



**EDO-NQ
FACTSHEET SERIES**

AN INTRODUCTION TO TRESPASS

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AN INTRODUCTION TO TRESPASS

This factsheet is intended as a plain English guide to a particular area of law. It is not legal advice and is not intended as a comprehensive examination of the legislation. Whilst all care has been taken in its preparation, it is not a substitute for legal advice as legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your particular circumstances you should contact the EDO or your solicitor.

WHAT IS TRESPASS?

Civil Tort

Trespass involves intentionally or negligently entering or remaining on, or directly causing any physical matter to come into contact with, land without the permission of the owner or lawful occupier. Therefore, to enter another's property without permission is a trespass. This civil tort is to protect the interests of others in maintaining their land free from any physical intrusion.

A plaintiff may bring an action in trespass to the land if he or she is in exclusive possession of the land in question. The Court is not concerned with a question of title over the land, simply that the plaintiff has exclusive possession, which would include an occupier of the property such as lessee.

Trespass to land is *actionable per se*, which means that the party whose land is entered may sue even if no actual harm or damage is done. However, where damage can be proven, the amount of compensation which the owner or occupier may recover will be increased.

Criminal Offence

Trespass may also be a criminal offence pursuant to the *Summary Offences Act 2005* (Qld) ("the SO Act") if the "property" involved is a dwelling or an enclosed yard for a dwelling. Section 11(1) of the SO Act states that a person must not unlawfully enter, or remain in, a dwelling or the yard for a dwelling.

Section 11(2) of the SO Act provides that a person must not unlawfully enter, or remain in, a place used as a yard for, or a place used for, a business purpose.

Defences to Trespass

The defences to an action in trespass are as follows:

- (1) the authority of law – for example:
 - a police officer entering onto land pursuant to some legal power;
 - a bailiff entering onto land in the course of their duty;
 - fire brigade if they are trying to stop a fire;
 - licensed surveyors with a genuine need to carry out a survey from a position on your land;
 - pest eradicators contracted by an appropriate body such as the local council;
 - RSPCA officers or other authorised inspectors who may have a reasonable belief that someone is being cruel to animals on your property and
 - authorised gas, electricity, post office officials, health officers, council officers and telecommunications staff etc;
- (2) abatement of a nuisance – for example, a person who enters a property to stop a fire spreading; and
- (3) permission to enter onto land, which is given by the person entitled to possession – for example the registered owner or the occupier, such as the lessee.

Penalties and Remedies Against a Trespasser

Civil Tort

A trespasser on property may be:

- (1) Ejected from the property, using sufficient force only.

The party in possession of the property, such as the occupier, can eject a trespasser from the property but is not allowed to use any more force than is necessary. Generally no force is necessary to eject a trespasser, however if the trespasser uses force during or after the entry, the occupier is then justified in using a similar force to protect themselves and their property. If the trespasser assaults the occupier when they are being ejected, the occupier is entitled to act in self defence. If however, the occupier uses greater force than the court considers reasonable, the trespasser may sue the occupier for assault. This generally involves the police being called to remove trespassers from the property.

- (2) An injunction to restrain a continuing trespass (i.e. continuing to remain on the property or cause rubbish to remain after initial trespass) or to prevent a threatened trespass.

An injunction is an order by the court and simply orders a person to do something, or stop doing something, such as ordering a person(s) to stop entering a property without permission.

- (3) Court action for damages.

If any damage is caused on the property during an act of trespass, the party in possession of that property may sue for damages.

