

28 February 2006

Ms Robina Jaffray
Standing Committee on Legal Affairs
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Ms Jaffray

Submission on Inquiry into Court Procedures (Protection of Public Participation) Amendment Bill 2005

Introduction

1. While some of the goals behind the *Court Procedures (Protection of Public Participation) Amendment Bill 2005* (“**the Bill**”) are admirable, its provisions seem largely unnecessary, unrealistic, or likely to be ineffective. The Bill appears to be an over-reaction to the *Gunns* case. Numerous existing *Supreme Court Rules* already exist to allow a defendant and/or the Court to deal with an improper claim. Many such rules are mentioned in the body of this submission. In addition, s188 *Civil Law (Wrongs) Act 2002* already requires a lawyer filing proceedings to certify that the proceedings (claim or defence) have reasonable prospects of success and there are sanctions for falsely certifying this.
2. For these reasons this Bill should not be supported.
3. The nature of the Bill is revealed by a detailed analysis of its provisions. In the analysis which follows the numbering of the proposed new provisions is adopted and the provisions are generally discussed seriatim and in order. Relevant extracts from the Bill are included to facilitate the discussion, although generally stem provisions are not be repeated for the discussion of later sub-sections relying on the same stem provision.

Section 37A(a)(i)-(ii)

37A Objects of pt 4A

The objects of this part are—

(a) encouraging public participation, and dissuading people from bringing or maintaining proceedings for improper purposes, by 18 providing—

- (i) an opportunity, at or before the trial of a proceeding, for a defendant to claim that, and for the court to consider whether, the proceeding is brought or maintained for an improper purpose; and
- (ii) a way in which a proceeding that is brought or maintained for an improper purpose can be summarily dismissed; and

4. Provisions to meet these objectives appear unnecessary because the courts already have wide powers to stay proceedings, to permanently stay proceedings, to dismiss proceedings or to enter judgment against a litigant, if the court considers that the proceedings have been brought for an improper purpose: see, for example, the High Court case of *Williams v Spautz* (1992) 174 CLR 509. This power of the court is an inherent power and is not dependent on a specific court rule. While the Magistrates Court may not have inherent powers, being a creature of statute, it will soon have substantially similar powers under the new joint rules currently being developed.

5. In this context, an improper purpose would seem to cover anything contemplated by the Bill as improper, because at common law an improper purpose extends to any collateral purpose, that is, any predominant purpose not about seeking judgment on the issue in the proceedings. The existing general law definition of improper purpose is already wider than that contemplated by the Bill.

6. In addition, the Supreme Court Rules (“*SCR*”) already provide expressly for much of what seems to be contained in the above objective:¹

- (a) Order 66 r10B provides a power for the Registrar of the Court to reject documents which amount to an abuse of process.
- (b) Order 29 rule 4 *SCR* provides a general power to the Court to deal with any pleadings if they disclose no reasonable cause of action or if they are frivolous or vexatious. The Court may strike out the pleading in whole or part, stay or dismiss proceedings or enter judgment against a party.
- (c) Further strike out powers against scandalous matters, or matters which may prejudice, embarrass or delay a fair trial are provided in *SCR* Order 23 rule 28 and Order 32 rule 8.
- (d) Order 34A rule 30 *SCR* provides a general power to the Court to stay proceedings.
- (e) Order 17 *SCR* provides for a defendant to seek summary judgment against a plaintiff if an action is frivolous or vexatious or that there is a good defence on the merits.
- (f) Order 33A *SCR* allows the court to stay or dismiss proceedings because of undue delay or want of prosecution by a plaintiff or claimant.

¹ Although reference throughout this submission is to the soon to be replaced *Supreme Court Rules*, substantially similar provisions will appear for both ACT courts in the joint rules being developed.

