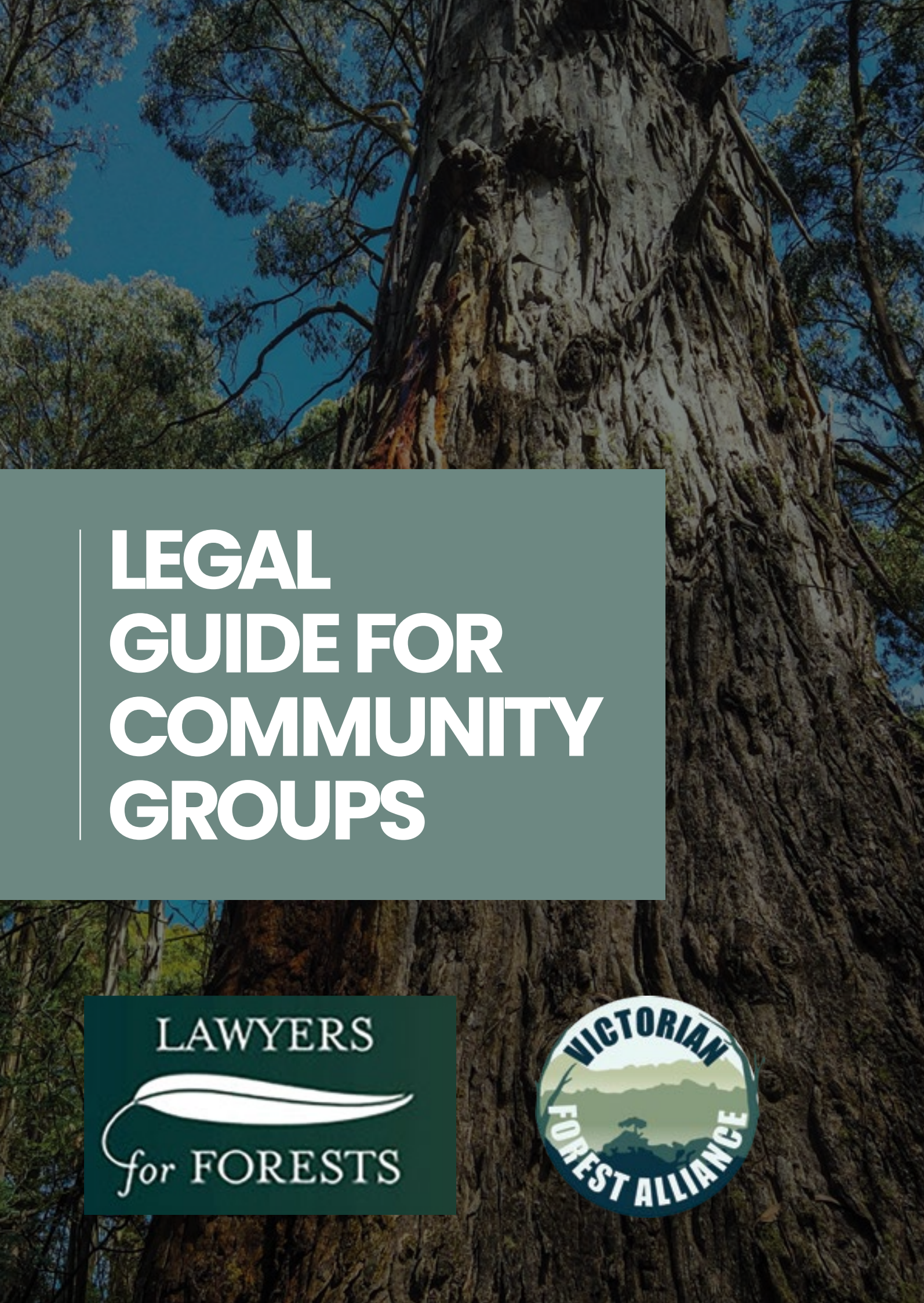

LEGAL GUIDE FOR COMMUNITY GROUPS

LAWYERS for FORESTS

VICTORIAN FOREST ALLIANCE

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Acknowledgement
Lawyers for Forests and the Victorian Forest Alliance recognise we live and work on the stolen land of First Nations peoples. We acknowledge the Traditional Owners and their long and ongoing custodianship of Country and pay our deepest respects to Elders past and present.

We thank all the organisations and people who helped write and produce this report, and all the hard-working legal teams, citizen science groups and dedicated volunteers from all the community groups who have worked tirelessly to hold governments and their agencies accountable to the law. We are beyond grateful for all your work and everything you've achieved.

