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## TOOLKIT 3: BEYOND LITIGATION – ALTERNATIVE DISPUTE RESOLUTION IN ENVIRONMENTAL DISPUTES



**ENVIRONMENTAL  
DEFENDERS OFFICE NT**

## ABOUT THE ENVIRONMENTAL DEFENDERS OFFICE (NT) INC

The Environmental Defenders Office NT (EDO) is an independent non-for-profit, community legal centre that specialises in environmental law. The EDO provides legal advice, representation and education through the Northern Territory. The EDO also advocates for stronger environmental protection laws by making submissions on law reform.

The EDO is the only community legal centre in the Northern Territory that provides legal advice on environmental matters in the public interest. The EDO is an incorporated association established under the *Associations Act* (NT).

In addition to NT based activities, the EDO is a member of a national network of EDO's working collectively to protect Australia's environment through public interest planning and environmental law.

### For further information contact:

#### Environmental Defenders Office NT

**Phone:** (08) 8981 5883

**Email:** [edont@edont.org.au](mailto:edont@edont.org.au)

**Website:** [www.edont.org.au](http://www.edont.org.au)

**Address:** Suite 5/84 Smith Street, Darwin, NT, 0801

**Post:** PO Box 4289, Darwin NT 0801.

### LEGAL ADVICE SHOULD BE SOUGHT IN SPECIFIC CASES

While all care has been taken in the preparation of this publication, it is not a substitute for legal advice in individual cases. For any specific questions you should seek legal advice.

### ACKNOWLEDGEMENT

Sections of this toolkit are based on the Environmental Justice Australia (EJA) 'Beyond Litigation Kit'. EDONT thanks EJA for allowing us to utilise their resources in developing this toolkit.



*The Judicial Review Toolkit is part of a project that has been made possible due to generous funding from the Law Society Public Purposes Trust. The EDO NT sincerely thanks the Law Society Public Purposes Trust for the provision of funding for this project.*

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## What is alternative dispute resolution?

In this toolkit, Alternative Dispute Resolution, or 'ADR' means parties working together in order to find a resolution to a dispute without having to go to court.

The aim of ADR is to promote discussion, negotiation and compromise between the parties that find themselves in a disagreement.

ADR enables the parties to stay in control of their own dispute and decide for themselves how they would like to deal with it. This means a cost effective way of working things out together instead of having someone else telling the parties how their dispute should be solved. In this way, ADR aims to produce an outcome with positive effects for everyone, rather than reaching an outcome with a 'winner' and a 'loser'.

Different types of ADR addressed in this toolkit:

- Negotiation
- Mediation
- Arbitration
- The Ombudsman

## Why use ADR?

- Compared with litigation, ADR usually saves parties time and money. Fewer people are involved and some ADR services are free
- ADR is informal and flexible, and creates scope for ways of solving a dispute that are not available in a court
- ADR is almost always confidential
- ADR aims to be as non-threatening and open as possible
- ADR is intended to help parties that are in dispute to maintain good relationships, which is important for legal disputes about the local environment, where community members need to live together harmoniously after the dispute is over

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**Caption:** Lighting over floodplains, Arnhem Land, NT Australia.

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## Handy hints for using ADR

Here are some things to consider while you are going through ADR, to ensure you get the best possible outcome.

### What do you want?

If you go into the ADR process with a clear idea about what it is that you really want, and what you are prepared to compromise about, you will be off to a good start.

It is helpful to write a list of your aims in order of importance, putting your most important aim first.

### Give and take

The flexibility of ADR allows for creative thinking when you are trying to work out solutions. Start by listening carefully to the person you are in dispute with. Try to work out what is really important to them, or is on the top of their list of goals. These may be things that are not hard for you to give up.

This process is the beginning of the all-important compromise. It will start to become clear how much room for negotiation there is.

### ADR between different languages and cultures

If there are language or cultural barriers between the parties that are in dispute, an interpreter may be needed to keep things fair and to ensure both parties understand each other's position.

