

CAMPAIGNING AND THE LAW IN NSW

A Guide to Your Rights and Responsibilities

Environmental Defender's Office (NSW)

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The Guide is a substantially different resource. First and foremost, it has been rewritten from the standpoint of campaigners. Amongst other things, this means that the Handbook is a much bigger proposition. It contains eighteen chapters, with a focus on specific areas – including chapters on inclosed lands, on the street, forestry areas, national parks and protected areas, foreshores and Commonwealth land.

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Numerous texts and resources were invaluable in providing background information, and an understanding of the issues.¹

1 Brown D, Farrier D, Egger S, McNamara L and Steel A (2006) *Criminal Laws* 4th Edition, Federation Press.

Steve Bolt *Protest and Civil Rights*, available on the National Association of Community Legal Centre website at www.naclc.org.au/activist.

NSW Young Lawyers Criminal Law Committee (2004) *A Practitioner's Guide to the Criminal Law*, 3rd Edition, Young Lawyers.

Roger Douglas (2004) *Dealing with Demonstrations: the Law of Public Protest and its Enforcement*, Federation Press.

Baker D, Blay S, Corbin L and Gibson A (2002) *Torts Law: In Principle* 3rd Edition, Thomson Law Book Company.

Aronson M and Hunter J (2005) *Litigation: Evidence and Procedure* 7th Edition, Butterworths.

University of Technology, Sydney Community Law Centre (see www.law.uts.edu.au/clc).

1 Introduction

Campaigning carries with it the risk of falling foul of the law – for example, being arrested or having defamation action taken against you. For most campaign actions, the risks will be small. Nevertheless, it is important to be aware of your rights and duties under the law. Being informed helps you to feel more in control, be aware of your rights, stay out of trouble or, at least, minimise the trouble you may get into.

This Guide focuses on summary offences and police powers pertaining to non-violent actions, as these are the sorts of matters that campaigners (and especially environmental campaigners) are usually faced with. It also deals with police responsibilities in a campaigning context, an often neglected area. Broader and more serious matters (such as drugs, violent offences and tortious actions) are also touched on, as even non-violent actions can go wrong.

1.1 Using this Guide

This Guide is not a substitute for legal advice. Criminal laws and regulatory offences change so quickly that you should always seek legal advice before acting. The information contained in this guide is current as at 1 July 2010.

1.1.1 *Before the event*

This Guide seeks to arrange information from the perspective of campaigners. Many offences and powers are context specific – that is, they depend on where you are physically. For example, the powers of police or other authorised officers and the type of things you are allowed to do will depend on whether you are on the street, in forestry areas, on private land or even in a car. Police responsibilities to you will also differ in these different contexts.

Scenario-setting thus underpins the structure of the Guide, with chapters on specific areas – Inclosed Lands, On the Street, Forestry Areas, National Parks and Protected Areas, Special Areas, and Commonwealth Land. The Guide seeks to make campaigners aware of their rights and responsibilities in these specific contexts before they embark on a course of action – be it a street demonstration or a blockade – to ensure that they are adequately prepared.

However, this scenario-setting material needs to be read in conjunction with the chapters on actions and offences that operate regardless of location, such as speaking out in public and doing things that may interfere with business activities, as well as general offences and search and arrest powers under the criminal law.

1.1.2 *After the Event*

If things go wrong, the Guide serves a different purpose. By this stage, you will be aware of the specific charges you are facing or civil action that has been brought. The index will help to identify relevant information about the charges you are facing. Extensive references have been provided to point you and/or your lawyer to the relevant legislative provisions. Also, if you are facing criminal charges, you should read and familiarise yourself immediately with the chapters on Preparing for Court and Going to Court.

Text Box 1.1

Protesting in Particular Areas

This Guide provides information about laws applying in particular locations. Many of the rules applying to particular areas are contained in regulations. A regulation is a legal instrument that provides detailed rules in relation to issues covered by an Act of Parliament.

Two cautions should be noted.

First, regulations can be changed much more easily than Acts of Parliament. Regulations simply need to be put before Parliament, and will become law unless disallowed.

Second, regulations contain a great deal of detail. For example, you are not allowed to address public assemblies in the Royal Botanical Gardens, but you may do so in the Domain during the day. These are set out in the *Royal Botanical Gardens and Domain Trust Regulation 2008*.

This Guide seeks to provide a solid overview of the laws applying in particular areas, yet is obviously unable to cover all potential scenarios. Thus, certain assumptions about the nature of protest actions need to be made. The Guide covers in considerable detail the laws applying to loitering, identification, public assemblies, trespass, search and seizure, obstruction and so on.

Police and other authorised officers may be extremely tolerant, and privately supportive, of protest actions. On the other hand, they may be antagonistic and seek to thwart the aims of a demonstration. This Guide makes few assumptions about how officers will behave in specific circumstances. Rather, it sets out the main powers and responsibilities of police and other law enforcement officers as the basis for informing campaigners.

However, there are limits to this approach. In particular, innovative or overseas models of protest actions such as “crowd-surfing” along public streets, human pyramids, music, kite-flying, balloons and even “contrived” spontaneity (which are often used to inspire campaigners, make the protest fun, and promote a sense of community), are activities that simply cannot be comprehensively covered. Particular regulations may allow, prohibit or prohibit indirectly (on grounds such as nuisance) such activities. As the Easter 2005 Baxter Detention Centre protests showed, the law is flexible: Police banned kite-flying and burst balloons due to the fact that the

area is in “restricted air space”.²

Therefore, when considering and engaging in protest actions in particular areas, you should make yourself familiar with the regulations applicable to your protest, as well as this Guide. Refer to the footnotes in this Guide to identify the relevant regulations. These regulations are available at www.legislation.nsw.gov.au (NSW) or www.austlii.edu.au/au/legis/cth/consol_reg (Commonwealth).

² To give a further historical example used by Douglas, hundreds of communists were charged with soliciting funds and selling literature under Domain by-laws in the 1930s. This offence remains today under *(NSW) Royal Botanical Gardens and Domain Trust Regulation 2008* cl 11(a) and (b): see Douglas R (2004) *Dealing with Demonstrations: the Law of Public Protest and its Enforcement* Federation Press, Sydney, Australia at p 91.

2 Basic Legal Concepts

Every effort has been made to use plain English throughout this Guide. However, as the subject matter is often legalistic, legal terms are necessarily used on occasion. This Chapter is intended to give you a basic understanding of the key legal terms that are used throughout the Guide and provide an overview of the two key areas of law that will be dealt with - civil law and criminal law.

2.1 Civil Law

Rights and obligations between individuals are governed by the civil law. Two of the main areas of civil law are the law of contract and the law of tort. The law of contract determines the rights and obligations of the parties to a contract and what remedies are available if one of the parties breaches the contract. From the point of view of campaigners, the area of the civil law which is most likely to affect their activities is the law of torts.

2.1.1 Torts

Generally speaking, a tort is an injury other than a breach of contract which the law will compensate by an award of damages (or in limited circumstances an order known as an injunction).³

In this Guide, we have dealt with two areas of torts law which are most likely to impact on the activities of campaigners. The first area is the law of defamation. Defamation is dealt with in more detail in Chapter 4. The second area is the group of torts known as “economic torts”. Unlike other torts, economic torts have as their primary function the protection of a person’s economic interests.⁴ These torts, which include conspiracy, inducing breach of contract and intimidation, are dealt with in more detail in Chapter 5.

2.1.2 Statutory Rights

In addition to the law of contract and the law of torts, civil (as opposed to criminal) relations between individuals are also governed by Commonwealth and State statutes (Acts of Parliament). The most obvious statute which anyone planning a protest action should be aware of is the *(CTH) Trade Practices Act 1974* and, in particular, Part IV of the Act which deals with boycotts and secondary boycotts. Actions under the *Trade Practices Act 1974* are dealt with in more detail in Chapter 5.

2.1.3 Proof in Civil Matters

3 Fleming D (2003) *The Law of Torts 8th Ed*, Law Book Company at p 1.

4 Carty, H (2001) *An Analysis of the Economic Torts* Oxford University Press at p 1.

The burden of proof in civil matters lies with the applicant. The standard of proof is usually *the balance of probabilities*.

2.1.4 Civil Law Remedies

a) Damages

Where a Court finds that there has been a breach of contract, that a tort has been committed, or there has been a breach of a statute (such as section 52 of the *Trade Practices Act 1974*), the wrongdoer may be ordered to pay damages.

Damages are awarded to compensate the innocent party for the loss or damage that has been suffered. Sometimes, although a person's rights may have been infringed, the Court will only award nominal damages in recognition of the fact that no actual damage has been suffered, for example, if there has been a trespass on a property owner's land but no damage has been caused to the land.

On the other hand, in certain limited situations, a Court can also award what is called exemplary damages. The object of exemplary damages is to punish and to deter the wrongdoer. Exemplary damages can be awarded in actions for defamation, intimidation, conspiracy, deceit and trespass to land.⁵

b) Injunctions

An injunction is an order by which a court directs someone to refrain from acting in a particular way, or, less commonly, to perform an act.⁶ For example, if a person is trespassing on land, a Court may order the person to stop trespassing and to refrain from trespassing for a specified period in the future.

For present purposes, be aware that there are different types of injunctions, including the following:

Ex parte injunction: This is an injunction granted to a party at a hearing at which the defendant is not present. It is generally granted only where there is some urgency. An *ex parte* injunction will only be granted for a limited period of time until the defendant can be served with the court papers and can appear in court.

Interlocutory injunction: This is an injunction which a court grants at some time before the final hearing takes place. It usually does not involve the court making a final determination about the merits of the case (interlocutory

⁵ *Halsbury's Laws of Australia* Law Book Company at [415-215].

⁶ Burns N (1988) *Injunctions: A Practical Handbook* The Law Book Company at p 1.

injunctions are discussed in more detail in Chapter 5). An interlocutory injunction usually lasts up until the final hearing can take place.

Mandatory injunction: Generally, most injunctions are granted to restrain a person from doing a particular act. Sometimes, however, a court may order a person do a particular act. This is known as a mandatory injunction. There are strict requirements for the grant of a mandatory injunction and courts will exercise considerable caution before making mandatory orders.

2.2 Criminal Law

The administration of the criminal justice system largely falls within the domain of the States and Territories. It is thus usually State laws that affect campaigners, but it is important to be aware that Commonwealth laws may also be relevant. Commonwealth criminal law will apply in a limited number of situations. For example, Commonwealth law will be the only law applicable when an alleged offence takes place on Commonwealth property, such as a military base or an embassy. Commonwealth law also applies to a limited number of issues on which the Commonwealth government has made laws under its constitutional powers (for example, in relation to customs and quarantine). Otherwise, State law applies.

The criminal law deals with situations where the State (that is, the police or the Director of Public Prosecutions) believes that a person or entity has committed an offence. If the police reasonably suspect that you have committed an offence, you may be arrested or issued with a Court Attendance Notice (CAN) and have to attend Court. The Court – usually the Local Court – then decides whether or not you are guilty of the offence or offences that you have been charged with. This guilt must be proven 'beyond reasonable doubt'. Most criminal offences require that you intended to do the act (called *mens rea*) as well as physically doing the act (*actus reus*). You do not need to intend to break the law to commit an offence, so long as you intended to carry out the physical act. Ignorance of the law is no defence. Furthermore, there are an increasing number of "strict liability" offences, where your intention is irrelevant to determining your guilt.

2.2.1 Statutory and common law offences

There are two basic types of offences: (i) statutory offences, and (ii) common law offences. Statutory offences are those enacted by Parliament in legislation. Common law offences are those developed over time by the Courts in deciding cases. If a charge for a statutory offence is not possible because an element of the offence was not committed, it may still be possible for the police to charge a person with a similar common law offence. Nowadays, most offences are found under legislation.

2.2.2 Structure of offences

There are three main categories of offences – summary offences, indictable offences, and indictable offences dealt with summarily. These distinctions reflect the general seriousness of the crime and the procedure that applies to the prosecution. The overwhelming majority of matters through which campaigners come into contact with the law are summary offences and these are the focus of this Guide.

a) *Summary offences and regulatory offences*

Summary offences are the least serious – in terms of penalties – but may have the same consequences (for example, a criminal record). They generally relate to prohibiting disruptive conduct in public spaces. Because the illegal conduct is often described in vague terms in the legislation (eg. offensive, annoying, distressing), the police can use these laws to engage in “street-sweeping” tactics, removing people who have caused or may cause problems. Many, but not all, summary offences are found under the *Summary Offences Act 1988* and form the basis of Chapter 8 of this Guide. Alongside these, there are nowadays a number of “regulatory” offences that are minor in nature. These are usually found under the regulations to an Act (for example, the *National Parks and Wildlife Regulation 2002*) and empower other officers to regulate conduct in specific areas.

These offences are heard in a Local Court before a magistrate. There is no jury. The penalties for summary offences can range from a bond or fine to a gaol sentence of up to two years⁷ (or five years if convicted of more than one offence).⁸

b) *Indictable offences*

Indictable offences are more serious crimes such as assault, riot and affray and property damage, and are generally dealt with in the District Court. These matters are dealt with before a Judge and jury, or sometimes before a Judge alone. Before an indictable offence can be tried, a committal hearing is held in the Local Court where a magistrate determines, on the evidence presented by the prosecution, whether the matter should go to trial.

c) *Indictable offences dealt with summarily*

In NSW, many indictable offences can be dealt with as a summary offence unless the accused or the prosecution chooses for them to be heard on indictment.⁹ With other indictable offences it is possible for the prosecution to

7 (NSW) *Criminal Procedure Act 1986* ss 267(2) and 268(2).

8 (NSW) *Crimes (Sentencing Procedure) Act 1999* s 58.

9 These are table 1 offences under the (NSW) *Criminal Procedure Act 1986*: s 260(1). The Act

deal with the matter as a summary offence even without the consent of the accused.¹⁰ If an indictable offence is treated as a summary offence, the Local Court deals with the matter (and the maximum penalty is usually two years gaol).

Under Commonwealth law, indictable offences can be dealt with as summary matters, with the consent of the accused, or if prescribed under a specific Act.¹¹

If you have the choice, you need to weigh up the (often significantly) lesser penalties and informalities of the Local Court with the possibility of a trial before a jury. Juries may be more inclined to acquit than magistrates, although you obviously cannot rely on this.

2.2.3 *Proof in criminal matters*

If a matter goes to Court, certain matters need to be proven to the satisfaction of the magistrate or Judge. There are two general issues concerning the issue of proof. These are the burden of proof (who has to prove what) and the standard of proof (the extent to which someone has to prove or show something).

a) *Burden of proof*

Under traditional criminal law principles, a person is presumed innocent until proven guilty. This means that the prosecution has the burden of proving *all* the “elements” of the offence. Many offences are technical and have many elements. For example, if you are charged with wilfully obstructing an officer in the execution of their duty¹² the prosecution must prove all four elements as follows:

- that you were actually (not just potentially) obstructing someone
- that you were doing so deliberately
- that the person was an officer
- that the officer was doing something that could reasonably be regarded as part of their duties.

Although the presumption of innocence is something that people readily understand and appreciate, there is no constitutional protection of this right in

contains 2 “tables” of various offences under the (*NSW*) *Crimes Act 1900* which may be heard summarily: see Chapter 5 generally.

9 These offences are table 2 offences under the (*NSW*) *Criminal Procedure Act 1986*: s 260(2).

11 (*CTH*) *Crimes Act 1914* s 4J(1) and (2). Indictable offences are those that impose a gaol sentence of more than 12 months: s 4G.

12 (*NSW*) *Crimes Act 1900* s 58.

Australia. Consequently, the presumption of innocence may be, and has been, departed from under legislation. For example, under drugs legislation in NSW, there is a presumption that a person in possession of a certain quantity of prohibited drugs is supplying the drugs.¹³ This presumption can be rebutted but the burden is on the defendant to do so. Likewise, for the offence of possessing stolen goods, the defendant must prove that they had no reasonable grounds for suspecting that the goods were stolen.¹⁴

b) *Standard of proof*

To obtain a conviction, the prosecution needs to prove their case *beyond reasonable doubt*. In fact, all the elements of an offence need to be proven beyond reasonable doubt. Returning to our previous example, even if the magistrate was absolutely convinced that you were obstructing an officer, you would not be guilty of that offence if the prosecution could not *demonstrate* that the officer was acting in the execution of his or her duty. Evidence that you sat in front of a stationary police car would not satisfy the standard of proof but if it could be shown that you remained there once the officer attempted to move the vehicle in the course of their duty, the burden would be satisfied.

Sometimes the law only requires that something be proved on the balance of probabilities. This is the standard for civil or non-criminal matters, as well as for some defences (see below).

2.2.4 *Defences*

The law relating to defences is sometimes technical and complex. If you raise a defence, the onus is usually on you to prove the defence *on the balance of probabilities*.¹⁵ You may be said to have a defence in two types of circumstances.¹⁶

a) *“Excuses”*

13 (NSW) *Drug Misuse and Trafficking Act 1985* s 29.

14 (NSW) *Crimes Act 1900* s 527C(2).

15 If the absence of a lawful or reasonable excuse is an element of the offence (for example, “It is an offence to obstruct without reasonable excuse”), the onus is on the prosecution to prove that beyond reasonable doubt: see *Henshaw v Mark and Ors* (1997) 95 A Crim R 115 (ACT Sup Court per Miles CJ); *Connors v Craigie* (1994) 76 A Crim R 502 at 506 (NSW Supreme Court per Dunford J). However, a common practice nowadays is to explicitly place the onus on you (on the balance of probabilities) to make out the excuse: see, for example, (NSW) *Crimes Act 1900* s 417; (NSW) *Inclosed Lands Protection Act 1901* s 4(1); (NSW) *Summary Offences Act 1988* ss 4(3) and 4A(2).

16 You should also note that it is always a full answer to a charge that you did not do what is actually prohibited. This is not a “defence”, strictly defined.

Many minor offences provide defences of ‘reasonable excuse’, ‘lawful excuse’ or ‘lawful authority’. For example, federal laws make it an offence to trespass, or refuse to leave Commonwealth land when directed.¹⁷ However, all this is subject to whether you had a reasonable excuse.¹⁸ The same applies to offensive conduct and language offences under NSW law.¹⁹ Lawful excuse is a defence to a charge of trespass under the *(NSW) Inclosed Lands Protection Act 1901*.²⁰

It has been said that a very real distinction exists between “reasonable excuse” and “lawful excuse” (and, by extension, lawful authority),²¹ although the issues are often conflated by commentators.

i. Reasonable excuse

The Courts have been reluctant to derive general principles for a reasonable excuse as (they say) it depends on the circumstances of the case and the purpose of the provision.²² As was said in the leading judgment on the issue:

The reality is that when legislatures enact defences such as “reasonable excuse” they effectively give, and intend to give, to the courts the power to determine the content of such defences. Defences in this form are categories of indeterminate reference that have no content until a court makes a decision. They effectively require the courts to prescribe the relevant rule of conduct after the fact of its occurrence.²³

This statement provides little guidance, or comfort, to campaigners in planning protest action. However, some guidance can be found from the cases.

First, the words ‘reasonable excuse’ should not be given a narrow meaning, given the criminal penalties involved.²⁴ Absence of intention, mistake, infancy, or duress would ordinarily fall within the term “reasonable excuse”.²⁵

17 *(CTH) Public Order (Protection of Persons and Property) Act 1971* s 12(1) and 12(2)(c).

18 *(CTH) Public Order (Protection of Persons and Property) Act 1971* s 12(5).

19 *(NSW) Summary Offences Act 1988* ss 4(1) and 4A(1) (the offences) and 4(3) and 4A(2) (the defences).

20 *(NSW) Inclosed Lands Protection Act 1901* s 4.

21 *Darcey v Pre-Term Foundation Clinic* [1983] 2 NSWLR 497 (Admin Law div) per Hunt J.

22 *Taikato v The Queen* (1996) 186 CLR 454; 90 A Crim R 323 at 464; 331 per Brennan CJ, Toohey, McHugh and Gummow JJ.

23 *Taikato v The Queen* (1996) 186 CLR 454; 90 A Crim R 323 at 466; 332 per Brennan CJ, Toohey, McHugh and Gummow JJ.

24 *Ganin v NSW Crime Commission* (1993) 32 NSWLR 423 at 437 per Kirby P.

Second, the reasonableness of the excuse needs to be determined objectively, based on things such as a person's belief and community standards.²⁶ This means, subject to the qualification above regarding the circumstances of the case and the purpose of the provision, that "a reasonable excuse is no more or less than an excuse which would be accepted by a reasonable person".²⁷

Third, an honest (*bona fide*) mistake of fact based on reasonable grounds can be a reasonable excuse. While ignorance or mistake of law is generally not an excuse, the line between fact and law is often blurry.²⁸ The Court in *R v Keenan*²⁹ held that the defendant's mistaken belief that a logger's activities were unlawful was an excuse to the crime of intimidation. Keenan was charged with intimidation after protesting against logging in the Badja State Forest. Intimidation is an offence making it illegal to stop someone from doing something they have a right to do.³⁰ To make out the defence in these circumstances, you would need to demonstrate two things (on the balance of probabilities). First, that you honestly believed an activity – in that case, proposed logging – was illegal. Second, you would need to show that your belief was reasonable. To do this, you would need to present evidence that backed up your belief of illegality – research into the relevant law, evidence from experts and so on.

Fourth, the fact that non-violent action is claimed to be in the "public interest" or based on a right of "peaceful protest", will not normally be sufficient to raise the defence of reasonable excuse.³¹ In limited circumstances, such as where the defendant was trying to stop unlawful behaviour and other practical options (such as seeking an injunction) were impractical, 'reasonable excuse' may be a defence to obstruction.³²

ii. Lawful excuse

25 *R v Tawill* [1974] VR 84 at 88; 22 FLR 284 at 289-90 per the Full Court.

26 *Mark and Ors v Henshaw* (1998) 101 A Crim R 122 (Fed Court FC). See also *Connors v Craigie* (1994) 76 A Crim R 502 (NSW Supreme Court per Dunford J).

27 *Taikato v The Queen* (1996) 186 CLR 454; 90 A Crim R 323 at 470; 336 per Dawson J.

28 See Brown D, Farrier D, Egger S, McNamara L and Steel A, (4th ed 2006) *Criminal Laws* Federation Press, Sydney at 405; Fairall P A and Yeo S, (4th ed 2005) *Criminal Defences* Butterworths, at 64.

29 (1994) 76 A Crim R 374.

30 (NSW) *Crimes Act 1900* s 545B.

31 See *R v Mossop* (Unreported, NSWCCA, 19 December 1991), *O'Donohue v Wille* (NSWSC, Unreported, 6 July 1999) and *Willis v Wilkinson* (ACT Magistrates' Court, Unreported, 3 March 1994).

32 *R v Atkins* (Unreported, District Court, Lismore, 27 November 2000).

A lawful excuse is similar to reasonable excuse but narrower in scope. To make out this defence, you need to demonstrate that you honestly believed on reasonable grounds certain facts (as above) *and* if those facts had been true, your conduct would have been lawful.³³

iii. Lawful authority

Lawful authority has been seen as narrower in scope again, being described (somewhat unhelpfully) as “authority supported by law”.³⁴ Put another way, you can succeed with a defence of lawful excuse, even though no “lawful authority” exists for doing what you did.³⁵

b) Full defences

The law also allows certain defences that will negative an offence, regardless of whether the prosecution has proven all the elements of the offence. These include self-defence, duress, necessity, intoxication and mistake.³⁶ You would need to seek specialist legal advice in relation to these defences, which have often been defined narrowly by the courts.

2.2.5 Penalties

a) General

The penalty for offences is usually found in the same section as the offence. It is usually expressed as a maximum but, in any event, the Court has the discretion to impose lesser penalties.³⁷ Your financial means is a matter the Court must take into account in determining any monetary penalty,³⁸ and you may seek time to pay.³⁹

This Guide seeks to give as much information as possible on penalties. However, you should not rely exclusively on the Guide, as penalties frequently change.

b) Penalty units

33 *Cambridgeshire & Isle of Ely County Council v Rust* [1972] 2 QB 426. See also *Broome v Director of Public Prosecutions* [1974] AC 587; *R v Smith (David Raymond)* [1974] QB 354.

34 *Crafter v Kelly* [1941] SASR 237.

35 *Wong Pooh Yin alias Kwang Sin alias Kar Sin v Public Prosecutor* [1955] AC 93.

36 For further details see Chapter 6 of Brown D, Farrier D, Egger S, McNamara L and Steel A, (4th ed 2006) *Criminal Laws* Federation Press, Sydney.

37 (NSW) *Crimes (Sentencing Procedure) Act 1999* s 21.

38 (NSW) *Fines Act 1996* s 6(a); (CTH) *Crimes Act 1914* s 16C(1).

39 (NSW) *Fines Act 1996* ss 10 and 11. A penalty notice sets out the time to pay and there are procedures for reminder notices and enforcement orders: see Divisions 2-5 of the (NSW) *Fines Act 1996*.

Penalties may also be expressed as *penalty units*. Under both Commonwealth and NSW laws, these presently equate to \$110 per unit.⁴⁰

c) *Penalty notices*

Many minor offences can now be dealt with by way of *penalty notices* (sometimes also referred to as penalty infringement notices or “PINs”). Police cannot issue penalty notices for:

- an apparently genuine demonstration or protest, or
- a procession, or
- an organised assembly, or
- an industrial dispute.⁴¹

The police or other officers usually issue penalty notices on-the-spot.⁴² The amount of a penalty notice may vary widely, even within the same Act.⁴³ If you elect to pay the fine, you do not have to go to Court and you will not get a criminal record.

d) *Electing to go to Court*

If you go to Court rather than pay the penalty notice, you may well get a criminal record if you are found guilty.⁴⁴ This can have serious consequences (see below at 18.7). Potential maximum penalties are usually much higher if you go to Court. However, you are unlikely to receive a fine of more than the penalty notice where a penalty notice was issued and you chose to take the matter to Court. This is because the prosecution has already indicated what they view as an appropriate penalty by seeking to proceed by way of a penalty notice, a factor that will often guide the magistrate.

40 (CTH) *Crimes Act 1914* s 4AA(1) and (NSW) *Crimes (Sentencing Procedure) Act 1999* s 17.

41 (NSW) *Criminal Procedure Act 1986* s 339.

42 (NSW) *Criminal Procedure Act 1986* s 334(2) (which allows for penalty notices to be served personally or by post).

43 Compare (NSW) *Forestry Regulation 2009* cl 11(4) and 63(1) where the maximum penalty if these matters go to Court is \$2200 but the penalty notices may be either \$100 or \$1000: see (NSW) *Forestry Regulation 2009* cl 11(4), 63(1), 74 and Schedule 3.

44 There is an exception for a section 10 order: see *Crimes (Sentencing Procedure) Act 1999* s 10.

3 Campaign Planning and Protest Action

Campaigns may take a variety of forms, from letter and submission writing to lobbying, protests and blockades. Indeed, many campaigns may incorporate all of these elements, deliberately combining policy, education, litigation and communications strategies. Alternatively, frustration with the process may lead to a protest escalating in unplanned ways, which may be counterproductive and/or lead you into the mire of the criminal law.

The focus here is on planning non-violent actions – that is, protests and blockades – and is meant to inform community groups and campaigners on the ground. It seeks to provide an overview of issues and approaches as a backdrop for better understanding, and negotiating through, the legal issues that may arise in the context of such action. The more organised your action is, the better chance you have of avoiding unnecessary legal hassles. You may wish to consider devising plans, protocols, check lists and information kits before you take protest action.

It is important to identify relevant issues and problems for two main reasons. First, so that everyone involved is aware of the possible consequences of their actions. Second, so that problems can be minimised or avoided.

There are three main aspects to a successful action. These are all interrelated and include:

- defining the action
- planning the action
- monitoring and evaluation.

The first two are generally preparatory; the third ongoing.

3.1 Defining the action

Clearly defining and communicating your action may be crucial to both the success of your action and any legal consequences. The objectives of the action need to be defined based on considerations such as values, resources and risks.

3.1.1 Objectives

You should first decide what your objectives are. This may require some brainstorming sessions and the consideration of options. In assessing the different options, you may wish to consider the following:

- are the proposed actions consistent with what you do (for example, the mission statement of your organisation)?

- how do the proposed actions relate to existing campaigns?
- are the proposals realistic and clearly targeted?
- what are the possible costs associated with the various proposals (including financial, 'reputational' and legal liability costs)?

You should debate these issues thoroughly in an appropriate forum (such as a management committee meeting or within the project team), so that all perspectives and issues are covered and so that people have a chance to have their say. At the end of the discussion, you should consider formalising the decisions.

3.1.2 Values

The values that underpin protest action will fundamentally frame other aspects, such as the objectives and the risks. You should discuss these issues openly, so that nothing is assumed. Groups such as Greenpeace and the Wilderness Society are committed to non-violent action⁴⁵ and require their volunteers to uphold this commitment.⁴⁶ This process is easily overlooked by community groups with less experience in campaigning and advocacy.

Campaigners who use violence can undermine the legitimacy of non-violent actions, and potentially affect the criminal and civil liability of others (if a common purpose can be shown – for example, exposing other protestors to charges of riot or violent disorder).

Non-violent action may still carry significant risks of arrest and civil actions. As this Guide demonstrates, police and other authorised officers have a wide range of powers to deal with campaigners. Even if you behave in a non-violent and passive manner at all times, the law may impose positive duties on you – for example, to leave an area or to provide your name and address. A failure to comply may be an offence that, in turn, may lead to the escalation of the situation and your arrest. Some people may be prepared to be arrested and convicted; others not. If you are prepared to be arrested, or are aware of people that are, your intentions and the possible consequences of your actions should be thought through and openly discussed.

3.1.3 Resources

The objectives of the action will determine the resources necessary, although the two should be considered together. A long-running action may require, amongst other things:

45 See: www.greenpeace.org.au/aboutus/mission.html and www.wilderness.org.au/about/whatistws

46 See: www.greenpeace.org.au/get_involved/index.html?type=generalvol;
www.wilderness.org.au/getinvolved/volunteers

- people and community support
- amenities (food, drink and facilities will be needed for long vigils or blockades)
- money (to sustain the action generally, as well as to provide for potential bail and legal costs)
- equipment (mobile phones, video-cameras, radios, stationery, as well as computers, photocopiers, etc for the base)
- transport.

3.1.4 Identifying the risks

Consider the risks that are involved as well as the risks that you and the members of your group are prepared to take (such as arrest, safety issues, adverse media, civil lawsuits, etc). This will help you to develop a set of rules around the action, identify training needs and develop contingency plans.

3.2 Planning the action

3.2.1 Preparing for the action

Unless you are the co-ordinator or leader of the action, your role is likely to be quite discrete. To fulfil this role, you will generally need to know:

- what the action is about,
- how your role fits within the plan,
- what others will be doing,
- basic information about your rights, and
- how to minimise trouble.

These aspects can be achieved through a combination of establishing clear lines of communication and training.

a) Establishing lines of authority

Everyone directly involved in an action should have clearly defined roles and areas of authority. In particular, everyone should know who is responsible for overall co-ordination, as well as the liaison contacts for media, police and legal support. You should make sure you are clear about your role in the action, how it fits with others and its limits.

b) Training

Everyone directly involved in the action should know what the aim is, what will (or could) happen and by whom, as well as how the action is planned to end.

