Quantum of strategic litigation — quashing public participation

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The focus of human rights scholars in recent times has been on the state's coercive powers to curtail civil liberties (Fitzpatrick 2003; Roberts 2004, 721–49; Hamilton and Maddison 2007). However, less attention has been given to the increasing role of large corporations in containing resistance. This article will discuss the corporate use of private civil actions to deter and punish protesters. These are known as Strategic Lawsuits Against Public Participation (SLAPPs) and have had many legal guises, including negligence, defamation and nuisance. However, they are most easily identified by their targets: individuals and groups which publicly protest against activities by corporations that undermine human rights or result in damage to the environment. SLAPPs are being used across Western societies not to acquire damages (as many of these cases are not successful, or do not even reach trial), but, rather, to silence the protest and instill fear of a civil action in the minds of current and potential participants.

This article looks at the impact of SLAPPs on human rights, particularly those embraced by Art 20 of the Universal Declaration of Human Rights, such as freedom of assembly, association, expression and political participation. Essentially, the article argues that legislation directed to this abuse of legal process is needed to combat SLAPPs. It draws on the experience of the United States and other jurisdictions in developing 'model' anti-SLAPP legislation, and the recent enactment in the Australian Capital Territory of similar legislation. It argues specifically that the legislation needs to provide an objective test based on a broad definition of public participation, as well as adequate provisions for summary dismissal, if the anti-SLAPP legislation is to be effective.

Introduction

The genesis of Strategic Lawsuits Against Public Participation (SLAPPs) in Australia can be traced to the early 1990s (Jamieson and Plibersek 1991). However, recent multimillion dollar suits against public participants signal the imperative for legislative intervention (for example, see *Australian Wool Innovation Ltd v Newkirk,*

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2005 (the *Wool* case);[1] *Gunns Ltd v Marr & Ors,* 2005 at [10] (the *Gunns* case)[2]). These SLAPPs have intensified the silencing of dissent that has been a feature of governance in the past decade. Hamilton and Maddison (2007, 22–23) claim that 'there is now much tighter control over the flow of information that should help to keep citizens informed, there are fewer forums in which dissenting voices can be heard'.

The United States, Canada and New Zealand have also witnessed SLAPPs and the resulting paralysis of public campaigns. The US has responded by enacting statutes that allow SLAPPs to be struck out before they can have their silencing impact on public dissent. Without legislative reform, the adverse effects of SLAPPs on public participation will also be fully realised in Australia.

This article draws on a considerable body of overseas commentary and experience, particularly from the US and Canada, which highlights the necessity of anti-SLAPP policy. Lessons can be drawn to enable Australian governments to short-circuit unfruitful judicial avenues, in favour of a more cohesive and effective framework. Since the 1990s, 27 states and territories of the US have enacted anti-SLAPP measures.[3] The statutes protect against the deleterious effect of SLAPPs by providing for early dismissal remedies and awarding damages for targets. In addition, anti-SLAPP policy raises awareness of the SLAPP problem to fortify public participants. This is crucial, given that the threat of SLAPPs alone holds 'public dialogue hostage' by affecting not only the defendants, but broad community involvement (Stetson 1995, 1332). The latter casualty sets SLAPPs apart from general tort reform and makes it necessary for specific policies to be adopted to combat SLAPPs (Stetson 1995, 1335).

The article highlights the impact of SLAPPs on public participation, the limited capacity for courts to address this problem, and the need for appropriate statutory responses. It considers the strengths and weaknesses of overseas legislative reforms

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1 The actions brought by Australian Wool Innovation Ltd against members of the People for the Ethical Treatment of Animals led to a number of cases: *Australian Wool Innovation Ltd v Newkirk,* 2005; *Australian Wool Innovation Ltd v Newkirk (No 2),* 2005; *Australian Wool Innovation Ltd v Newkirk (No 3),* 2005.

2 The actions brought by Gunns Ltd against environmental organisations and activists have led to a number of cases thus far: *Gunns Ltd v Marr,* 2005; *Gunns Ltd v Marr (No 2),* 2006; *Gunns Ltd v Marr (No 3),* 2006; *Gunns Ltd v Marr (No 4),* 2007; *Gunns Ltd v Marr,* 2008.

3 These are Arizona, Arkansas, California, Delaware, Florida, Georgia, Guam, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah and Washington. There are a further eight anti-SLAPP Bills on foot. See 'States with anti-SLAPP laws', 27 November 2007, at <www.casp.net/statutes/menstate.html> [2008, December 10].

(especially in the US) and Australian measures, including the recent enactment of the *Protection of Public Participation Act 2008* (ACT) (anti-SLAPP legislation) and similar Bills before the Tasmanian and South Australian Parliaments. The article highlights the importance of anti-SLAPP laws in providing both procedural mechanisms to counter SLAPPs and support for the rights of citizens to participate, in order to protect citizens' rights under Art 20 of the United Nations Universal Declaration of Human Rights (including rights to freedom of assembly, association, expression and political participation).

Identifying SLAPPs and Australian manifestations

Objectives of SLAPPs

A SLAPP is a form of civil litigation which usually goes no further than the issuing of originating process (such as a writ). It is aimed at derailing public participation that is detrimental to the plaintiff (also known as the 'SLAPP filer') (Canan 1989–90, 23). The filers are mostly corporations, but can also include governments. The targets are private individuals and community groups. The term 'SLAPP' was originated by US legal sociologists Penelope Canan and George Pring (1988), who studied the phenomenon of corporations claiming injury from communication on a public issue. According to Pring and Canan (1992), the filers are usually losing the public campaign when they transfer the forum from the political to the legal realm, where only the legal dispute can be adjudicated. This 'privatisation of public controversies' (Stetson 1995, 1335) disadvantages the politically active citizen because, inter alia, the issues shift from the political to judicial spheres, and from the defendants' to the plaintiffs' grievances (Baruch 1996–97, 56; Braun 1998–99, 971). It also diverts energy and resources from opposing the relevant project into defending the lawsuit.

SLAPP filers have the dual objectives of punishing those who have exercised political rights and discouraging others from engaging in similar conduct in the future (Baker 2004, 410). There is a 'chilling effect' on public campaigns by intimidating individuals through fear of large damages and legal costs (Foskey 2008b, 3754; McBride 1992–93, 926). An Australian Independent member of the federal Parliament, the late Peter Andren (2005, 46), once stated in Parliament that SLAPPs are designed to 'scare off community protest and dry up the resolve and financial resources of those who dare to speak out'. Upon introducing the Protection of Public Participation Bill 2008 in the Australian Capital Territory (ACT) Parliament, Dr Deb Foskey MLA (2008a, 1169) claimed that the intention of SLAPPs was 'to silence and intimidate activists, activist organisations, investigative journalists, concerned citizens or any outspoken individual or group on matters of public interest'. Its intimidatory effect ripples

through the community, dissuading a large pool of citizens from participation on a public issue.

Features of SLAPPs

Paradigmatic SLAPPs

A useful starting point for understanding the evolving features of SLAPPs is to examine the practice in the US in the 1970s involving property developers bringing SLAPPs. These SLAPPs arose as a result of the development boom in urban areas and the effect on the local environment, community spaces and heritage. Community groups organised to oppose the developments. Australia experienced its first significant community protests of this nature in the late 1970s with the Green Bans campaign. Governments also sought to encourage public involvement by providing for consultation and submissions in planning legislation (on US laws, see Stetson 1995, 1334; on Australian laws, see Anthony and Dixon 1998, 24).

In these circumstances, developers required a new response to government-sanctioned community opposition. The response was in the form of defamation suits against citizens and community organisations (Braun 1998–99, 981). One of Australia's first SLAPP suits was the *Helensburgh* case in 1993.[4] In this case, the Helensburgh District Protection Society organised opposition to town expansion, including 5000 submissions to the council. The developers then issued a writ for defamation and conspiracy against the society. The proceedings continued for many years without a case being brought for hearing. In the meantime, many submissions were withdrawn and the council's consultation processes were undermined (Beder 1995, 24).

