



# Factsheet

## 2. Common law

Most of what we regard as “environmental law” comes from legislation made by Parliament and government. These laws are considered throughout the other Fact Sheets in this series. Despite the pre-eminence of legislation in protecting the environment, common law principles remain relevant, particularly where the issue involves private land holders.

This fact sheet examines the three key common law actions that can be used to protect the environment – trespass, nuisance and negligence. For information on relevant statutory controls, refer to the other Fact Sheets in this series.

### What is “common law”?

Common law is law that exists independently of any legislation. It has been developed by courts over hundreds of years. The common law is principally concerned with protecting individual's rights and private property rights. However, when interference with those rights is associated with an environmental impact, the common law can be used to protect the environment.

Note that statute law prevails over common law, although there is a presumption that a statute does not take away common law rights unless it clearly says so.

### How can the common law be used to protect the environment?

The common law can assist people who believe that they or their properties are suffering some harm due to the activities of another person. The common law allows a person (“the plaintiff”) to ask the court for assistance if the plaintiff believes any other person (“the defendant”) has caused or will cause them harm. If the plaintiff successfully proves their case to the court, the defendant can be ordered to pay damages or to stop causing harm to the plaintiff.

In order to ask the court for assistance, the plaintiff must claim that the defendant has done something which is in breach of the common law. A breach of the common law gives the plaintiff a “cause of action”. The common law causes of action are:

- trespass;
- private nuisance;
- public nuisance; and
- negligence.

### Statutory causes of action

In addition to the above common law actions, some statutes give a person a right to compensation in some cases. For example, where a person is convicted of an offence under the *Environmental Protection Act 1986*, a person who has suffered loss as a result of the commission of the offence may apply to the court for compensation.

### Who can take common law action?

In order to bring a common law action, the plaintiff usually must show that there has been or will be some actual damage to themselves or to their property. This means that a plaintiff cannot bring an action for damage to the environment unless the damage is on property which they own or lease. Neither can a plaintiff usually bring an action for harm to the general community or even particular members of that community. An exception is where a plaintiff can establish that the damage complained of amounts to a public nuisance (see below).

#### Important disclaimer:

This Fact Sheet is for general information purposes. Important legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your specific circumstances you should contact the Environmental Defender's Office WA (Inc) or your solicitor. The EDO takes no responsibility for any loss or damage resulting from any error in this Fact Sheet.



## Trespass

Trespass occurs where a person *directly, intentionally* and *without permission* causes some object to come into contact with another person or property. For example, if the defendant deliberately sprays pesticides on the plaintiff's property without their consent and causes damage to the plaintiff's property, the plaintiff will have a cause of action in trespass. However, a trespass action will not be successful unless the plaintiff can show that the damage to his or her property was as a direct result of the defendant's act. For example, if pesticides being used on the defendant's property accidentally blow onto the plaintiff's land, it is unlikely that there has been a "direct" interference with the affected land, as the drift of the pesticides onto the affected property is merely a consequence of the defendant's activity.



## Private nuisance

### What is private nuisance?

Private nuisance is committed where a person's use of land unreasonably interferes with the another persons ordinary and reasonable use of their land.

Unlike trespass, an interference can amount to a private nuisance even if it is not direct or intentional – private nuisance is made out as long as the interference is a reasonably foreseeable consequence of the defendant's activities. For example, if it is foreseeable that the defendant's use of pesticides could interfere with the reasonable use or enjoyment of the plaintiff's land, the defendant will be liable in nuisance if they do not take actions to prevent wind or water transporting pesticides off their land and onto the plaintiff's land.

### What does private nuisance cover?

Nuisance is one of the most commonly used actions for addressing environmental concerns and can be used to bring actions associated with dust, noise, vibration, tree roots, sewerage, odours and light on the plaintiff's property. However, claims relating to an interference with privacy, a view or a source of natural light probably do not amount to nuisance. In addition, private nuisance does not protect all possible uses of land – it protects only ordinary and reasonable uses of land. Private nuisance is therefore usually not available where the plaintiff's land is used for a particularly sensitive purpose or if the plaintiff is particularly sensitive.

In determining whether there is a nuisance, the court will consider:

1. the frequency and extent of the interference;
2. the defendant's reasons for using the land in the way they are;
3. the ordinary use of land in the area; and
4. the difficulty the defendant would face in taking precautions to prevent the nuisance.

### Can I fix the problem myself?

Where a plaintiff has a cause of action in nuisance, that person may be able to enter the defendant's property to stop (or "abate") the source of the nuisance. If the plaintiff proposes to do this, they should always notify the defendant before entering the land, unless there is an immediate threat to life and health. Notice is not required where the nuisance can be abated without entering the defendant's land (for example, by lopping overhanging branches of a tree).

Plaintiffs should always be careful about taking any action themselves, because if a court later finds that the plaintiff did not have a cause of action against the defendant, the defendant may then have a cause of action against the plaintiff in trespass.

