



*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

REPRESENTATIVE ACTIONS 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 representative actions.

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.

EXECUTIVE SUMMARY

The EDO submits that Rules 7.1.2 and 7.1.6 of the ERD Court Rules should be amended to allow proceedings to be commenced in a representative capacity without the requirement that the representor first obtain written, signed consent from all those represented. This would remove the requirement of a written memorandum prior to representative proceedings being filed and would adopt provisions which are equivalent to the Federal Court, all other Supreme Courts (except South Australia) and the New South Wales Land and Environment Court.

Further, the EDO submits that the ERD Court Rules should be altered to allow group members in representative actions to have immunity from costs orders in the manner allowed in the Federal Court of Australia.

Representative Actions – South Australia

Part 7.1 of the ERD Court Rules (SA) 2003 sets out the procedural requirements for undertaking enforcement action in a representative capacity under environmental legislation such as the Development Act (SA) 1993, the Environment Protection Act (SA) 1993 and the Natural Resources Management Act (SA) 2004.

Rule 7.1.2 of the ERD Court Rules provides that when proceedings for an enforcement order are commenced in the ERD Court, the applicant must file in the Court registry an application seeking leave to serve a summons, the summons itself and at least one supporting affidavit. However, paragraph (d) of that rule also requires an applicant bringing proceedings in a representative capacity to file a memorandum, which must specify all the people or organisations being represented and must be signed by all of these people or organisations. The relevant rules are set out below.

ERD Court Rules

7.1 Institution of Application

7.1.2 *Proceedings for an enforcement order (but not including a compliance order sought pursuant to the provisions of section 74A of the Mining Act 1971 or section 86 of the Opal Mining Act 1995), shall be commenced by filing in a registry of the Court the following documents:*

- (a) an application seeking leave to serve a summons (and where the applicant is a person other than those contemplated by subsections 104(7)(a) and (7)(b) of the Environment Protection Act 1993, or subsections 141(6)(a) and (6)(b) of the Water Resources Act 1997 seeking leave to bring the application);*
- (b) the summons in respect of which leave is sought;*
- (c) one or more supporting affidavits; and*
- (d) where the applicant brings the proceedings in a representative capacity, a memorandum.*

7.1.6 *Every memorandum must specify all the people or organisations upon behalf of whom or which the proceedings are brought and signed by all the people or organisations in such manner as shows that all the people or organisations consent to the proceedings being brought on their behalf.*

Rule 41(1)(c) of the new draft rules is more onerous. It provides that:

41(1) The originating process for an enforcement or compliance application is a summons, in an approved form, addressed to the person against whom an order is sought from the Court, accompanied by—

.....

(c) if application is being made in a representative capacity, a memorandum, in an approved form—

- (i) specifying each member of the group on whose behalf the application*

is being made and containing each member's signed consent thereto; and

- (ii) *specifying the nature of the interest in the action shared in common by the members of the group.*

The most recent rules of the Supreme Court of South Australia¹ adopt a similar approach to the ERD Court Rules for the commencement of representative actions. Rule 80 provides that where a representative action is brought, the applicant acting in a representative capacity must be authorised in writing by all members of the group to act in such a capacity. This written authorisation must contain a list of names and addresses of all persons being represented² and must be filed at the Court registry when the applicant files the originating process³.

Rule 81 allows some flexibility in that a plaintiff can bring an action on their own and apply for the court's authorization to bring an action as representative of a group. However, the originating process must state that the plaintiff intends to apply for the authorization and the application must be made within twenty-eight days after the time allowed for the defendant to file a defence⁴. Further, any order made must define the group on whose behalf the action is brought⁵.

Representative Actions – Australia, England and Wales

The representative action provisions for the Federal Court, the Supreme Courts of Victoria, New South Wales, Western Australia, Tasmania, Australian Capital Territory and Queensland and the respective environment courts of New South Wales, Victoria and Queensland do not require written consent in representative actions⁶. Further, the Civil Procedure Rules of England and Wales 1998 contain similar provisions and do not require any authorisation by the represented persons before the representative can file proceedings on their behalf.

