



chapter eleven

## Taking action

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### Introduction

So you have an environmental issue that needs to be addressed? Not sure how to start or whom to turn to for assistance? This chapter provides guidance on what to do, whom to get advice from and how to set up a new group, if that is necessary. It also covers the legal hurdles you may have to face, the bodies you can complain to, and what happens if the issue you are interested in reaches the courts. At the end of this chapter, we have also included a summary of resources available on risks associated with non-violent direct action and, particularly, dealing with the criminal law.

### Finding like-minded people

A key question in starting to address an environmental issue is whether another person or organisation is already addressing the issue. Some of the work may already be done so it might make sense to join forces, particularly as there tends to be only limited funds and resources in the community and the duplication of groups can affect the work of all of the groups. Working with an existing organisation can make achieving your aim much easier.

There are many groups in the ACT that have an interest in the environment. These range from single-issue organisations to planning associations and to the ACT's peak environment organisation, the Conservation Council of the South East Region and Canberra.

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The Conservation Council's position in the environment movement makes it a worthwhile starting point to see if anyone else is working on your issue. The Conservation Council currently has about forty groups as part of its membership base. A quick look at the Conservation Council's website, a phone call or a

visit may put you in contact with people already working on your issue or ones like it (see Contacts list at the back of this book).

Many of Australia's national environmental organisations have offices in the ACT. Some of these, like the Australian Conservation Foundation, have local branches in the ACT that are members of the Conservation Council and will take on regional issues. Others tend to focus more on nationally significant environmental issues and these may be worth contacting if your issue is significant and, for whatever reason, the Conservation Council or other regional groups are not able to assist.

A range of groups, both regional and national, is listed in the Yellow Pages phone directory, currently under the heading of Organisations – Conservation and Environmental.

### *Starting your own group*

If there is, however, no one working on the issue then starting your own group is an option. There are a couple of excellent publications that deal with starting an environmental group:

- *...Anyone can* by Robin K Villiers Brown on behalf of the Queensland Conservation Council
- *Act locally!* by Kathy Fook and Anne Roberts for the Nature Conservation Council of New South Wales.

Copies of these books can be obtained by contacting the two conservation councils (see Contacts list at the back of this book). The National Library holds reference copies. Both these publications provide in-depth advice on the issues to be considered when creating an environmental group and for running a campaign. It is beyond the scope of this handbook to go into the same level of detail. However, a critical legal issue is whether to incorporate the group or not.

### *Incorporation*

Incorporation gives the group its own legal identity; you are no longer a group of individuals with each one being a separate legal entity. There are some distinct advantages to incorporation, including:

- providing a separate legal entity which can open bank accounts, enter into contracts, take out insurance, hold assets, etc in its own right
- limiting the financial liability of the group's members in respect of the debts of the group
- defining the role of the group through the drafting of its aims and objectives required for its constitution
- meeting the requirements of some funding bodies that will only provide funds to an incorporated entity.



Offsetting these advantages are:

- the costs, both financial and administrative, of creating and maintaining the incorporated entity
- the risks associated with being a director or office bearer of an incorporated entity, which are similar to those of being a director of a company.

In the ACT it is most usual for an environmental group to become an incorporated association under the *Associations Incorporation Act 1991* (ACT). Another, but less common, alternative is to establish a company under the *Corporations Act 2001* (Cth). The former is a simpler process, resulting in an entity that is less costly to create and maintain, has less ongoing regulatory requirements and for which the penalties for breaching any regulatory requirement are not as severe. Regardless of the structure, however, it would be prudent to obtain independent legal advice before proceeding.

To become an incorporated association you will need:

- at least three members
- a constitution to set out the group's aims and objectives and rules on how it will function
- a public officer to be the legal face of the group and to lodge documents at the Registrar-General's office
- an auditor to check the financial affairs of the group
- a committee to organise the activities and manage the finances of the group.

