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Strategic Litigation Against Public Participation (SLAPP suits) – An Overview

The use of a lawsuit known as SLAPP (Strategic Litigation Against Public Participation) is a tool used by individuals and industry to threaten the community's rights and their ability to participate in public debate and political protest.

While individuals and NGOs cannot be directly sued for exercising their democratic right to participate in the political process, their opponents attempt to find technical legal grounds on which to limit public debate and comment. Such grounds usually include defamation, conspiracy, nuisance, invasion of privacy or the interference with business/economic expectancy.

The common feature of SLAPPs is that they are a response to some form of public participation in policy or management and aim to have a chilling effect on that participation and on the related political and social debate. SLAPPs are simply used to intimidate people; to literally scare them into silence on issues of public interest.

Defamation

Until recently, most SLAPPs have been based on claims on defamation.[1] Defamation is primarily a civil action where a person or entity seeks damages for loss of reputation from someone who has published defamatory material about them. There are three aspects to defamation - publication, identification and damage to reputation.[2]

[1] Defamation in English and Australian common law is defined as 'the wrong of lowering an individual in the estimation of others, causing him/her to be shunned or avoided, or exposing him/her to hatred, contempt or ridicule through publishing demeaning statements or other matters.'

[2] Environmental Defender's Office New South Wales (Ltd) Fact Sheet 7.4 - Speaking Out In Public. Available at http://www.edo.org.au/edonsw/site/factsh/fs07_4.php

In Australia, this protection often clashes with the principle of free speech, whereas in the United States (US) the right to free speech is guaranteed in the Constitution and the US Bill of Rights. For example, in Australia, electronic 'blogs' fall under the same defamation and other laws that regulate all media organizations. Australian bloggers are liable for everything they write on their sites and for the comments made by contributors.

Each state and territory of Australia recently enacted uniform defamation laws. The New South Wales version, the Defamation Act 2005, came into force on 1 January 2006 and replaced the Defamation Act 1974. Importantly, any person can claim the right to protect their reputation using the defamation laws, provided they are identified in a publication. Corporations cannot sue in defamation, unless they are an excluded corporation or sole corporations with less than ten employees.

Government organisations cannot sue for defamation but individual members can still sue if the defamatory statement points to them in particular. The writer or speaker of a statement can be sued for defamation. In addition, the broadcasting body which publishes the statement; the person who wrote the material; a person being interviewed; a speaker in a talk-back program; the producer or editor; and any other person who contributed in any way to the publication or authorised the making of the statement can also be sued, if their contribution can be identified.

Importantly for NGOs, you cannot avoid personal liability for defamation by making a statement on the letterhead of an incorporated association.

The new Act also provides many defences including: Truth and public interest; Triviality; Honest Opinion; Fair Report; and importantly, the Offer of Amend, where a publisher of alleged can make a written offer to make amends.

Threats of SLAPPs just as effective

Even the threats of a SLAPP can be effective. The lawyer's letter(s) threatening to sue can have the same effect on activists, NGOs and communities and can effectively curtail participatory democracy. The Centre for Media and Democracy reported that the Australian Journal of Mining acknowledged this when it advised readers that *'anti-mining opponents generally make outrageous and defamatory claims'* and that *'a crowd stopper in a debate is the threat of legal action.* [3]

Some defamation media cases have also been used to limit public debate by restricting news reporting of the behaviour of public figures involved.

[3] SLAPP's in Australia 22 September 2007. From SourceWatch, The Center for Media and Democracy Available at http://www.sourcewatch.org/index.php?title=SourceWatch

Commercial Torts

Recently in Australia, there have been a number of SLAPPs exploiting commercial torts and the Trade Practices Act 1974. This has not been restricted to environmentalists and has been used against consumer protection issues as well.[4] Researchers have found that those filing the suits assume that their economic rights are superior to public interests.