In the 1990s, SLAPP writs became more aggressive in targeting Australian community groups. After SLAPPs took full flight in the US and Canada, with a number of multimillion dollar suits in the late 1980s and early 1990s (see Goetz 1991–92, 1009–1010; Goldberg 1992–93, 2), Australian corporations followed suit. A $14 million defamation writ against seven members of Bannockburn Yellow Gum Action Group in 1997 was symptomatic of the Australian trend — this is referred to as the *Barwon Water* case. The catalyst was a sticker, 'Frankly Foul', in protest at the decision of Barwon Water, a public authority, to bulldoze a protected site for a

4 *Ensile Pty Ltd and Lady Carrington Estates Pty Ltd v James Edward Donohoe, Jennifer Donohoe and Timothy Tapsell*, 1994.

sewerage farm (Lane 2001, 13). This case was a forerunner of a litany of Australian SLAPPs in defamation: in 1999 against church ministers of an anti-gambling taskforce for writing an article in the *Sunday Age* opposing the decision of the Victorian Casino and Gaming Authority to license poker machines locally (Lane 2001, 4); in 1997 against local opposition to a racing club (see *NSW Harness Racing Club Ltd v Leichhardt Municipal Council,* 1997); in 1993 against opposition to road construction (see *Department of Transport* [Tas] *v Williams,* 1993); and in 1994 against conservationists who sought to discourage financiers from participating in the construction of the Hindmarsh Island Bridge (see *Binalong Pty Ltd v Conservation Council of South Australia Inc,* 1994; *Ballina Shire Council v Ringland,* 1994). These SLAPPs have culminated in the ongoing *Gunns* case brought by Gunns Ltd, Australia's largest logging company,[5] against environmental groups and activists seeking to protect Tasmania's forests. This litigation is by far the longest and most costly SLAPP in Australia to date.

New causes of action — from defamation to 'economic torts'

The causes of action brought by SLAPP filers have taken on new guises since originally identified by Pring and Canan. Braun (1998–99, 971) claims that 'because filers do not care that they cannot ultimately prove their allegations, they are free to choose from a wide menu of causes of action'. In the US, new causes of action became necessary because of the 'actual malice' requirement in defamation claims (see *New York Times Company v Sullivan,* 1964).

In Australia, malice is not a requirement in defamation actions. Nonetheless, Australian corporations that have brought SLAPPs have relied on a broad set of new economic torts to litigate against a wide range of protest activities. Reliance on these economic torts will now be necessary as national uniform defamation laws (enacted in 2005) prohibit large profit-making corporations from suing in defamation.[6] In defending the legislation, a former New South Wales Attorney-General explicitly pointed to the harmful effects on public participation when large corporations are

5 Statement of Claim No 1, at [470]: <www.gunns20.org/sites/gunns20.org/files/Statement%20of%20Claim%20(Version%201)%2013%20Dec%202004.DOC> [2008, December 16].

6 This is provided in s 9 of the *Defamation Act 2005* and exists uniformly in the New South Wales, Queensland, Tasmanian, Victorian, South Australian and Western Australian *Defamation Act*s; s 8 of the *Defamation Act* (NT); and s 121 of the *Civil Law (Wrongs) Act 2002* (ACT). For a discussion on the rationale behind this prohibition, see Rolph (2008, 215–20).

allowed to sue in defamation.[7] SLAPP filers invoke 'economic torts' of interference with trade and business (or with prospective economic advantage in the US, see Note 1975, 107), interference with contractual relations, and conspiracy. While these torts are established in the US, they are still emerging in Australia.[8]

The unsettled state of these torts makes Australian SLAPP targets particularly vulnerable, as corporations can adapt prolific pleadings to undefined laws, while courts cannot respond expediently and decisively. It also allows filers to request untested remedies, including injunctions on future public participation — such as prohibiting future interference with the live export trade (see *Rural Export and Trading (WA) Pty Ltd v Hahnheuser,* 2004) or future publication of material critical of wool growers (see *Australian Wool Innovation Ltd v Newkirk*).

This phenomenon is evident in recent cases against animal liberationists and environmental activists. Cases have been brought in the tort of conspiracy and subsequently found to have deficient pleadings. Without legislation that directs them otherwise, courts allow ongoing amendments that drag out the proceedings.[9] In the *Wool* case, where Australian Wool Innovation sued 104 members of People for the Ethical Treatment of Animals (PETA) for the tort of conspiracy, the tort of intimidation and breaches of the *Trade Practices Act 1974* (Cth) (TPA), Hely J of the Federal Court dismissed the allegations of conspiracy and intimidation after six amendments. His Honour stated that the claim of conspiracy was 'shapeless' and 'embarrassing': 'A pleading of a single conspiracy, the objects of which may be 104 people or 30,104 people is embarrassing as a conspiracy takes its shape and scope from its objects' (*Australian Wool Innovation Ltd v Newkirk,* 2005 at [68]). A similar statement was made by Bongiorno J of the Victorian Supreme Court in relation to deficient pleadings brought in *Gunns v Marr & Ors,* 2005 (at [32]).

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7 Attorney-General Bob Debus (2005, 15581) stated that: 'there is simply no need to allow large corporations to sue for defamation … because they have no personal reputation to protect' and 'are already in possession of ample legal protection for the legitimate interests of a commercial nature that they hold, including … relief under the *Trade Practices Act*'. Debus pointed to the *Gunns* case as evidence of corporate abuse of defamation suits. He noted that 'giving corporations the right to take defamation action … would give free reign to big companies to abuse their economic strength in order to silence individuals and stifle free speech'.

8 See *Northern Territory v Mengel,* 1995 at 342, 343 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ); *Sanders v Snell,* 1998 at 338, 341 (Gleeson CJ, Gaudron, Kirby and Hayne JJ); *Perre v Apand Pty Ltd,* 1999 at [374]; *Monsanto Plc v Tilly,* 2000 at 321.

9 See *Takhar & Takhar v Animal Liberation SA Inc,* 2000; *Gunns Ltd v Marr,* 2005 at [57].

Dragging out pleadings benefits the corporation, as it places an ongoing cloud over the relevant campaign until, and often after, legal resolution (Stein 1989–90, 59). This is the situation in the ongoing *Gunns* case. The action was brought by the world's largest woodchipping hardwood exporter in December 2004. The 233-page statement of claim alleged conspiracy, defamation and economic interference. It is now in its fourth version.[10] The current claims are torts of intentional interference with contractual relations, intentional injury in its trade and business, trespass, nuisance and conversion. Originally, the defendants were the Wilderness Society, five of its officers and 14 other groups and individuals (including Senator Bob Brown and former Greens leader Peg Putt). As of March 2009, there are seven remaining defendants. In 2007, the claims against Bob Brown and Meg Putt were withdrawn. In March 2009, the Wilderness Society and three other plaintiffs were removed from the proceedings, with one of them undertaking not to interfere with Gunns property or equipment until 2011. In January 2009, Gunns launched a separate action in trespass against 13 protesters in relation to a protest in Triabunna (the 'Triabunna 13') (McKay 2009). The costly discovery process and persistent pleadings are paralysing aspects of the Tasmanian environmental campaign (Gallacher 2005).

In addition, corporations are bringing SLAPPs under the TPA. For example, Rural Export and Trading (WA) Pty Ltd brought its case for unconscionable conduct under s 45DB of the TPA against protesters who interfered with live exports. In the *Wool* case, there was an action for breaches of s 45D of the TPA by virtue of 'illegal secondary boycott conduct' in the form of letter writing. Both of these cases have also undergone multiple pleadings in respect of the TPA allegations. They have all been dismissed (see *Rural Export & Trading (WA) Pty Ltd v Hahnheuser,* 2007; *Australian Wool Innovation Ltd v Newkirk (No 3),* 2005).