### Defences to private nuisance

A defendant may have a defence to a plaintiff's cause of action in private nuisance if the plaintiff "comes to the nuisance". For example, if a plaintiff moves next door to an existing factory, that person will have "come to the nuisance" and the factory owner will probably not be liable in nuisance if its activities impact on the new neighbour.

It is also a defence to nuisance that a person has "statutory authority" to carry out an activity which causes a nuisance if the nuisance is an inevitable result of the carrying out that activity. For example, if the damage caused to a plaintiff's property is an inevitable result of an activity which is authorised under an Act, the defence of statutory authority may apply and the damage will not be actionable in nuisance. However, if the damage is not inevitable, but merely a consequence of the way

the person or body decided to carry out its activities, the defence of statutory authority would generally not apply. Note that an approval under the *Environmental Protection Act 1986* does not take away another person's right to prevent, control or abate pollution or to obtain damages.

## Public nuisance

In addition to claims which may be brought in private nuisance, claims may be brought in public nuisance. "Public nuisance" occurs when a person causes a nuisance which endangers the health, property or comfort of the public generally or obstructs the public in the exercise of their rights.

Actions in public nuisance may be brought on behalf of the community by the Attorney-General. Actions can also be brought on behalf of affected members of the community by any person who suffers damage to an extent over and above that suffered by those members of that section of the community. For example, in *Ball v Consolidated Rutile Ltd*, a mining company allowed earth and slurry to enter a watercourse, interfering with fish stocks. A group of commercial fishing operators took action against the mining company in public nuisance. The court refused the claim on the basis that the watercourse was open to all members of the public to fish, therefore the commercial fishing operators suffered no special loss.

## Negligence

### What is negligence?

The plaintiff will have a cause of action against the defendant in negligence if they can show that:

1. The defendant had a "duty of care" to manage their activities so that they do not cause reasonably foreseeable damage to the plaintiff;
2. the defendant breached its duty; and
3. the breach of duty caused damage to the plaintiff.

### Does the defendant have a duty of care?

Defendants do not owe a duty of care to every member of the community. Defendants only owe a duty of care to those people who are so closely and directly affected by the defendant's activities that the defendant ought reasonably to have considered those persons as being so affected. In addition, defendants only have a duty of care to ensure they do not cause damage which is reasonably foreseeable. Defendants do not generally have to guard against all or any possible types of damage.

### Has the defendant breached a duty of care?

A defendant will only breach a duty of care if they do not carry out their activities in accordance with the required standard of care. The "standard of care" required will vary according to the circumstances of each case. However, as a general rule, the standard of care is whatever a "reasonable person" would do. In determining this question, the court will consider the probability and severity of the risks associated with the defendant's conduct, the costs of taking steps to eliminate or reduce those risks, and the usefulness of, and benefits from, the defendant's conduct.

### Defences to negligence

A defendant's liability in negligence will be limited if they can show that the plaintiff contributed to their own damage in some way. For example, if pesticides are washed onto the plaintiff's property by reason of the fact that that plaintiff altered the path of a watercourse on their land, a court may attribute some or all of the blame for the resulting damage to the plaintiff.

It is a defence to negligence if the plaintiff voluntarily assumes the risk of an activity. For example, if a defendant warns a prospective purchaser that the land they are buying is next to land on which pesticides are sprayed, and the purchaser later tries to sue the licence holder for damages suffered because their land is next to sprayed land, it is likely that the purchaser will not be able to recover any damages, as they will have voluntarily assumed the risk of the harm they complain of.



## Statutory causes of action

Under the *Environmental Protection Act*, where a person suffers loss as a direct result of the convicted person's illegal conduct, that person may be entitled to the payment of compensation. A claim for this type of statutory compensation can be made either at the time the person is convicted, or on a later application by the Department of Environmental Protection. A person who is affected by an unlawful emission of noise also has a statutory cause of action against the offender for the alleged unlawful conduct.



## Can government bodies be liable?

Government authorities are usually liable in negligence, nuisance and trespass in the same way as a private person. However, the liability of government authorities is restricted in a number of ways.

### Government defences to negligence

Government authorities are not liable in negligence for decisions which involve or are dictated by financial, economic, social or political factors. For example, government authorities are not liable in negligence for damage caused as a result of how many inspectors they employ, what expert qualifications those inspectors have, how often the agency carries out inspections or what tests the agency carries out.

### Government defences to nuisance

Statutory authorities are not liable in nuisance if the interference they cause with the plaintiff's land is an inevitable or unavoidable result of the authority carrying out its statutory powers and duties.

### Liability of government employees

Government employees are usually not liable for anything which they do in good faith in the course of carrying out their statutory powers and duties.



## Taking legal action

### Which court do I have to go to?

The court in which a plaintiff must commence an action depends upon the plaintiff's cause of action, the amount of damages suffered and what the plaintiff is requesting the court do. We recommend you seek legal advice about what court to go to before you start any proceedings.