7. Further, s188 *Civil Law (Wrongs) Act 2002* requires a lawyer filing proceedings to certify that the proceedings (claim or defence) have reasonable prospects of success. Of course, most if not all plaintiffs against whom the Bill is addressed will be represented by lawyers. There are sanctions for breach of this provision, including a finding of professional misconduct against the lawyer and an order that they personally pay the costs of proceedings if they file proceedings when the proceedings have no reasonable prospects of success.

8. Under general law the courts also have wide powers to order costs against a solicitor who pursues litigation predominantly for some collateral purpose: see judgment of the Full Federal Court in *Flower & Hart v White Industries (QLD) Pty Ltd* (1999) 87 FCR 134. A wide court power to order costs against a lawyer is proposed for the new joint court rules.

Section 37A(a)(iii)

(iii) a way in which people who are subject to a proceeding that is brought or maintained for an improper purpose can obtain reimbursement for all reasonable costs and expenses incurred as a result; and

9. The Bill will be strictly ineffective in meeting this objective. This is because none of its provisions expressly provide for indemnity or solicitor-client costs. Thus, to the extent that the Bill provides for a court to order costs, such costs would usually be costs on a party-party basis, leaving solicitor-client costs for the hapless defendant who was made subject to the sort of proceedings the Bill is directed against. Of course, the courts retain their existing wide discretion to order indemnity or solicitor-client costs in appropriate cases.

10. To the extent that the Bill seeks to redefine costs (which is one interpretation of it) see paragraphs 15 and 16 below.

11. Further, provisions of the Bill to meet this objective are also largely unnecessary. If the hapless defendant (as contemplated by the Bill), wins judgment or otherwise has proceedings stayed, dismissed or struck out then under current court rules and precedents, the defendant would generally be awarded costs.² There are also specific provisions that where proceedings are discontinued by a party, then that party will normally pay the other party's costs: see Order 30 rules 1 and 3.

Section 37A(a)(iv)

(iv) a way in which punitive or exemplary damages can be imposed in relation to a proceeding that is brought or maintained for an improper purpose; and

12. Provisions to obtain this objective may also be unnecessary because the courts already have wide discretion concerning costs, including the ability to impose what can be

² A "costs generally follow the event" provision is proposed for the new joint court rules.

punitive cost orders in appropriate cases. As already mentioned the courts have powers to make personal costs orders personally against a lawyer and these may be regarded as relevantly punitive costs: see paragraphs 7 and 8 above.

13. Since the Bill provides no new criteria to be applied by the courts in considering the imposition of punitive or exemplary damages, one can only assume that the courts will continue to apply existing criteria – that is to continue to apply the law as it was prior to any enactment of the Bill. To the extent that the Bill proposes an entitlement to damages for improper proceedings it raises a problematic issue without providing guidance to the courts as to how to implement any such provision and it goes well beyond existing law.

Section 37A(c)

(c) consistently with the Human Rights Act 2004, section 15, section 16 and section 17 (a), better protecting the following rights:

- (i) the right of peaceful assembly and to freedom of association;
- (ii) the right to freedom of expression;
- (iii) the right to take part directly in the conduct of public affairs.

14. It is unclear and dubious that any provisions of the Bill actually further these laudable objectives.

Section 37B

costs, of a defendant in relation to a proceeding, includes all of the reasonable costs and expenses incurred by the defendant in relation to the proceeding (including in taking action under this part).

15. On its face this definition adds nothing to the usual and very detailed cost provisions found in court rules such as the *SCR*. If the definition is intended to displace those general provisions of long standing and include solicitor-client costs as a matter of course or to widen costs to costs incurred by a self-represented litigant, then the definition should expressly say that.

16. To widen costs provisions specifically for defendants and specifically for the type of litigation contemplated by the Bill would seem to be iniquitous in that it would not treat all litigants equally before the law. Such inequality could be contrary to s8(2)-(3) *Human Rights Act 2004*.

