

MAY 2016

**BREAK FREE
FROM FOSSIL
FUELS →**

BREAK FREE: LEGAL TOOLKIT

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INTRODUCTION

Next month you will be joining a global wave of resistance to keep coal, oil and gas in the ground. The action you are preparing is part of a wider movement aiming to accelerate and escalate the move to a carbon-free future.

To this end organisations and individuals from around the world, united in common values and shared goals, have created an online platform to support the actions being planned under the Break Free banner. While we encourage the use of this platform to recruit participants and promote activities that adhere to our agreed values, it does not constitute a formal coalition or legal entity. We cannot, therefore, provide specific assistance or legal support to individual actions.

Break Free actions will be big, bold, and brave. They're designed to shake up the status quo and confront polluters where they are most powerful. By their very nature, therefore, these actions carry risk. While risk-taking is an unavoidable part of what we are doing, however, we should always limit ourselves to "smart" risks: those which are consciously assumed, considered in light of all possible consequences, and mitigated through appropriate precautionary measures.

Given the scale of Break Free actions, it is of crucial importance that legal support is in place well in advance of the planned activity. This legal support shouldn't just be in place to *respond* but to anticipate and prepare for possible legal consequences. It should consider in advance precautions to minimise risk as well as possible legal strategies for responding to adverse legal consequences.

Many of the planned actions are taking place in territories that are unfriendly or downright hostile to peaceful protests. It is therefore important that legal provisions put in place prior to an action consider the political context in which the actions will be operating. The more closely tailored the legal advice is to the legal and political environment the more protected you and your activists will be.

It's important to emphasise, finally, that our obligations to our activists go beyond the merely legal. **We have an ethical duty of care to ensure activists are fully prepared for the action and not abandoned if and when things go wrong.** This doesn't mean we shouldn't expect our activists to assume risk and take personal responsibility for their actions; it does mean, however, that they should be fully informed of the risks they are embarking on and consent to taking those risks. Fulfilling this obligation to our activists is only possible with comprehensive legal advice.

This package has been designed to assist you in procuring this comprehensive advice. In it, you will find the principles that should guide preparations for the planned activity, along with a legal checklist to be used when engaging your lawyer or legal counsel.

THE BREAK-FREE LEGAL PRINCIPLES

These are the principles that will be sent out to each Lead National Organisation (LNO) in charge of individual actions to ensure a standardised approach to crucial issues such as non-violence, responsibility, risk-taking, duty of care and individual rights. They've been deliberately separated from the Values so to allow for as much flexibility and autonomy in the application of the principles as possible.

WE ARE COMMITTED TO THE PRACTICE OF PEACEFUL DIRECT ACTION

We are committed to a strict understanding of peaceful direct action and non-violence when undertaking Break Free actions. This goes beyond mere physical harm and entails no intimidation, threats, gratuitous property damage, or harm to animals or the environment

WE ACCEPT RESPONSIBILITY FOR OUR ACTIONS

We take ownership over and accept organizational responsibility for our Break Free actions. Likewise we expect individual Break Free action participants, where they have freely given their informed consent to participate in an activity, to take personal responsibility for their actions

WE TAKE ONLY CONSIDERED RISKS THAT ADVANCE CAMPAIGN GOALS

We will identify, categorize and assess all likely risks prior to undertaking a Break Free action. Efforts to prepare for and measures to mitigate identified risks will be built into the activity's preparation process.

WE ARE COMMITTED TO A DUTY OF CARE FOR OUR BREAKFREE ACTION PARTICIPANTS

We assume a duty of care over those people participating in Break Free actions on behalf of our organisation that extends beyond our legal obligations and entails our full solidarity. We therefore ensure to the highest reasonable level that the physical, psychological, emotional well being and legal rights of our Break Free action participants are protected before, during and after involvement in a Break Free action. We will fully brief our Break Free action participants on the full scope of our organisation's duty of care, along with the standards set out in these principles.