Table of Contents

1. Introduction 4

2. Preparing to obtain legal advice 5

A. Evidence 5
B. Party to proceedings 8
C. Finding a lawyer 10

3. Commencing proceedings 12

A. Receiving initial legal advice 12
B. How to work with your lawyer 14
C. Risks of litigation 16
D. What you can say 17

4. During proceedings 18

A. Originating Court documents and Urgent Injunctions 18
B. Affidavits 20
C. Interlocutory applications 20
D. Discovery or production of documents 21
E. Mediation 22
F. Trial 23

5. Final determination 24

6. Appeals and timing 25

Photo: *Warburton Environment*

1. Introduction

The law administers the destruction of the environment. If the law is not properly complied with, the activity destroying the environment may be stopped. For these reasons, litigation plays a significant role in campaigns to protect our natural environment.

Too often, the government, or an enterprise owned by it, takes our natural resources for free and extinguishes them at will for purported commercial gain. And governments allow companies to do the same. Meanwhile, our natural environment and the species who depend on it to live suffer unprecedented damage and decline, many toward predicted extinction. The ecology of our planet and human society that relies on it are being severely compromised.

Just as the law is used to allow our natural resources to be destroyed for human profit, the law can also be used for the protection of our environment. You can achieve access to justice for our natural environment like so many already have.

The law and the systems designed to achieve justice can be complex and confusing. It need not be daunting. The purpose of this guide is to give you an idea about how to prepare to take legal action to protect our environment and what to expect if you do.

This guide does not go into case law or detail statutory schemes. It is designed as a simple tool and an easy read. Its purpose is to help you take that next step towards embracing the Courts as part of our collective responsibility to protect our planet.

2. Preparing to obtain legal advice

A. Evidence

If you are concerned that an activity is destroying the environment and may not comply with law, it is important to gather evidence and take the evidence to a lawyer.

For example, if the activity of concern is the logging of native forest by VicForests in Victoria (the State-owned enterprise commanded with logging Victoria's remaining native forests), you should gather evidence relating to any threatened species that are or may be present in the area to be logged.

In Victoria, taxa and communities of flora and fauna which are threatened are listed under the Flora and Fauna Guarantee Act 1988 (Vic) (the FFG Act) and categorised as critically endangered, endangered or vulnerable, among other categorisations. In some circumstances, the FFG Act, including through tools prepared under it such as action statements, may be used to protect the threatened species' habitat and so logging of the habitat may be unlawful.

Also, in Victoria there is a Code of practice for timber production which includes prescriptions. Those prescriptions state rules that logging must comply with. Logging can often breach those rules. If the rules in the Code are not complied with, the logging may be unlawful.

Photo: *Karena Goldfinch*

You need not be distracted by the complexities of the law. If you gather your evidence and take it to a lawyer, the lawyer should apply the law to the evidence and determine if you have an arguable case to stop the destruction, and what your prospects of success are.

By way of another example, if the activity is a proposed mine or any other development that has had an application made for approval at the Federal level under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act), you should closely follow the application through the department's online referrals portal: http://epbcnotices.environment.gov.au/referralslist/. Each time a document is made available through the portal, download it and save it. Each time a decision is made leading up to whether the decision is to be approved or not, you should write to the Minister for the environment and request the statement of reasons for the decision.

The first decision is usually whether the activity (called an 'action' under the EPBC Act) is a controlled action or not. That is, whether it is an action that is likely to have a significant impact on a matter of national environmental significance. Matters of national environmental significance include threatened species listed as Critically Endangered, Endangered or Vulnerable under the EPBC Act, National Heritage places and World Heritage places.

The second decision, or a decision often made at the same time as the controlled action decision, is usually the assessment approach decision, that is, what type of assessment will be applied to the proposed action to determine if it should be approved or not.

The final decision is whether the proposed action is approved or not. If the action is approved, this decision will often include conditions on the action.

Statements of reasons are usually required to be produced within 28 days of a request. If you wait too long to request the statement of reasons, this may form a basis for the government to refuse to give you the statement of reasons.

It is very helpful for a lawyer to have the statement of reasons as well as the decision to which it relates when giving you advice. If the action commences after an approval and before the statement of reasons is given, it can be harder to give legal advice on reviewing the decision and securing an interlocutory injunction to stop the action.

If you are concerned about any decision in the process you should promptly go to a lawyer with the decision and reasons for it. For example, if you think a proposed action is likely to have a significant impact on a matter of national environmental significance but the decision says the action is not a controlled action, you should promptly go to a lawyer with the controlled action decision and the statement of reasons for the controlled action decision and seek advice as to whether you have a proper basis to ask a Judge to review the decision.