Campaigners should also be “equipped”, so as to minimise the possible

negative consequences of the action. In particular, you should know:

- how to ensure your own safety, and that of others involved,
- your basic legal rights (and the consequences of arrest and possible conviction), and
- how to contact someone for legal advice.

Organisations like Greenpeace and The Wilderness Society routinely conduct non-violent direct action training prior to protest action. The Environmental Defender's Office can also provide information on your legal rights and responsibilities.

Others, such as front room staff and volunteers, may need different training. For example, they may need to know who to contact for information, how to respond to calls about the action and handle them sensitively and how to appropriately record feedback for the co-ordinators.

3.2.2 Adopting a communications strategy

a) Internal

It is important to establish internal lines of communication to ensure that all participants are kept informed, both of the objectives of the action and any ongoing developments.

The complexity and length of the action will determine what level of organisation is needed to ensure proper internal communication channels. For long-running or complex actions, a 'command centre' may be needed. This may be on-site and/or at head office and run by a co-ordinator (or teams). For smaller actions, a contact point at the base and in an office may be all that is required to ensure that information flows are maintained.

It is vitally important that you and others are aware of the need for secure internal communications and the dangers of, for example, leaked or forwarded emails. In some situations, it may be wise to consider a "hard copy" only policy with documents.

b) External

In many actions, a key objective will often be to draw attention to an issue and influence public opinion. Effective media may thus be a crucial element of a successful action. However, if done badly, it may lead to your action being thwarted, confused messages and even actions for defamation being threatened or launched.

You should designate a media spokesperson and train them accordingly. If you are going to talk to the media, you should know (and practice) the key messages, and be aware of the laws of defamation (see Chapter 4). Role-plays may be a useful device for gaining skills and insights into the dimensions of the topic, particularly if outsiders unfamiliar with the issues conduct 'interviews'.

3.3 Monitoring and Evaluation

Many aspects of monitoring and evaluation will happen informally; with people communicating naturally as an action develops. This section is about formalising some of these aspects.

First, there is a need to continually review your action, as well as to have mechanisms in place to do so. What was planned may not happen, and contingency plans may have to be used.

Second, it is always a good idea to “log” or document the course of the action to protect those involved and provide a verifiable version of events.

Third, at the end of the action you should regroup and assess how it all went. This can build on the knowledge base of your organisation or group and help you to avoid pitfalls in future actions.

4 Speaking Out in Public

Campaigners often operate in a highly stressed environment, with campaigns frequently being long-running and emotionally difficult. Amidst all this, it is important to be aware that some things that are said and written – even unintentionally - can result in you being sued for defamation. Defamation laws attempt to balance freedom of speech with the need to protect the reputation or privacy of individuals.

4.1 Defamation

Each State and Territory of Australia has uniform defamation laws.⁴⁷ These generally came into effect in 2006 around Australia. Publications and causes of action which have occurred and arisen before the new laws will still be subject to the previous legislation.⁴⁸ The Act operates in conjunction with the common law which was established in this area.⁴⁹

4.1.1 What is defamation?

Defamation is primarily a civil action where a person or entity seeks damages for loss of reputation from someone who has published defamatory material about them. There are three aspects to defamation – publication, identification; and defamatory meaning.

a) Publication

A publication is a communication by one person to at least one other person (other than the one defamed).⁵⁰ A publication may be spoken, written or communicated in any form including television, radio, photograph, facial expression, drawing, letter, book, fax, e-mail or internet chat.⁵¹ It should be noted that cyberspace is not a law-free zone and internet defamation is treated as seriously as defamation in traditional forms.⁵²

b) Identification

A publication will only be defamatory if it identifies one or more people. A person can be identified directly, by name or by photograph or other image. A person can also be identified even if he or she is not named, if someone else knowing the person could reasonably identify him or her. You cannot avoid

47 As of 26 April 2006

48 See for example *Habib v Nationwide News Pty Limited* [2006] NSWCA 14, where it was held that the new provisions of the 2005 Act will only apply to publications subsequent to 1 January 2006.

49 (NSW) *Defamation Act 2005* s 24.

50 See *Webb v Bloch* (1928) 41 CLR 331; *Dow Jones & Co. Inc. v Gutnick* (2002) 210 CLR 575.

51 (NSW) *Defamation Act 2005*, s. 4 “Definitions”: under “matter”.

52 See *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

liability for defamation by not naming the person about whom you are writing or speaking.

c) *Defamatory meaning*

Something – a media release, photo or radio interview – will be defamatory if it conveys a meaning which is likely either to:

- lower the person's reputation in the eyes of ordinary reasonable members of the community,
- lead people to ridicule, avoid or despise the person, or
- disparage the person's reputation in business, trade or their profession.⁵³

In terms of this element, it is important to note several things.

First, the meaning behind the publication can be implied as well as express. Much will depend on the context. Defamation may arise from the direct meaning of words used when taken on face value, through an innuendo from the statement itself, or from an innuendo based on known facts that are not included in the statement. For example, in one well known case a doctor successfully sued for defamation because a file photograph of him was used on the cover of a report on medical negligence.⁵⁴ Likewise, if press coverage about a person is widespread, the courts are more likely to assume that the ordinary person has a greater knowledge of the facts.

Second, it is irrelevant whether a person intended to make a defamatory statement. The test is an objective one: whether or not a statement is defamatory is judged against contemporary community standards, from the point of view of a reasonable person.⁵⁵

Third, the test is quite specific. Not all criticism or abuse is necessarily defamatory. The question is whether or not the 'ordinary' person would tend to form a significantly lower opinion of someone just because they are the subject of that criticism or abuse.⁵⁶

Fourth, there is a common misconception that a person can avoid being defamatory by reporting something as an 'allegation' (which implies that it has not been substantiated). This is not always true. Statements couched as allegations can be defamatory, where the ordinary person is likely to conclude that there is some factual basis to the allegation. The one exception is for criminal proceedings. Merely stating that a person has been charged with an alleged offence will not be seen as a statement that the accused is guilty, as ordinary people are assumed to know that the law presumes innocence until

53 *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460.

54 *Nixon v Slater and Gordon* (2000) 175 ALR 15; (2000) *Aust Torts Reports* 81-565.

55 See *E Hulton & Co v Jones* [1910] AC 20.

56 See *Farquhar v Bottom* [1980] 2 NSWLR 380.

guilt is proven.⁵⁷ However, in every case, context is important.

Fifth, damage to reputation is presumed in Australia – that is, a plaintiff need not prove actual financial or other losses flowing from a defamatory publication.⁵⁸

4.1.2 *Who can be defamed?*

Any person can claim the right to protect their reputation using the defamation laws, provided they are identified in a publication. Corporations cannot sue in defamation, unless they are an excluded corporation or sole corporations with less than ten employees.⁵⁹

Government organisations, such as local governments and Aboriginal land councils, cannot sue for defamation. However, individual members of these organisations can still sue to defend their own reputations, if the defamatory statement points to them in particular.⁶⁰

4.1.3 *Who can be sued?*

The writer or speaker of a statement can be sued for defamation. In addition, the broadcasting, television or newspaper corporation which publishes the statement; the person or journalist who wrote the material; a person being interviewed; a speaker in a talk-back program; the producer, executive producer or editor; and any other person who contributed in any way to the publication or authorised the making of the statement can also be sued, if their contribution can be identified. For example, you cannot avoid personal liability for defamation by making a statement on the letterhead of an incorporated association.

4.1.4 *Defences*

There are a number of defences available against defamation.

a) *Truth and public interest*

A defamation action will fail if it can be shown that the allegation complained of is substantially true.⁶¹ There is no longer a requirement that the matter should also be of public interest or public benefit. The removal of the public interest

57 See *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293.

58 See (NSW) *Defamation Act 2005* s 7(2).

59 (NSW) *Defamation Act 2005* s 9 However, you may be liable for misleading or deceptive conduct and injurious falsehood in similar circumstances. There have been a number of cases in which the overlap between defamation, misleading or deceptive conduct and injurious falsehood have been considered, with some important implications for non-profit and community organisations. See, for example, *Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals* (Vic) (2002) 120 FCR 191.

60 See *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 and *New South Wales Aboriginal Land Council v Jones* (1998) 43 NSWLR 300.

61 (NSW) *Defamation Act 2005* s 25: the defence of justification. See also *Defamation Act 2005* s 26 regarding the defence of contextual truth.

requirement may mean that sensational revelations about private conduct will be a more common occurrence. The defence reflects the defence of justification at common law.

The defendant has to prove that the matter is true. Defamation law presumes that the matter is false. This often leads to practical problems in proving the truth of a statement in court. You may, for example, need persuasive and authentic documents to prove this, or have witnesses who can and will give evidence of the truth of your statement.

b) Fair comment and honest opinion

At common law, there is a defence of fair comment to a claim for defamation. This is augmented by a similar statutory defence of honest opinion. These defences only apply if the matter represents an expression of opinion of the defendant (rather than a statement of fact) which is based on proper material.⁶² These defences are only available in relation to opinions regarding a matter of public interest.⁶³

The statutory defence is specifically available in similar terms to an employee or agent of the defendant, or of a third party.⁶⁴ However, this defence is not available if it can be shown that the matter did not represent the opinion of the defendant or that the defendant did not believe the employee, agent or third party honestly held the opinion.⁶⁵

c) Absolute privilege

Publication of statements made in Parliament, parliamentary papers and certain court proceedings are subject to absolute privilege and, consequently, are immune from legal proceedings.⁶⁶

However, a person reporting a defamatory statement made by a member of Parliament or by a witness in court does not have the protection of the maker's absolute privilege – just as the maker of the statement does not have the protection of absolute privilege if he or she repeats the statement outside the Parliament or the courtroom. A person reporting a defamatory statement made in Parliament or in court has a defence of qualified privilege for fair and accurate reports of proceedings. The reporter does not have a derivative of absolute privilege but rather has an independent qualified privilege.

The defence of absolute privilege extends to the publication of material that would be subject to absolute privilege under the corresponding law of another

62 This is typically material that is substantially true or privileged: (*NSW Defamation Act 2005*, ss. 31(1)(a) and (c).

63 (*NSW Defamation Act 2005* s 31(1)(b).

64 (*NSW Defamation Act 2005* ss. 31(2) and (3).

65 (*NSW Defamation Act 2005* s 31(4).

66 See (*NSW Defamation Act 2005* s 27

Australian jurisdiction.⁶⁷

d) *Qualified privilege*

Under this defence, the defendant needs to prove three things. First, that the recipient has an interest or apparent interest in having information on some subject. Second, that publication of the information to the recipient occurred in the course of giving to the recipient that information. Third, that the defendant's conduct in publishing the matter was reasonable in the circumstances.⁶⁸

The *Defamation Act 2005* outlines various factors which a Court may take into account in determining whether a publisher has been reasonable in the circumstances, which largely mirror the factors relevant under the common law.⁶⁹ The defence can be defeated by proving that the publication was done maliciously, as under the common law.⁷⁰

There are, in New South Wales, four varieties of the defence of qualified privilege:

- the defence of common law qualified privilege, which is founded upon the notion of reciprocity of duty between the publisher and the audience;⁷¹
- the defence of statutory qualified privilege under section 30 of the *Defamation Act 2005*, which moves away from this reliance on reciprocity and is instead founded upon the notion of reasonableness of publication;⁷²
- the defence of fair and accurate report of parliamentary and judicial proceedings. The reporter's qualified privilege is defeated by a lack of fairness or accuracy, or by the presence of malice; and
- importantly, for environmental campaigning, the defence of *Lange* qualified privilege.

Broadly, the defence of *Lange* qualified privilege protects publications about governmental or political matters. The High Court decision in *Lange*⁷³ found that the common law is subject to the Commonwealth Constitution, with the effect that the defence of common law qualified privilege must expand to

67 (NSW) *Defamation Act 2005* s 27(2)(c).

68 (NSW) *Defamation Act 2005* s 30(1).

69 (NSW) *Defamation Act 2005* s 30(3). See *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 and note that the NSW Court of Appeal refused to follow the more liberal view of the common law taken by the House of Lords in *Reynolds*.

70 (NSW) *Defamation Act 2005* s 30(4). For discussion on malice, see *Robert v Bass* (2002) 212 CLR 1 at 30-33.

71 See, for example, *Adam v Ward* [1917] AC 309.

72 See, for example, *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 204 ALR 193; (2004) 78 ALJR 737.

73 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

accommodate the implied freedom of political communication.⁷⁴

An example of qualified privilege may be when a member of an environmental advisory committee established by local government tells the committee that an enforcement or assessment officer has a conflict of interest or has failed to carry out their responsibilities.

The justification for this defence is that in such cases the advantage of public knowledge is outweighed by any private injury resulting from the publication.

e) *Fair report*

This defence will be made out if the defendant proves that the matter published was a fair report of any proceedings of public concern.⁷⁵ Such proceedings are broadly defined and include proceedings of the courts, Parliament, matters of adjudication before recreation or sport associations, and any public meetings held anywhere in Australia.⁷⁶

Such a defence is defeated, in turn, where the plaintiff proves that the defamatory matter was not published honestly for the advancement of education or for information to the public.

f) *Publication of public documents*

This defence applies to the publication of defamatory matter if it can be proved that it was contained in a public document or a copy or summary of a public document or an extract from a public document.⁷⁷ The defence can be defeated if the plaintiff proves that the defamatory matter was not published honestly for the advancement of education or the information of the public.⁷⁸

g) *Innocent dissemination*

Newsagents, booksellers, libraries and certain service providers can usually take advantage of this defence.⁷⁹ This defence can be claimed if they did not know or ought not to have known that the published material was defamatory.⁸⁰

74 Strictly speaking, the defence of *Lange* qualified privilege is not a separate defence, merely an expansion of an existing defence. However, it is useful to treat it separately, given that it relates specifically to publications about governmental and political matters. For recent, important decisions on the defence of *Lange* qualified privilege and the implied freedom of political communication, see *Herald & Weekly Times Ltd v Popovic* [2003] VSCA 161; *Coleman v Power* [2004] HCA 39.

75 (NSW) *Defamation Act 2005* s 29(1).

76 (NSW) *Defamation Act 2005* s 29(4).

77 (NSW) *Defamation Act 2005* s 28(1). The Act defines "public document" as including any paper or report published by Parliament, a Court or Tribunal determination or any record of other documents open to inspection by the public that is kept by an Australian jurisdiction or statutory authority: s 28(4).

78 (NSW) *Defamation Act 2005* s 28(3).

79 (NSW) *Defamation Act 2005* s 32(3).

80 See (NSW) *Defamation Act 2005* ss 32(1) and (2) and *Thompson v Australian Capital Television* (1996) 186 CLR.

Campaigning groups may find themselves in similar situations if they regularly let other organisations put material in their bookshop, foyer or stand at the markets.

The person who claims defamation must prove that the parties 'ought to have known' that the material was defamatory for the defamation action to succeed.

h) Triviality

This defence is available where the circumstances of the publication of the matter complained of were such that the person defamed was not likely to suffer any harm.⁸¹ This defence, however, rarely succeeds, as it is very difficult for a defendant to establish that its publication is unlikely to cause any harm at all.

i) Consent

Another defence to a defamation action may arise if the person claiming to have been defamed expressly or by implication consented to, assented to, acquiesced in or invited the defamation.⁸²

j) Offer of amends

The *Defamation Act 2005* provides that where a publisher receives a Concerns Notice (a notice in writing informing the publisher of alleged defamatory imputations), a publisher, can within 28 days make a written offer to make amends to the aggrieved person which can later be relied upon as a defence.⁸³ There are important time limits and mechanisms involved in accessing this defence, so it is important to get advice or refer to the Act once a Concerns Notice is received.

4.1.5 Apologies, damages and restraining orders

Many defamation cases don't proceed and few go to trial. Corrections, rights of reply or an apology can often be negotiated as full settlement when defamation has occurred. If an apology is issued, the *Defamation Act 2005* protects the publisher from express or implied admission of fault or liability.⁸⁴

However, if the case does go to court, the main remedy available is monetary damages (even though this clearly isn't the most appropriate way to restore an injured person's reputation). The amount of damages awarded by a Court depends on whether there is an appropriate and rational relationship between the harm sustained by the plaintiff and the damages awarded.⁸⁵

Damages are mainly awarded for injury to reputation (to both people and legal

81 (NSW) *Defamation Act 2005* s 33.

82 *Monson v Tussauds* [1894] 1 QB 671 at 691.

83 See (NSW) *Defamation Act 2005* ss 13, 14, 15 and 18.

84 (NSW) *Defamation Act 2005* s 20.

85 (NSW) *Defamation Act 2005* s 34.

entities) and for hurt feelings (to people only). The Court must generally disregard the maliciousness or otherwise of the defendant at the time the matter was published when awarding damages.⁸⁶

The fact that someone already has a poor reputation may be relevant. Although damage is assumed in defamation cases, it is possible to prove that someone's reputation was so poor that there has been no real damage. The judge will consider all the circumstances and make their own evaluation. There are no guidelines for awarding damages, so the results are often unpredictable. However, under the *Defamation Act 2005* there are now factors that the court can take into consideration in mitigation of damages.⁸⁷

The *Defamation Act 2005* seeks to place a cap of \$250,000 on general damages.⁸⁸ A Court may also award damages for any actual economic losses caused by the publication of defamatory matter. These damages are not capped. A Court is also able to award aggravated damages.⁸⁹ However, exemplary or punitive damages cannot be awarded⁹⁰. The Court is able to award only a single sum of damages where there is more than one cause of action to assess.⁹¹

Injunctions (restraining orders) to stop the publication of allegedly defamatory material are rarely granted. Courts are reluctant to prevent freedom of speech on matters in the public interest.⁹² An action seeking an injunction must be based on evidence that without the injunction the plaintiff will suffer injury which an award of damages cannot adequately compensate.

4.1.6 Time limits regarding proceedings

The limitation period for defamation actions in the uniform scheme is one year.⁹³ Time starts to run under the limitation period when the matter is published. This poses a problem for certain publications, such as internet archives. This is because defamation law in Australia proceeds on the basis of a 'multiple publication' rule, which has the effect of making the communication of defamatory matter to each recipient a separate cause of action. So, for example, if a defamatory article is stored in an online archive, a fresh cause of action arises, even if the article was written and uploaded, more than a year before it is accessed. Each time it is accessed, a fresh cause of action in

86 (NSW) *Defamation Act 2005* s. 36.

87 (NSW) *Defamation Act 2005* s 38(1). The list of factors is not exhaustive: s 38(2).

88 (NSW) *Defamation Act 2005* s 35(1). This cap is indexed annually – as at 19 June 2009, the current cap is \$294,500.

89 (NSW) *Defamation Act 2005* s 35(2).

90 (NSW) *Defamation Act 2005* s 37.

91 (NSW) *Defamation Act 2005* s 39.

92 See *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57.

93 (NSW) *Limitation Act 1969* s 14B. There is scope, in exceptional circumstances, for this limitation period to be extended to three years.

defamation arises.⁹⁴

4.1.7 Managing Defamation Risk

There are several things you can do to minimise the risks of having defamation action taken against you, based on an understanding of the basic principles set out above.

First, you should assess any draft press release, statement or document (including on the internet or via email) in light of these principles. Do you identify a person or particular people? Is the publication likely to damage their reputation?

Second, you should assess whether any defences apply, such as fair comment or qualified privilege. For example, can you substantiate any alleged facts and prove that the worst suggestion is both true and in the public interest?

Third, if possible, you should get independent legal advice on your draft before publishing it.

If you are threatened with defamation action, you should seek independent advice from either a lawyer or a law firm that specialises in defamation. Legal advice may be available for free or at reduced rates for public interest matters. If an action for defamation is a serious possibility, a prompt offer of an apology can often be the fairest, quickest and least expensive remedy.

Case-study: *Bennette v Cohen*

Speaking out in public without properly considering defamation issues can be costly, as Greens MLC, Ian Cohen, recently discovered. In two community meetings in April and May 2001 – to raise funds for a local resident’s defence of defamation proceedings brought by developer, Jerry Bennette – Cohen called Bennette a thug, a bully and a person who improperly brings defamation proceedings for the purpose of stifling public protest. Cohen himself was sued for defamation by Bennette for these remarks. Eight years later, after two trips to the New South Wales Court of Appeal, an unsuccessful application for special leave to appeal to the High Court of Australia and a crippling bill for the legal costs of both sides amounting to over one million dollars [to be confirmed], Cohen was found to have defamed Bennette and was ordered to pay him \$15,000 damages. It may have been possible for Cohen to have avoided being sued by simply talking about the facts rather than directly making statements which were damaging to Bennette’s reputation. But, as discussed above, it is important to note that defamation can be implied as well as express.⁹⁵

94 *Loutchansky v Times Newspapers Ltd (Nos 2-5)* [2002] QB 783 at 817-18.

95 The course of the proceedings can be followed through *Bennette v Cohen* (2005) 64 NSWLR 81; [2005] NSWCA 341; *Bennette v Cohen* (2007) Aust Torts Reports ¶81-897; [2007] NSWSC 739; *Bennette v Cohen* [2009] NSWCA 60; *Bennette v Cohen (No 2)* [2009] NSWCA 162.

4.2 Injurious Falsehood

This tort applies where you maliciously make a false statement (by words or deeds) about a person or company to a third person, who acts on that statement to the detriment of the person or company. Conservation groups who make fraudulent or reckless statements about the business practices of corporations, with a view to moving customers and contractors away from the business, may fall within this category.

4.3 Sub Judice

The ambit of sub judice is often misunderstood.⁹⁶ The sub judice rule prohibits publications if they have a tendency to influence the outcomes of undecided legal proceedings, or prejudge the issues at stake in particular proceedings. The law does not, however, prevent discussion of *all* matters before the Court, so long as the comment does not prejudice proceedings. For example, you cannot publish statements about the guilt or innocence of the accused,⁹⁷ about their criminal record, or adverse comments which tend to criticise or disparage them,⁹⁸ nor can you publish accounts of witnesses in advance of a hearing.⁹⁹ Yet you can publish statements that might influence a litigant in the conduct of an action, as long as the pressure you exert is not improper.¹⁰⁰ An inaccurately stated fact or the use of offensive or insulting language will not necessarily breach the rule of sub judice, but might constitute defamation (see Defamation at 4.1 above).¹⁰¹

4.4 Seditious

There are numerous Commonwealth offences relating to seditious. These include urging:

- the overthrow of the Government or Constitution by force or violence¹⁰²
- interference by force or violence in parliamentary elections¹⁰³
- the use of force or violence against other groups (as distinguished by race, religion, nationality or political opinion)¹⁰⁴
- a person to assist the enemy or those engaged in armed hostilities with

96 The phrase "sub judice" means "under or before a judge or court".

97 *Director of Public Prosecutions v Wran* (1987) 86 FLR 92 at 101-102.

98 *R v Saxon, Hadfield and Western Mail Ltd* [1984] WAR 283.

99 *Attorney-General (NSW) v Mirror Newspapers* [1980] 1 NSWLR 374 at 387.

100 *Harkianakis v Skalkos* (1997) 42 NSWLR 22.

101 *Harkianakis v Skalkos* (1997) 42 NSWLR 22.

102 (CTH) Criminal Code Act 1995 s 80.2(1).

103 (CTH) Criminal Code Act 1995 s 80.2(3).

104 (CTH) Criminal Code Act 1995 s 80.2(5).

Australian soldiers.¹⁰⁵

These offences carry a penalty of seven years' imprisonment.¹⁰⁶

There is a defence of acting in good faith, which includes trying to show that heads of state, for example, are mistaken in their policies or actions or pointing out errors or defects in the government, Constitution, legislation or the courts.¹⁰⁷ This defence does not extend to academic, artistic or journalistic expression.

Note: The Australian Law Reform Commission has conducted an inquiry into the effectiveness and appropriateness of the sedition laws.¹⁰⁸ The Commission has recommended that the term 'sedition' should be removed from the federal statute book, and offences urging force or violence against the government or community groups should be redrafted.¹⁰⁹ The Final Report was released in September 2006.¹¹⁰

On 12 August 2009, the Attorney-General released a Discussion Paper on proposed legislative reforms to Australia's counter-terrorism and national security legislation.¹¹¹ **Following the release of the Discussion Paper, in March 2010, the *National Security Legislation Amendment Bill 2010* had three readings in the House of Representatives without amendment.**¹¹²

In introducing the Bill, the Government has accepted the recommendations of the ALRC, which included removing the term 'sedition' and replacing it with the phrase 'urging violence' and clarifying and modernising elements of the offence. The Bill also extends the offence to cover urging violence against a group or individual on the basis of national and ethnic origin in addition to race, religion, nationality or political opinion. At the time of publication, recommendations made by the Senate Legal and Constitutional Affairs

105 (CTH) Criminal Code Act 1995 s 80.2(7) and (8).

106 (CTH) Criminal Code Act 1995 s 80.2(1), (3), (5), (7) and (8).

107 Criminal Code Act 1995 s 80.3.

108 Australian Law Reform Commission, Media Release Sedition Laws Must Strike a Balance (2 March 2006) at <http://www.alrc.gov.au/media/2006/mr1002.htm>

109 Australian Law Reform Commission, Discussion Paper 71: [Review of Sedition Laws](#). (Report released 29 May 2006). The Discussion Paper is available at <http://www.alrc.gov.au/publications/recentpubs.htm>

110 Australian Law Reform Commission, Report 104 : Fighting Words: A Review of Sedition Laws in Australia. (Report released 13 September 2006).

111 The Discussion Paper invited submissions on the Paper and an Exposure Draft Bill (see http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_Nationalsecuritylegislation-Publicconsultation_Nationalsecuritylegislation-Publicconsultation).

112 The *National Security Legislation Amendment Bill 2010* and Explanatory Memorandum can be found at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2F4320%22>.

Committee were being considered by the Attorney General.¹¹³

113 The Senate Legal and Constitutional Affairs Committee published its report and recommendations on 17 June 2010 which can be accessed at: http://www.aph.gov.au/Senate/committee/legcon_ctte/National_Security_Legislation/report/index.htm

5 Interfering with Business Activities

There are a variety of different legal actions that can be taken by an individual or corporation in relation to hindering the supply of goods or services to an individual or corporation, or in some other way interfering with their business interests. If such actions, known as “economic torts”, are successful they may result in an injunction, an award of damages and/or an award of costs. Even apart from the damages that can be awarded, the amount of costs that an unsuccessful defendant can be ordered to pay in these types of actions is potentially large. This means that any assets you may have, such as your house, or any assets of an Association, may be at risk.

Such legal actions have often been used to discourage dissent. Historically, the economic torts have been used to stifle the actions of trade unions. It should not be thought, however, that the economic torts are of historical interest only. In 2004, Australian Wool Innovations Ltd and 100 Australian wool growers brought proceedings in the Federal Court against People for the Ethical Treatment of Animals Inc., Animal Liberation and a number of individuals associated with those two organisations in relation to what the applicants described as an Australian wool boycott. The applicants alleged that the defendants had committed various breaches of the secondary boycott provisions of the *Trade Practices Act 1975* (Cth), unconscionable conduct under the *Trade Practices Act*, the tort of conspiracy and the tort of intimidation.¹¹⁴

Similarly, in December 2004 the Tasmanian timber company Gunns Limited commenced proceedings in the Victorian Supreme Court against 17 individuals, The Wilderness Society, the Huon Valley Environment Centre and Doctors for Native Forests. Gunns Limited claimed damages, including aggravated and exemplary damages, and injunctions in relation to the disruption of its businesses allegedly caused by various tortious actions of the defendants¹¹⁵ (See Civil Law Remedies at 2.1.4. above).

While such actions do have a contemporary relevance, they are relatively rare for a number of related reasons:

First, a common thread in almost all the civil actions set out below is that you intentionally invade or “*target*” the economic interests of an individual or a company (other than through merely competitive practices). This is rarely what protest actions are about.

Second, damages are usually nominal (as opposed to substantial), even if actions such as blockades from time to time target particular people or entities¹¹⁶.

Third, legal actions are not lightly taken on because of the time, energy and

114 *Australian Wool Innovation Ltd v Newkirk* [2005] FCA 290.

115 *Gunns Limited & Ors v Marr & Ors* [2005] VSC 251.

116 Douglas R (2004) *Dealing with Demonstrations: the Law of Public Protest and its Enforcement* Federation Press, Sydney, Australia at p 92.

expense involved. Groups or individuals involved in protest action rarely have substantial assets. Those that do routinely undertake a range of “*risk management*” measures prior to any proposed action.¹¹⁷

5.1 Torts

There are various actions, both in tort and under various statutes, that can be brought against campaigners whose actions interfere with trade. The torts most likely to be relevant to campaigning are discussed here.¹¹⁸

5.1.1 Conspiracy

Conspiracy is the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. Historically there are two kinds of conspiracy, each of which has distinct elements. The first type of conspiracy is an “*unlawful means*” conspiracy in which the participants combine together to perform acts which are themselves unlawful. The second kind of conspiracy is one in which the participants combine to perform acts which, although not themselves unlawful, are done with the sole or predominant purpose of injuring the claimant.¹¹⁹

5.1.2 Intimidation

The tort of intimidation is made out where there is a deliberate threat, the threat is to commit an unlawful act, and the person so threatened has complied with the demand thus bringing about loss or damage.¹²⁰

Generally, the tort has been applied where three parties are involved – such as where protestors intimidate a supplier, so that goods are not supplied to a company. Again, the classic application of this tort has been in the area of trade union activity, such as unlawful picketing.¹²¹

5.1.3 Interference with Contract

You may be liable in tort if you intentionally induce a person to breach a contract. While this tort has been used by employers threatened with industrial action it is not restricted to the industrial arena. For example, it is the type of action that may be available to a construction company whose work on building a road is hindered by protestors or a food processing company whose

117 Douglas R (2004) *Dealing with Demonstrations: the Law of Public Protest and its Enforcement* Federation Press, Sydney, Australia at p 92.

118 This Chapter draws widely from Baker D, Blay S, Corbin L and Gibson A (2002) *Torts Law: In Principle* 3rd edition Thomson Law Book Company, Pyrmont, Sydney, as well as the incisive commentary of David Rolph, Lecturer-at-Law, University of Sydney

119 *Australian Wool Innovation Limited v Newkirk* [2005] FCA 290 at [60]; *McKellar v Container Terminal Management Services Limited* [1999] 165 ALR 409 at [135]-[154]

120 Balkin, RP and Davis JLR (2004) *Law of Torts* LexisNexis Butterworths, 3rd edition at p 654.

121 One case held it to be intimidation for a union to threaten unlawful picketing of premises so that the owners would not give their business to certain artists: *Sid Ross Agency Pty Ltd v Actors Equity Association of Australia* [1971] 1 NSWLR 760.

goods are boycotted by environmental campaigners.¹²²

It is necessary to distinguish between a “*direct*” interference and an “*indirect*” interference. A direct interference is where the defendant, by words or actions, in some way prevents the person with whom the plaintiff has the contract from carrying out the contract. An indirect interference is generally where the defendant procures a third party to interfere with the contract.

In order to commit the tort of indirect interference with a contract there must be an unlawful act (for example, a trespass) and the interference must be a necessary consequence of the unlawful act.¹²³

The following example of indirect interference is given in Balkin and Davis: *Law of Torts*¹²⁴. A group of conservationists wishing to protect a species of fish mount a vigorous campaign of distributing leaflets outside supermarkets in a town, urging shoppers not to buy any of the fish in question. If wholesalers of the fish were able to demonstrate that the protestors had committed an unlawful act (such as trespass) in the course of inducing shoppers not to buy the fish, as a result of which supermarkets had broken their contracts for its supply, the conduct of the conservationists would constitute the tort.