WE RECOGNISE THE PRIMACY OF INDIVIDUAL RIGHTS

Our respect for the individual rights of our Break Free action participants takes priority over all other interests. We allow our Break Free action participants full autonomy in making decisions on matters entailing personal risk and disavow compulsion in any form.

THE BREAK FREE LEGAL CHECKLIST

Introduction

The following checklist has been drafted to assist you in assessing possible legal risks when preparing for your Break Free action and should be considered in consultation with lawyers providing advice at the national level prior to, during and after the Break Free actions.

It is important to emphasise that this document has been drafted to be of general application to all those organising actions under the Break Free banner. It has not been tailored to the circumstances of your country or the nature of your action, and should not therefore supplant a full legal risk assessment of an appropriately qualified lawyer.

This checklist sets out the topics that your local lawyer should cover in his/her advice. They should be used to make informed decisions about how to proceed with the action, to brief individual activists about the risks they are running by participating, and to make the necessary preparation to mitigate, minimise, or avoid adverse legal consequences altogether. In any event, given the scale of the Break Free actions, it is our strong recommendation that specific legal advice is obtained from a local lawyer.

To ensure the legal advice obtained covers all potential issues, it is important to provide your lawyer with a comprehensive action scenario as far in advance as possible. If this scenario changes, the legal advice may no longer be relevant and it will be important to refer any revised plans back to the lawyer.

A number of the questions below relate to the lawyer's perception of the level of risk and likely outcome of the activity. This will of course be unavoidably subjective and uncertain, but the lawyer's informed opinion will still be of value in determining the best course of action moving forward.

It should be noted that lawyers are bound by ethical duties and cannot advise you as to how to break the law and escape penalty. A lawyer's advice will be limited to informing you of the risks of criminal and civil liability should you proceed with certain actions. In some cases, it may be that a lawyer will advise you to not proceed with a certain action and the choice belongs to you as the client as to whether to heed this advice.

We view our activists as good citizens upholding rights, not criminals. If necessary, we prefer to demonstrate in court that their actions were justified and deserve respect, rather than arguing that facts have not been proven. Whether this approach is possible depends on local conditions. Against this background, here is a list of guiding questions to help determine the scope of your legal advice.

The Checklist

1. Preparing the Action

- What (if any) permits will legally be required for the action to proceed and what measures should be taken to reduce any risks of breaching conditions, laws or regulations (include variations to the proposed action that could reduce risk of criminal charges or civil claims being filed)?
- What measures should be taken to communicate with authorities in preparation for, and during the action?
- What risks are associated with communicating publicly about the action in advance?
- Do you need to increase security measures in the organization?
- What measures should be put in place to ensure legal observers are present at the action, including availability to collect any evidence of wrongdoing and taking statements from victims of any violence committed by authorities?

2. Criminal /Administrative Law

- Which criminal or administrative offences could be committed during the proposed action, and what are the maximum penalties which could be imposed on the activists involved? As much as possible, please also indicate an estimate of the actual sentence which might be imposed.
- How wide does the risk of prosecution spread (e.g. is it only actual protesters, or could organisers be at risk)?
- Which individuals are likely to be most at risk?
- Are there different roles in the proposed action that would involve less risk?

3. Arrest Guidelines / Bail

- What kind of identification, if any, are activists legally required to carry?
- To what extent should activists use their right to remain silent, if questioned? (*Bearing in mind that responsibility and transparency are core Break Free principles*)
- What are the possibilities to obtain bail and what is the process for this?
- What is the likely amount charged for bail?
- In the event of arrests, how long could the detainees be held before arraignment and/or trial and at what point will they be entitled to legal counsel?
- Are there any other risks in relation to arrest or detention that activists should be aware of (e.g. deficiencies in interrogation standards)?

4. Foreign Activists / Immigration

- Do the rules for bail you described above apply equally to non-citizens ?
- In the event charges are filed against a foreign activist, would there be any restrictions on that individual leaving the country before or during trial?