Where an interpreter is required as part of the ADR process everyone should make sure:

- The interpreter is neutral and independent. The interpreter should not be a family member or friend of one of the parties in the dispute
- The interpreter understands what everyone is trying to achieve using ADR
- Some cultural background information is obtained, to prevent accidental misunderstandings
- The way you are going to use the interpreter's skills is worked out and understood, so everyone is comfortable with what happens
- Seating is arranged in a way that makes sure communication is as easy as possible
- Everyone agrees to ground rules for talking through the interpreter, making sure the interpreter translates everything that is said in a way that everyone can understand.

### How do I find an interpreter?

Free interpreter services are available through the Community Justice Centre (refer to contact details on page 8).

### Principles of effective negotiation

#### Separate the person from the problem

When you are in dispute with someone else, the conflict can easily become personal. Separating the person from the issue you are trying to solve can help to solve the problem. Try not to be overly emotional or use personal attacks. It can help to consider the perspective of the other party.

#### Focus on interests rather than positions

Your interests are what caused you to come to your position. Framing the issue in terms of positions means that one party will necessarily 'lose' the dispute. However, defining the problem in terms of the underlying interests involved can make it easier to find a solution that suits both parties' interests.

#### Generate a variety of options before settling on an agreement

Allow time for thinking of creative solutions and focus on both parties' interests. There may be a solution that satisfies all of the parties' requirements.

#### Use objective criteria

This will make it easier for parties to agree. Ask for reasoning behind the other parties' suggestions and give objective reasons for your own.

#### Identify your best alternative to a negotiated agreement

What is your 'best alternative to a negotiated agreement' or your "BATNA"? At all times while you are negotiating keep your BATNA in mind and be sure not to accept a resolution that is less than your BATNA. The reason you are negotiating is to get a solution that is better than one you can obtain without negotiating. If you are coming to the negotiation in a weaker position than the other party, consider how you can improve your BATNA, for instance, by involving third parties.

### How do I know if I should accept a proposed ADR solution?

In choosing whether or not to accept a proposed solution, first consider the following:

- Does this solution meet my own needs as well as everyone else's?
- Is this the best solution we have come up with?
- Does this mean that everyone can have a workable relationship in the future?
- Do I feel comfortable with the way this solution was worked out?

If you still feel unsure with what has been worked out, you can ask for some time to think about it before agreeing.

### At the conclusion of ADR

If ADR succeeds and you do work out an agreement, you should write this agreement down. Even if you only agree on some things, getting it down in writing is very important. You can write your agreement down yourself, or ask someone else to do this for you. This could be your mediator, you or one of the other parties, your lawyers, or other support people.

Your agreement should clearly describe:

1. What everyone intends the agreement to do
2. The decisions that have been made between the parties
3. A time frame for further actions to be taken

Each party should sign and take a copy of the agreement. This way, everyone will have a record of exactly what has been agreed to.

## Negotiation

### What is negotiation?

Negotiation is an informal way of resolving a dispute. In fact, negotiation is really part of all types of ADR. Negotiation is the process of communication between two or more parties with the aim of reaching a mutual agreement.

You can have a direct conversation with the other party, or you may choose to have a third party to help run the negotiation.

You can choose whether you do a negotiation by yourself, or with a lawyer. You can agree to make binding decisions at the end of the negotiation and can decide what will be talked about in the negotiation. The parties can decide how the process will work and whether it will be confidential.

### Should I try negotiation?

- Negotiation works where both parties are able to listen to each other
- There are no inherent costs involved
- There is no paperwork necessarily involved, although some participants may want paperwork
- The participants can speak for themselves and can do so without a lawyer (although you may choose to have one)
- You can choose for the negotiation to be private and confidential
- The focus is on the participants' needs, and you come up with your own solutions
- Negotiation helps the participants learn new skills, which can prevent disputes in the future

### Negotiation may not be appropriate where:

- You do not feel safe when communicating with the other participants
- The parties are not willing to try to reach a solution together

### How do I arrange a negotiation?

You can begin a negotiation by contacting the other party. You can also contact a lawyer if you think you will need help in your negotiation, but make sure that you tell the other party that you plan on using a lawyer.