Or, if you think that a proposed action has been approved in a way that will cause damage to matters of national environmental significance, you should promptly go to a lawyer with the approval decision and the statement of reasons for the approval decision and seek advice as to whether you have a proper basis to ask a Judge to review the approval.

It is helpful if you have evidence of threatened species that you think are likely to be significantly impacted by the proposed action, and you should take that evidence to your lawyer.

For assistance requesting a statement of reasons, contact a lawyer. Further information about contacting a lawyer is referred to below. For assistance gathering evidence, read the Citizen science evidence gathering document which you can obtain by contacting the Victorian Forest Alliance through https://www.victorianforestalliance.org.au/.

Once you have your evidence and are ready to contact a lawyer to see if you have a proper basis to start a case, the lawyer should talk to you about standing.

B. Party to proceedings

To commence a Court case, a party needs to be the Plaintiff (as it is referred to in the Supreme Court of Victoria) or the Applicant (as it is referred to in the Federal Court of Australia).

The Plaintiff or Applicant needs to have what is called standing. Standing means that the party needs to have the necessary special interest in the subject matter of the Court case. For example, if an incorporated association is established for the purpose of protecting native forest in East Gippsland, it is likely to have standing to challenge the lawfulness of logging in East Gippsland. Or, if a group has done repeated on-ground surveying in a particular region or for a particular species, it is likely to have standing for that region or that species. If an incorporated association has only existed for a short period of time, it can be more difficult to establish standing. But activities of the same group for a longer period before it became incorporated might mean the group has standing shortly after incorporation.

A party may have standing if, for example, that party has done some of the following things in respect of the subject matter of the proposed proceeding:

(a) *included in its Rules (if it is an incorporated association) that it has a specific purpose relating to the subject matter of the proposed proceeding such as protecting it;*

(b) *actively educated the community about the subject matter of the proposed proceeding (such as through holding public meetings and online Zoom events);*

(c) *regularly maintained a website or facebook page which includes information relevant to the organisation's objects and purposes;*

(d) *written letters, reports or submissions to, or had meetings with, government about its purposes or the subject matter of the proceeding;*

(e) *done on-ground activities related to the subject matter of the proceeding, like guided educational walks, surveys or revegetation, and has done the things at paragraphs (b) to (e) for an extended period of time (such as about a couple of years).*

It is important that easily accessible records are properly kept of the group's activities, as they will form evidence in the case to prove standing.

It is a little bit easier to prove standing in the Federal Court under the EPBC Act than in the Supreme Court of Victoria. This is because standing is written into the EPBC Act and is defined more broadly than in the Victorian jurisdiction.

Not only is it important to identify who the Plaintiff or Applicant will be, the proper Defendant also needs to be identified before the case is started. The Defendant is the party being sued by the Plaintiff. In the Federal Court, this party is called the Respondent.

If the case is to stop unlawful logging being undertaken by VicForests, then VicForests is the proper Defendant. If the case is a Federal Court case to seek to set aside a decision by the federal environment Minister to approve an environmentally destructive project, then the environment minister is the proper Respondent (or the Minister for whatever is the name of the portfolio at the relevant time). When you contact a lawyer, the lawyer should determine who is the proper Defendant/Respondent.

There have been several references to contacting a lawyer in this guide. You must be wondering who this person is. We need to tell you how you go about finding a lawyer.

Photo: *Lisa Roberts*

C. Finding a lawyer

It is important to find the right lawyer. Environment protection litigation is time consuming and complex. Many lawyers do some pro bono work (such as work for free, on a no win no fee basis or on a reduced fee basis), but they also need to pay their bills. So, you need someone with experience in the area, but who is also willing and able to be flexible with fees.

Given, among other things, the intensity of the work and reality that the lawyer will not be paid as much as if they act for a mining company, it is helpful if the lawyer has a passion or personal interest in the subject matter of the case.

For most environmental cases, you will need a team of lawyers to run your case. There are two types of lawyers – solicitors and barristers. Usually, you only need to find and approach one lawyer. That lawyer will then build the team of other lawyers with you to run the case. Often you will first approach and find a solicitor for this role, but not always. Barristers usually do most of the speaking in Court to present your case to the Judge. It is not uncommon for four or more lawyers to work together to run an environment case.

A lawyer is generally required by law to give you a disclosure statement and costs agreement about your estimated legal costs early in the matter and before you are given an invoice. If you are concerned that legal costs have not been mentioned, you should ask about them.