In recent years, the basis of the tort of inducement of a breach of contract has changed conceptually.¹²⁵ It now seems accepted that the tort is based on a willful violation of a person’s right by the wrongdoer, and this may lead to an expansion of the tort beyond contracts.

5.1.4 *Interference with trade and commerce by unlawful means*

A specific tort of interference with trade and commerce by unlawful means is not presently part of Australian law.¹²⁶ Rather, it is a general term covering all of the individual economic torts of intimidation, conspiracy and interference with contract.

In other jurisdictions, you may be liable for this tort if you intend to cause loss to a person (though this does not have to be your predominant intention),¹²⁷

122 Balkin RP and Davis JLR (2004) *Law of Torts* LexisNexis Butterworths, 3rd edition at p 637.

123 Balkin RP and Davis JLR (2004) *Law of Torts* LexisNexis Butterworths, 3rd edition at p 646.

124 Supra at p 646.

125 See *Law Debenture Trust Corp pic v Ural Caspian Oil Corp Ltd* [1995] 1 All ER 157 and, for the theoretical basis of the change: *Lumley v Gye* (1853) 2 E & B 216; 118 ER 749.

126 In *Sanders v Snell* (1998) 196 CLR 329, the High Court said they did not ‘think it necessary to decide in this case whether a tort of interference with trade or business interests by an unlawful act should be recognised in Australia’.

127 *Lonrho plc v Fayed* [1990] 2 QB 479 [[1989] 3 WLR 631; [1989] 2 All ER 65] (CA), Woolfe LJ at

you use unlawful means, and you actually cause loss to the person. Unlawful means would include crime, tort and breach of contract as well as fraudulent misrepresentation.¹²⁸ The defence of justification is probably not available to the tort of unlawful means.¹²⁹

5.1.5 *Causing loss by unlawful means*

The use of unlawful means by the defendant to inflict an intended loss on the plaintiff is a tort about which there is much uncertainty.¹³⁰ Arguably the tort will be committed where a person has caused harm to another party by acting unlawfully – such as by fraudulent misrepresentation, acting in contempt of court, or by breach of confidence – and the person intends to target a party. This targeting does not need to be their predominant intention. Thus, a conservation group could be acting in a manner consistent with their Mission yet still commit the tort, provided there was an element of intention in their actions to cause harm.

5.1.6 *Interference with Land*

You may be liable in tort for acts that intentionally or negligently interfere with a person's exclusive possession of their land, whether it be directly or indirectly. The main remedy will be damages (often these will involve large sums of money as the remedy is also intended to punish the wrongdoer). Injunctive relief is also a common remedy and may be used to formally prohibit certain behaviour. Injunctions may be particularly relevant to campaigners where there is an ongoing course of action (such as picketing). There are numerous ways in which a person can interfere with another's exclusive possession of their land. Therefore, the tort of interference with land encompasses a number of separate torts.

a) *Trespass*

Being on land without permission is the most obvious form of this action. In this respect, the law recognises certain forms of express or implied licences to enter onto land (such as to go to the front door to discuss a matter). However, it is also clear that such licences can be revoked and that entry onto land for

494 (followed in *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* [1991] 1 VR 637 [95 ALR 211; [1989] Aust Torts Reports ¶80-290], Brooking J at 668).

128 *Lonrho plc v Fayed* [1990] 2 QB 479 [[1989] 3 WLR 631; [1989] 2 All ER 65] (CA), Dillon LJ at 489. *National Phonographic Co Ltd v Edison-Bell Consolidated Phonographic Co Ltd* [1908] 1 Ch 335 (CA).

129 *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* [1991] 1 VR 637 [95 ALR 211; [1989] Aust Torts Reports ¶80-290].

130 *Halsbury's Laws of Australia* Law Book Company volume 33.8 [69]

other purposes may be unlawful (such as using an express or implied licence to snoop around the property).

If protestors do take photographs or footage during the course of a trespass to land, they may be restrained from making use of the photographs or the video, if their existence is known, because they are the 'fruits of trespass'.

The taking of photographs from outside the land is not trespass.¹³¹ Nor is it necessarily trespass to fly over someone's land and take photographs, notwithstanding that theoretically a person's land extends to the air space above it.¹³²

Trespass is also considered to be a criminal activity (see 6.7 below).

Text Box 5.1

Strategic Litigation Against Public Participation or SLAPP suits

Sometimes, developers and others under attack from environmental action try to use the civil law against campaigners. The name "SLAPP" suits (Strategic Litigation Against Public Participation), has been given to court actions filed by developers or decision-makers in order to intimidate and discourage campaigners from voicing their concerns about politically sensitive issues. They are used as a tactic to quash public debate by silencing the voice of campaigners.

In part, a SLAPP suit achieves its purpose by inflicting great expense and inconvenience on innocent campaigners. In addition, SLAPP suits often have a dampening effect on wider community debate by discouraging the media from publishing or reporting any material from environmental organisations facing a SLAPP suit. SLAPP suits are usually brought against campaigners on the grounds of alleged *defamatory statements or interference with trade*.

Campaigners are sometimes tempted to bring their own lawsuit against the SLAPPER. While you might eventually be able to sue the SLAPPER for "abuse of process" or "malicious prosecution", this is expensive, time-consuming, and very difficult to prove in court. You generally cannot commence a suit for abuse of process until the original civil suit against you has been disposed of by a court. Such litigation diverts time and resources from the real objectives of your non-violent action.

b) Private Nuisance

131 *Bathurst CC v Saban* (1985) 2 NSWLR 704.

132 Trespass or nuisance are not available, provided that the aircraft flies at a reasonable height above the property in light of all the circumstances: see (*NSW*) *Damage by Aircraft Act 1952* s 2.

The common law also provides protection for indirect interference with a plaintiff's possessory interests in land by means of the tort of private nuisance. Private nuisance requires that the interference with the plaintiff's use and enjoyment of his or her land be substantial and unreasonable.

There are a number of decided cases on private nuisance and picketing and protests.¹³³ There are also a number of cases dealing with injunctions restraining picketing

surrounding the 1998 dispute between the Maritime Union of Australia and Patricks.¹³⁴

c) *Invasion of Privacy*

A recent High Court case suggests that, whilst private nuisance does not protect privacy, the common law in Australia may develop a tort of invasion of privacy.¹³⁵ If such a tort were to be recognised in Australian law, it would not be for the benefit of corporations.

5.2 Actions under the (CTH) Trade Practices Act 1974

5.2.1 *Misleading and Deceptive Conduct*

Section 52 of the *Trade Practices Act 1974* provides that a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive. While section 52 applies to corporations (and in certain limited circumstances to individuals), proceedings can be brought against individuals under the *Fair Trading* legislation in the various States and Territories that have provisions which mirror section 52.

The misleading and deceptive conduct must occur "*in trade or commerce*". It is arguable as to whether statements made in an interview, or during a demonstration, or in a protest pamphlet are made "*in trade or commerce*". For example, statements made by an RSPCA officer in opposing the sale of electronic dog collars were found not to have been made in trade or commerce.¹³⁶

133 See, for example, *Barloworld Coatings (Aust.) Pty Ltd v Australian Liquor, Hospitality and Miscellaneous Workers' Union* (2001) 108 IR 207; *McCoy Constructions Pty Ltd v Dabrowski* [2001] QSC 413; *National Australia Bank Ltd v Juric* [2001] VSC 51; *Ridge Street Medical Clinic Pty Ltd v Christian Outreach Centre* (unreported, SC(Qld), White M, 19 February 1991).

134 There is also a tort of public nuisance. See, for example, *McFadzean v Construction, Forestry, Mining and Energy Union* [204] VSC 289.

135 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 (15 November 2001).

136 *Orion Pet Products v RSPCA (Vic)* [2002] FCA 860; [2002] 120 FCR 191

5.2.2 Boycotts and Secondary Boycotts

Individuals and groups planning boycott actions need to take great care that their actions do not infringe the boycott and secondary boycott provisions of the *Trade Practices Act 1974*. A prohibited boycott is one in which one person, in concert with another, engages in conduct which has the effect (or is likely to have the effect) of preventing or substantially hindering a third person from engaging in trade or commerce involving the movement of goods between Australia and overseas.¹³⁷

A “*secondary boycott*” is, in a sense, an indirect boycott. It is one in which a boycott is placed on person A in order to damage the business of person B. For example, a union ban on loading or unloading cargo in order to damage the business of the person importing the goods.¹³⁸ In essence, s.45D bans two or more people from engaging in conduct together which hinders or prevents a third person supplying goods or services to a corporation or acquiring goods or services from a corporation if one of the purposes for doing so is to cause substantial loss or damage to the business of the corporation or the conduct is likely to have that effect.¹³⁹

Section 45DD provides a defence to an action in relation to a boycott or secondary boycott in certain situations. One such situation is where the dominant purpose of the conduct engaged in is substantially related to environmental protection or consumer protection and the conduct is not industrial action.

5.3 Remedies: The Interlocutory Injunction

In Chapter 2 there is a brief outline of the various remedies that can be obtained by a party who successfully sues in relation to a breach of contract, the commission of a tort or a breach of statute. It is important for those undertaking protest actions to appreciate the speed with which certain types of court orders can be made.

As briefly outlined in Chapter 2, one type of injunction that can be granted by a court is an interlocutory injunction - that is, an injunction granted by a court well before a final hearing is able to take place. For example, a landowner who alleges that campaigners are trespassing on his or her land will commence proceedings wanting to put an immediate stop to the trespassing. It is highly unlikely the landowner would want the trespass to continue for the many

¹³⁷ Section 45DB *Trade Practices Act 1974*.

¹³⁸ *Miller's Annotated Trade Practices Act* (2006) Thomson Law Book Company, 27th edition at p 340.

¹³⁹ *Miller's Annotated Trade Practices Act* (2006) Thomson Law Book Company, 27th edition at p 340.

months (or longer) that may pass before the parties are ready, and the Court is able to hear and determine all the issues in the case on a final basis. Similarly, a corporation alleging that its business is suffering damage as a result of a boycott will not want the boycott to continue until such time as the final hearing takes place.

If you are engaged in protest action which is alleged to amount to a tort or a breach of the *Trade Practices Act*, it is highly likely that those commencing proceedings will seek an interlocutory injunction.

In a practical sense, this means a number of things.

First, if the matter is sufficiently urgent, by the time you are served with the papers the plaintiff or applicant may already have obtained what is known as an *ex parte* injunction (see Chapter 2). This will only last until you are able to be served with the Court documents and are able to appear in Court.

Second, a court will not decide whether or not to grant an interlocutory injunction by deciding all the issues in the case. A court will look at whatever evidence is before it at that stage (this will probably not be all the evidence that will be called at the ultimate final hearing) and decide two questions:

1. Is there a “serious question to be tried”?

An applicant must show that, there is a serious question to be tried which, if resolved in its favour, would entitle it to relief.

2. What is the “balance of convenience”?

In deciding where the “balance of convenience” lies a court will carefully consider the effect on both parties of granting an injunction and, in particular, whether granting an injunction would cause hardship to the defendant or refusing one would cause hardship to the plaintiff.

Third, you should be aware that in deciding whether or not to grant an interlocutory injunction a court will not ordinarily resolve conflicts in the evidence. Indeed, generally cross-examination is not permitted and the court will simply read the affidavits filed by the plaintiff and the affidavits filed by the defendant.

Text Box 5.2

What to do if you are served with a summons or a statement of claim

1. Read the document! Don't be put off by what appears to be legal gobbledegook.

2. Try and work out what legal relief “the applicant” or “the plaintiff” is seeking. This will usually be set out towards the end of the document. In addition to damages, is the applicant seeking an “interlocutory injunction” or an “urgent injunction” (that is an order made on an interim basis that you immediately stop doing a particular act, for example, trespassing on land)?
3. Check when the case is next before the Court. If the applicant is seeking urgent relief from the Court you may be required to appear within the next few days. Failure to appear may result in orders being made against you.
4. Go and see a lawyer. NOW! Do not put the legal documents in the top drawer, the rubbish bin or the too hard basket. The sooner you seek legal advice the better. Your lawyer will be able to advise you on your rights and what options you have in relation to the claim being made against you.

6 General Criminal Offences and Powers of Police

This Chapter deals with offences and powers that operate at large, regardless of where in NSW (or on Commonwealth land) the activity is taking place.

It should be noted that a raft of terrorism laws have been passed by both the Federal and NSW Governments in recent years. Although most protest actions will ostensibly fall outside their ambit, these laws are briefly dealt with here because of the wide definition of terrorism and the discretionary and subjective circumstances under which special powers can be invoked.

In particular, for present purposes, a terrorist act is defined under both Commonwealth and NSW legislation to exclude advocacy, protest, dissent or industrial action, except where it is intended:

- to cause serious harm that is physical harm to a person, or
- to cause a person's death, or
- to endanger the life of a person, other than the person taking the action, or
- to create a serious risk to the health or safety of the public or a section of the public.¹⁴⁰

The *(NSW) Terrorism (Police Powers) Act 2002* also allows the Commissioner of Police or a Deputy Commissioner of Police or, in urgent circumstances, a police officer above the rank of superintendent to grant an authorisation for the exercise of special powers to prevent or deal with a terrorist act.¹⁴¹

6.1 Police Responsibilities and Powers

In late 2006, police procedures for dealing with the public were watered down and made more flexible.¹⁴² In particular, the requirement to issue a warning was confined to a more limited set of circumstances, and provision was made for these responsibilities to be excluded completely in relation to certain powers.¹⁴³

140 See *(CTH) Criminal Code Act 1995* s 100.1 and *(NSW) Terrorism (Police Powers) Act 2002* s 3(3) and section 3 more generally. "Terrorism offences" are more broadly defined as offences against Division 72 or Part 5.3. See *(CTH) Criminal Code Act 1995*.

141 See *(NSW) Terrorism (Police Powers) Act 2002* ss 5, 6 and 8 and more generally Parts 2 and 3 of the Act. The decision to issue an authorisation for the use of special powers cannot be challenged in any court: s 13.

142 Police used to use the acronym WIPE to describe the procedure for dealing with the public. In the exercise of police power, police officers previously had to:

- **Warn** you that failure to comply with a police request may be an offence
- **Inform** you of the reason the police are exercising their powers
- **Provide** their name and place of duty, and show
- **Evidence** that they are a police officer.

143 See *(NSW) Law Enforcement (Powers and Responsibilities) Act 2002* s 201(6), which provides for specified powers to be excluded under Schedule 1.

6.1.1 Supplying police officer's details

In exercising a range of powers, police generally have an obligation to show you they are a police officer, including giving you their name and place of duty, and provide reasons for the exercise of the power.¹⁴⁴ Relevantly, for the purposes of this Guide, these powers are:

- a power to search or arrest you
- a power to search a vehicle, vessel or aircraft
- a power to seize property
- a power to stop or detain you
- a power to stop or detain a vehicle, vessel or aircraft
- a power to request your name or that of someone else
- a power to ask you to “move on”
- a power to request you to open your mouth or shake your hair
- a power to request you to submit to a frisk search.¹⁴⁵

When asking you for identification or requesting you to submit to certain searches, the police must abide by the above obligations *before* exercising the power.¹⁴⁶ Otherwise, they may do so as soon as it is reasonably practicable.¹⁴⁷

6.1.2 Warnings

For a limited number of powers, the police generally need to give a warning that you are obliged to comply and that a failure to comply with a request may be an offence. This applies to:

- requests to give your name or someone else's
- certain searches relating mainly to drug dealing
- “move on” directions
- certain powers under terrorism legislation.¹⁴⁸

144 See *(NSW) Law Enforcement (Powers and Responsibilities) Act 2002* s 201. Note that if the search is made in relation to any of the powers under s 201(3) under a covert search warrant, then the police do not have to supply proof of the fact that they are a police officer: see s 201 (3AA).

145 See *(NSW) Law Enforcement (Powers and Responsibilities) Act 2002* s 201(3). See also *(NSW) Terrorism (Police Powers) Act 2002* Part 2 Division 3.

146 See *(NSW) Law Enforcement (Powers and Responsibilities) Act 2002* s 201(2A), (3)(g), and (3)(j).

147 See *(NSW) Law Enforcement (Powers and Responsibilities) Act 2002* s 201(2) and (2B).

148 *(NSW) Law Enforcement (Powers and Responsibilities) Act 2002* s 201(2C). A warning need not be given if you have subsequently complied: s 201(2C) and *(NSW) Terrorism (Police Powers) Act 2002* s 23(3). Under the terrorism laws, the requirement extends only to the exercise of powers involving a request that a person is obliged to comply with the law, which would seem to limit it to identification: see s 23(3).

The warning must be given as soon as reasonably practicable after the making of the request.¹⁴⁹

6.2 Loitering or “Moving People On”

The police have the general right to move people on in situations where there has been, for example, a breach of the peace.¹⁵⁰ As noted immediately above, the exercise of this power carries certain responsibilities.¹⁵¹ Apart from this, dispersal powers are limited to the context-specific chapters following.

6.3 Identification

Police may ask you for your name and address, but in most cases you don't have to comply.

Despite this general rule, there are a number of circumstances that may be relevant to campaigners where it is an offence to *not* identify yourself. Many of these are specific to where you are at the time (and consequently are dealt with in following chapters in the context of specific locations). Other circumstances, however, arise regardless of where you are. These circumstances carry wide differences in penalties for failing to comply and include where:

- police are trying to serve a fine default warrant¹⁵² or penalty notice¹⁵³
- police have a reasonable belief you may be a witness to, or are able to assist them in relation to, a serious crime¹⁵⁴
- police have a reasonable suspicion that you (or the vehicle you are in) is the target of an authorisation for the use of special powers under the *(NSW) Terrorism (Police Powers) Act 2002* (or if you are found in suspicious circumstances in the company of the target of the authorisation),¹⁵⁵ or you are in an area that is the target of an

149 *(NSW) Law Enforcement (Powers and Responsibilities) Act 2002* s 201(2C) and *(NSW) Terrorism (Police Powers) Act 2002* s 23(3).

150 A breach of the peace has been defined as “an act done ... which either actually harms a person, or in his presence his property, or is likely to cause such harm”: see *Howell* [1982] 1 QB 416, at 426. See also Glanville Williams, “Arrest for Breach of the Peace” [1954] *Crim LR* 578 at 578-583.

151 *(NSW) Law Enforcement (Powers and Responsibilities) Act 2002* s 201(1), (2A) and (3)(i).

152 *(NSW) Fines Act 1996* s 104(1). The maximum penalty for failing to comply is \$1100: s 104(3).

153 *(NSW) Criminal Procedure Act 1986* s 341(1). The maximum penalty for failing to comply is \$220: s 341(3).

154 *(NSW) Law Enforcement (Powers and Responsibilities) Act 2002* ss 11 and 12 (the maximum penalty for failing to comply is \$220); *(CTH) Crimes Act 1914* s 3V (the maximum penalty for failing to comply is \$550).

155 *(NSW) Terrorism (Police Powers) Act 2002* s 16(1)(a) and (b) (the maximum penalty for failing to comply is \$5500 or 12 months imprisonment, or both).

authorisation.¹⁵⁶

In exercising these powers, police or other officers generally have an obligation to provide reasons for the request, to warn you that a failure to comply is an offence,¹⁵⁷ and also show you they are a police officer, including giving you their name and place of duty.¹⁵⁸

6.4 Search and Seizure

Police may stop, search and detain you and items in your possession if they hold a reasonable suspicion that you:

- possess something stolen¹⁵⁹
- possess something used, or intended to be used, in certain serious offences¹⁶⁰
- possess a prohibited drug¹⁶¹
- are, or the vehicle in which you are in is, the target of an authorisation for the use of special powers under the *(NSW) Terrorism (Police Powers) Act 2002* (or you are found in suspicious circumstances in the company of the target of the authorisation).¹⁶²

More broadly, the police may stop, search and detain *anyone* in an *area* that is the target of an authorisation under the *(NSW) Terrorism (Police Powers) Act 2002* – that is, they do not need to hold any reasonable suspicion.¹⁶³ For the purpose of conducting a search pursuant to these powers, police must not detain you for longer than is reasonably necessary.¹⁶⁴

156 *(NSW) Terrorism (Police Powers) Act 2002* s 16(1)(c) (the maximum penalty for failing to comply is \$5500 or 12 months imprisonment, or both).

157 *(NSW) Fines Act 1996* s 104(2) (the only obligation for fine defaults); *(NSW) Law Enforcement (Powers and Responsibilities) Act 2002* s 201(2C); *(NSW) Criminal Procedure Act 1986* s 341(2)(d); and *(NSW) Terrorism (Police Powers) Act 2002* s 23(3).

158 *(NSW) Law Enforcement (Powers and Responsibilities) Act 2002* s 201(1)(a)-(c); *(NSW) Criminal Procedure Act 1986* s 341(2)(a)-(c); *(NSW) Terrorism (Police Powers) Act 2002* s 23(1). Federal police only have an obligation to inform a person of the reasons for the request: *(CTH) Crimes Act 1914* s 3V(2)(b). *If asked*, they must also show a person they are a police officer and give their name and/or place of duty (their maximum penalty for failing to comply is \$550): *(CTH) Crimes Act 1914* s 3V(3).

159 *(NSW) Law Enforcement (Powers and Responsibilities) Act 2002* s 21(1)(a) and 21(2)(a).

160 *(NSW) Law Enforcement (Powers and Responsibilities) Act 2002* s 21(1)(b) and 21(2)(b).

161 *(NSW) Law Enforcement (Powers and Responsibilities) Act 2002* s 21(1)(d) and 21(2)(d).

162 *(NSW) Terrorism (Police Powers) Act 2002* s 17(1)(a) and (b).

163 *(NSW) Terrorism (Police Powers) Act 2002* s 17(1)(c).

164 *(NSW) Terrorism (Police Powers) Act 2002* s 17(3).

In exercising these powers, police must show they are a police officer, give their name and place of duty, and provide reasons for the request.¹⁶⁵ Warnings need only be given in limited circumstances regarding searches of the mouth and hair (introduced to target drug dealers) and for the exercise of certain powers in relation to terrorism.¹⁶⁶

6.5 Hindering Police and Resisting Arrest

It is an offence in NSW to resist or hinder, or to incite someone else to assault, resist or hinder, a member of the police force in the execution of his or her duty, including the making of an arrest.¹⁶⁷ This offence is dealt with by a local court and carries a maximum penalty of 12 months gaol or a fine of \$1100, or both.¹⁶⁸

“Resist” means opposing by the threat or use of force.¹⁶⁹ “Hinder” means making an arrest or other police action more difficult.¹⁷⁰ It does not matter whether the resistance or hindrance actually prevents the performance of police duties or can be overcome.¹⁷¹ However, the resistance or hindrance must be intentional.¹⁷²

Incitement means to rouse, stimulate, urge or spur on, stir up or animate;¹⁷³ it is not necessarily restricted to starting or initiating.¹⁷⁴

6.6 Assaulting Police

Related to the offence of hindering police and resisting arrest, it is an offence to assault, resist, or wilfully obstruct police and other officers in the execution

165 See *(NSW) Law Enforcement (Powers and Responsibilities) Act 2002* s 201 and *(NSW) Terrorism (Police Powers) Act 2002* s 23(1).

166 *(NSW) Law Enforcement (Powers and Responsibilities) Act 2002* s 201(2C) and (3)(j) and *(NSW) Terrorism (Police Powers) Act 2002* s 23(3). Under the terrorism laws, the requirement extends only to the exercise of powers involving a request that a person is obliged to comply with the law, which would seem to limit it to identification: see s 23(3).

167 *(NSW) Crimes Act 1900* s 546C.

168 *(NSW) Crimes Act 1900* s 546C.

169 *R v Galvin (No 2)* [1961] VR 740 at 749.

170 *Plunkett v Kroemer* [1934] SASR 124 at 127; *Leonard v Morris* (1975) 10 SASR 528; *Jones v Daire* (1983) 32 SASR 369.

171 *Dixon & Sons Ltd v Henderson, Craig & Co* [1919] 2 KB 778.

172 This is self-evident for resisting; for hindering see *Leonard v Morris* (1975) 10 SASR 528 at 531.

173 *Young v Cassells* (1914) 33 NZLR 852 at 854, 855 per Stout CJ.

174 *R v Crichton* [1915] SALR 1.

of their duty.¹⁷⁵

It is also an offence to assault any person, with intent to resist or prevent the lawful apprehension or detention of any person for any offence.¹⁷⁶ This could include State Forest and National Parks officers. It is important to note that assault can be both physical and verbal.¹⁷⁷ Therefore, threats of violence to police and other officers in the heat of the moment could have serious consequences. The maximum penalty for these offences is potentially severe, being five years gaol.¹⁷⁸

6.7 Trespass

Trespass is generally defined as an unlawful presence on land. Because of the need to be able to demonstrate that a person was on a particular property, the offence is principally dealt with under the *Inclosed Lands Protection Act 1901*, which applies to private and public land and buildings (Chapter 7).

However, the *Summary Offences Act 1988* also contains a trespass-like offence. It prohibits abseiling, jumping or parachuting from any part of a building or other structure such as a bridge or a crane without reasonable excuse, when to do so would risk the safety of another person.¹⁷⁹

Certain Acts may contain similar offences relating to particular infrastructure. For example, the *Electricity Supply Act 1995* contains an offence of entering, climbing, or being on electricity works.¹⁸⁰ There is also the offence of interfering with electricity supply works.¹⁸¹ There are similar provisions under the *Gas Supply Act 1996 (NSW)* for interfering with gas supply works.¹⁸²

6.8 Damage to Property

175 (NSW) *Crimes Act 1900* s 58.

176 (NSW) *Crimes Act 1900* s 58.

177 The modern criminal law has collapsed assault (putting someone in fear) and battery (the actual application of force): see Brown D, Farrier D, Egger S, McNamara L and Steel A, (4th ed 2006) *Criminal Laws* Federation Press, Sydney at p 675.

178 (NSW) *Crimes Act 1900* s 58.

179 (NSW) *Summary Offences Act 1988* s 8A(1) and (2). The maximum penalty is \$1100 or 3 months gaol, or both: s 8A(1).

180 (NSW) *Electricity Supply Act 1995* s 65A.

181 The maximum penalty for this offence is \$22,000 or 5 years imprisonment or both. See (NSW) *Electricity Supply Act 1995* s. 65.

182 The maximum penalty for interfering with gas works is \$22,000 or 5 years imprisonment or both. See (NSW) *Gas Supply Act 1996* s. 66.

Most offences concerning property damage are of a general nature – that is, they apply to both State-owned and private land. Numerous other offences apply only to public land – such as war memorials – and these are dealt with under Chapter 8.

6.8.1 Graffiti and sign posting

It is an offence to intentionally damage or deface any property with any graffiti implement,¹⁸³ or indeed, to have any graffiti implement in your possession with the intent to damage or deface property.¹⁸⁴ Defacing walls with placards or other materials such as chalk is also illegal (providing that the material can be seen from a public place) without the consent of the property owner.¹⁸⁵

If you are convicted of any offence under the *Graffiti Control Act* and the actions giving rise to your conviction caused property damage, then as well as a fine you can be held liable to pay the costs of restoration or repair up to \$2200.¹⁸⁶

6.8.2 Offences under the (NSW) Crimes Act 1900

More serious damage may constitute an offence under the (NSW) *Crimes Act 1900*, with these offences usually able to be tried either as an indictable offence (District Court), or summarily (Local Court).

The (NSW) *Crimes Act 1900* contains numerous provisions relating to property damage, with property being defined broadly.¹⁸⁷ It is an offence to intentionally or recklessly destroy or damage property,¹⁸⁸ as well as to threaten to destroy

183 (NSW) *Graffiti Control Act 2008* s 4(1). The maximum penalty is \$2200 or imprisonment for 12 months: s 4(1). A court that convicts a person of an offence under this section must not sentence the person to imprisonment unless the person has previously been convicted of an offence under this section or section 5 (or under the corresponding provisions of the [Summary Offences Act 1988](#) as in force before their repeal by this Act) on so many occasions that the court is satisfied that the person is a serious and persistent offender and is likely to commit such an offence again: s4(2).

184 (NSW) *Graffiti Control Act 2008* s5(1). The maximum penalty is \$1100 or imprisonment for 6 months. A court that convicts a person of an offence under this section must not sentence the person to imprisonment unless the person has previously been convicted of an offence under this section or section 4 (or under the corresponding provisions of the [Summary Offences Act 1988](#) as in force before their repeal by this Act) on so many occasions that the court is satisfied that the person is a serious and persistent offender and is likely to commit such an offence again.: s5(2) . The crown can also take the graffiti implement from you and keep it if convicted of an offence under this section: s5(3).

185 (NSW) *Graffiti Control Act 2008* s 6. The maximum penalty is \$440: s 6.

186 (NSW) *Graffiti Control Act 2008* s 18.

187 (NSW) *Crimes Act 1900* s 4. Property is defined to 'include every description of real and personal property; money, valuable securities, debts, and legacies; and all deeds and instruments relating to, or evidencing the title or right to any property, or giving a right to recover or receive any money or goods; and includes not only property originally in the possession or under the control of any person, but also any property into or for which the same may have been converted or exchanged, and everything acquired by such conversion or exchange, whether immediately or otherwise.'

property with an intention to cause another to fear the threat will be carried out.¹⁸⁹ It is also an offence to possess an instrument with an intention that it should be used to destroy property¹⁹⁰ or to destroy property belonging to a mine or hinder the working of equipment belonging to a mine.¹⁹¹

6.9 Other Serious Offences

6.9.1 Intimidation

It is an offence to, among other things, wrongfully and without legal authority:

- use violence or intimidation towards another person or that person's family, and
- follow that person around, and
- hide that person's tools or property, with a view to compelling or causing the person to do or refrain from doing an act that he or she had a right to do.¹⁹²

The offence has been commonly used against non-violent environmental campaigners.

6.9.2 Riot and affray

The offence of riot is committed when 12 or more people use or threaten unlawful violence in a public or private place for a common purpose and their conduct is such that a person of reasonable firmness would be put in fear for his or her safety.¹⁹³ Note that the 12 or more people at the scene need not use or threaten violence at the same time, and a person of reasonable firmness need not be present, in order for there to be a conviction.¹⁹⁴

If there are less than 12 people present the offence of affray may be committed, provided that the conduct associated with affray is directed

188 (NSW) *Crimes Act 1900* s 195. If dealt with on indictment the penalty may be up to five year's gaol (or ten year's if the damage was done by fire or explosives). If done during a public disorder, the penalties are even greater: see (NSW) *Crimes Act 1900* ss 195(2) and 196(2).

189 (NSW) *Crimes Act 1900* s 199. If dealt with on indictment the penalty may be up to five year's gaol.

190 (NSW) *Crimes Act 1900* s 200. If dealt with on indictment the penalty may be up to three year's gaol (or seven year's for an explosive).

191 (NSW) *Crimes Act 1900* s 201. If dealt with on indictment the penalty may be up to seven year's gaol.

192 (NSW) *Crimes Act 1900* s 545B. The maximum penalty is \$5500 or two year's gaol, or both: s 545B(1).

193 (NSW) *Crimes Act 1900* s 93B(1).