Nature of SLAPP targets

The first defining feature of SLAPP targets is that they tend to be individuals, local community groups and, more recently, non-profit organisations. Unlike most tort litigation that is pursued against 'deep pockets', SLAPP litigation reverses the pattern and involves well-financed plaintiffs pursuing defendants possessing limited resources or legal knowhow. This can force the targets to surrender what they do have: the capacity to express their political convictions. In defamation cases, the critic being reported is sued, rather than the newspaper or media corporation (see *Bennette v Cohen,* 2007 at [208]). This is also illustrated by the 1997 case of Miles Lewis. He was

10 The fourth statement of claim can be found at <www.gunns20.org/sites/gunns20.org/files/Gunns%20Statement%20of%20Claim%20Version%204%20-%203%20April%202007.DOC> [2008, December 10].

issued with a writ after he was quoted in *The Age* as criticising a casino development (Lewis 2001, 12). The writ ran until *The Age* underwrote Lewis for the $200,000 in damages. Without the individual as the target, the purpose of the SLAPP was defeated. More recently, Dr Frank Nicklason, who was dropped from the *Gunns* case in 2007, was sued the next day for defamation. Gunns alleges that the defamatory remarks were published on Hobart WIN Television News. The statement of claim is currently in its fifth amendment, after the first four have been struck out (see *Gunns Ltd v Nicklason*, 2007). Gunns has not sued WIN News. The second feature of targets is that there tends to be many of them. Often both the organisation and all the active members of the organisation are targeted. This feature is present in the *Gunns* case. Gunns originally sued 20 defendants (including environmental organisations) in 2004. In January 2009, it brought additional civil proceedings against 13 anti-logging activists (McKay 2009).

The third feature is that minutes of meetings are used to identify the targets. Therefore, people who simply attend meetings of an organisation can find themselves joined as defendants in a SLAPP. This is especially the case where there are allegations of a conspiracy or breaches in concert under the TPA. The minutes are obtained through discovery processes. This occurred in the *Barwon Water* case (Walters 2003, 15) and the *Wool* case (Baruch 1996–97, 58). The Victorian Supreme Court recently dismissed a further application by Gunns for discovery of the Wilderness Society's telephone records, travel records, invitations, constituent profiles (which detail the contributions of each member to the society), agendas, papers circulated and tabled, and minutes of meetings held between 2002 and 2003. Kaye J concluded: 'The application, thus propounded, has the hallmarks of a fishing expedition' (*Gunns v Marr & Ors,* 2008 at [68]).

Unequal resources and prospects

SLAPP filers — corporations or governments — have vastly greater resources than their targets, and the natural persons representing the corporation or government face no personal risk. Corporations also seek to gain from SLAPP litigation through tax deductions. Given that corporations are taxed in Australia according to their rate of profit, litigation is recorded down as a cost incidental to a development venture and reduces corporate taxable income (on the analogous US experience, see Braun 1998–99, 971). The tax deduction of legal costs for businesses provides additional incentive to bring a SLAPP. Walters (2005a, 346) explains that 'this will mean the corporation will receive a significant tax reduction for each dollar it spends on legal action'. By contrast, defendants do not receive the deduction since they are not engaged in a profit-making venture.

Given that individual targets are often inexperienced in the legal issues involved,[11] and given the complexity of the torts being alleged, targets will often feel they have to retain lawyers irrespective of how unmeritorious the suit is (Walters 2005a, 346; see *Bill Johnson's Restaurants Inc v NLRB,* 1983 at 740–41). This legal cost deters defendants from defending the claim (Note 1975, 108). Filers tend to be experienced users of the legal system, whereas targets are unfamiliar with its processes. In an attempt to overcome this imbalance, the Kumarangk Legal Defence Inc was formed to advise targets on defamation action brought by developers of Hindmarsh Island Bridge. The legal team was also met with legal threats, although these were later dropped (Beard 2000, 24).

Moreover, when corporations lose, any legal costs that they are made to pay to the SLAPP targets can be deducted as a business expense. On the other hand, a prospective loss for the targets can amount to millions of dollars of lost personal income (Friedlander 1995, 59 n46). They stand to lose their assets, usually their homes and/or the resources of public interest groups (Lane 2001; Waldman 1991–92, 993–94). If they win, they could recover some of their legal costs, although in almost all cases not the totality, and the difference can amount to tens of thousands of dollars (Walters 2005a, 346). This adds to the general disadvantage that environmental groups face in challenging developments in the public interest due to the 'costs follow the event' rule (groups cannot claim until after a successful challenge).[12]

Subsequent to the claims being withdrawn from Senator Bob Brown, Peg Putt and Helen Gee in the *Gunns* case, the defendants sought orders from the court that their costs be paid on an indemnity basis (which includes all costs, except unreasonable costs[13]) (*Gunns v Marr & Ors,* 2007 at [34]). Bongiorno J of the Victorian Supreme Court rejected this request (at [34], [42]), instead awarding the lesser 'party and party basis' for costs (which are costs necessary for defending rights[14]). Senator Brown claimed that despite the award of $91,186 in legal costs to himself, Peg Putt and Helen Gee, he is 'still extensively out of pocket' (Arup 2008). Win or lose, the defendant is exposed to financial risk that does not exist for the corporation suing.

11 The position may be different for established environmental groups (Waldman 1991–92, 993).

12 However, there is some latitude to dispense with this rule in certain circumstances. See *Minister for Planning v Walker*.

13 *Supreme Court (General Civil Procedure) Rules 2005* (Vic), r 63.30.1.

14 Above, r 63.29.

Timing of suits

Suits are often brought when a public campaign has successfully restricted the socially detrimental activities of the plaintiff corporation. This explains the use of the word 'strategic' in SLAPP. The action is part of the company's strategy in the face of successful public campaigns — another of the many tools available to those that can afford expensive court processes — as well as being strategically directed against key activists and/or timid community members.

Defendants are usually informed of the legal action in a 'Tet Offensive' style (when they least expect it). In the *Barwon Water* case and the *Gunns* case, defendants received writs on Christmas Eve (Walters 2005a, 343; Gallacher 2005). This timing is not only disturbing for the defendants, but also makes it more difficult for them to obtain immediate legal advice.

Nature of damages

Another feature of SLAPPs is that large damages are sought, commonly amounting to millions of dollars (see Baruch 1996–97, 58), such as the $14 million claim brought by Barwon Water (Lane 2001, 5) and the $6.4 million claim in *Gunns v Marr & Ors*, 2005 (served in late 2004). In the US in the late 1980s, a sanitary district in California brought a $42 million suit against Alan LaPointe for successfully petitioning against a waste plan (Harper 1993–94, 408). Given that these suits are brought against 'shallow pockets', a much smaller amount would achieve its dissuasive effect. Lifting the figure to millions sends a message that there are unaffordable risks attached to public participation. This transforms the litigation to have a general community deterrence effect.

Legal outcomes

While many SLAPPs do not go to trial, the proceedings can be continued until the desired effect is achieved. Threatening legal letters are used as a major strategy. Corporations often fall short of bringing the case to trial because the letters alone achieve the desired effect, and also for fear the defendants will order discovery and expose company 'secrets' (Hager and Burton 1999, 48). Whether it is a writ or letter, targets mostly settle to prevent the case coming to fruition. It is not uncommon for the SLAPP filer to offer voluntary dismissal in exchange for a halt in the target's political activity (Pring and Canan 1992, 951). In other cases, the stakes are higher. In the *Barwon Water* case, the group was made to apologise and pay $10,000 to the chair of the authority (Carrick 2001). In a case involving Ruth Hawley, a member of the Lorne Planning and Preservation League, she was made to publish a draft apology in *The Age* at her expense (Walters 2005a, 344–45). This was after she was threatened

with an unmeritorious defamation suit under the TPA for writing a letter published in *The Age* (Hawley 1999), which responded to an article (Dunstan 1999) favourable to the development of Lorne.

