

CONSTRUCTION LAW IN AUSTRALIA

THIRD EDITION

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The liability of proprietors to their neighbours may also arise as a result of statutory provisions which impose a duty upon those "causing" excavation to be undertaken, which thereby interferes with rights of support. There may also be a separate liability in nuisance.

NUISANCE

[6.11] Apart from issues of negligence in the execution of building works, liability may also arise based on the actual effect which building operations have on adjoining properties or on "public rights" generally.

Nuisance is similar to trespass in that both involve some interference with the plaintiff's interest in land, but arise in different circumstances. Trespass occurs where, by a positive voluntary act of a defendant (which may be intentional or negligent), there is *direct* interference to or with the plaintiff's land. The trespass may be to the air space over the land, for example, by scaffolding⁴⁶ or a crane jib.⁴⁷ For historical reasons, an action in trespass is available even without proof of actual damage to the land, and regardless of the intention of the defendant, be they unaware, deliberately harmful, or acting with neighbourly care.

Private nuisance is concerned with indirect or consequential interference to the land as a result of an act or omission of the defendant occurring outside the plaintiff's land. It is wider than trespass in the sense that it is not restricted to physical intrusions, be they persons or things. Noises, smells, vibrations and even high frequency waves have been held to be nuisances. However, these interferences must be unreasonable and the plaintiff must show actual damage to the use or enjoyment of land to which it has some legally recognised interest. Public nuisance consists of interference by the defendant with any rights shared by the public, which rights need not necessarily relate to land or the ownership or occupation of land.

Private nuisance

[6.12] The tort of private nuisance protects the right of a person to the use or enjoyment of land and property which that person owns or occupies or in which that person has an interest. There are two types of private nuisance.

The first type occurs when a person allows the escape of materials or things such as water, trees, or even pieces of masonry, onto the land of another, which causes material damage to that land or property on that land. A plaintiff's cause of action is made out on proof of material damage to property that the plaintiff owns or occupies or in which the plaintiff has an interest, and proof that the damage was reasonably foreseeable.

⁴⁶ *LJP Investments Pty Limited v Howard Chia Investments Pty Limited* (1989); *Bendal Pty Limited v Mirvac Projects Pty Limited* (1991).

⁴⁷ *Graham v K D Morris & Sons Pty Limited* (1974).

The second type occurs where there is a substantial or unreasonable interference with the enjoyment by another of their land or other property on that land through excessive noise, vibrations, dust or smells. Whether the interference is unreasonable is a question of degree: a continuing interference with the enjoyment may be unreasonable, even if that interference is slight; likewise, an isolated deliberate act or an irregular unintended occurrence may give rise to an action for private nuisance, if that interference is considerable.⁴⁸

The interference must be with a recognised property right of the plaintiff in or over the affected land. The success of an action will depend on how unusual or unreasonable the interference is in all the circumstances of the case, having regard to the neighbourhood and use of surrounding properties, the duration, time of day, frequency and extent of the interference and all other relevant considerations.⁴⁹ For example, where a defendant undertakes building works on their land, interference with a neighbour's use or enjoyment of their property might not be considered unreasonable where the interference is temporary and confined to business hours.

It is no defence to say that the defendant's nuisance existed before the plaintiff's interest in the land and that the plaintiff "came to the nuisance".⁵⁰ A defendant continues or "adopts" a nuisance if, after the defendant knew or ought to have known of its existence, the defendant takes no reasonable steps to end it. For example, in *Ikic v Evans* (1989), the plaintiffs' house was damaged by a concentration of groundwater that resulted from excavations for a swimming pool undertaken on the defendant's property by the defendant's predecessor in title. Although the defendants had "adopted" the nuisance, the plaintiffs' action failed because they were unable to establish that there was any reasonable step which the defendants could have taken to prevent the continuing damage.

Only the owner or occupier of, or the person with the interest in, the affected land or property on that land is able to sue for private nuisance, though others affected by the nuisance may sue in negligence on the same facts. The creator of the nuisance is liable for the nuisance (and may also be liable in negligence to third parties), as may the person who occupies or owns the premises from which the nuisance emanates. A building contractor is responsible for private nuisance caused by its construction operations, and the owner of the land on which the building work is being undertaken may also be liable in negligence to third parties, either as a result of a non-delegable duty at law or under statute.⁵¹

As between the building contractor and the property owner, liability to third parties for nuisances created by the construction work is usually regulated under the building contract: the building contractor is typically

48 See, eg, *Halsey v Esso Petroleum Co Ltd* (1961); *Owners of Strata Plan 4085 v Mallone* (2006).

49 See, eg, *Baxter v Camden London BC [No 2]* (1999).

50 See *Proprietors of Strata Plan No 14198 v Cowell* (1989).

51 See, eg, *Burnie Port Authority v General Jones Pty Ltd* (1994).

required to indemnify the owner (as principal under the building contract) against such liability to third parties (see [9.75]).

