Chapter **12**

Taking action

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Taking action

We are the people we have been waiting for

June Jordan, poet

Introduction

Canberra is a transient base for politicians from the States and Territories. Accordingly, it attracts a large number of lobbyists, think tanks and bureaucrats. Canberra also has the highest mean income of all the States and Territories. The town is characterised by a well-worn labyrinth of cycle paths and nature parks. According to the 2011 Census, about 4.7% per cent of the populous walk or cycle to work. Namadgi National Park is located 40 km southwest of Canberra city and makes up approximately 46 per cent of the ACT's land area.

Since the first edition of the *ACT Environmental Law Handbook* was published in 2002, local environmental groups have achieved on-the-ground victories. These include the re-introduction of the eastern bettong in the ACT by the Bettong Bungalow campaign. For the first time since their extinction on mainland Australia, the bettong has flourished in a purpose built sanctuary in Mulligans Flat. There has also been ongoing lobbying and law reform work undertaken by environment groups including Pedal Power, Canberra Ornithologists Group, the ACT branch of Australian & New Zealand Solar Energy Society, and the peak organisation that advocates on environmental issues in the ACT, the Conservation Council ACT Region (Conservation Council) (see Contacts list at the back of this book).

Since previous editions there have also been consistent efforts by environment groups to promote the importance of sustainability and conservation on a national and international scale. Although Canberra may have relatively small numbers on a local scale, several initiatives have allowed concerned people from all over the world to coordinate and communicate powerful messages, with the help of social media. As part of the Climate March in September 2014, more than 1000 Canberrans protested at the Australian National University to show their dissatisfaction at the Federal Government's position on climate change. The Climate March is one of the largest coordinated efforts to combat climate change with over 2700 rallies, marches and protests taking place in over 160 countries in 2014. A further example is the Earth Hour initiative. Earth Hour began in Sydney in 2007 with 2.2 million people participating, and has become a global phenomenon. In 2015, Earth Hour had gathered such momentum that it became the largest environmental movement worldwide with over 172 participating countries and territories.

As the home of the Federal Parliament, groups regularly gather in Canberra to take action on national issues. The Parliamentary Triangle has been the site of protests relating to the Australian response to asylum seekers, logging in Tasmanian forests, and is an ongoing site of significance for Australian Aboriginal rights.

Scope of chapter

The process of taking action can be broken down into eight elements:

1. research and evidence gathering—background science, economics, key players, policy context
2. disseminating information to public—events, stalls, website
3. media—building relationships, effective messaging, creative stunts, timing
4. legal and advocacy platforms—Freedom of Information, going to court, parliamentary processes, law reform
5. political—supporting candidates, how to vote cards, the running of fair elections, lobbying
6. fundraising—seeking donations, grants, selling merchandise
7. non-violent direct action (NVDA)—necessity, safety, police, media, logistics, criminal justice system
8. personal sustainability and growth/survival of group—trust exercises, active listening, establishing decision making processes.

Think of these eight elements as tools in your toolbox that need to be in working order; the use of a tool or a number of tools involves strategic consideration of the bigger picture. Going to court is just one strategy/tool; very rarely is it the solution in itself. The group must monitor and anticipate the bigger picture, including how your action ties in with public sentiment, the election cycle, the legitimacy of the group's objectives, and the reasonableness of the solutions being proposed.

This chapter provides information on element 4, the legal and advocacy platforms, and element 7, criminal law aspects of NVDA. More detailed inquiries on the information here can be directed to the Environmental Defender's Office (EDO) in the ACT (see Contacts list at the back of this book).

Finding like-minded people

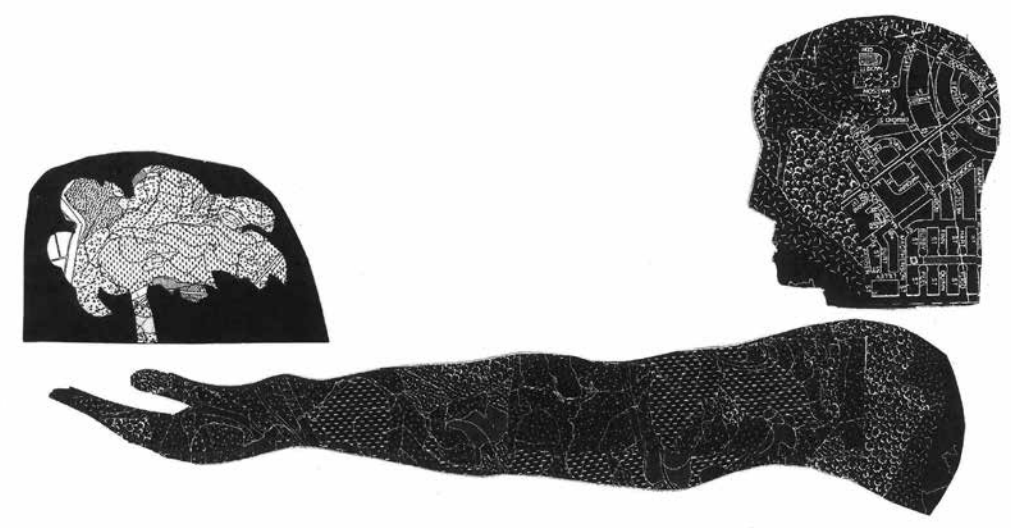
What makes some people decide to take action on environmental issues? There are different reasons people get together, including the desire to 'make a difference' or to achieve a very specific objective. In Canberra, the high level of education is a factor in people taking action in environment matters, because they are often knowledgeable about the issue and why it is important to act. Individuals and groups taking action on climate change have reached an all-time high, with organisations using coordinated campaigns and mass public action to raise awareness and encourage Australians

to take positive action to address climate change. For example, 350.org Australia campaigns around divestment from fossil fuels, and protestors, including students from the ANU Environment Collective and members of the Australian Youth Climate Coalition, recently rallied outside bank branches to discourage the Commonwealth bank from financing fossil fuel projects. This demonstrates the ongoing and cross-generational concern for the environment and the effects of climate change that is prominent in the ACT. Such organisations aim to create accountability for the actions of governments on both a local and international scale to ensure there is a collaborative effort when working for a solution to climate change.