Section 37C

37C Improper purpose

17 A proceeding is brought or maintained for an improper purpose if—

- (a) the publication or conduct in relation to which the proceeding is brought is public participation; and
- (b) the plaintiff could have no reasonable expectation that the proceeding would succeed; and
- (c) a purpose for bringing the proceeding is—

(i) to discourage the defendant or anyone else from engaging in public participation; or

(ii) to divert the defendant's resources from public participation to the proceeding; or

(iii) to penalise the defendant for engaging in public participation.

17. Given the presence of “and” in the definition in s 37C, an essential element of the definition is that the plaintiff could have no reasonable expectation that the proceeding would succeed. The reference to the plaintiff's expectations changes the normal test the court would apply by linking it to the plaintiff himself/herself/itself. Arguably this might make the test more subjective despite the inclusion of the word “reasonable” qualifying “expectation”. However, putting to one side the uncertainties created by such issues, it is unclear that the definition of improper purpose does anything but point to a narrower range of cases than the courts normally contemplate and deal with under the guise of “improper purpose”. This is because the definition is narrowed by requiring one of the purposes in s37C(c).

18. The courts would normally, and without the operation of the provisions of the Bill, strike out, discontinue, or otherwise dismiss actions where there were (objectively speaking) no reasonable expectations that the proceeding would succeed: see paragraphs 6(a), 6(d), 6(e) and 7 above. Accordingly, this core definition in the Bill effectively renders the Bill unnecessary given existing common law and court rules.

19. Section 37C(c) amounts to another change from the existing law in that it refers to “a purpose” in bringing proceedings, while the existing law has sanctions against pursuing litigation for a dominant collateral purpose. Three things should be said about this. First, if there are to be sanctions against plaintiffs with a purpose which is a collateral purpose, then those sanctions would probably be cast far too widely and might well catch a range of litigants not intended to be caught. For example, among those caught could be consumers who would like to see a manufacturer of a defective product improve the product in addition to paying the consumer damages, or creditors who commence bankruptcy action to try to shake some payment out of the debtor and not just to enforce bankruptcy. On this basis, the Bill may be drafted too widely. The general law approach relying on the dominant purpose of the proceedings would seem preferable.

20. Second, it may be unreasonably discriminatory to limit improper purposes, for the purposes of the Bill, just to the specific purposes listed in s37C(c). This treats some litigants quite different from others based on an arbitrary subset of potentially improper purposes. Arguably, this could be contrary to s8(2)-(3) *Human Rights Act 2004*.

21. Third, to the extent that the general law and statutes provide sanctions against those (or their lawyers) pursuing litigation for a dominant improper purpose, then the s37C definition is simply unnecessary and will only serve to prevent the evolution of the concept of improper purpose from benefiting the hapless defendants contemplated by the Bill. In this context, s37C is unnecessary and potentially unhelpful to the very people it is trying to assist.

22. In addition, use of the vague word “penalise” in s37C(c)(iii) also likely to cast the net too widely. In particular, any proceeding against a defendant could “penalise” the defendant by effectively forcing them through the process of litigation. No definition of “penalise” is provided.

Section 37D

37D Public participation

Public participation is a publication or conduct aimed at influencing public opinion or promoting or furthering lawful action by the public or by any government entity in relation to an issue of public interest, but does not include a publication or conduct—

- (a) in relation to which a prosecution has been started; or
- (b) that is a breach of a territory law; or
- (c) that contravenes an order of a court; or
- (d) that intentionally or recklessly causes physical injury; or
- (e) that intentionally or recklessly causes damage to or destruction of property; or
- (f) that is trespass to land; or
- (g) by way of advertising for commercial goods or services; or
- (h) that a court otherwise considers to be unlawful or unwarranted interference by the defendant with someone's rights or property.

23. To the extent that the Bill relies on the concept of litigation concerning a publication, it may well run foul of moves currently underway to implement a national approach to defamation law. This is perhaps a matter best addressed by parliamentary counsel. In what follows reference is made only to conduct.