Even if a lawyer is prepared to act for you no win no fee, it is unlikely the lawyer will cover the out-of-pocket costs (called disbursements) that cannot be avoided, such as Court filing fees.

"It is important to find the right lawyer. Environment protection litigation is *time consuming* and *complex*. "

If you budget for $10,000 in out-of-pocket costs (disbursements, not including barristers' or experts' fees), you should be well prepared. It is difficult to estimate what your solicitor, barristers and experts will charge you, as it is flexible and really about how much work they will need to do depending on the size and complexity of the case, what they are prepared to be paid and what you think you are capable of fundraising.

The actual commercial legal costs in large and complex litigation of this kind are easily in the 6 digits. It is not unusual for a lawyer acting for a Plaintiff in a public interest case to suggest you aim to fundraise $100,000, or more in large cases, which would involve all professionals including solicitors, barristers and experts charging heavily reduced rates given the volume of work over the usual period of time the case might run.

You should be prepared to fundraise to cover legal costs for the case so your lawyers can at least be paid at a reduced rate, and you should work on a fundraising plan. You should also have a media plan. For assistance on fundraising and media planning for your Court case contact the Victorian Forest Alliance through https://www.victorianforestalliance.org.au/ or email admin@victorianforestalliance.org.au.

To be connected with a lawyer who may be able to assist you, contact Lawyers for Forests for a referral through https://www.lawyersforforests.org.au/ or Environmental Justice Australia through https://envirojustice.org.au/.

"You should be prepared to fundraise to cover legal costs for the case so your lawyers can at least be paid at a reduced rate"

3. Commencing proceedings

A. Receiving initial legal advice

After being connected with a lawyer, you will need to organise a first meeting. Ask the lawyer if the first meeting will at least be free, so there is clarity about costs. At the first meeting, take your evidence with you.

The lawyer will ask you questions, and you should feel comfortable to ask the lawyer questions as well. Your goal is for the lawyer to give you advice as to whether you have a proper basis to bring a Court case and, if so, what are your prospects of success.

Advice as to proper basis and prospects may not be able to be delivered at the first meeting. It may be that your lawyer needs to take some time to consider the matter or request more documents to properly consider it. Also, your lawyer may advise that a barrister also be briefed to assist with that advice. If the advice is not going to be delivered at the first meeting and your lawyer wants to take some time, ask again about legal costs.

The relationship between lawyer and client is one of the lawyer giving you advice and you giving your lawyer instructions.

Before a Court case is commenced, your lawyer might ask you for instructions to send a letter demanding, for example, that logging cease or that logging not commence pending the outcome of a Court case, or even to send a letter seeing if the whole issue can be resolved without going to Court.

Your lawyer will also need to determine which Court the case should be commenced in. In Victoria, there are generally three Courts in which a case can be started, the Magistrates' Court, County Court or Supreme Court. If the case is to be run under Victorian State law, the proper venue is usually the Supreme Court of Victoria. Although the Supreme Court of Victoria mostly sits in Melbourne, it may also sit elsewhere in the State. The Brown Mountain case in 2010 (Environment East Gippsland v VicForests) sat for weeks at Sale, as there was a Court building at Sale capable of hearing the case and it was the closest Court to the subject matter of the proceeding (Brown Mountain in East Gippsland).

If the case is about federal law, such as the EPBC Act, the case will be run in the Federal Court of Australia. There are Federal Courts in each State and Territory in Australia. The cases might be run in the State or Territory of the subject matter of the proceeding, or the case might be run in the State or Territory in which a party is based. For example, Lawyers for Forests ran some cases to stop the then proposed pulp mill in the Tamar Valley in Tasmania in the Federal Court in Melbourne. The cases were run in Melbourne for reasons including Lawyers for Forests Inc is incorporated in Melbourne.

Photo: *Chris Schuringa*

B. How to work with your lawyer

Your communications with your lawyer are privileged which generally means they are confidential. If you want to share advice that your lawyer has given you, always check with your lawyer first. There may be some people, such as the other committee members of an incorporated association, who you can share the advice with without breaching privilege.

There can be negative ramifications for your case if you breach the confidentiality of your relationship with your lawyer, so you should take this rule seriously.

Similarly, there are rules around what you can do with documents produced or discovered or filed in Court throughout the case. As a general rule, and to be safe, do not share any documents discovered or produced in the case or any affidavits filed in the case without asking your lawyer first. There is likely to come a time in the Court case where those documents can be made public.

There is a saying that a lawyer is only as good as their instructions. The law is a complex beast. It is helpful if you listen to your lawyer's advice and give your lawyer instructions as soon as you can after your lawyer asks for them. Sometimes your lawyer might need instructions from you urgently, so you need to be prepared, willing and able to respond at short notice.

