



# Protesting Forestry Activities

Current as of October 2018

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## Overview

Peaceful protest in relation to forestry activities has a long history in NSW but protestors do, on occasion, face criminal charges for their actions.

The right of citizens to participate in peaceful assemblies has been described by the Supreme Court of NSW as “integral to a democratic system of government and way of life”.<sup>2</sup> However, there are important legal limitations on a person’s right to protest and this can give rise to a broad range of protest-related offences.

This fact sheet outlines the right to protest, such as it is, and some of the potential legal implications of engaging in protest activity. It is not possible to predict the specific nature of forest protests or the likely response from law enforcement agencies. This fact sheet should therefore be seen as a general guide only.

It is also important to keep in mind that it is common for multiple charges to be laid against protestors, as well as civil claims.

<sup>1</sup> [http://www.edonsw.org.au/legal\\_advice](http://www.edonsw.org.au/legal_advice)

<sup>2</sup> *NSW Commissioner of Police v Bainbridge* (2007) NSWSC 1015.

## Is there a right to protest?

An important starting point is to identify whether there is a legal right to protest. The answer to this question is nuanced.

It is not possible to point to a particular law that confers the right to protest.

However, the High Court of Australia has recognised a right to *peaceful* assembly, and this right has become known as the right to protest. The right does not extend to violent protest or to trespass or actions that may cause harm to property.

The right to protest can be modified or removed altogether by an Act of Parliament. The right is therefore not absolute.

### Authorised assemblies

In addition to the right to peaceful assembly, some protest activities can be expressly authorised under the *Summary Offences Act 1988* (NSW).

This Act sets up a system whereby certain protests can be facilitated by the police.<sup>3</sup>

Protest organisers can choose to inform the Commissioner of Police about their intention to hold a public assembly<sup>4</sup> and provide particulars such as the date, time, proposed location or route and expected number of participants.

There is a notice form that can be downloaded and used for the purpose of informing the Commissioner of an intention to hold a public assembly.<sup>5</sup>

The Commissioner of Police can then either authorise the public assembly<sup>6</sup> or determine not to authorise the assembly.

Participating in a protest/assembly which has not been “authorised” under the *Summary Offences Act* is not unlawful. An authorised assembly is simply an assembly (protest) that has been provided with additional legal protection.

The effect of authorisation is that, so long as the protest is conducted substantially in accordance with the particulars given to the Commissioner of Police, participants cannot be charged with two key offences:<sup>7</sup>

1. Participating in an unlawful assembly; or
2. Obstruction.

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<sup>3</sup> *Summary Offences Act 1988* (NSW), Part 4.

<sup>4</sup> *Summary Offences Act 1988* (NSW), s. 23.

<sup>5</sup> See:

[https://www.police.nsw.gov.au/\\_data/assets/pdf\\_file/0007/275560/Notice\\_of\\_Intention\\_to\\_Hold\\_a\\_Public\\_Assembly.pdf](https://www.police.nsw.gov.au/_data/assets/pdf_file/0007/275560/Notice_of_Intention_to_Hold_a_Public_Assembly.pdf)

<sup>6</sup> *Summary Offences Act 1988* (NSW), s. 23.

<sup>7</sup> *Summary Offences Act 1988* (NSW), s. 24.

However, all other charges associated with protest activities can still be laid against participants of an authorised assembly.

### **Unauthorised assemblies**

An unauthorised assembly is one where:

1. The organisers have chosen not to apply to the Commissioner of Police for authorisation, or
2. The organisers have applied for authorisation and the Commissioner of Police has determined not to authorise the assembly.

An unauthorised assembly is not necessarily unlawful. It simply means that the participants of the assembly do not have the benefits afforded to authorised assemblies – namely protection from charges of participating in an unlawful assembly and obstruction.

In some cases, the Commissioner of Police can seek a Court order prohibiting the holding of a public assembly.<sup>8</sup> However, such orders do not actually prohibit the assembly or make such an assembly unlawful. Again, the effect is to expressly deny the participants the protection that would be available to them had the assembly been authorised.

