



*A Community Legal Centre specialising
in public interest environmental law.*

15 April 2010

Her Honour Judge Cole
Chairperson
Environment, Resources and Development Court Rules Liaison Committee
Sir Samuel Way Building
Victoria Square
ADELAIDE SA 5000

Dear Judge

DRAFT RULES IN THE ENVIRONMENT, RESOURCES AND DEVELOPMENT COURT (“ERD Court”)

The Environmental Defender's Office (SA) Inc (“the EDO”) welcomes the opportunity to make a submission with respect to the draft rules of the Environment, Resources and Development Court.

The EDO is a community legal centre specialising in public interest environmental law and has fourteen years experience in litigating environmental matters and participating in environmental law reform processes. EDO functions include legal advice and representation, law reform and policy work and community legal education.

We make the following comments with respect to the draft rules.

Simplified procedure

Clause 1.3.1 of the current rules provides:

These Rules are made for the purpose of establishing orderly procedures for the conduct of proceedings in the Court, and are to be construed and applied so as to best ensure the attainment of the following objects:

- *the simplification of practice and procedure;*
- *the identification of the real issues between the parties prior to the hearing of proceedings;*

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- *the saving of expense; and*
- *the fair and expeditious disposal of the business of the Court....*

The simplicity of the current rules is reflected in their brevity and the minimal procedural and evidential requirements. Whilst we acknowledge that draft rules will “*be adapted, as far as practicable and appropriate, to the participation in proceedings of persons without legal representation*”¹; minimise formality; ensure flexibility in the receipt of evidence² and give the Court power to control procedure³, we are concerned that the volume of the draft rules will prove daunting to unrepresented parties and that the obligations set out the rules may deter meritorious litigants from bringing or continuing an action.

We are also concerned that the Court must be seen to be fair and that the draft rules appear to emphasise efficiency (which we endorse as a general principle) over fairness⁴. In these circumstances, we submit that it may be prudent to add a version of the final bullet point in clause 1.3.1⁵ of the current rules to the draft rules to alleviate some of these concerns.

Rule 24 – Respondent to file Reply

This draft rule requires the respondent to an administrative appeal to file a reply. We endorse this rule as it encourages consideration of the critical issues relevant to the dispute at an early stage in the proceedings. This in turn may lead to early settlement of the proceedings and is consistent with the objects of the draft rules. If the appellant’s claim is written in minimal terms, then preparation of the reply is not likely to be unduly onerous.

Rule 26 – Obligations of development and other applicants

This draft rule requires a developer to file any amendment to the development at least 14 days before the hearing. Whilst this rule reflects the current position⁶, we submit that the 14 day time period places an unfair disadvantage on other parties to the action who are faced with having to reassess the matter and liaise with experts at that late stage in the proceedings. We submit that provision of any amendment to the development 28 days before the hearing is reasonable and that the rules should be amended to this allow for 28 days.

Rule 41 (1)(c) Representative actions

We have made submissions with respect to this sub-rule by way of separate letter.

¹ Draft rule 3(2)

² Ibid

³ Draft rule 9

⁴ Rule 3(1)(c) provides: “to promote efficiency ...” provided that it is consistent with the paramount claims of justice.

⁵ “*the fair and expeditious disposal of the business of the Court*”

⁶ Rule 1.3.1(f)

Rule 78(3) – Partnership or unincorporated association

This rule provides that:

- (3) *If an action is commenced against an unincorporated association in the name of the association, a document is taken to have been served on the association if served on—*
- (a) *any member of the committee of management of the association; or*
 - (b) *a person who holds property on trust for the purposes of the association; or*
 - (c) *a person who has the management or control of the business of the association.*

It is likely that an unincorporated association will be a community group which may be taking or defending court action to protect the environment in the public interest. As each committee member of an unincorporated association is personally liable for the association's actions it is important that each committee member receives the proceedings and we submit that the rule should be altered to allow for this circumstance.

The proposed amendment would result in unincorporated associations being served differently to partnerships⁷. This is appropriate as a partnership usually operates as a business on a commercial basis and so is likely to have procedures in place for the transfer of the documents from one partner to another (which is envisaged by the rule). On the other hand, an unincorporated association is not likely to have such procedures in place.

Rule 101(6) Late applications

This rule provides that late applications will only be allowed in special circumstances. Whilst we note that the draft rules will “be adapted, as far as practicable to the participation in proceedings of persons without legal representation”⁸, we are concerned that self represented litigants often may be ‘caught out’ (due to ignorance) by the operation of this rule. As a result, we submit that it is appropriate that “special circumstances” be defined to include such self represented litigants needing to file a late application due to their ignorance of the Court processes.

Rule 107(6) Privileged documents

This rule indicates documents which need not be disclosed in a list of documents, but does not refer to privileged documents such as witness statements. We submit that the rule should be amended to include a comprehensive list of privileged documents and in

⁷ Subsection 78(1) provides for a form of service with respect to partnerships which is similar to the requirements provided for service of unincorporated associations.

⁸ Draft rule 3(2)

particular to refer to witness statements in that list given the potentially deleterious effect discovery of privileged documents may have on unrepresented litigants.

Rule 112(3)(b)(i) Photocopying of inspected documents

This rule provides that the party making documents available for inspection must make available facilities for copying the documents. We submit that this rule should not apply to self represented litigants, given compliance difficulties.

Rule 117 Notice to admit

Sub-rule 117(7) provides that a recipient of a notice to admit who fails to respond to an assertion in accordance with sub-rule 117(6) will be taken to have admitted the assertion. We submit that this rule should not apply to self represented litigants, given the potentially disastrous consequences that this rule may have on an unrepresented litigant who fails to respond to a notice to admit (which includes the inability to withdraw an admission without the Court's permission⁹).

Part 3 – Court's discretion as to costs

Whilst rule 160 confirms that costs are not applicable in certain circumstances, a lay reading of Part 3 appears to give the impression that costs will be awarded against unsuccessful litigants¹⁰. In the circumstances, we submit that rule 160 should specify the circumstances in which the ERD Court Act may exercise its statutory discretion with respect to costs.

Environmental Defenders Office (SA) Inc

⁹ Rule 119

¹⁰ Rule 160 confirms that costs are not applicable in certain circumstances.