The right attitude of both parties is vital for a successful negotiation. You will need skills such as respect, active listening, having a problem-solving approach, being open and direct and being prepared to exchange information. Be prepared to make concessions, and think about trade-offs.

### Negotiation example

Orwell is unhappy because Winston has been allowing his sewerage to spill from his septic tank into Orwell's front lawn. Orwell writes Winston a letter to ask him to come to a negotiation. Winston does not speak English well, so he calls an interpreter service, which sends Julia along to translate on Winston's behalf. At the negotiation, Orwell explains to Winston that the sewerage has been making his front lawn smelly. Winston explains (through Julia) that this is because Orwell has been parking his car over the sewage pipes. Winston agrees to fix the pipes within the next 3 days on the basis that Orwell moves his car.

## Mediation

### What is mediation?

Mediation is the process in which the participants, with the assistance of a third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavor to reach an agreement. Mediation should be approached as a problem-solving exercise.

The mediator is usually regarded as having a facilitative role and will not provide advice on the matters in dispute. The mediator may have no particular expertise in the subject area of the dispute but should be expected to be experienced in the mediation process.

Should you wish to use one, a lawyer can assist you in helping to present your case and by giving practical and legal advice and support.

The principles of mediation are impartiality, confidentiality, voluntary and good faith. Mediators should be completely impartial and not favour one party over the other; what is spoken about in mediation is confidential and can't be shared with others without permission; the parties attend the mediation process voluntarily and act in good faith during the process.

### Should I try mediation?

- Mediation can be free
- Mediation is quicker than litigation and can be organised within days once the parties agree to meet
- There is no paperwork necessarily involved, although some participants may want paperwork
- The participants speak for themselves and you can do so without a lawyer (although you may choose to have one)
- You can choose for mediation to be private and confidential
- The focus is on participants' needs and what is important to them
- The participants come up with their own solutions
- Mediation helps the participants learn new skills, which can prevent disputes in the future

Over 85% of mediations result in an agreement being reached. In most cases mediations can be arranged quickly, usually taking around 2-4 hours.

Mediation may not be appropriate where:

- You are disputing the action of a government department or government minister
- You do not feel safe when communicating with the other participants
- You are forced against your will to participate by other parties in the dispute

## How do I arrange mediation?

### 1. Contact a mediator

#### The Community Justice Centre

Mediation can be arranged with the Community Justice Centre (CJC), which provides mediation services that are free, confidential, voluntary, timely, and easy to use.

#### Contact:

Free call number 1800 000 473 (free interpreter services are available)

[www.nt.gov.au/justice/policycoord/cjc/](http://www.nt.gov.au/justice/policycoord/cjc/)

Level 1, Darwin Magistrates Court  
Nichols Place, Darwin 0801

Email: [cjc.doj@nt.gov.au](mailto:cjc.doj@nt.gov.au)

The CJC staff will:

- Talk with you about the problem and discuss ways you can resolve it yourself
- Provide information and/or referral
- Assess if your dispute is suitable for mediation and if so, ask for brief information about you, your concerns and the other parties involved
- With your permission, contact the other parties to arrange mediation

Steps the CJC will take:

1. The CJC will assess whether the dispute is suitable for mediation and if so, ask for the name and address of the other party and send a letter telling them that you are interested in mediating with them about a particular issue
2. If the CJC has not received a response after 7 working days, it will send a follow-up letter
3. If the other party does not respond after a further 7 working days, or they decline the offer for mediation, the CJC will send a letter to you advising this
4. If the other party is willing to attend mediation, a convenient time and place will be organised

#### Other mediators

You may choose to go to a private mediator. Mediators can be approved to practice under the Australian National Mediator Standards. However, not all mediators are accredited, so it is useful to check. Using a mediator that meets the standards means it is more likely that you will receive a high-quality service and a resolution that both parties are happy with.