There have been no surveys in Australia to ascertain how many SLAPPs that have gone to trial have been successful. Of the cases discussed above, very few have gone to trial and the plaintiffs have never succeeded. Studies in the US between the late 1980s and early 1990s, prior to the enactment of the anti-SLAPP statutes, revealed that between 77 per cent and 90 per cent of SLAPP plaintiffs lose the court case (Pring and Canan 1993, 384; Nye 1994, 15). Nonetheless, the success of a SLAPP lies in the draining effect on public participants (Beard 2000, 24). On average, cases last 32 months (Pring and Canan 1993, 389), which is usually long enough for public interest in the protest issue to wane (Harper 1993–94, 409).

Transnationalising SLAPPs

SLAPP suits now operate at both national and transnational levels. They are now brought by transnational corporations against national and international campaigns. These have included corporations suing 'cyber-activists' (Delfino and Day 2002) and national environmental organisations for opposing logging;[15] a spate of defamation suits brought by McDonalds (Donson 2000, ch 5); and the transnational litigation against PETA (Walters 2005b). The *Sunday Age* commented that the Australian Wool Industry 'appears to agree that the case has little chance of proceeding in its current form, but is prepared to drag out its campaign until it can sue for damages in the US' and quoted the chairman as saying that the intention was to 'wear PETA down financially' while the 'industry is extremely well financed and these sorts of crises are catered for' (cited in Walters 2005b, 17). The growing internationalisation of company activities is encouraging the spread of SLAPPs globally.

Signals for early identification based on broad consideration

Given the changing guises of SLAPPs and the fact that there has been a proliferation in the causes of action that plaintiffs bring, policy should not be focused on the elements of the legal action, but rather on the effect on public participation (Civil Trial Manual 1988, 461). Broadly, a SLAPP can be identified through a two-prong test. First, it is aimed at public participants. This encompasses torts against legal protests,

15 For example, in Canada in *Daishowa Inc v Friends of the Lubicon,* 1998; in New Zealand by Timberlands' public relations strategist, Shandwick, against Native Forest Action (Hager and Burton 1999, 42); in Australia against the Wilderness Society in *Gunns v Marr,* 2005, 2006, 2007, 2008.

publications and boycotts, which will be discussed below. Second, the plaintiff's legal action is prima facie meritless (Waldman 1991–92, 1045). Alternatively, some jurisdictions (such as the ACT) propose an 'improper purpose' test rather than a merit-based test (which will be discussed below). By combining these tests, Costantini and Nash (1991, 423) argue, SLAPPs can be seen as meritless suits designed to intimidate and harass political critics into silence and not to achieve the purposes of the action, such as compensation for the wrong. The lack of merit can be inferred from loose pleadings and a loosely connected group of defendants. Where both prongs of the test are met, the court can dismiss the claim immediately and order damages against the plaintiff. This circumvents a lengthy court trial for the defendants and sends a deterrent message to other SLAPP plaintiffs. An analysis of how these procedures are translated into legislation is provided below.

Potential judicial remedies

This section of the article addresses the capacity and limitations of courts to cure the symptoms of SLAPPs. Since only a few Australian SLAPPs have recently come to trial, there has not been adequate testing of how Australian courts will respond.[16] However, judicial experiences in the US and Canada provide a window on how courts may respond to SLAPPs in the future, given Australia's comparable court mechanisms. In general, judicial remedies provide relief for defendants, but are not sufficiently timely or compensatory to remove the paralysing effect.

Judicial recognition of SLAPPs

The most forthright response to SLAPPs in the US and Canada was for the courts to recognise the phenomenon and pronounce tests to identify and exclude SLAPPs. In the US, the constitutional right to petition provides fertile grounds for their exclusion.[17] SLAPPs are identified as a form of 'improper litigation', due to their 'baseless' infringement of petitioning rights, in landmark Supreme Court decisions of the 1980s (Braun 1998–99, 987; see *Webb v Fury,* 1981; *Protect Our Mountain Environment v District Court,* 1984 (the *POME* case)). In the $40 million *POME* case (brought in conspiracy), a three-part test was established to increase the burden on plaintiffs who were suing petitioners, in order to protect the constitutional rights of

16 Courts have the power to control their processes, including against abuse of process: *Evidence Act 1995* (Cth), s 11(2).

17 The Constitution is interpreted in accordance with the *Noerr-Pennington* doctrine, which holds that a lawsuit cannot be based on attempts to influence government: *Eastern Railroad Presidents Conference v Noerr Motor Freight,* 1961.

petitioners. Plaintiffs must prove: (1) the petitioner's action lacks factual basis; (2) it is aimed at harassing the plaintiff; and (3) it affects a legal interest of the plaintiff (Abrams 1989–90, 42).

The Canadian judiciary has also forbidden SLAPPs, although not with reference to Canada's Charter of Rights and Freedoms[18] (Rogachevsky 2000, 35). Canada's best-known SLAPP, *Daishowa Inc v Friends of the Lubicon,* 1998, which lasted from 1992 to 1998 without the plaintiffs being awarded damages or an injunction, alerted courts to problems with SLAPPs (Tollefson 1996, 123; Sills 1993, 548–49). In the following year, the Supreme Court of British Columbia in *Fraser v Corp of District of Saanich,* 1999 explicitly condemned SLAPPs. Singh J found that the action in conspiracy against a citizens' group amounted to nothing more than 'bald assertions' that attempted to 'stifle democratic activities' (cited in Daisley 2000). His Honour criticised the weak cause of action (despite the 77-paragraph statement of claim) and granted special costs.

By contrast, the Australian courts have not recognised SLAPPs. This may be due to the absence of a US-styled legislated or constitutional right to public participation and freedom of speech (including in relation to corporations), or simply a more limited experience of SLAPPs in Australia. The *Gunns* case may alert courts to the SLAPP phenomenon as it progresses. However, the current absence of a clear judicial response makes statutory reform particularly pertinent in Australia. Legislation would outline criteria for courts to identify a SLAPP expeditiously.

Abuse of court process provisions

Before turning to consider possible legislative responses to SLAPPs, it is first necessary to consider existing procedures that allow Australian courts to strike out SLAPPs for abuse of process. For instance, under r 13.4 of the national *Uniform Civil Procedure Rules 2005,* the court can (independently or on application) dismiss the proceedings if they are frivolous or vexatious, have no reasonable cause of action, or are an abuse of process. This capacity is similar to r 11 of the US *Federal Rules of Civil Procedure*, which has been used in the US to mitigate against SLAPPs (Abrams 1989–90, 43; Stetson 1995, 1337).

However, such court rules have two significant limitations in combating SLAPPs. First, the courts tend to allow multiple amendments where there are insufficient

18 The charter at s 2(b) only protects communication regarding government activity, and not private disputes: *Retail, Wholesale and Department Store Union v Dolphin Delivery,* 1986. Contrast the US *Noerr-Penington* doctrine.

pleadings or causes of action before the action is dismissed, as in the *Wool* case and for a number of defendants in the *Gunns* case. This delay tactic compounds the chilling effect (Atkins 1991–92, 1003). The second reason why court rules are not entirely effective is that in reaching a conclusion that the suit is frivolous, courts must sift through the facts of lengthy statements of claim. Hearings are drawn out as courts do not have the tools to identify SLAPPs immediately. Even in the US, where the courts have identified SLAPPs, court rules are only effective for dismissing paradigmatic SLAPPs (Margulies 1991–92, 963). However, amending court rules to make them more discerning of SLAPPs would be an effective component of anti-SLAPP reform, as courts have an inherent interest in protecting their processes.

