied upon by the applicant Lot Owners to demonstrate their exposure to cigarette smoke and its risks is general and not specific to the issues in this case. As noted above, the respondent Lot Owners' primary contention is that the applicant Lot Owners are not genuinely motivated by smoke drift but are attempting to use this as a means of asserting control over them.

Jurisdiction

74 There is no issue that the Tribunal has jurisdiction to deal with this application according to the provisions of the SSM Act.

Applicable law

75 Section 241 of the Act confers power on the Tribunal to order a person the subject of an application to do or refrain from doing a specified act in relation to a strata scheme:

241 Tribunal may prohibit or direct taking of specific actions

The Tribunal may order any person the subject of an application for an order to do or refrain from doing a specified act in relation to a strata scheme.

76 Section 153 of the Act provides, relevantly, that an owner in possession of a lot in a strata scheme must not use their Lot in a way that causes or permits a nuisance to any other Lot:

153 Owners, occupiers and other persons not to create a nuisance

(1) An owner ... in possession ... of a lot in a strata scheme must not -

- (a) use or enjoy the lot, or permit the lot to be used or enjoyed, in a manner or for a purpose that causes a nuisance or hazard to the occupier of any other lot (whether than person is an owner or not),

...

Note: Depending on the circumstances in which is occurs, the penetration of smoke from smoking into a lot or common property may cause a nuisance or hazard and may interfere unreasonably with the use of enjoyment of common property or another lot.

77 The “note” at the end of s 153 does not form part of the SSM Act by operation of s 35(2)(c) of the *Interpretation Act* 1987, but it is extrinsic material by operation of s 34(2)(c) of that Act that can be used as an aid to the interpretation of 153 if that need arises.

78 Neither the term “nuisance” or “hazard” are defined in the Act. However, there is superior court authority to the effect that the term “nuisance” means private nuisance: *The Owners Strata Plan No 2245 v Veney* [2020] NSWSC 134.

79 The term “hazard” should be given its ordinary meaning, which is something that is ‘a risk’ or ‘an exposure to danger or harm’ or ‘the cause of such a risk’ or ‘a potential source of harm, injury or difficulty’ (Macquarie Dictionary). It “plainly relates to situations with a potential for harm which has not yet occurred”: *Mirana Investments Pty Ltd and Ors v Coupe* [2012] QCATA 187 at [48].

80 In *Chehelnabi v Gourmet and Leisure Holdings Pty Ltd* [2020] NSWCATAP 102 at [52]ff an Appeal Panel of the Tribunal provides a useful summary of the relevant authority in relation to the meaning and application of s 153(1)(a):

- 53. In *Veney*, Darke J found, at [46], that “nuisance” for the purpose of s 153(1)(a) of the SSMA should be interpreted in accordance with the common law meaning of an actionable nuisance, consistent with the approach previously taken by the Tribunal in applications under the former *Strata Schemes Management Act 1996*, for example in *Cannell v Barton* [2014] NSWCATCD 103 at [95] and *Gisks v The Owners – Strata Plan No 6743* [2019] NSWCATCD 44 at [26] ([46]-[47]).
- 54. In broad terms, the Court in *Veney* found that an actionable nuisance may be described as an unlawful interference with a person’s use or enjoyment of land, or of some right over or in connection with the land. Liability is founded upon a state of affairs created, adopted or continued by a person, otherwise than in the “reasonable and convenient use” of their own land, which, to a substantial degree, harms another owner or

- occupier of land in the enjoyment of that person's land, citing *Hargrave v Goldman* (1963) 110 CLR 40 at [59]-[62].
55. The Court also referred with approval at [45] to the comments of Lord Wright in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903, where his Lordship said:
"A balance has to be maintained between the right of the occupier to do what he likes with his own [land], and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society."
56. That statement is consistent with the submissions of the parties here and so we will, with respect, adopt that meaning. We are satisfied that there is no need to hear further from the parties prior to doing so.
57. The parties also referred us to *Quick v Alpine Nurseries Sales Pty Ltd* [2010] NSWSC 1248, where Ward J framed the question for determination in relation to a claim for nuisance as:
" ...whether there has been a substantial and unreasonable interference by the defendants with the rights of Mr and Mrs Quick in relation to or in connection with the use of their land".
58. Ward J considered the principles relating to establishing whether a defendant has created or maintained a nuisance....
59. Ward J, at [58], said that unreasonable interference required a determination of whether the events in question interfered with the comfortable and convenient enjoyment by the plaintiffs of the land, and that "this turns on whether there has been an excessive use by the defendants of their land resulting in what is considered to be an unreasonable interference with the enjoyment by the plaintiff of his land, having regard to the ordinary usages of humankind living in a particular society ..."
60. In considering this question, her Honour went on to refer to the decision of the Full Court of the Supreme Court of New South Wales in *Bayliss v Lea* [1961] NSWLR1002 ('*Bayliss*') in which the Court approved the following statement from Fleming on Torts 2nd ed, Clarendon Press, 1961 at 400-1:
"The paramount problem in the law of nuisance is, therefore, to strike a tolerable balance between conflicting claims of landowners each of whom is claiming the privilege to exploit the resources and enjoy the amenities of his property without undue subordination to the reciprocal interests of the other. Reconciliation has to be achieved by compromise, and the basis for that adjustment is reasonable use. Legal intervention is warranted only when an excessive use of property causes inconvenience beyond what other occupiers in the vicinity can be expected to bear, considering the prevailing standard of comfort of the time and place. Reasonableness in this context is a two-sided affair. It is viewed not only from the standpoint of the Defendant's convenience, but must equally take into account the interest of the surrounding occupiers. It is not enough to ask: Is the Defendant using his property in what would be a reasonable manner if he had no neighbour? The question is: Is he using it reasonably, having regard to the fact that he has a neighbour?"