If a plaintiff is concerned about damage to them or their property coming from an agricultural operation in rural areas, then the matter may be subject to the mediation procedures under the *Agricultural Practices (Disputes) Act 1995*. Under this Act, either party to a dispute about spray drift, noise, dust, odour, smoke or light may refer the matter to the Agricultural Practices Board. If the Board determines that the activity complained of constitutes "normal farm practice", then the person undertaking the activity will have a defence to an action for common law damages. It is not a complete defence – a plaintiff may present evidence to rebut the defence.

### What do I need to prove?

In order to successfully prove all common law causes of action, a plaintiff must prove all parts of their claim on the balance of probabilities. The plaintiff must also show that they would not have suffered harm but for the defendant's conduct. This means that the defendant's conduct does not need to be the only cause of the harm - it needs to significantly contribute to the harm.

The plaintiff must also usually show that they or their property has suffered, or will suffer, actual damage because of the defendant's conduct. However, if the plaintiff's cause of action is in trespass, the plaintiff need only show that the trespass happened – the plaintiff does not have to show that they have or will suffer any actual damage.

## Is there a time limit for commencing actions?

Actions for trespass, nuisance and negligence must be started within six years of the date which the plaintiff suffered actual damage. The six year time limit begins to run as soon as the damage is actually suffered - even if the plaintiff does not know they have suffered damage. Shorter time limits generally apply in relation to actions against government authorities. For more information on limitation periods, refer to [Fact Sheet 1: Overview of environmental law in Western Australia](#).

## What orders can the court make?

A plaintiff who believes they have a cause of action against a defendant may ask the court to order the defendant to either:

- pay money to the plaintiff to compensate the plaintiff for the harm they have suffered (“damages”); or,
- if damages are not appropriate, stop causing harm to the plaintiff (“injunction”).

### Damages

The usual remedy for common law actions is damages. Damages are an amount of money that the defendant must pay to the plaintiff as compensation for the damage or injury caused by the defendant’s conduct. The amount of damages is the cost of putting the plaintiff back in the same position as if the defendant had not carried out their actions. In order to award damages, the court must be able to quantify the plaintiff’s loss in dollar terms. Unfortunately, damage to the environment generally, or to a specific species or population, is quite difficult to quantify in monetary terms.

### Injunction

An injunction is a discretionary order of the court compelling a person to do or stop doing a particular act. As long as the plaintiff has evidence that they will suffer harm from the defendant’s actions, a court can order an injunction even if the plaintiff has not yet suffered any harm. Injunctions are awarded most frequently in trespass and nuisance cases where there is a risk that the damaging conduct would continue or be repeated.

An injunction can be awarded by the court at the conclusion of the case (a “final injunction”) if damages will not adequately compensate the plaintiff for the loss that they have suffered. In addition, plaintiffs often request that the court issue an injunction to stop any damage being done to them while the court case is being heard (an “interlocutory injunction”). An interlocutory injunction will only be issued by the court where the plaintiff can show that:

1. There is a legitimate cause of action before the court;
2. There is a real risk of further serious injury to the plaintiff if the injunction is not granted;
3. An injunction is favoured by the “balance of convenience” (which balances the interests of the plaintiff, the defendant and the public); and
4. Damages would not be able to compensate the plaintiff.

Before it issues an interlocutory injunction, the court usually requests that the plaintiff give the court an undertaking that the plaintiff can pay any damages which the defendant will suffer if the interlocutory injunction is granted but the plaintiff does not eventually prove their case. The court may also order that the plaintiff provide a security for the legal costs that may be incurred by the defendant in successfully defending the proceedings. Such undertakings can be for substantial sums of money.

## Do I need a lawyer?

You do not need to have a lawyer to start court proceedings for a common law cause of action. However, most people do use lawyers as the court process is formal and there are many rules about how you must write court documents, how you may act in court and how you may present evidence to the court.

## How much will it cost?

One of the major practical limitations to using the courts to seek compensation or prevent environmental harm is the time and expense associated with litigation. If you have a lawyer to represent you, you will usually need to pay your own lawyer’s costs. If you win, some, but not all, of those costs will be paid by the defendant. If you lose, you will have to pay some of the defendant’s legal costs as well as your own your legal costs.

## Contacts and further information

Legal Aid Western Australia, Perth  
Law Access, Law Society of Western Australia, Perth

Tel: 1300 650 579  
Tel: (08) 9322 4911

### The Environmental Defender's Office WA (Inc)

The Environmental Defender's Office WA (EDO) is a community legal centre specialising in public interest environmental law.

The objects of the EDO include:

- ◆ to provide community groups and individuals with legal advice and representation to help protect the environment;
- ◆ to promote law reform that improves environmental protection; and
- ◆ to provide community education about environmental law.

The EDO is a non-profit, non-government organisation. The EDO receives its principal funding from the Federal Attorney-General's Department. However, these funds are limited and donations from the public provide a vital source of funds for many of our activities. Donations over \$2 are fully tax deductible. The EDO also welcomes people with a commitment to the environment to join as members.

If you require legal advice on an environmental issue or wish to find out more about the EDO, please contact us at the following address:

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