The Associations Incorporation Act and the Associations Incorporation Regulations 1991 set out more detailed requirements on all these points, so you will need to purchase a copy or download one from the ACT legislation register (see Contacts list at the back of this book). The Regulations contain a model set of rules that can be adopted as your constitution or, if they are changed to suit the group's needs, or totally replaced, there is a checklist of the matters that must be included in your constitution.

The ACT Registrar-General manages incorporated associations and that office can provide information and advice, for example, it has produced a useful guide, called the *Associations kit*, on the obligations of incorporated associations (see Contacts list at the back of this book).

On money matters—if the incorporated entity is to hold a bank account it is worthwhile either applying for a tax file number or, if it is a not-for-profit entity, an income tax exemption. Without either of these the bank will be required to withhold income tax out of any payment of interest. Application forms are available from the Australian Taxation Office or, for Tax File Numbers, Australia Post.

Being an incorporated entity is also one of the business structures acceptable by Environment Australia for inclusion on its Register of Environmental Organisations that allows tax deductibility status for donations received.

Once the group structure is established, you can start the business of lobbying, campaigning, protesting. The following sections of this chapter cover the legal matters that may arise from these activities.

### Risks of speaking out—defamation

Environmentalists involved in public debate and protest can be confronted with a wide range of risks associated with their activities. There is not the scope in this handbook to deal with all these potential legal risks, however, no handbook on environmental law would be complete without at least a short summary of the basic principles of defamation.

The risk of a developer or corporation, whose actions you are opposing, taking legal action for defamation are real. This was demonstrated only recently in

South Australia when the developers of the Hindmarsh Island bridge were successful in their defamation action against a number of people and organisations who campaigned against the building of the bridge, including the Conservation Council of South Australia. Damages were awarded against these parties (*Chapman & Ors v Conservation Council of SA & Ors* [2002] SASC 4). The Conservation Council has appealed the decision.

Australian defamation laws permit a person, including a corporation, to recover damages for injury to his, her or its reputation. The law attempts to strike a balance between the need to protect a person's reputation and the public's right to free speech. Defamation laws, however, are complex and in many ways anachronistic. What follows is only a brief discussion of some of the key principles. This should not be regarded as legal advice. If you are concerned that you, or your organisation, may be at risk in relation to defamation issues, then you should consider seeking legal advice. The Environmental Defender's Office (ACT) can assist environmental organisations with advice on defamation issues.

### *What is defamation?*

Defamation occurs when published material, identifying a person, conveys a meaning that tends to:

- lower that person's reputation in the estimation of right-thinking members of society
- lead people to ridicule, avoid or despise that person
- or
- injure that person's reputation in business, trade or profession.

However, even if what you have said is defamatory, there may be a defence available, such as defences based on justification (truth), fair comment, or privilege (absolute or qualified). A person can take action for defamation without any proof of any actual damage having been suffered as a result of the injury to their reputation.

### *Defamation laws in different states and territories*

In the ACT, defamation laws are based partly on the common law, or judge-made law, and partly on legislation (*Defamation Act 1901* (NSW) and the *Defamation (Amendment) Act 1909* (NSW)). These New South Wales laws were adopted in the ACT when it became a separate territory in the early 1900s.

Defamation laws differ in all Australian states and territories, although many of the basic principles are similar. This may be important to consider if the material you are disseminating is published in other states and territories as well as the ACT. A person about whom defamatory material has been published in more than one state or territory will be able to choose in which jurisdiction they wish to sue for defamation.

### *Elements of defamation*

There are three main elements that the plaintiff (the party bringing the action) must establish in an action for defamation:

1. the material must be published
2. the material must identify a particular party
3. the material must have a defamatory meaning.

#### 1. Publication

Material is published if it is communicated to anyone other than the party who claims to have been defamed. So, for the purposes of defamation laws, material does not have to be published in a newspaper—any of the following examples could constitute publication:

- a simple comment in a conversation with a person (other than the person defamed)
- a media release or published article
- comments made during a speaking engagement
- a letter
- a banner
- material published on a website
- material contained in an e-mail (even an internal e-mail).

Republication of another person's defamatory statement can also be a new and separate defamation. So it is not a defence to say that you were simply repeating what someone else had already published.

