



Factsheet

1. Overview of environmental law in Western Australia

Western Australia has a coastline of 12,500 kilometres and a land area of almost 2.6 million square kilometres. Within this vast region, the State is host to a diverse range of environments and native species of plants and animals. For example, the south west botanical province is classified as one of only 25 “biodiversity hotspots” on Earth. The State’s environmental laws play an important part in protecting Western Australia’s environment.

This Fact Sheet provides an overview of environmental regulation in Western Australia, including an examination of the roles of Commonwealth, State and local governments.



What is “environmental law”?

The term “environmental law” refers to those laws directed towards protecting soil, air, water and biodiversity.

The details of these laws are set out in the EDO fact sheet series. The purpose of this fact sheet is to provide a framework for understanding where those laws come from, and how they are enforced.



Sources of environmental law

Environmental law derives from five sources - common law, statute, subsidiary legislation, administrative policies and international law.

1. Common law

Common law refers to laws that have been developed by the courts over many years. Whilst most environmental laws derive from statutes (see below), there are a number of common law principles which are relevant to protecting the environment, particularly where the issue involves a dispute between neighbours (see [Fact Sheet 2: Common law](#)).

2. Statute

Statutes are laws enacted by the State or Federal Parliament. A great deal of what is commonly referred to as “environmental law” is derived from statute (for example, the *Environmental Protection Act 1986* (WA)). 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.

3. Subsidiary legislation

A statute may allow for the making of subsidiary legislation, containing details of how a statute applies. Local town planning schemes and the *Environmental Protection Regulations* are examples of subsidiary legislation.

4. Administrative policies and guidelines

Although not laws themselves, policies and administrative guidelines applied by government affect how particular laws are enforced and administered in practice. Statements of planning policy and guidelines to the environmental impact assessment process are examples of policies and guidelines that affect the way the law is applied by government authorities.

5. International law

Australia is a signatory to a number of international treaties. These treaties do not have direct legal effect in Australia until they are implemented by legislation. An example is the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) which implements Australia’s commitment to the World Heritage Convention.

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.



Guiding principles of environmental law

In developing new environmental legislation, law-makers are increasingly adopting a number of internationally recognised principles:

- ecologically sustainable development;
- the precautionary principle;
- conservation of biological diversity and ecological integrity;
- economic valuation of environmental factors and the polluter pays principle; and
- public participation.



Roles of Commonwealth, State and local government

Commonwealth

The *Commonwealth Constitution* gives specific law-making powers to the Commonwealth Parliament. Although these powers do not include the power to make laws about the “environment”, the Commonwealth does have powers that may be exercised for the purposes of environmental regulation, including:

- control of interstate and overseas trade and commerce (e.g. granting export licences with conditions that protect the environment); and
- external affairs (e.g. implementation of the *World Heritage Convention* to protect world heritage areas).

The Commonwealth may also exercise its financial powers to make laws about taxation and expenditure of Commonwealth money in ways which protect the environment. For example, the Commonwealth may make grants to the States on conditions that the money be spent in a certain way, including ways which promote sustainable land management (see for example, the [National Action Plan on Water Quality and Salinity](#)).

For an overview of the most important Commonwealth environment laws, see [Fact Sheet 6: Commonwealth environmental impact assessment](#), [Fact Sheet 9: Biodiversity protection under Commonwealth law](#) and [Fact Sheet 17: Marine reserves](#).

State

The Western Australian Parliament has the power to make laws with respect to “peace, order and good government” of the State. This includes the power to make laws regulating the use of land and natural resources. A State law that is inconsistent with a Commonwealth law is invalid to the extent of its inconsistency.

Most environmental laws applying in Western Australia are State laws, and these are considered throughout the fact sheets.

Local government

Local government has the function of providing for the good government of persons within their districts. This includes the authority to make local laws that may protect the environment. It also exercises important powers under the *Town Planning and Development Act* and the *Health Act*.

Local laws made by local government are inoperative to the extent that they are inconsistent with a written law of the State or Commonwealth, and they can be disallowed by the State government.

Regional local governments may also be formed, and have the power to make local laws applying to the region in the same way as local governments.



Criminal, civil and administrative laws

Legal action to enforce environmental laws can be criminal, civil or administrative.

Criminal law

A criminal law is one which imposes a fine or custodial sentence on an offender. A person accused of causing environmental harm contrary to a law can be charged and required to attend court.

In order to be successful, the prosecutor (usually a government department) must prove “beyond reasonable doubt” that the accused committed the offence.

Statutes often specify a body that will be responsible for enforcing provisions within a particular Act. For example, the *Environmental Protection Act* provides that prosecution of offences under that Act may only be instituted by the Chief Executive Officer of the Department of Environmental Protection, acting with the consent of the Minister for the Environment, or a person authorised under a power issued to her or him pursuant to the Act.