A document setting out the relevant provisions from the above jurisdictions is attached.

Advantages to Amendment

For the following reasons, the EDO submits that Part 7 of the ERD Court Rules (and rule 41(1) of the new draft rules) should be amended to:

¹ Supreme Court Civil Rules SA 2006. Previously, the Supreme Court Rules SA 1987 did not require the filing of a written authorisation in representative actions. See Rule 34.

² Rule 80(4) Supreme Court Civil Rules 2006 ("SCR")

³ Rule 80(2) SCR

⁴ Rule 81(3) SCR

⁵ Rule 80(5) SCR. Compare s33H of the Federal Court Act which requires the group to be described, which arguably allows more inclusivity than the restrictive word "define".

⁶ The rules of the environment courts in the balance of the states have not been considered at this stage due to lack of time.

- enable representative actions to be brought without requiring written consent of group members at the time the summons is lodged; and
- to allow immunity from costs for group members.

- **Public Interest Matters**

Public interest environmental matters usually impact a wide group of people, many of whom would normally be reluctant to take part in litigation. Individuals and groups seeking to preserve the environment in the public interest face many hurdles including an uneven balance of power between individual claimants and large corporations. Given that applicants in public interest cases are attempting to protect the interests of a large group of people, (as distinct from the individual concerns which are normally represented in the Courts), the usual conditions required in matters with a commercial or private aspect should not apply. The requirement that representors provide written authorisation from all those involved, and the prospect of costs orders, provides a further deterrent to potentially meritorious litigants who are often already reluctant to engage in the Court process.

- **Access to justice**

Representative actions give access to justice to those who can least afford such justice or who are deterred by the Court process from bringing meritorious claims. As indicated above, the requirement to provide a written authorisation and the prospect of costs orders provides a further deterrent to such applicants.

Further, the principle of access to justice expects that the entire affected group will be represented and not simply those who are named and provide consent. This is advantageous in that it enables the Court to be fully aware of the issues of those involved.

- **Costs/Damages Orders**

Requiring written authorisation by all parties may deter litigants from pursuing worthwhile cases due to concerns that they will be exposed to costs and damages orders. The Federal Court Act (Cth) 1976 gives group members immunity from costs orders⁷ but there are no similar provisions in the SA ERD Court Act and Rules.

- **Reduce Court Time and Litigation Expense**

As with all representative actions, aggregating numerous claims is a more efficient and cheaper mechanism for resolving a dispute, both in Court time and in costs incurred by the parties. We note that rule 167 of the new draft rules acknowledges this fact by providing costs consequences where there is over-representation in proceedings.

⁷ s43(1A) Federal Court Act (Cth) 1976

Other South Australian Environmental Legislation

There is no South Australian legislation preventing an amendment to the rules to remove the requirement for written authorisation and to give group members immunity from costs.

Written authorisation

Representative actions may be commenced in the ERD Court pursuant to the Environment Protection Act (SA)1993 ('EP Act'), the Development Act (SA) 1993 and the Natural Resources Management Act (SA) 2004 and each of these Acts refer to actions taken in a representative capacity.

Section 104(10) of the EP Act, under a heading of '*Civil remedies*', states that:

"An application under this section may be made in a representative capacity (but, if so, the consent of all persons on whose behalf the application is made must be obtained)."

There is no definition of "consent" in the interpretation section of the EP Act. Subsection 104(10) itself does not require the consent to be in writing and such an interpretation is consistent with other sections of the Act which require certain consents in certain circumstances⁸.

Section 85 of the Development Act 1993 and s201 of the Natural Resources Management Act 2004 have sections which are similar to section 104(10). Section 85 of the Development Act provides:

*"(1) Any person may apply to the Court for an order to remedy or restrain a breach of this Act or a repealed Act (whether or not any right of that person has been or may be infringed by or as a consequence of that breach).
(2) Proceedings under this section may be brought in a representative capacity (but, if so, the consent of all persons on whose behalf the proceedings are brought must be obtained)."*

Section 201 of the Natural Resources Management Act 2004 provides:

"(8) An application under this section may be made in a representative capacity (but, if so, the consent of all persons on whose behalf the application is made must be obtained)."