To start, think about whether another group is working on your issue. There may be many groups working on different aspects and angles of the same issue. The main thing is to establish relationships with the other groups and communicate. For example, if you want to monitor water quality in your catchment, you would be better working within a catchment group or if you have an interest in the way development deals are done in the ACT, contact your local planning associations, active resident groups and also your local politician. When taking action, ensure that you ask around and find out what groups might already be out there.

The Conservation Council ACT is the 'umbrella' conservation organisation in the region. It and many of its 48 member groups, encompassing over 15,000 members, can be found on its website (see Contacts list at the back of this book).

The work of the Conservation Council includes directly lobbying government and agencies on environmental issues in the ACT and region. They also provide education and literature on environmental issues and have established working groups which are open to the community to become involved. The working groups focus around each of the Conservation Council campaigns; for example, at the time of writing the council had been very active around cat containment in Canberra.



You can also get involved with community groups through 2XX 98.3 FM community radio. It has a variety of shows which specialise in local, regional and global environmental issues.

Incorporation

If there is no-one working on your issue then starting your own group is an option. If you decide to take this course then whether or not to incorporate will become an issue. Incorporation gives a group its own formal separate legal identity; you are no longer a group of individuals. There are some distinct advantages to incorporation, including:

- creating a separate legal entity which can open bank accounts, enter into contracts, take out insurance, hold assets, etc. in its own right
- providing a certain amount of limited liability of individual members for actions of the incorporated association
- limiting the financial liability of the group's members in respect of the debts of the group
- establishing clear aims and objectives which are included in the group's constitution/ articles of association
- meeting the requirements of some funding bodies that only provide funds to an incorporated entity
- incorporated bodies may also hold an advantage when arguing standing if the organisation wants to have a decision reviewed by ACAT. For example, when appealing a development approval an applicant must illustrate 'material detriment' which, for an organisation, is satisfied if an entity has objects or purposes and the decision relates to a matter included in the entity's objects or purposes (*Planning and Development Act* 2007 (ACT) s 419(1); see also *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 22Q).

Offsetting these advantages are factors, such as:

- 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, risks that are similar to those of being a director of a company.

As well as legal considerations, group activities and experience may suit a less formal way of organising, for example, an affinity group model or empowerment model.

In the ACT, environmental groups can become an incorporated association under the *Associations Incorporation Act 1991* (ACT) ('*Associations 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 under the *Associations Act*, you will need:

- at least five members (s 14(1)(a))
- a lawful object for the association (s 14(1)(b))
- a constitution/articles of association to set out the group's aims and objectives and rules on how it will function, voting, quorums, timing of the AGM, etc (Pt 3)
- a public officer to be the legal face of the group and to lodge documents at the Registrar-General's office (s 57)
- an auditor to check the financial affairs of the group (Pt 5)
- a committee made up of at least three members to organise the activities and manage the finances of the group (s 60).

The *Associations Act* and the *Associations Incorporation Regulation 1991* (ACT) ('*Associations Regulation*') set out more detailed requirements on all these points. You can purchase a copy of the Act and Regulation, or download a copy from the ACT legislation register (see Contacts list at the back of this book). The *Associations Regulation* contains a model set of rules that can be adopted as a constitution or articles of association. Alternatively, if you decide to change the constitution to suit the group's needs, or totally replace it with your own, a checklist of the core rules that must be included in your constitution is also available.

If the incorporated entity is to hold a bank account you must apply for a tax file number. If it is a not-for-profit entity, an application should be made for income tax exemption. Without either of these your bank will be required to withhold income tax out of any payment of interest. Application forms are available from the Australian Tax Office. The ACT Registrar-General manages incorporated associations and more information can be found on the website (see Contacts list at the back of this book).

See the Environmental Defender's Office (ACT) factsheet on incorporating an environmental group.

Tax deductibility

Being an incorporated entity is one of the business structures acceptable for tax deductibility under the *Income Tax Assessment Act 1997 ('ITAA Act')*. The Commonwealth Department of Environment administers the Register of Environmental Organisations. Any money paid into the public fund of a registered organisation can be claimed by the person giving the money as a tax deduction.

For a group to be eligible for the register there are a number of criteria that must be satisfied and included in the group's constitution. Under section 30.265 of the *ITAA Act,* in order to be eligible, the group must have been established for the principal purpose of either:

- protection and enhancement of the natural environment or of a significant aspect of the natural environment; or
- provision of information or education, or the carrying on of research, about the environment or a significant aspect of the environment.

Further requirements under sections 30.270 and 30.275 include:

- be not-for-profit
- establish and maintain a public fund in Australia for gifts of money or property for its environmental purposes that is only used to support the body's environmental purposes (*Taxation Ruling 95/27*)
- if the group is a body corporate or co-operative society it must have at least 50 individual voting financial members, or an exemption from the Environment Minister.

For information on eligibility for the register and application guidelines see the department's website (see Contacts list at the back of this book).

Define objectives

If you decide to incorporate, your constitution must include the group's objectives. Even if you do not incorporate, take time to define your objectives at this will provide a focus for people in the group to work around and can potentially avoid conflict between members at a later stage.

Get it sorted out at the beginning and have processes for introducing new people to the group's objectives. It is important to set the ground rules, which should also include dispute resolution mechanisms. When you are taking on an issue that will require dedication over some period of time, ground rules are essential to assist with unity. If conflicts arise, objective dispute resolution guidelines can be followed and will not detract from the group's focus, which should always be the aims and objectives of the campaign.

It is important that objectives are described with sufficient specificity. Some organisations have faced take-over bids because they have defined their objects too broadly, for example, 'the protection of the environment'. Framing your objects more specifically allows for more control over the organisation. For instance, 'protecting the environment by working for the creation of national parks'. Those who do not agree with the objectives can be prevented from joining or asked to leave.

In circumstances where it may be necessary to pursue legal rights of redress, a group's aims and objectives as set out in a constitution will be a relevant factor (see below for information on taking court action).

Access to information

There are many sources of public information that may be of assistance when taking action. Clues to corporate decision-making can be found by accessing company annual reports and literature. Information regarding government decisions may be sought under the *Freedom of Information Act 1989* (ACT) ('*FOI Act*').

Freedom of information

Sometimes the information you require about a decision made by a government department may be available for a fee, or the department or agency may be willing to provide the information if an informal request is made politely. Email the relevant department and follow up with a phone call. Otherwise, the *FOI Act* provides guaranteed rights to obtain certain kinds of information.