### **Unlawful assemblies**

An unlawful assembly is any assembly of five or more persons whose common object is, by means of intimidation or injury, to compel any person to do what the person is not legally bound to do, or to abstain from doing what the person is legally entitled to do.

It is an offence to join, or continue to be part of, an unlawful assembly.<sup>9</sup> The maximum penalty is \$550 and/or 6 months imprisonment.

This offence could be committed where forest activists threaten or physically harm a forest worker or log truck driver to stop them going about their lawful business. It is unlikely that simply blockading a logging site or access road will constitute an unlawful assembly without an added element of intimidation or injury.

### **Specific offences for forest protests**

There are a whole range of general offences that can apply to forest protests. The *Forestry Act 2012* and *Forestry Regulation 2012* contain a number of specific offences that apply to forestry areas such as State forests and flora reserves.

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<sup>8</sup> *Summary Offences Act 1988* (NSW), s. 25.

<sup>9</sup> *Crimes Act 1900* (NSW), s. 545C.

## **Damaging timber**

It is an offence to damage or destroy any forest products in a State forest.<sup>10</sup>

This offence could apply where trees are felled to construct tripods.

The maximum penalty is \$5,500 and/or 6 months imprisonment. There is a further penalty of \$10 per tree that is destroyed or damaged.

The on-the-spot fine for this offence is \$100.

## **Unauthorised use of forestry areas**

It is an offence to use any land within a forestry area without lawful authority.<sup>11</sup>

The maximum penalty is \$2,200 and the defendant has the onus of proving lawful authority.

The on-the-spot fine for this offence is \$100.

## **Camping**

Land managers of forestry areas can display a notice prohibiting camping in a forestry area.<sup>12</sup> Alternatively, the land manager can impose conditions or directions on camping in forestry areas, including the number of people allowed and the location of the camp.<sup>13</sup>

It is an offence to contravene a notice or direction about camping.<sup>14</sup> The maximum penalty is \$2,200.

The on-the-spot fine for this offence is \$100.

## **Dangerous activities in forestry areas**

Whilst in a forestry area it is an offence to engage in any activity that involves risking one's own safety or that of others, or that damages the environment.<sup>15</sup>

The maximum penalty is \$2,200.

This offence could apply to the use of tripods and other elevating structures, such as tree platforms. It could also apply to clearing of any vegetation for the purpose of establishing a camp, or for firewood.

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<sup>10</sup> *Forestry Act 2012* (NSW), s. 38.

<sup>11</sup> *Forestry Act 2012* (NSW), s. 67.

<sup>12</sup> *Forestry Regulation 2012* (NSW), cl. 21.

<sup>13</sup> *Forestry Regulation 2012* (NSW), cl. 21.

<sup>14</sup> *Forestry Regulation 2012* (NSW), cl. 21.

<sup>15</sup> *Forestry Regulation 2012* (NSW), cl. 8.

It is an offence to damage, remove or otherwise interfere with any notice or sign erected by the Forestry Corporation.<sup>16</sup>

The maximum penalty is \$2,200.

The on-the-spot fine for this offence is \$100.

### **Lighting fires in a forestry area**

It is an offence to light a fire in a forestry area unless:<sup>17</sup>

- authorised to do so by a permit or an authorised officer;
- the fire is for cooking purposes, boiling water; or personal warmth but only if the fire is at least 4.5 metres from the nearest stump or tree, the ground is clear of flammable material within a 2 metre circumference of the fire, and the fire is lit in a fireplace of a kind approved by an authorised officer; or
- the fire is part of a vehicle such as a camper or caravan.

The maximum penalty is \$2,200.

The on-the-spot fine for this offence is \$250.

It is an offence to leave a fire without first extinguishing it.<sup>18</sup>

The maximum penalty is \$2,200.

The on-the-spot fine for this offence is \$250.

It is also an offence to fail to extinguish a cigarette or lit match.<sup>19</sup>

The maximum penalty is \$2,200.

The on-the-spot fine for this offence is \$350.