Mediators can be found at:

#### Institute of Arbitrators & Mediators Australia

Parties are able to select their mediator from the Institute's panel of accredited mediators, or the Institute will nominate a suitable person on request.

[www.iama.org.au](http://www.iama.org.au)

National Headquarters  
PO Box 13064, Law Courts Melbourne, Victoria 8010

Phone: (03) 9607 6908

Fax: (03) 9602 2833

Email: [national@iama.org.au](mailto:national@iama.org.au)

#### LEADR

This is an organisation formed to serve the community by promoting and facilitating the use of ADR.

LEADR's services include access to panels of independent mediators and facilitation of mediations and conciliations.

[www.leadr.com.au](http://www.leadr.com.au)

Level 9, 15-17 Young St, Sydney, NSW, 2000

Ph: (02) 9251 3366

Fax: (02) 9251 3733

Email: [leadr@leadr.com.au](mailto:leadr@leadr.com.au)

## 2. Prepare for mediation

Prepare for your mediation by filling in the NT Community Justice Centre 'Prepare for Mediation Workbook' (workbook). The workbook can be accessed at: [www.cjc.nt.gov.au/preparingformediation.pdf](http://www.cjc.nt.gov.au/preparingformediation.pdf)

The workbook runs through areas such as:

- What is the dispute about?
- How would you like the dispute resolved?
- What is the other parties' view?

## 3. Mediation process

### Pre-mediation

Pre-mediation sessions that are convened by the mediator are a good opportunity to establish a relationship with the mediator; and arrange any practical matters and risks relevant to convening the mediation.

### Mediation

A mediation session is then held with the mediator. During this session the rules of the mediation will be established, each party will have the opportunity to tell their story and explore the issues and if possible a resolution will be reached.

### Conclusion

At the end of a successful resolution everyone should walk away with the "one story", i.e. the same understanding of the outcomes of the mediation. Specifically, you should be able to answer the following questions:

- What were the outcomes / undertakings?
- Who else needs to know about the outcomes?
- What is the time frame for any further action to be completed?

### Support persons in the mediation

A support person is someone that may be invited to provide support to a party at mediation. They could be a lawyer, friend or relative.

A support person can help a party understand the issues in dispute or simply help the party feel more comfortable about attending the mediation. Support persons may only attend and speak at the consent of all parties to the mediation and are bound by confidentiality.

### Example

Aureliano owns a small shop in a rural setting. He decides to build it into a giant tower. Jose lives next door and breeds rare tropical parakeets. Jose is concerned that Aureliano's tower will scare his parakeets and he will no longer be able to breed them. Jose contacts the free service at Darwin's Community Justice Centre, and the CJC send a letter to Aureliano asking him to come to a mediation. Aureliano arranges a convenient time through the CJC, and Remedios agrees to be the mediator. Jose explains that he is afraid that he will be unable to breed parakeets, while Aureliano explains that the building of the tower is very important for securing his financial future. Remedios asks the parties to think of some solutions that would benefit both parties. Jose suggests that Aureliano builds a very flat, large building rather than a tower. Aureliano suggests that Jose moves the parakeet breeding to the other side of his property. In the end, both parties agree that the tower will be painted with parakeet colours so that the birds are not disturbed and Jose Arcadio can continue with his business.

## Arbitration

### What is arbitration?

Arbitration is where the parties present their perspectives and facts to an independent person (an arbitrator), who makes a decision based on this information.

Arbitration is a more formal process than mediation, so usually there is a greater need to produce facts. The parties agree that the arbitrator's decision will be binding and enforceable. Because of this, arbitration can be similar to court, except it is less formal and is often quicker.

The arbitrator will decide how the process will be run and make sure that both parties are following the guidelines of the arbitration. They are also responsible for deciding on the outcome of the dispute.