As with the EP Act there is no requirement that consent be in writing and we submit that the interpretation should be consistent with the interpretation under the EP Act above, that is, it is not necessary for the consent to be in writing.

⁸ See ss16 and 84 EPAct

The representor can meet the requirements for consent set out in the above legislation and deposing to his or her compliance in an affidavit filed with the summons. The legislation then places an obligation on the representor to ensure compliance with the Act on an ongoing basis and for the respondent to proceedings to raise any irregularity with the Court if necessary.

Accordingly, These provisions in the EP Act, the Development Act and the Natural Resources Management Act are consistent with amendments to ERD Court Rules proposed above.

Costs

There is no South Australian legislation preventing an amendment to the rules to give group members immunity from costs. In fact, subsections 104(22) and 104(23) of the EP Act and subsections 201(18) and 201(19) of the Natural Resources Management Act (SA) 2004 allow costs in public interest cases. Given this, it is most appropriate that an equivalent provision be included in the ERD Court Rules.

Subsections 104(22) and (23) of the EPAct provide:

- (22) *The Court may, in any proceedings under this section, make such orders in relation to the costs of the proceedings as it thinks just and reasonable.*
- (23) *Without limiting the generality of subsection (22), in determining whether to make any order in relation to costs the Court may have regard to the following matters (so far as they are relevant):*
 - (a) *whether the applicant is pursuing a personal interest only in bringing the proceedings or is furthering a wider group interest or the public interest;*
 - (b) *whether or not the proceedings raise significant issues relating to the administration of this Act.*

Subsections 201(18) and 201(19) of the Natural Resources Management Act (SA) 2004 are written in the same terms.

Proposed Amendment

The EDO proposes an amendment to the ERD Court Rules which:

1. ensures represented applicants need not be named in the originating process;
2. ensures represented applicants need not give written authorisation for the representative to commence proceedings;
3. ensures the endorsement on the application seeking leave to serve a summons does not seek to define the identities of the represented group members;
4. allows immunity from costs for group members.

The EDO proposes the following wording to amend the ERD Court Rules Part 7⁹:

7.1.2 Proceedings for an enforcement order (but not including a compliance order sought pursuant to the provisions of section 74A of the Mining Act 1971 or section 86 of the Opal Mining Act 1995), shall be commenced by filing in a registry of the Court the following documents:

(a) an application seeking leave to serve a summons (and where the applicant is a person other than those contemplated by subsections 104 (7) (a) and (7) (b) of the Environment Protection Act 1993, or subsections 141 (6) (a) and (6) (b) of the Water Resources Act 1997 seeking leave to bring the application);

(b) the summons in respect of which leave is sought;

(c) one or more supporting affidavits; and

~~*(d) where the applicant brings the proceedings in a representative capacity, a memorandum.*~~

7.1.2A(1) Proceedings commencing a representative action, or a document filed in support of such proceedings, must, in addition to any other matters required to be included:

(a) describe or otherwise identify the group members to whom the proceeding relates; and

(b) specify the nature of the claims made on behalf of the group members and the relief claimed; and

(c) specify the questions of law or fact common to the claims of the group members.

7.1.2A(2) In describing or otherwise identifying group members for the purposes of subsection (1), it is not necessary to name, or specify the number of, the group members.¹⁰

....

~~*7.1.6 Every memorandum must specify all the people or organisations upon behalf of whom or which the proceedings are brought and signed by all the people or organisations in such manner as shows that all the people or organisations consent to the proceedings being brought on their behalf.*~~

In a representative proceeding the Court or Judge may not award costs against a person on whose behalf the proceeding has been commenced (other than a party to the proceeding who is representing such a person).¹¹

⁹ Equivalent amendments are proposed for the new draft rules.

¹⁰ This proposed amendment adopts s33H of the Federal Court Act.

¹¹ This proposed amendment adopts s43(1A) of the Federal Court Act.

Conclusion

By adopting the above amendment the Environment Resources and Development Court will be alleviating the already heavy burden placed on the public seeking to preserve the environment in representative actions.

Environmental Defenders Office (SA) Inc