194 (NSW) *Crimes Act 1900* s 93B(2) and (4).

explicitly toward another person (unlike riot).¹⁹⁵ Also, a threat of unlawful violence cannot be proved by showing a person used threatening words alone.¹⁹⁶

Assaults committed in the course of a riot carry a maximum penalty of five year's gaol, or seven years if actual bodily harm is occasioned.¹⁹⁷

Riot and affray are normally dealt with summarily but can be dealt with on indictment by request of the prosecutor or defendant. The Local Court can impose penalties of 2 years for these offences.¹⁹⁸ Where the prosecution or defendant chooses to proceed by way of trial upon indictment for riot and affray, the maximum penalties increase to 15 years gaol for riot and 10 years for affray.¹⁹⁹

6.9.3 *Violent disorder*

The NSW statutory offence of "violent disorder" is committed where three or more persons together use or threaten unlawful violence towards a person or property that would "cause a person of reasonable firmness present at the scene to fear for his or her personal safety".²⁰⁰ An offence may be committed even if no "person of reasonable firmness" is, or is likely to be, present at the scene.²⁰¹ The statutory offence is similar to the common law offence of unlawful assembly, except that in the former the prosecution must show that violence was actually used or threatened.²⁰²

6.9.4 *Disguises*

In some non-violent actions, people may consider concealing their identity, especially where police or other surveillance cameras are in use. Under the NSW *Crimes Act* it is an offence (punishable by imprisonment for up to seven years) where a person "has his face blackened or otherwise disguised, or has in his possession the means of blackening or otherwise disguising his face,

195 (NSW) *Crimes Act 1900* s 93C(1).

196 (NSW) *Crimes Act 1900* s 93C(3).

197 (NSW) *Crimes Act 1900* s 59A. This compares to two and five years respectively, where the assault was committed outside of a riot situation: see (NSW) *Crimes Act 1900* ss 59 and 61.

198 (NSW) *Crimes (Sentencing Procedure) Act 1999* s 58.

199 (NSW) *Crimes Act 1900* ss 93B and 93C.

200 (NSW) *Summary Offences Act 1988* s 11A(1). The maximum penalty is \$1100 or 6 months gaol.

201 (NSW) *Summary Offences Act 1988* s 11A(3).

202 Brown D, Farrier D, Egger S, McNamara L and Steel A, (4th ed 2006) *Criminal Laws Federation Press*, Sydney at 867.

with intent to commit a felony or misdemeanour”.²⁰³ Of course, the prosecution will have to prove the intention to actually commit an offence of sufficient magnitude – the intent to commit a summary offence will not suffice.

6.9.5 Peep and pry

Campaigners undertaking surveillance of a site may inadvertently risk being charged with the offence of peep and pry. It is an offence to be in, on or near a building with intent to peep or pry on another person without reasonable cause.²⁰⁴

6.10 Victim’s compensation orders (Directions for compensation)

Increasingly, the provisions of the (NSW) *Victim’s Support and Rehabilitation Act 1996* are being used to seek monetary compensation from offenders. This means if you are convicted of an offence, in addition to receiving a criminal conviction, you may be liable to pay considerable amounts in compensation. Compensation can be awarded in relation to the commission of any crime (for example, entering inclosed lands) and even if the damage suffered relates to property damage or some other type of economic loss.

If you are convicted of an offence, the court may, after notice is given to you, direct that you pay compensation to any aggrieved person for any loss sustained through or by reason of the offence you committed.²⁰⁵ A direction for compensation may be given by a court on its own initiative or on an application made by or on behalf of the aggrieved person.²⁰⁶

In giving a direction for compensation, the court must have regard to:²⁰⁷

- any behaviour (including past criminal activity), condition, attitude or disposition of the aggrieved person that contributed to the loss they sustained;
- any amount paid or to be paid to the aggrieved person by way of damages which have been awarded in civil proceedings in respect of substantially the same facts as those on which the offender was convicted; and
- such other matters it considers relevant.

203 (NSW) *Crimes Act 1900* s 114(1)(c).

204 (NSW) *Crimes Act 1900* s 547C. The maximum penalty is \$220 or 3 months gaol.

205 (NSW) *Victim’s Support and Rehabilitation Act 1996* s 77B(1). An “aggrieved person” generally means a person who has sustained loss through or by reason of an offence which an offender has been convicted.

206 (NSW) *Victim’s Support and Rehabilitation Act 1996* s 77B(2). For example, a direction for compensation can be requested by the police.

207 (NSW) *Victim’s Support and Rehabilitation Act 1996* s 77D.

If you are notified that a compensation order is being sought against you, you should immediately seek legal advice. However, generally speaking, it is important to note:

- you must be given notice that a direction for compensation is being sought or will be made²⁰⁸;
- a claim for compensation must be supported by evidence and a figure cannot simply be “plucked out of the air”²⁰⁹; and
- there must be a clear link between the relevant offence and the loss sustained²¹⁰.

Case-study: *Leathart and ors v Director of Public Prosecutions*

In June 2009, four climate change protestors from Rising Tide were jointly imposed with a \$5,000 victim’s compensation order under s 77B of the (NSW) *Victims Support and Rehabilitation Act 1996*. The protestors were campaigning against cheap electricity and CPRS concessions being provided to heavy polluters like Aluminium smelters. The protestors had attached themselves to railings on the premises of the Tomago Aluminium Smelter - blocking the passage of trucks. They were charged and convicted with entering inclosed lands and resisting or hindering police. In addition, they were ordered to pay compensation in the sum of \$5,000 to Tomago Aluminium Company Pty Limited (substantially owned by Rio Tinto Alcan) for alleged over time paid to workers as a result of the disruption to the company’s operations caused by the protest.

The protestors appealed the compensation order in the District Court with the assistance of the EDO. In the appeal, the protestors argued: there was no reliable evidence supporting the alleged loss; there was no link between the enter inclosed land offence and the alleged loss; and, proper regard ought to be had to the matters set out in s 77D of the (NSW) *Victims Support and Rehabilitation Act 1996*.

On 19 November 2009, Justice Blanch of the District Court quashed the compensation order and held that the order should not have been made by the magistrate in the first instance because there was no reliable evidence of the alleged loss suffered by Tomago Aluminium Company.

208 (NSW) *Victim’s Support and Rehabilitation Act 1996* s 77B(1).

209 For example see the following English cases: *R v Vivian* [1979] 1 All ER 48; (1979) 68 Cr App R 53; *R v Swann and Webster* [1984] Crim LR 300; (1984) 6 Cr App R (S) 22; *R v Horsham JJ ex p Richards* [1985] 2 All ER 1114; (1985) 82 Cr App R 254; and, *R v Watson* [1991] Crim LR 307; 12 Cr App R (S) 508.

210 See *Regina v Skaf* (2001) NSWCCA 1999 (23 May 2001) and *Police v Morgan & ors* (14 August 2002, Unreported, Local Court Eden, Magistrate Heilpern).

7 Inclosed Property

The *(NSW) Inclosed Lands Protection Act 1901* applies to both private and public land and facilities. Inclosed land is defined in two ways. First, it is any land surrounded by a fence, wall or other erection, or partly by a fence and partly by a natural feature (like a river or cliff) that makes the land's boundaries recognisable.²¹¹ Second, certain facilities – such as schools, child care services and hospitals and nursing homes - are defined to be inclosed lands and are known as prescribed lands in the legislation. Again, these do not discriminate between public and private facilities.²¹²

7.1 Loitering or “Moving People On”

The *(NSW) Inclosed Lands Protection Act 1901* creates two separate offences of remaining on inclosed lands,²¹³ or engaging in “offensive” conduct,²¹⁴ after being asked to leave by the owner, occupier or person apparently in charge of those lands. The offensive conduct offence has a harsher penalty, except (curiously) when dealt with by penalty notice.

The usual provisions apply regarding the need for police to give their name and place of duty, the reason for the direction,²¹⁵ and a warning that you are obliged to comply and that failure to comply may constitute an offence before issuing the direction.²¹⁶

7.2 Identification

Anyone who is found committing an offence against the *Inclosed Lands Protection Act 1901* must give their name and address when asked, even to someone who is not a police officer such as a security guard or worker. If you do not give your name and address, you can be detained by that person and

211 *(NSW) Inclosed Lands Protection Act 1901* s 3.

212 *(NSW) Inclosed Lands Protection Act 1901* s 3.

213 *(NSW) Inclosed Lands Protection Act 1901* s 4(1). The maximum penalty is \$550 or \$1100 where the offence occurs in respect of prescribed premises: s 4(1). Where dealt with by way of a penalty notice, the penalty is \$350 and \$550 respectively: see *Inclosed Lands Protection Regulation 2008* cl 4 and Schedule 1.

214 *(NSW) Inclosed Lands Protection Act 1901* s 4A(1). The maximum penalty is \$1100 or \$2200 where the offence occurs in respect of prescribed premises: s 4A(1). Where dealt with by way of a penalty notice, the penalty is \$250 in either case: see *Inclosed Lands Protection Regulation 2008* cl 4 and Schedule 1.

215 *(NSW) Law Enforcement (Powers and Responsibilities) Act 2002* s 201(1), (2A), (2B) and (3)(i).

216 *(NSW) Law Enforcement (Powers and Responsibilities) Act 2002* s 201(2C). A warning need not be given if you have subsequently complied: s 201(2C)..

given into police custody.²¹⁷ There is also a penalty of \$55 for providing false details, on top of any penalty for the principal offence for which you were apprehended.²¹⁸

Before exercising this power, police must show they are a police officer, give their name and place of duty, and provide reasons for the request.²¹⁹ A warning that you are obliged to comply with a request for identification and that failure to comply constitutes an offence should also be given as soon as reasonably practicable after making the request.²²⁰ There is generally no such obligation on others.

7.3 Trespass

It is an offence under the *Inclosed Lands Protection Act 1901* to enter inclosed lands without the consent of the owner or occupier of the land.²²¹ The offence is often used against demonstrators and activists to protect property and maintain public order. There has been a steady increase in trespass charges over the last 20 years, with over 9,000 people charged with trespass in 2008.²²² Although the offence carries a penalty of \$550 (or \$1100 for premises such as schools and hospitals), campaigners may find that bail is refused or unacceptable conditions are imposed. Consequently, people may spend time locked up prior to their hearing.

There is a defence of lawful excuse.²²³ This may be made out by establishing a reasonable belief in the existence of a public right of way, coupled with the fact there were no closed gates.

Certain Acts may contain similar offences relating to particular infrastructure. For example, the *Electricity Supply Act 1995* contains an offence of entering, climbing, or being on electricity works.²²⁴ There is also the offence of interfering with

217 (NSW) *Inclosed Lands Protection Act 1901* s 6(1).

218 (NSW) *Inclosed Lands Protection Act 1901* s 6(2).

219 See (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 201(1), (2A) and (3)(g).

220 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 201(2C). A warning need not be given if you have subsequently complied: s 201(2C).

221 (NSW) *Inclosed Lands Protection Act 1901* s 4(1). The maximum penalty is \$550 or \$1100 where the offence occurs in respect of prescribed premises: s 4(1). Where dealt with by way of a penalty notice, the penalty is \$350 and \$550 respectively: see *Inclosed Lands Protection Regulation 2008* cl 4 and Schedule 1.

222 D. Goh & S. Moffatt, *NSW Recorded Crime Statistics 2008* (2009), NSW Bureau of Crime Statistics and Research: Attorney General's Department, at 6 April 2010
[http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/RCS08.pdf/\\$file/RCS08.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/RCS08.pdf/$file/RCS08.pdf)

223 (NSW) *Inclosed Lands Protection Act 1901* s 4(1).

224 (NSW) *Electricity Supply Act 1995* s 65A.

electricity supply works.²²⁵ There are similar provisions under the *Gas Supply Act 1996 (NSW)* for interfering with gas supply works.²²⁶

Text Box 7.1

Your Right to Peaceful Protest

You do generally have a right to lawful assembly in public spaces (see 8.4 below). This does not, however, extend to inclosed spaces. In *O'Donohue v Wille* [1999] NSWSC 661, three protestors were charged with trespass under the *Inclosed Lands Protection Act 1901* as a result of entering an area of public parkland enclosed by barbed wire fencing that had been licenced to the RTA to construct the Eastern Distributor tunnel. The protestors argued that they had a lawful excuse for being on the inclosed lands occupied by the RTA since they were protesting against the construction of the Eastern Distributor and the associated tree destruction and reduction of public recreation space in Moore Park. At first instance, Magistrate Pat O'Shane dismissed the charges on the basis that the protestors "had a right to protest peacefully".

This decision was overturned on appeal. Justice Kirby of the Supreme Court of NSW held that entering land for a purpose that is not unlawful, does not constitute a lawful excuse.

This means that actions such as "sit-ins" in Ministerial Offices or corporate headquarters or, more generally, protests inside premises or in inclosed spaces are not lawful excuses that would allow you to avoid trespass charges/convictions under the *Inclosed Lands Protection Act 1901*.

225 The maximum penalty for this offence is \$22,000 or 5 years imprisonment or both. See (NSW) *Electricity Supply Act 1995* s. 65.

226 The maximum penalty for interfering with gas works is \$22,000 or 5 years imprisonment or both. See (NSW) *Gas Supply Act 1996* s. 66.

8 On the Street

Public order or “street” offences and summary police powers are primarily found under the *Summary Offences Act 1988*. These offences classically apply to public places, which are defined generally as follows:

public place means:

- (a) a place (whether or not covered by water), or
- (b) a part of premises,

that is open to the public, or is used by the public whether or not on payment of money or other consideration, whether or not the place or part is ordinarily so open or used and whether or not the public to whom it is open consists only of a limited class of persons, but does not include a school.

However, the position is more complicated than that. Three things should be noted.

First, some offences may be committed in, “or within view or hearing of” a public place generally or a specific place such as a school.²²⁷ These include the offensive conduct and language offences.²²⁸

Second, for the purposes of the provisions regarding public assembly under the *Summary Offences Act 1988*, a different definition of public place is used. Under this Part of the Act, public place means a public road, public reserve or other place which the public are entitled to use.²²⁹

Third, and somewhat counter-intuitively, public place may include private property. As was stated in *In The Appeal of Camp* “it has long been held that a public place is one where the public go, no matter whether they have a right to go or not”.²³⁰ Likewise, the offence of violent disorder specifically provides that the offence can be committed in private as well as public spaces.²³¹

Following on from the Cronulla riots in late 2005, police have been given powers to “lock-down” public places in order to prevent or control public disorders. These powers are discussed in more detail in Chapter 10.

227 *Studsell v Reid* (1990) 20 NSWLR 661.

228 (NSW) *Summary Offences Act 1988* ss 4 and 4A.

229 See (NSW) *Summary Offences Act 1988* s 22 (definitions) and Part 4 generally.

230 [1975] 1 NSWLR 452 at 454. See also the South Australian case of *Semple v Howes* (1985) 38 SASR 34, concerning demonstrations against uranium mining at Roxby Downs.

231 (NSW) *Summary Offences Act 1988* s 11A(4).

8.1 Loitering or “Moving People On”

Police cannot give directions to move people on in public places where an apparently genuine demonstration or protest, a procession, or an organised assembly is occurring.²³²

Outside of these exceptions, police do have the power to “move on” people in public places if they reasonably believe that the conduct or mere presence of a person or group:²³³

- is causing an obstruction;
- constitutes harassment or intimidation;
- 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; or
- is drug-related²³⁴

Such directions must be reasonable in the circumstances for the purpose of reducing the threat posed by the conduct.²³⁵ Complicated provisions govern the exercise of the power by the police (namely, the need to give their name and place of duty, the reason for the direction,²³⁶ and a warning that you are obliged to comply and that failure to comply constitutes an offence²³⁷).

It is an offence not to comply with a direction by persisting to engage in the relevant conduct.²³⁸ Police have generally issued penalty infringement notices for this offence.²³⁹

8.2 Search and seizure

232 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 200.

233 See (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 197(2), which makes it clear that the power applies to moving on groups of people.

234 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 197(1).

235 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 197(2).

236 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 201(1), (2A), (2B) and (3)(i)

237 See (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 201((2C) A warning need not be given if you have subsequently complied: s 201(2C).

238 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 199.

239 The fine is \$220, which is the same as the *maximum* penalty if the matter goes to Court: see (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* ss 199(1) and 235; (NSW) *Law Enforcement (Powers and Responsibilities) Regulation 2005* cl 40.

Police may stop, search and detain you and items in your possession if they hold a reasonable suspicion²⁴⁰ that you possess, or that there is in your car or vessel, *in a public place*, a dangerous article (such as a gun or explosive) used, or intended to be used, in certain serious offences.²⁴¹

A more general frisk search power exists where the police reasonably suspect you have a knife, dangerous implement or a laser pointer in a public place.²⁴² Provisions apply regarding the need for police to give their name and place of duty, the reason for the request,²⁴³ and a warning.²⁴⁴

8.3 Sniffer dogs

If you are in a public place, police can generally only use drug detection or sniffer dogs to search you if they have a warrant.²⁴⁵ However, they do not need a warrant to use such dogs where you are at or on, entering or leaving hotels, clubs, public transport or a public place being used for a “sporting event, concert or other artistic performance, dance party, parade or other entertainment”.²⁴⁶ Police are required to keep the dog under control and to take all reasonable precautions to stop the dog touching you.²⁴⁷

8.4 Unlawful assembly

People generally have the right to peacefully assemble in any public place, so long as the safety or the rights and freedoms of others are not compromised. Should the latter occur, you may be guilty of unlawful assembly, which is an offence under both NSW legislation and the common law. Notwithstanding your rights, the *Summary Offences Act 1988* allows people to choose to use a

240 Such a suspicion must be more than a “hunch”. Rather, it must be based on facts which would create a reasonable suspicion in the mind of a reasonable person.

241 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 21(1)(c) and (2)(c).

242 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 26(1) & 26(1A). It is an offence not to co-operate with lawful police requests regarding the search power without reasonable excuse: see (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 27 (with a maximum penalty of \$5500).

243 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 201(1), (2) and (3)(k).

244 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 201(2C) A warning need not be given if you have subsequently complied: s 201(2C).

245 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 149.

246 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 148.

247 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 150.

process to “authorise” their assembly, providing an additional degree of protection against the levying of obstruction-related offences.

It is important to note that a simpler definition of public place is used in relation to public assemblies under the *Summary Offences Act 1988*, as compared to the Act generally. Under Part 4 of the Act, public place means a public road, public reserve or other place which the public are entitled to use.²⁴⁸

8.4.1 “Authorised” assemblies

The *Summary Offences Act 1988* regulates public assemblies and provides a way of “authorising” them.²⁴⁹ An assembly can be authorised by notifying the police (formally, the Commissioner) of your intention to hold a public assembly under the *Summary Offences Act 1988*. Notification can be made to any member of the police force (such as the local Traffic Services Sergeant).²⁵⁰ The notification has to be in writing, has to set out the purpose and details of the assembly and must be in the form set out in **Appendix A**. You should give it to the police at least seven days before the proposed public assembly, otherwise it must be authorised by the District or Supreme Court.²⁵¹

Providing the assembly is held “substantially in accordance with” the details given, you will not be guilty of any offence such as obstruction or unlawful assembly.²⁵²

However, failure to get authorisation does not of itself mean that the assembly will be unlawful. The elements of the statutory and common law offence are technical and require certain numbers of participants together with certain types of behaviour (see 8.4.2 below).

It is important to note that police do not have the power to ban protests outright.²⁵³ Rather, if the police wish to make an assembly unlawful upfront, they need to go to the District or Supreme Court and obtain a prohibition order (after giving the organisers a chance to respond). If you act contrary to such a prohibition order, you will be in contempt of Court, which can be extremely serious.²⁵⁴

248 See (NSW) *Summary Offences Act 1988* s 22 (definitions) and Part 4 generally.

249 (NSW) *Summary Offences Act 1988* s 23.

250 See (NSW) *Summary Offences Act 1988* s 23(2).

251 (NSW) *Summary Offences Act 1988* s 23(1)(f).

252 (NSW) *Summary Offences Act 1988* s 24.

253 *Commissioner of Police v Rintoul* [2003] NSWSC 662 (18 July 2003).

254 Contempt of court is a common law offence. The Court has wide powers of arrest and there is no maximum penalty for the offence: see, for example, the (NSW) *Local Courts Act 2007* s 24, the (NSW)

8.4.2 Unlawful assembly under the Crimes Act

Under the *Crimes Act*, 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 he is not legally bound to do or to abstain from doing what he is legally entitled to do.”²⁵⁵ It is an offence in NSW to knowingly join or continue in an unlawful assembly, or to carry arms in such an assembly.²⁵⁶ The maximum penalty is a \$550 fine or six months imprisonment, or both (or double this for carrying arms).²⁵⁷

8.4.3 Unlawful assembly at common law

Even if the police cannot charge you under the *Crimes Act* they may be able to charge you with unlawful assembly as a common law offence.²⁵⁸ An unlawful assembly at common law is:

“... an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or conduct themselves when assembled as to cause persons in the neighbourhood of such assembly to fear on reasonable grounds that the persons so assembled will disturb the peace tumultuously or will by such assembly needlessly and without any reasonable occasion provoke other persons to disturb the peace tumultuously.”²⁵⁹

8.5 Obstruction

Under the *Summary Offences Act* it is an offence to “wilfully prevent, in any manner, the free passage of a person, vehicle or vessel in a public place.”²⁶⁰ All participants in a rally may be considered to be obstructing the free passage of the public, even if they individually are not so doing.²⁶¹ Whether or not there

Supreme Court Rules 1970 Part 55 and Registrar, Court of Appeal v Maniam (No 2) (1992) 26 NSWLR 309 at 314.

255 (NSW) *Crimes Act (1900)* s 545C(3).

256 (NSW) *Crimes Act (1900)*, s 545C(1) and (2).

257 (NSW) *Crimes Act (1900)*, s 545C(1) and (2).

258 See the discussion in *Corkery v Black* (1988) 33 A Crim R 134 at 138.

259 Flick G. *Civil Liberties in Australia* Law Book Company 1981 at p 105.

260 (NSW) *Summary Offences Act 1988* s 6 (with a maximum penalty of \$440). See also (NSW) *Roads Act 1993* ss 5 (right of passage along public road by members of the public), and 107 (right of roads authority to direct the removal of an obstruction); (NSW) *Local Government Act 1993* s 68, Table/Approvals/Part E (activities requiring approval on public roads).

261 This is known as the legal doctrine of common purpose: see Brown D, Farrier D, Egger S,

has been an obstruction will often be arguable on the facts. For example, does a protest that blocks a footpath really constitute an obstruction if pedestrians can go around? Would protestors linking arms such that people are forced onto the road constitute an obstruction?

8.6 Offensive Conduct and Language

Under the *Summary Offences Act* it is an offence to engage in offensive conduct or to use offensive language. These two offences were among the “top 20” offences sentenced in the Local Court in 2007, with over 2,200 for offensive conduct and just over 1,500 for offensive language.²⁶² Fines of around \$100 to \$500 were typical for offensive conduct and around \$100 to \$300 for offensive language.²⁶³

‘Offensive conduct’ consists of acting “in an offensive manner in or near, or within view or hearing of, a public place or a school” and carries a maximum penalty of \$660 or three months gaol.²⁶⁴ Even if there is no proof that there was anyone in the public place to be offended the offence may still occur.²⁶⁵ Merely using offensive language is not sufficient to sustain a conviction for offensive conduct,²⁶⁶ although there may be difficulties in drawing a line between the two.²⁶⁷

It is, however, a separate offence to “use *offensive language* in or near, or within hearing of, a public place or school” with the maximum penalty being \$660.²⁶⁸ Again, it is not necessary that anyone actually hear the offensive language for a conviction to occur. Whether offensive language has been used will usually depend on the factual circumstances of the case - sometimes what would ordinarily be obscene language may be reasonable.²⁶⁹

McNamara L and Steel A, (4th ed 2006) *Criminal Laws* Federation Press, Sydney at pp 1130-1143.

262 See Karpin M and Poletti P (2008) “Common offences in the NSW Local Court: 2007” in *Sentencing Trends and Issues* Number 37 - November 2008 at <http://www.judcom.nsw.gov.au/publications/st/sentencing-trends-and-issues-no-37/st37.pdf>. There has been no more recent study at the time of publication.

263 Karpin M and Poletti P (2008) “Common offences in the NSW Local Court: 2007” in *Sentencing Trends and Issues* Number 37 - November 2008 at <http://www.judcom.nsw.gov.au/publications/st/sentencing-trends-and-issues-no-37/st37.pdf>.

264 (NSW) *Summary Offences Act 1988* s 4(1).

265 *Stutsel v Reid* (1990) 20 NSWLR 661.

266 (NSW) *Summary Offences Act 1988* s 4(2).

267 As noted by Simpson J in *Burns v Seagrave* [2000] NSWSC 77.

268 (NSW) *Summary Offences Act 1988* s. 4A(1).

269 See eg *Keft v Fraser* [1986] ACLD 35142.

It would appear for both these offences that you need to intend to behave offensively (consistent with the principles of criminal responsibility), although the issue has not been authoritatively determined.²⁷⁰

It is a defence to a charge of offensive conduct or language that the accused has a reasonable excuse for the conduct.²⁷¹ For example, if the behaviour is almost a “reflex action” to “a sudden outrageous outburst of provocation, this could be a reasonable excuse.”²⁷²

8.7 Damage to Property

It is a summary offence to damage or deface fountains, shrines, monuments, statues and war memorials under the *Summary Offences Act*.²⁷³ The possible penalties are quite severe, ranging from \$440 for damaging fountains²⁷⁴ up to \$4400 (for wilfully damaging war memorials and the like).²⁷⁵ You may also be liable to pay restoration costs up to \$2200,²⁷⁶ with the Court even being able to order you to personally repair the damage where the offence involves war memorials, shrines, monuments and statues.²⁷⁷ Under the ***Graffiti Control Act 2008*** a person who intentionally affixes placard or paper or marks any premises with paint, chalk or any other material faces a possible penalty of up to \$440.²⁷⁸

The *Local Government Act 1993* contains a number of offences of damage to property, such as breaking glass in a public place²⁷⁹ or the wilful destruction of notices or signs.²⁸⁰

270 See *Jeffer v Graham* (1987) 8 NSWLR 292 (CL Div), which somewhat ambiguously indicated this to be the case. A divergence of authority is evident in two cases outside of NSW: *Pregelj and Wurrumurra v Manison* (1988) 31 A Crim R 383 (NTCCA) and *Pfeifer* (1996) 68 SASR 285 (SASC Full Court).

271 (NSW) *Summary Offences Act 1988* ss 4(3) and 4A(2).

272 *Karpik v Zisis* (1979) 5 Petty Sessions Review 2055 at 2056.

273 (NSW) *Summary Offences Act 1988* ss 7-8.

274 (NSW) *Summary Offences Act 1988* ss 7.

275 (NSW) *Summary Offences Act 1988* s 8(2).

276 (NSW) *Summary Offences Act 1988* s 33.

277 (NSW) *Summary Offences Act 1988* s 30A(1) and (5).

278 (NSW) *Graffiti Control Act 2008* s 6.

279 (NSW) *Local Government Act 1993* s 630. The maximum penalty is \$1100 under section 630 of the Act or \$220 by way of a penalty notice under the Regulation: see (NSW) *Local Government (General) Regulation 2005* cl 398 and Schedule 12.

280 (NSW) *Local Government Act 1993* s 667. The maximum penalty is \$2200 under the Act with the

8.8 Engaging in Dangerous Activities

It is an offence to climb on or jump from buildings or bridges, towers and so on so as to risk the safety of others, including by abseiling, jumping or parachuting.²⁸¹ It is a defence to do so with reasonable excuse.²⁸² The maximum penalty is \$1100 or 3 months gaol, or both.²⁸³

9 Special Areas

Increasingly, there are specific NSW and federal laws relating to conduct in special areas, such as the Opera House and iconic locations on the Sydney foreshore. The offences and police powers generally mirror those discussed elsewhere, although their application is uneven. The “grab-bag” nature of the laws reflects the reactive context in which many of them were introduced – in particular, concerns around security for the Sydney Olympics (resulting in powers given to the Sydney Harbour Foreshore Authority) and the “No War”²⁸⁴

matter not able to be dealt with by penalty notice.

281 (NSW) *Summary Offences Act 1988* s 8A(1).

282 (NSW) *Summary Offences Act 1988* s 8A(2).

283 (NSW) *Summary Offences Act 1988* s 8A(1).

284 Where two protestors scaled the Sydney Opera House and painted the words “No War” on its

protest on the Sydney Opera House.

To make this chapter easier to understand, the key geographical or descriptive element of the laws is highlighted in **bold** below. Also, you should note:

- The authority of the Sydney Harbour Foreshore Authority extends to The Rocks, Darling Harbour, Pyrmont/Ultimo, the White Bay Power Station, the Rozelle railway yards, Ballast Point and the Australian Technology Park in Redfern. The Authority also manages the Circular Quay promenades, the Conservatorium of Music, King Street Wharf promenade and the Luna Park reserve (see map at **Appendix B**). However, some powers only apply to public areas within these precincts. These areas are described in this Chapter as the **Sydney Harbour foreshore**.
- The **Royal Botanical Gardens and Domain**, and the **Centennial Park and Moore Park** areas in Sydney are covered by regulations which establish Trusts to administer the lands.²⁸⁵ Sometimes different laws apply to these areas within the same Regulation.²⁸⁶
- **Sydney Olympic Park** is administered by a corporation, the Sydney Olympic Park Authority, which oversees Telstra Stadium, Sydney Superdome, the Sydney Showground, the Millennium Parklands (including Bicentennial Park), other parks and facilities and the Sydney Olympic Park Development Area.²⁸⁷
- The Sydney Harbour Federation Trust administers a number of old defence sites and other special Commonwealth lands, which are gradually being returned to the public. These are North Head Artillery School, Middle Head - Georges Heights, Woolwich Dock & Parklands, Cockatoo Island, Snapper Island, Macquarie Lightstation and the former Marine Biological Station (at the southern end of Camp Cove). These sites are described in this Chapter as the **Sydney Harbour Federation sites**.
- You should also note that police may have additional powers in respect of people attending particular events. The *Major Events Act 2009* (NSW) allows for certain events to be declared 'major events' and deals with such matters as crowd management and personal conduct at such events. Similarly,

side.

²⁸⁵ See (NSW) *Royal Botanical Gardens and Domain Trust Act 1980* and (NSW) *Royal Botanical Gardens and Domain Trust Regulation 2008* and the (NSW) *Centennial Park and Moore Park Trust Act 1983* and the (NSW) *Centennial Park and Moore Park Trust Regulation 2009*.

²⁸⁶ See (NSW) *Royal Botanical Gardens and Domain Trust Regulation 2008* Parts 3 and 4.

²⁸⁷ (NSW) *Sydney Olympic Park Authority Act 2001* and the (NSW) *Sydney Olympic Park Authority Regulation 2007*.

the *Motor Sports (World Rally Championship) Act 2009 (NSW)* applies to declared rally events and deals with such matters as directions by police officers at those events.²⁸⁸

9.1 Loitering or “Moving People On”

Under laws introduced prior to the Olympics, *authorised officers*²⁸⁹ may direct you to leave certain public areas on the **Sydney Harbour foreshore** if you:

- are causing annoyance or inconvenience to others, or
- are trespassing in closed areas, or
- have committed an offence under the Regulation.²⁹⁰

It is an offence not to comply with such a direction, provided you have been warned that failure to comply constitutes an offence.²⁹¹ The maximum penalty is a fine of up to \$2200.²⁹² The police or a ranger may use reasonable force to physically remove you from the area if you fail to comply.²⁹³

Authorised officers also have “move on” powers in relation to the following parks in Sydney:

- the **Royal Botanical Gardens and Domain**
- **Centennial Park and Moore Park**
- **Sydney Olympic Park**

If directed,²⁹⁴ you are obliged to leave if you have entered the area unlawfully or are causing annoyance or inconvenience to others.²⁹⁵ If you refuse to leave,

288 A police officer may give a direction to a person on a road on which a rally event is being conducted, or on public or private land adjacent to, or in the vicinity of, that road, if the police officer believes on reasonable grounds that it is necessary for the safety of that or any other person from the conduct of the rally event. See *(NSW) Motor Sports (World Rally Championship) Act 2009* s. 9 (1).