#### 2. An identifiable person

The test for establishing whether a person is identified in the published material is whether a reasonable person who is in receipt of the material can, in light of all the information and circumstances surrounding the material, establish who in fact is the subject of the material. So even if the person is not named, if there is sufficient material to identify to whom you are referring, then this can still be defamation. Also if in error you identify the wrong person, then the person who was wrongly identified may have been defamed. All living persons can be defamed. Importantly, this includes corporations and other bodies such as trade unions and statutory authorities.

#### 3. Defamatory material

Whether or not something is defamatory is an objective question, to be measured by general community standards. The test is whether an ordinary, reasonable person would have understood the material to be defamatory. In determining whether material is defamatory it is necessary to consider the material in its entirety and its context, including all of the material such as headings, captions

and accompanying visual material.

### *Defences*

If a plaintiff can establish all three elements then a defendant is liable for defamation unless he, she or it can prove that there was a defence available. Broadly speaking, the defences to a defamation action are designed to balance the competing public interests of protection of an individual's right to reputation and freedom of speech.

The following is only a very brief summary of the main defences, as again the law in this area is extremely complex. The focus mainly is on the defences as they apply in the ACT.

#### Truth/justification

The starting point is that it is a defence to publish material that is true. In some states, including Victoria, South Australia and Western Australia, truth alone is a complete defence. However, in the ACT, it is not sufficient to prove that the material is true; you must also prove that the publication of the material was for the public benefit. This means that in the ACT there are two elements you must prove to maintain a defence of truth:

1. the material is true
2. publication is for the public benefit.

Proving that a statement is in fact true can be very difficult because you can only rely on material that is admissible in evidence in a court of law. Not all material is admissible. It is not sufficient, for example, that the information has come from a reliable source or is common knowledge. Second hand information (hearsay) is generally not admissible evidence in a court proceeding.

#### Fair comment/honest opinion

A defence of fair comment is available in all states and territories either under common law or legislation. To raise this defence a defendant must establish all of the following matters:

- the communication was on a matter of public interest, that is, related to a public role or activity—it is for the court to decide what is in the 'public interest'
- the facts upon which the communication was based were notorious, or were stated or referred to in the material
- the relevant facts are either true or privileged (see privilege below)
- the communication was fair in that the opinion expressed could be honestly held.

The defence will fail if the court finds malice or ill will has inspired the communication.

### Privilege

It is a complete defence to an action for defamation if it can be shown that at the time of communication the relevant information was privileged. If the publication is privileged the truth of the defamatory material is irrelevant. There are two levels of privilege, absolute and qualified.

The publisher of absolutely privileged material enjoys a complete defence from defamation proceedings. The two most commonly raised instances of publications protected by absolute privilege are:

- statements made in the course of parliamentary proceedings and in official parliamentary papers—the term parliamentary proceedings extends to parliamentary committee reports and inquiries
- statements made in the course of judicial or quasi-judicial proceedings.

The defence of absolute privilege can be relied on even if the material was published maliciously. Absolute privilege only attaches to the primary publication of absolutely privileged materials, for example, in parliament or the court.

The defence of qualified privilege covers a range of different situations where, in the interests of protecting the essential flow of information, a limited or qualified privilege is allowed by the law. Broadly speaking, these are situations in which the publisher or speaker has an interest in or duty to provide information on a particular subject to a person who has an interest in or duty to receive that information. An example of qualified privilege might be where a minister or official, who is going to make a decision on an issue, has called for submissions and views from interest groups.

The High Court recently held that the categories of qualified privilege include the dissemination and receiving of information about government and political matter that affects the people of Australia (see *Lange v ABC* (1997) 189 CLR 520).

Malice or improper purpose will defeat the defence of qualified privilege.

A fair and accurate report on privileged material, such as what is spoken in parliament or presented in courts, is protected by qualified privilege. The privilege is qualified in that the publisher or speaker must not be motivated by malice or an improper purpose. And the report must indeed be both fair and accurate. The report need not be complete but it must be neutral and balanced. In other words, you must be careful not to quote selectively from the material.

