

# KELLEHERS

## AUSTRALIA

---

### In-House Briefing Memorandum

~

#### *Private Nuisance*

A successful private nuisance claim requires a substantial and unreasonable interference with the private right to use and enjoy one's land. As distinct from trespass, that requires a *direct* intentional interference, a nuisance may include an *indirect* interference with not only a person's land but also the enjoyment of such land by noise, smell or other forms of air or waterborne pollution.

A nuisance is "an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions" (*Walter v Selfe* [1851] Eng R 335; (1851) 4 DeG & Sm 315 @ 322).

Liability in nuisance is not strict or absolute and fault in the alleged wrongdoer must be shown. The wrongdoer must have:

- (a) created the nuisance;
- (b) permitted the nuisance to arise by failing to exercise reasonable care;
- (c) continued or adopted the nuisance; or
- (d) negligently failed to remedy or abate the nuisance. (*Halsbury's Laws of Australia* at 9 June 2012, 415 Tort, 'B Private Nuisance')

The plaintiff must prove actual damage to or, at least, actual interference with, use and enjoyment of land. A claim in nuisance is unavailable without proof of harm and, in this way, is different from trespass.

Generally, there must be:

- (a) some 'sensible' and 'material' injury to claimant's property;
- (b) some affects to reasonable enjoyment.

Where a claim is based upon substantial interference with land enjoyment, rather than physical damage, liability turns upon the reasonableness of the activity causing the nuisance. However, where there is actual damage to property, reasonableness is not such an important issue.

Damages may be awarded for reasonably foreseeable harm caused by the defendant's activity that amounted to the nuisance. A Court may also grant an injunction, including a permanent injunction, to restrain an ongoing nuisance.

In the interesting case of *Gales Holdings Pty Ltd v Tweed SC* [2011] NSWSC 1128, the plaintiff claimed lost development potential and reimbursement of the financial burden of ongoing maintenance of undevelopable land. The case concerned polluted stormwater run-off flowing from Council kerbs, gutters, roads and pipe that ponded on the development land, creating a suitable habitat for a threatened species of wallum froglet. The plaintiff, in effect, claimed a right to be free of the protected species in order to develop the land, and that interference with such reasonable and unfettered enjoyment of land was an actionable nuisance. The Chief Justice Bergin of the NSW Supreme Court found that the run-off constituted a nuisance. However, it rejected a claim for the value of the habitat land because evidence showed some froglet habitat on the land prior to the nuisance arising and, thus, the habitat *per se* was not a consequence of it. However, it supported a claim for contribution to the plaintiff's additional development costs associated with treating or improving the quality of the contaminated stormwater within the habitat land to make it suitable for the froglet, as required by a condition of the development approval.

Copyright © Kellehers Australia 2013

This fact sheet is intended only to provide a summary and general overview on matters of interest. It does not constitute legal advice. You should always seek legal and other professional advice which takes account of your individual circumstances.

KELLEHERS AUSTRALIA: [www.kellehers.com.au](http://www.kellehers.com.au) / e: [kellelegal@kellehers.com.au](mailto:kellelegal@kellehers.com.au)

497 Swan Street, Burnley, 3121, Victoria, Australia