81 The respondent Lot Owners reference to the “4-metre Law” appears to be derivative of the *Smoke-free Environment Act 2000* (NSW) (**S-FE Act**). The object of that Act is found in s 3:

3. Object of Act

The object of this Act is to promote public health by reducing exposure to tobacco and other smoke, as well as aerosol or vapour (whether or not containing nicotine) generated by e-cigarettes, in certain public places.

82 Section 6 of the S-FE Act designates enclosed public spaces as smoke-free areas for the purposes of the Act. Schedule 1 of the Act contains a list of examples of enclosed public spaces, which includes ‘hospitals’ and ‘childcare facilities’.

83 Section 6A of the S-FE Act designates certain outdoor public areas smoke free areas for the purpose of the Act. It relevantly provides:

6A Smoke-free areas – outdoor public places

- (1) An outdoor public place is a *smoke-free area* for the purposes of this Act if it is any of the following places (or part of any of those places).
- (a) a place that is within 10 metres of children’s play equipment, but only if the children’s play equipment is in an outdoor public place.
 - (b) a swimming pool complex
 - (c) an area set aside for or being used by spectators to watch an organised sporting event at a sports ground or other recreational area, but only when an organised sporting event is being held there,
 - (d) the platform of a passenger railway or light rail station,
 - (e) a ferry wharf,
 - (f) a light rail stop (with *light rail stop* to include any area where persons queue or gather when waiting at a light rail stop).
 - (g) a bus stop (with *bus stop* to include any area where persons queue or gather then waiting at a bus stop),
 - (h) a taxi rank (with *taxi rank* to include any area where persons queue or gather then waiting at a taxi rank),
 - (i) a place that is within 4 metres of a pedestrian access point to a building (as provided by subsection (2)).
 - (j) a commercial outdoor dining area,
 - (k) a place at a public hospital, health institution or health service under the *Health Services Act 1997* that is designated as a smoke-free area by a by-law or regulation under that Act and notified by signs displayed in, or at an entrance to, any such area,

- (l) any other outdoor public place that is prescribed by the regulations as a smoke free area.
- (2) A **pedestrian access point** is an entrance to or exit from a building for use by pedestrians, but does not include:
 - (a) an entrance to or exit from a building that is used only for residential purposes (including a boarding house and a building in a caravan park), or
 - (b) an entrance to or exit from a building that is used partly for residential purposes and partly for other purposes if the entrance or exit concerned is used solely for entry to or exit from that party of the building that is used for residential purposes, or
 - (c) an emergency exit that is locked to entry.

...

84 The applicant Lot Owners bear the onus of establishing the respondent Lot Owners' contravention of s 153(1)(a) to the civil standard, which is the balance of probabilities. This requires them to establish the affirmative of their allegations to the reasonable satisfaction of the Tribunal bearing in mind that reasonable satisfaction is not produced by inexact proofs: *Briginshaw v Briginshaw* [1938] 60 CLR 336 per Dixon J at p 362.