Disciplinary proceedings against plaintiffs' lawyers

If a SLAPP is dismissed for being an abuse of process, lawyers also risk sanctions under s 345 of the *Legal Profession Act 2004* (NSW) and equivalents in other Australian states (Beaumont 2004). Similar disciplinary proceedings under r 11 have been used to penalise US attorneys for bringing SLAPPs (Harper 1993–94, 436). Australian commentators assert that without anti-SLAPP policies or penalties, disciplinary proceedings are the main disincentives for lawyers seeking to institute SLAPP proceedings (Evans 2005, 79). Cosentino (1991, 416) suggests that lawyers' ethics and training make them uniquely situated to avoid SLAPPs. Lawyers have a heightened responsibility and should be competent to screen SLAPPs (1991, 417–18).

However, a disciplinary proceeding is contingent on the courts finding an abuse of process — which is subject to the shortcomings listed above. The court will still have to go through the process of multiple amendments to dismiss the SLAPP before penalising the lawyer (Atkins 1991–92, 994). Also, lawyers are reluctant to bring a complaint against another lawyer, and judges against the bar (McBride 1992–93, 943; Harper 1993–94, 414). Moreover, disciplining a lawyer for bringing a frivolous case is measured by how the lawyer conceives 'in good faith', which is a subjective and flexible standard. This is made more difficult by legal professional privilege preventing the disclosure of communication between clients and lawyers (see *Evidence Act 1995* (Cth), s 118). But, even if the lawyer is found to have acted with bad intentions (including to sabotage politically a group), it is only sanctioned if it is an abuse of court processes.

The courts look to whether lawyers breach their duty to the court, rather than to political 'side-effects' (Brooks 1989–90, 70). If the courts were concerned with the political agenda of lawyers, this could (and should) also have dangerous consequences for environmental lawyers (1989–90, 72). Brooks (1989–90, 73) argues that lawyering can be political on both sides, but that is not the issue. The issue is the

effect on public participation, rather than legal ethics. This is for legislatures and not courts alone to determine.

Cross-claims in damages: SLAPP-backs

If courts identify SLAPPs or recognise the case before them as an abuse of process in the US, defendants may have the capacity to counter-sue for the damages from the original suit. Before the US's anti-SLAPP laws, the most popular and successful response in the mid 1990s was the 'SLAPP-back' (Lowe 1996, 53). The tort of malicious prosecution was used as a retaliatory mechanism by SLAPP targets. Damages of up to $86.5 million were awarded against filers and their lawyers (Stetson 1995, 1351) and the successful SLAPP-backs outnumbered the unsuccessful by two to one (Baruch 1996–97, 69). However, a major hurdle is that the counter-suit can only be filed after successful termination for the defendant in the underlying SLAPP and proof of malice (*LoBiondo v Schwartz,* 1999).[19] Nonetheless, the tort of malicious prosecution would not be viable in Australia, as a claim of malicious prosecution is not available for civil proceedings (Fleming 1998, 675).

Alternatively, and more appropriately for the Australian system, is the tort of abuse of process as a cross-claim (*Grainger v Hill,* 1838; Fleming 1998, 687). This tort has the advantage of not requiring finalisation of the underlying suit. It has been used as a SLAPP counter-suit in the US, although not as successfully as the tort of malicious prosecution (Brecher 1988, 137–40). The action arises where a legal process 'has been perverted for some extraneous purpose', even if there is legal foundation (*Spautz v Williams,* 1983 at 527). Australian lawyers can also be sued for abuse of process (Dal Pont 2001, 451). The leading Australian case is *White Industries v Flower & Hart,* 1998 (Goldberg J), where a solicitor was penalised for commencing an action for a client in order to frustrate a debt payment. However, the tort of abuse of process requires more than a reprehensible motive; it must be for a purpose 'beyond what the law offers', such as improper use of discovery (*Spautz v Gibbs,* 1990 (Priestley JA)).

Even if targets have a strong chance of success in the SLAPP-back, they are often unwilling and unable to embroil themselves in further litigation (Costantini and Nash 1991, 477). Damages are unlikely to compensate adequately the SLAPP-back plaintiffs for infringement of their political rights, as the tort is a sanction for improper proceedings and does not provide remedy for public participants. It only provides compensation for the defendants and nothing more to protect public participation

19 In California, this shortcoming prompted legislative reforms to allow SLAPP targets to cross-claim prior to the resolution of the original suit (Duman 2005, 7).

(Waldman 1991–92, 991). It must be the responsibility of governments to protect against the imperilling effect on community participation (McEvoy 1990; Schauer 1978).

Proposals for anti-SLAPP legislation

The major shortcoming of judicial responses is that a favourable resolution is not sufficient to protect targets. The filer need not win the suit for it to be a powerful weapon against targets. Simply dragging out proceedings and moving the debate from the political to the judicial forum can fulfil the filer's objectives of curtailing political expression (Brecher 1988, 106). Once a SLAPP is filed, the SLAPP defendant must spend time on the legal challenge relative to the extent to which the filer seeks to wear down the target (Harper 1993–94, 409), which prevents time being spent on the public campaign.

Therefore, legislation is necessary to prevent or minimise the harassment and intimidation associated with SLAPPs. The main policy objectives should be to prevent identifiable SLAPPs from proceeding to trial or onerous pleadings, and to provide compensatory relief without a cross-claim. Legislation should set out a process for identifying SLAPPs at an interlocutory stage, otherwise courts are obliged to take the SLAPP filer's allegations as seriously as they would those of any other plaintiff (Braun 1998–99, 971).

This section of the article will consider throughout how the *Gunns* case may have developed differently had the proposed anti-SLAPP laws been in place from the first statement of claim against the environmental groups and protesters. It will also critically assess the anti-SLAPP legislation in the ACT.

The immediate impact of anti-SLAPP legislation

The foundation of anti-SLAPP policy should be a clear statutory declaration of the right of public participation and condemnation of SLAPPs (Baruch 1996–97, 67; Bover and Parnell 2002). This informs citizens of their enhanced protection, so they are less likely to be discouraged from public advocacy by the prospect of a SLAPP in response. At present, targets treat SLAPPs as a personalised attack (Gallacher 2005), whereas the disapproval of SLAPPs in policy will notify citizens of their systemic threat to civil liberties (Waldman 1991–92, 994). Otherwise, targets concede their rights because 'they don't know better and they don't have the money or legal resources to find out' (Hager and Burton 1999, 42). The policy will also make the filer more reluctant to issue the writ because they risk tainting their public image (McBride 1992–93, 953). Rogachevsky (2000, 32) sums up the instant benefits of anti-SLAPP statutes:

A clear message from the legislature would increase public awareness of the issue and rally support for individuals and grassroots public interest groups against tactics of intimidation. Corporations wary of the implications of a negative public image on their financial success will be forced to weigh the costs and benefits of proceeding with SLAPP actions.

Objective of legislative provisions

The overriding imperative of anti-SLAPP legislation is early diagnosis. The US and short-lived Canadian (British Columbia) anti-SLAPP statutes mandate early court review of the merits of lawsuits purported to be SLAPPs.[20] This lets the citizens out of the courthouse 'almost as quickly as the developer dragged them in', and at the developer's expense (Wilson 2004, 375; also see Neigher 1991–92, 987). Thus, the primary objective of legislation should be to allow determination and abatement of the claim before its chilling effect is realised. The second objective should be to provide for damages to be awarded to the defendant to deter SLAPPs and compensate the targets. The following sections break down the requirements.