The *FOI Act* was enacted as an accountability measure supporting a commitment to open government and transparency. The *FOI Act* creates a legal right for any member of the public to access certain documents held by ACT ministers, government departments and some statutory authorities. It also gives the public access to information about the organisation and operations of departments and agencies, including procedures used in decision-making and their arrangements for public participation. It may also be possible to peruse or purchase copies of manuals and guidelines, or parts thereof, used by government agencies for making decisions.

The types of documents accessible to the public under the *FOI Act* include procedure manuals, guidelines, files, reports, computer printouts, maps, plans, photographs, tape recordings, films or videotapes.

Whilst the public has a right to information, some information is subject to a number of exemptions. These include:

- protection of personal privacy (s 41)
- public safety (s 37)
- law enforcement (police) activities (s 37)
- where disclosure could prejudice the security of Australia, the ACT or other States (s 37A)
- where all the work involved in an FOI request involves an unreasonable diversion of resources or interferes with the functions of the minister (s 23)
- where documents would disclose trade secrets or diminish information containing commercial value (s 43)
- where documents containing material that would constitute a breach of confidence (s 45).

Each government department has FOI officers to assist with the requests for information. You must identify the document or documents you want to access, for example, by giving the date the document was created or by describing in detail the

matter in which you are interested. You then make a request either by writing to the department or by filling in an FOI application form (s 14).

The department or agency must acknowledge receipt of your request within 14 days. Further, the responding agency must notify you of its decision on access within 30 days (although this may be extended by 30 days in certain cases) and give you notice of any charges that are payable (ss 18 and 28). 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, personal information about an individual may be deleted. If access is refused, you must be given a statement setting out the reasons why access was refused (s 25).

If you are unhappy about a decision that denies access to information or that imposes a charge, you can ask the department within 28 days of being notified of the original decision for an internal review (s 59). You will be notified of the reviewed decision within 14 days and, if access is still denied, you will be given reasons why access has been denied. If still unhappy, you can apply to the ACT Civil and Administrative Tribunal (ACAT) for a merits review or make a complaint to the Ombudsman (see below).

Application fees for FOI requests are now abolished. Processing charges may still be levied for work in excess of 10 hours processing time and/or 200 A4 photocopies (*Freedom of Information* (*Fees*) *Determination* 2015 s3(2); sch items 400(5)(e), 400(5)(f)). Applicants may wish to bear this in mind when formulating their request.

There is a similar process available under the *Freedom of Information Act 1982* (Cth) for information held by Commonwealth departments and agencies. General information on FOI is available on the Australian Information Commissioner's website. See also the Environmental Defenders' Office (ACT) factsheet for further information about making Freedom of Information requests to the ACT and Commonwealth governments.

Parliamentary/Assembly processes

The first sitting of the ACT's Legislative Assembly took place on 11 May 1989 in rented premises at No 1 Constitution Avenue, Canberra City. The current Assembly running from 2012-2016, is comprised of 17 elected representatives: the Australian Labor Party holds eight seats, the Canberra Liberals eight seats and the ACT Greens one seat. The ACT Legislative Assembly's website contains up-to-date members and committee information, parliamentary documents, including minutes of proceedings, notice papers and daily programs (see Contacts list at the back of this book).

Assembly committees

Assembly committees are divided into two types, standing committees and select committees. Standing committees are established for the term of each Assembly and at the time of writing there are two committees dealing with environmental issues:

the Standing Committee on Planning, Public Works and Territory and Municipal Services and the Standing Committee on Climate Change, Environment and Water. Select committees are created for a specific purpose; one example is the Estimates Committee where committee members examine proposed government expenditure. This provides an opportunity to ask questions of the majority government on the allocation of taxpayer's money.

Committees are made up of members of the government, opposition and independents, usually totalling about three to four members. Committee inquiries are often instigated because members of the Assembly perceive there is public interest or concern about an issue. In recent times, the Standing Committee on Planning, Public Works and Territory and Municipal Services held inquiries into the implementation of an action plan to combat climate change, and promoted public awareness of the potential for fast track development in the Planning and Development (Project Facilitation) Amendment Bill 2014.

Groups and individuals can contribute to committee inquiries by attending a public forum, lodging a submission, or appearing at a hearing. A committee inquiry is usually advertised in the *Canberra Times* or on the Legislative Assembly website. Recently, the inquiry into the action plan on climate change implemented strategies on how to promote environmentally sustainable measures to assist members of low-income households. Following an inquiry, the committee will report to government on its findings and may make recommendations for change.

The government provides a response to the recommendations, usually within three months, outlining what recommendations it has accepted, those it has not, and the reasons why.

Question time and questions on notice

Questions and questions on notice can be an effective way of obtaining information from government which is not obtainable by other means. Community groups can participate by requesting Legislative Assembly members to ask questions of the government.

Annual reports and Auditor-General reports

Another useful source of information are the annual reports of government departments and agencies. Annual reports are produced at the end of each financial year, usually printed in September, and are publicly available.

Commonwealth department annual reports must include information on how the department or agency activities and administration of legislation accords with the principle of ecological sustainable development (ESD) as required by section 516A of the *Environment Protection and Biodiversity Conservation Act* 1999.

The Auditor-General is responsible for undertaking audits of management performance and financial statements of Commonwealth government bodies.

These reports are one method of ensuring accountability in the executive arm of government.

In the ACT, the Commissioner for Sustainability and the Environment in the ACT produces State of the Environment reports for the ACT (*Commissioner for Sustainability and the Environment Act 1933* (ACT) s19), and information from ACT departments and agencies may be included in this report. Note that ACT government bodies are no longer required to report on environmental sustainability in their annual reports since the repeal of section 158A of the *Environmental Protection Act* 1997. As a result, only general information is provided on a variety of activities that each department has undertaken throughout the reporting year, depending on the level of commitment and the culture of that department.

Matters of public importance

Matters of public importance are a topical issue of concern to the community which is suggested for discussion by a member of the ACT Legislative Assembly. They can be a useful way of raising an issue by means of petitions or submissions. A member of the Assembly may propose that a matter of public importance be submitted to the assembly for discussion. The Speaker places all submitted matters of public importance into a hat and randomly selects the matter that will be called on. No decision has to be reached by the end of the discussion, but it gives members the opportunity to express their views on the issues. These matters are quite often critical of a facet of the government's activities and are an effective way to make the government accountable for its actions and to start a discussion, which could lead to review or change. The Legislative Assembly (ACT) publish the topics of these Matters of Public Importance through a newsletter on their website.