### Should I try arbitration?

- Contracts often contain clauses that require that the parties go to arbitration if a dispute arises
- An arbitrator often has expertise in a particular area. Disagreements about environment or planning issues can sometimes involve a lot of technical, scientific or other matters that can be helped along by scientific expertise
- Arbitration is good if you want someone to make the decision for you
- Arbitration is less formal and quicker than going to court
- Arbitration can be private and confidential

### Arbitration may not be appropriate where

- You want to be able to come up with a solution with the other party, rather than have the solution decided for you

### How do I arrange an arbitration?

#### 1. Find an arbitrator

Everyone in the dispute must agree:

- Who the Arbitrator will be
- How the Arbitrator will be paid
- How the Arbitrator will collect their information before making their decision
- That the Arbitrator's decision will be final. This means that neither party will be able to go to Court if they don't like the outcome

A list of barristers who are arbitrators can be found at the following website: [www.nt.gov.au/justice/policycoord/construction/adjudicator.shtml](http://www.nt.gov.au/justice/policycoord/construction/adjudicator.shtml)

Alternatively, an arbitrator can be found through the following contact:

#### Institute of Arbitrators & Mediators Australia

Parties are able to select their mediator from the Institute's panel of accredited mediators, or the Institute will nominate a suitable person on request.

[www.iama.org.au](http://www.iama.org.au)

National Headquarters

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Phone: (03) 9607 6908

Fax: (03) 9602 2833

Email: [national@iama.org.au](mailto:national@iama.org.au)



## 2. Arbitration process

The arbitrator will guide you through the arbitration process, which may include:

- Placing moneys in trust: the arbitrator may require that money be put into an account held by a nominating body
- Directions hearing: there will be a hearing to discuss all of the issues
- Statements of claim will be submitted by both parties, which will outline the relevant facts
- The other party will then outline their response to these facts in their statement of defence, along with any counterclaim
- You will be able to file a response to the defence and counterclaim
- Both parties will file an affidavit of documents comprising all documentation relating to the dispute
- Both parties will be given the opportunity to inspect the other party's documents
- Some parties may ask expert witnesses to substantiate their claim

## 3. Conclusion to arbitration

Conclusions to arbitration are usually binding and enforceable. There may be orders providing that the parties will attend further hearings to make sure that the time frames are being met.

### Example

Tzipi is an emerald miner. Bibi is the owner of a large area of forest, containing emeralds. Tzipi signs a contract with Bibi, such that she can mine on the land as long as the tall Truffeler trees are not disturbed. There is a clause in the contract stipulating that the parties will go to arbitration if there is a dispute between them. A few weeks into the mining, Bibi notices that some of the Truffeler trees have been cut down. Bibi and Tzipi go to arbitration. The arbitrator, Peres, asks them to each write down the facts and their perspective of the dispute. Bibi states that the Truffler trees are a rare species, and it is very important to him that they are untouched. Tzipi states that she did not realise that the trees were cut down and, anyway, what's so important about a few trees? Peres decides that Tzipi must pay Bibi for the monetary value of the trees and that Bibi will have the option to rescind the contract if Tzipi cuts down any more Truffeler trees.

## Key distinctions between negotiation, mediation and arbitration

	Alternative form of dispute resolution	Parties can be ordered by a court to partake in	Independent third party involved to assist with resolving dispute	Independent third party can make binding decision
Negotiation	✓			
Mediation	✓	✓	✓	
Arbitration	✓	✓	✓	✓

## Office of the Ombudsman

### What is the Ombudsman's office and what is its role?

Ombudsman offices deal with complaints by providing independent review and investigation services. The role of Ombudsman offices are to receive, investigate and facilitate resolution of a complaint about government departments, statutory authorities, community councils, police and correctional services and freedom of information.

