

Castan Centre for Human Rights Law

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Suing Into Submission: Using Litigation to Quell Dissent

Free speech is about giving a voice to the community.

Blue Wedgie

Last week the Blue Wedges coalition approached the Supreme Court to challenge the legality of the government's "trial" dredging of Port Phillip Bay. Blue Wedges allege that the dredging is in breach of the government's own laws, particularly because it is being conducted without any environment effects statement. Section 6(2) of the *Environment Effects Act* requires that "no works" be carried until the EES has been considered by the Minister. The claim by Blue Wedges had, at the very least, real prospects of success.

A challenge like this takes months to be given a full hearing by the Supreme Court. By then the dredging could be finished, and there would be no point in the Court ruling on the controversy.

For this reason, the Blue Wedges coalition asked the court for an interlocutory injunction to prevent works until the issue could be fully argued.

In such cases it is usual for the party who seeks an injunction to give the court an undertaking to pay any damages caused by the delay in works if the court ultimately rules against the legal challenge. If you want a court to stop

something so you can bring a case, you must be prepared to cover the loss caused if you fail.

In this case, the prospective damages from a delay in the dredging was said to be some \$32 million, accumulating at over \$300,000 a day. There was no prospect of a community group honestly giving an undertaking to pay such a vast sum, and they sought to be excused from the requirement.

Justice Mandie would not excuse them from this requirement, and accordingly would not grant the injunction.

Whatever you think of the merits of dredging Port Phillip Bay, the Blue Wedges case highlights an important gap in our rule of law. If the government is acting unlawfully in this trial dredging, surely the rule of law requires that it be held to account. But how?

The common law assumes that private individuals only take court action to protect their private interests. The common law also assumes that the only party who approaches the courts to uphold the public interest is the Attorney-General. Both these assumptions are now outdated and wrong.

The common law model does not take account of community groups approaching the courts not for any financial interest, but for the public good. It is not unusual for community groups to be in stark conflict with the Attorney-General of the day in doing so. When Liberty Victoria approached the Federal Court seeking relief for the asylum seekers on the *Tampa* they did so in spite of strong efforts by the government of the day, including the Attorney-General, to oppose them. But if Liberty Victoria, (and other concerned members of the public) had not approached the court, there

would have been no one to speak for the asylum seekers whose rights were being overridden.

And yet, when the courts consider cases brought by such community groups, they generally apply rules designed for a different situation – namely for those who come to court to defend their private interests.

The safeguard of relying on the Attorney-General to protect the public interest is no longer enough. It is true that the Attorney-General may intervene in any case as of right, and may give his “fiat” for an issue of public interest to be litigated by another person. But what if the Attorney-General is himself party to the conduct in question?

In the Blue Wedges case, the Victorian Attorney-General has an interest. He is also the Minister for Planning, who administers the environment effects process. He has made public pronouncements in support of the trial dredging. He is not to be regarded as a genuinely independent law officer who would defend the public interest in this matter despite his own political interests.

Whether in Victoria or elsewhere, this is the reality with Attorneys-General in Australia today. They are no longer independent of the political fray, and our reliance on the Attorney-General to uphold issues of public interest is unrealistic and ignores the political pressures to which they are subject.

In 1972, when the Attorney-General of Tasmania, Mervyn Everett, gave his fiat to conservationists to challenge the lawfulness of the flooding of Lake Pedder, he refused to accept a cabinet directive to stop the litigation. The

Premier, Eric Reece, sacked him and assumed the office of Attorney-General himself. The courts were not permitted to decide.

Mt Etna Bat Caves

A similar case to the Blue Wedges experience occurred in the litigation surrounding the Mt Etna caves in Queensland. These caves, apart from being very beautiful, contained breeding habitat for the ghost bat, which is unique to Australasia and listed as vulnerable. It is Australia's only carnivorous bat and the second largest such bat in the world. It has the most sensitive hearing of any land mammal, and has been the subject of specialist hearing research.

One cave, Speaking Tube, was considered critical to the habitat of the ghost bats in the area.