If a statute does not limit the ability to bring prosecutions to a specified body, then members of the public may be able to bring a “private prosecution”. For example, a community group in South Australia took a private prosecution against a local government for allegedly illegally clearing a road verge contrary to the relevant Act in that State. Although the group lost the case, it was agreed that it could commence the prosecution.

Where an environmental offence is being committed, private legal action in the form of civil proceedings for an injunction may also be available.

Civil law

The civil law relates to legal disputes which do not involve criminal offences. A person breaching a civil law is not subject to a fine or imprisonment, but could be ordered to pay damages, or to refrain from further infringements of the rights of another person.

Where a person’s private interests (for example, financial interests) are harmed by the activities of another person and there are grounds for legal action, civil proceedings may be commenced in an appropriate court or tribunal to remedy that harm.

If a general public right is harmed (for example, a nature reserve is unlawfully cleared by a property developer), it will be harder for a person to commence legal proceedings because that person will have to prove that he or she has a “special interest” going beyond that of other members of the public.

Administrative law

Administrative law is the area of law dealing with the review of decisions made by public bodies, such as Ministers, government departments and statutory corporations. It has been said that the “primary purpose of administrative law is to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse.”

Where a public body acts contrary to a rule of administrative law, that body’s actions may be reviewed through the courts by a person affected by the decision in question. Where the public body is a Commonwealth one, its decision can be reviewed by the Federal Court. Where the public body is a State one or a local government, its decision can be reviewed in the Supreme Court.



Alternatives to legal action

If you are concerned that someone is causing environmental damage, there are a range of things you can do to prevent it before taking legal action.

Contact the person causing the harm

Often the easiest way to resolve a situation where environmental harm is occurring is by approaching the person causing the problem and discussing it with them. It could be that they did not know that their activity was causing harm, and that on becoming aware of your concerns, they may agree to modify their activities.

Contact the relevant enforcement agency

If the environmental harm being caused is one which is regulated by statute, then there will usually be a government authority that has powers to take action. For example, if your neighbour is building levee banks or lowering the height of the bed of a watercourse, you can refer the matter to the Water and Rivers Commission which has responsibility for managing developments on most watercourses in the State.

Where environmental harm is apparent, and the relevant government authority has the power to stop it being caused, it has a range of steps it can take to prevent the damage. It can do this by contacting the person causing the damage and seeking

their agreement to halt or modify the offending activity. If that person fails to obey such advice, the authority may have the power to:

- issue directions or a notice requiring specified action to be taken;
- undertake the required work itself and recover the cost from the offender; or
- bring a prosecution in court.

What to do if the authority refuses to become involved

Under this State's environmental laws, many enforcement decisions are left to the discretion of local government, a government authority or a Minister. Sometimes such a government authority will decide not to take action against a person breaching a law. Such enforcement bodies can choose not to take enforcement actions in a particular case, so long as the grounds on which that decision is made are lawful. For example, the enforcement body's limited resources may be legitimately taken into account in deciding whether to prosecute in any particular case. However, where the enforcement body refuses to even consider enforcing the laws it has authority over, a court order can be obtained to compel it to do so.

A member of the public may also refer a complaint against a government authority to the **State** or **Commonwealth** Ombudsman (depending on whether a State or Commonwealth authority is involved). The Ombudsman will investigate and hand down a finding on the matter. Although government departments are not bound to follow an adverse finding, they will usually do so to avoid negative publicity.



Taking legal proceedings

If you have exhausted alternatives to legal action, you may consider commencing legal proceedings in court. Legal action can be expensive and lengthy, so should only be used as a last resort.

How do you commence a legal action?

Different procedures apply depending upon whether the proceedings are of a criminal, civil or administrative law nature. Because civil actions are the most relevant to disputes involving individuals, the procedure discussed in this section relates only to civil proceedings.

As a general rule, in order to successfully commence such a legal action, you must have:

- standing to appear before the court;
- a valid "cause of action" (that is, a claim recognised by the law); and
- evidence that the person accused of causing the harm did in fact cause the harm.

You must also commence the action before the expiration of the "limitation period" (see below).

It should be noted that if you commence legal proceedings for a complaint relating to odour, noise, dust, smoke, fumes, fugitive light, or spray drift coming from an agricultural operation on rural land, then either party may require that the matter be referred to the Agricultural Practices Board. While a decision of the Board is not binding on the parties to the dispute, it is taken to be "declaratory of the public interest" and can be used as a defence in any subsequent court proceedings.

What is "standing"?

As a way of limiting the number of cases that go to court and avoiding cases being brought by "busy-bodies", a person must prove that he or she has "standing" before the matter can be heard. This requires that you have an interest in the subject matter of the action that goes beyond the interests of other members of the public.