### In what circumstances should I complain to the Ombudsman?

- If you have a complaint about government or industry, the Ombudsman may be able to help you with it
- Any complaint and assistance obtained from the Ombudsman is free
- You do not need to be represented by a lawyer
- The Ombudsman will try to help you resolve your dispute informally

### A complaint to the Ombudsman may not be appropriate where

- The Ombudsman offices will not investigate complaints against individuals or corporations.

### How to make a complaint to the Ombudsman

#### 1. Contact the Ombudsman

There are two Ombudsman offices relevant to environmental issues - the Northern Territory Ombudsman and the Commonwealth Ombudsman. Depending on the nature of your issue, you will be directed to the relevant office. For example, if your issue relates to a Northern Territory government department then you would make a complaint to the NT Ombudsman office.

#### Complaining to government departments

Most complaints need to be made and dealt with by the relevant government department before the Ombudsman can investigate a complaint. Refer to the relevant government department's website for the complaints and feedback mechanisms. You may also wish to consider what information is needed to support your complaint and what could be available through a freedom for information request.

For complaints regarding Northern Territory government departments refer to the NT Ombudsman office. You can make a complaint online through the website at [www.ombudsman.nt.gov.au/make-a-complaint/complaint-form-online/](http://www.ombudsman.nt.gov.au/make-a-complaint/complaint-form-online/), or lodge a complaint in person at the Darwin office located at:

12th Floor, NT House,  
22 Mitchell Street,  
Darwin NT 0800

or by post addressing mail to:

PO Box 1344  
Darwin NT 0801

or by telephone / fax or email:

Phone: (08) 8999 1818  
Fax: (08) 8999 1828  
Freecall: 1800 806 380 from landlines

Email: [nt.ombudsman@nt.gov.au](mailto:nt.ombudsman@nt.gov.au)

For complaints regarding Commonwealth government departments refer to the Commonwealth Ombudsman office. You can make a complaint online through the website at <https://forms.business.gov.au/aba/ombudsman/ombudsman-complaint-form->

or by post addressing mail to:

GPO Box 442  
Canberra ACT 2601  
or by telephone/fax or email

Phone: 1300 362 072  
Fax to (02) 6276 0123

Email: [ombudsman@ombudsman.gov.au](mailto:ombudsman@ombudsman.gov.au)

#### 2. The Ombudsman will consider your complaint

The Ombudsman can consider your dispute or complaint and decide what action they can take. Ombudsman offices often have access to a range of measures to help resolve disputes or complaints. These may include:

- Managing ADR processes, such as assisted negotiation, mediation and conciliation
- Investigating an issue, either on its own or as part of a larger problem
- Providing opinions (for example, whether they agree with a decision)
- Making recommendations (for example, suggesting that a decision be changed)

Ombudsman will try to reach an outcome that is fair to everyone involved in the dispute. In reaching an outcome, an Ombudsman will consider:

- What the law says
- Any codes of practice that may apply
- What is good administrative or industry practice
- What is fair and reasonable in the circumstances of your dispute or complaint

## Further resources

#### Guide to Dispute Resolution

The Attorney-General's Department's Guide to Dispute Resolution contains basic information about common ADR processes, as well as some tips for using ADR and resolving disputes generally. It is a resource to help ordinary Australians understand more about ADR:

[www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/default.aspx](http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/default.aspx)

#### Community Justice Centre NT

In addition to their free services, the Community Justice Centre provides fact sheets and tips for ADR:

[www.cjc.nt.gov.au](http://www.cjc.nt.gov.au)