Presenting petitions, submissions and letter writing

A petition is a written request, calling for the redress of a grievance or seeking action, presented to the Legislative Assembly by a member. The request must be written on every page containing signatures. All petitions must be respectful, accurate and reasonable. The ACT Legislative Assembly website has more information on petitions, including the format of a petition, and contact details for all MLAs (see Contacts list at the back of this book). When writing a letter or a submission be polite and address the issue in question using headings and concise expressions. Submissions may have a prescribed format which you will need to adhere to.

The public has access to multiple platforms through which to communicate its concerns. One example is Time to Talk, an initiative launched by the ACT government, which provides an online platform where members of the public can discuss individual or local issues. This can be done though posting comments, sending a submission, via discussion forums, surveys or Twitter.

ACT Ombudsman

The ACT Ombudsman has broad powers under the *Ombudsman Act 1989* (ACT) to investigate complaints that relate to matters of administration, including complaints regarding ACT government agencies, ACT policing, how an FOI request was handled, and whistle blower complaints. In some instances, the ACT Ombudsman refers complainants to other review agencies that can more appropriately deal with the issues raised (ss 6A and 6B). Issues presented to the Ombudsman may include complaints about the environment, but the Ombudsman has a limited role in the environmental area. Specific responsibility for investigating complaints about the management of the environment in the ACT lies with the Commissioner for Sustainability and the Environment and complaints regarding environmental administration will generally be referred to the Commissioner (see below). The ACT Ombudsman does not investigate actions taken by:

- the territory or a territory authority for the management of the environment
- the Commissioner for Sustainability and the Environment
- a minister
- a judge or magistrate or tribunal (s 5(2)).

The distinctive feature of the ACT Ombudsman is that its findings are not determinative or final (unlike a court or tribunal). The Ombudsman's powers are recommendatory only; he/she investigates a matter and produces a report in which recommendations may be that the government department undertake one of the following actions:

- reconsider or change its decision
- apologise
- change a policy or procedure
- any other any recommendations he or she thinks fit (s 18).

The Ombudsman also has the option of publicly airing his/her recommendations if an unsatisfactory response is received from the government. This can sometimes be embarrassing for the government department concerned.

Making a complaint

The Ombudsman provides a free service. Complaints may be made by going to the Ombudsman's office, by telephone, in writing (by letter, email or facsimile), or by using the online complaint form on the Ombudsman's website (see Contacts list at the back of this book). Complaints will be accepted anonymously.

The Ombudsman's website includes tips on making a complaint:

- keep track of conversations with the government agency—ask for a reference number and names
- set out your complaint clearly and briefly—stick to main facts do not go into excessive detail

- if detail is necessary, it is useful to set it out in the format of a timeline
- include information about each contact with the agency and what happened with details of who you spoke to, or who wrote to you
- record any steps you have taken to sort out the problem
- keep any relevant documents, including all correspondence with the agency
- be persistent with the agency to progress your complaint.

You can also suggest to the Ombudsman what action you think should be taken to resolve your complaint. Keeping accurate records is also useful when considering pursuing legal action (see section below on Legal Remedies).

Commissioner for Sustainability and the Environment

The position of ACT Commissioner for the Environment was established under the *Commissioner for Sustainability and the Environment Act 1993* (ACT), and is an alternative complaint mechanism to the Ombudsman for issues relating to the management of the environment by the Territory or territory authority, or issues relating to ESD in the ACT (s 13). This role and title was expanded in 2007 to include sustainability. In that role the commissioner shall:

- produce State of the Environment reports for the ACT every 4 years —at the time of writing, the 2015 report is being prepared
- investigate complaints from the community regarding the management of the territory's environment by the ACT government or its agencies
- conduct investigations directed by the minister—for example, in 2011 the Minister for the Environment directed that an investigation into the state of watercourses and catchments for Lake Burley Griffin be initiated, which resulted in the 2012 report concluding that water quality in Lake Burley Griffin will nurture blue green algal blooms for the next 20 years unless the situation is rectified
- initiate investigations into actions of the ACT government or its agencies, where those actions have a substantial adverse impact on the territory's environment
- make recommendations for consideration by the ACT government, and include in the annual report the outcomes of those recommendations.

Making a complaint

Section 12 of the *Commissioner for Sustainability and the Environment Act* sets out what the commissioner can and cannot investigate. Under section 12(2), the commissioner is not authorised to investigate action taken by any of the following:

- a judge or the master of the Supreme Court
- a magistrate or coroner for the ACT
- a royal commission under the *Royal Commissions Act 1991* (ACT)

- a board of inquiry under the *Inquiries Act 1991* (ACT)
- a panel conducting an inquiry under Chapter 8 of the *Planning and Development Act 2007* (ACT), dealing with environmental impact statements and inquiries
- the Ombudsman.

Section 14 details the discretion available to the Commissioner not to investigate certain complaints, similar to the Ombudsman's powers.

Legal remedies

Internal review (or review within the agency)

If you are unhappy with a government or agency response or decision, the first step is usually to contact the decision-maker and the relevant department for the agency seeking reconsideration of a decision. Generally a member of staff will be in contact and an interview may be established or discussions may take place through written correspondence. A formal investigation will follow this and the internal review is done by someone other than the original decision-maker in the department.

The relevant legislation will set out which decisions are subject to internal review. For example, under the *Tree Protection Act 2005* (ACT) a decision by the Conservator of Flora and Fauna to approve or refuse a tree management plan, or to approve or refuse a tree damaging activity, or to cancel such an approval, may be internally reviewed by the applicant or approval holder. In such a case the internal review must reconsider the conservator's original decision, having regard to any advice from the advisory panel (*Tree Protection Act 2005* (ACT) s 106) (see Chapter 6 in this Handbook for more information on tree protection law). If you are still dissatisfied with the outcome, you can take steps to launch an external review.

Asking for reasons

It is possible to obtain a written statement of reasons for some government decisions. A statement of reasons is important to enable you to make an informed decision as to whether to take the matter further, for example, by making representations to a Member of Parliament, complaining to an ombudsman, seeking internal review or review by a tribunal, or commencing proceedings in a court.