24. The definition in s37D substantially renders the Bill nugatory. It does so, because the Bill will catch little or perhaps no conduct under the rubric of public participation and public participation is a core concept of the Bill. While the definition of “public participation” interestingly draws attention to the concepts of influencing public opinion and of issues of public interest, the exclusions to the definition render the concept of public participation substantially null. Much conduct is clearly ruled outside the concept by sections 37D(a)-(g) of the definition. Realistically, most other potentially relevant conduct is excluded by s37D(h).

25. The reason s37D(h) is so powerful and unhelpful is as follows. First, it must be noted that conduct or public participation is only relevant in the Bill if litigation is launched against or about the conduct or public participation. If the exception in s37D(h) applies then, by definition, a court could consider that the plaintiff had a reasonable cause of action against the defendant, and of course, the conduct involved would not be public participation. Thus, if the exception applies, operative provisions of the Bill have no force and a plaintiff could readily pursue litigation against a hapless (but perhaps blameworthy) defendant.

26. On the other hand, if the exception in s37D(h) does not apply then, a court would not consider that the defendant's action was unlawful or unwarranted or constituted interference with someone's rights or property. In such a case, it seems most unlikely that a court could hold that the plaintiff had any justiciable cause of action. In such a case, without the present Bill, the common law and court rules would allow the plaintiff's claim to be struck out or allow judgment for the defendant with costs following the event: see, eg, paragraphs 6(a) and 6(e) above. In other words, for litigation against public participation as defined in the Bill, the Bill adds nothing to the current law and is unnecessary.

Section 37E

37E Application for summary dismissal

(1) If a defendant in a proceeding in a court considers that the proceeding was brought or is being maintained for an improper purpose, the defendant may apply to the court for an order dismissing the proceeding.

27. As already explained, the courts already have wide powers to dismiss proceedings being pursued for a dominant improper purpose. The courts existing powers are wider than those proposed under the Bill, because under existing law “improper purpose” is an open class which is more widely defined than in the Bill. As already mentioned (paragraph 19 above), to the extent that the Bill seeks to allow the imposition of sanction not only for proceedings pursued for a dominant improper purpose, but also for any (even secondary and minor) improper purpose, then it probably casts its net dangerously too wide. Again, this provision seems either unnecessary or unwise.

Section 37E(2)

(2) The application must be made within 60 days after the day the originating process (however described) for the proceeding is served on the defendant.

28. This provision is a procedural one and will be inconsistent with the existing and proposed joint court rules. The legislature clearly has the power to enact this provision of the Bill, but it is unclear that the specific time periods serve sufficient useful purpose to bother altering existing court provisions.

Section 37F(1)-(2)

37F Orders available to defendant on application for summary dismissal

(1) On an application under section 37E by a defendant in a proceeding, the court may make an order dismissing the proceeding if the defendant satisfies the court, on the balance of probabilities, that, when viewed objectively, the proceeding was brought or is being maintained for an improper purpose.

(2) If the court makes an order dismissing the proceeding, the court may also make either or both of the following orders:

- (a) an order that the plaintiff pay the defendant’s costs in relation to the proceeding;
- (b) an order that the plaintiff pay the defendant punitive or exemplary damages.

29. As indicated by the arguments above, s37F(1) add nothing to more general court powers to dismiss proceedings maintained for an improper purpose and is unnecessary.

30. Subject to the comments in paragraphs 15 and 16 above concerning the potential redefinition of costs, s37F(2) also adds nothing to existing court discretion to make orders concerning costs.

31. To introduce the notion that defendants receive not just costs but punitive or exemplary damages because the proceedings were brought for an improper purpose is a change to the law. However, in the absence of guidance to the courts as to how this is to

be implemented and what criteria are relevant it is likely to be ineffective. Further, by discriminating in favour of one class of defendants, it may well offend against s8(2)-(3) *Human Rights Act 2004*.