#### EDONT factsheet

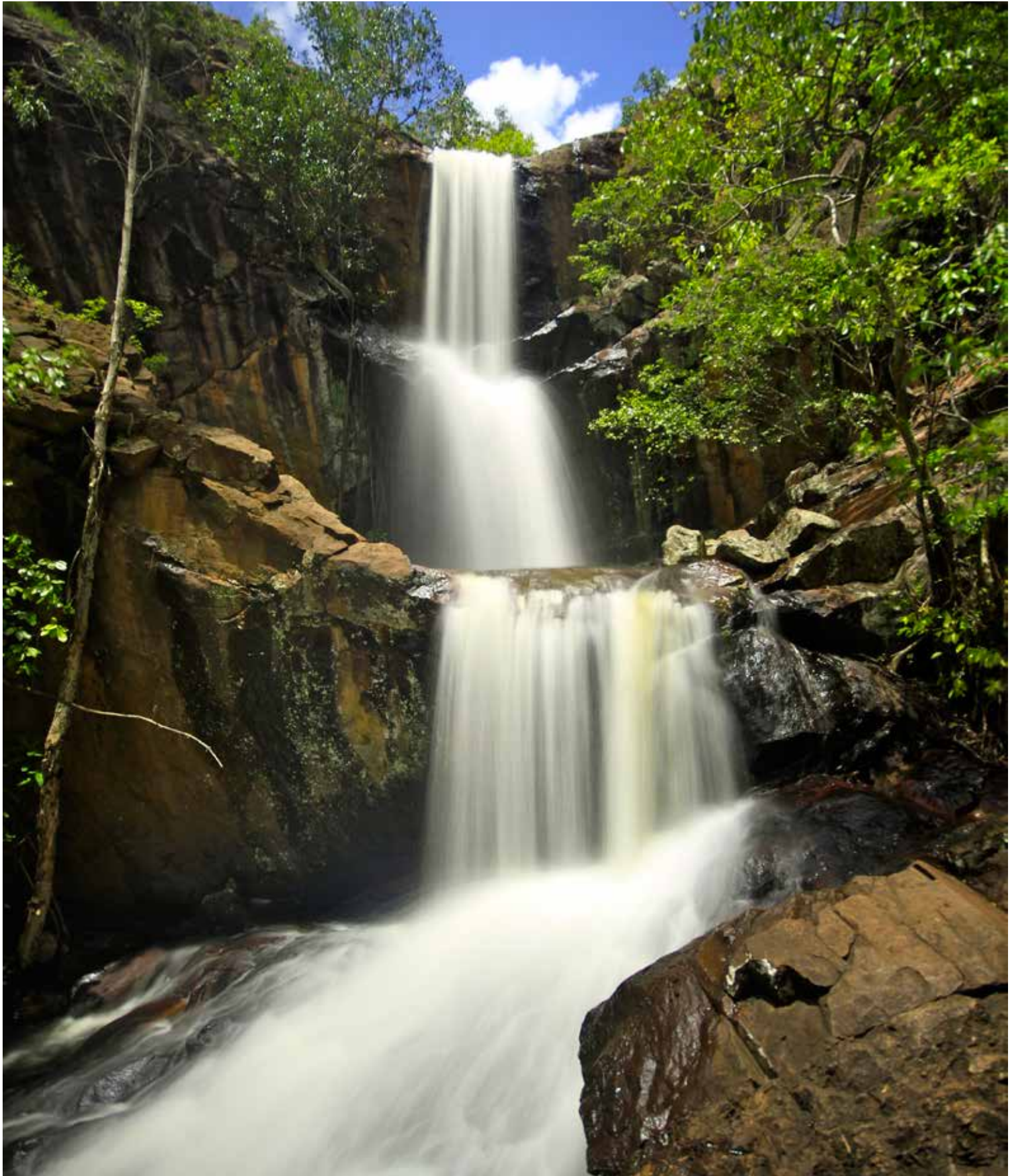
The Environmental Defenders Office (NT) provides a factsheet on a number of alternatives to legal action that can be found at the below website:

[www.edont.org.au/factsheets/alternatives-legal-action/](http://www.edont.org.au/factsheets/alternatives-legal-action/)

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**Caption:** Wet season flows, Robin Falls, NT Australia.

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**A** 5/84 Smith Street  
PO Box 4289, Darwin NT 0801  
**P** (08) 8981 5883  
**E** [info@edont.org.au](mailto:info@edont.org.au)

[www.edont.org.au](http://www.edont.org.au)

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