- What are the consequences of arrest for the immigration status of a non-citizen who are legal residents of a particular country or a foreign activist? As part of this analysis consider both immediate and future travel and residence consequences.

5. Civil consequences

- What is the risk of a civil claim for damages? (Consider the possibility not only of a claim by the target, but also by third parties affected by the action.)
- If possible, provide a rough estimate of likely damages, including whether the losing party could have to pay the winning party's legal costs.
- Are there any mitigation strategies that can be relied on to reduce this risk?
- Which defenses, if any, could be useful to employ in the event a claim is filed?

6. Injunctions

- Are you aware of any existing injunctions that might be breached by the action?
- What is the likelihood of an injunction being issued to stop the action both before it begins and while it's taking place and how long would it take for an injunction to be granted?
- What are the likely consequences of breaching such an injunction?

7. Risk analysis

- Most likely outcome
 - What is your assessment of the most likely legal consequences of the action?
 - Please base your analysis on all relevant factors, including, for example:
 - The influence the target has locally and nationally;
 - The attitude of the authorities towards the organisations or individuals involved;
 - The level of public support for the organisations and the campaign;
 - The outcome of any relevant previous actions.
- Worst case outcome
 - What is the worst case outcome and how likely is it – even if a small risk, is it a real risk?

8. Defence strategies

- Trials resulting from an action may be used to draw further attention to the environmental problem we are campaigning on. Please provide us your thoughts on whether it would be possible to:
 - Argue that our actions serve an important function and should be permitted or treated lightly, based on freedom of expression;
 - Argue that a justification defence is available (e.g. state of necessity, self-defence, lawful excuse, necessity or public trust);
 - File a counter-claim raising causes of action concerning the environmental destruction or contributing to climate change.
- Please indicate any steps we could take before or during the action to improve the chances of one of the above-mentioned strategies succeeding.

9. Organisational risks

- What risks might be posed to the organisations involved in coordinating the action?
- What risks might be posed to the organisations involved in the Break Free platform?
- How might the organisations mitigate this risk?

10. Conduct of Authorities

- How much discretion do the police authorities have to use force against those who may attend the action?
- What other police tactics to manage or curtail actions (e.g. the use of 'kettling', horses or tear gas) may those who attend the action be exposed to?
- In the event of police abuse or misconduct, what evidence would be needed to mount a complaint?
- Is there a risk of violence from the authorities, whether legal or not?

MASS NON-VIOLENT DIRECT ACTION (NVDA) GUIDELINES

The following document summarises the advice put together by the Mass NVDA Mobilisation Working Group at Greenpeace in February 2016, along with feedback received from those involved in the successful mass mobilisations that took place in New Zealand and the USA in the same month. It looks at how risk assessments, sign-off procedures, and duty of care principles are affected by engaging in Mass NVDA, as opposed to more “traditional” actions. We hope it is helpful to you when organising your action.

Justification

In many circumstances Mass NVDA will imply taking legal and physical risks, and it is therefore essential to have a clear and strong justification of why we invite people to take that step.

1. **Integrity:** we don't ask people to take risks just for the sake of it, but because the scale of the issues at stake requires us to take NVDA with a breadth and intensity never before seen in the environmental movement.
2. **Last resort:** taking NVDA with potential legal and other risks is a tactic to be used only when other types of action have not or cannot succeed.
3. **Proportionality:** the scale and nature of the action and the risks we ask people to take must be proportionate to the situation at stake. It must be totally clear that the action is the right tool in the right place at the right moment, and that it is a necessary step to win our campaigns.
4. **Part of a wider movement:** the challenges that we are facing today are so huge that they require wider participation and engagement to drive social change.

