



# A Recipe for Failure

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*If you lodge an Adjudication Application with the Commissioner, be careful what relief you ask for, and how you ask for it. If you get either of those things wrong, then your Application may be thrown out.*

The recent decision of QCAT in *Rolling Rock Nightclub Pty Ltd v Commissioner for Body Corporate Community Management* [2020] QCAT 435 has imposed strict requirements on Adjudication Applications.

Most Adjudicator's orders are made under one of two order making powers. First, schedule 5 of the *Body Corporate and Community Management Act 1997*. Second, under section 276(2) of the Act.

Under schedule 5, an Adjudicator can choose orders from a list; for example, an order that an animal being kept on the common property, or a lot, contrary to the by-laws, must be removed from the scheme land. Under section 276(2) an Adjudicator may make whatever order is 'just and equitable in the circumstances to resolve the dispute'.

Some years ago, the decision of *Wheeler & Smith v Body Corporate for Calypso Towers* [2016] QCATA 66, held that an Adjudicator's order making power under section 276(2) was limited to relief known to the law. That is, an adjudicator could not make a novel 'Judge Judy' style order, such as ordering a litter bug to spend a day picking up all the rubbish on the common property.

The decision in *Rolling Rock* took this principle one step further. If, as an Applicant, you weren't asking for an order from schedule 5 (as happens in most Adjudication Applications), then the orders sought had to be supported by a 'cause of action', as that phrase is known to the Courts, detailed within your Adjudication Application.

A simple analogy for this is baking a cake. All of the known 'causes of action' make up the legal recipe book and each type of 'order' for relief is a dish. Each dish has a recipe. If you have the right ingredients and you follow the recipe, then you end up with the dish.

Let us say that one of the 'dishes' in the recipe book is chocolate cake. If the relief that you are after in your Adjudication Application is a chocolate cake, then your Adjudication Application must have all of the necessary ingredients in it, e.g. sugar, flour, egg, cocoa powder etc.

If your Adjudication Application sought a chocolate cake but only contained the ingredients for a sponge cake, then that's not good enough; your Adjudication Application is liable to be thrown out by the Commissioner or (successfully) objected to by a Respondent.

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Until *Rolling Rock*, to perhaps strain the analogy, an Adjudicator could make whatever they liked out of the ingredients that you presented to them, as long as the end result being the dish (i.e. the orders) was in the cookbook.

While this might sound a touch esoteric, it has some very important real-world consequences.

Take the example of a noisy pet. Let us say that your neighbours' pet dog is approved under the by-laws but is barking all the time, loudly. So much so that you are losing sleep at night. You can bring an Adjudication Application to the Commissioner's Office alleging a breach of section 167 of the Act, on the basis that the dog is either causing a nuisance or is interfering unreasonably with

the use and enjoyment of your Lot. In schedule 5 of the Act, section 19 enables an Adjudicator to make an order that the dog be removed, if the Adjudicator is satisfied that the dog is causing a nuisance or unreasonable interference with the use and enjoyment of your Lot.

Your Adjudication is pretty simple, in that you provide evidence of the dog's barking, and its' impact upon you.

You also point to section 167 of the Act and section 19 of schedule 5. Odds are that if you do so, you will get relief.

If you change the facts very slightly however, things become much more complicated. Instead of a noisy dog, imagine that what is keeping you up at night is an aspiring teenage drummer. There is no specific order making power in schedule 5 for an Adjudicator to order that the teenage drummer stops drumming. So instead, you will have to rely upon the Adjudicator's general order making power under section 276(2). That is, an Adjudicator to make an order, that is just and equitable in the circumstances to resolve the dispute, that the drummer stops drumming!

That sort of order is known as prohibitory injunction; it is an order requiring a particular person not to engage in a particular activity. The question is, will you have the 'ingredients' necessary to get such an order?

Again, in your Adjudication Application you raise a breach of section 167 of the Act. In this case however, that will not be enough. A mere breach of the Act does not, at the general law, give rise to a 'cause of action' which entitles you to prohibitory injunction. Instead you will need to look for another recipe that will enable you to bake the prohibitory injunction cake.

The recipe that you need is the cause of action of 'private nuisance' at common law; that is, an unlawful and unreasonable interference with an occupier's use and enjoyment of land. Nuisance can be constituted by noise, but the inconvenience caused by the noise needs to result in a substantial degree of interference, according to what is considered reasonable standards for the enjoyment of the premises.

In residential areas the principle of 'give and take, live and let live' is customarily applied so that the 'ordinary and accustomed use' of premises will not be considered a nuisance, even if some inconvenience to a neighbour is caused. Unit occupiers are people, (most) people have children at some stage and (most) children learn an instrument at some stage – so stop complaining about the noise Karen.

As you can see there are a lot more ingredients to assemble, and the recipe becomes a lot more complicated. While you might still get relief in your Adjudication Application, odds are that even as a competent home cook, you won't be able to bake the

cake by yourself; you'll probably need the help of an experienced chef (lawyer).

This is the most critical consequence of the *Rolling Rock* decision. It is very rare for a self-represented Applicant for Adjudication to know the legal causes of action available to them, and how to establish them, with supporting evidence in their Adjudication Application.

While no doubt (some) lawyers will like the extra work, the Commissioner's dispute resolution service is supposed to be 'efficient and effective'. Most users of the dispute resolution service are self-represented. While the decisions in *Wheeler* and *Rolling Rock* are well reasoned and based on sound legal principles, they have together created substantial hurdles to the efficient and effective resolution of disputes in Community Title Schemes within Queensland.

*Stratum Legal can assist you with your adjudication application.*

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