Court cases can extend for a long time, often more than a year. The period when your group is required to prepare and file its evidence is likely to require particularly intensive work from you together with your lawyers. The final hearing in the case, usually called the trial, can go for days or even weeks. It helps if you prepare to focus your energy and efforts for the trial period, as you may be needed to attend Court and then instruct your lawyers for many hours of the day.

"There is a saying that a lawyer is *only as good as their instructions.*"

You should also be aware that if you win the case and the losing party is ordered to pay your costs, you do not recover any costs you, the client, have lost for time you might have spent working and being paid rather than instructing your lawyers.

If the Plaintiff or Applicant is an incorporated body, it is very helpful if one person from the committee can be appointed as the lawyer's main instructor. That person can then go to the rest of the committee to share advice or seek instructions and then return to the lawyer with the required instructions. It is a more efficient process than the lawyer needing to communicate with the whole committee. The person who is appointed the lawyer's main instructor can be someone who has the capacity to give the lawyer the time that is needed during the case. If the case extends over many years, it is okay for the main instructor to swap or rotate, but not too often.

You should feel comfortable to ask your lawyer any questions that you have throughout the case. Sometimes your lawyers might take a little bit of time to answer your question. Feel free to follow up your lawyer for the answer.

Photo: *Lisa Roberts*

C. Risks of litigation

Even if your lawyer advises you that you have good prospects of winning the case, there are always risks in litigation and you could end up losing. Usually, the losing party is ordered to pay the winning party's legal costs.

If the Plaintiff or Applicant is an individual and loses the case, you run the risk of being made bankrupt, but this is worst case scenario. A properly advised defendant who has won a case against an individual who appears to have no assets should not want to pursue that person to the point of bankruptcy. This is because all they are doing is spending more money to get nothing. Also, a defendant might attract bad publicity if they pursue an individual to the point of bankruptcy when the individual brought an arguable case in the public interest.

If the Plaintiff or Applicant is an incorporated body and loses the case, it runs the risk of being wound up. An incorporated body can voluntarily wind up or wait and see if the Defendant takes steps to cause it to be wound up. Similar principles apply as to making a person bankrupt. If an incorporated association is wound up, the members are not personally liable so their assets are protected (unless the Rules of the incorporated body make the members personally liable which is very unlikely).

If you win the case and the losing party is ordered to pay your costs, you may also end up not recovering the costs if the losing party does not have them. A properly advised Plaintiff will be given advice as to the potential to recover from a losing Defendant before the case is started so an informed decision can be made. If the Defendant or Respondent is a government party, you should expect to recover your costs if you succeed in the case.

The costs recovery process after the Court determines the outcome of a Court case can be a long and complex process in itself. If the parties do not agree on the quantum of costs, the matter may need to go to Court for the Court to assess the costs. Your lawyer can assist you in this process if it arises. The goal is to try to avoid this lengthy and inconvenient process and agree the quantum of costs.

Photo: Warburton Environment

D. What you can say

There are different schools of thought about how much a party can or should say to the public, including to the media, about the case.

On the one hand, the Plaintiff may put out a media release to announce the commencement of the case, any important hearing in the case such as the trial and the outcome of the case, and otherwise not comment. On the other hand, the Plaintiff may issue more regular media releases and both the Plaintiff and lawyer may speak to media on the record.

Whichever approach is taken for your case, you should do your best to run your media by your lawyer first. This is because there are rules around not making statements or comments through the media about cases currently before the Court that could interfere with the proper running of the case. These rules are more likely to affect jury trials, which are rare in environmental litigation, but your lawyer will want to consider it.

Also, you may be reported as saying something that is adverse to your case and the Defendant may then try to use it as evidence in the proceeding. While they might try and not succeed, it is better to avoid this arising in the first place.

It is of course important to publicise the case for many reasons, most importantly because your case is likely to be about a matter of public interest and so it is important that the public know about your case and what it is seeking to protect. It can also be useful to attract interest in the case to help you meet your fundraising target.

"... you should do your best to run your media by your lawyer first."

4. During proceedings

A. Originating Court documents and Urgent Injunctions

When you start a case, the first thing that needs to be prepared is an originating document to file with the Court. The form of originating document varies depending on what Court you are in, the cause of action in your case and what orders you are seeking.

If you are commencing a Court case in the Supreme Court and are seeking an injunction to stop logging, you will most likely need to file a writ and statement of claim. Sometimes, just a writ is filed at first and you file your statement of claim later.