Central Queensland Cement was mining limestone at Mt Etna, which was in a public reserve. Legal advice had been obtained that the mining was illegal.

When the Company announced that it would blast Speaking Tube, the Central Queensland Speleological Association sought injunctions in the Queensland Supreme Court.

The court found that the speleologists lacked standing, and did not grant injunctions pending the full hearing. More importantly, it ordered that they deposit \$15,000 for security for costs in respect of the balance of the action – that is, they had to put up money for Queensland Cement's costs.

After a series of further hearings dealing with procedural issues, Justice De Jersey ordered the speleologists to give further security in the sum of

\$45,000 within a fortnight, failing which, the case would be struck out - and the company would blast Speaking Tube.

The speleologists embarked on a fundraising campaign. They raised \$20,000, and had the balance guaranteed by a Brisbane woman.

However, it then became clear that if they deposited the \$45,000, the speleologists would be met with a further application for yet more security for costs. They knew they would not be able to raise this, and then they would lose the \$45,000.

The speleologists abandoned their action.

The manager of Central Queensland Cement had admitted that the limestone around Speaking Tube would not be needed for ten years. Nevertheless, the following morning, 12 June 1989, a screen of trucks was placed in front of the cave in a vain bid to block the view of waiting television cameras. The company then dynamited Speaking Tube out of existence.

Despite several court hearings, the cave was destroyed without the legality of the mining ever being determined.

Access to justice is critical for the rule of law. There is no point having the law if members of the community are not able to approach the courts to obtain remedies to enforce it. It is an affront to the rule of law to leave anyone – especially the government – free to break the law because no one can afford to challenge them.

Where issues of public interest are raised, particularly by non-profit groups acting for what they perceive to be the public good, it is no longer enough to assume that such matters are only for an Attorney-General to pursue. Rather, courts should be assiduous to ensure that the merits of claims of unlawfulness by government authorities are determined as soon as possible.

It is time for a comprehensive approach to giving community groups a hearing in the courts. New procedures are needed. Where non-profit groups approach the courts in order to uphold the public good, in a proceeding with real prospects of success, generally they should not have to pay costs, they should not have to give security for costs, and they should not have to give undertakings as to damages.

Upholding the rule of law requires us to give the community a hearing.

Muzzling FIDO

John Sinclair was named Australian of the Year in 1976. He grew up in Maryborough in Queensland. He had studied agriculture and had been a district organiser for the Young Farmers. Having qualified at night school, he worked as a teacher with the Queensland Education Department.

Sinclair had heard about Fraser Island from his parents, who honeymooned there, and when he visited the place, it fulfilled his almost mythical expectations.

John became the driving force behind the Fraser Island Defence Organisation. Without FIDO, Fraser Island would have been logged and mined to the point where it lost most of its natural values. FIDO is

responsible for its status as a national park. The story of the Fraser Island campaign is one of tenacity and ingenuity - and injustice.

During the course of the campaign, in which not only the mining industry but also the Bjelke-Petersen government attacked him relentlessly, John Sinclair's wife received threatening phone calls. His children had the tyres on their bikes slashed. He himself was booed when he led his scout troop into the arena at the Maryborough Show.

In the Queensland Parliament Sinclair was repeatedly vilified by National Party MPs with false and scandalous allegations –for which he was given no right of reply.

The Education Department moved him without warning from Maryborough to a specially created post in Brisbane, and then, again with no warning, to Ipswich.

At the height of the controversy, Sinclair published in his newsletter the submission he had made to the Commonwealth's Commission of Inquiry into Fraser Island mining. In it, he attacked the mining company Murphyores for "corruptly obtaining its leases and licences". The Murphyores company.sued him for defamation.

Murphyores had tried to stop the Commonwealth's inquiry – taking two proceedings. The failure of its challenge to the constitutionality of the

Commonwealth's inquiry was one of the first great environmental victories in the Australian courts - the High Court's decision in *Murphyores*¹.

