More Than A Smell Test: Hanoze Park Pty Ltd and City of Vincent [2024] WASAT 72 *and Health (Miscellaneous Provisions) Act Nuisance Abatement Powers*

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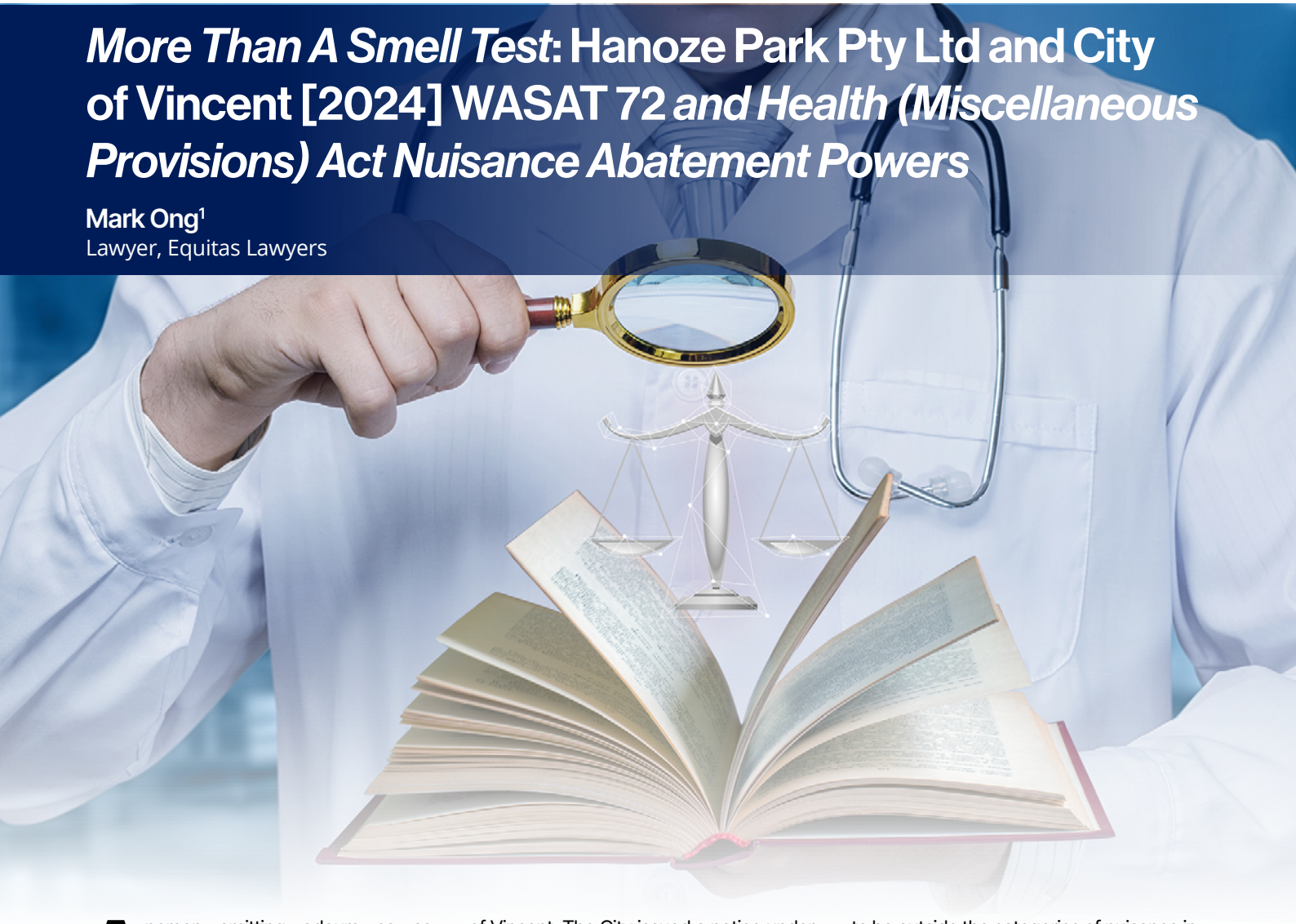

A person emitting odours so as to cause a nuisance may find themselves at risk on multiple fronts. In addition to neighbours availing themselves of the common law of nuisance, a local authority may use its powers under the *Health (Miscellaneous Provisions) Act 1911* ('HMPA') to deal with "any nuisance"[2]. However, while the HMPA uses the terminology of nuisance, not every common-law nuisance is actionable.