85 In relation to the potential harm caused by tobacco smoke the applicant Lot Owners rely on the paragraphs 19 and 22 of Senior Member Buckley's decision in *Bill Sheath and Rhonda Sheath v Rick Whitely and Sandra Whitely* [2014] NSWCATAD 44, which was also a case concerning exposure to cigarette smoke drift in a strata plan brought in nuisance under the former Act. I will quote those paragraphs in context:

- 19. There is, in my view no medical or scientific dispute that the inhalation of either primary smoke and second-hand smoke can cause an increased risk of adverse health effects. It is an issue of increased risk, not of the certainty of a health hazard becoming a reality.
- 20. Smoking is not illegal, except as prohibited by various restrictions of smoking in a public area, specifically as referred to in the *Smoke-free Environment Act 2000*, which outlaws smoking within certain public areas both inside and out. There is no legislation which prevents a home owner smoking in his own backyard, bedroom, lounge room, wherever within the boundaries of the home that he either owns or rents. That is not necessarily the case with a strata scheme by virtue of the provisions of s 117 of the SSMA, which is in terms of a mandatory prohibition - "an owner lessee or occupant **must not** **cause a nuisance or hazard to the occupier of any other lot.**" It is not necessary to establish intention. I determine that the risk of exacerbation of respiratory symptoms is a "hazard" within the meaning of s 117(1)(A) of the SSMA.

21. The four metre standard which the applicant submits as being appropriate is an indication of the relevant risk, as viewed from a public building perspective of the area in which smoking is to be prohibited. Lot 8 has a courtyard length which varies on its short side, the rear boundary of the dwelling of approximately 9.5 metres to the rear boundary fence which is 10.28 metres in length.
22. The inhalation of second-hand smoke is a hazard. It is adjudged as such by public health legislation. It is particularly so with regard to those, like the applicant and his daughter who suffer with respiratory complaints.

86 In relation to the discharge of their onus of proof, the applicant Lot Owners also rely upon a decision of the Appeal Panel in *Bhandari v Laming* [2015] NSWCATAP 24, which concerned a residential tenancy over a Lot in a strata plan where the applicant tenant complained of cigarette smoke ingress from another Lot. At first instance (in an unpublished decision) the Tribunal made the following finding:

Although I accept the submission of the agent that smoking is not illegal, and the landlord has almost no option to try and fix the problem, because it is a strata issue, the fact remains that most people accept that tobacco smoke is a health hazard and most people especially if they don't smoke, would be concerned about their health if they were taking in smoke fumes on a regular basis. I am satisfied that most afternoons and evenings the leased premises were affected by smoke from downstairs and to quite a considerable extent. I am satisfied that somehow there is a mechanical problem in the internal ventilation passages of the strata that is allowing the smoke to pass from the downstairs unit into the inside areas of the upstairs unit through those passages. Obviously it is going to be a complex problem to rectify and probably expensive. However, this does not lessen the landlord's responsibility to provide premises which are fit for habitation (section 52(1) of the Residential Tenancies Act).

Based on the evidence I am satisfied that the premises were not fit for habitation. It is unacceptable for a tenant and a child to live in an environment which smells of tobacco smoke, and particularly where the smoke is so strong it is causing the tenant and her child to feel unwell. I accept the tenant as a witness who was not exaggerating the severity of the smell to improve the prospects of success of her claim. I accept that this was a unit she would have much rather lived in, than had to leave, and this explains all the steps she took prior to bringing this application.

87 At paragraphs [48] and [49] the Appeal Panel held:

48. Dr Bhandari's representative submitted that Mr Laming's evidence was not supported by any evidence from an independent source. The test applied by the Tribunal was therefore subjective, rather than objective, or in the alternative, there was no or insufficient evidence to establish that the premises were not fit for habitation within the meaning of s 52.

The fact that Ms Laming occupied the premises for six months gave rise to the implication that the premises were fit for habitation.

49. It is apparent from the reasons for decision that the Tribunal applied an objective test when assessing whether the residential premises were fit for habitation. The Tribunal relied on the uncontroverted evidence of Ms Laming about the smoke, which was supported by contemporaneous correspondence from her to the agent and the agent managing the property. Ms Laming gave an account of the smoke and described how the residential premises were affected on a daily basis and over a period. She gave evidence about factual matters, from which the Tribunal made inferences and findings. The Tribunal did not rely on or simply accept Ms Laming's opinion that the residential premises were not fit for habitation. The reasons for decision disclose that the Tribunal weighed up the evidence and was satisfied that the residential premises were not fit for habitation.

- 88 Also in relation to the discharge of their onus of proof, the applicant Lot Owners rely upon *Gisks v The Owners – Strata Plan No 6743; The Owners - Strata Plan No. 6743 v Gisks* [2019] NSWCATCD 44 at [29] to [31] where Senior Member Goldstein said (in a case also concerning smoke drift in a strata plan):