Public nuisance

[6.13] Public nuisance occurs when there is an obstruction to the exercise by members of the public of a right that is common to all members of the public.⁵² Any interference that endangers the health, safety or comfort of the public is actionable as a public nuisance, and the interference need not relate to rights over land. A commonly-occurring interference is obstruction of a public highway. The erection of a building which interferes with reception from a television transmitter is neither a public nor private nuisance.⁵³ The action in public nuisance is usually taken by the Crown; however, an individual who can prove he or she suffered damage over and above that suffered generally by the public may take action.

Nuisance from construction

[6.14] Construction operations often cause disruption to, and interference with, the rights of adjoining owners or occupiers. Disputes may arise not only because of nuisance arising from the construction work itself, but also from the effect of the project on rights of owners or occupiers of neighbouring properties to light or air. During construction, problems may arise where noise, dust and vibrations emanate from the construction site.

Such situations may constitute a private nuisance. If so, there may be grounds for obtaining an injunction to prohibit its continuance,⁵⁴ or an action for damages may also lie, or both remedies may be available. In *Wherry*, partly by agreement, the hours of operation of demolition and excavation work were restrained. In *Aldridge v J O Clough & Son Pty Limited* (1979), an injunction was granted in general terms and damages awarded for interference with the enjoyment of the plaintiff's land from the activities of a quarrying operation.

Unlike negligence, liability for nuisance does not generally depend on the standard of conduct of the defendant. Thus, it is not necessarily a defence to a nuisance action that the defendant took reasonable precautions to avoid the nuisance, although it may be a defence to an action for private nuisance by interference with use and enjoyment of property, particularly where the duration of the nuisance is temporary. Where the nuisance occasions material damage to the plaintiff's property, the reasonableness of the use of defendant's property and the actual consequences of the defendant's actions are the important considerations.⁵⁵

⁵² *Kent v Johnson* (1973).

⁵³ See *Hunter v Canary Wharf Limited & London Docklands Development Corporation* (1997).

⁵⁴ See *Wherry v KB Hutcherson Pty Limited* (1986).

⁵⁵ *Cambridge Water Co Ltd v Eastern Counties Leather plc* (1993).

The courts, however, have adopted a pragmatic approach to demolition and building works. The contractor will be under a duty to take proper precautions to avoid undue inconvenience to neighbours. Where no steps are taken to limit the interference with a neighbour's property, the contractor will be liable for the nuisance, though not necessarily for the total consequences of the nuisance caused by the building work. Liability would extend only to that part attributable to the failure to take proper precautions.⁵⁶

The actual invasion of neighbouring property by crane jibs and scaffolding occurs often, particularly on inner city construction sites. Such an interference with a neighbour's rights has been held to be a trespass and not a mere nuisance. In *Graham v K D Morris & Sons Pty Limited* (1974), for example, an injunction was granted to prevent a crane jib passing over the plaintiff's property.

The test for determining whether an activity or an incursion above the surface of land constitutes a trespass to land is whether it is of a nature and at a height which may interfere with any ordinary uses of the land which the occupier may see fit to undertake.⁵⁷ Despite case law to the contrary, it is respectfully suggested that a temporary and limited invasion of air space is a nuisance rather than a trespass and should require actual damage to the plaintiff's property or unreasonable interference with the plaintiff's enjoyment of its property to entitle the plaintiff to a remedy, certainly a remedy by way of injunction.

When considering whether to grant an injunction, the court will seek to balance the rights of the parties; delay in commencing action and the availability of damages are also relevant considerations (see, generally, [5.53] and [6.28]). Cantilevered staging represents a more continuing trespass and is more likely to be restrained by way of injunction. Accordingly, the written permission of neighbouring properties' owners is usually sought for such activities and compensation considered.

Apart from interference with the enjoyment and use of land, interference with other rights over land owned or occupied by the plaintiff may constitute private nuisance, the most important being the right of support. Whilst there is a natural right of support for land by land, and a nuisance is committed if subsidence is caused by either the removal of natural support by excavation or undermining, there is no equivalent natural right for support of the building.⁵⁸ This old and unsatisfactory rule is partly overcome by the concurrent liability in negligence of a builder or property owner for damage caused to neighbouring properties during excavation and underpinning.⁵⁹

56 See *Andreae v Selfridge & Company Limited* (1937).

57 See *Bendal Pty Limited v Mirvac Projects Pty Limited* (1991), *LJP Investments Pty Limited v Howard Chia Investments Pty Limited* (1989) and *Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd* (2007).