For certain decisions, government agencies are required to provide a person with a statement of reasons for their decision. For example, if ACTPLA approves a development application under sections 162(1)(a) or (b) of the *Planning and Development Act 2007* (ACT), then they must provide the applicant and anyone who has put in a submission relating to the development application, a notice setting out the reasons for the approval (s 170(3)(c)). If a statement of reasons for a decision is not required by legislation, then it is at the discretion of the decision-maker to provide the reasons.

Under section 13 of the *Administrative Decisions (Judicial Review) Act 1989* (ACT) (the 'ACT *ADJR Act*') an 'eligible person' - defined in section 4A (see below) - who is eligible to apply for judicial review - can apply in writing for a written statement of reasons for certain government decisions. For Commonwealth decisions, section 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('the Commonwealth *ADJR Act*') allows an 'aggrieved person' who is eligible for judicial review the same right. According to section 3(4)(a) of the Commonwealth Act, a 'person aggrieved' includes a person whose interests are adversely affected by the decision; or whose interests would be adversely affected if a decision were, or were not, made in accordance with the report or recommendation.

Finding the right lawyer

When dealing with a legal issue it is important to find a lawyer who specialises in the particular area of law with which you are concerned. If you do not know a specialist lawyer then the ACT Law Society can be a good first port of call. For example, the Environmental Defenders' Office (EDO) specialises in public interest environmental law and is a good starting point for getting assistance in environmental matters. If the EDO cannot assist you, they will refer your matter to an appropriate lawyer.

Legal actions and barriers to pursuing them

…to assume that competitive instincts are aroused only by concern for material wealth would be to ignore history. Much of the progress of mankind has been achieved by people who have sacrificed their own material interests in order to champion ideals against fierce resistance. The recent Australian experience is that, in cases where ideologues have been able to gain access to the court, cases have been hard fought and professionally conducted.

Ogle v Strickland (1987)13FCR36 (Federal Court of Australia)

Legal actions are one strategy for achieving better environmental outcomes, and while they should not be ignored, they should also not be seen as a silver bullet. A decision on the most appropriate judicial venue needs to be made on a case by case basis after considering the nature of the decision, what legislation is involved, the level of potential cost, and the expected outcome and respective jurisdictions of the venues. This chapter covers the different types of legal action available to parties, and the forums where these can be pursued.

Merits review involves reviews of the merits of a decision, rather than its lawfulness. That is, the tribunal 'stands in the shoes' of the original decision maker and decides the matter de novo or afresh, according to the facts and circumstances as they exist as at the date of the tribunal's review, that is, not at the date of the original decision. In the ACT, merits review is available through ACAT.

Judicial review is the process of considering the lawfulness of the decision that has been made, that is, whether the requirements and procedures of the law were

followed. This process is undertaken by a court, under the *Administrative Decisions (Judicial Review) Act 1989* (ACT) in the ACT and the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* at the Federal level.

It is important to note that there are a number of 'procedural barriers' in pursuing legal redress to achieve an environmental outcome. Procedural barriers are hurdles you must jump before the substance of your legal arguments can be heard. While this chapter outlines some of the procedural barriers below, it is beyond the scope of this Handbook to provide detailed information. Typical procedural barriers include standing and security for costs.

Standing

Standing is the right to have an issue heard before a court or tribunal. Standing is often only available to a 'person aggrieved' or an 'eligible person' whose interests have been affected. Traditionally this has meant that only persons directly affected by a decision or an action have a right to take legal action. However, the different forums for legal actions all have different tests for standing, which will be discussed below. Standing is often an issue for environmental groups pursuing a legitimate public interest goal, and a long line of cases have involved groups having to justify that they are a 'person aggrieved'. Whether an individual or an organisation has standing may also be regulated by the legislation under which a particular decision was made (see below).

Security for costs

Even if a group can establish standing to bring an action they may be prevented from doing so if security for costs is required by the court. Security for costs is where a party to the proceeding, when challenged, must provide evidence that it has sufficient funds to cover costs in the event that it loses. It can be argued that the ordering of security for costs should be waived in public interest matters where an order would stop or prohibit the progress of the proceeding, however in many jurisdictions this is a matter for judicial discretion. In *Truth Against Motorways v Macquarie Investments* 2000 FCA 918, the Federal Court decided that TAM had to provide a security for costs and Justice Hely rejected the argument that the public interest nature of the litigation meant that the Court should not require security.

Merits review in the ACT

The *ACT Civil and Administrative Tribunal Act 2008* (ACT) amalgamated the Administrative Appeals Tribunal (AAT) and establishes the ACT Civil and Administrative Tribunal (ACAT).

ACAT provides the means to review the merits of some ACT government decisions, but it is important to be aware that not all decisions of all government agencies or authorities are subject to an ACAT review. The decision must be a 'reviewable decision' as stated in the relevant legislation and the applicant must be 'eligible' (in

other words, have standing) to bring the proceedings which is also defined in the relevant legislation. What constitutes a reviewable decision is commonly listed in a Schedule located towards the end of the legislation that conferred the decision-making power in question. For example:

- *Environment Protection Act 1997* (ACT) (s 135, Sch 3)—a decision to grant an environmental authorisation
- *Water Resources Act 2007* (ACT) (s 94, Sch 1)—a refusal to issue licence to take water
- *Planning and Development Act 2007* (ACT) (ss 407- 410, Sch 1)—a decision to approve or refuse a development application
- *Tree Protection Act 2005* (ACT) (s 107A, Sch 1)—a decision to refuse or approve the registration of a tree
- *Heritage Act 2004* (ACT) (ss 111-114, Sch 1)—a decision to register or not register a place or object.

If the decision is not specified in the relevant Schedule, then it is excluded from a review in ACAT (see Chapter 3 in this Handbook for more information on challenging planning decisions). If you are unsure of your rights then it is important to seek advice from a lawyer, such as the EDO, or from the Registrar's office at the ACAT as to whether the decision is reviewable by the tribunal.