### *Some tips for avoiding defamation actions*

- Fight the issue not the personality. Ensure that any communication does not involve any form of personal criticism or attack on an identifiable individual.
- Ensure the truth of any representation made can be verified with original

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documentation or witness statements. If you are unsure of the truth of a representation, do not make it.

- Where possible attempt to include the factual basis of a representation along with the published material.
- Be able to readily identify an issue of public interest or benefit relating to a representation, remembering that in the ACT the defence of truth is not available unless it is in the public interest or of public benefit.
- In the case of e-mail, think before you click. Do not write anything in an e-mail that you would not want published on the front page of a national newspaper.
- Have a colleague scan any material intended for public release. In many cases, an independent mind will see potential defamatory material when you may not.

## Freedom of information

What if you need to know some information that is held by an ACT government department or agency? In some instances, the information you require may be available for a fee, or the department or agency may be willing to provide the information upon request. However, if these two routes are not available, the *Freedom of Information Act 1989* (ACT) (FOI Act) provides a legislative basis for obtaining the required information.

The FOI Act gives the community a right to access documents held by ACT ministers, departments and some statutory authorities. It also gives access to information about the ways departments and agencies are organised, including the procedures they use in making decisions and the arrangements they have for public involvement. It is also possible to look at or buy copies of manuals (or parts thereof) and guidelines used by government agencies when making decisions. The types of documents you can access include files, reports, computer printouts, maps, plans, photographs, tape recordings, films or videotapes. But among all these documents some are exempt from disclosure, generally to protect some public interest, confidential matters or the private or business affairs of others.

Each department has FOI officers who will help if you wish to make a request. You must identify the document or documents you want to access, for example, by giving the date it was created or describing in detail the matter you are interested in. You then make a request either by writing to the department or by filling in an FOI application form.

The department or agency must acknowledge receipt of your request within fourteen days. It must notify you of its decision on access within thirty days and give you notice of any charges that are payable. If you are granted access, you

will receive a copy of the document or you will have the right to view the document at the department or agency. The document you see may contain sections that have been deleted or blacked out, for example, information about another person may be deleted. If you are refused access you should be given a statement of reasons setting out why access was refused.

If you are unhappy about a decision that denies you access, or that imposes a charge, or the fact that there have been delays in making a decision, you can ask the department for an internal review. You will be notified of the new decision within fourteen days and if access is still denied you will be given reasons. If still unhappy, you can apply to the ACT Administrative Appeals Tribunal (AAT) or to the Ombudsman (see below).

Currently, no fee attaches to making a request under the ACT FOI Act, but there are charges for locating documents (\$15 an hour), for the department's time in making decisions about your application (\$20 an hour), for photocopying more than 200 pages (20c per page) and for supervising any inspection (\$6.25 an hour).

General information on FOI is available on the web, surprisingly, on the Department of Health's website at [www.health.act.gov.au](http://www.health.act.gov.au). Go to 'About us' where there is a link to Freedom of Information.

There is a similar process available under the *Freedom of Information Act 1982* (Cth) for information held by Commonwealth departments and agencies.

## ACT Ombudsman

The office of the ACT Ombudsman is created under the *Ombudsman Act 1989* (Cth) as the Commonwealth Ombudsman also holds the position of the ACT Ombudsman. The ombudsman acts as an independent watchdog whose primary role is to investigate complaints about government administration, for example, where there has been inordinate delays in making a decision, where a decision-maker has not taken sufficient notice of a particular argument, or where in the complainant's view there has been bias, neglect, inattention or incompetence. To assist the investigation of the complaints, the ombudsman has wide powers to question people and inspect documents.

However, there are some actions that the ombudsman cannot investigate. These are actions taken by:

- the territory or a territory authority for the management of the environment
- the Commissioner for the Environment
- a minister
- a judge or a magistrate.

The first of these points makes it clear that the ombudsman has a very limited role in the environmental area. The person who has specific responsibility for

investigating complaints about environmental administration is the Commissioner for the Environment (see below).