29. I further find that the smoke drift that emanates from lot 7 owned and occupied by Ms Cameron which enters into lot 5, owned and occupied by the lot owner, is a hazard for the same reasons as found by Senior Member Buckley in *Bill Sheath and Rhonda Sheath v Rick Whitley and Sandra Whitley* as stated in the passages extracted above. The lot owner complains in his email of 16 March 2015 of his health and safety being of primary concern and his health concerns regarding inhalation of cigarette smoke which he describes as a toxic chemical cocktail. I accept that evidence of his concerns regarding tobacco smoke drift.
30. I further find that the smoke drift that emanates from lot 7 owned and occupied by Ms Cameron which enters into lot 5, owned and occupied by the lot owner is a nuisance because it is an interference with the lot owner's use and enjoyment of his lot which is substantial and unreasonable. His evidence in my view establishes that fact.
31. The finding in the previous paragraph is based on my acceptance of the lot owner's evidence and the virtual concession by Ms Cameron that she smokes in lot 7, although she tries to close all windows and doors when she does so. The fact that the lot owner has complained of this issue from 2015 to 2017 leads me to find that his complaints are not trivial or lack a serious element and have not been properly addressed. The fact that the Strata Committee has misconceived the position in connection with s153 of the *Strata Schemes Management Act* has not assisted the resolution of this issue

- 89 Again, in relation to the discharge of their onus of proof, the applicant Lot Owners rely upon the following passage in *Owners Corporation SP 49822 v May & Ors (Strata & Community Schemes)* [2006] NSWCTTT 739, (a case also

concerning smoke draft in a strata plan) where from Strata Schemes Adjudicator G J Durie said at paragraphs [h] and [o]:

- h. The evidence with the applications consists of the relevant minutes authorising an application for adjudication. There is then a series of e-mails containing complaints about cigarette smoke over different days in units 1207 and 1209. This evidence is best described as informal, but that is consistent with the adjudication process. Rarely if ever is evidence presented in strict and admissible form as if it were being given in an oral hearing. ...
- ...
- o. On this material, I am satisfied on the balance of probabilities that smoke penetration causes a considerable problem for the occupiers of the adjoining lots.

90 Additionally, in relation to the discharge of their onus of proof the applicant Lot Owners rely on *Artique* [2021] QBCCMCmr 596 where Adjudicator Rosemann said at [36] to [42] (references omitted):

- 36. The respondent does not dispute that she smokes on her lot. While she disputes that she smokes as frequently as the applicant claims, she still seems to acknowledge that she smokes regularly. The respondent also does not dispute that she smokes on the balcony of her lot. She argues that she is entitled to smoke anywhere on her lot.
- 37. The respondent does not dispute that the applicant experiences cigarette smoke in her lot. The respondent also does not dispute that smoke from Lot 805 drifts into the Lot above. The respondent makes vague assertions that others smoke in the building. The applicant refutes the respondent's submissions in general but does not specifically address this point. While it may be that the applicant is experiencing smoke drift from multiple sources, given the proximity of the lots, the submissions and that that the respondent acknowledges smoking regularly on her lot, I am satisfied on the balance of probabilities that the primary source of the cigarette smoke affecting Lot 905 is from Lot 805.
- 38. The respondent refers generally to the odour of cigarette smoke but does not appear to acknowledge the impact of tobacco smoke on the health of others. Despite the respondent's apparent scepticism in this regard, I consider that the harm from second hand tobacco smoke is sufficiently widely accepted that the applicant does not need to provide medical evidence to establish it. I accept the views of NCAT quoted above. On that basis, I similarly agree that second hand tobacco smoke is a 'hazard' in that it presents a risk of harm. Furthermore, I accept that the risk of harm is serious, and that there does not appear to be a safe level of exposure to second hand smoke.
- 39. Having regard to the test for nuisance and unreasonable interference set by QCAT in the cases cited above, I am not satisfied the applicant has provided sufficient objective evidence as to the volume and frequency of smoke drift into Lot 805 from Lot 905 to establish a requisite degree of substantiality for nuisance. As such, I do not

consider on this occasion that I am able to reach a finding that the smoking on Lot 805 is causing a 'nuisance; for the purposes of s 167 of the Act. I consider it is more arguable that the smoke drift is unreasonably interfering with the lawful use of Lot 905. More substantively, I am satisfied that the smoke drift from Lot 805 into Lot 905 constitutes a hazard.

...

Conclusion

41. The respondent believes she is entitled to do whatever she likes within her lot. However, owners and occupiers within a community titles scheme do not have unfettered rights. The respondent is bound by the by-laws (including By-law 5) and the body corporate legislation (including section 167 of the Act). These provisions place some limitation on activities within lots to reduce or avoid adverse impacts on other uses of scheme land
42. Although smoking is not inherently illegal, controls exist on smoking in many contexts within the community because of its potential harm to others. The Body Corporate for Artique has chosen to include smoking controls in its by-law. Section 167 of the Act applies in any event.
43. On balance, I am satisfied the respondent's smoking on Lot 805 is causing a hazard to those using Lot 905, such that it is a breach of By-law 5 and section 167(a) of the Act.