In order to seek a review of a decision by ACAT, the challenging party must have 'standing'. Different laws have different standing requirements allowing review at ACAT. ACT environmental laws which confer this right are as follows:

- the E*nvironment Protection Act 1997* (ACT) allows certain entities to seek review of decisions (see Sch 3), while other parties must show that their interests are affected by the decision (s 136D(b))
- the *Heritage Act 2004* (ACT) requires parties to be an 'interested person' (s 114). The definition in section 13 generally excludes third parties and the only exception to this is if the third party has submitted a comment in public consultation about a decision to register, or not register, a place or object which has been provisionally registered under section 40 by the Council, or to cancel or cancel a registration of place or object under section 47 (s 13(2)(a) and (2)(b))
- the *Tree Protection Act 2005* (ACT) provides a list of entities that may seek review of a corresponding 'reviewable decision' (Sch 1), but makes no provision for third parties
- the *Planning and Development Act 2007* (ACT) allows parties to seek review of a 'reviewable decision' if they are an 'eligible entity' in relation to that decision (s 408). Schedule 1 of the Act lists the reviewable decisions and the entities eligible to seek review. The Act only grants standing to third parties in limited circumstances, for example, for the approval of development applications in the merit or impact track, or a decision made on reconsideration of a development application. To be entitled to make a challenge, parties must have made a

representation under section 156 about the development proposal, or had a reasonable excuse not to, and suffer a 'material detriment' from the approval of the development application. In relation to an entity, the decision has to relate to a matter included in the entity's objects or purposes, while in relation to an individual, the decision must have, or is likely to have, an adverse impact on the third party's use or enjoyment of the land (s 419)

- the *Water Resources Act 2007* (ACT) allows listed entities to seek review of corresponding decisions (s 96(a), Sch 1), while third parties can seek review of a 'reviewable decision' if they can show that their interests are affected by the decision (s 96(b))
- the *Nature Conservation Act 2014* (ACT) allows listed entities to seek review of corresponding decisions (s 362(a), Sch 1), and third parties can seek review of a 'reviewable decision' if they can show that their interests are affected by the decision (s 362(b)).

Many of the above authorising laws refer to 'people whose interests are affected' by a decision. This term includes a reference to an unincorporated body or a government body, that is, a body has 'interests that are affected' by a decision if the decision relates to a matter included in the objects or purposes of that body. In relation to individuals and organisations, it is the tribunal that decides whether or not a person's interests are affected by a decision (*ACAT Act* s 22Q).

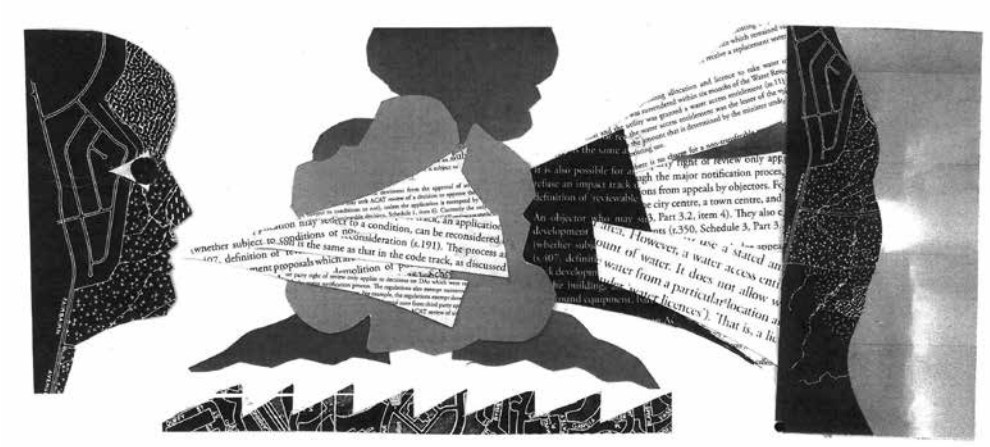
An important aspect of ACAT is that it differs from a court as a method for dispute resolution. In contrast, court proceedings can take years before there is a resolution and litigation can be expensive in terms of filing fees and ongoing legal fees. ACAT is characterised by speedy processes, minimal fees, self-representation, reduced formalities, and less reliance on the technical rules of evidence.

The form, 'Application for Review of Decision', is available from the tribunal registry and online. At the time of writing, an application for a merits review under any authorising Act costs $313 if applying as a natural person or $626 if applying as a corporation. If considering an application then it is important to check with the tribunal for any changes in the fee structure. Generally an applicant has 28 days from the date of the decision to lodge an appeal *ACT Civil and Administrative Tribunal Procedure Rules 2009 (No. 2)* (r 14(1)), however it is also important to verify this with the tribunal (see Contacts list at the back of this book).

Judicial review - Supreme Court of the ACT

The ACT Supreme Court is another forum for seeking review of a decision. The Court can hear appeals on questions of law from ACAT hearings, and review appeals of decisions dismissed by ACAT if the applicant seeks to appeal the original decision (ACAT Act, s 80(3)).

It can also review certain decisions made by government agencies without an initial ACAT hearing. This includes reviewing whether an ACT government decision has been decided in accordance with the law (ACT *ADJR Act* s 5).



To determine whether a matter can be taken to the Supreme Court, it is necessary to look at the legislation under which the decision was made as well as the ACT *ADJR Act*. Exceptions to judicial review under the ACT *ADJR Act* are found in Schedule 1 of that Act. Notable examples from the *Planning and Development Act* 2007 (ACT) include development proposals in relation to light rail, other than a development proposal involving a protected matter or a decision making, or forming part of the process of making, a special variation to the Territory Plan.

To bring a matter to court, a person has to be able to demonstrate standing to challenge the decision. For most decisions made pursuant to ACT law, the ACT *ADJR Act* provides in section 4A that an 'eligible person' can make an application for judicial review. Under section 4A(3), a person is an 'eligible person' and has standing to apply for judicial review if an applicant's interests are affected or they can raise a significant issue of public importance. However, a narrower test for standing applies for review of decisions made under the *Planning and Development Act 2007* (ACT) and the *Heritage Act 2004* (ACT), requiring the applicant to show that their interests will be adversely affected (s 4A(2)).

In contrast to ACAT, Supreme Court hearings tend to be more costly and are held in a more formal legal environment. The Supreme Court Registrar can assist with information on filing fees. If you and your group are at the stage of considering a Supreme Court challenge then you should be in regular communication with a solicitor. Going to court means being mentally prepared for the expense and time consuming nature of proceedings.

Judicial review – Federal Court of Australia

Judicial review is also available for Commonwealth government decisions, under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (Commonwealth *ADJR ACT*). The most relevant Commonwealth legislation for environmental matters is the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*'). Litigation commenced under this Commonwealth law is generally brought in the Federal Court of Australia.