Procedural provisions

Early dismissal

The strongest weapon in the target's arsenal is quick identification and immediate dismissal of the SLAPP (Stetson 1995, 1347). Legislation should enable a target to file a pre-trial motion to dismiss the suit. US anti-SLAPP statutes provide that a SLAPP defendant may immediately bring a 'special motion to dismiss' that lawsuit.[21] The court will grant a preference in hearing these motions and the motion must be heard within 30 to 60 days of filing the motion (Tate 1999–2000, 857).[22] If the action is determined to be a SLAPP, dismissal is granted through a summary judgment (Rogachevsky 2000, 33; Braun 1998–99, 994). It is analogous to an interlocutory

20 Canada: *Protection of Public Participation Act* [SBC 2001], Ch 19 (British Columbia); on US statutes, see Stetson 1995, 1357.

21 See, for example, under the Californian *Code of Civil Procedure,* § 425.16(f), where it must be filed within 60 days of service of the SLAPP or, at the court's discretion, any time later; under the *New York Civil Practice Law and Rules*, r 3211(g), the 'court shall grant preference in the hearing' motions to dismiss cases involving public petition and participation.

22 For example, under the Californian *Code of Civil Procedure,* § 425.16(f), it must be heard within 30 days; under the Missouri Anti-SLAPP Statute, § 537-528.1, motions for a summary judgment 'shall be considered by the court on a priority or expedited basis to ensure the early consideration of the issues raised by the motion and to prevent the unnecessary expense of litigation'.

injunction, with the aim of preventing further incursion of public participation. This protects against the adverse side-effects of the case going to trial and thereby inhibiting public participation, even if the court hears the claim only to dismiss it (Stetson 1995, 1333). For the six defendants in the *Gunns* case whose claims have been dismissed, this would have circumvented four years of litigation. For the remaining defendants, there would have been an opportunity for the case to be assessed as a SLAPP from the outset.

The chink in the legislative armour of the recently enacted ACT anti-SLAPP legislation (the *Protection of Public Participation Act 2008)* (discussed in detail below) is its failure to provide a mechanism for summary dismissal. Although dismissal of proceedings was initially provided for in the Protection of Public Participation Bill 2008 (cl 10), presented by Deb Foskey MLA in 2008, the government omitted the provision relating to dismissal in the watered-down version that was finally passed.[23] The government also removed cl 8, which provided that the defendants' application 'must be heard by the Magistrates Court not later than 30 days after the day when the application is served'. Therefore, the ACT legislation does not provide for the courts to immediately respond to the SLAPP.

Discovery rules

Due to the major financial and time burden that discovery can place on defendants, a number of US statutes provide for an automatic stay of discovery pending the determination of the summary judgment.[24] Australian commentators have pointed to wealthy clients who misuse discovery to defeat 'small pocket' opponents (Ross 1998, 33). It also widens the net of defendants to the most peripheral of participants. The overwhelming effect of discovery can alone achieve the objectives of a SLAPP filer (Braun 1998–99, 1075). The recent application for discovery by Gunns Ltd in the *Gunns* case, which was dismissed as a 'fishing expedition' after 18 months (*Gunns v Marr & Ors*, 2008 at [68]), highlights the importance of curtailing this use of discovery.

However, in some instances discovery can serve the target's objectives. Hager and Burton (1999, 48) argue that the possibility of discovery being ordered on the corporation may prevent it from bringing a suit (as opposed to a mere legal threat), as the corporation may not want to risk public exposure. Where the SLAPP filer does

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23 See government amendment 5 in the Explanatory Statement at <www.legislation.act.gov.au/b/db_32176/relatedmaterials/supp_explanatory_statement_.pdf> [2008, December 10].

24 See Minnesota Free Speech; Participation in Government Statute 1994 (Codified in Declaratory, Corrective, Administrative Remedies Statute, Ch 554).

proceed, the findings from discovery may be useful in furthering the defendants' public campaign. The findings by Steel and Morris pursuant to discovery ordered on McDonalds, in the *McLibel* case,[25] revealed vital information about the company's public relations strategy, which was then disseminated internationally.

Proof issues: three limbs

Anti-SLAPP legislation in the US and Australia draws on a number of proof tests. The most common test is based on proof of three elements: (1) the defendants are engaged in public participation on a public issue; (2) the plaintiffs are pursuing an improper purpose in courts; and (3) the plaintiffs have brought a meritless suit. However, different jurisdictions rely on these elements to varying degrees, depending on their interests in striking a balance between the rights of public participation and the right to litigate, and based on the remedies available to the SLAPP targets. Each limb will be assessed below.

First limb: public participation

The first limb requires the defendant to prove, on the balance of probabilities, that the targeted activity entailed public participation on a public issue. This gives rise to prima facie protection and there is a rebuttable presumption that the action is a SLAPP (Waldman 1991–92, 1046).

The definition of public participation has been a much-debated issue in Australian and US legislatures. Some US jurisdictions, for fear of abuse of the legislation by defendants, have limited the definition of public participation to the paradigmatic SLAPP — opposition to community planning and land use (Baker 2004, 413–14).[26] While it would be worthwhile to ensure that planning statutes (discussed above) protect communication pursuant to their consultation processes, a broader scope of public participation is needed to rule out SLAPPs. Indeed, such 'novel' torts are likely to be utilised more often and may exclude defendants such as those in the *Gunns* case who are not being accused of objecting exclusively to community planning, but more broadly for opposing Gunns's logging of old-growth native forests, generation of pulpwood and sale of timber products.[27]

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25 See *McDonalds Corporation v Steel and Morris*, 1996 (*McLibel* case); 'The McLibel Story' <www.mcspotlight.org/case/trial/story.html> [2008, December 10].

26 See New Mexico Anti-SLAPP Statute 2001 (Codified in New Mexico Statutes, §§ 38-2-9.1 and 9.2).

27 See Statement of Claim No 1, at [450], [475]: <www.gunns20.org/sites/gunns20.org/files/Statement%20of%20Claim%20(Version%201)%2013%20Dec%202004.DOC> [2008, December 16].

The ACT anti-SLAPP legislation (*Protection of Public Participation Act 2008*) departs from the narrow US SLAPP statutes that define public participation as involving a land dispute. This prevents the filer from tailoring its suit to the narrow definition based on land disputes. Section 7 of the Act defines 'public participation' as follows:

> (1) ***public participation*** means conduct that a reasonable person would consider is intended (in whole or part) to influence public opinion, or promote or further action by the public, a corporation or government entity in relation to an issue of public interest.
> (2) However, ***public participation*** does not include conduct —
> (a) that contravenes a court order or constitutes contempt of court; or
> (b) that constitutes unlawful vilification under the *Discrimination Act 1991*; or
> (c) that causes, or is reasonably likely to cause, physical injury or damage to property; or
> (d) that constitutes unlawful entry at residential premises; or
> (e) that constitutes an offence punishable by imprisonment for longer than 12 months; or
> (f) if—
> (i) the conduct is communication by a party to an industrial dispute between an employer and employee, former employee, contractor or agent; and
> (ii) the communication relates to the subject matter of the dispute; or
> (g) that constitutes the advertising of goods or services for commercial purposes; or
> (h) that incites others to engage in conduct mentioned in paragraphs (a), (b), (c), (d) or (e).
> (3) Subsection (2) applies in relation to a person's conduct whether or not the person has been convicted or found guilty of an offence for the conduct.

In addition, the *Protection of Public Participation Act* does not apply to a cause of action for defamation (s 8). The test is based on what the reasonable person would deem to be public participation, rather than the public participant's perception. The broad scope of exceptions in the ACT legislation is likely to open the door for filers to allege that the participant's conduct falls within one of the exceptions. For example, conclusions may be reached that the public participant's proximity to the filer's property is likely to cause or incite property damage.

In California, by contrast, the definition of public participation is more inclusive in its anti-SLAPP statute: *Code of Civil Procedure*, § 425.16. Subsection 3(e) covers communication before a legislature, executive or judiciary; any statement made in a public place or public forum in connection with an issue of public interest; or any other conduct in furtherance of the exercise of the constitutional right to petition or to free speech in connection with a public issue or issue of public interest. The only exception is enforcement action brought by a public prosecutor (subs 3(d)).