### **Firearms and hunting**

It is an offence to shoot a firearm in or into a forestry area, or have a firearm, net, trap, poison, explosive or other hunting device in a forestry area without authorisation.<sup>20</sup>

It is also unlawful to kill or capture any animal, excluding fish, in a forestry area without authorisation.<sup>21</sup> A game hunting licence amounts to authorisation.<sup>22</sup>

The maximum penalty is \$5,500 and/or 6 months imprisonment.

<sup>16</sup> *Forestry Regulation 2012* (NSW), cl. 8.

<sup>17</sup> *Forestry Regulation 2012* (NSW), cl.10,11.

<sup>18</sup> *Forestry Regulation 2012* (NSW), cl. 12.

<sup>19</sup> *Forestry Regulation 2012* (NSW), cl. 13.

<sup>20</sup> *Forestry Act 2012* (NSW), s. 68.

<sup>21</sup> *Forestry Act 2012* (NSW), s. 68.

<sup>22</sup> *Forestry Act 2012* (NSW), s. 68.

The on-the-spot fine for this offence is \$500.

### **Unlawful entry into forestry areas**

Generally State forests are open to the public but it is possible for the Forestry Corporation to prohibit all people/vehicles, or a certain class of person or vehicle from entering a particular forestry area. This can be done by displaying a notice to that effect in a conspicuous position in, or in the vicinity of, the relevant forestry area.<sup>23</sup>

It is an offence to enter or remain in a forestry area if that person is prohibited from entering.

The maximum penalty is \$2,200.

The on-the-spot fine for this offence is \$100.

### **Approaching or interfering with forestry operations**

It is an offence to come within 100 metres of, or interfere with, timber harvesting or hauling equipment in a forestry area unless authorised to do so by an authorised person.<sup>24</sup>

This includes obstructing, defacing, climbing, or attaching something to the equipment.

Authorised people include employees of the Forestry Corporation, police officers, and Office of Environment and Heritage staff.

The maximum penalty is \$2,200.

On-the-spot fine for this offence is \$1000.

### **Failure to leave a forestry area when requested by an authorised officer**

An authorised officer can request a person to leave an area if forestry operations are in progress and the authorised officer believes that:<sup>25</sup>

- those activities constitute a danger or potential danger to the safety of persons or property, or
- there is likely to be conflict with other uses of the area by other persons, or
- there is a risk of a significant adverse impact on the area.

It is an offence to not comply with an offence to leave a forestry area, but only if the authorised officer:

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<sup>23</sup> *Forestry Regulation 2012 (NSW)*, cl. 6

<sup>24</sup> *Forestry Regulation 2012 (NSW)*, cl. 47.

<sup>25</sup> *Forestry Regulation 2012 (NSW)*, cl. 4.

1. discloses that they are an authorised officer, and
2. informs the person that a failure to comply with the request is an offence.

The maximum penalty is \$2,200.

The on-the-spot fine for this offence is \$100.

An authorised officer can remove any person from a forestry area who is causing a nuisance or inconvenience to other people in the area.<sup>26</sup>

### **Offences relating to authorised officers**

It is an offence to obstruct, delay or hinder an authorised officer in the exercise of the officer's functions.<sup>27</sup>

The maximum penalty is \$2,200.

The Minister for Primary Industries appoints authorised officers. People who can be appointed include employees of the Forestry Corporation, members of any Division of the Government, or staff members of a land manager other than the Forestry Corporation.<sup>28</sup> Police officers can also exercise the functions of an authorised officer.<sup>29</sup>

### **General offences for protest activities**

In addition to the specific offences that apply to forestry areas, there are a number of offences that apply to protest activities more generally.

### **Offensive conduct and offensive language**

It is an offence for a person to conduct himself or herself in an offensive manner, or to use offensive language while in, near, or within view of a public place or a school.<sup>30</sup>

It is not always easy to predict what will be considered "offensive" in the circumstances, but it is worthwhile assessing clothing, banners, signs etc. ahead of time for any potentially offensive content. Some swear words are still considered offensive by the police and the courts.

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<sup>26</sup> *Forestry Regulation 2012* (NSW), cl. 5.

<sup>27</sup> *Forestry Act 2012* (NSW), s. 83.

<sup>28</sup> *Forestry Act 2012* (NSW), s. 70.