EPBC Act – Injunctions

Under section 475(1) of the *EPBC Act*, any 'interested person' (individual or organisation) can apply for an injunction to remedy or restrain a breach of the Act. An interested person is defined as a person whose interests have been, or would have been affected by the conduct, or has engaged in a series of activities for protection or conservation of, or research into, the environment in the previous two years (s 475(6)). Section 475(7) similarly defines an interested person as an organisation if the organisation's interests have been, are or would be affected by the conduct by the conduct or the organisations objects and purposes at any time during the 2 years preceding the conduct have related to the protection, conservation or research into the environment.

EPBC Act – Judicial review

Under section 487 of the *EPBC Act*, the term 'person aggrieved' for the purposes of the application of the Commonwealth *ADJR Act* (that is, to seek judicial review) is similarly extended to include persons or organisations who, in the preceding 2 years have engaged in activities for the protection or conservation of, or research into, the environment. This extended definition reduces the burden on environmental groups who wish to access judicial review of decisions made pursuant to the *EPBC Act*, and recognises that landholders should not bear the entire burden of protecting national icons; that there is a the broad public interest in conserving Australia's environment, and more generally, the rule of law. It also recognises that all Australians have an interest in seeing that our unique natural heritage is protected as well as the importance of conservation groups, researchers and educators in safeguarding these interests.

Administrative review of decisions under other Commonwealth Acts

The Commonwealth *ADJR Act* also applies to judicial review of decisions made under other Commonwealth Acts. In order to use this Act, an applicant must be a 'person aggrieved' before they can seek a review of a decision on one of the grounds listed in section 5. A 'person aggrieved' is defined as including a person whose interests are adversely affected by the decision (s 3(4)).

Before the introduction of the extended standing definition in section 487 of the *EPBC Act*, the common law was applied. Those wishing to challenge Federal Government decisions made under the *EPBC Act* faced the hurdle of having to demonstrate that they were 'a person aggrieved'. For example, they had to show they had something more than 'a mere intellectual or emotional concern' *(Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552) and that they would be 'likely to gain some advantage, other than the satisfaction of righting a wrong' in order to commence proceedings (*Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 at 530). Interpretations of the

'special interest' rule were not always consistent, and ambiguous boundaries to the definition sometimes led to conflicting judgments.

If environmental groups want to challenge a decision made under a Commonwealth Act other than the *EPBC Act,* this more strenuous test of 'special interest' would still apply.

Risks of speaking out—defamation

What is defamation?

Defamation occurs when a 'publication' (see below) identifies a person and 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.

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

Defamation law is based on common law principles (principles developed through case law) supplemented by statutory provisions. In 2004, the Attorneys-General of the States and Territories agreed to support the enactment of uniform defamation laws in their respective jurisdictions. Before this agreement, defamation laws differed from jurisdiction to jurisdiction in Australia, but in 2005 uniform defamation laws were enacted in each state and territory, commencing in January 2006. ACT included the provisions of the uniform model defamation law into the *Civil Law (Wrongs) Act 2002* (ACT) ('*Civil Wrongs Act*').

Elements of defamation

There are three main elements that must be established by the party alleging defamation:

- the defamatory material is published
- it identifies a particular person, and
- has a defamatory meaning.

Publication

Material is deemed 'published' if it is communicated to anyone other than the party who claims to have been defamed. Material does not have to be published in a newspaper; any of the following could fall into the legal definition of publication:

- comment in a conversation with a person (other than the person defamed)
- media release
- comments made during a speaking engagement
- a letter
- a banner
- material published on a website
- material contained in an email, including internal emails.

It is not a defence to say you are simply repeating what someone else has already published. Republication of another person's defamatory statement can give rise to a new and separate action for defamation. The law requires defamation proceedings to be brought within a year of broadcast or publication. However, this may be extended to 3 years if the plaintiff can provide reasonable cause as to why they could not start the action within the limitation period.

An identifiable person

The defamed person need not be explicitly identified. If certain recipients of the publication had knowledge of special facts or circumstances at the time of publication, which enabled identification of the individual, then this is sufficient. Further, if the published material/statement identifies someone falsely, then the person who has been wrongly identified can also establish they have been wrongly defamed.

Only living persons can be defamed (*Civil Wrongs Act* s 122). Significantly, since the changes implemented in 2006, corporations (which are not public bodies or not-for-profit) employing more than 10 people can no longer sue for defamation (*Civil Wrongs Act s 121*). This severely limits large corporations from suing people who speak out against them. However, an individual director of a large company may still sue for defamation if the defamatory material points to the specific individual.

Defamatory material

Material is considered to be defamatory when judged against community standards. The test applied by the court is whether an ordinary reasonable person would have understood the material as:

- lowering that person's reputation in the opinion of right thinking members of society
- leading people to ridicule, avoid or despise that person, or
- injuring that person's reputation in business, trade or profession.

Defences to defamation

The defences to a defamation action are designed to balance the competing public interests of freedom of speech and the protection of an individual's right to reputation. The defences of most relevance in relation to environmental comments are:

- justification/truth
- fair comment
- honest opinion
- privilege (absolute or qualified).

These defences are either set out in Division 9.4.2 of the *Civil Wrongs Act* (such as justification, privilege and honest opinion) or are available at common law (such as fair comment).

Justification/truth

This defence is for publication of material that is true. Previously in the ACT, it was not sufficient to prove that the material was true; the publication of the material also had to be for the public benefit.

However, under section 135 of the *Civil Wrongs Act*, there is a defence that the defamatory imputations carried by the matter of which the plaintiff complains are 'substantially true'. The term 'substantially true' is defined in section 116 to mean 'true in substance or not materially different from the truth'. In all other respects, the common law principles apply.

Fair comment

The common law provides a defence of fair comment on a matter of public interest which protects freedom of expression, which has been long regarded as a basic right. Under this defence the comment must be:

- related to a matter of public interest
- based on fact or other proper material
- a comment, not a statement of fact and
- fair, in the sense that it is the honest expression of the person's real view—the defendant must prove that the comment is objectively fair, that is, that an honest or fair-minded person could hold such an opinion, even if it is exaggerated, prejudiced or obstinate.

This common law defence may be defeated by proof of malice.

Honest opinion

The statutory defence of honest opinion is modelled on the common law defence of fair comment, but both continue to apply.

Section 139B of the *Civil Wrongs Act* provides a defence to the publication of defamatory matter if the defendant proves that:

- the matter was an expression of opinion of the defendant rather than a statement of fact
- the opinion related to a matter of public interest and
- the opinion was based on 'proper material'.