289 Police, the Authority and rangers possess the power: *(NSW) Sydney Harbour Foreshore Regulation 2006* cl 24(1).

290 *(NSW) Sydney Harbour Foreshore Regulation 2006* cl 23(1).

291 *(NSW) Sydney Harbour Foreshore Regulation 2006* cl 23(1) and (4).

292 *(NSW) Sydney Harbour Foreshore Regulation 2006* cl 23(1).

293 *(NSW) Sydney Harbour Foreshore Regulation 2006* cl 23(2) and (3).

294 Variously, Rangers, Directors and police officers are basically given the same powers under the regulations: see, for example, *(NSW) Royal Botanical Gardens and Domain Trust Regulation 2008* cl 3, 14(b), 16 and 17 and *(NSW) Centennial Park and Moore Park Trust Regulation 2009* cl 27(1).

295 *(NSW) Royal Botanical Gardens and Domain Trust Regulation 2008* cl 16(1); *(NSW) Centennial Park and Moore Park Trust Regulation 2009* cl 27(1); *(NSW) Sydney Olympic Park Authority Regulation 2007* cl 30(1).

you may be removed²⁹⁶ and liable to substantial penalties.²⁹⁷

Authorised officers²⁹⁸ on **Sydney Harbour Federation sites** have similar powers to direct you to leave the land immediately, and to use reasonable force if you refuse, if they hold a reasonable belief you have committed, or are committing, an offence under the Regulations.²⁹⁹ Officers must identify themselves and give a warning.³⁰⁰ The maximum penalty for non-compliance is \$550.³⁰¹

9.2 Identification

When requested, you must identify yourself in the following areas:

- the **Sydney Harbour foreshore**,
- the **Royal Botanical Gardens and Domain**,
- **Centennial Park and Moore Park**
- **Sydney Olympic Park**

if an authorised officer reasonably suspects that you have committed an offence.³⁰² Provided that you have been warned, it is an offence, punishable by a fine of up to \$2200, to fail to comply with a request that you identify yourself.³⁰³

296 (NSW) *Royal Botanical Gardens and Domain Trust Regulation 2008* cl 16(2); (NSW) *Centennial Park and Moore Park Trust Regulation 2009* cl 27(4); (NSW) *Sydney Olympic Park Authority Regulation 2007* cll 30(2) and (3).

297 For the Royal Botanical Gardens and Domain the fine is \$1100 or, if dealt with by way of a penalty notice, \$175: (NSW) *Royal Botanical Gardens and Domain Trust Regulation 2008* cll 16(1), 23, Schedule 1 and the (NSW) *Royal Botanical Gardens and Domain Trust Act 1980* s 22B. For Centennial Park and Moore Park the fine is \$1100 or \$195 by way of a penalty notice: (NSW) *Centennial Park and Moore Park Trust Regulation 2009* cll 27(6), 46 and Schedule 1 and the (NSW) *Centennial Park and Moore Park Trust Act 1983* s 24. For Sydney Olympic Park, the offence is only made out if a person has been warned; if so, the fine is \$2200 or \$200 if dealt with as a penalty notice: (NSW) *Sydney Olympic Park Authority Regulation 2007* cll 30(1), 30(5), 33, Schedule 1 and the (NSW) *Sydney Olympic Park Authority Act 2001* s 79.

298 There are a wide range of people who may exercise these powers including employees of the Trust, police and security officers: see (CTH) *Sydney Harbour Federation Trust Regulations 2001* cl 27.

299 (CTH) *Sydney Harbour Federation Trust Regulations 2001* cl 31(1), (5) and (6).

300 (CTH) *Sydney Harbour Federation Trust Regulations 2001* cl 31(3).

301 (CTH) *Sydney Harbour Federation Trust Regulations 2001* cl 31(2).

302 (NSW) *Sydney Harbour Foreshore Regulation 2006* cl 22(1); (NSW) *Royal Botanical Gardens and Domain Trust Regulation 2008* cl 17(1); (NSW) *Centennial Park and Moore Park Trust Regulation 2009* cl 43(1); (NSW) *Sydney Olympic Park Authority Regulation 2007* cl 29(1) (where police can also ask for proof of age, where this is relevant).

303 (NSW) *Sydney Harbour Foreshore Regulation 2006* cl 22(2) and (3) (\$2200 fine); (NSW) *Royal*

Authorised officers on **Sydney Harbour Federation sites** again have similar powers, providing they hold a reasonable *belief* that you have committed, or are committing, an offence under the Regulations.³⁰⁴ It is an offence to fail to comply with a request for identification, provided the officer identifies him/herself and warns you.³⁰⁵ The maximum penalty is \$550.³⁰⁶

9.3 Public Assemblies

Permits are required for public assemblies in the following places:

- public areas within the **Sydney Harbour foreshore**,³⁰⁷
- on **Sydney Harbour Federation sites**³⁰⁸
- **Centennial Park and Moore Park**³⁰⁹
- on the **Sydney Harbour Bridge and ANZAC Bridge**.³¹⁰

The governing bodies for **Centennial Park and Moore Park**, the **Royal Botanical Gardens and Domain**, and **Sydney Olympic Park** also have the power to reserve parts of the land for organised activities and limit the number of people who may enter any part of the lands.³¹¹

Botanical Gardens and Domain Trust Regulation 2008 cl 17(2), 17(3), 23, Schedule 1 and the *(NSW) Royal Botanical Gardens and Domain Trust Act 1980* s 22B (\$2200 fine or \$110 if dealt with by a penalty notice). There is an additional requirement under the latter for an officer to identify himself or herself, although this will usually be unnecessary: cl 17(3)(a). *(NSW) Centennial Park and Moore Park Trust Regulation 2009* cll 43(2), 43(3), 46 and Schedule 1 and the *(NSW) Centennial Park and Moore Park Trust Act 1983* s 24 (fines of \$1100 or \$195 by way of penalty notice). For Sydney Olympic Park, the fine is \$2200 or \$200 if dealt with as a penalty notice: *(NSW) Sydney Olympic Park Authority Regulation 2007* cll 29(2), 29(3), 33, Schedule 1 and the *(NSW) Sydney Olympic Park Authority Act 2001* s 79.

304 (CTH) *Sydney Harbour Federation Trust Regulations 2001* cl 30(1).

305 (CTH) *Sydney Harbour Federation Trust Regulations 2001* cl 30(2), (3) and (4).

306 (CTH) *Sydney Harbour Federation Trust Regulations 2001* cl 30(2) and (3).

307 (NSW) *Sydney Harbour Foreshore Regulation 2006* cl 5(2). The maximum penalty for proceeding without a permit is \$2200.

308 (CTH) *Sydney Harbour Federation Trust Regulations 2001* cll 11(1) and 25(1). The maximum penalty for proceeding without a permit is \$1100: cl 11(1).

309 (NSW) *Centennial Park and Moore Park Trust Regulation 2009* cl 13(1)(f). The maximum penalty for proceeding without a permit is \$1100 or \$260 by way of a penalty notice: *(NSW) Centennial Park and Moore Park Trust Regulation 2009* cll 13(1)(f), 46 and Schedule 1 and the *(NSW) Centennial Park and Moore Park Trust Act 1983* s 24.

310 (NSW) *Roads Regulation 2008* cl 52(1)(d) (the permit is obtainable from the Roads and Traffic Authority). The maximum penalty for failure to obtain a permit is \$550.

311 (NSW) *Royal Botanical Gardens and Domain Trust Regulation 2008* cll 4(d) and 6(1)(a); *(NSW) Centennial Park and Moore Park Trust Regulation 2009* cll 8(1), 10(2)(h); *(NSW) Sydney Olympic Park Authority Regulation 2007* cl 5(1)(a) and (b).

You may address public assemblies in the **Domain** during the day without consent but consent is needed to do so at night.³¹² Consent is also required to address public assemblies in the **Royal Botanical Gardens**.³¹³

Consent is also often required to use loudspeakers and public address systems in special areas.³¹⁴

9.4 Trespass

It is a summary offence punishable by \$22,000 or 2 years gaol, or both, to enter or remain at the **Sydney Opera House** as a trespasser.³¹⁵ If such trespass is with intent (including attempts) to cause damage, seriously disrupt the operations of the Opera House, or commit any offence punishable by imprisonment or arising under the *(NSW) Summary Offences Act 1988*, the penalty may be 7 years gaol.³¹⁶ This substantially increases the penalties for numerous summary offences such as offensive language, so long as they are committed on the grounds of the Opera House as a trespass.³¹⁷

It is an offence to enter or remain in the **Royal Botanical Gardens, Centennial Park, Moore Park** and **Sydney Olympic Park** when they are closed. These offences are punishable by substantial fines.³¹⁸

312 *(NSW) Royal Botanical Gardens and Domain Trust Regulation 2008* cl 20(1)(b). The maximum penalty is \$550 or a fixed fine of \$82 if dealt with by a penalty notice: see cl 23, Schedule 1 of the *(NSW) Royal Botanical Gardens and Domain Trust Regulation 2008* and the *(NSW) Royal Botanical Gardens and Domain Trust Act 1980* s 22B.

313 *(NSW) Royal Botanical Gardens and Domain Trust Regulation 2008* cll 19(1)(b), 20(1)(b) and 21. The maximum penalty is \$550 or a set fine of \$82 if dealt with by a penalty notice: see cl 23, Schedule 1 of the *(NSW) Royal Botanical Gardens and Domain Trust Regulation 2008* and the *(NSW) Royal Botanical Gardens and Domain Trust Act 1980* s 22B.

314 See, for example, *(NSW) Royal Botanical Gardens and Domain Trust Regulation 2008* cll 10(f) and 21; *(NSW) Centennial Park and Moore Park Trust Regulation 2009* cl 27(b).

315 *(NSW) Sydney Opera House Trust Act 1961* s 28A.

316 *(NSW) Sydney Opera House Trust Act 1961* ss 28B and 28D. Offences under 28B and 28D are table 1 offences under section 260(1) of the *(NSW) Criminal Procedure Act 1986* – that is, indictable offences that are to be dealt with summarily unless the prosecutor or person charged elects otherwise.

317 The usual penalty for offensive language is a maximum fine of \$660: see *(NSW) Summary Offences Act 1988* s 4A.

318 For the Royal Botanical Gardens, see *(NSW) Royal Botanical Gardens and Domain Trust Regulation 2008* cl 18(2) (\$1100 fine). There is a fixed fine of \$115 if dealt with by a penalty notice: see cl 23, Schedule 1 of the *(NSW) Royal Botanical Gardens and Domain Trust Regulation 2008* and the *(NSW) Royal Botanical Gardens and Domain Trust Act 1980* s 22B. For Centennial Park and Moore Park, see *(NSW) Centennial Park and Moore Park Trust Regulation 2009* cll 11(2), 27(1)(a), 27(6), 46 and Schedule 1 and the *(NSW) Centennial Park and Moore Park Trust Act 1983* s 24 (\$1100 fine or \$130 under cl 11 or \$1195 under cl 27 by way of a penalty notice). For Sydney Olympic Park, the fine is \$2200 or \$200 if dealt with as a penalty notice: *(NSW) Sydney Olympic Park Authority Regulation 2007* cll 30(1)(c), 33, Schedule 1 and the *(NSW) Sydney Olympic Park Authority Act 2001* s 79.

On **Sydney Harbour Federation sites**, you must not enter closed places, or swim or take vessels into the water around the sites without consent.³¹⁹

Intentionally or recklessly damaging the **Sydney Opera House** (or attempting to do so) carries a maximum penalty of 5 years gaol.³²⁰

The uses of the **Royal Botanical Gardens and Domain**, as well as **Centennial Park** and **Moore Park** are regulated by various provisions prohibiting damage, destruction or interference with things on Trust lands, both natural and built.³²¹

On **Sydney Harbour Federation sites**, it is an offence to damage, deface, destroy, interfere with or take a variety of natural, cultural and built features.³²²

9.5 Obstruction

Authorised officers may order the removal of obstructions within the following special areas:

- public areas on the **Sydney Harbour foreshore**³²³
- **Sydney Harbour Federation sites**³²⁴
- **Sydney Olympic Parkland**³²⁵
- **Centennial Park and Moore Park**³²⁶

The order may be given to the person who caused, or person using, the obstruction or encroachment.³²⁷ Failing to comply with an order is an

319 (CTH) *Sydney Harbour Federation Trust Regulations 2001* cl 17(1), 19(4), 20(1), 22, 23 and 25. The maximum penalty is either \$1100 (regarding vessels) or \$550 (entering closed places or swimming).

320 (NSW) *Sydney Opera House Trust Act 1961* ss 28C and 28D. If the damage is less than \$5000, the offences are table 2 offences under section 260(2) of the (NSW) *Criminal Procedure Act 1986* – that is, indictable offences that are to be dealt with summarily unless the prosecutor elects otherwise. If more than \$5000 damage, they are table 1 offences under section 260(1) of the (NSW) *Criminal Procedure Act 1986* – that is, indictable offences that are to be dealt with summarily unless the prosecutor or person charged elects otherwise.

321 For the Royal Botanical Gardens and Domain, the maximum penalty is \$1100 or a set fine of \$85 to \$500 if dealt with by a penalty notice: (NSW) *Royal Botanical Gardens and Domain Trust Regulation 2008* cl 10, 23, Schedule 1 and the (NSW) *Royal Botanical Gardens and Domain Trust Act 1980* s 22B. For Centennial Park and Moore Park, the maximum penalty is \$1100 or various fines of between \$95 and \$500 if dealt with as penalty notices: (NSW) *Centennial Park and Moore Park Trust Regulation 2009* cl 16, 46 and Schedule 1 and the (NSW) *Centennial Park and Moore Park Trust Act 1983* s 24.

322 (CTH) *Sydney Harbour Federation Trust Regulations 2001* cl 10(1) and (3). The maximum penalty is \$1100.

323 (NSW) *Sydney Harbour Foreshore Regulation 2006* cl 24(1) and (6)

324 (CTH) *Sydney Harbour Federation Trust Regulations 2001* cl 33(1). See also cl 34 regarding the power to direct cars to be moved.

325 (NSW) *Sydney Olympic Park Authority Regulation 2007* cl 31(1).

326 (NSW) *Centennial Park and Moore Park Trust Regulation 2009* cl 15(2).

offence.³²⁸ In any event, police or others may remove the obstruction and recover from you any reasonable expenses incurred.³²⁹

You must not obstruct someone in the performance of their duties or fail to comply with reasonable directions from authorised officers relating to the good order, management and enjoyment of the following areas:

- the **Royal Botanical Gardens and Domain**³³⁰
- **Centennial Park and Moore Park**³³¹
- **Sydney Olympic Park**³³²

9.6 Offensive Conduct and Other Activities

Authorised officers have wide powers to regulate activities on **Sydney Harbour Federation sites, Centennial Park and Moore Park and Sydney Olympic Park**. It is variously an offence to act in a manner that is disorderly, offensive, indecent, disturbing, annoying, or which unduly interferes with the amenity of the land.³³³ These complement, or operate in the alternative to, “move on” powers in special areas (see 9.1 above).

Camping, erecting banners and climbing trees without consent are, along with

327 (NSW) *Sydney Harbour Foreshore Regulation 2006* cl 24(2); (CTH) *Sydney Harbour Federation Trust Regulations 2001* cl 33(2); (NSW) *Sydney Olympic Park Authority Regulation 2007* cl 31(2); (NSW) *Centennial Park and Moore Park Trust Regulation 2009* cl 15(2).

328 (NSW) *Sydney Harbour Foreshore Regulation 2006* cl 24(3) (the maximum penalty is \$2200); (CTH) *Sydney Harbour Federation Trust Regulations 2001* cl 33(3) (the maximum penalty is \$550); (NSW) *Sydney Olympic Park Authority Regulation 2007* cll 31(3), 33, Schedule 1 and the (NSW) *Sydney Olympic Park Authority Act 2001* s 79 (a maximum penalty of \$2200 or \$200 as a penalty notice); (NSW) *Centennial Park and Moore Park Trust Regulation 2009* cl 15(2), 46 and Schedule 1 and the (NSW) *Centennial Park and Moore Park Trust Act 1983* s 24 (a maximum penalty of \$1100 or \$130 by way of penalty notice).

329 (NSW) *Sydney Harbour Foreshore Regulation 2006* cl 24(4) and (5); (CTH) *Sydney Harbour Federation Trust Regulations 2001* cl 33(6) and (7); (NSW) *Sydney Olympic Park Authority Regulation 2007* cl 31(4) and (5); (NSW) *Centennial Park and Moore Park Trust Regulation 2009* cl 15(3).

330 (NSW) *Royal Botanical Gardens and Domain Trust Regulation 2008* cl 14. The maximum penalty is \$1100 or a set fine of \$175 if dealt with by way of a penalty notice: see cl 23, Schedule 1 of the (NSW) *Royal Botanical Gardens and Domain Trust Regulation 2008* and the (NSW) *Royal Botanical Gardens and Domain Trust Act 1980* s 22B.

331 (NSW) *Centennial Park and Moore Park Trust Regulation 2009* cl 26(d) and (e), 46 and Schedule 1 and the (NSW) *Centennial Park and Moore Park Trust Act 1983* s 24 (a maximum penalty of \$1100 or \$195 by way of penalty notice).

332 (NSW) *Sydney Olympic Park Authority Regulation 2007* cll 13(1)(d) and (e), 33, Schedule 1 and the (NSW) *Sydney Olympic Park Authority Act 2001* s 79 (a maximum penalty of \$1100 or \$150 as a penalty notice).

333 (CTH) *Sydney Harbour Federation Trust Regulations 2001* cl 19(1) and (2) (a maximum penalty of \$550 in all circumstances); (NSW) *Sydney Olympic Park Authority Regulation 2007* cll 13(1), 33, Schedule 1 and the (NSW) *Sydney Olympic Park Authority Act 2001* s 79 (a maximum penalty of \$1100 or \$150 as a penalty notice); (NSW) *Centennial Park and Moore Park Trust Regulation 2009* cll 26, 46 and Schedule 1 and the (NSW) *Centennial Park and Moore Park Trust Act 1983* s 24 (a maximum penalty of \$1100 or \$195 by way of penalty notice).

failing to comply with safety directions and other activities, variously banned on **Sydney Harbour Federation sites, Sydney Olympic Parkland** and in **Centennial Park and Moore Park**.³³⁴

Camping and the erection of structures without consent are banned in the **Royal Botanical Gardens and Domain**, with authorised officers able to require their removal, or remove them themselves.³³⁵

334 See (CTH) *Sydney Harbour Federation Trust Regulations 2001* cl 19(3), 21, 22, 23 and 25 (the maximum penalty is \$550 in all cases); (NSW) *Sydney Olympic Park Authority Regulation 2007* cl 4, 33, Schedule 1 and the (NSW) *Sydney Olympic Park Authority Act 2001* s 79 (a maximum penalty of \$2200 or \$200 as a penalty notice); (NSW) *Centennial Park and Moore Park Trust Regulation 2009* cl 15, 16, 18, 46 and Schedule 1 and the (NSW) *Centennial Park and Moore Park Trust Act 1983* s 24 (a maximum penalty of \$1100 or between \$95 and \$500 by way of penalty notice).

335 (NSW) *Royal Botanical Gardens and Domain Trust Regulation 2008* cl 7(1), (2) and (3). The maximum penalty is \$1100 or a set fine of \$175 if dealt with by way of a penalty notice: see cl 23, Schedule 1 of the (NSW) *Royal Botanical Gardens and Domain Trust Regulation 2008* and the (NSW) *Royal Botanical Gardens and Domain Trust Act 1980* s 22B.

10 Lock-down Areas

In the aftermath of the Cronulla riots in 2005, Parliament was recalled from its summer recess to pass legislation granting extra-ordinary emergency powers to the police to prevent or control public disorders in authorised areas (so-called lock-down areas).

The special powers are dealt with schematically here, notwithstanding that most community protest action will be non-violent and peaceful. Peaceful protest can turn violent through no fault of your own, due to the conduct of others. Furthermore, the police powers apply to all those in, or entering, the area. For example, police can stop and search all vehicles or search all people in the area that is locked-down (without the need to hold any reasonable suspicion that, for example, an offence has been committed).

Terrorism powers allow for similar actions by police, but are not dealt with further here.

10.1 Authorisation

Special police powers may be invoked by an authorisation granted by the Commissioner of Police, or a Deputy or Assistant Commissioner.³³⁶ No other police officers may give such an authorisation (the power is non-delegable).

Authorisation can only be granted if the Commissioner of Police, or a Deputy or Assistant Commissioner has reasonable belief that a large riot is occurring or is about to occur and the exercise of the special powers is reasonably necessary to control or prevent the disorder.³³⁷ The nature and extent of the special powers to be conferred must be appropriate to the public disorder that is occurring or threatened.³³⁸

10.2 Scope of Authorisation

The authorisation may apply to a particular area so as to prevent or control a public disorder or to specific roads so as to prevent people travelling to an area to involve themselves in a riot.³³⁹ In certain circumstances, the police may

³³⁶ (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 87F(1).

³³⁷ (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 87D(1).

³³⁸ (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 87D(2).

³³⁹ (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 87E.

exercise the special powers outside the authorised areas (see 10.5 below)

All police officers may exercise the special powers conferred by an authorisation.³⁴⁰

Authorisation must not exceed 48 hours, except where the Supreme Court so allows.³⁴¹

10.3 Identification

Police may ask you to identify yourself (and provide proof) if you are in an authorised area or on an authorised road and the police reasonably suspect your involvement or interest in a public disorder.³⁴² A failure to comply carries a maximum penalty of \$5500 or 12 months imprisonment.³⁴³

Before exercising this power, police must show they are a police officer, give their name and place of duty, and provide reasons for the request.³⁴⁴ A warning that you are obliged to comply with a request for identification and that failure to comply constitutes an offence should also be given as soon as reasonably practicable after making the request.³⁴⁵

10.4 Cordons and Roadblocks

Police have the power to cordon off areas or set up roadblocks for the purpose of exercising stop and search powers or to prevent people entering or leaving authorised areas without permission.³⁴⁶ Police generally do not have the right to stop you leaving the area.³⁴⁷

340 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 87H.

341 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 87G.

342 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 87L(1) and (4).

343 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 87L(2) and (3).

344 See (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 201(1), (2A) and (3)(g). Unless it is a search made under a covert search warrant: s 201(3AA). A covert search warrant is a special type of search warrant issued when it is considered necessary for the entry and search of premises without the knowledge of any occupier of the premises: see (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 46C.

345 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 201(2C). A warning need not be given if you have subsequently complied: s 201(2C).

346 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 87I(1).

347 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 87I(2).

10.5 Search and Seizure: Cars and Other Items

Police may stop and search all vehicles in the authorised area or road and detain that vehicle for as long as is reasonably necessary to conduct a search.³⁴⁸ The car itself, mobile phones or other things may also be seized (generally for up to seven days) if the seizure will assist in preventing or controlling a public disorder.³⁴⁹ Other things also may be seized if the officer reasonably suspects the thing provides evidence of a serious indictable offence.³⁵⁰

The special powers may be exercised at any time where a police officer:

- has reasonable suspicion that a riot is occurring or is about to occur; and
- has a reasonable suspicion that the occupants of the car have participated or intend to participate in the public disorder; and
- has obtained oral or written approval from a police officer of the rank of Inspector or above³⁵¹

Approval is not to be given unless the police officer is satisfied that the officer seeking to exercise the power has reasonable grounds for suspecting that a riot is occurring or is about to occur and the occupants of a car have participated or intend to participate in the public disorder.³⁵²

An officer is to cease exercising these special powers 3 hours after approval was given for the exercise of these powers or if the officer is notified that an application for an authorization has been granted or refused.³⁵³

When exercising these powers, police have an obligation to show they are a police officer, give their name and place of duty, and provide reasons for the request.³⁵⁴

10.6 Search and Seizure: People

Police may stop and search all people in the authorised area or road and

348 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 87J.

349 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 87M(1)(a) and (2).

350 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 87M(1)(b).

351 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 87N.

352 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 87N(2).

353 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 87N(3).

354 See (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 201(1),(2), (3)(b), (3)(e) and (3)(f). Unless it is a search made under a covert search warrant: s201 (3AA).

detain them for as long as is reasonably necessary to conduct a search.³⁵⁵ The police may also seize mobile phones and other things for seven days (usually) if the seizure will assist in preventing or controlling a public disorder. An officer may also seize things the officer reasonably suspects provides evidence of a serious indictable offence.³⁵⁶ You should note that the police do not have to issue a receipt for things seized in the exercise of these powers.³⁵⁷

In exercising these powers, police have an obligation to show they are a police officer, give their name and place of duty, and provide reasons for the request.³⁵⁸

11 In the Car

355 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 87K.

356 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 87M(1) and (2).

357 Normally, the (NSW) *Law Enforcement (Powers and Responsibilities) Regulations 2005* (at Reg 8) require receipts to be issued for things seized in the execution of a search warrant or crime scene warrant or dangerous articles seized under s85 or s87 of (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002*. However, there are no regulations requiring receipts to be issued where things are seized pursuant to s87M.

358 See (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 201(1), (2), (3)(a), (3)(e) and (3)(f). Unless it is a search made under a covert search warrant: s201(3AA).

Police have quite extensive powers regarding, for example, the search and seizure of cars. In particular, police have gained a number of powers to assist them to prevent or investigate serious crimes, including drugs and terrorist offences. They are mentioned here as non-violent protestors may get caught up in the exercise of these powers, as the powers often differ according to where the car is and what class of vehicle it is, rather than what someone has been doing.

11.1 Identification

Police may ask you to identify yourself or others if you are the owner, driver or passenger of a car that police reasonably suspect has been used to commit an indictable offence,³⁵⁹ or to prevent or investigate terrorism,³⁶⁰ and provide proof of your identity.³⁶¹

Failure to do so correctly (or, where you are asked to identify others, to the fullest extent possible) is an offence unless you have a reasonable excuse.³⁶² The penalties are severe, carrying a maximum penalty of \$5500 or 12 months gaol, or both.³⁶³

Before exercising this power, police must show they are a police officer, give their name and place of duty, and provide reasons for the request.³⁶⁴ A warning that you are obliged to comply with a request for identification and that failure to comply constitutes an offence should also be given as soon as reasonably practicable after making the request.³⁶⁵

359 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 14.

360 Police may request a person's name and address (and it must be provided) if they have a reasonable suspicion that a person (or the vehicle in which they are in) is the target of an authorisation for the use of special powers under the (NSW) *Terrorism (Police Powers) Act 2002* (or they are found in suspicious circumstances in the company of the target of the authorisation), or they are in an area that is the target of an authorisation: see (NSW) *Terrorism (Police Powers) Act 2002* s 16(1), (2) and (3).

361 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 19 and (NSW) *Terrorism (Police Powers) Act 2002* s 16(4).

362 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 15, 16 and 17.

363 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* ss 15, 16 and 17 and (NSW) *Terrorism (Police Powers) Act 2002* s 16(2) and (3).

364 See (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 201(1), (2A) and (3)(g). Unless it is a search made under a covert search warrant: s201(3AA).

365 See (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 201(2C) and (NSW) *Terrorism (Police Powers) Act 2002* s 23(3). A warning need not be given if you have subsequently complied: (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 201(2C) and (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 201(2C) and (NSW) *Terrorism (Police Powers) Act 2002* s 23(3). Under the terrorism laws, the requirement extends only to the exercise of powers involving a request that a person is obliged to comply with the law, which would seem to limit it

11.2 Search and seizure

Police search and seizure powers regarding vehicles depend on somewhat arbitrary and confusing distinctions about where the vehicle is at the time.

Police have the general power to stop, search and detain vehicles if they hold a reasonable suspicion that the vehicle contains stolen goods,³⁶⁶ drugs,³⁶⁷ anything used or intended to be used in serious offences³⁶⁸ or people whom the police have grounds to exercise arrest, search or detention powers against.³⁶⁹

Where the vehicle is on or near a public place or school, police have more specific powers to stop, search and detain vehicles if the police have a reasonable suspicion there is a dangerous article in the car or there is a risk to public safety near the public place or school and that the exercise of the powers may lessen the risk.³⁷⁰

Finally, police have the power to stop, enter, search and detain *classes of* vehicles:

- on roads,
- on road related areas, or
- in public places or schools,

but only in the following circumstances:

- if they have reasonable grounds to suspect the vehicle was used in the commission of an indictable offence (and stopping and searching may provide evidence of the offence)³⁷¹

to identification: see s 23(3).

366 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 36(1)(a).

367 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 36(1)(e).

368 See (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 36(1)(b) and (c) (which includes, but is not limited to, indictable offences: see s 35) and (CTH) *Crimes Act 1914* s 3T(1) and (2). Under the federal powers, the police must also hold a reasonable suspicion that using their powers in this way is necessary for both forensic purposes and because of the serious and urgent nature of the circumstances: s 3T(1)(b) and (c). If the police use these powers, they can use whatever assistance is necessary and use reasonable force, provided they do the search publicly and do not detain the vehicle for longer than is reasonable: s 3U.

369 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 36A.

370 The power to stop, search and detain for dangerous articles only extends to where the vehicle is in a public place or school whereas the public safety power may be exercised where the vehicle is in the vicinity of a public place or school: see (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 36(1)(d) and (f).

371 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 36(2)(a).

- if they have reasonable grounds to suspect there is a serious risk to public safety near a public place or school (and stopping and searching may lessen the risk),³⁷² or
- to prevent or investigate terrorist acts.³⁷³

They also have ancillary powers to facilitate the exercise of these powers, such as to give reasonable directions,³⁷⁴ and erect roadblocks.³⁷⁵ For the purpose of conducting a search pursuant to these powers, police must not detain the vehicle for any longer than is reasonably necessary.³⁷⁶

It is generally a precondition to using these powers that the police officer must show you they are a police officer, give you their name and place of duty, and provide reasons for the request.³⁷⁷

11.3 Defect Notices

The police or Roads and Traffic Authority officers have the power to inspect a vehicle for the purpose of deciding whether it is roadworthy.³⁷⁸ If requested, you must allow the police or the Authority all reasonable facilities for making such an inspection.³⁷⁹

If they find your vehicle defective, they can issue a defect notice, impose conditions on the use of the vehicle or stop you from driving it.³⁸⁰ Police have

372 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 36(2)(b).

373 Provisions relating to terrorism actually straddle the types of search and seizure powers noted here at 11.2. For example, a police officer may, without a warrant, stop, enter and search a vehicle, and anything in or on the vehicle, if the officer suspects on reasonable grounds that the vehicle or a person in the vehicle is the target of an authorisation, or the vehicle is in an area that is the target of an authorisation under the (NSW) *Terrorism (Police Powers) Act 2002*: s 18.

374 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 38.