Even where a matter does come within the ombudsman's responsibilities, he or she may decline to investigate a complaint if:

- no complaint has been made direct to the agency
- the complaint relates to matters to be reviewed by a court or tribunal
- there is adequate provision within the agency for the review of the complaint under an administrative practice
- the person complaining does not have sufficient interest in the matter or is not acting in good faith
- he or she believes that investigation is not necessary.

When the ombudsman has investigated the complaint he or she can make recommendations to the department or agency concerned and can request that body to advise the ombudsman of its response. If that response is not satisfactory, the ombudsman may advise the Chief Minister and provide a report to the Speaker of the Legislative Assembly for tabling in the assembly. The ombudsman also prepares an annual report that gives details of the complaints that have been made during the year. It could be said that the ombudsman's chief weapon is the power to embarrass government agencies.

Complaints to the ombudsman can be made by going to the ombudsman's office, by phone, in writing or by email (see Contacts list at the back of this book). More information about the ombudsman processes is on the website.

## Commissioner for the Environment

One of the functions of the ACT Commissioner for the Environment, established under the *Commissioner for the Environment Act 1993* (ACT), is to operate as the ombudsman for environmental matters, that is, to deal with complaints about actions taken by agencies and authorities that manage the environment.

As with the ombudsman, the commissioner cannot investigate actions taken by judges and magistrates and may decline to investigate complaints on similar grounds to those listed above, for example, if no complaint has been made direct to the agency or if the complainant does not have sufficient interest in the matter. If the commissioner decides not to investigate, he or she must give reasons for this decision in an annual report.

Complaints have to be made in a form approved by the commissioner (see Contacts list at the back of this book).

The commissioner can also conduct special investigations of more general matters arising from individual complaints, or conduct investigations as directed by the

minister, or initiate investigations into the actions of an agency where those actions have a substantial impact on the environment of the ACT. Two such investigations have been into the government's use of chemicals for pest control and the government's progress on its No Waste by 2010 strategy.

The commissioner can make recommendations to the ACT Government on environmental matters and has to include the outcomes of these recommendations in his or her annual report.

The commissioner produces a triennial State of the Environment (SoE) Report that includes recommendations for government actions on specific environmental problems. The commissioner also publishes an annual report that includes an assessment of the government's implementation of the recommendations made in the SoE Report. Through these processes, matters of concern to the community may also be dealt with.

### Asking for reasons

It is also possible to obtain a written statement of reasons for some government decisions. For ACT decisions, a person can make a written request for a statement of reasons under s.13 of the *Administrative Decisions (Judicial Review) Act 1989* (ACT) (Judicial Review Act). For Commonwealth decisions, s.13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) confers the same right.

### ACT Administrative Appeals Tribunal

As noted in Chapter 1, the AAT reviews the merits, rather than the lawfulness, of a decision. That is, the AAT stands in the shoes of the original decision maker and decides the matter afresh.

#### *What can be reviewed?*

Not all decisions of all government agencies or authorities can be reviewed by the AAT. Those decisions that can be reviewed are identified in the piece of legislation under which the decision was made. For example, decisions that can be reviewed include approval or refusal of development applications under the *Land (Planning and Environment) Act 1991* (ACT) (see Chapter 3), or restrictions on or prohibition of access to reserved areas under the *Nature Conservation Act 1980* (ACT) (see Chapter 8). Some decisions are specifically exempted from review, for example, single residential development approvals. It is necessary, therefore, to examine the relevant legislation to see if it is possible to seek review in the AAT. Advice on this point can be obtained from a lawyer or from the Registrar's office at the AAT (see Contacts list at the back of this book).

#### *Who can apply for review?*

The person who is directly affected by the decision is usually the party who initiates a review in the AAT, for example, because their application has been

refused or granted with conditions. However, in some circumstances third parties can also apply for review or can apply to join in an appeal already started by someone else. For a third party to have the right to do either of these things, they usually have to have been involved in the original decision making process, for example, as an objector to a development application. Whoever commences the appeal is obliged to give notice of the appeal to all other parties who were involved in the original decision.