To date, in Queensland, in one case, a claimant successfully sued for damage to privacy and thus was acknowledged a right of action independent of statute. In 2003 Justice Skoien of the Brisbane District Court, in *Grosse v Purvis* [2003] QDC 151, ruled for the plaintiff in a suit for the tort of privacy, noting that "in Australia it would be the first step to hold that there can be a civil action for damages based on the actionable right of an individual person to privacy "albeit "a logical and desirable step"". The defendant was awarded \$178,000 to recover damages for mental, psychological or emotional harm for a willed act that intrudes upon the claimant's privacy or seclusion and causes the claimant harm or distress. Similar positions have not been taken by higher courts in subsequent decisions.¹

Criminal Offence

A trespasser in a dwelling or in a yard of a dwelling may be:

- (1) arrested; and
- (a) fined the maximum penalty 20 penalty units (1 penalty unit equals \$75, therefore it will be \$1,500.00); or
 - (b) imprisoned for a maximum of 1 year.

Evidence Collected During Trespass

Court proceedings

If you obtain evidence during an act of trespass, you will not normally be allowed to rely on that evidence in court, as it has been illegally obtained. The judge has discretion as to whether or not to allow evidence obtained during an act of trespass to be relied upon.

Publication

Injunctive relief is also available to the Plaintiff to suppress the after effects of trespass, such as the subsequent publication of evidence, such as a videotape, film, photograph,

¹ Examples are *Giller v Procopets* [2004] VSC 113 and *Kalaba v Commonwealth of Australia* [2004] FCA 763 and FCAFC 326.

or interview, obtained by a trespasser during the course of the trespass. However, it needs to be demonstrated that:

- 'the circumstances would make publication unconscionable;
- that the plaintiff will suffer irreparable harm if an injunction is refused; and
- the balance of convenience favours the granting of the injunction.'²

To determine the criterion of what is unconscionable, it has been stated that:

*'what is unconscionable will depend to a great degree on the court's view as to what is acceptable to the community as decent and fair at the time and in the place where the decision is made.'*³

This means that those plaintiff's who can only demonstrate that their reputations or interests alone will suffer if the publication of the trespass material were to proceed, will not have proven unconscionability so as to satisfy the court. In these circumstances, the plaintiff would also need to demonstrate that the publication could not be reasonably sanctioned as:

- the defendant's conduct was motivated by ill-will or a callous disregard of the rights of others;
- the material is used irresponsibly and is biased; or
- the evidence is used to portray the plaintiff in a way which would be unfair and severely prejudicial.

In considering the balance of convenience Young J⁴ indicated that he would have weighed:

...the public interest in having full dissemination of news of matters of general importance... [against] the court's duty to prevent persons in positions of power riding roughshod over the personal and proprietary rights of other citizens... the prejudice suffered by the defendants if the story, on which doubtless [were] invested considerable sums of money, might go stale as against the possible prejudice to the plaintiff's business if it were telecast.'

The above considerations and decisions of the court in the above New South Wales case was referred to with approval by the Supreme Court of Queensland in the case of *Emcorp Pty Ltd v ABC* [1988] 2 Qd 169.

More recently, the High Court in *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; 185 ALR 1 has held that equitable jurisdiction exists not only to restrain the publication of a videotape or photograph made by a trespasser, but is equally applicable where such materials have passed into the hands of third party, itself innocent of the trespass, who threatens to publish it.

² *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457

³ *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457 at 463-4

⁴ *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457 at 465

Further information

If you have any further questions or concerns about any of these matters, then please contact us on the details below. While we have limited resources, often we can give you quick advice over the phone or direct you to someone who may help on a free or reduced rate basis.

Stay in contact with your local Environmental Defenders Office.

Useful Contacts

EDO-NQ

Suite 1, Level 1
96-98 Lake Street
CAIRNS QLD 4870
Ph : 07 4031 4766; Fax: 07 4041 4535
Email: edong@edo.org.au

EDO (Qld)

30 Hardgrave Road,
WEST END QLD 4101
Ph: 07 3211-4466; Fax: 07 3211-4655
Email: edoqld@edo.org.au

To become a member of the Environmental Defender's Office of Northern Queensland, or for more information about factsheets and legal advice, please contact us at edong@edo.org.au or on 07 4031 4766. Our web address is www.edo.org.au/edong