In *Hanoze Park Pty Ltd and City of Vincent (No 2)* [2024] WASAT 72 the State Administrative Tribunal set aside a nuisance abatement notice issued under the HMPA, finding that there was no nuisance for the purposes of section 184 HMPA. The *Hanoze* decision provides helpful guidance on the scope of local authorities' nuisance abatement powers under the HMPA, the relevance of evidence in odour-related matters, and expert witnesses in general.

Background

The applicant operated a fried chicken restaurant in a mixed-use area in the City of Vincent. The City issued a notice under section 184 HMPA alleging that "oily, fried, greasy, rancid and burnt odours"[3] were being emitted from the applicant restaurant's exhaust stack so as to "unreasonably interfere with the comfort and amenity of local residents"[4]. The notice further required the applicant to "stop emitting oily, fried, greasy and burnt odours from the exhaust stack".[5]

The applicant applied to the Tribunal on 2 grounds: first, that the notice related to a matter outside the categories of nuisance for which the City's powers under the HMPA were available, and second, that in the circumstances the issue of the notice was not the correct and preferable decision and so it ought to be set aside upon merits review.

The preliminary decision

The applicant sought a preliminary determination of whether the list of nuisances in section 182 HMPA were the only circumstances in which section 184 HMPA powers could be used, as the applicant's odour emissions were agreed to be outside the categories of nuisance in section 182.

In the Tribunal's preliminary decision, *Hanoze Park Pty Ltd and City of Vincent* [2022] WASAT 30, Jackson J held that "any nuisance" for the purposes of section 184 HMPA was not confined to the closed list in section 182 HMPA, but not so expansive as to span common-law nuisance. Rather, it had a specific statutory meaning which required a public health concern.

While it was possible for cooking odours to be of such quality and quantity as to constitute a nuisance capable of remediation under the HMPA[6], Jackson J noted that this would be a matter of fact and degree to be further ventilated in a substantive hearing of the matter.

The final decision

Notably, between the commencement of proceedings and the final substantive hearing of the matter, the applicant installed an ozone treatment system in its restaurant's exhaust stack which the

parties' experts agreed had an odour removal efficiency of 94%. In particular, the applicant contended that, by this point, the odour of the exhaust being emitted was described as "fresh, sweet clean light oil"[7].

The Tribunal expressed two telling preferences as to evidence.

First, the Tribunal preferred expert evidence over that of the local residents. It should be considered that in doing so the Tribunal not only acknowledged the subjectivity and sensitisation of those residents in contrast to other "substantive and objective"[8] evidence, but also demonstrated an (at least ideally) objective approach to the question of whether a public health nuisance was present.

Second, the Tribunal was presented with expert evidence derived from two different types of odour analysis and afforded them differing weights. The first category of expert evidence, which was produced by both parties, was 'odour patrols' reporting on odours detected at street level in the vicinity of the applicant's premises.

The second category of expert evidence, produced only by the applicant, derived from the comparison of air samples taken immediately before entering the ozone treatment system with samples taken at the point of discharge to demonstrate the efficacy of the system.

The Tribunal strongly preferred the second category of evidence due to both the specific reference to exhaust stack emissions in the City's notice, as well as the inability of the 'odour patrols', in the Tribunal's view, to adequately account for "fugitive" odours other than those specified in the notice.