375 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 37. Unless police have a reasonable suspicion that a roadblock is necessary and the circumstances are serious and urgent, senior police are generally required to authorise a roadblock: ss 40 and 41.

376 (NSW) *Terrorism (Police Powers) Act 2002* s 18(2).

377 See, for example, (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 201(1) and (3)(b) and (3)(e) and the (NSW) *Terrorism (Police Powers) Act 2002* s 23(1). Unless it is a search made under a covert search warrant: (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s201(3AA).

378 (NSW) *Road Transport (Vehicle Registration) Act 1997* s 26(1). This includes the power to enter a car: s 26(1B).

379 (NSW) *Road Transport (Vehicle Registration) Act 1997* s 26(1A). The penalty for failing to comply is \$2200. This provision applies to a registered operator or owner of, or any person in charge of or having the custody of or selling or having in possession for sale or otherwise of the vehicle: s 26(1A).

sometimes used conditions in defect notices to disperse campaigners (by, for example, requiring them to take the vehicle to a certain place within 24 hours).

12 Forestry Areas

Forests have historically been a common battleground for environmental protests, with the presence of campaigners, loggers, forestry officers and police often contributing to tensions and high levels of arrest.

Authorised officers have wide powers to regulate conduct and activities in forestry areas (State Forests, timber reserves or flora reserves).³⁸¹ You should note that you may be liable to compensate State Forests for costs or expenses, losses or damages if you are convicted of an offence under NSW forestry laws.³⁸²

12.1 Loitering or “Moving People On”

Under the *Forestry Regulation 2009* it is an offence, in a range of circumstances, to remain in a forestry area after being requested by an authorised officer to leave.³⁸³ Circumstances that may give rise to such a request include:

- if you are causing “inconvenience” to other persons in the area,³⁸⁴
- if you are otherwise breaching the Act or the Regulation,³⁸⁵ or
- when logging operations, bushfires, high fire danger conditions, controlled burning and others are present and/or being undertaken, so long as State Forests or an officer believes that there is a danger or potential danger to the safety of persons or property, or a potential for conflicting uses or there is a risk of a significant adverse impact on the area.³⁸⁶

It will only be an offence if you have been previously told that the officer is, in fact, an authorised officer and that it is an offence not to comply with the request.³⁸⁷

An authorised officer is allowed to physically remove you, should you fail to

381 See *(NSW) Forestry Regulation 2009* cl 3(1), which defines forestry areas as meaning State Forests, timber reserves and flora reserves. The following material in this Chapter which concerns the *Forestry Act 1916* deals with State Forests, timber reserves and flora reserves in the same way (for example, ss 38A and 38B).

382 *(NSW) Forestry Act 1916* s 48. See also the general provision under *(NSW) Victims Support and Rehabilitation Act 1996* s 77B.

383 *(NSW) Forestry Regulation 2009* cl 11(4). The maximum penalty for failure to do so is \$2200 or \$100 by penalty notice: see *(NSW) Forestry Regulation 2009* clauses 11(4), 74 and Schedule 3.

384 *(NSW) Forestry Regulation 2009* cl 11(1)(b)(i).

385 *(NSW) Forestry Regulation 2009* cl 11(1)(a).

386 *(NSW) Forestry Regulation 2009* cl 11(2).

387 *(NSW) Forestry Regulation 2009* cl 11(6).

leave after being requested to do so.³⁸⁸ In exercising this power, they are only entitled to use the amount of force that is reasonable and necessary to remove you.³⁸⁹

12.2 Identification

Laws governing forestry areas require people to give their name and address in two circumstances. Failure to do so or to give false information is an offence.³⁹⁰

First, you must state your name and address if an officer of State Forests reasonably suspects that an offence under the relevant Act has been committed.³⁹¹ In addition, authorised officers also have broad powers to require the owner or custodian of a vehicle or, indeed, any other person to assist (including the writing of a signed statement) in identifying the driver allegedly guilty of committing an offence under these laws.³⁹² Failure to do so or the giving of false information is an offence unless the person can show that they could not with “reasonable diligence” have established the name or address of the driver.³⁹³

Second, if you are driving a car or motor bike in forestry areas, you must produce your driver’s licence and state your name and address if requested by an authorised officer.³⁹⁴

12.3 Trespass

State Forests has the power to prohibit people indefinitely from entering a forestry area by displaying a conspicuous notice in the area.³⁹⁵ To enter such an area without prior written permission from the Commission is an offence.³⁹⁶

12.4 Engaging in dangerous activities

Certain activities and recreational pursuits that involve risking the safety of the

388 (NSW) *Forestry Regulation 2009* cl 12.

389 See *R v Turner* [1962] VR 30.

390 (NSW) *Forestry Act 1916* s 38A(4) and 38B(3) (maximum penalty of \$2200 or \$100 under a penalty notice). For provisions dealing with penalty notices, see (NSW) *Forestry Regulation 2009* clause 73, Schedule 3.

391 (NSW) *Forestry Act 1916* s 38A(2).

392 (NSW) *Forestry Act 1916* s 38B(2).

393 (NSW) *Forestry Act 1916* s 38B(4).

394 (NSW) *Forestry Act 1916* s 38A(3).

395 (NSW) *Forestry Regulation 2009* clauses 13(1) and 14(1).

396 (NSW) *Forestry Regulation 2009* clauses 13(4) and 14(3). The maximum penalty is \$2200 or \$100 by penalty notice: see (NSW) *Forestry Regulation 2009* clauses 13(4), 14(3), 73 and Schedule 3.

person or the safety of other persons or damaging the environment are banned in forestry areas.³⁹⁷ These include abseiling, base jumping, bungy jumping, rock climbing, caving and hang gliding.³⁹⁸

12.5 Interfering with management activities

The *Forestry Regulation 2009* creates numerous offences involving damage, obstruction or interference to things in forestry areas. These include damage to, or destruction of, vegetation; erecting fences or other obstructions; defacing signs or notices erected by the Commission; and damaging drainage structures and features.³⁹⁹ It is also an offence to interfere with timber harvesting or hauling equipment in a forestry area, or even to approach within 100 metres of timber harvesting or hauling equipment being operated by a person in a forestry area.⁴⁰⁰

12.6 Camping

By displaying a conspicuous notice in the area, State Forests has the power to prohibit or regulate camping activities in forestry areas.⁴⁰¹ It is an offence to fail to comply with any relevant direction, prohibition or condition imposed.⁴⁰²

12.7 Lighting of fires

Lighting of fires in forestry areas is strictly regulated. It is an offence to leave a lit match or cigarette in a forestry area.⁴⁰³ You may also only light fires for certain authorised purposes, such as for management activities or meals or warmth,⁴⁰⁴ and you must do so in accordance with the Regulation (either in an approved fireplace or 4.5 metres from logs, stumps or trees in cleared

397 (NSW) *Forestry Regulation 2009* clause 15(1). The maximum penalty is \$2200 or a \$100 flat penalty if dealt with by a penalty notice: see clauses 15(1), 73 and Schedule 3.

398 (NSW) *Forestry Regulation 2009* clause 15(2).

399 (NSW) *Forestry Regulation 2009* clause 15(3). The maximum penalty is \$2200 or a \$100 flat penalty if dealt with by a penalty notice: see clauses 15(3), 73 and Schedule 3.

400 (NSW) *Forestry Regulation 2009* clause 67. The maximum penalty is \$2200 or a \$1000 (not \$100) flat penalty if dealt with by a penalty notice: see clauses 63, 74 and Schedule 3.

401 (NSW) *Forestry Regulation 2009*, clause 31(1) and (2).

402 (NSW) *Forestry Regulation 2009*, clause 31(4). The maximum penalty is \$2200 or a \$100 flat penalty if dealt with by a penalty notice: see clauses 31(4), 73 and Schedule 3.

403 (NSW) *Forestry Regulation 2009* clause 21. The maximum penalty is \$2200 or a \$350 flat penalty if dealt with by a penalty notice: see clauses 21, 73 and Schedule 3.

404 (NSW) *Forestry Regulation 2009*, clauses 17(1), 18, 19 and 20. The maximum penalty for non-compliance is \$2200 or variously a \$350 or \$550 flat penalty if dealt with by a penalty notice: see clauses 17(1), 18, 19, 20, 73 and Schedule 3.

areas).⁴⁰⁵ Authorised officers have an overriding power to direct that an activity cease, should he or she believe there is a risk of fire.⁴⁰⁶

405 (NSW) *Forestry Regulation 2009*, clause 17(1)(a). The maximum penalty for non-compliance is \$2200 or a \$350 flat penalty if dealt with by a penalty notice: see clauses 17(1)(a), 73 and Schedule 3.

406 (NSW) *Forestry Regulation 2009* clause 26. The maximum penalty for non-compliance is \$2200 or a \$550 flat penalty if dealt with by a penalty notice: see clauses 28, 73 and Schedule 3.

13 National Parks and Protected Areas

Much protest has revolved around the proposed logging of pristine areas, with campaigners seeking the protection of the area through its declaration as a national park. Protest actions may spill onto national parks, say, where an extension of the park is sought or a proposed activity within a protected area is opposed (such as filming within a wilderness area).

There are over 600 national parks and other protected areas situated in NSW. Of these, only Booderee National Park (formerly Jervis Bay National Park) is a Commonwealth Park. For this reason, this Chapter focuses on the NSW provisions. Comparable Commonwealth provisions are noted in the footnotes.

NSW Park Authorities have wide powers to regulate conduct and activities in national parks and other protected areas, such as historic sites, state conservation areas, regional parks, nature reserves, Karst conservation reserves or Aboriginal areas (hereafter called “parks”). It is important to remember that, for second and subsequent offences, you may be excluded from parks for so long as the authority determines.⁴⁰⁷

13.1 Loitering or “Moving People On”

An authorised officer may direct you to leave a NSW park or any part of a park if, in the opinion of the authorised officer, you:

- are trespassing,
- are causing annoyance or inconvenience to others, or
- have committed an offence under the Act or Regulation.⁴⁰⁸

It is an offence to fail to comply with such a direction, punishable by a fine of up to \$3300.⁴⁰⁹

An authorised officer may physically remove you (or any car, vessel, animal or other property with you) if you refuse to “move on”.⁴¹⁰

There is no requirement – as is common elsewhere – for the officer to tell you who they are or that it is an offence not to comply with their request.⁴¹¹ You

407 (NSW) *National Parks and Wildlife Regulation 2009* clause 33. It is an offence to attempt to re-enter a park when excluded: clause 34(3). The maximum penalty is \$3300 or a \$500 flat penalty if dealt with by a penalty notice: see clauses 33(3), 96 and Schedule 2.

408 (NSW) *National Parks and Wildlife Regulation 2009* clause 8(1). See also (CTH) *Environment Protection and Biodiversity Conservation Regulations 2000* Reg 12.60(1).

409 (NSW) *National Parks and Wildlife Regulation 2009* clause 8(2). See also (CTH) *Environment Protection and Biodiversity Conservation Regulations 2000* Reg 12.60(2) (maximum penalty for failing to comply is \$2200) and 12.60(3) (requirements for rangers or wardens to identify themselves).

410 (NSW) *National Parks and Wildlife Regulation 2009* clause 8(3).

411 See generally (NSW) *National Parks and Wildlife Regulation 2009* clause 8.

must not re-enter a park for 24 hours after being removed or directed to leave.⁴¹²

13.2 Identification

Laws governing NSW parks require you to give your name and address in two circumstances. Failure to do so or to give false information is an offence.⁴¹³

First, you must state your name and address if an officer of the National Parks and Wildlife Service reasonably suspects that an offence under the relevant Act has been committed.⁴¹⁴ Complementing this power, authorised officers have broad powers to require the owner or custodian of a vehicle or, indeed, any other person to assist (including the writing of a signed statement) in identifying the driver allegedly guilty of committing an offence under these laws.⁴¹⁵ Failure to do so or the giving of false information is an offence unless the person can show that they could not with “reasonable diligence” have established the name or address of the driver.⁴¹⁶

Second, if you are driving a car or motor bike in these areas, you must produce your driver’s licence and state your name and address if requested by an authorised officer.⁴¹⁷

13.3 Public Assemblies

In NSW parks, it is an offence to organise, attend or participate in a public meeting, demonstration or gathering involving more than 40 persons (or such other number as is stated in a plan of management or notice, or given to a park user, whichever is the lesser).⁴¹⁸ The maximum penalty is \$3300 or \$300

412 (NSW) *National Parks and Wildlife Regulation 2009* clause 8(4).

413 (NSW) *National Parks and Wildlife Act 1974* s 157(3) (maximum penalty of \$1100 or \$500 under a penalty notice). For provisions dealing with penalty notices, see (NSW) *National Parks and Wildlife Regulation 2009* clause 96 and Schedule 2.

414 (NSW) *National Parks and Wildlife Act 1974* s 157(1). See also (CTH) *Environment Protection and Biodiversity Conservation Regulations 2000* Reg 14.01(1) - under these regulations you can also be asked for an identification document that proves your name and address. The maximum penalty under the federal laws is \$1100 for failing to comply: Reg 14.01(3). This is not a matter that can be dealt with by way of penalty notice: see Reg 14.02 and Schedule 10.

415 (NSW) *National Parks and Wildlife Act 1974* s 158(1).

416 (NSW) *National Parks and Wildlife Act 1974* s 158(3).

417 (NSW) *National Parks and Wildlife Act 1974* s 157(2).

418 (NSW) *National Parks and Wildlife Regulation 2009* clauses 22(1)(b). Compare to (CTH) *Environment Protection and Biodiversity Conservation Regulations 2000* Reg 12.31(1) and (2)(a),(b) & (c) (where there is a ban on public gatherings of more than 15 people except as organised by the the Director, a family gathering or a group gathering that has been determined by the Director to which 12.31(1) does not apply).

if dealt with by penalty notice.⁴¹⁹ You would need consent to use public address systems or loudspeakers at such assemblies.⁴²⁰

13.4 Erection of Banners

It is an offence to erect or exhibit any political advertising matter, sign, bill or poster in a NSW park.⁴²¹ The maximum penalty is \$3300 or \$500 if dealt with by penalty notice.⁴²²

13.5 Trespass

NSW park authorities may regulate uses within parks by displaying notices or giving oral directions.⁴²³ These restrictions may include closing or reserving the park (or sections of it) to the public, or particular sectors of the public.⁴²⁴ It is an offence not to comply with these notices or directions.⁴²⁵ If you are trespassing in parks, an authorised officer has the power to direct you to move, or failing compliance, physically remove you from the park.⁴²⁶ The offence is to fail to comply with the direction to move, rather than the initial trespass itself.⁴²⁷

419 (NSW) *National Parks and Wildlife Regulation 2009* clauses 22(1)(b), 96 and Schedule 2. Compare to (CTH) *Environment Protection and Biodiversity Conservation Regulations 2000* Reg 12.31(1) (where the maximum penalty is \$1100). This is not a matter that can be dealt with by way of penalty notice: see Reg 14.02 and Schedule 10.

420 (NSW) *National Parks and Wildlife Regulation 2009* clause 13(1)(c) and (3). See also (CTH) *Environment Protection and Biodiversity Conservation Regulations 2000* Reg 12.27(1)(b).

421 (NSW) *National Parks and Wildlife Regulation 2009* clause 17(1)(d). See also (CTH) *Environment Protection and Biodiversity Conservation Regulations 2000* Reg 12.40(1).

422 (NSW) *National Parks and Wildlife Regulation 2009* clause 17(1), 96 and Schedule 2. See also (CTH) *Environment Protection and Biodiversity Conservation Regulations 2000* Reg 12.40(1) (where the maximum penalty is \$550). This is not a matter that can be dealt with by way of penalty notice: see Reg 14.02 and Schedule 10.

423 (NSW) *National Parks and Wildlife Regulation 2009* clauses 4 and 5. Compare to (CTH) *Environment Protection and Biodiversity Conservation Regulations 2000* Reg 12.23(4) (where the prohibition or restrictions must usually be published).

424 (NSW) *National Parks and Wildlife Regulation 2009* clause 4(1)(b) and (c). See also (CTH) *Environment Protection and Biodiversity Conservation Regulations 2000* Reg 12.23(3) and (3A).

425 (NSW) *National Parks and Wildlife Regulation 2009* clauses 4(2) and 5(2). The maximum penalty is \$3300 or a \$300 flat penalty if dealt with by a penalty notice: see clauses 4(2), 5(2), 96 and Schedule 2. See also (CTH) *Environment Protection and Biodiversity Conservation Regulations 2000* Reg 12.23(1) (where the maximum penalty is \$5500). This is not a matter that can be dealt with by way of penalty notice: see Reg 14.02 and Schedule 10.

426 (NSW) *National Parks and Wildlife Regulation 2009* clause 8(1)(a). cf (CTH) *Environment Protection and Biodiversity Conservation Regulations 2000* Reg 12.60(1) (where there is no express power to physically remove you).

427 (NSW) *National Parks and Wildlife Regulation 2009* clause 8(2). The maximum penalty is \$3300 or a \$500 flat penalty if dealt with by a penalty notice: see clauses 8(2), 96 and Schedule 2. See also

13.6 Engaging in Dangerous Activities

Certain activities and recreational pursuits that involve risking the safety of the person or the safety of other persons or damaging the environment are banned in NSW parks except with permission.⁴²⁸ These include abseiling, base jumping, bungee jumping, rock climbing, caving and hang gliding.⁴²⁹

13.7 Interfering with Management Activities

The *National Parks and Wildlife Regulation 2009* establishes several offences relating to interference with park management activities.⁴³⁰ These include:

- destroying, damaging, removing, or interfering with things used for the control of animals,⁴³¹
- removing, damaging, destroying or obscuring signs or notices,⁴³²
- interfering with, or obstructing, actions taken by a park authority for the purpose of the care, control and management of the park.⁴³³

The maximum penalty for these offences is \$3300 or a \$500 flat penalty if dealt with by a penalty notice.⁴³⁴

(*CTH*) *Environment Protection and Biodiversity Conservation Regulations 2000* Reg 12.60(2) (where the maximum penalty is \$2200). This is not a matter that can be dealt with by way of penalty notice: see Reg 14.02 and Schedule 10.

428 (*NSW*) *National Parks and Wildlife Regulation 2009* cl 22(1)(d), 22(3) and 22(4). The maximum penalty is \$3300 or variously a \$300 or \$500 flat penalty if dealt with by a penalty notice: see cl 22(1)(d), 22(3), 22(4), 96 and Schedule 2. Compare to (*CTH*) *Environment Protection and Biodiversity Conservation Regulations 2000* Reg 12.26(5) and (6) (where public notice needs to be given of the area set aside and conditions attached). The maximum Commonwealth penalty is \$3300: Reg 12.26(2). This is not a matter that can be dealt with by way of penalty notice: see Reg 14.02 and Schedule 10.

429 (*NSW*) *National Parks and Wildlife Regulation 2009* cl 22(2). Compare to (*CTH*) *Environment Protection and Biodiversity Conservation Regulations 2000* Regs 12.17 and 12.26(1) (where caving is not included as a permissible activity but entering caves etc is not allowed).

430 (*NSW*) *National Parks and Wildlife Regulation 2009* clause 25. Compare to (*CTH*) *Environment Protection and Biodiversity Conservation Regulations 2000* Regs 12.12 and 12.13 (where the offences are more about damaging, defacing etc the natural features or heritage of the park, as well as signs, objects, roads or tracks and structures). These are not matters that can be dealt with by way of penalty notice: see Reg 14.02 and Schedule 10.

431 (*NSW*) *National Parks and Wildlife Regulation 2009* clause 25(a) and (b).

432 (*NSW*) *National Parks and Wildlife Regulation 2009* clause 25(c).

433 (*NSW*) *National Parks and Wildlife Regulation 2009* clause 25(d).

434 (*NSW*) *National Parks and Wildlife Regulation 2009* clause 25, 96 and Schedule 2. Compare to (*CTH*) *Environment Protection and Biodiversity Conservation Regulations 2000* Reg 12.12 and 12.13 where the penalties are \$5500. These are not matters that can be dealt with by way of penalty notice: see Reg 14.02 and Schedule 10.

13.8 Offensive Conduct

Various behaviour and activities are regulated in NSW parks. You must not behave in a disorderly manner, use insulting or offensive language, commit a nuisance or an act of indecency or cause annoyance or inconvenience to others,⁴³⁵ or take drugs.⁴³⁶ You are also not allowed to use skateboards, roller blades or bikes on walking tracks.⁴³⁷

13.9 Camping

Camping in NSW parks must generally be in designated areas⁴³⁸ and for up to 21 days only.⁴³⁹ However, camping in accordance with a plan of management⁴⁴⁰ or in remote areas⁴⁴¹ may be allowed if not prohibited by a notice.⁴⁴²

13.10 Lighting of fires

The lighting of fires in NSW parks is strictly regulated. Fires must only be lit in

435 (NSW) *National Parks and Wildlife Regulation 2009* clause 13(1)(a) and 13(1)(c). The maximum penalty is \$3300 or a \$300 flat penalty if dealt with by a penalty notice: see clauses 13(1)(a), 13(1)(c), 96 and Schedule 2. Compare to (CTH) *Environment Protection and Biodiversity Conservation Regulations 2000* Reg 12.26(2). This is not a matter that can be dealt with by way of penalty notice: see Reg 14.02 and Schedule 10.

436 (NSW) *National Parks and Wildlife Regulation 2009* clause 13(1)(b). The maximum penalty is \$3300 or a \$300 flat penalty if dealt with by a penalty notice: see clauses 13(1)(b), 96 and Schedule 2.

437 (NSW) *National Parks and Wildlife Regulation 2009* clause 13(2). The maximum penalty is \$3300 or a \$300 flat penalty if dealt with by a penalty notice: see clauses 13(2), 96 and Schedule 2.

438 (NSW) *National Parks and Wildlife Regulation 2009* clause 10(1). The maximum penalty for non-compliance is \$3300 or a \$300 flat penalty if dealt with by a penalty notice: see clauses 10(1), 96 and Schedule 2. Compare to (CTH) *Environment Protection and Biodiversity Conservation Regulations 2000* Regs 12.28(1) and 12.29. Under the Commonwealth scheme, the maximum penalty for non-compliance or failing to comply with a direction to camp in a designated area is \$1100 or a \$220 flat penalty if dealt with by a penalty notice: see Reg 14.02, Schedule 10 and section 497(2) of the (CTH) *Environment Protection and Biodiversity Conservation Act 1999*.

439 (NSW) *National Parks and Wildlife Regulation 2009* clause 10(2)(a), although a plan of management or notice may vary this: (NSW) *National Parks and Wildlife Regulation 2009* clause 10(2)(b) and (c). The maximum penalty for camping illegally is \$3300 or a \$300 flat penalty if dealt with by a penalty notice: see clauses 10(2), 96 and Schedule 2. Compare to (CTH) *Environment Protection and Biodiversity Conservation Regulations 2000* Reg 12.28(4)(e) where the length of stay is at the discretion of the Director.

440 (NSW) *National Parks and Wildlife Regulation 2009* clause 10(4)(b).

441 If there is no plan of management, camping is permitted over one kilometre away from camping spots, picnic areas and roads: (NSW) *National Parks and Wildlife Regulation 2009* clause 10(4)(c).

442 (NSW) *National Parks and Wildlife Regulation 2009* clause 10(6). If camping is done in defiance of a notice, the maximum penalty is \$3300 or a \$300 flat penalty if dealt with by a penalty notice: see clauses 10(6), 96 and Schedule 2.

designated fireplaces or cleared areas (where no designated fireplaces exist), and in accordance with any notices, and so on.⁴⁴³

14 Commonwealth Land

Over the years, protest actions have sometimes happened on Commonwealth land, either because of the location (for example, Parliament House) or the

443 (NSW) *National Parks and Wildlife Regulation 2009* clause 15(1). The maximum penalty for non-compliance is \$3300 or (variously) a \$300 or \$500 flat penalty if dealt with by a penalty notice: see clauses 14(1), 96 and Schedule 2. See also (CTH) *Environment Protection and Biodiversity Conservation Regulations 2000* Reg 12.30A. Maximum penalties vary from \$1650 (for using fuel prohibited under a management plan) to \$5500 for acting contrary to a fire ban, not using designated fireplaces, using portable stoves and BBQs outside of designated areas and leaving fires unattended: Reg 12.30A(1)-(5). These are not matters that can be dealt with by way of penalty notice: see Reg 14.02 and Schedule 10.

subject-matter (for example, Pine Gap).

14.1 Loitering or “Moving People On”

Under the *(CTH) Public Order (Protection of Persons and Property) Act 1971*, the Federal Police have the power to move on or disperse individuals or groups of people in certain circumstances.

It is an offence for a person to fail to quit “premises” in a Territory or owned by the Commonwealth when requested to by an officer.⁴⁴⁴

The Federal Police can also direct an assembly of 12 or more people to disperse if an officer of the rank of sergeant or above reasonably apprehends that there may be a threat of violence or property damage.⁴⁴⁵ If, after 15 minutes, the assembly has not dispersed or reduced to less than twelve, then all persons to whom the direction was made may be guilty of an offence, punishable by up to six months gaol.⁴⁴⁶

It is important to remember that a “reasonable excuse” for failing to comply with a direction is a defence to these charges,⁴⁴⁷ even though the High Court has construed the meaning of “reasonable excuse” in a similar context very narrowly.⁴⁴⁸

14.2 Identification

It is an offence to fail to give your name and address to an officer if requested to do so when found on prohibited Commonwealth land.⁴⁴⁹

14.3 Hindering Police and Resisting Arrest

It is a federal offence to knowingly obstruct, hinder, intimidate or resist a Commonwealth public official in the performance of their functions.⁴⁵⁰

444 *(CTH) Public Order (Protection of Persons and Property) Act 1971* ss 11(2)(c). The maximum penalty is \$2200.

445 *(CTH) Public Order (Protection of Persons and Property) Act 1971* s 8(1)(a).

446 *(CTH) Public Order (Protection of Persons and Property) Act 1971* s 8(3). The maximum penalty is 6 months gaol.

447 *(CTH) Public Order (Protection of Persons and Property) Act 1971* ss 8(3B) and 11(2B).

448 *Taikato v The Queen* (1996) 70 ALJR 960.

449 *(CTH) Crimes Act 1914* s 89(2). The maximum penalty is \$1100. “Prohibited Commonwealth land” must be identified with a notice to the effect that trespassing upon the land is prohibited: *(CTH) Crimes Act 1914* s 89(5).

450 *(CTH) Criminal Code Act 1995* s 149.1(1). The penalty is a maximum of two years gaol: s 149.1(1).

14.4 Unlawful Assembly

You may be guilty of an offence if you are part of a group assembled for a common purpose on Commonwealth premises or in a Territory if the group conducts itself in a certain way. Specifically, it is an offence if the group behaves in a way “that gives rise to a reasonable apprehension that the assembly will be carried on in a manner involving unlawful physical violence to persons or unlawful damage to property.”⁴⁵¹ Each member of the group can be guilty of an offence.⁴⁵²

14.5 Obstruction

Under the *Public Order (Protection of Persons and Property) Act* it is an offence to take part in an assembly on Commonwealth premises or in a Territory and thereby engage in “unreasonable obstruction.”⁴⁵³

14.6 Offensive Behaviour and Language

Commonwealth legislation makes it an offence for a person who is trespassing on Commonwealth premises or in a Territory to “behave in an offensive or disorderly manner.”⁴⁵⁴ The defence of reasonable excuse is available.⁴⁵⁵

14.7 Trespass

Under federal law, it is an offence to trespass on prohibited Commonwealth land, such as Defence Force installations.⁴⁵⁶ More generally, it is an offence to trespass on “premises” in a Territory or the Commonwealth without a reasonable excuse.⁴⁵⁷ Greater penalties apply where the trespass is

451 (CTH) *Public Order (Protection of Persons and Property) Act 1971* s 6(1). The offence is punishable by a fine of up to \$2200: s 6(1).

452 (CTH) *Public Order (Protection of Persons and Property) Act 1971* s 6(1).

453 (CTH) *Public Order (Protection of Persons and Property) Act 1971* s 9. The offence is punishable by a fine of up to \$2200: s 9(1).

454 (CTH) *Public Order (Protection of Persons and Property) Act 1971* ss 11(2)(b) & 12(2)(b). The offence is punishable by a fine of up to \$2200: s 11(2) and 12(2).

455 (CTH) *Public Order (Protection of Persons and Property) Act 1971* ss 11(2B) and 12(3).

456 (CTH) *Crimes Act 1914*, s. 89(1). The maximum penalty is \$1100. “Prohibited Commonwealth land” must be identified with a notice to the effect that trespassing upon the land is prohibited: (CTH) *Crimes Act 1914* s 89(5).

457 (CTH) *Public Order (Protection of Persons and Property) Act 1971* ss 11(1) & 12(1). The maximum penalty is \$1100. The defence of reasonable excuse exists under 11(2B) and 12(5).

aggravated by behaviour such as obstruction, disorderly conduct and a refusal to leave.⁴⁵⁸

14.8 Damage to Property

A person who wilfully damages property while taking part in an assembly in a Territory or on Commonwealth premises, or damages protected property such as diplomatic and consular premises, is guilty of an offence.⁴⁵⁹

It is also an indictable offence to cause property damage in excess of \$1,500 while taking part in an assembly in a Territory or on Commonwealth property.⁴⁶⁰

14.9 Violent Disorder

Under the *Public Order (Protection of Persons and Property) Act 1971*, it is an offence for a person to take part in an assembly in a Territory or wholly or partly on Commonwealth premises in certain circumstances. Specifically, it will be an offence if the conduct “gives rise to a reasonable apprehension that the assembly will be carried on in a manner involving unlawful physical violence to persons or unlawful damage to property”.⁴⁶¹ It is also an offence to intentionally do an act of physical violence.⁴⁶² Similar offences exist for diplomatic and consular premises.⁴⁶³

Wherever an action takes place, you should make clear that the action you are taking is *non-violent* to ensure that no reasonable person could be put in fear for their safety.

14.10 Interference with Rights

458 (CTH) *Public Order (Protection of Persons and Property) Act 1971* ss 11(2) & 12(2). The maximum penalty is \$2200.

459 (CTH) *Public Order (Protection of Persons and Property) Act 1971* ss 6(2) & 15(2). The maximum penalty is 12 months gaol.

460 (CTH) *Public Order (Protection of Persons and Property) Act 1971* s 7(1). The maximum punishment is three years imprisonment: s 7(1).

461 (CTH) *Public Order (Protection of Persons and Property) Act 1971* s 6(1). The maximum penalty is \$2200.

462 (CTH) *Public Order (Protection of Persons and Property) Act 1971* s 6(3). The maximum penalty is \$2200.

463 (CTH) *Public Order (Protection of Persons and Property) Act 1971* s 15(1) and (3). The maximum penalty is \$2200: s 15(1).

It is an indictable offence for any person to use threats or intimidation of any kind to hinder or interfere with the free exercise, by any other person, of any political right or duty.⁴⁶⁴

464 (CTH) *Crimes Act 1914* s 28. The maximum penalty is 3 years imprisonment.

15 Arrest and Detention

If you are planning non-violent action, be sure that you are familiar with the contents of this and the following Chapter. Some people may be prepared to be arrested and to meet the consequences that may flow from arrest; others may not. Knowing how to act lawfully, knowing your rights and what to do if you are arrested will help you to deal with the stresses related to arrest and detention, and beyond. This Chapter outlines a number of legal and practical considerations surrounding arrest. Laws regarding arrest are slightly different under Commonwealth and State legislation, with the common law continuing to play a key role in both jurisdictions.