"The idea is that because a business has money at stake, business should receive priority over civic, communal opposition.[5]

Australian NGOs have been SLAPPed for supporting a Local Environment Plan that proposed rezoning rural land as environmentally protected land. Developers wanting the land to be rezoned for residential development sued a conservation group for conspiring with each other 'to damage or destroy the financial and commercial interests of the Plaintiffs with the sole or predominant purpose of injuring the commercial interests of the Plaintiffs.' [6]

One of my own personal experiences with a SLAPP involved a large landholder and developer who claimed that in comments I had made regarding land clearing and degradation I had both defamed him as well as significantly damaging his commercial interests in his tourist development.

Throughout the 1980s and 1990s, SLAPPs proliferated in Australia. While many cases have gone unnoticed and are not reported on, the largest and the most famous Australian example of a large company suing its opponents is the case of the Gunns20.

In December 2004, Gunns, one of Australia's largest forestry companies lodged a writ in the Victorian Supreme Court against 20 Tasmanian environmentalists and groups seeking $6.3 million for actions it claims had damaged their business and reputation.[7] Within days, Gunns announced its plans to build a pulp mill in northern Tasmania.

An Effective Response – The 'Backfire Effect'

However, by 2004 in Australia, the public acceptance of the SLAPP suit tactics was on the wane due to the considerable publicity surrounding the McLibel suit [8] as well as the high profile cases of the NGO, Animal Liberation South Australia.[9]

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[4] Dold, C., `SLAPP Back!', Buzzworm: *The Environmental Journal* IV, July/Aug 1992 p36
[5] Peter Nye, `Surge of SLAPP Suits Chills Public Debate', *Public Citizen*, Summer 1994 p15
[6] Supreme Court, Ensile Pty Ltd and Lady Carrington Estates Pty Ltd vs James Edward Donohoe, Jennifer Donohoe and Timothy Tapsell, Amended Statement of Claim, filed 10th May 1994; Also see Sharon Beder, 'SLAPPs--Strategic Lawsuits Against Public Participation: Coming to a Controversy Near You', *Current Affairs Bulletin*, vol.72, no. 3, Oct/Nov 1995, pp.22-29.
[7] Gunns Limited v Marr [2005] VSC 251 (18 July 2005)
[8] McDonald's Corporation versus Steel [1997] EWHC QB 366 (Unreported Bell, 19 June 1997) Also see David Morris, McLibel: Do-it-yourself-justice (1999) 24 *Alternative Law Journal* 269

In both McLibel and Animal Liberation SA, the strategy adopted by the NGOs was one of attack not silence, that is, the *'backfire effect'*. This strategy uses the case to generate adverse publicity that far outweighs the benefits for the proponent of the SLAPP suit. [10]

Rather than having the effect of silencing public debate, the case is used to gain significant publicity for the issue. So successful was the Mclibel case (the longest libel case in British legal history) that it is often forgotten that Steel and Morris actually lost the case. Yet, the McDonalds Corporation could never be considered a winner !

Similarly, the Animal Liberation SA used the case to increase the media publicity about the plight of battery hens. Importantly, in order to show that they were not intimidated by the legal system, they lodged their documents wearing chicken costumes. Over two years, Animal Liberation SA pushed discovery orders ('discovery' is the process by which the parties in the case exchange documents relevant to the case) to the point where the egg producer abandoned all claims of economic loss. Animal Liberation SA won some of their legal costs and achieved this with self- representation.

Regulatory Backfire in US

A similar positive outcome was evident when in early 2008 and after nearly two years of litigation, Morton Grove dropped their SLAPP against the US based Ecology Center.

In July 2006, Morton Grove Pharmaceuticals the formulator of lindane in shampoos had filed suit in U.S. District Court in Chicago charging the US based Ecology Center, and two members of the Michigan Chapter of the American Academy of Pediatrics with defamation, tortious interference, trade disparagement, and deceptive trade practices.

