

2005

THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Dr Deb Foskey)

Court Procedures (Protection of Public Participation) Amendment Bill 2005

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Court Procedures (Protection of Public Participation) Amendment Bill 2005

A Bill for

An Act to amend the *Court Procedures Act 2004*

The Legislative Assembly for the Australian Capital Territory enacts as follows:

1 Name of Act

This Act is the *Court Procedures (Protection of Public Participation) Amendment Act 2005*.

2 Commencement

This Act commences on the day after its notification day.

Note The naming and commencement provisions automatically commence on the notification day (see Legislation Act, s 75 (1)).

3 Legislation amended

This Act amends the *Court Procedures Act 2004*.

4 New part 4A

insert

Part 4A Protection of public participation

Division 4A.1 Preliminary

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 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

- 1 (ii) a way in which a proceeding that is brought or
2 maintained for an improper purpose can be summarily
3 dismissed; and
- 4 (iii) a way in which people who are subject to a proceeding
5 that is brought or maintained for an improper purpose can
6 obtain reimbursement for all reasonable costs and
7 expenses incurred as a result; and
- 8 (iv) a way in which punitive or exemplary damages can be
9 imposed in relation to a proceeding that is brought or
10 maintained for an improper purpose; and
- 11 (b) preserving the right of access to the courts for all proceedings
12 that are not brought or maintained for an improper purpose;
13 and
- 14 (c) consistently with the *Human Rights Act 2004*, section 15,
15 section 16 and section 17 (a), better protecting the following
16 rights:
- 17 (i) the right of peaceful assembly and to freedom of
18 association;
- 19 (ii) the right to freedom of expression;
- 20 (iii) the right to take part directly in the conduct of public
21 affairs.

22 **37B Definitions for pt 4A**

23 *claim* means any claim for relief in a proceeding.

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

27 *defendant* means a person against whom a proceeding is brought or
28 maintained.

government means the Territory, the Commonwealth, a State, another Territory or a local government of a State.

government entity includes—

- (a) an instrumentality, officer or employee of the government; and
- (b) a contractor or anyone else who exercises a function on behalf of the government; and
- (c) any entity funded by government; and
- (d) an entity appointed or established by government or from which advice is requested by government.

improper purpose—see section 37C.

plaintiff means a person who brings or maintains a proceeding against a defendant.

proceeding means any proceeding brought in a court other than a prosecution for an offence, and includes a claim in a proceeding.

public participation—see section 37D.

37C Improper purpose

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.

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.

Division 4A.2 Proceedings brought for improper purposes

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.

- 1 (2) The application must be made within 60 days after the day the
2 originating process (however described) for the proceeding is served
3 on the defendant.
- 4 (3) The court must deal with the application as soon as practicable.
- 5 (4) Unless the court orders otherwise, no further steps may be taken in
6 the proceeding until the application has been heard and decided.
- 7 (5) This section does not prevent a court from granting an injunction
8 before the rights of the parties under this part are decided.
- 9 **37F Orders available to defendant on application for summary**
10 **dismissal**
- 11 (1) On an application under section 37E by a defendant in a proceeding,
12 the court may make an order dismissing the proceeding if the
13 defendant satisfies the court, on the balance of probabilities, that,
14 when viewed objectively, the proceeding was brought or is being
15 maintained for an improper purpose.
- 16 (2) If the court makes an order dismissing the proceeding, the court may
17 also make either or both of the following orders:
- 18 (a) an order that the plaintiff pay the defendant's costs in relation
19 to the proceeding;
- 20 (b) an order that the plaintiff pay the defendant punitive or
21 exemplary damages.
- 22 (3) If the court does not make an order dismissing the proceeding but
23 the defendant satisfies the court there is a realistic possibility that,
24 when viewed objectively, the proceeding was brought or is being
25 maintained for an improper purpose, the court may make either or
26 both of the following orders:
- 27 (a) an order, on the conditions the court considers appropriate, that
28 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.

37G Order available to defendant on settlement or discontinuance etc of proceeding

- (1) This section applies if an order is made under section 37F (3) in a proceeding.

- (2) On an application for approval of the settlement or discontinuance of the proceeding, the court may, despite any agreement to the contrary between the plaintiff and defendant, order the plaintiff to pay the defendant's costs in relation to the proceeding.

- (3) If—

- (a) the defendant applies for the proceeding to be dismissed for want of prosecution; and

- (b) the plaintiff does not satisfy the court, on the balance of probabilities, that, when viewed objectively, the proceeding was not brought or maintained for an improper purpose; and

- (c) the court dismisses the proceeding for want of prosecution;

the court may order the plaintiff to pay the defendant's costs in relation to the proceeding.

37H Orders available to defendant at trial of proceeding

- (1) A defendant who has obtained an order under section 37F (3) in a proceeding may, at the trial of the proceeding, obtain either or both of the orders mentioned in section 37F (2) if—

- (a) the defendant alleges at the trial that the proceeding was brought or is being maintained for an improper purpose; and

- 1 (b) the proceeding is discontinued by the plaintiff or is dismissed;
2 and
- 3 (c) the plaintiff does not satisfy the court on the balance of
4 probabilities that, when viewed objectively, the proceeding
5 was not brought or maintained for an improper purpose.
- 6 (2) A defendant who has not obtained an order under section 37F (3) in
7 a proceeding may, at the trial of the proceeding, obtain either or
8 both of the orders mentioned in section 37F (2) if—
- 9 (a) at least 60 days before the date set for the start of the hearing of
10 the proceeding (or, with the court's leave, any shorter period
11 before that date), the defendant gives the plaintiff written
12 notice that the defendant intends to seek an order under this
13 subsection; and
- 14 (b) the defendant satisfies the court there is a realistic possibility
15 that, when viewed objectively, the proceeding was brought or
16 maintained for an improper purpose; and
- 17 (c) the proceeding is discontinued by the plaintiff or is dismissed;
18 and
- 19 (d) the plaintiff does not satisfy the court on the balance of
20 probabilities that, when viewed objectively, the proceeding
21 was not brought or maintained for an improper purpose.

22 **37I Parties may present any evidence and argument**

- 23 (1) If a defendant in a proceeding seeks an order under this part in the
24 proceeding, the parties may present evidence and make arguments
25 about whether the proceeding was brought or maintained for an
26 improper purpose, whether or not the evidence or arguments relate
27 to a claim made by the plaintiff in the proceeding.
- 28 (2) This section does not limit any other rights the parties may have to
29 present evidence and make arguments.

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- 1 **37J Disposing of security**
- 2 If a court makes an order under this part that the plaintiff in a
- 3 proceeding pay the defendant's costs in relation to the proceeding,
- 4 the order may provide for the costs to be paid out of any security
- 5 provided by the plaintiff under an order made under
- 6 section 37F (3) (a) in the proceeding.
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Endnotes

- 1 **Presentation speech**
Presentation speech made in the Legislative Assembly on 2005.
- 2 **Notification**
Notified under the Legislation Act on 2005.
- 3 **Republications of amended laws**
For the latest republication of amended laws, see www.legislation.act.gov.au.
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