However, the Tribunal did not confine its decision to the narrow terms of the notice, holding that:

> *Even if the City had cast the Notice differently... the nuisance must reach a threshold level to be actionable at law. Here, that threshold level is that it must be a matter of public health... [this] is not a pristine or homogenous residential area and a level of amenity that is completely devoid of any odours... cannot, in our view, be reasonably expected. We find that [the applicant] has put in place arrangements that so significantly lessen the odours emitted at the exhaust stack to the point where we are satisfied that there is no public health nuisance that justifies the Notice being affirmed.*[9]

Notably, the applicant raised, and the Tribunal accepted, several matters in criticism of the respondent City's expert witness. These included:

a. a "predatory" letter sent to the applicant after the HMPA notice had been issued by the City, "spruiking for work" to solve the odour issues the notice alleged, despite the expert's later evidence before the Tribunal being that those odour issues were impossible to solve[10];

b. open association with media coverage of the case while proceedings were on foot by publishing links to news articles reporting on his work in the matter as promotional material on his firm's website[11]; and

c. making the "extraordinary" inference that the observations made by one of the applicant's experts were "fictional", leading to his evidence reading "as a contest"[12],

all of which affected the Tribunal's view of the City's expert witness' consistency with his obligations of neutrality, independence, and impartiality.

Comment and Conclusions

Hanoze's main *ratio* comes from the preliminary decision, where Jackson J held that:

> *...whatever the meaning of the phrase 'any nuisance', it does not encompass the common law concept of nuisance but is, rather, limited in its scope to those matters which constitute a nuisance affecting public health.*[13]

The Tribunal in its final decision confirmed that as a threshold question a "matter of public health"[14] had to be caused by a nuisance in order for HMPA powers to be available. On the facts, no such public health nuisance existed.

While there may remain a question of the point at which there arises a "matter of public health", the *Hanoze* interpretation of the HMPA sensibly limits the scope of HMPA nuisance abatement powers with reference to the purpose of the Act in dealing with matters of public health, rather than the otherwise-unrestrained plain meaning of the words "any nuisance".

The Tribunal's treatment of various forms of evidence in the final hearing indicates a sensible recognition of the risk that local residents' evidence concerning odour may be flavoured by sensitisation, even where it consists of honest and genuine beliefs. It also shows the exercise of determining what is a "matter of public health" capable of invoking the HMPA to be, as far as possible, an objective one with specific reference to the aetiology of nuisance alleged by the public authority seeking to exercise abatement powers.

For local governments and decision-makers, the approach taken in the *Hanoze* cases preserves a measure of operational discretion, but the threshold requirement that there be a matter of public health should encourage careful consideration of the connection between nuisance complaints and public health before exercising HMPA powers.

Business operators or landlords concerned about odour emissions may be comforted by the Tribunal's consideration of the mixed-use locality and the applicant's abatement efforts as important context in its decision. However, *Hanoze* does not provide *carte blanche* as to odour emissions, but rather demonstrates where the threshold for local government intervention lies.

For practitioners, the decision serves also as a reminder of how the conduct of an expert witness, even that without the knowledge or consent of their principal, may justifiably come under scrutiny. It is worth remembering that practitioners are not the only persons who owe duties to the Court – or Tribunal, as the case may be – and so care should be taken in the briefing and management of expert witnesses, particularly in longer-running matters, to ensure they do not (inadvertently or otherwise) breach those duties. ■

Endnotes

1. LLB MA (KCL) AKC. The author acted for the successful applicant.
2. *Health (Miscellaneous Provisions) Act 1911* (WA), s 184.
3. *Hanoze Park and City of Vincent (No 2)* [2024] WASAT 72, [3].
4. Ibid.
5. Ibid.
6. *Hanoze Park and City of Vincent* [2022] WASAT 30, [87] – [88].
7. *Hanoze (No 2)* (n 3), [91].
8. Ibid, [103].
9. Ibid, [105].
10. Ibid, [57]-[59]; [74].
11. Ibid, [61]-[64].
12. Ibid, [75].
13. *Hanoze* (n 6), [73] footnote 29.
14. *Hanoze (No 2)*, [105].