<sup>29</sup> *Forestry Act 2012* (NSW), s. 71.

<sup>30</sup> *Summary Offences Act 1988* (NSW), s. 4.

The maximum penalty for offensive conduct is \$660 and the same maximum applies to offensive language.

The on-the-spot fine for these offences is \$500.

However, police are not authorised to issue an on-the-spot fine in relation to:<sup>31</sup>

- an industrial dispute
- an apparently genuine demonstration or protest,
- a procession, or
- an organised assembly.

Anyone issued an on-the-spot fine for offensive conduct or offensive language while participating in a protest should seek legal advice.

### **Failure to comply with a direction of a police officer**

Police officers have broad powers to give directions to people in a public place, including where the police officer believes the person's behaviour or presence in the place.<sup>32</sup>

- is obstructing another person or traffic,
- constitutes harassment or intimidation of another person or persons, or
- is causing or is likely to cause fear to another person or persons, so long as the relevant conduct would be such as to cause fear to a person of reasonable firmness.

Such directions can only be given if the direction is reasonable in the circumstances for the purpose of reducing or eliminating the obstruction, harassment, intimidation or fear.

It is an offence to fail to comply with a police direction without reasonable excuse.<sup>33</sup>

The maximum penalty is \$220.

A police officer is not authorised to give a direction in relation to an apparently genuine demonstration or protest, a procession, or an organised assembly unless:<sup>34</sup>

- the police officer believes on reasonable grounds that the direction is necessary to deal with a *serious* risk to the safety of the person or any other person, or
- the demonstration/protest is obstructing traffic, the protest is not authorised (see above), the police officer in charge at the scene has authorised the

<sup>31</sup> *Criminal Procedure Act 1986* (NSW), s. 339.

<sup>32</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s. 197.

<sup>33</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s. 199.

<sup>34</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s. 200.



giving of the direction and the direction is limited to those persons who are obstructing traffic.

Under the Road Rules, It is an offence to fail to comply with any reasonable direction for the safe and efficient regulation of traffic given to the person by a police officer or authorised person.<sup>35</sup>

The maximum penalty is \$2,200.

The on-the-spot fine for this offence is \$337 but it attracts demerit points so it could be argued that the person needs to be in a car.

### **Obstruction**

It is an offence for a person, without reasonable excuse, to wilfully prevent in any manner the free passage of a person, vehicle or vessel in a public place.<sup>36</sup>

The maximum penalty is \$440.

The on-the-spot fine for these offences is \$200.

However, police are not authorised to issue an on-the-spot fine in relation to:<sup>37</sup>

- an industrial dispute
- an apparently genuine demonstration or protest, or
- a procession, or
- an organised assembly.

Anyone issued an on-the-spot fine for obstruction while participating in a protest should seek legal advice.

This offence could apply to protest activities that block access roads or the passage of logging trucks.

There is a separate offence of causing a traffic hazard where a pedestrian moves into the path of a driver or another pedestrian.<sup>38</sup>

The maximum penalty is \$2,200.

The on-the-spot fine for this offence is \$75.

Participants in an authorised assembly will be protected from an obstruction charge in circumstances where the protest is held substantially in accordance with the

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<sup>35</sup> *Road Rules 2014 (NSW)*, r. 304.

<sup>36</sup> *Summary Offences Act 1988 (NSW)*, s. 6.

<sup>37</sup> *Criminal Procedure Act 1986 (NSW)*, s. 339.

<sup>38</sup> *Road Rules 2014 (NSW)*, cl. 236.

notification. However, there is no protection from the charge of causing a traffic hazard.

### **Affray**

It is an offence for a person to use or threaten unlawful violence towards another so as to cause a person of reasonable firmness who is present at the scene to fear for his or her safety.<sup>39</sup>

If two or more people threaten or use violence, it is their behaviour together that is used to determine if the offence has been committed.

The maximum penalty is 10 years imprisonment.

### **Riot**

It is an offence to participate in a riot. A riot is where 12 or more persons who are present together use or threaten unlawful violence for a common purpose and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his or her personal safety.<sup>40</sup>

It is immaterial whether or not the 12 or more persons use or threaten unlawful violence simultaneously.