58 See *Dalton v Angus* (1881); *Kebewar Pty Ltd v Harkin* (1987).

59 See *Pantalone v Alaouie* (1989); *Anderson v MacKellar County Council* (1968) and *Hicks v Lake Macquarie City Council (No 2)* (1992).

Apart from the present inclination of courts to impose liability based on a duty of care to neighbouring owners of property during construction excavation, there are statutory regulations which require certain procedures and notification of work, particularly where underpinning is involved. These statutory provisions may impose a non-delegable duty upon the owner of the land to ensure that excavation and underpinning works are carried out without causing damage to neighbouring properties.⁶⁰

DEFAMATION

[6.15] Defamation is concerned with damage to a person's reputation, and not merely with hurt feelings, invasion of privacy or distress. Reputation is injured if a communication concerning the plaintiff is made to a person other than the plaintiff, which communication (known as "publication") contains a defamatory imputation, that is, it is likely, in the minds of ordinary, reasonable people, to cause others to think less of the plaintiff or to shun or avoid the plaintiff. A defamatory imputation may be conveyed by the natural and ordinary meaning of a publication or by innuendo. Publications may be defamatory even if the publisher has no intention to defame.

The defamatory imputation must have been published by the defendant, in the sense of conveyed in print or some other material form, by word of mouth or by broadcast to a person other than the plaintiff. A defamatory statement conveyed only to the subject of the statement is not actionable. All persons involved in the publication or republication of a defamatory imputation may be liable for the defamation, subject to a defence of innocent dissemination. Other specific defences are available to a defendant to excuse or justify an otherwise defamatory publication.

Since 2006, following the enactment by all States and Territories of model defamation laws, essentially uniform defamation legislation operates in Australia.⁶¹ The *Defamation Acts* retain, with some modification, the common law of defamation, including the common law principles with respect to "publication", conveyance of a meaning and defamatory character and common law defences. Significantly, the *Defamation Acts* abolish the distinction at common law between slander and libel, establish a defence of "contextual truth", set a statutory cap on awards of damages for non-economic loss, abolish exemplary and punitive damages and impose a one year limitation period on defamation actions, subject to extension for up to three years following publication.

The abolition of the distinction between libel and slander by the *Defamation Acts* means that the publication of defamatory material of any kind is actionable

⁶⁰ See, eg, *Conveyancing Act 1919* (NSW) s 177.

⁶¹ See the States' *Defamation Acts 2005* and the *Civil Law (Wrongs) Act 2002* (ACT) and *Defamation Act 2006* (NT).

AS 2124—1992

with
AS 2125—1992
AS 2127—1992
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AS 2126—1978.
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which necessitates a change in the Temporary Works or the Contractor's method of working and thereby causes the Contractor to incur more or less cost than the Contractor could reasonably have anticipated at the time of tendering, the difference shall be valued under Clause 40.5.

14.3 Notices and Fees

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The Contractor shall give the notices necessary to comply with the requirements referred to in Clause 14.1.

The Contractor shall pay any fees or charges necessary to comply with the requirements referred to in Clause 14.1.

If a requirement necessitates the provision or expansion of services of a municipal, public or statutory authority in relation to the Works or the Temporary Works, the Contractor shall pay any fee or charge payable to the authority for the services and to the extent to which the services are not included in the work under the Contract, the fee or charge shall be reimbursed by the Principal to the Contractor.

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If after the 14th day prior to the closing of tenders, there is required to be paid by the Contractor to a municipal, public or statutory authority in relation to the Works or the Temporary Works—

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(a) an increase or decrease in a fee or charge, the difference shall be valued under Clause 40.5; and

(b) there is a new fee or charge, that fee or charge shall be reimbursed by the Principal to the Contractor.

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14.4 Documents Evidencing Approvals of Authorities

The Contractor shall give the Principal copies of documents issued to the Contractor by municipal, public or other statutory authorities in respect of the work under the Contract and, in particular, any approvals of work.

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15 PROTECTION OF PEOPLE AND PROPERTY

Insofar as compliance with the requirements of the Contract permits, the Contractor shall—

(a) provide all things and take all measures necessary to protect people and property;

(b) avoid unnecessary interference with the passage of people and vehicles;

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(c) prevent nuisance and unreasonable noise and disturbance.