Section 37F(3) & Consequential Provisions

(3) If the court does not make an order dismissing the proceeding but the defendant satisfies the court there is a realistic possibility that, when viewed objectively, the proceeding was brought or is being maintained for an improper purpose, the court may make either or both of the following orders:

(a) an order, on the conditions the court considers appropriate, that the plaintiff provide as security an amount to cover the costs and damages to which the defendant may become entitled under this part;

(b) an order that the proceeding must not be settled or discontinued without the approval of the court and on the conditions the court considers appropriate.

32. The key terms in s37F(3) are “a realistic possibility”. These effectively require the court to proceed to determine a matter not on the criminal standard of “beyond reasonable doubt” or on the civil standard of “on the balance of probabilities” but on the new standard that there is a “realistic possibility”. Establishing that a fact is a realistic possibility seems at a lower level than establishing the fact on the balance of probabilities: as can be inferred from the High Court judgment in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337. It seems likely that this provision would be struck down under s28 *Australian Capital Territory (Self Government) Act 1988* (Cth) as being inconsistent with the provisions of the s140 and s141 *Evidence Act 1995* (Cth) which enact the civil and criminal standards of proof.

33. These same problems with “a realistic possibility” infect s37H(2) which relies on the same standard of proof in s37H(2)(b).

34. Further, such problems concerning s37F(3) infect all of s37G and s37H(1) which effectively only apply after obtaining an order under s37F(3).

35. Also, the provisions of s37G and s37H(1) effectively widen the impact of s37F(3). They, therefore, widen the importance of the conflict between the Bill and the *Evidence Act 1995*.

36. Even putting aside the problem raised in paragraph 32 above, s37F(3)(a) appears to ignore the existing provisions for a court to order security for costs. In the absence of specific and new criteria in s37F(3) for a court to apply in considering a security for costs order, a court will probably apply the tried and tested existing criteria. In this case, s37F(3)(a) seems unnecessary and is likely to be ineffective.

37. Further, when a corporation is involved (and one imagines that most the plaintiffs sought to be caught by the Bill will be corporations), the *Corporations Act 2001* (Cth) provides the criteria which must be applied to order security for costs. Provisions contrary to the *Corporations Act 2001* would probably be struck down under s28 *Australian Capital Territory (Self Government) Act 1988* (Cth). On this basis, s37F(3)(a) seems nugatory.

38. Section 37F(3)(b) is also unnecessary given the requirements for court leave prior to discontinuance already in Order 30 rules 1(3) and 1A *SCR*.

Section 37I

37I Parties may present any evidence and argument

(1) If a defendant in a proceeding seeks an order under this part in the proceeding, the parties may present evidence and make arguments about whether the proceeding was brought or maintained for an improper purpose, whether or not the evidence or arguments relate to a claim made by the plaintiff in the proceeding.

(2) This section does not limit any other rights the parties may have to present evidence and make arguments.

39. Any order sought by a party under this part (to use the words of s37I(1)) would be by way of interlocutory order, or summary judgment. Accordingly, the evidence led would have to be relevant to that interlocutory proceeding as mandated by s56 *Evidence Act 1995*. Section 37I appears not to be unnecessary as neither adding to nor limiting what is already provided for in the *Evidence Act 1995*. Even if s37I did attempt to extend or limit what was admissible under the *Evidence Act 1995*, it would be ineffective because it could not constitutionally be contrary to the *Evidence Act 1995*.

Section 37J

37J Disposing of security

If a court makes an order under this part that the plaintiff in a proceeding pay the defendant's costs in relation to the proceeding, the order may provide for the costs to be paid out of any security provided by the plaintiff under an order made under section 37F(3)(a) in the proceeding.

40. This provision too seems unnecessary as effectively duplicating extensive existing provisions in court rules covering security or other monies paid into the court.

Yours sincerely

Greg Walker
President