...

Consideration

91 Having regard to what has been set out above, in order to determine the outcome of this application, the questions the Tribunal must pose and answer are as follows:

- (a) Do the respondent Lot Owners cause or permit the use of their Lot, and in particular, the balcony of their Lot, to smoke tobacco products?
- (b) If the answer to (a) is "yes", does tobacco smoke, fumes and odour emitted during such use enter the airspace of applicant Lot Owners' balcony and into the interior of the applicant Lot Owners' Lot?
- (c) If the answer to (b) is "yes" does this constitute a substantial and unreasonable interference with applicant Lot Owner' ordinary use of their Lot (nuisance) and/or does it constitute a hazard?

- (d) If the answer to (c) is “yes” what remedy are the applicant Lot Owners entitled to?

Do the respondent Lot Owners cause or permit the use of their Lot, and in particular, the balcony of their Lot, to smoke tobacco products?

- 92 The respondent Lot Owners do not deny that they both smoke cigarettes and do so at home. There are issues in dispute as to the frequency, duration, and times of day they each smoke, but I am comfortably satisfied on the evidence that they are both at least moderate smokers, meaning that they each typically smoke more than 10 and less than 20 cigarettes a day. I draw this conclusion from what the respondent Lot Owners did say in the written presentation of their case and in oral evidence in relation to their usage. In cross-examination they did not admit to smoking up to or around 18 cigarettes each per day, but they were not prepared to state what their typical daily usage was. I found this evidence evasive. I am satisfied that it was an attempt by the respondent Lot Owners to obscure and minimise the frequency they smoke cigarettes.
- 93 Of course, it must be accepted that the respondent Lot Owners are not at home all the time, and some of their cigarette smoking may be taken to occur elsewhere. However, it is not in issue that they are usually at home for most of each day. I therefore conclude that a substantial proportion of their cigarette consumption occurs at home.
- 94 In his email of 18 July 2021 Mr Newport contends that he had at that time stopped smoking at home, and that Ms Traynor had significantly reduced her smoking. There were other references in Ms Traynor and Mr Newport’s oral evidence to having reduced their intake, but these were vague. I am not satisfied on their evidence that there has been any significant sustained reduction in their smoking rates at home since June 2021, even if there may have been some variation to typical patterns at times.
- 95 The applicant Lot Owners’ evidence in relation to the frequency of smoke drift into their Unit has been meticulously compiled. For reasons I explain following I am satisfied that it records smoke drift emanating from Unit 201, rather than

any other source. Although a distinction must be drawn between 'drift' and cigarette smoking events (one cigarette smoking event might give rise to one or more smoke drifts), I am nevertheless satisfied that this record establishes conclusively that the respondent Lot Owners are frequent daily smokers.

96 I therefore find on the balance of probabilities that the respondent Lot Owners between them smoke between 20 and 40 cigarettes at home on a typical day, noting that a 'typical day' is not every day.

97 I am also satisfied that the respondent Lot Owners have in the past, and intend in the future, to smoke cigarettes on their balcony. That inference can be drawn from what is stated in their Notice of Appeal as is recorded in the Appeal Panel decision. Their object in pursuing the Appeal was to have their ability to smoke cigarettes on their balcony re-instated by overturning the orders of the first instance Tribunal which prohibited this. Under cross-examination Ms Traynor agreed that she and Mr Newport smoked on the balcony before the first instance decision was made, and that they continued to do so afterwards up until they received a letter demanding their compliance with the orders from the applicant Lot Owners' solicitor.

98 Mr Pittman and Ms Cartwright's Affidavits both depose to them having seen from the front of the building while walking or biking Mr Newport and Ms Traynor smoking on the balcony of Unit 201 on multiple occasions. Having considered the proximity of the balcony of unit 201 to the nature strip and road at the front of the building, and that the balcony is substantially constituted by glass, I am satisfied that they were easily capable of making that observation, just as any other person passing by could. I accept their evidence.

Does tobacco smoke, fumes and odour emitted during such use enter the airspace of applicant Lot Owners' balcony and into the interior of the applicant Lot Owners' Lot?

99 I am comfortably satisfied on the evidence that cigarette smoke is capable of, and does, rise from the balcony of Unit 201 and enters the air space of Unit 301. Both balconies are unenclosed. They are in close vertical proximity, being

just 4 meters apart (measured from the top of each balcony floor). The smoke enters through gaps between Unit 301's balcony glass panels and between the glass panels and the balcony floor. It also enters through the unenclosed space above the balcony railing.