These documents set out what your case is about and what relief you are seeking from the Court (such as a permanent injunction to stop logging of specified native forest). They also include some administrative matters about the start of the case including the parties' names and addresses.

After you have filed your originating document, you will need to serve it on the Defendant. Service of such a document is usually in person, so the document is taken by hand to the Defendant's address. If there have already been communications between the parties lawyers, the lawyers will often agree to serve by email.

When you start your case, you might need to approach the Court straight away to ask it to urgently make orders. To do this, you might need to file a summons and a supporting affidavit. The summons is just a document giving the Court and the other party notice that you are applying for urgent orders and setting out what those orders are, such as an interlocutory application for an injunction to stop the logging, or to stop commencement of the mine or other development, pending the outcome of the whole Court case.

The affidavit is to give the Court the evidence you are relying upon in support of the grant of an interlocutory injunction, such as evidence of presence of threatened species and that logging or development has commenced or is about to commence. This affidavit should also include evidence that the Plaintiff has standing.

For an application for an interlocutory injunction, the Plaintiff usually needs to give the Court an undertaking as to damages, that is, an undertaking that the Plaintiff will pay the defendant's damages (or losses) if the Plaintiff ultimately loses the case. The Plaintiff generally does not need to pay security for the undertaking or need to prove that it can pay the damages. This is because of the public interest nature of the litigation.

The next step after all of this is usually that the Defendant will file a defence to the statement of claim, saying what parts of your case it disagrees with and why.

In the Federal Court, a case seeking judicial review of a government decision is usually commenced by a document called an Application. If an urgent injunction is required the process is very similar to that in the Supreme Court of Victoria, except that the document is not called a summons, it is called an interlocutory application. In the Federal Court, in a judicial review case, no defence is filed.

Relatively early in the case no matter which Court you start your case in, a timetable is set for the steps that need to be taken from then up until final trial and determination by the Court. Sometimes the steps can be ordered in parts.

From when a case is started a clock starts ticking and there will always be dates by which steps need to be met, whether those steps are defined in orders or in the Rules of the Court. Your lawyer should always be aware when the steps are due and seek your instructions on the work necessary to meet the steps along the way. If you ever have any concerns about what needs to be done and when, just ask your lawyer.

Photo: *Max Ravier*

B. Affidavits

The timetable will often include a date by which the Plaintiff files any affidavits upon which it intends to rely at trial, the Defendant to file any affidavits in response and the Plaintiff to file any in reply.

Any documents, maps or photos that parties want to put before the Court for the Judge to consider when making their decision will likely be attached to an affidavit. You may need to make an affidavit more than once throughout the case to get all the relevant evidence before the Court. For example, you might need to put into an affidavit your detections of relevant threatened species in the area. You will also need to put into affidavit documents and facts establishing your group's standing. The contents of affidavits must be true and correct. Making a false affidavit can constitute the offence of perjury which can be punishable by imprisonment.

Your lawyer may also need to obtain affidavits and reports from experts to put expert evidence before the Court, such as to prove the presence of threatened species, threats to their survival or adequate protections needed for them to continue to exist in their habitat. Experts who give evidence in Court must be independent; they do not act in the interest of any party. Communication with the experts who are to give evidence in Court is best left to your lawyer. Your group can communicate comfortably with other people who have expertise relevant to your case but who will not be asked to give evidence in Court in the case.

Your lawyers will know what evidence is needed in an effort to prove your case. Your lawyer will guide your group as to what affidavits should be filed with the Court and what those affidavits should include. Your lawyer will ask for detailed instructions and documents from you to advise you about evidence and assist you to prepare affidavits.

C. Interlocutory applications

Other interlocutory applications can be made aside from the application for the interlocutory injunction. An interlocutory application is just when a party approaches the Court during the case to ask the Court to make orders along the way for matters not included in the timetable.

The more applications that are made, the more time the lawyers need to spend on the case, and the more the case can cost. Sometimes a party deploys a tactic where they make a lot of applications to try and run the other party out of money or to try to wear out the other party. Litigation is time consuming and can be stressful, so it is important to be strong, persistent and stay healthy, particularly during a long trial.

It is not unusual for interlocutory applications to be made in respect of discovery.

D. Discovery or production of documents

Most cases require a party to produce documents to the other party. This can be done through statutory tools like notices to produce or through the discovery process.

For example, in the Supreme Court of Victoria, you can serve a notice to produce on the Defendant requiring the Defendant to produce to you any documents referred to in the Defendant's defence.