The US courts have tended to interpret public participation broadly (Braun 1998–99, 1072). Public participation statutes have protected citizens involved in peaceful economic boycotts (Braun 1998–99, 1016, 1020); internet publications (see Electronic Frontier Foundation 2002); and whistleblowers regarding a wide range of corporate activities (Peeters 2003–04, 810).

Second limb: improper purpose

In a number of jurisdictions, including the Australian Capital Territory, anti-SLAPP legislation requires that defendants prove the SLAPP filer's motive is 'improper'. In the US, the 'improper purpose test' includes a purpose contrary to the US constitutional right to petition (Johnston 2002–03, 288). In the ACT (*Protection of Public Participation Act*, s 6), the filer's improper purpose must be the 'main' purpose, rather than being one of many purposes (s 6). Improper purpose is established where 'a reasonable person would consider that the main purpose for starting or maintaining the proceeding' is:

(a) to discourage the defendant (or anyone else) from engaging in public participation; or
(b) to divert the defendant's resources away from engagement in public participation to the proceeding; or
(c) to punish or disadvantage the defendant for engaging in public participation.

This is a high threshold for the defendant to meet, as it requires the defendant to prove purpose and motivations of the filer, rather than focus on the rights of the defendant. It is particularly difficult to prove because it must be the 'main purpose'. In the *Gunns* case, there may be evidence to prove that a purpose is to silence dissent (that is, through the nature of the targets, loose pleadings and 'fishing' discovery processes), but to allege it is the main purpose would require proof that winning the litigation was secondary — which the plaintiff would contest fiercely. However, in the ACT this is somewhat counterbalanced by making the test 'objective', as the purpose is determined by the reasonable person's perception of the filer's purpose, rather than by a 'subjective test' that would require determination of the filer's actual purpose.

An exception to the general US approach is in California, where the defendant does not have to show that the lawsuit was brought for an improper purpose, but simply that it was aimed at affecting public participation (*Code of Civil Procedure*, § 425.16; see also Braun 2002–03, 737–38). Thus, the test for proving the SLAPP is whether the filer targets public participation, rather than seeks to target a public participant, as its main purpose. The effectiveness of the Californian statute in its first six years was evidenced by the fact that targets received a summary judgment in 22 of the 27 cases (Braun 1998–99, 1012).

Third limb: meritless suit

In the US, once the defendant has made out a case that public participation has been burdened under the first and second limbs (or simply the first limb in states such as California), the onus shifts to the plaintiff to prove that the action has substantial merit (McBride 1992–93, 949). This provision does not exist in the ACT legislation.

In the US, the action will be deemed a SLAPP if the plaintiff cannot meet this third limb. The purpose of this limb was to provide procedural fairness to filers with legitimate claims (Waldman 1991–92, 1045; Harper 1993–94, 409). This includes in California, where the *Code of Civil Procedure,* § 425.16(1)(b)(1) provides that a SLAPP strike-out motion will fail where the 'plaintiff has established that there is a probability that the plaintiff will prevail on the claim'.

Before the legislation, there was evidence that in a corpus of US cases studied, defendants in 83 per cent of cases were unsuccessful in SLAPPs (Waldman 1991–92, 984). However, it is unclear whether courts would strike down all these cases on a lack of probability of success from the outset, and why the remaining 17 per cent of SLAPPs were successful. Commentators have argued that the third limb would allow too many SLAPPs to proceed, which would then fail at the trial stage (Braun 1998–99, 1074).

A preferable approach, if this provision is to be retained, may be to require that there is a 'substantial' likelihood of success. The New York *Civil Practice Law and Rules,* r 3212(h) requires that the plaintiff to the suit for damages has a 'substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law'. This requires the plaintiff both to present evidence to justify the claim and to demonstrate substantial probability that the plaintiff will prevail (Waldman 1991–92, 1340). Given the grave dangers to public participation, a higher standard of 'substantial probability' is warranted. Also, there is a need to ensure that this evidence of 'substantial probability', if accepted, is inadmissible at trial (see the Californian *Code of Civil Procedure,* § 425.16(b)(3)).

In the ACT, given the need to objectively prove an 'improper purpose', this section seems irrelevant. However, it appears that the third limb (which existed in the Protection of Public Participation Bill 2008, cl 6) was omitted only because the provisions for summary dismissal (cl 10(1)) were also omitted. If the ACT legislation does not seek to dismiss the case, but merely penalise the filer for interference in public participation through an award of damages against it, then there is no need to prove whether or not the case will be successful.

A better position is to retain the 'substantial prospects' limb alongside the summary dismissal provision, as this allows the deep-seated needs of the targets to have the case short-circuited, alongside a capacity for the corporation to rejoin only where there is substantial evidence that the case will be successful. Bongiorno J has held that the pleadings in the *Gunns* case are deficient. For example, in *Gunns v Marr & Ors*, 2005 (at [32]), his Honour stated in relation to conspiracy:

> In the pleading with which this Court is presently concerned, it is not a lack of particularity which has led to deficiencies in the pleading of the conspiracies alleged. It is the nature of the pleading itself. It is one thing to excuse a plaintiff from provision of precise particulars of conversations which are said to have constituted the conspiracy. It is quite another to excuse pleadings which are embarrassing in the sense that a defendant cannot plead to them because he cannot determine with any precision whether any, and if so, what allegation is made against him.

This may be evidence of the lack of substantial or even reasonable prospects in the *Gunns* case, which would warrant its dismissal, had an anti-SLAPP statute been operative at the time of the litigation.

Costs, compensatory and penalty provisions

Ancillary to summary dismissal, anti-SLAPP reforms should direct the filer to pay the target's legal costs and compensate the defendant where a SLAPP motion is successful, or if the first limb is proven and the plaintiff loses at trial. This would provide an incentive to make an application under the anti-SLAPP statute, protect the financially constrained defendant, and deter the filer (Braun 1998–99, 984).

SLAPP targets should have the capacity to make a plea for damages in a pre-trial motion, rather than through a separate process or trial. Legislation should encourage the courts to use their discretion to award punitive damages, since the courts otherwise award them sparingly.[28] If there are uncompensated costs incurred in the defence, the defendant should be able to claim them as a tax deduction (Braun 1998–99, 1070). On the other hand, the SLAPP filer should be barred from receiving a tax deduction for payment of legal costs and damages to the defendants. This would reverse the anomaly of the government subsidising interference with public participation.

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28 See *Gray v Motor Accident Commission*, 1998 at [20].

Awarding legal costs and fees

The US and ACT statutes provide that when the defendant is successful in a summary motion, the plaintiff is to pay the defendant's legal costs (Rogachevsky 2000, 32). In some jurisdictions, such as California, the defendant is entitled to costs without an additional hearing.[29] This is an important provision in the US because costs are not routinely awarded against the unsuccessful party in civil suits.

In the ACT, the court has the power to award costs on an indemnity basis where an improper purpose has been established (this is an annotation under s 9 of the *Protection of Public Participation Act* and is to be read in accordance with the *Court Procedures Rules 2006* (ACT), r 1752). This would have aided the defendants in the *Gunns* case, who were refused indemnity costs and accordingly allege that they are 'still extensively out of pocket' (Arup 2008). Nonetheless, the ACT provision is discretionary and does not provide the same assurance as do the US statutes. However, unlike in the US, Australian courts ordinarily award costs, and thus a mandatory provision may not be required.