Without limiting the generality of the Contractor's obligations, they include the provision of barricades, guards, fencing, temporary roads, footpaths, warning signs, lighting, watching, traffic flagging, safety helmets and clothing, removal of obstructions and protection of services.

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If the Contractor or the employees or agents of the Contractor damage property, including but not limited to public utilities and services and property on or adjacent to the Site, the Contractor shall promptly make good the damage and pay any compensation which the law requires the Contractor to pay.

If the Contractor fails to comply with an obligation under Clause 15 the Principal may, in addition to any other remedy, perform the obligation on the Contractor's behalf and the cost incurred by the Principal shall be a debt due from the Contractor to the Principal.

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16 CARE OF THE WORK AND REINSTATEMENT OF DAMAGE

16.1 Care of the Work Under the Contract

From and including the earlier of the date of commencement of work under the Contract and the date on which the Contractor is given possession of the Site to 4 p.m. on the Date of Practical Completion of the Works, the Contractor shall be responsible for the care of the work under the Contract.

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Without limiting the generality of the Contractor's obligations, the Contractor shall be responsible for the care of unfixed items the value of which has been included in a payment certificate under Clause 42.1, things entrusted to the Contractor by the Principal for the purpose of carrying out the work under the Contract, things brought on the Site by subcontractors for that purpose, the Works, the Temporary Works and Constructional Plant, and the Contractor shall provide the storage and protection necessary to preserve these items and things, and the Works, the Temporary Works and Constructional Plant.

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consequence of the wrongful act.³⁶ Public nuisance may also result in criminal sanctions depending on the nature of the nuisance in question.³⁷ However, as certain legal principles are shared by both public and private nuisance, the same interference constituting a private nuisance may also in some circumstances establish public nuisance.³⁸

Private nuisance

19.10 The tort of nuisance involves fault of some kind.³⁹ Such fault generally involves foreseeability but liability is not strict.⁴⁰ The kind of fault required depends upon whether the defendant created the nuisance in the first place or adopted or continued the nuisance.⁴¹ Liability for nuisance (unless the conduct gives rise to a claim based on strict liability)⁴² will not be established unless it can be shown the defendant acted recklessly or either failed to take action or took action knowing the likely impact upon the enjoyment by the plaintiff of its property.⁴³

19.11 To constitute a nuisance, the interference must be unreasonable, having regard to a variety of factors including: the nature and extent of the harm or interference; the social or public interest value in the defendant's activity; the peculiar sensitivity of the user or use of the claimant's land; the nature of established uses in the locality (e.g. residential, industrial, rural); whether all reasonable precautions were taken to minimise any interference; and the type of damage suffered.

As such, private nuisance is a substantial and unreasonable interference with the private right to use and enjoy land. To establish the cause of action, the plaintiff must demonstrate the holding of title to prosecute in respect of the particular nuisance, and that the defendant has interfered with its property right. Interference must be both substantial and unreasonable.⁴⁴ The interference must result in physical or material damage, and/or interference with the use and enjoyment of the land.⁴⁵

36. *Harper v GN Haden & Sons Ltd* [1933] Ch D 298; *Leichhardt Municipal Council v Montgomery* [2007] HCA 6. See also *Onus v Telstra Corporation Ltd* [2011] NSWSC 33 at [122].

37. *Hunter v Canary Wharf Ltd* [1997] AC 655.

38. *Boyce v Paddington Borough Council* [1903] 1 Ch 109 at 114; *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 905, 907.

39. *Sutherland Shire Council v Becker* [2006] NSWCA 344 at [119]; *Robson v Leischke* [2008] NSWLEC 152; *Montana Hotels Pty Ltd v Fasson Pty Ltd* (1986) 61 ALJR 282 at 284.

40. *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 904.

41. *Robson v Leischke* [2008] NSWLEC 152 at [47].

42. In Australia, strict liability within the rule in *Rylands v Fletcher* (1868) LR 3 HL 330 has been subsumed within the law of negligence: *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520. However, strict liability can still be created by statute.

43. *Quick v Alpine Nurseries Sales Pty Ltd* [2010] NSWSC 1248 at [140].

44. *SJ Weir Ltd v Bijok* [2011] SASCF 165.

45. *Harris v Carnegie's Pty Ltd* [1917] VLR 95; *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145; *Robson v Leischke* [2008] NSWLEC 152 at [42]–[48]; *Holloway v Newcastle City Council* [2013] NSWDC 62 at [112].