100 I am also satisfied that cigarette smoke is capable of, and does, rise from Unit 201 and enter the interior of Unit 301 via its balcony. It does so through the balcony doors if they are open, and if they are not, through the ventilation panels in those doors (the applicant Lot Owners refer to these as weep holes). The main bedroom and living room in Unit 301 are immediately adjacent to the balcony and the balcony doors. The kitchen and study nook are configured in the open plan space that includes the living room.

101 The reference material relied upon by the applicant Lot Owners (summarised at paragraphs 56 to 58 above) is compelling in its demonstration that even low levels of cigarette use (1 cigarette) can be detected up to 9 metres away (both Physicians for smoke-free Canada and Hwang & Lee). The interior of the applicant Lot Owners' Unit is well within that range. It also compellingly documents the propensity of cigarette smoke to 'permeate' the vicinity in which it is generated, including its ability to rise and spread (Physicians for smoke-free Canada), and enter via gaps in doors, windows, cracks in walls, over balconies (Grace, Greenhalgh and Tumini). There can be no doubt having regard to this reference material that the applicant Lot Owners have established the capacity and mechanisms by which cigarette smoke drift enters their balcony and apartment from Unit 201.

102 I am also persuaded by the applicant Lot Owners evidence that this has and continues to frequently occur in fact. Both Mr Pittman and Ms Cartwright were credible witnesses who gave their evidence under oath. I believe them when they say that the cigarette smoke drift emanates from Unit 201. Their evidence is supported by repeated complaint about the issue over an extended period of time (their emails of 5, 18, and 27 July 2021, their two unsuccessful attempts to mediate the dispute with the respondent Lot Owners, and their requests to the Strata Committee and Owners Corporation to take action in relation to the

issue), and the meticulous diary records that they have maintained to record smoke drift from Lot 201. I am satisfied that this evidence is sufficient to discharge their onus of proving cigarette smoke into their apartment from Unit 201, and note that it is more robust than that which was accepted in *Gisks, Bhandari v Laming, May, and Artique*.

103 I reject the respondent Lot Owners contention that smoke from their balcony is incapable of traveling the distance to the balcony and interior of Lot 301. There is an inherent unreality in this contention. On the one hand the respondent Lot Owners submit that the source of the smoke nuisance experienced by the applicant Lot Owners is cigarette smoke from the building beside them (which is at least 12 meters away), and/or from the building behind (which is at least 18 metres away), or from cane burn offs (which are at least several kilometres away). In other words, they assert that smoke can travel these distances onto the applicant Lot Owners' balcony and into the interior of their lot. But, on the other hand, they vehemently assert that the cigarette smoke from their balcony is incapable of rising the very much shorter distance into the Unit 301 balcony and interior. Causation in tort is ultimately a question of common sense: *March v E & MH Stramare Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506. I am satisfied on a common sense basis that the source of the cigarette smoke drift experienced by the applicant Lot Owners is from the respondent Lot Owner's balcony immediately below them, and not from any other source.

104 The same observation is to be made in relation to the respondent Lot Owners' contentions about wind dispersing smoke from their balcony. Why wind would disperse their cigarette smoke, but not cigarette smoke from the building beside and behind, or cane burn off smoke from several kilometres away is unexplained.

105 The applicant Lot Owners have provided in their diary notes detailed records of wind direction on the dates that cigarette smoke drift was experienced. This indicates that the building substantially shields the balconies of Units 201 and 301 from the mostly prevailing wind direction, which is south-west, south-east or southerly because they are on the northern side of the building. I also accept

that the building on the northern side of the strata plan shields Units 201 and 301 from wind blowing from a northerly direction. I accept the applicant Lot Owners' submission that, generally, prevailing wind conditions do not disperse the cigarette smoke generated on the respondent Lot Owners' balcony for these reasons.

106 I note the respondent Lot Owners' reference to Australian Standard AS1170 *Structural Design Actions – Part 2 – Wind Action*, which they have not placed in evidence. Assuming, for the purposes of argument, that this Standard supports the propositions they contend for (see paragraph 63 above), I cannot see how an eddy would prevent cigarette smoke from rising from their balcony to the balcony and interior of Unit 301. It appears to me that an eddy is a potential vector for the conveyance of cigarette smoke into the balcony and interior of Unit 301. Why an eddy would only direct smoke away from the building and not into it is unexplained.