The issue of standing will most commonly arise in cases where the damage you are complaining of affects the community at large (for example, smoke haze caused by a hazard reduction burn). If you cannot show that you have suffered some special damage over and above that suffered by the community at large, then the court is unlikely to grant you standing to appear in court.

What is "a cause of action"?

In general terms, and in relation to most kinds of legal action, if someone has caused you or your property actual damage (for example, physical damage to land or to your person), then you may have a legal claim to compensation (for example, through the law of trespass or nuisance).

Not all losses give rise to a cause of action. For example, if your neighbour builds a house which blocks your view, then even though you have suffered a loss (that is, a loss of a view and loss in value of your property), you do not have a cause of action because the courts have not recognised any right to a view. See **Fact Sheet 2: Common law**.

What evidence needs to be presented to court?

Evidence will need to be presented to establish each element of your cause of action and to provide a basis for the court to award a remedy. For example, if you bring a legal action against your neighbour for damage caused by the breach of a soil conservation notice, you would need to bring evidence that:

- (a) a soil conservation notice had been issued;
- (b) the notice was breached; and
- (c) the breach caused damage.

You would also need to prove the extent of that damage in financial terms so that compensation could be quantified.

Evidence can be by oral testimony, calling witnesses and expert witnesses, producing documents or producing photographs or other evidence.

Limitation periods

What is a limitation period?

Legal proceedings must be commenced by lodging the necessary papers in court within a period set by law (called a “limitation period”). **Limitation periods are complicated and vary depending upon the cause of action, the parties involved, and whether the proceedings are civil or criminal. Consult a lawyer for further information.**

Civil law

Common law actions

In the case of actions in nuisance, negligence or trespass (see **Fact Sheet 2: Common law**), the general rule is that legal action must be commenced within six years from the date the cause for complaint arose. For example, if a neighbour negligently chops down a tree which falls and causes damage to your fence on 1 July 1998, you must commence action in negligence within six years, that is on or before 1 July 2004.

Statutory actions

Where an Act grants on a person a right to take legal action against another person for breach of a statutory provision, then unless that Act states otherwise, the action must be commenced within two years of the date on which the breach occurred. For example, a property owner bringing an action for breach of a soil conservation notice causing damage must do so within two years of the damage being caused.

Special rules for actions against the Crown or persons acting under statutory authority

Special rules apply to legal actions against a person acting under statutory authority (for example, employees of Western Power, local government etc.). In these cases, legal action must be commenced within one year and notice of intention to bring the action must be given to the appropriate government body as soon as practicable. The Court may extend the one year period to a maximum of six years where the justice of the case requires it, for example where the delay was caused by mistake and the government body is not materially prejudiced in its defence.

Criminal law

A prosecution for an indictable offence (i.e. a serious offence heard before a judge and jury) may be commenced at any time unless a specific limitation period is specified.

A prosecution for a simple offence (an offence not heard before a jury) must generally be commenced within 12 months of the offence being committed. However, some statutes specifically provide for longer periods within which prosecutions can be brought. An example of a statute that extends the limitation period for a simple offence is the *Land Administration Act*, which gives the Minister for Lands ten years to commence proceedings for certain offences against the Act.

What remedies are available?

If an action is successful, a court has a number of things it can do. In criminal cases, the relevant Act creating the offence may allow the court to impose a fine, a custodial sentence or order that the offender rehabilitate the area damaged. In civil cases, the court can usually award an injured party damages or can issue an injunction to restrain future misconduct. For more information on civil remedies, see [Fact Sheet 2: Common law](#).

How much will legal proceedings cost?

Legal action can be expensive. In addition to court fees, you will usually have to pay for your lawyer and the legal costs of the other party if you are unsuccessful. If you are successful, the court will generally award you costs, but these usually only amount to around two-thirds of what you will have to pay your lawyer.

What legal assistance is available?

It is increasingly difficult to obtain legal aid funding for anything other than serious criminal offences. The Legal Aid Commission of Western Australia would generally not be able to assist people to take civil action.

The Environmental Defender's Office assists individuals or groups with advice on environmental law problems, and may even represent you in court if you cannot afford to do so yourself. The EDO will only provide advice or representation where it is in the public interest to do so.

Contacts and further information

Legal Aid Western Australia, Perth

Tel: 1300 650 579

Law Access, Law Society of Western Australia, Perth

Tel: (08) 9322 4911

Commonwealth Ombudsman, Perth

Tel: (08) 9220 7541

WA Ombudsman, Perth

Tel: (08) 9220 7555

(Freecall 1800 117 000)

For copies of legislation considered in this fact sheet visit:

[Australasian Legal Information Institute](#) (Commonwealth laws)

[State Law Publisher](#) (WA laws)

Tel: (08) 9321 7688

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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