The maximum penalty for riot is 15 years imprisonment.

### **Violent disorder**

It is an offence to participate in a violent disorder. A violent disorder is where 3 or more persons who are present together use or threaten unlawful violence and their conduct (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his or her personal safety.<sup>41</sup>

It is immaterial whether or not the 3 or more persons use or threaten unlawful violence simultaneously.

The maximum penalty for violent disorder is \$1,100 and/or 6 months imprisonment.

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<sup>39</sup> *Crimes Act 1900* (NSW) s. 93C.

<sup>40</sup> *Crimes Act 1900* (NSW) s. 93B.

<sup>41</sup> *Summary Offences Act 1988* (NSW) s. 11A.

### **Assault during a public disorder**

It is an offence for a person to assault another person during a large-scale public disorder.<sup>42</sup>

If the assault does not cause actual bodily harm, the maximum penalty is 5 years imprisonment.

If the assault does cause actual bodily harm, the maximum penalty is 7 years imprisonment.

### **Intimidation or annoyance by violence or otherwise**

It is an offence to, wrongfully and without legal authority, use violence or intimidation towards someone or their family with an intention to make that person stop doing something they have a legal right to do or to do something they have a legal right to not do.<sup>43</sup>

This offence can include following the person and hiding (or depriving the person of) any tools, clothes or other property of the person.<sup>44</sup>

The maximum penalty is imprisonment for 2 years and/or a fine of \$5,500.

*Intimidation* in this context means the causing of a reasonable apprehension of injury to a person or to any member of his or her family, or of violence or damage to any person or property.

### **Destroying or damaging property**

It is an offence to intentionally or recklessly destroy or damage property belonging to another.<sup>45</sup>

The maximum penalty is imprisonment for 5 years. The maximum penalty increases to 6 years if the offence is committed in the company of others.<sup>46</sup> If the offence is committed during a public disorder, the maximum penalty increases to 7 years.<sup>47</sup>

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<sup>42</sup> *Crimes Act 1900* (NSW), s. 59A.

<sup>43</sup> *Crimes Act 1900* (NSW), s. 545B.

<sup>44</sup> *Crimes Act 1900* (NSW), s. 545B.

<sup>45</sup> *Crimes Act 1900* (NSW), s. 195.

<sup>46</sup> *Crimes Act 1900* (NSW), s. 195.

<sup>47</sup> *Crimes Act 1900* (NSW), s. 195.

### **Unlawful entry on inclosed lands**

Some (but not all) State Forests are inclosed lands – meaning they are surrounded (wholly or in part) by a fence and/or some natural feature by which the boundaries of the State forest can be recognised.

It is an offence to enter inclosed lands without lawful excuse (and the defendant has the onus of proving lawful excuse).<sup>48</sup>

It is also an offence to remain on inclosed lands after being requested by the owner, occupier or person apparently in charge of the lands to leave those lands.<sup>49</sup>

The maximum penalty for entering or remaining on inclosed lands that are State Forests is \$550.

### **Aggravated unlawful entry onto inclosed lands**

It is an offence to enter inclosed lands on which any business or undertaking is conducted and, while on those lands:<sup>50</sup>

- interfere, attempt to interfere, or intend to interfere with the conduct of the business or undertaking; or
- do anything that gives rise to a serious risk to the safety of the person or any other person on those lands.

The maximum penalty for this offence is \$5,500.

### **Assault and other actions against police officers**

There are a range of offences relating to the assault of police officers.<sup>51</sup>

It is an offence to assault, throw a missile at, stalk, harass or intimidate a police officer while in the execution of the police officer's duty.

The maximum penalty is imprisonment for 5 years if no actual bodily harm is caused, and 7 years if actual bodily harm is caused.

If the assault occurs during a public disorder, the maximum penalty is 7 years if no actual bodily harm is caused, and 9 years if actual bodily harm occurs.

It is also an offence to, by any means, wound or cause grievous bodily harm to a police officer while in the execution of the officer's duty.

<sup>48</sup> *Inclosed Lands Protection Act 1901* (NSW), s. 4.