As to discovery, the timetable will usually include a date by which the parties must make discovery. In the Supreme Court of Victoria, documents that must be discovered are those upon which a party relies, those that adversely affect the party's own case, those that adversely affect another party's case and those that support another party's case. This can include hard copy and electronic documents such as emails.

You do not need to discover any documents that do not fall within those categories. Also, you are not required to discover documents that are privileged from production such as documents the subject of client legal privilege. You do not need to discover communications providing legal advice, such as an email to you from your lawyer that includes advice or instructions about the case.

You do not need to discover documents in relation to current or anticipated litigation such as documents prepared for the dominant purpose of you being provided with legal services relating to the proceeding. The document does not have to include a communication with your lawyer. An example of documents of this kind are minutes of meetings of an incorporated association which record discussions about anticipated litigation and whether to commence the case.

It is not uncommon for a party to believe that the other party has not discovered all the documents that should have been discovered. A Plaintiff can get excited about discovery because it can uncover a smoking gun that could assist the Plaintiff to win the case.

If there is a basis to allege that the Defendant has not made proper discovery, your lawyer would usually send a letter to the Defendant's lawyer first, giving the Defendant the chance to cure the non-compliance, failing which you might instruct your lawyer to approach the Court for orders that the Defendant make discovery of additional documents. This is an example of an interlocutory application referred to above.

If you succeed in an interlocutory application, the Court might order the other party to pay your costs of you having to have made the application. Although you may need to wait until the end of the case to recover those costs, a costs order can be helpful to put pressure on the other party. It can also offset any costs order made against you.

E. Mediation

Timetables in commercial litigation include an order that the parties have a mediation. A mediation involves the parties and their lawyers sitting together with an independent mediator (usually also a lawyer or a judicial officer of the Court), to see if the parties can settle the dispute by agreeing terms between them.

If the case settles at mediation, the entire proceeding is resolved and there is no need to involve the Court any further. A proceeding can resolve on any lawful terms at the will of the parties, not just the terms that a party may achieve if the party succeeds at trial. For example, a matter can resolve at mediation on terms requiring the logging entity not to log some of the forest the subject of the Court case and another area not directly subject of the Court case. Both parties must agree to all terms of the settlement.

What is shared at mediation is confidential and, if the matter does not settle at mediation, a party cannot use anything that is said or shared at mediation as evidence in the case.

It is less common for environmental litigation to include a mediation, or for such matters to settle at mediation. However, it does happen sometimes and is something to consider as a settlement to achieve a good part of your case can be better than continuing with the risk and uncertainty of litigation so long as the settlement terms are satisfactory.

As to legal costs, whether a party pays some or all of the other party's legal costs if the matter settles at mediation is a matter for the parties. It is standard for settlement terms to include a party making a payment to the other party in commercial cases. In environmental cases the main settlement terms are usually about protection of the environment and may or may not include payment of some kind.

You should take advice from your lawyer about mediation having regard to the circumstances of your case.

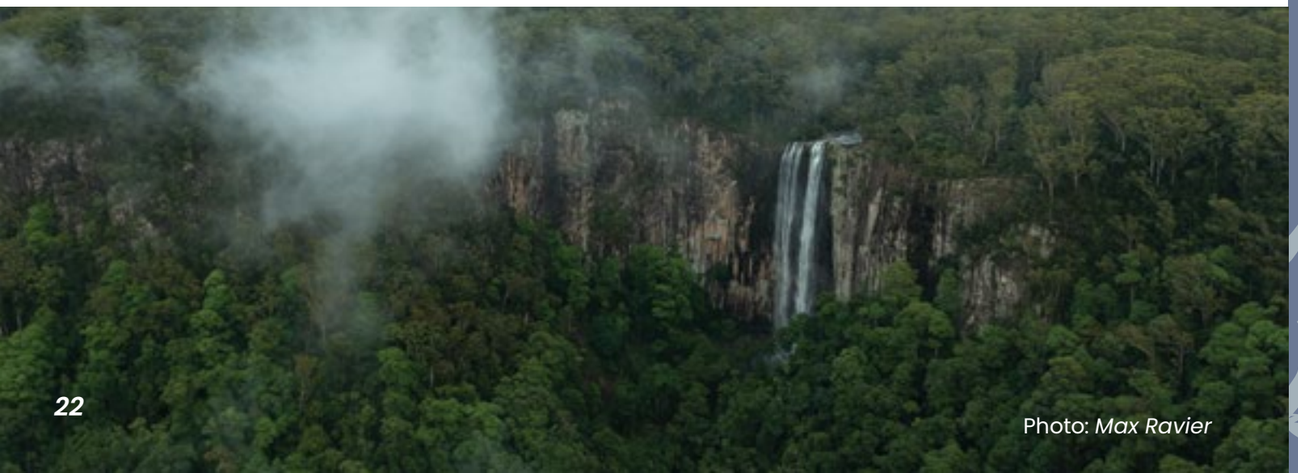

Photo: *Max Ravier*

F. Trial

The trial is the final hearing in the case. It can start with the Plaintiff and Defendant making opening submissions. The Plaintiff then puts all of its evidence before the Court in support of its case. This can involve people getting into the witness box and answering questions about the evidence in their affidavit from the lawyers for the other party. But sometimes, the parties agree to just put the affidavit into evidence without needing the person to answer any questions about it.