The award of costs provides the target with certainty and entices lawyers to take their cases without asking for payment upfront (Rowe and Romero 2002, 299). Some commentators suggest that this is not enough, as some targets often do not have the funds to defend the case from the outset, and that costs should be awarded on an ongoing basis, such as for discovery (Barker 1993, 456), once the first limb is established. The European Court of Human Rights found in the *McLibel* case that SLAPP defendants (although not categorised in such terms) should be entitled to legal aid when unable to afford private representation.[30]

Costs provisions also contain risks. Defendants may be cavalier in retaining counsel and then face a greater economic loss if their motion does not succeed. Furthermore, legal costs alone provide little economic deterrence to the plaintiff when the gains from stifling political debate outweigh the legal costs, which will be reasonably incorporated into general business costs. Costs provisions also do not compensate the targets for other losses and harm. Thus, additional compensatory provisions are needed.

Compensatory damages

Legislation should allow courts to award damages for a loss of income and emotional harm ensuing from the SLAPP. Damages should be granted pursuant to motions

29 Californian *Code of Civil Procedure*, § 425.16(2)(c).

30 *Steel and Morris v United Kingdom*, 2005 at [64].

brought by targets after their cases have been dismissed summarily, or if there is a finding of improper purpose, or if the target should succeed at trial and public participation is established.[31] However, in the latter case, the courts should have the discretion not to award damages in borderline cases, which would unduly curtail the rights of the SLAPP filer.

Damages should compensate the defendant for loss of employment income or opportunities, humiliation, anxiety and distress suffered by virtue of the SLAPP (Barker 1993, 441–42). This eliminates the need for the defendant to file a cross-claim (Braun 1998–99, 984). By awarding relief for a range of losses, the SLAPP filer is unable to account for economic loss based on a 'reasonable damages' calculation of legal costs alone.

In the ACT, however, the legislation does not provide for damages to be awarded to the targets. A civil penalty under s 9 of the *Protection of Public Participation Act* provides a deterrent to the filer, although no remedy for the target. The civil penalty applies where the court has established public participation and improper purpose. The court then has the discretion to order the plaintiff pay the territory a financial penalty, in accordance with a regulation (yet to be prescribed). At this stage, it is uncertain how much a filer may be expected to pay.

Exemplary (punitive) damages

In order to deter a filer effectively, legislation should allow courts to award exemplary or punitive damages where an improper purpose is established. Damages are to be calculated high enough to hurt, and take into account the resources of the filer.[32] They therefore are not capped and can be very large. This means that they send a message to filers and are beyond ordinary business calculations of the cost of litigation. Exemplary damages have been awarded in the US for major SLAPP cases (Braun 1998–99, 999). Given that the targets receive exemplary damages, it would provide them with further incentive to defend the case.

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31 For example: Minnesota Free Speech; Participation in Government Statute 1994 (Codified in Declaratory, Corrective, Administrative Remedies Statute, Ch 554).

32 This is Brennan J's approach in *XL Petroleum (NSW) v Caltex Oil (Australia),* 1985 at 471. McBride (1992–93, 427) proposes that defendants recover damages in a sum reasonably equivalent to the plaintiff's projected profits if the participation had been quashed: 'This type of penalty strikes directly at the economic incentive that causes business organisations to file SLAPPs.'

The ACT anti-SLAPP legislation does not make provisions for exemplary damages. This is despite cl 10(5) of the Protection of Public Participation Bill (2008):

> The Supreme Court may, on application by the defendant or on its own initiative … make an order for punitive or exemplary damages if satisfied that the proceeding (or part of the proceeding) was begun against the defendant for an improper purpose.

In Parliament, Deb Foskey MLA criticised the government for not accepting this provision for exemplary damages, which would have made the legislation more robust. Foskey (2008a, 1174) had espoused the value of the clause when introducing the legislation to Parliament:

> … the laws that I am proposing today will make SLAPP suits less attractive because, by virtue of the availability of exemplary and punitive damages, a plaintiff bringing an unmeritorious claim for an improper purpose may have their action backfire on them and suffer real financial loss and loss of corporate image. This has been the experience in the US …

Limitations of anti-SLAPP laws

Problems of procedural reform without substantive change

While the procedures in anti-SLAPP laws provide a hurdle for SLAPP filers, such procedures may be overcome. This is, first, because of the exceptions under the first limb of public participation; second, because of possible challenges under the third limb; and third, because the substantive law is favourable to corporations. As long as substantive laws (such as the torts of intimidation and conspiracy) remain open to corporations, the target will have difficulty succeeding under anti-SLAPP laws — and applications under the laws will simply be another legal hurdle without a fruitful outcome. Certainly laws that bar large corporations from suing in defamation are a positive step against such substantive laws.[33] However, legislators may have

33 There may, however, be an argument to extend the prohibition to all corporations. Certainly in NSW, national corporations with complex structures have sued in defamation for comments in newspapers criticising developers. This includes against Henry James, who was reported in the *Tweed Sun* as being critical of the effect of a development on the local environment (*Leda Developments Pty Ltd v James*, 2005). It is interesting to note that the original South Australian Protection of Public Participation Bill 2005 (cll 7 and 8) outlawed defamation for corporations and did so for all corporations (irrespective of size, but excepting situations relating to protection of competition) and all politicians in their official capacity.

more regard to restricting some of the newer novel torts that corporations rely on and that are more appropriately relegated to the rights of natural persons, such as the tort of intimidation, or amending sections of the *Trade Practices Act* to bar corporations from suing public participants.

Inadequate legal services for SLAPP targets

Anti-SLAPP legislation may be inadequate if lawyers are not equipped to defend SLAPPs and citizens are unaware of how to go about retaining lawyers. Given the experience of corporate lawyers vis-a-vis their targets, allocating resources to specialised SLAPP legal services for defendants would help equalise the imbalance. For example, in the Lorne case (mentioned above), incorrect legal advice was given with regard to the defamation suit brought under the TPA. The target, Ruth Hawley, could have been assisted by being informed of her rights and defences (Walters 2003, 27). In New Mexico, the bench and bar are mandated in the anti-SLAPP legislation to spot and stop SLAPP suits (Rowe and Romero 2002, 299). It would be more appropriate, however, for funded lawyers in public interest centres who specialise in SLAPPs to provide advice as soon as the claim is lodged.

Concluding remarks — lessons for legislators

The detrimental impact that the prolonged *Gunns* litigation has had on the defendants and environmental movement, and freedom of assembly, association, expression and political participation more broadly, is an appropriate signal for anti-SLAPP legislation. In presenting anti-SLAPP legislation in the ACT Parliament, Deb Foskey (2008a, 1172) highlighted that the *Gunns* litigation shows how SLAPPs have expanded beyond control in Australia and how the courts are ill-equipped to strike them out before they take their chilling effect.

Ideally, anti-SLAPP legislation would be enacted through national uniform laws, given that cases are often brought across state jurisdictions.[34] There are currently Bills for anti-SLAPP legislation before the Tasmanian and South Australian Parliaments. These Bills are similar to the original 2008 Protection of Public Participation Bill (ACT).[35] If a commitment is to be made to uniform laws, this article has signalled how these laws can attempt to match the legal ammunition of the SLAPP filer. Legislation in Australia should particularly have regard to the need for summary dismissal provisions (to circumvent the effect of a SLAPP on

34 For example: *Gunns v Marr*; as well as in the US (Braun 1998–99, 1034).

35 Protection of Public Participation Bill 2005 (Tas); Protection of Public Participation Bill 2008 (SA).

public participation) and adequate penalties or damages to punish SLAPP filers and protect participants.

While anti-SLAPP policy represents a substantial inroad for tort reform, it is justified as prudent public policy by protecting fundamental rights to assembly, association, expression and political participation, and essentially upholding the democratic process. As Deb Foskey (2008a, 1175) has noted, '[f]ree speech and robust public debate, together with the ability to participate in community and political activity without fear of litigation, are fundamental rights in a democratic society'. However, such rights are hollow without legislation that provides procedures to defend public participation against suppressive litigation. ●

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