The suit was in response to the 2006 campaign by the Ecology Center, medical professionals, and other environmental organizations to urge the Michigan Legislature to restrict the use of pharmaceutical lindane. Lindane was already banned for all uses in 52 countries and in California and had been withdrawn for use in US agriculture. Morton Grove alleged over $9 million in damages.

Morton Grove dropped its lawsuit after the US Food and Drug Administration had informed the company that their promotion of lindane shampoos omitted or minimize serious risk information and gave misleading claims about dose and the efficacy of Lindane Shampoos.[11]

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[9] Takhar v Animal Liberation South Australia Inc & Or (Supreme Court of South Australia, Number 754 of 2000); also see Greg Ogle, "Beating a SLAPP Suit", *Alternative Law Journal,* Volume 32, Number 2, June 2007, pp. 71-74.

[10] Ogle, G., "Beating a SLAPP Suit", *Alternative Law Journal,* Vol 32, No. 2, June 2007, p71.

[11] See http://www.fda.gov/foi/warning_letters/s6604c.htm

Gunning for Change

The 'backfire' strategy was also used by the Wilderness Society when as one of the defendants in the Gunns20 case,[12] they launched the report 'Gunning for Change'. The report documented a range of Australian lawsuits against public participation and called for law reform to establish and protect the right to public participation.

At the same time, nearly 150 Australian lawyers signed up to a Public Interest Lawyers' Statement in Support of Public Participation Law Reform. A group of 40 British lawyers also issued a statement condemning the Gunns' case and calling for law reform. The case, the report and the support received wide publicity in the national and international media.

Since 2004, Gunns has filed three statements of claim but in October, 2006 they dropped a major part of their claim in which it sought $500,000 in damages, alleging a co-ordinated campaign involving all defendants.

Gunns has now been ordered to pay the legal costs of 17 environmentalists and three environmental groups, after the third version of its $6.9 million damages claim was thrown out of court. The legal costs are estimated at more than $1 million.

Despite this in July 2008, Gunns returned to court in its ongoing attempt to access documents from the Wilderness Society (TWS). They are attempting to gain access to a list of the contact details of 79 conservationists. The decision on this will be handed down shortly. Gunns has also continued its defamation case against leading Hobart physician Dr Frank Nicklason.

The Gunns' legal actions have sparked considerable publicity and consolidated opposition to its logging practices and the proposed pulp mill. It has also brought calls for an overhaul of Australian laws to ensure that corporations cannot initiate legal actions aimed at stifling community participation in public policy debates.

In the last month, the Australian bank, ANZ that was to fund the Gunns' pulp mill has withdrawn their support from the project. At the same time, the Tasmanian Premier Paul Lennon, a passionate backer of the mill, resigned.[13] The future of the proposed pulp mill is now seriously in doubt.

Lesson learnt

The lessons that Australian NGOs learnt from these cases are that there are effective strategies to respond to SLAPP suits. While SLAPPs can be very stressful, they can also be a very effective campaign tool and rarely is the issue settled by the courts alone.

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[12] For current information on the Gunns20 case visit http://www.gunns20.org/

[13] Marian Wilkinson & Ben Cubby May 28, 2008, 'ANZ exit from pulp mill project confirmed', The Age

As with my own SLAPP, after 18 months of preparation and hearings, the case was withdrawn after other activist colleagues heavily publicised the issue of the developer's land degradation central to the defamation and economic loss claims.

Clearly, not all activists have either the skills or the time resources, let alone the political or cultural context in which to participate effectively in the legal system and defend themselves against the SLAPP. Yet, with the help of well-established NGOs or experienced activists, many NGOs can use the legal system to get better outcomes, politically and in court.

Importantly, in Australia we have learnt that for the 'backfire affect' to work best, NGOs, community groups and activists need to cooperate and coordinate and to unite nationally and globally to oppose SLAPPs and to assist their brothers and sisters in trouble.