Risk Assessment and Duty of Care

While risk assessment and sign-off procedures will differ from group to group and coalition to coalition, it is important to take the following general elements into account:

1. **Who are the organisers of the activity?** It is important to be clear and consistent on the role of the different organisations so as to avoid any inadvertent legal liability.
2. **Who will join the activity?** A Mass NVDA Mobilisation implies a wide range of participants, many of whom will have no previous experience of NVDA and will not have received any NVDA training before joining the action. The target audience we intend to mobilise for the activity should be defined in advance as it will have an influence on many key processes:
 - a. Content of training programme
 - b. Content and level of details of briefings
 - c. Organisation of legal support

- d. **Duty of care** All these elements must be developed in a way that guarantees that participants are well-prepared and well-informed (so that they can give their informed consent before joining the action) and that they receive the right level of support before, during and after the activity.
3. **Informed consent:** this means that all participants must be fully informed about and clearly understand prior to the activity:
- a. What is the context and the campaign objectives of the activity;
 - b. What is expected from them, prior, during and after the activity;
 - c. How their specific role fits in the overall scenario of the activity;
 - d. What the personal legal and other risks that they take by joining the activity, including a detailed description of the likelihood and impact of these risks;
 - e. The system that is put in place to mitigate these risks and how organisers and participants plan to deal with them if they occur (legal support, duty of care plan);
 - f. The attitude / behaviour that is expected from them if & when these risks materialize;
 - g. The genuine option that they have to opt out and end their participation in the activity at any point;

Given the diversity of participants (and their differing levels of experience with NVDA) involved in Mass NVDA, this informed consent process is more important than ever. In practice, it means that briefings must be organized for all potential participants prior to the start of the activity, with enough time for everyone to think and take a decision about their participation. These detailed briefings must be given in a language and level of vocabulary understandable by everyone and they must contain Q&A sessions led by organisers with the right level of legal and other expertise. How, in practice, consent is procured from the activists will of course depend on the circumstances: where possible written consent should be obtained, but if this is not practicable verbal consent (or even just raising hands) may be necessary.

4. **Duty of Care:** this is the obligation of an organisation to take all reasonable steps to avoid that people are harmed by its actions or by its lack of action. How we care for our people is important for our campaign success and fundamental to maintaining our values and advancing our objectives. This duty includes:
- a. Full support and solidarity of the organisation, at all levels, for those taking risks;
 - b. Prioritisation of support for dangerous and emergency situations;
 - c. Best practice security planning; thorough and proper training and preparation;
 - d. Provision of reasonable personal protection measures;
 - e. Accurate and realistic management and control of situations,
 - f. The capability to withdraw our people should a security situation deteriorate.

These are obviously more difficult to guarantee in the context of Mass NVDA. The basic principle for those leading activities must be that we strive to provide to all participants a level of care that is fully in line with our values, our legal obligations and policies. The way this principle applies in practice to the activity in question and the modifications that may be needed in light of the nature or context of the activity needs to be agreed in detail as part of the preparation process within the coalition of organisers. These must then be communicated in the clearest possible way to all action participants in order to guarantee their fully informed consent and

their active and positive contribution to the activity and its possible consequences if the risks identified materialize. It is important to brief activists on the exact parameters of the duty of care provided by your organisation. Beyond the points listed above, this will be for the organisation in question to determine, but the following are recommended:

- a. If it is not possible to pay for travel, accommodation, etc. help *facilitate* these logistical details by providing links to possible cost-effective options, e.g. providing a website page for participants to coordinate ride sharing.
 - b. Likewise, if it is not possible to cover legal fees where action is taken against participants, offer to *facilitate* legal representation and the payment of fees: e.g. via the provision of pro bono lawyers or the use of crowd-sourcing or other means of fundraising to cover costs.
5. **Non-violence:** Mass NVDA will bring together a very diverse group of participants, many of whom have limited or no experience of non-violent direct action, and many of whom will have different views about what non-violence means and how important it is in the context of activism. Given the scale of the actions, Mass NVDA may also cause law enforcement authorities to deal with situations they are not used to or are not trained to deal with. As such, the risk is higher than usual that situations of aggression, violence or hostility escalate, whether consciously created or not. We can reduce that risk by:
- a. Repeatedly emphasizing the message of peaceful direct action publicly and as much in advance as possible: e.g. referencing historic examples of peaceful resistance (e.g. Gandhi, Rosa Parks) in our communications material.
 - b. Developing specific training and briefing packages for all participants, including elements around non-violent behavior, action scenario, quick decision-making, etc.
 - c. Setting up a system of peacekeepers whose role during the action will be specifically to maintain its non-violent character and to deal with escalation situations.
 - d. Agreeing in advance with all participants an “action consensus” (see examples below) that describes what behavior is expected from every participant, regardless of their personal opinion on non-violence.
 - e. Communicating, as much as tactically possible, with the authorities and other law enforcement about the action, in order to avoid escalating reactions from their side.
 - f. Film briefings and keep footage safe as evidence that you were consistently repeating a message of non-violence

Training and Briefing

Training packages aimed at preparing people to join a Mass NVDA Mobilisation should be tailored given the very different circumstances in which the different actions will be operating. However, the objectives of Mass NVDA trainings will be similar in most if not all cases:

- Explain to all participants what the essential principles are in terms of non-violent behavior, and describe how we expect them to apply these in practice. In practice, this can take the shape of a

basic document that stipulates principles that all participants are expected to accept, understand and apply.

- Prepare participants to deal with possible aggressive or violent behavior their fellow activists or other stakeholders (passers-by, law enforcement or security officers on the ground, opponents) and to behave in a way that promotes non-violent de-escalation. In practice, this can take the shape of various role plays in which participants experience situations of violent escalation and learn how to deal with them, sharing their experiences with fellow participants.
- Familiarise participants with the various roles and tasks that need to be taken during a Mass NVDA Mobilisation and see with them which role they would feel comfortable to play. The nature of these roles will vary depending on the context and the scenario of the action.
- Prepare participants to take action in small groups, with clear leadership roles identified in every group. Working with small groups allows a better management of big crowds, and a better ability of individuals to deal with unexpected (violent) situations.
- Explain to participants which legal and other consequences they can expect during and after the action and which support they can expect from the organizers. Prepare them to deal with these consequences in a way that allows mutual support, and that makes the aftermath of the action a part of the campaign.
- Prepare participants to be real actors in the mobilisation towards the action and explain how they can motivate others to join.

An obvious difficulty of adapting training practices to the needs of Mass NVDA is how to accommodate the numbers of participants. It is important to emphasise when communicating to potential participants that the training session organised is a *mandatory* precondition of participation and is essential to the integrity of the action. If it is practically impossible to ensure full participation, the use of webinars can ensure a more comprehensive turn-out. *Note that collecting a list of participant names and details may put those participants risk in the event that of data seizure, so some uncertainty as to the full scope of participation may be unavoidable.*

Even if these things are done, however, a risk remains that participants will miss the training and go to the action without any knowledge of the risks they face or the rights they have. To mitigate the problems such a scenario presents, the following precautions can be taken:

- Place those people who were not present at the full briefing in groups with those participants who did attend.
- Have a short “mini-briefing” immediately before the action itself, which covers the key details (this should be done in any event as a “refresher”)
- Provide “Know Your Rights” cards with the contact details of legal support and “Dos and Don’ts” in the event of confrontation or arrest.
- Provide lawyers on standby to assist in the event something goes wrong.
- Fully brief a support team of trained activists as to how to deal with police tactics and have them on standby.

FURTHER INFORMATION

We have set up a Dropbox folder to update this toolkit between now and the actions with new material. We plan to include helpful articles, links, and further information on our campaigns.

- You can access this material via the following link:
https://www.dropbox.com/sh/p6owz1kv9bbp06/AACoEHv1DFA2yZAg_sCT5EyNa?dl=0
- Note that you will need a Dropbox account to access these files, but that this can be signed-up to for free.