It has already been noted that both the Federal and NSW Governments have passed numerous laws relating to terrorism. For the purposes of this Chapter, two things should be noted.

First, the Federal Government has changed the legislative framework regarding the arrest, questioning and detention of terrorist suspects (including extending the period of detention and imposing an obligation to answer questions, as well as secrecy provisions).⁴⁶⁵

Second, the Federal Government has dramatically broadened the range of interventions or mechanisms to deal with terrorist suspects in this area, through the advent of control orders⁴⁶⁶ and preventative detention orders.⁴⁶⁷

Most protest actions fall well outside the ambit of these changes, notwithstanding the wide definition of terrorism.⁴⁶⁸ Beyond noting this change,

465 For further information on these provisions, see, for example, Part III, Division 3 of the *(CTH) Australian Security Intelligence Organisation Act 1979*, the *(CTH) Crimes Act 1914* ss 23CA and 23DA and the following websites: www.utscommunitylaw.org.au; www.civilrightsnetwork.org; and www.amcran.org

466 Certain Courts have the power to impose control orders on a person if the Court is satisfied that the making of the order would substantially assist in preventing a terrorist act or that a person has provided training to, or received training from, a terrorist organisation. Such orders may impose restrictions on a person's movements, communications, use of technology, activities, type of work and so on. The provisions are complex, with extensive procedural requirements governing the seeking, granting and review of such orders. Control orders may be in force for up to 12 months, although there is no bar on successive orders being made. There is a five year maximum penalty for failing to comply with a control order: see Division 104 of the *(CTH) Criminal Code Act 1995*; see also *(CTH) Anti-Terrorism Act (No.2) 2005* which is the relevant amending act.

467 Preventative detention orders can be issued for up to 48 hours where a terrorist threat is imminent or where a terrorist act has just occurred and there is a need to preserve evidence. Police cannot question a person who is subject to a preventative detention order, except to ascertain their identity. If a person is subject to such an order, they can contact their family and a lawyer to let them know they are safe, but not that they are subject to an order. As with control orders, there are extensive procedural requirements governing preventative detention orders: see Division 105 of the *(CTH) Criminal Code Act 1995*; see also *(CTH) Anti-Terrorism Act (No.2) 2005* which is the relevant amending act. The NSW Government has passed complementary legislation that allows for preventative detention for up to 14 days: *(NSW) Terrorism (Police Powers) Act 2002*: Part 2A.

468 A terrorist act is defined under both Commonwealth and NSW legislation to exclude advocacy,

therefore, arrest, control and detention powers for terrorist suspects are not considered further here.

15.1 Police Discretion

The operation of the criminal law allows for, and depends on, a considerable amount of discretion to be exercised by those who administer it – police, prosecutors and courts. Police on the street often have the most discretion. For example, they can decide:

- *whether or not to take action.* Often police may decide not to act because the offence is minor or taking action against certain individuals would aggravate a situation (such as in a riot),
- *what action to take.* Police may caution offenders, issue court attendance notices (CANs), issue Field Warrants or use their powers of arrest,
- *what charges to lay.* The same circumstance may give rise to a variety of potential offences. Police may decide to “throw the book at you” or lay relatively minor charges.

Given this discretion, it is no surprise that your conduct may often determine which course of action the police take.

15.2 When Can an Arrest Be Made?

15.2.1 Arrest powers of police

a) Under NSW laws

You can be arrested by a police officer if they have a warrant⁴⁶⁹ or they hold reasonable grounds for suspecting you have just committed, or are committing, an offence; you have committed a serious indictable offence;⁴⁷⁰ or you are unlawfully at large.⁴⁷¹ Most arrests are made on the basis of this

protest, dissent or industrial action, except where it is intended:

- to cause serious harm that is physical harm to a person, or
- to cause a person’s death, or
- to endanger the life of a person, other than the person taking the action, or
- to create a serious risk to the health or safety of the public or a section of the public.

See (CTH) *Criminal Code Act 1995* s 100.1 and (NSW) *Terrorism (Police Powers) Act 2002* s 3(3) and section 3 more generally.

469 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 101. A warrant is a written authority from a magistrate, judge or Justice of the Peace to arrest a person.

470 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 99(1).

471 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 102.

standard of a “reasonable suspicion”,⁴⁷² rather than under a warrant. In forming such a suspicion, police officers can rely on material that would not be admissible in Court (such as inferences and hearsay).⁴⁷³

When exercising the power of arrest in NSW, police have an obligation to provide reasons for the exercise of the power, show they are a police officer, and give their name and place of duty.⁴⁷⁴

Police are not supposed to use arrest powers for the purpose of taking proceedings for an offence unless they hold a reasonable suspicion that this course of action is necessary to achieve certain purposes, including to ensure you appear at Court and evidence is not lost, and to preserve the safety and welfare of the public and witnesses.⁴⁷⁵

b) *Under Commonwealth laws*

The Federal police may arrest you if they hold a belief, on reasonable grounds, that you are committing, or have committed, **any** offence and proceeding by way of a summons would be unsuitable to:

- ensure you turn up for Court,
- prevent the offence or other offences being committed again,
- prevent loss or fabrication of evidence,
- prevent interference with witnesses and others, or
- preserve the safety and welfare of that person.⁴⁷⁶

15.2.2 *Arrest powers of others*

a) *Under NSW laws*

Private citizens, security guards and others such as State Forest Officers, Fisheries Officers or National Park Rangers have broadly analogous powers to arrest pursuant to the *(NSW) Law Enforcement (Powers and Responsibilities) Act 2002*. They can also arrest someone where they see that a person is in the act of committing, or has just committed, an offence or where a person has committed a serious indictable offence.⁴⁷⁷ State Forest Officers, Environment

472 Such a suspicion must be more than a “hunch”. Rather, it must be based on facts which would create a reasonable suspicion in the mind of a reasonable person.

473 *Hussien v Chong Kook Kam* [1969] 3 All ER 1626.

474 See *(NSW) Law Enforcement (Powers and Responsibilities) Act 2002* s 201(1), (2) and (3)(a).

475 *(NSW) Law Enforcement (Powers and Responsibilities) Act 2002* s 99(3).

476 *(CTH) Crimes Act 1914* s 3W(1).

477 *(NSW) Law Enforcement (Powers and Responsibilities) Act 2002* s 100. Police obviously have the right in such instances as well.

Protection Authority Officers or National Park Rangers generally do not arrest people, despite their power to do so.⁴⁷⁸

b) Under Commonwealth laws

Under Federal laws, a citizen may arrest you if they hold a belief, on reasonable grounds, that you are committing, or have committed, an **indictable** offence and proceeding by summons would not:

- ensure you turn up for Court,
- prevent the offence or other offences being committed again,
- prevent loss or fabrication of evidence,
- prevent interference with witnesses and others, or
- preserve the safety and welfare of that person.⁴⁷⁹

The arrestor has a duty to deliver you into the custody of a constable as soon as practicable.⁴⁸⁰

15.3 What is the Purpose of Arrest?

You cannot be arrested merely for the purpose of questioning or to obtain evidence.⁴⁸¹ The police need to have a reasonable “suspicion” (NSW) or “belief” (under Commonwealth law) that you have committed an offence before they can arrest you. You may then be detained for questioning.

15.4 How Can an Arrest be Made?

15.4.1 *Elements of a lawful arrest*

An arrest takes place when a police officer plainly conveys to you - by what he or she says and/or does - the impression that you are not free to leave or to refuse to accompany them.⁴⁸² Words may be sufficient.⁴⁸³ However, if you are

478 They have broad powers to disperse people and ask for details such as name and address. Failure to comply with a direction or request of such an officer is an offence and could give rise to the citizen's arrest power. Indeed, Environment Protection Authority officers have an explicit power of arrest under section 204(3) of the *(NSW) Protection of the Environment Operations Act 1997*. They do not, however, have the power to detain a person for questioning and must take the person directly to a magistrate (consistent with the common law).

479 *(CTH) Crimes Act 1914 s 3W(1)(b) and 3Z(1)*.

480 *(CTH) Crimes Act 1914 s 3Z(2)*.

481 *Williams v R (1986) 161 CLR 278; R v Foster (1993) 67 ALJR 550*.

482 *R v O'Donohue (1988) 34 A Crim R 397 and Lavery (1978) 19 SASR 515, C (1997) 93 A Crim R 81*.

483 *Alderson v Booth (1969) 2 All ER 271*.

merely asked to accompany an officer, you may not be under arrest.⁴⁸⁴ If you are in any doubt, ask the police officer whether you are under arrest. The distinction is important because it can affect the statutory obligations police have upon arrest and whether you are guilty of escaping from lawful custody.

At the time of your arrest the police officer should tell you the reasons for your arrest unless this is impractical or obvious to all concerned.⁴⁸⁵ The police do not have to tell you the precise charges that will be laid.⁴⁸⁶

It is an offence to resist arrest or incite others to do so, regardless of whether you are innocent of the offence for which you have been arrested.⁴⁸⁷ Merely lying down or refusing to co-operate is not resisting arrest, as resistance must be active. However “passive resistance” could constitute the offence of hindering police.⁴⁸⁸

15.4.2 Use of force

Police carrying out a lawful arrest are entitled to use the amount of force that is reasonable and necessary to secure the arrest or to prevent flight after arrest.⁴⁸⁹ Handcuffs can be used if they are considered necessary to prevent a person from escaping.

If more than “reasonable or necessary” force is used in arresting you, the police involved are liable to charges of assault. This issue depends on all the circumstances at the time of the arrest and will ultimately be determined by a judge or magistrate.

If you believe the force used is excessive, you should tell a lawyer as soon as possible. If you are injured you have the right to ask the police to arrange a doctor to attend to you as soon as possible. Keep a copy of the doctor’s report and make sure you inform your lawyer. Take photographs of any injuries, remembering that bruises might not be obvious for a number of days.

484 *R v O’Donohue* (1988) 34 A Crim R 397.

485 In NSW, the common law applies: *Christie v Leachinsky* (1947) [1947] AC 573; 1 All ER 567. For the Commonwealth, see 3ZD of the (CTH) *Crimes Act 1914*.

486 For example, see (CTH) *Crimes Act 1914* s 3ZD(2).

487 (NSW) *Crimes Act 1900* s 546C.

488 (NSW) *Crimes Act 1900* s 546C.

489 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 231. Previously in NSW, the common law applied: *R v Turner* [1962] VR 30. For the Commonwealth, see (CTH) *Crimes Act 1914* s 3ZC.

You may also want to make a complaint.⁴⁹⁰ See 15.10 below.

15.5 What Should I Do if I Am Arrested?

Being arrested is serious and the first few hours may be crucial to your chances of escaping conviction or emerging relatively unscathed from the experience of arrest and detention. Try to remember three things: contact, co-operation and complaint.

15.5.1 Contact

You need to speak to a lawyer as soon as possible and to ask for them to be present during questioning.

15.5.2 Co-operation

There may be little to be gained from refusing to co-operate. You should not, however, talk to police (beyond providing your name and address) without first seeking legal advice. You need to remember that *anything* you say can be used in court as evidence against you (there is no such thing as saying something “off the record”).⁴⁹¹ Without admissions, many police cases would simply not stand up in court.

15.5.3 Complaint

If you believe you have been unlawfully arrested, you should make your complaint known in the presence of an independent witness.

15.6 Detention for Questioning

Police can always ask you to accompany them to the station to answer questions but you are free to go when you please (unless they find grounds for arrest). In this situation, you are not under arrest and the police do not have to abide by the rules governing detention below (such as informing you of your rights).

Under both Commonwealth and NSW law, if you have been arrested, the police may detain you for a period of time (up to twelve hours)⁴⁹² for questioning and take you to the nearest police station to be charged.⁴⁹³ So-

⁴⁹⁰ There is the right to make such a complaint: see *(NSW) Police Act 1990* s 126.

⁴⁹¹ *(NSW) Evidence Act 1995* s 139; *(CTH) Evidence Act 1995* s 139.

⁴⁹² Minors and Aboriginal and Torres Strait Islanders may only be detained for 2 hours under Commonwealth law, unless an extension is granted: see *(CTH) Crimes Act 1914* s 23C(4)(a).

⁴⁹³ The police cannot hold a person indefinitely without charging them with an offence. They may only detain a person for a “reasonable period” (up to four hours, or twelve hours if a warrant is obtained). Similar provisions exist under both Commonwealth and NSW law: see *(CTH) Crimes Act 1914* s 23C(2) and 23D (extension only for offences carrying a penalty of 12 months or more of

called “time-outs” – for things such as transport, waiting for a lawyer or parent (for someone under 18), or waiting for medical treatment – do not count but act to extend this time.⁴⁹⁴

15.7 What May Happen When I Am in Detention?

15.7.1 Under NSW law

a) *The Custody Manager and your rights*

Once you are arrested, the police may detain you for a “reasonable period”. For this purpose, you must be brought before a senior officer at a police station. He or she is known as the Custody Manager. It is the role of the Custody Manager to explain your rights to you – more formally, they are responsible for your care, control and safety while in detention.⁴⁹⁵ Specifically, their responsibilities include:

- cautioning you as soon as practicable, including informing you of your right to remain silent and that any answers given may be used in evidence,⁴⁹⁶
- summarising the laws regarding your period in detention (including the detention warrant system) as soon as practicable,⁴⁹⁷
- giving you the opportunity to get legal advice or communicate with a friend, independent person or consular official before investigative procedures begin,⁴⁹⁸
- providing you with facilities to properly exercise your right to communicate and consult,⁴⁹⁹
- deferring investigative procedures (for a reasonable period, not exceeding

imprisonment); (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* ss 115, 116 and 118(3).

494 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 117(1) and (CTH) *Crimes Act 1914* s 23C(7).

495 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 3.

496 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 122(1)(a).

497 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 122(1)(b).

498 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* ss 123(1) and 124. In limited circumstances, the police do not need to permit communication, such as where the police fear that evidence will be destroyed or an accomplice might escape: see Police Code of Practice – CRIME (Custody, Rights, Investigation, Management and Evidence) at Annexure B. The Code of Practice is downloadable at http://www.police.nsw.gov.au/about_us/acts_and_legislations/legislation_list/code_of_practice_for_crime

499 See (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* ss 123(2), 123(4), 123(5), 124(3), and 124(5).

- 2 hours) to allow you to communicate,⁵⁰⁰
- allowing a lawyer to be present, and advise you, during investigative procedures,⁵⁰¹
- upon request, informing a person of your whereabouts,⁵⁰²
- providing an interpreter, where applicable,⁵⁰³
- arranging medical assistance where appropriate,⁵⁰⁴
- arranging reasonable refreshments and toiletry facilities for you,⁵⁰⁵
- maintaining a record of your period in custody.⁵⁰⁶

b) Search and seizure

If you are in lawful custody, upon a charge of committing an offence, police may search you and take from you anything found in the search.⁵⁰⁷ More intrusive searches may be undertaken where there are reasonable grounds to believe that the search will reveal evidence as to the commission of the offence.⁵⁰⁸

c) Fingerprints and photographs

Once you have been spoken to by the Custody Manager, the police may need to identify you. Police can take fingerprints or photos, amongst other things, where this is necessary

for identification purposes (unless you are under 14 years of age).⁵⁰⁹ This should not be necessary where you can provide other forms of identification (like your driver's licence). However, it is general practice for the police to take finger (or palm) prints if large numbers of people are being processed for

500 See (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 123(3), 123(7), 123(8), 124(4), 124(6) and 124(7) (NSW).

501 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 123(5)(b).

502 See (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* ss 126 and 127.

503 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 128.

504 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 129.

505 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 130.

506 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 131.

507 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 24.

508 See, for example, (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 138(1)(b).

509 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 133. You can write to the Commissioner and ask that these be destroyed if you are found not guilty or if no proceedings have been taken within 12 months: see (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 137A(1)-(3). The Commissioner must destroy them as soon as reasonably practicable, unless an extension to the 12 months has been granted: see ss 137A(5) and 137B.

arrest.

d) Record of interview

The police will then proceed to interview you. For most environmental offences, a written record – either in a police notebook, computer or typewriter – will suffice. If an interview takes place at the police station, the police will usually provide you with a record of the interview to sign. Signing the record means that you agree with **all** the contents of the record. You do not, however, have to sign these records, and **you should not sign anything** until you get legal advice. An unsigned record can still be used in court, but if you deny the truth of the document it is less likely to be accepted as evidence. If you are under 18, police are required to interview you in the presence of a parent or other support person in order for that interview to be admissible in court. You should consider carefully whether to accede to a supposedly ‘independent’ person nominated by police.

e) Tape or video record

Most environmental offences will not be serious enough to require an interview to be taped. The police may try to tape record or video tape the interview, but they can only do so with your consent. Until you get legal advice, refuse to let them record you. If the interview is transcribed or taped, be sure to obtain a copy. Just as importantly, as soon as you are released from custody, write down everything that has happened, including the names of witnesses you are aware of, what you told the police and what they said to you.

f) Laying of charges

The purpose of detention is for investigation and questioning.⁵¹⁰ This period is to determine what, if any, charges to lay. The charge is a statement of the precise crime(s) you are alleged to have committed and laws that are asserted to have been broken.

15.7.2 Under Commonwealth law

a) The Custody Manager and your rights

Before questioning, the police have obligations to:

- inform you of your right to talk with a friend, relative or lawyer and defer questioning to afford that opportunity;⁵¹¹
- provide facilities,⁵¹²

510 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 114(2).

511 (CTH) *Crimes Act 1914* s 23G(1).

512 (CTH) *Crimes Act 1914* s 23G(2).

- allow you to have a lawyer present at questioning (including deferring questioning until your lawyer arrives and consults with you privately).⁵¹³

b) Fingerprints, photographs, etc

The police officer in charge of the station or police officer of the rank of sergeant or above may take identification material (prints, voice recordings, handwriting samples or photos) for identification or evidential purposes.⁵¹⁴ You may consent to have such identification material taken.⁵¹⁵ If you do not consent, a police officer is allowed to take the identification material in certain circumstances, using an amount of force that is reasonable and necessary.⁵¹⁶ A different regime applies for minors and those incapable of managing their own affairs, in which case magistrates have a greater role.⁵¹⁷ Even so, prints can be taken from you so long as you are ten years old and so long as they are taken in accordance with the detailed provisions governing forensic procedures.⁵¹⁸

Except where there are special reasons for not doing so,⁵¹⁹ identification material should be destroyed as soon as practicable upon acquittal or where no conviction is recorded or, alternatively, after twelve months, where proceedings have not been instituted or have been discontinued.⁵²⁰

c) Tape or video recordings

The police officer who is required to give you certain information (such as a caution) **must**, if practicable, tape record the interchange.⁵²¹ Confessions or admissions will be inadmissible in court unless it can be shown that it was not reasonably practicable to tape record the questioning and admissions⁵²² or a tape recording of a written record of the interchange being read back to you is

513 (CTH) *Crimes Act 1914* s 23G(3).

514 (CTH) *Crimes Act 1914* s 3ZJ.

515 See, for example, (CTH) *Crimes Act 1914* s 3ZJ(2)(b), (3)(a) and (12).

516 (CTH) *Crimes Act 1914* s 3ZJ(3)(b), (3)(c) and (4). The police officer must have reasonable grounds for believing the identification material is necessary to establish a person's identity or provide evidence relating to the offence or another offence. See (CTH) *Crimes Act 1914* s 3ZJ(3)(b), (3)(c).

517 (CTH) *Crimes Act 1914* s 3ZJ(5)-(11).

518 (CTH) *Crimes Act 1914* s 3ZJ(6A).

519 For example, pending proceedings or where a magistrate is satisfied special reasons exist: see (CTH) *Crimes Act 1914* s 3ZK(2) and (3).

520 (CTH) *Crimes Act 1914* s 3ZK(1) and (2).

521 (CTH) *Crimes Act 1914* s 23U.

522 (CTH) *Crimes Act 1914* s 23V(1)(a).

made.⁵²³ You are entitled to a copy of the audio or video recording and any transcript, if prepared, within seven days.⁵²⁴

d) *Search and seizure*

The *(CTH) Crimes Act 1914* allows for you to be searched upon arrest, subject to the police forming a reasonable suspicion or belief about certain things. You may be frisked,⁵²⁵ subject to an ordinary search,⁵²⁶ have your premises searched⁵²⁷ or, more rarely, strip searched⁵²⁸ with a view to gathering seizable items⁵²⁹ or evidence regarding the offence or others. In essence, the level of intrusion of the search depends on what is suspected, with more intrusive searches – such as strip searches – being subject to greater supervision and procedures.⁵³⁰ The police have the power to seize any relevant items found in such searches.⁵³¹

As many environmental offences are minor, the power to search will generally only be for frisk searches. These can be conducted where the police reasonably suspect it is prudent to do so to determine whether you have a seizable item.⁵³²

15.8 Custody Records

Under NSW law, the Custody Manager must open a custody record and record the

523 *(CTH) Crimes Act 1914 s 23V(1)(b)*.

524 *(CTH) Crimes Act 1914 s 23V(2)*.

525 *(CTH) Crimes Act 1914 s 3ZE*. A “frisk search” is defined as: (a) a search of a person conducted by quickly running the hands over the person’s outer garments; and (b) an examination of anything worn or carried by the person that is conveniently and voluntarily surrendered by the person: s 3C.

526 *(CTH) Crimes Act 1914 s 3ZF*. An “ordinary search” means a search of a person or of articles in the possession of a person that may include: (a) requiring the person to remove his or her overcoat, coat or jacket and any gloves, shoes and hat; and (b) an examination of those items: s 3C.

527 *(CTH) Crimes Act 1914 s 3ZG*.

528 *(CTH) Crimes Act 1914 s 3ZH and 3ZI*. A “strip search” means a search of a person or of articles in the possession of a person that may include: (a) requiring the person to remove all of his or her garments; and (b) an examination of the person’s body (but not of the person’s body cavities) and of those garments: s 3C.

529 A “seizable item” means anything that would present a danger to a person or that could be used to assist a person to escape from lawful custody: *(CTH) Crimes Act 1914 s 3C*.

530 For example, a strip search must be approved by a superintendent, be conducted in private, done by a person of the same sex and must not involve cavity searches: see ss 3ZH(2)(c) and 3I of the *(CTH) Crimes Act 1914* generally.

531 See, for example, 3ZE of the *(CTH) Crimes Act 1914*. Where a search is conducted of premises, the police can only seize things in “plain view”: 3ZG.

532 *(CTH) Crimes Act 1914 s 3ZE*.

details of your detention.⁵³³ There is no such requirement under Commonwealth law.

15.9 What Happens When the Detention Period is Up?

Police must either release you, take you before a magistrate to be formally charged⁵³⁴ or give you a Court Attendance Notice (CAN) and bail.

In NSW, the Custody Manager must ensure that a copy of your custody record is given to you as soon as practicable after you are released or taken before a magistrate.⁵³⁵ There is no such requirement under Commonwealth law.

15.10 What Happens if the Arrest is Unlawful?

Where an arrest is unwarranted (for instance, there was no justification) or improper (for instance, the arrest was made for the purpose of questioning), there may be a few courses of action available to you. These will have different consequences for both you and the police concerned.

First, you may have an action under tort law for trespass to the person or false imprisonment. It is important to remember that an arrest will not be unlawful just because you are innocent. Police may arrest on a “reasonable suspicion” (in NSW) or a “reasonable belief” (under Commonwealth law). Therefore, it is only when a police officer had no grounds or unreasonable grounds for arrest that an action will be sustainable. Any such action will usually be against the State in addition to, or instead of, the police officers concerned.⁵³⁶

Second, an unlawful arrest may allow for the court to exclude certain evidence obtained during the time of the impropriety or illegality.⁵³⁷ The court’s discretion as to how it deals with such evidence is bound by the need to consider factors such as the following:

- the probative value of the evidence,

533 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 131 (cf (NSW) *Crimes Act 1900* s 356V).

534 See (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 99(4).

535 (NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 131(5) (cf (NSW) *Crimes Act 1900* s 356V(5)).

536 Under NSW law, police are not personally liable, so long as the conduct is not serious and wilful: see (NSW) *Police Act 1990* s 213; (NSW) *Employees Liability Act 1991* ss 3 and 5; (NSW) *Law Reform (Vicarious Liability) Act 1983* ss 6-10; (NSW) *Crown Proceedings Act 1988* s 5. Under Commonwealth law, the Commonwealth is jointly liable: (CTH) *Australian Federal Police Act 1979* s 64B.

537 (NSW) *Evidence Act 1995* s 138; (CTH) *Evidence Act 1995* s 138. See also *Bunning v Cross* (1978) 141 CLR 54, on which the discretion is broadly based.

- the importance of the evidence,
- the nature of the relevant offence,
- the seriousness of the improper police behaviour,
- whether the behaviour of the police was deliberate or reckless,
- whether the behaviour of the police was contrary to or inconsistent with a person's rights under the International Covenant on Civil and Political Rights,
- whether any other proceedings (for example, court, internal, Ombudsman) have been or are likely to be taken regarding the behaviour, and
- the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.⁵³⁸

Third, you may complain to the Commissioner or Ombudsman and seek disciplinary proceedings against the police concerned. If you do, you should first put your complaint in writing and deliver it by post to the Local Area Commander of the NSW Police Force.⁵³⁹ There is little point in contacting the Ombudsman first, as they generally only have an oversight function in relation to complaints against police.⁵⁴⁰ Consequently, they will regard it as a premature complaint and advise you to proceed as above.⁵⁴¹ If you are not satisfied with the response from the Local Area Commander, you should then forward your complaint and the response (if any) to the Ombudsman.⁵⁴²

538 (NSW) *Evidence Act 1995* s 138(3); (CTH) *Evidence Act 1995* s 138(3).

539 (NSW) *Police Act 1990* s 127.

540 See, for example, (NSW) *Police Act 1990* ss 146, 150(c) and 154.

541 (NSW) *Ombudsman Act 1974* s 13(4)(v).

542 They may investigate if it is in the public interest to do so and must then provide a report to the person, the Minister and the Commissioner: see (NSW) *Police Act 1990* s 156(1) and 157(1).

Text Box 15.1

Should I Exercise My Right to Silence?

The right to silence is not absolute, as there are limited exceptions.⁵⁴³ Generally speaking, however, you do not have to answer questions or write anything down. Before deciding what you will do, it is important that you first speak to a lawyer. In any event, you should keep the following in mind:

- the court cannot draw an adverse inference from the exercise of your right to remain silent,
- the police may try a number of things to get you to talk,
- admissions are regularly used to convict people, and
- a decision to remain silent may mean you are detained longer, although this will depend on whether this is “reasonable”.

If you decide not to say anything, make this clear from the outset. State your name and address and answer each and every question with something like “I do not want to say anything at this stage”. You may need to be persistent; police may try a number of conversational gambits or tacks to get you to talk.

⁵⁴³ See, for example, section 3V of the (CTH) *Crimes Act 1914*.

16 Bail

The *(NSW) Bail Act 1978* applies to almost all proceedings to do with bail, regardless of whether you are charged with Commonwealth or NSW offences.⁵⁴⁴

16.1 What is bail?

After you are charged, you will usually be either kept in police custody or released on bail. Bail is an agreement given by you to attend Court to answer a criminal charge. It is a conditional liberty since it is granted on the condition that you will provide a guarantee to appear to have the charges against you heard. The guarantee can simply take the form of your written promise to appear or you may be required to promise to forfeit a sum of money if you fail to appear. An “acceptable” person (formally called a “surety”) can also guarantee your bail. The conditions attached to bail can include restricting your movements, regular reporting to police or staying clear of certain places or people.

16.2 How do I get bail?

The police must inform you of your bail rights and obligations⁵⁴⁵ and you have the right to communicate with a lawyer in relation to the bail.⁵⁴⁶ As soon as practicable after you have been charged, the police must decide whether or not to grant bail.⁵⁴⁷ Bail may be offered to you by the police (police bail) or, if the police refuse you bail, then they must take you to the next available court sitting so that a judge can determine whether or not to grant bail (court bail).⁵⁴⁸ If you are arrested on a Friday night this can mean you might spend the weekend in the police station. If you have been in custody for more than four hours, the police have a duty to provide you with washing facilities, showers, and allow a change of clothing.⁵⁴⁹

16.3 What happens if I don't get bail?

If you are not granted bail, then you will remain in custody until the next hearing of your case or until the decision to refuse bail is reversed. There are

544 The only exception is for terrorist offences: see *(CTH) Crimes Act 1914* s 15AA.

545 *(NSW) Bail Act 1978* s 18(1)..

546 *(NSW) Bail Act 1978* s 19.

547 *(NSW) Bail Act 1978* s 18(1) and (2).

548 *(NSW) Bail Act 1978* s 18(1) and (2).

549 *(NSW) Bail Act 1978* s 21.

limits to the time allowed between a court's refusal to grant bail and your actual hearing (3 days or 8 days depending on who has refused you bail).⁵⁵⁰ If you are under 18 years old and have to be held in custody overnight you should be taken to a juvenile justice centre, if possible. This means that in many campaigns young people will be held at the local police station if arrested at a time when there is no court sitting.

You can make an application for court bail either orally before the court or you (or your solicitor, spouse, parent or guardian on your behalf) can make an application in writing. You can make further applications for bail in certain circumstances namely, when you have legal representation and you did not have such representation in your previous application, new relevant information becomes available, or your relevant circumstances change.⁵⁵¹ However, the court will not hear these if they are "frivolous" or "vexatious".⁵⁵² It is wise to be well-prepared before seeking bail or making further applications. You need to be able to present good evidence of where you will live, who can guarantee your appearance, whether you can provide financial surety and so on.

16.4 Under what circumstances do I have a right to bail?

Under the *Bail Act* there are certain circumstances in which you have a right to be released on bail. These circumstances include for example, where the offence charged is not one punishable by a prison sentence or is an offence under the *Summary Offences Act* (NSW). However, this is a qualified right. For example, you will probably not be released on bail if the police suspect you are incapacitated by drug use or if you have a history of non-compliance with bail undertakings.⁵⁵³

During protests against a World Trade Organisation meeting held at Sydney Olympic Park in late 2002, police arrested and detained about 50 protestors for up to 8 hours. Despite the fact that virtually all those arrested had a right to bail (being charged with summary and/or regulatory offences), police in all cases either refused bail or failed to make a bail determination. It was not before protestors were brought before a magistrate that they were granted bail and released. The lesson: ask for bail and, if it is refused, ask for a copy of the bail determination.

If your circumstances are such that you do not have a right to be released on bail, then whether or not you will be granted bail depends on a number of

⁵⁵⁰ (NSW) *Bail Act 1978* s 25.

⁵⁵¹ (NSW) *Bail Act 1978* ss 22A(1) & 22A(1A).

⁵⁵² See (NSW) *Bail Act 1978* s 22A(2).

⁵⁵³ (NSW) *Bail Act 1978* s 8(1) and (2).

factors, as set out in section 32 of the *Bail Act*. These are, and are limited to, the following:

- the probability of the person appearing in Court to face the charges, having regard to the person's background and community ties, and any previous failure to appear in Court and the seriousness of the offence,
- the interests of the person, having regard to things such as the need to prepare for the hearing and their physical state,
- the protection of others (such as witnesses and alleged victims),
- the protection and welfare of the community, having regard only to the nature and seriousness of the offence, prior history of complying with bail conditions and the likelihood of the person interfering with evidence, witnesses or jurors.