In the case of appeals about development applications, once an appeal has been commenced the first step is usually for the planning authority to prepare a bound set of documents relevant to the making of the decision. These are known as the 'T documents' and a copy will be provided to each person who is a party to the proceedings.

It is important to note that time limits apply to appeals. An appeal must be commenced within twenty-eight days from the time you receive written notice of the decision that is being appealed. The time limit may be extended but such a request needs to be made in writing.

### *Procedures in the AAT*

Shortly after the appeal has been commenced the matter will be listed for a directions hearing. At this time any applications to be joined as parties to the appeal will be dealt with and consideration given to whether the matter might be resolved by mediation or a preliminary conference. These are less formal ways of debating the issues associated with an appeal. If the appeal is to proceed to a formal hearing, the AAT will normally then set a timetable for each party to prepare statements of facts and contentions and written statements of evidence on which they will rely at the hearing. These need to be filed with the AAT and served on each of the other parties to the matter. When the AAT is satisfied that a matter is ready for hearing it will allocate a hearing date and each party will be expected to be in a position to go forward with the appeal at that time. The office of the Registrar of the AAT will normally assist parties with information about the procedures and paperwork of an appeal (see Contacts list at the back of this book).

At the hearing of an appeal any party may appear in person or be represented by someone else, including a lawyer. The AAT is required to conduct appeals with as little formality and technicality and as quickly as is reasonably possible. The AAT is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.

Having heard all of the evidence and considered any submissions made by the parties, the AAT may affirm the decision, or vary the decision, or set the decision aside. If the decision is set aside, the AAT then makes a substitute decision or

sends the matter back to the original decision maker with directions or recommendations about making the decision anew. The AAT is required to try to give its decision within fourteen days of the completion of the hearing.

In normal circumstances a decision of the AAT in relation to an appeal is final and binding on the parties. An appeal is available to the ACT Supreme Court but only on a question of law, so the advice of a lawyer will be required.

The process of an AAT appeal is set out in a document available through the ACT Magistrates Court (see Contacts list at the back of this book).

There is also a Commonwealth AAT that reviews decisions made under some Commonwealth legislation.

## ACT Supreme Court

As well as hearing appeals on questions of law from AAT hearings, the Supreme Court can review certain decisions made by government agencies without an initial AAT hearing. The Judicial Review Act provides a right of judicial review of the lawfulness of a wide range of ACT government decisions and those cases are heard in the ACT Supreme Court. In contrast to the AAT, Supreme Court hearings tend to be more costly and are held in a more formal legal environment.

A decision on the most appropriate judicial venue needs to be made on a case by case basis; considering what legislation is involved, the level of potential cost and the contrasting natures of the venues.

## Mediation

Lobbying will naturally require you to deal with people who hold different views on your issue to your own. Resolving these issues needs to be done constructively and an important step is to try and understand the basis of the other viewpoints and determine options that will lead to as fair a resolution as is possible.

Another key factor in resolving differences is the ability to communicate. This is often not an innate skill but one that must be learned. The ACT's universities and colleges regularly run community education courses on various aspects of communication.

Sometimes, however, it is not possible to resolve the differences by yourself. In these cases it is possible to get professional help. The Conflict Resolution Service provides a dispute advisory and mediation service, often at no cost. It and other mediators can be found in the Yellow Pages under the heading of Mediators.

## Resources on non-violent direct action

It is beyond the scope of this handbook to discuss the legal aspects of non-violent direct action. However, it is an important topic and two state offices of the Environmental Defender's Office have produced practical guides on the

advantages and disadvantages of this type of action. These guides include case studies, brief theoretical background notes, and material on planning for non-violent action, legal threats and what happens if you are arrested and have to go to court. These books can be obtained from the relevant state office or can be consulted at the ACT office (see Contacts list at the back of this book).

NSW Environmental Defender's Office *A NSW guide to non-violent action, the environment and the law*

SA Environmental Defender's Office *The law of protest in South Australia.*