<sup>49</sup> *Inclosed Lands Protection Act 1901* (NSW), s. 4.

<sup>50</sup> *Inclosed Lands Protection Act 1901* (NSW), s. 4B.

<sup>51</sup> *Crimes Act 1900* (NSW), s. 60

The maximum penalty is imprisonment for 12 years, or 14 years if the offence is committed during a public disorder.

## Activities on Crown land

Authorised officers have the power to direct a person or group of people to stop carrying on certain activities on Crown land.<sup>52</sup> This includes:<sup>53</sup>

- entering Crown land at a time it is not open to the public;
- taking part in any gathering, meeting or assembly (except, in the case of a cemetery, for the purpose of a religious or other ceremony of burial or commemoration);
- distributing any circular, advertisement, paper or other printed, drawn, written or photographic matter;
- camping; and
- climbing any tree, building, fence, seat, table, enclosure or other structure.

It is not an offence to carry out these activities on Crown land, but rather to contravene a direction from an authorised officer to *stop* carrying out the activity.<sup>54</sup>

The maximum penalty for an individual is \$11,000 and \$1,100 for each day the offence continues.<sup>55</sup>

An authorised officer is someone who has been appointed by the Minister for Lands and Forestry as an authorised officer and can be:

- an employee of a government sector agency;
- an employee of a local council; or
- an employee of a Crown land manager.

The Minister for Lands and Forestry also has the power to put up a notice on or near Crown land that prohibits a person from carrying the activities listed above.<sup>56</sup> A Crown land manager has the same power to put up a notice on the Crown reserve they manage.<sup>57</sup> It is an offence for a person to carry on an activity if a notice prohibits them from doing so.<sup>58</sup>

The maximum penalty for an individual is \$11,000 and \$1,100 for each day the offence continues.<sup>59</sup>

<sup>52</sup> *Crown Land Management Act 2016* (NSW), s. 9.4(1)(b).

<sup>53</sup> *Crown Land Management Regulation 2018* (NSW), cl 13.

<sup>54</sup> *Crown Land Management Act 2016*, s 9.4(2).

<sup>55</sup> *Crown Land Management Act 2016*, s 9.4(2).

<sup>56</sup> *Crown Land Management Act 2016*, s 9.5(1).

<sup>57</sup> *Crown Land Management Act 2016*, s 9.5(2).

<sup>58</sup> *Crown Land Management Act 2016*, s 9.5(3).

<sup>59</sup> *Crown Land Management Act 2016*, s 9.5(3).

State Forests are not Crown land, but many parks, reserves and community halls are Crown land.

## Criminal proceedings

Many of the offences outlined in this fact sheet can be dealt with by way of penalty notice (also known as an on-the-spot fine). If a penalty notice is issued, the recipient can elect to pay the fine or challenge it in Court.

Criminal proceedings are likely for the more serious offences and these will often be heard initially in the Local Court with the possibility of appeal to higher courts.

Generally, criminal prosecutions must commence within two years of the date of the alleged offence, or two years after the date evidence of the alleged offence first came to the attention of an authorised officer.

## Civil proceedings

In addition to monetary penalties or imprisonment, a Court can also order a person who has been convicted of an offence to pay the Forestry Corporation or another land manager compensation for loss or damage to land or property, or costs and expenses incurred by the Forestry Corporation or land manager in their attempts to prevent or mitigate damage.<sup>60</sup>

For offences outside of Forestry land, a Court may order an offender to pay compensation to an “aggrieved person” (including a corporation) for any loss incurred as a result of their offending.<sup>61</sup> The Court may make such orders either in response to an application from the aggrieved party or of its own volition.<sup>62</sup> Such an order may only be made to compensate for *actual* loss suffered by the aggrieved person and not for any other purpose. There must be evidence of the actual loss suffered and a direct causal link between the offence committed and the loss incurred must also be established.

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<sup>60</sup> *Forestry Act 2012* (NSW), s. 85(1).

<sup>61</sup> *Victims Rights and Support Act 2013* (NSW) Part 6.

<sup>62</sup> *Victims Rights and Support Act 2013* (NSW), s. 94(2).