Unless there is evidence that you are unlikely to appear in Court or that you are likely to commit a serious offence while on bail, it is unlikely that you will be refused bail if you have been charged with one of the typical charges that arise out of non-violent action.

16.5 Will conditions be imposed on the bail?

Bail should generally be granted unconditionally.⁵⁵⁴ However, conditions may be imposed for the purpose of promoting effective law enforcement, for the protection and welfare of any specially affected person or the community, or for reducing the possibility of future offending through rehabilitation and other measures.⁵⁵⁵

For many charges involving campaigners, the circumstances will not be such as to allow the authorities to refuse bail outright. However, bail conditions can still be imposed and if they are unreasonable, you may decide not to accept them. The result is that you may still be detained.

The Court has a wide discretion as to the conditions that can be attached to the grant of bail. However, this discretion is not completely unlimited and the conditions must be no more severe than appear to the police or the Court to be required.⁵⁵⁶

16.6 What happens if I breach a bail notice or fail to appear?

If you are granted bail on certain conditions and you breach those conditions

⁵⁵⁴ (NSW) *Bail Act 1978* s 37(1).

⁵⁵⁵ (NSW) *Bail Act 1978* s 37(1)(a)-(d).

⁵⁵⁶ (NSW) *Bail Act 1978* s 37(2).

then you may be arrested.⁵⁵⁷ Accordingly, it is usually best to ask for unconditional bail. It is also an offence to fail to appear in the Court at the time and on the date contained in the bail notice.⁵⁵⁸ See **Appendix C** for a sample copy of an application for the grant of bail.

16.7 Court Attendance Notices

Arrest is supposed to be a measure of last resort. If you are accused of committing an offence the police can issue you with a Court Attendance Notice (CAN) rather than arrest you. If bail is not required, the police must provide you with a CAN or Field Warrant that contains the particulars of the offence and requires you to be at a specific Court on a specific date at a certain time.⁵⁵⁹ Field Warrants are particularly common in remote places.

The officer that provides you with the CAN must tell you that failure to attend Court may result in your arrest. It is important to retain any document issued to you. There have been occasions when the date appearing on the CAN or warrant conflicts with the date notified to the Court. If the offence with which you are charged is a summary offence and you fail to attend court as required in the CAN then the prosecution may proceed in your absence.⁵⁶⁰ An example of a CAN is set out in **Appendix D**.

Text Box 16.1

Bail and the Franklin River campaign

During the Franklin River campaign, arrested participants were granted bail on the condition that they would not return to the site where the dam was being constructed. When these conditions were challenged they were held to be within the discretion of the Court. Many people refused to accept these bail conditions and went to prison. This fact itself helped to escalate the issue and attract public attention. It is important, however, to highlight that the decision to remain in gaol is not one to be taken lightly. Gaol is not generally a safe place and careful thought and caution should be exercised before voluntarily submitting oneself to these dangers.

⁵⁵⁷ (NSW) *Bail Act 1978* s 50.

⁵⁵⁸ (NSW) *Bail Act 1978* s 51.

⁵⁵⁹ For the full particulars of what the CAN must contain, see (NSW) *Criminal Procedure Act 1986* s 175(3)-(4) and (NSW) *Local Courts (Criminal and Applications Procedure) Rule 2003* clause 17(2).

⁵⁶⁰ See, for example, (NSW) *Criminal Procedure Act 1986* s 196. The Court may not do this unless it is satisfied that the accused person had reasonable notice of the first return date or the date, time and place of the hearing: s 196(3). The magistrate has an overall discretion to adjourn the proceedings: s 197.

17 Preparing for Court

Most charges laid against protestors are summary matters and so are heard in the Local Court with a solicitor from the Office of the Director of Public Prosecution (DPP), or sometimes a police prosecutor, presenting the evidence against you. If you are charged with a more serious or indictable offence, your matter will be heard by a judge and jury in the District Court and the case against you will be presented by a Crown Prosecutor or Solicitor Advocate from the DPP.

Defamation and tort actions are usually dealt with in either the District or Supreme Court. It would be highly advisable to obtain legal representation for these matters. Civil actions are not dealt with further here.

The things you need to do (yourself) to prepare for Court will depend on whether you have legal representation. Going to Court is serious and may affect your future, so take care to prepare properly.

17.1 Getting Assistance

17.1.1 *Legal assistance*

Even if you want to represent yourself at Court, you should seek legal advice as soon as possible after your arrest. A lawyer will be able to give you advice on the preparations needed, as well as talking to you about what will happen in Court.

There are a number of options for legal assistance, depending on whether you are willing and/or able to pay. These include:

- *Private solicitors* or *barristers*, who will charge fees that may vary considerably.⁵⁶¹ Make sure you address this issue at the outset – either on the phone or at the first interview – so that you know what fees to expect. In some circumstances, solicitors or barristers may be prepared to act for you or your group on a pro bono or reduced fee basis.
- *Community legal centres* (including the *Environmental Defender's Office*)⁵⁶² or the *Legal Aid Commission*.⁵⁶³ There will also be a duty lawyer in the Court on the day if you are eligible for legal aid.

⁵⁶¹ The NSW Law Society has a "Find a Lawyer" function, with the ability to seek accredited specialists in criminal law. To start the search, go to: <http://www.lawsociety.com.au/Search/Query.aspx>

⁵⁶² A full list of Community Legal Centres can be found at <http://www.nswclc.org.au/clcs.html>.

⁵⁶³ For information on how the Legal Aid Commission can assist see <http://www.legalaid.nsw.gov.au/asp/index.asp>

- *Chamber magistrates* can help with queries about how the Court works. You can usually ring your local Court to make an appointment or ask basic questions over the phone. Chamber magistrates cannot help you in Court.
- *McKenzie Friend*. On rare occasions, magistrates will allow someone - such as a friend - to assist as your legal representative or helper/note-taker. It is up to the magistrate to decide whether they will allow such assistance.⁵⁶⁴

17.1.2 *Interpreters*

You should consider legal representation or an interpreter if you are not confident about your English. You should contact the local Court where your matter is to be heard to book an interpreter. In most criminal matters, interpreters will be free. If you are eligible for legal aid, the Legal Aid Commission will arrange an interpreter for your appointment with the duty solicitor.

17.2 **Preparing Your Case**

17.2.1 *Recording events*

You should make a record of all the relevant circumstances occurring on the day of the arrest as soon as possible. If there are any witnesses to the alleged offences or the arrest, ask them to record, date and sign a statement as soon as possible. Sometimes videos or photographs are taken at protest actions, either spontaneously or as part of a well-planned action (see Chapter 3 above). If so, you should collect any that show you being arrested. This will assist you and/or your lawyers in the preparation of your case. It will also assist you if you need to make a complaint about police misconduct. You should also note that police regularly videotape protest events.

17.2.2 *Organising a file*

You should maintain a file of all the documents you have been given - such as the charge sheet, police facts sheets, Court Attendance Notice and bail undertaking – as well as your notes. You should have received a copy of the charge sheet and facts sheet from the police when you were charged. If you did not, contact the arresting officer to ask for a copy. You should take all documents with you to Court.

17.2.3 *Doing Your Homework*

In preparing your case, you or your lawyer will need to know:

⁵⁶⁴ See (NSW) *Criminal Procedure Act 1986* s 37(2).

- the prosecution case against you, and
- the relevant law and Court procedures.

a) *Prosecution case*

The prosecution case against you should be found in the documents you have received – such as the charge sheet, facts sheet and Court Attendance Notice (CAN) (see **Appendix D** for an example of a CAN). The CAN will set out the following:

- when and where you need to go to Court (including that you may be arrested if you fail to appear or convicted in your absence),
- the alleged offence and some brief facts, including the time and place where it is alleged to have occurred, and
- the prosecutor's name.⁵⁶⁵

You should consider speaking to the prosecutor before the hearing. The NSW Legal Aid Commission advises that this may help to:

- clarify any parts of the prosecution case you are unsure of,
- identify the issues in dispute,
- check which witnesses the prosecution has available to call in the hearing,
- discuss the proposed course of the evidence, and
- make sure that prejudicial or clearly inadmissible evidence is not led.⁵⁶⁶

b) *Relevant law and procedures*

Finding (and understanding) the law and Court procedure can be particularly difficult if you are not legally trained. However, depending on the complexity of the matter, it may not be too difficult to represent yourself through a combination of preliminary legal advice, research and good preparation.

This Guide is an obvious starting point for practical advice regarding offences relating to the context within which many campaigners operate. However, finding your way around the relevant statutes and case law is no easy task and you should seek professional legal advice from the Legal Aid Commission or from community legal centres. The Legal Information Access Centre is also an excellent resource.⁵⁶⁷

More generally, the *Law Handbook* is a useful guide to both the applicable

⁵⁶⁵ See (NSW) *Criminal Procedure Act 1986* s 175(3)-(4) and (NSW) *Local Courts (Criminal and Applications Procedure) Rule 2003* clause 17(2).

⁵⁶⁶ NSW Legal aid Commission "Preparing a Defended Hearing in the Local Court" at <http://www.legalaid.nsw.gov.au/data/portal/00000005/public/61115001109048947468.pdf>

⁵⁶⁷ For information, go to <http://liac.sl.nsw.gov.au>

laws and procedure relating to Court. You should also consider familiarising yourself with the rules of Court. These are now available on the internet,⁵⁶⁸ in libraries and at the Court. You will find help in locating and using these services from the Legal Information Access Centre and community legal centres.

The Clerk of the Court is a helpful contact in the Court itself. They are usually experts on Court procedures and administration. The Clerk assists in the organisation and listing of matters (that is, when they are to be heard). A good working relationship with the Clerk will be most helpful to you especially if you are responsible for organising a number of defendants.

17.3 Deciding How to Plead

After you have received legal advice, you can decide whether you will plead guilty to the charges or go to trial. If you intend to plead guilty, make sure that you agree with the details in the police facts sheet, as it will be handed up to the magistrate. You can negotiate an agreed set of facts with the police prior to your appearance in Court and the facts sheet can be amended by rewriting or blacking out parts of it. If you have a criminal history (including charges where you were convicted but no conviction was recorded), obtain a copy from the police to check its accuracy. The police and the DPP have an obligation to supply a copy to you and give you an opportunity to verify it **before** it is handed up. The consequences of pleading guilty or not guilty are discussed below in Chapter 18.

568 See (NSW) *Local Courts (Criminal and Applications Procedure) Rule 2003* at www.legislation.nsw.gov.au/

18 Before the Court

This Chapter deals with the mechanics of going to Court and what you can expect to happen.

18.1 How do I know when to go to Court?

Court proceedings are now usually commenced by way of a Court Attendance Notice (or CAN),⁵⁶⁹ which can be given (or “served”) to you personally or by handing it to other adults at your home or workplace, by post or by email.⁵⁷⁰ Amongst other things, the CAN will set out the exact time, date and place where you are expected to appear.⁵⁷¹

18.2 What are the consequences of getting a Court Attendance Notice?

You must appear in Court on the date set out in the CAN. If you fail to appear without reasonable excuse, your case may be decided in your absence. You may also be charged with failure to appear and/or a warrant for your arrest may be issued.⁵⁷² It will also make it more difficult to get bail if you are charged with an offence in the future.⁵⁷³

18.3 What will happen on the first day I go to Court?

This will depend on whether you are pleading guilty or not guilty, and whether you have had time to decide what to do.

The magistrate will ask you what you intend to do with the charges and, if you know, you should inform him or her that you will be pleading guilty or not guilty. If you do not know and wish for the charges to be adjourned, you should make your request at this time, giving your reasons.⁵⁷⁴

569 (NSW) *Criminal Procedure Act 1986* s 172(1) and 173.

570 (NSW) *Criminal Procedure Act 1986* s 177 and (NSW) *Local Courts (Criminal and Applications Procedure) Rule 2003* clause 18(2). CANs cannot be given for certain, more serious offences: see clause 18(5).

571 See (NSW) *Criminal Procedure Act 1986* s 175(3)-(4) and (NSW) *Local Courts (Criminal and Applications Procedure) Rule 2003* clause 17(2).

572 See, for example, (NSW) *Criminal Procedure Act 1986* ss 181(3A), 196 and Chapter 4, Part 4, Division 2 generally. The magistrate has the discretion to adjourn the proceedings: s 197. Notwithstanding that the magistrate can find a person guilty or convict them in their absence, the magistrate has a limited discretion to *sentence* a person in their absence. Fines and “section 10s” may be made but the magistrate must not make orders with respect to custodial sentences, community service orders, good behaviour bonds, or place restrictions unless the person is at the Court: (NSW) *Crimes (Sentencing Procedure) Act 1999* s 25(1).

573 (NSW) *Bail Act 1978* s 32(1)(a)(ii) and (iv).

574 The Court has a wide and general power to adjourn proceedings, particularly if it looks likely that a

18.3.1 *Pleading guilty*

If you are going to plead guilty, you can have the matter dealt with on the first appearance in Court. The charges will be read and you will be asked how you plead. The police prosecutor may give a verbal summary of the facts or hand up the facts sheet to the magistrate. If you have a criminal record, this will also be tendered and will be taken into account in sentence.

You will be given an opportunity to have your say at this point. If you wish to avoid a criminal record, you should address the magistrate on this point and specifically ask for a “section 10 order”.⁵⁷⁵ You may wish to explain the nature of the protest action and that it was a matter of conscience or personal conviction by which you were involved. Other relevant factors will be whether you have a prior criminal record and the minor nature of the offence. It is wise to gather a couple of references from persons of stature in the community (university lecturers, politicians, solicitors or anyone who knows you well enough to vouch for your good character) and hand them to the magistrate at this point.

You should also be aware that the magistrate is required to take into account a plea of guilty when sentencing you, which will usually result in a lighter sentence.⁵⁷⁶

18.3.2 *Entering a plea of not guilty*

If you are pleading not guilty, the matter will be adjourned for a reply date in about a month’s time. You will receive the brief of evidence from the police prosecutor during this month. At the reply date, you can then change your plea to guilty or have the matter set down for hearing.

Text Box 18.1

How should I behave in Court?

You should behave in a way that respects the magistrate and the Court.⁵⁷⁷ Be polite to the

person has been misled: see (NSW) *Criminal Procedure Act 1986* s 40(1), (2) and (4).

⁵⁷⁵ In considering whether to give a section 10, the magistrate is to have regard to the following factors:

- (a) the person’s character, antecedents, age, health and mental condition,
- (b) the trivial nature of the offence,
- (c) the extenuating circumstances in which the offence was committed,
- (d) any other matter that the Court thinks proper to consider.

See (NSW) *Crimes (Sentencing Procedure) Act 1999* s 10(3).

⁵⁷⁶ (NSW) *Crimes (Sentencing Procedure) Act 1999* s 22.

⁵⁷⁷ In most cases, community protestors will be appearing before a magistrate. In more serious

magistrate and stand up when you are speaking or when the magistrate is speaking directly to you. The proper form of address for both judges and magistrates is now “Your Honour”. Also, do not eat, smoke, chew gum, or leave your mobile phone on.

If you are seeking a “section 10” order (see above), take care when addressing issues about the “triviality of the offence” (a consideration under s 10(3)). This implies that the magistrate’s work is, in turn, trivial (which it isn’t). Rather, you should speak of the offence as being minor (or even “not at the serious end of the scale”) and point out the relevant penalties.

18.4 What happens if I wish to plead not guilty and go to a full hearing?

Before the first reply date, you should be provided with copies of all the evidence that the police prosecution have.⁵⁷⁸ They will prepare witness statements, including statements from the arresting and corroborating officers.⁵⁷⁹ The police may also have photographic, video or tape recordings, such as recordings of conversations you had with the police.⁵⁸⁰ If you do not have this evidence at the first reply date, the magistrate may grant a further adjournment to allow more time for preparation of the evidence.⁵⁸¹

An unreasonable delay in preparation of the police brief of evidence can result in charges being dismissed, but as long as there is reasonable explanation of the delay a magistrate is likely to allow the police time to prepare.

It is up to the prosecution to prove the case against you *beyond reasonable doubt* (see 2.4 above). Even if they do this, you may still be able to raise a defence (see 2.5 above). For this part of the case, the onus is on you to prove the defence *on the balance of probabilities* (see 2.4 above). This is a lower standard of proof than *beyond reasonable doubt*. An accused person does not have to give evidence in a criminal hearing. You can decide to give evidence yourself and/or call other witnesses to give evidence on your behalf. It may be necessary to give evidence if you are relying on a defence. You do not have to provide your evidence to the prosecution before the hearing.

18.5 What happens on the day of the hearing?

The hearing is basically divided into three stages – the prosecution case, your case and submissions summarising the arguments from both sides. Within each of these stages there are set rules and procedures.

cases, they may appear before a District Court or Supreme Court judge. The same principles apply but self representation may be much more difficult.

578 (NSW) *Criminal Procedure Act 1986* s 183(1).

579 (NSW) *Criminal Procedure Act 1986* s 183(2)(a).

580 (NSW) *Criminal Procedure Act 1986* s 183(2)(b).

581 The magistrate has an overall discretion to adjourn the proceedings: s 197.

18.5.1 *The Prosecution case*

a) *Evidence in chief*

At the hearing, the police prosecutor will call their evidence first. In criminal matters, all evidence is given verbally. The police prosecutor will ask questions of the witness to reveal evidence (evidence in chief). These questions must not be “leading”, For example, “Did you see the accused cross the fence line onto Commonwealth property?” would be a leading question. You or your lawyer could make an objection to such a question. Rather, questions must be asked in as neutral a way as possible (“Did you see the accused?” or “Where was she?”).

b) *Cross-examination*

You will then have the opportunity to cross-examine the witness. You are able to ask leading questions in cross-examination. There are a few important points to note:

First, work out beforehand what you want to say to the magistrate at the end of your hearing (in your closing submission). The questions you ask in cross-examination should be based on the case you want to make.

Second, and related to the above, you must give a witness the opportunity to answer an accusation or submission that you later wish to make (for example, that the witness has given wrong or false evidence).⁵⁸² This can be done by the (classic) technique of “I put it to you that...). This rule is of enormous practical significance. If you do not abide by it in cross-examination, for reasons of fairness, you may not be able to make submissions on the issue to the magistrate (or even call witnesses on the issue).

Third, you should familiarise yourself with witness statements made prior to the court appearance. If what is said in court is inconsistent with these statements, you can draw the Court’s attention to the issue by asking the witness about the inconsistency.⁵⁸³

Fourth, ask what you need to and no more. You must be careful that you do not give the witness the opportunity to say something detrimental to your case that they were not able to say in evidence in chief.

⁵⁸² This is known as the rule in *Browne v Dunn* (1893) 6 R 67.

⁵⁸³ (NSW) *Evidence Act 1995* s 43; (CTH) *Evidence Act 1995* s 43. There is nothing wrong with questions such as: “How can you say that now, when before, what you said was ...”? It is important, however, to quote the previous evidence accurately. If challenged, do not be afraid to ask what the prosecution says is the correct version of the quoted evidence, as sometimes quite trivial objections are made as part of a tactic to embarrass, or even confuse the questioner.

c) *Re-examination*

Following cross-examination, the prosecutor will then have the opportunity to ask further questions of the witness but only to clear up any matters that have come up in cross-examination. This is called re-examination.

18.5.2 *Your case*

After the prosecution has finished presenting their case, you have the choice of whether or not to present evidence. If you call witnesses, the same procedure and rules apply as outlined for the police evidence.

18.5.3 *Closing submissions*

After all the evidence is finished, you and the prosecutor have the chance to make submissions to the magistrate. You should say why you should not be convicted. This may be because the prosecution has not proved the offence beyond reasonable doubt or because you have a defence.

You should note that there are many other rules of evidence. A good summary of evidence for self-represented people can be found in the book by Gaby Carney and Tim Anderson, *Defend Yourself: Facing a Charge in Court* produced by Redfern Legal Centre. A further extremely useful, but more technical resource (as it is targeted at lawyers), is "Preparing a Defended Hearing in the Local Court".⁵⁸⁴

18.6 What is the Court likely to do?

If you plead guilty or are found guilty after the hearing, you will be sentenced. There are several types of penalties, ranging in seriousness, as follows:

- *Custodial sentences.* These include deferred sentences,⁵⁸⁵ suspended sentences,⁵⁸⁶ home detention,⁵⁸⁷ periodic detention⁵⁸⁸ or imprisonment.⁵⁸⁹ Gaol is a penalty of last resort.⁵⁹⁰

584

Available

at

<http://www.legalaid.nsw.gov.au/data/portal/00000005/public/61115001109048947468.pdf>

585 (NSW) *Crimes (Sentencing Procedure) Act 1999* s 11.

586 (NSW) *Crimes (Sentencing Procedure) Act 1999* s 12.

587 (NSW) *Crimes (Sentencing Procedure) Act 1999* s 7 and Part 6.

588 (NSW) *Crimes (Sentencing Procedure) Act 1999* s 6 and Part 5.

589 (NSW) *Crimes (Sentencing Procedure) Act 1999* s 5.

590 (NSW) *Crimes (Sentencing Procedure) Act 1999* s 5(1).

- *Fines*. The amount is usually at the discretion of the magistrate up to the maximum for your charge.
- *Good behaviour bonds*,⁵⁹¹ which may have conditions on them such as keeping away from the protest site.⁵⁹²
- *Community service orders* requiring unpaid community work of up to 500 hours.⁵⁹³
- *Dismissal and conditional discharge* where the offence is proved and you are found guilty but the court does not proceed to conviction (now known as a “section 10”).⁵⁹⁴ You may have to enter into a good behaviour bond.⁵⁹⁵

591 (NSW) *Crimes (Sentencing Procedure) Act 1999* s 9(1) and Part 8.

592 (NSW) *Crimes (Sentencing Procedure) Act 1999* s 17A(2)(b) but only for offences punishable by gaol of 6 months or more: s 17A(1).

593 (NSW) *Crimes (Sentencing Procedure) Act 1999* s 8(1), (2) and Part 7.

594 (NSW) *Crimes (Sentencing Procedure) Act 1999* s 10(1).

595 (NSW) *Crimes (Sentencing Procedure) Act 1999* s 10(2).

Text Box 18.2

Getting a “Section 10”

It is important to remember that if you plead guilty or are found guilty you will get a criminal record unless you are discharged without recording a conviction (under a “section 10”).⁵⁹⁶ You have the best chance at getting discharged with no conviction if you are a first time offender pleading guilty to a minor charge.⁵⁹⁷

18.7 What are the consequences of a criminal record?

The law generally draws a distinction between your criminal record (convictions only) and your criminal history (charges, court appearances and convictions).

Your criminal record will lapse after a 10 year crime-free period, at least for the types of offences that a prosecutor may typically be convicted of.⁵⁹⁸ This is known as the conviction becoming “spent”. Once a conviction is spent, the person concerned is usually not obliged to disclose it (for example, when applying for most jobs, insurance, credit or when completing an application for a statutory licence).⁵⁹⁹ Penalties apply for the unauthorised release of information on spent convictions.⁶⁰⁰

By contrast, your criminal history generally lasts forever, as it is used by police to gain a profile of your involvement within the criminal justice system for investigative purposes. For example, even when a conviction is spent, information about it is generally not destroyed.⁶⁰¹

18.7.1 Employment

Generally, it is unlikely that a criminal conviction for a minor offence will

596 (NSW) *Crimes (Sentencing Procedure) Act 1999* s 10(1)(a). The order was commonly known as “s 556A” in NSW. For Federal offences, see (CTH) *Crimes Act 1914* Part VIIC.

597 (NSW) *Crimes (Sentencing Procedure) Act 1999* s 10(3).

598 See (NSW) *Criminal Records Act 1991* s 7 (types of offences that can be spent) and s9 (10 year period). Children’s Court convictions generally lapse after three years: (NSW) *Criminal Records Act 1991* s 10.

599 The exceptions include: judges, magistrates, police officers, members of staff of Corrective Services NSW, teachers, teachers’ aides, providers of child care services, child-related employment, fire fighting and fire prevention positions, lawyers, and positions at the Independent Commission Against Corruption, Office of Director of Public Prosecutions, Police Integrity Commission, Crime Commission, and Crown Prosecutors: see (NSW) *Criminal Records Act 1991* s 15(1),(1A) and (NSW) *Criminal Records Regulation 2004* clauses 6-11. Arson or attempted arson offences must be revealed for fire fighting or fire prevention positions: (NSW) *Criminal Records Act 1991* s 15(2).

600 See (NSW) *Criminal Records Act 1991* s 13. The maximum penalty is \$5500 or imprisonment for 6 months, or both.

601 (NSW) *Criminal Records Act 1991* s 23.

automatically be a bar to employment. It will usually be assessed by the employer and considered according to the individual circumstances of the case.

An employer may legally ask an applicant whether they have any previous charges or convictions. If an employer asks you if you have a criminal record, it may be advisable to disclose it. If you don't, this may justify your employer terminating your employment at some time in the future. However, you are entitled to withhold information about any spent convictions, except when applying for certain jobs.⁶⁰²

Some professions may refuse to register or licence persons with records of certain offences. Also, you may sometimes have an ongoing duty to notify your professional body and be subject to disciplinary proceedings. Examples include lawyers, doctors, nurses, teachers, security guards and accountants.⁶⁰³ In some cases, failure to disclose may be more serious than actual disclosure. For example, failure of a lawyer to disclose a conviction for a minor summary offence in a political demonstration is likely to be more seriously regarded than the offence itself, as the failure to disclose connotes dishonesty. You should check with the relevant professional body for their requirements.

18.7.2 *Public offices*

Having a criminal record may impact on your ability to hold a public office, such as a politician or councillor.⁶⁰⁴ If you think you may wish to go into politics in the future, you should check the requirements for the particular government (local, State or Federal) with a lawyer.

18.7.3 *Travel and immigration*

Some countries, including Australia, require you to disclose any past arrests or convictions on visa applications. Laws vary from country to country and are changing rapidly in the current international climate. You should call the relevant consulate or embassy to find out the approach taken to charges and convictions by the country you wish to visit. Websites may also contain such information.⁶⁰⁵

602 See (NSW) *Criminal Records Act 1991* s 15 and (NSW) *Criminal Records Regulation 2004* clauses 6-11.

603 See (NSW) *Health Practitioner Regulation National Law (NSW) No 86a s130*; (NSW) *Legal Profession Act 2004* ss 9, 25, 42 48, 60 and Chapter 4; (NSW) *Teaching Service Act 1980* s92C; (NSW) *Security Industry Act 1997* s 16.

604 See, for example (NSW) *Criminal Records Act 1991* s 17 and (NSW) *Local Government Act 1993* ss 274 and 275.

18.7.4 *Fingerprints*

The court will usually order that prints or photographs be taken of an offender upon conviction if they were not taken upon arrest.⁶⁰⁶ If you refuse, you may be liable to a maximum of 12 months imprisonment under Commonwealth,⁶⁰⁷ or to arrest under NSW law.^{608*}

605 See, for example, <http://travel.state.gov> (USA) and <http://www.delatus.ec.europa.eu/VisitingEurope/faqsvisas.htm> (European Union).

606 See generally *(CTH) Crimes Act 1914* s 3ZL(1) and *(NSW) Law Enforcement (Powers and Responsibilities) Act 2002* s134

607 *(CTH) Crimes Act 1914* ss 3ZL(2), 3ZL(3A) and 3ZL(3B).

608 *(NSW) Law Enforcement (Powers and Responsibilities) Act 2002* ss134(3) and 134(4).

APPENDIX A

Form 1 Notice of intention to hold a public assembly

(Summary Offences Act 1988)

(Clause 13)

To: The Commissioner of Police

1 I,

.....

(*name*)

of

.....

(*address*)

on behalf of

.....

(*organisation*)

notify the Commissioner of Police that on the

.....

(*day*)

of, it is intended to hold

(*month and year*)

*(a) a public assembly, not being a procession, of

approximately

.....

(*number*)

persons, which will assemble

at

.....

(*place*)

at approximately am/pm, and disperse at approximately am/pm, or

*(b) a public assembly, being a procession of

approximately

.....

(*number*)

persons, which will assemble

at

.....
.....

(*place*)

at approximately am/pm, and disperse at approximately am/pm,
and at approximately am/pm the procession will commence and proceed:

.....
.....
.....
.....
.....
.....

(Specify route of proposed assembly, any stopping places, the approximate length of the stop and the approximate time of termination. A diagram may be attached if desired.)

2 The purpose of the proposed assembly is:

.....
.....
.....
.....
.....
.....

3 The following special characteristics associated with the assembly would be useful for the Commissioner of Police to be aware of in regulating the flow of traffic or in regulating the assembly:

**(a)* There will be

.....
.....

(*number*)

vehicles and/or* floats involved and their type and dimensions are as follows:

.....
.....
.....
.....

**(b)* There will be

.....

(*number*)

bands, musicians, entertainers etc, which will entertain or address the assembly.

**(c)* The following number and type of animals will be involved in the assembly:

.....
.....

.....
.....
.....
.....

*(d) Other special characteristics of the proposed assembly are as follows:

.....
.....
.....
.....
.....
.....

4 I take responsibility for organising and conducting the proposed public assembly.

5 Notices for the purposes of the *Summary Offences Act 1988* may be served on me at the following address:

.....
.....
.....
.....
.....

Postcode:.....
.....

Telephone:.....
.....

Signed:

Date:

Capacity/Title:.....
.....

- Strike out whichever does not apply.

APPENDIX B



APPENDIX C

APPLICATIONS IN RELATION TO BAIL
APPLICATION FOR GRANT OF BAIL

Form 3
(Clause 8(1)(b))

I,
of
being in custody at
charged with
apply to the
at
for bail to be granted.

I was last by
the
at
on

I am next to appear before
the
at
on

Signature:

Date:

APPENDIX D

FOR GENERIC USE
** Court/Service Copy **

COURT ATTENDANCE NOTICE

DETAILS OF COURT LISTING

The Court Attendance Notice has been listed before the Local Court/Children's Court on
 Date: _____ Time: _____
 Place: _____

DETAILS OF DEFENDANT

Defendant:
 Address:
 Sex:
 Date of Birth:

DETAILS OF PROSECUTOR

Prosecutor:
 Department/Organisation:
 Address: _____ Telephone: _____
 Date of Issue of Court Attendance Notice:

DETAILS OF OFFENCE

Description of Offence:
 Time & Date of Offence:
 Place of Offence:
 Short Particulars:
 Statutory Provision Describing Offence:
 Law Part Code:

Signature of Prosecutor
(Signature not required if prosecutor is a police officer or public officer)

Signature of Registrar
(Signature not required if prosecutor is a police officer or public officer)

STATEMENT OF SERVICE:

I
 of (occupation)
 Did serve a copy of this Court Attendance Notice on the defendant on / / in the following manner:

- By handing it to the accused person
- By handing it to a person at the accused person usual place of residence or place of business who is apparently of or above the age of 16 years.
- By forwarding it to the officer in charge of the correctional centre at _____ by hand/post/facsimile or other (specify):
- By post/facsimile or electronic transmission to the person's residential address (Summary offences only). Please specify: _____
- I have not served a copy of this Court Attendance Notice on the defendant

Signed _____ Witness:
 Name _____ Name:

Court Registry Use Only
 Date Court Attendance Notice Filed:
 Place of Filing
 (if different from place of first listing):
 Court Reference Number:
 Fees: *Paid *Waived *Remitted *Exempt

PAYMENT STAMP