'Proper material' is defined in section 139B(5) to mean material that is substantially true, was published on an occasion of absolute or qualified privilege (see below) or was published on an occasion that attracted the protection of a defence under section 138 (publication of certain public documents) or section 139 (fair report of proceedings of public concern) or the defence of fair comment at general law.

Privilege – absolute and qualified

It is a defence to an action for defamation if it can be shown the relevant information was privileged at the time of communication. 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 defence can be relied on even if the material was published maliciously. 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.

Absolute privilege only attaches to the primary publication of absolutely privileged materials, for example, in parliament or the court. The *Civil Wrongs Act* confirms the common law defence of absolute privilege in section 137, which states that material published in the course of proceedings of parliamentary bodies, Australian courts and tribunals attract absolute privilege.

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 providing information on a particular subject to a person who has an interest in receiving the information, and the conduct of the defendant is reasonable in the circumstances (*Civil Wrongs Act* s 139A). 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.

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

Fair report of proceedings of public concern

Section 139 provides a defence to the publication of defamatory matter if the defendant proves that the matter was a fair report of any proceedings of public concern. To attract the privilege, a matter must be published honestly for the information of the public 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. Another defence is if you publish something based on a previous, earlier report of proceedings of public concern, and produce a fair copy, summary or extract of that earlier report with no knowledge that the earlier report was not fair.

This means that fair comment about much of what is spoken in parliament or presented in courts is protected by privilege.

Avoiding defamation actions

Some tips for avoiding defamation actions are:

- 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, and ensure the truth may be verified with original 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
- an issue of public interest or benefit relating to a representation should be readily identifiable
- think before you click when sending email—do not write anything in an e-mail that you would not feel comfortable about seeing 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.

Risks of taking action—criminal charges

Introduction

Protest is not uncommon in Canberra city, the site of the Commonwealth Parliament. If you are charged with committing such an offence in the Parliamentary Triangle or on Northbourne Avenue, chances are you will be charged under Commonwealth law and not ACT law. Both of these areas are designated as Commonwealth land. The Commonwealth planning agency, the National Capital Authority, has produced a booklet, The Right to Protest Guidelines, which delineates broad boundaries

between Commonwealth and ACT land, indicating which jurisdiction will apply to which areas (see Chapter 2 in this Handbook for more information on the interaction of Commonwealth and Territory land). In the ACT, for example, the *Human Rights Act 2004* (ACT) will only apply if you are protesting on Territory land.

Criminal law

The application of criminal law to matters in which individuals are seeking environmental outcomes can seem rather odd, but it is an outcome which people committed to taking action must be prepared for (see the section below for more information on protest matters).

Common charges include: obstruction of a police officer in the exercise of his/her duty; resist, hinder or obstruct arrest; trespass; assault; and in forestry matters, entering a prohibited area, or failure to obey a direction. Getting arrested should not be undertaken lightly. For instance, pleading 'not guilty' from the time of being charged to the final hearing can take between six months to two years.

Due to the heavy workload of the Magistrates court, the criminal justice system rewards persons who plead guilty early. If you have no prior convictions and can provide good character references, you may receive a few hundred dollar fine or have 'no conviction recorded' (*Crimes (Sentencing) Act 2005* (ACT) ('*Crimes Sentencing Act*'), s17). However, depending on the circumstances of the offence, you may end up with a fine and a criminal record. Section 33 of *Crimes Sentencing Act* sets out the factors that a judge will take into account when sentencing. This includes the nature and circumstances of the offence, any injury, loss or damage resulting from the offence, the cultural background, character, antecedents, age and physical or mental condition of the offender.

It is very important to seek legal advice prior to entering a plea of 'guilty' or 'not guilty' if you are charged with a criminal offence. You cannot be punished for the time it takes to seek legal advice regarding your right to know what you have been charged with and the potential consequences of your plea. Knowing the exact case against

you is a fundamental right afforded in the criminal justice system. At a protest it can be useful to have video evidence of the event, although be prepared that police may temporarily confiscate video cameras at the time of arrest.

Human Rights Act 2004

There is no right to a clean environment provided for in the *Human Rights Act 2004* (ACT) ('*Human Rights Act*'). Rather, the Act declares the following protections:

- the right to move freely within the ACT (s 13)
- the right of peaceful assembly (s 15(1))
- the right to freedom of association (s 15(2))
- the right to freedom of expression—including the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her (s 16(2)).

For an activist charged with a criminal offence under ACT law, the *Human Rights Act* provides very limited protection and has so far been largely untested regarding protest and environmental action in the ACT courts.

Non Violent Direct Action (NVDA)

NVDA, as practiced by the modern environmental movement, draws on the Quaker tradition of bearing witness to raise awareness and bring public opinion to bear on decision makers. When planning and participating in a non-violent direct action, remember that you are not out to make enemies, but to win people over to the issue. Non-violent means that in taking action you are:

- peaceful
- considerate
- compassionate
- gentle
- acting in the interests of the group, not in the heat of the moment.

There are a number of offences that protestors using non-violent direct action should be aware of during the course of their protest. Offences can occur under multiple Acts, which differ depending on the jurisdiction in which the action is undertaken. In the NSW context, common offences include: unlawful entry and/or offensive conduct on inclosed lands under the *Inclosed Lands Protection Act 1901* (NSW); resisting arrest, damaging property, interference with a mine and/or intimidation by violence or otherwise under the *Crimes Act 1900* (NSW); causing a hazard or obstruction under the *Road Rules 2008* (NSW); and obstruction relating to public places under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). The penalty for

offences undertaken during NVDA varies, but is often in the form of a fine. For more information on NVDA and criminal offences, please refer to the EDO (ACT) factsheet on our website.

Conclusion

By taking action to protect the environment, groups and individuals directly confront ingrained values and behaviours of self-interest, apathy and greed. People do not take kindly to being told that driving a car is polluting when it is what gets them to work, which pays the bills, which feeds the children. However, there are other values that environmental groups and individuals can appeal to, for example, the concept of intergenerational equity to ensure our children inherit a healthy environment.

A group's strengths in taking action include the use of both logical and lateral thinking, respect for the goals of the group and strategic use of the eight elements outlined at the beginning of this chapter, including legal and parliamentary tools. Governments and corporations are capable of change and it is the people who change them.