After the Plaintiff runs its case, the Defendant then runs its case by putting its evidence before the Court. This usually involves your barristers asking the Defendant's witnesses questions about their affidavits or other documents discovered in the case.

After both parties close their case, the parties make closing submissions which is a summary of their arguments and the evidence. This can be orally at the end of the trial or the Court might give the parties some time to prepare their closing submissions and come back later or make them by filing written submissions.

The more witnesses that need to get into the witness box, the longer a trial can take. It is not uncommon for these cases to run for a number of days in the Supreme Court. You should be at Court every day so you are available to give your lawyer instructions, but your lawyer can talk with you about any flexibility around this.

It is not unusual for matters involving just questions of law (so not much evidence) to only take one to three days. This is more common where the case is asking the Court to review a government decision, such as one made to approve an action under the EPBC Act.

After the trial, you usually wait a while for a decision. This is called the Judge reserving their decision. Some Courts have guidelines around the maximum amount of time that a Judge should take to hand down the decision, for example the High Court is 6 months.

5. Final determination

When the Court ultimately hands down its decision, it is the final determination in the case. The Judge might explain some of the reasons for the decision orally in Court, or the Court might just email the parties' lawyers the written judgment at a set date and time.

When judgment is received, your lawyer will read it and explain it to you.

If you have won the case, your lawyer will explain the extent to which you have succeeded and the practical impact of the decision.

If you have lost the case, your lawyer should advise you as to whether there are grounds to appeal the decision, the prospects of success of the grounds and the date by which any appeal must be filed with the Court.

The question of costs will also need to be addressed. The Court might immediately order the losing party to pay the winning party's costs. Or the Court might give the parties time to make submissions about what costs order should be made (such as the losing party paying only a percentage of the winning party's costs and the reasons for that).

Even if you lose your case, it can have some positive impact, including exposing the destructive conduct you are concerned about and the need to protect the species or area, public awareness of the issue, or pressure on the government to do things differently.

Litigation is an important tool in working to achieve the protection of our natural environment and, particularly, a stop to logging of native forests.

6. Appeals and timing

When a party loses a case, there may be an avenue of appeal. An appeal is an application to a higher Court to rehear or reconsider a decision of a lower Court on the basis that the lower Court made a mistake when making its decision.

If you ran your case in the Supreme Court of Victoria, any appeal would be run in the Victorian Supreme Court of Appeal. If you ran your case in the Federal Court of Australia, any appeal would be run in the Full Court of the Federal Court.

The necessary documents to appeal a decision need to be prepared and filed within a specified period. In the Court of Appeal, this is usually 42 days from the date of the decision. In the Full Court, it is 28 days. A party considering appealing a decision needs to move relatively swiftly in deciding whether to do so or not.

In giving advice, your lawyer should tell you any grounds of appeal (the bases upon which the lower Court was mistaken in its decision) and your prospects of success. An appeal is effectively a new Court proceeding, and so your lawyer should also talk to you about legal costs.

There is only one Court higher than the Court of Appeal and the Full Court. That is the High Court of Australia. If a case is taken to the High Court, its decision is final and there is no further avenue of appeal.

Absent appeals, a proceeding can take a long time. If the case involves evidence, including expert evidence, and people getting into the witness box to give evidence, it might take 1 to 2 years for the case to conclude. If the case is on questions of law only, it usually takes a little less time.

There can be reasons to ask the Court for an expedited hearing date, such as if the subject matter of the proceeding is not fully protected by interlocutory injunctions and some destructive conduct at issue in the case is occurring while the case continues. A Defendant might also ask for an expedited hearing date if interlocutory injunctions are holding up its conduct while the case continues.

If a case goes on appeal, it can take about another year. So, a Court case is an investment on so many fronts, including an investment of time. But it is a worthwhile investment, because our planet is not coping with the pace of devastation being caused to it. And the law can continue to be embraced, and more often, to allow access to justice for our environment.


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