107 The respondent Lot Owners' witness evidence (Mark Cowling, Janice and Sam Michaels and Leigh Cuncliffe) is to the material effect that they have not noticed cigarette smoke drift into their apartments from Lot 201. I am not satisfied that this disproves or renders less likely smoke drift from Unit 201 into Unit 301. Mr Cowling and Ms and Mr Michaels are occupants of apartments on the other side of the building in circumstances there the prevailing wind conditions are generally southerly. I am satisfied that this makes it less likely that they would experience cigarette smoke drift. It must be accepted that Mr Cuncliffe occupies the apartment immediately beneath Unit 201, which makes it more likely that he will experience smoke drift from that Unit if it occurs. However, the fact that he has not noticed smoke drift is not sufficient to prove its absence in the context of the evidence taken as a whole. It may be accounted for by the way in which he uses his Lot and its balcony or by the fact that he does not experience smoke drift as an irritant. I also note that the respondent Lot Owners witness evidence had the quality of advocacy for the respondent Lot Owners and against the applicant Lot Owners, rather than objectivity and independence of position. For this reason, I give this evidence limited weight.

108 For completeness, in relation to the respondent Lot Owners' contention that the smoke the applicant Lot Owners complain about is from cane burn-off, I am satisfied that this is not the case. I accept the applicant Lot Owners' sworn evidence that cane burn-off has a distinctly different smell to cigarette smoke and is usually associated with fires at night on the horizon and ash in the air. I note that it was put to Ms Traynor, Mr Cowling and Mr Cuncliffe in cross-examination that cane smoke has a distinct smell. I did not understand them to contradict that proposition.

Does this constitute a substantial and unreasonable interference with applicant Lot Owner' ordinary use of their Lot (nuisance) and/or does it constitute a hazard?

109 As the outline of authorities set out above makes clear, is not sufficient for the applicant Lot Owners to merely prove some form of interference with their Lot that is associated with the respondent Lot Owners' use of tobacco products on their Lot. The law permits a person to use their land in a manner that interferes with the use by a neighbour of their land, provided this interference is not unreasonable.

110 The application of the unreasonableness test requires an articulation of the context in which that test is to be applied. In this case the 'lands' in issue are Lots within a strata scheme. The strata scheme is a medium rise residential block located in a residential neighbourhood among other apartment blocks. This is a relatively high-density type of communal living. The applicant and respondent Lot Owners use their Lots as a home. In my view there is a degree of reciprocity (give and take) required of occupiers of land in a communal living environment of this type. An owner of land of this type cannot reasonably expect to be unaffected by their neighbour's use of their own land.

111 The 'use' of the respondent Lot Owners Lot which is in issue is its use to smoke tobacco products (cigarettes). The nuisance alleged by the applicant Lot Owners is exposure to second-hand tobacco smoke.

112 It must be accepted that there is no safe level of exposure tobacco smoke. That fact is recognised in the Preamble and Article 8 of the World Health

Organisation's *Framework Convention on Tobacco Control* 2003, to which Australia is a State Party, and it is elaborated in Principle 1 of the 'Statement of Principles and relevant definitions underlying protection from exposure to tobacco smoke' (2008), which has been developed as part of the implementation of that treaty. The potential harm of tobacco smoke drift, including in residential environments, such as strata schemes, is also recognised in both the Australian Government's currently in force *National Tobacco Strategy* (2012-2018), and its' draft prospective strategy (2022-2030) (see strategies 8.8 and 10.4 respectively). It has also achieved some legislative recognition in the Note that appears to s 153 of the Act, to which I may have regard in determining if cigarette smoke drift falls within the scope of the tort of private nuisance which is prohibited by that section. I also note that the serious health risk associated with exposure to tobacco smoke was accepted by the Tribunals as incontrovertible in *Sheath* at [19] to [22], in *Bhandari v Laming* at first instance (a finding not disturbed on Appeal), and in *Gisks* at [29].

113 I am satisfied that the applicant Lot Owners' diary is substantially accurate in its record of the times and dates on which they experienced cigarette smoke drift into their apartment. I am not persuaded by the respondent Lot Owners' evidence that the fact that they were not home at some of the recorded times, or that they never smoke at some of the recorded times of day means that this diary is unreliable or concocted. As I have already observed, a distinction is to be drawn between a smoke 'drift' event and a cigarette smoking event. Drift may not be contemporaneous with the smoking event because of the potential for smoke to become trapped and linger and to be absorbed by porous surfaces, such as carpets and rugs, furnishings, and soft furnishings. For these reasons, cigarette smoke may still be detectable some time, even a considerable time, after a smoking event.

114 That being so, it must be concluded on the diary entries and the applicant Lot Owners' witness evidence that their use and enjoyment of Unit 301 is very substantially affected by cigarette smoke emanating from Unit 201. This interference typically occurs on multiple occasions each day from the early morning to late evening. I accept the applicant Lot Owners' evidence that the

cigarette smoke constitutes a foul odour, respiratory and eye irritant, and frequently results in headaches and cognitive dysfunction. It's carcinogenic properties also have the potential to cause far more serious physical harm which causes distress and anxiety.

115 I reject the respondent Lot Owners' contention that the "4 metre Law" proves that any smoke drift experienced by the applicant Lot Owners is incapable of harming them. As I have set out above, this reference appears to invoke the provisions of the *Smoke-free Environment Act 200(NSW)*. The object of that Act is to promote public health by reducing exposure to (relevantly) tobacco smoke. It does so by designating enclosed public spaces as smoke free areas. The Act therefore has no direct application in the circumstances of this case (which relates to 'private' space), but even by analogy, it offers no real assistance to the respondent Lot Owners' case. The only reference to '4 metres' is found in s 6A(1)(i) which concerns pedestrian access points to a building excepting as set out in s 6A(2). A pedestrian access point is an area in which people are moving rather than situated for a continuing period (such as being at home). Any place at a public hospital is a smoke-free area (s 6A(1)(k)), and smoking is prohibited within 10 metres of children's play equipment, which is substantially more than the distance between the Unit 201 balcony and the interior of Unit 301. The various other smoke-free areas designated by s 6A(1) are public areas where people are likely to accumulate and stay for a time which indicates that Parliament considered there to be an unacceptable risk of harm from exposure to cigarette smoke in such locations in those circumstances.

116 I am satisfied that the applicant Lot Owners have taken reasonable steps to limit cigarette smoke drift into their Lot. Those steps are set out in the applicant Lot Owners emails to the respondent Lot Owners dated 5, 18 and 27 July 2021 and in Mr Pittman's Affidavit at paragraph 23 (paragraph 45 of these Reasons). Those efforts have been unsuccessful: smoke drift is still experienced despite these measures. In any event, I am satisfied from an objective point of view that these attempts unreasonably restrict the applicant Lot Owners in their use and enjoyment of their Lot. They live in a beachside apartment with exterior

balconies with panoramic views. It is unreasonable that they are deprived of their use of the balconies to avoid cigarette smoke drift.

- 117 The respondent Lot Owners contend that cigarette smoking is 'not against the law' and that they are entitled to use their Unit, including its balcony, to do so, because that is what they enjoy. While cigarette smoking is not a crime, it is not correct to say that it is always not unlawful. As the *Smoke-free Environment Act 2000*(NSW) makes clear they are various contexts in which smoking is made unlawful, and subject to civil penalty. Similarly, under the SSM Act it will be unlawful if it constitutes tortious conduct (that is, a civil wrong) in the form of private nuisance.
- 118 I am satisfied that the respondent Lot Owners' use of Unit 201 and particularly it's balcony to smoke cigarettes is a nuisance to the applicant Lot Owners in the circumstances of this case. That is, that it is tortious conduct and a civil wrong which is unlawful. For the reasons set out above it constitutes a substantial and unreasonable interference with the applicant Lot Owners use of Unit 301 to occupy as a home (and in Mr Pittman's case, formerly as a workplace). While communal living requires give and take, exposure to actual discomfort and disease and potential additional serious health risk is well beyond the reciprocity required of the applicant Lot Owners and permitted for the respondent Lot Owners having regard to contemporary notions of comfort and safety.
- 119 I am also satisfied on essentially the same bases as I have set out above with respect to nuisance that cigarette smoke drift from Unit 201 into Unit 301 constitutes a hazard contrary to s 153(a) of the Act. There is no safe level of exposure to second-hand tobacco smoke. It is a serious risk of harm. In this case the applicant Lot Owners have demonstrated in their evidence that they have already experienced a degree of harm to their health and well-being because of the smoke-drift. Additionally, there is the risk of more serious harm to their health from the carcinogenic properties of tobacco smoke.

What remedy are the applicant Lot Owners entitled to?

120 As the applicant Lot Owners have established that cigarette smoke drift into Unit 301 from Unit 201 is both a private nuisance and a hazard, they are entitled to orders that will require the respondent Lot Owners to prevent this from occurring. I will therefore order that the respondent Lot Owners must not smoke tobacco products on their balcony or allow any other person to do so. I will also order that the respondent Lot Owners must not cause or permit smoke, fumes or odour of any tobacco product to be emitted from the interior of the Lot into the applicant Lot Owners' Lot.

Orders

121 For the foregoing reasons I make the following orders:

- (1) The respondent Lot Owners, Desmond Newport and Carmen Traynor, must not smoke tobacco products on the balcony of their Lot (unit 201).
- (2) The respondent Lot Owners, Desmond Newport and Carmen Traynor, must not cause or permit any other person to smoke tobacco products on the balcony of their Lot (unit 201).
- (3) The respondent Lot Owners, Desmond Newport and Carmen Traynor, must not cause or permit smoke, fumes or odour of any tobacco product to be emitted from the interior of their Lot (unit 201) into the applicant Lot Owners' Lot (unit 301).

I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.

Registrar