But now *Murphyores* sued John Sinclair personally, and others with him. He was under immense pressure to do something to relieve the burden from others – particularly the Hervey Bay Publishing Company, the small business which printed FIDO's newsletter. Eventually, three days before the hearing, he caved in, apologised, and paid out a significant but undisclosed sum to *Murphyores*.

Then the Education Department sent him on another sequence of unsolicited transfers and he resigned, abandoning \$250,000 in superannuation. His family life in tatters, and having filed for bankruptcy, he moved to Sydney, where he was unemployed for six months, a refugee from a State whose heritage at Fraser Island and Cooloola he had done so much to protect.

Today Fraser Island is world heritage listed and a mecca for people all around the world – a wonderful resource for refreshment and inspiration. It would have been lost to Queensland and to the world if not for FIDO. And yet the legal system did not protect those who spoke out to make the world a better place, and the cost to John Sinclair – the Australian of the year – diminished all of Australia.

“Barwon Water – Frankly Foul”

¹ *Murphyores v the Commonwealth* (1976) 133 CLR 1; see also *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473

The Bannockburn Yellow Gum Action Group (“BYGAG”) was a small community group formed in 1997 to protect a local grassy woodland. The woodland contained some magnificent specimens of Yellow Gum. The site was assessed by Barwon Water’s consultants as being of State conservation significance and was entitled to protection under four separate listings of the Victorian *Flora and Fauna Guarantee Act*.

Barwon Water, a public authority responsible for the water supply and sewerage of the greater Geelong region, under its then chairman, Frank De Stefano, wanted to bulldoze the woodland for a sewerage farm.

Frank De Stefano was a prominent member of the Geelong community. He had been a councillor for several years and had been elected the last mayor before council amalgamations. He was awarded the Order of Australia in 1988. Mr De Stefano ran an accountancy business with ten staff. Initially BYGAG attempted to communicate their concerns directly to Barwon Water. However it soon became clear that there would be no negotiation on the Yellow Gums. Other conventional avenues of negotiation were cut off and they found it difficult to get space in the press. BYGAG met to develop a strategy. Communicating to the community was essential and making a bumper sticker was one small aspect of the strategies chosen.

One man, experienced in the campaign to prevent the use of Albert Park for a Grand Prix race track, offered to develop a slogan for a sticker. He came up with ‘Barwon Water, Frankly Foul’ which alluded to Barwon Water’s bad record with its ocean sewerage outfall, and also made reference to its Chairman.

Frank De Stefano could have laughed it off. Or he could have created his own bumper sticker. Or he could have used his influence in the media to reply to his critics.

Instead he sued for defamation.

The seven defendants initially named in the writ were nominated based on a copy of notes taken at a meeting which they were attending. The meeting had no relation whatsoever to the Bannockburn Yellow Gum issue. It had been called to organise an environmental festival. However the over zealous note taker had recorded a conversational aside when someone remarked that stickers had been produced. for the Bannockburn protest and identified the slogans, including 'Barwon Water, Frankly Foul'.

Desperate to put a stop to escalating protests that threatened to hold up the development of the sewerage ponds, Barwon Water retaliated, on Mr De Stefano's behalf, by delivering writs on Christmas Eve.

Although the writs named Mr De Stefano as the Plaintiff, the case was funded, at public expense, by Barwon Water.

In defamation cases, it is necessary to set out ("plead") the imputations that you allege arise from the statement you complain about.

Mr. De Stefano pleaded that the joke carried the imputations that:

- Frank De Stefano was a foul person.
- Frank De Stefano was a person smeared with the sewage that the authority of which he was Chairman treated.
- Frank De Stefano was a person who smelt like sewage.

- Frank De Stefano was a person unfit to hold the position of Chairman of Barwon Water.

The Defendants were confronted by a dilemma. They could defend the case, at great expense, and run the risk of losing their houses if they lost, and lose a great deal of money even if they won. They were confronted by a person who was using public money to run his case, and faced none of the same risks. The defendants were not familiar with defamation legislation, fatigued from running a demanding campaign and trying to keep up professional and personal commitments.

Defending the case was likely to take a large investment of time, week after week, for years.

The case became enmeshed in complexity and cost. Two of the defendants opted for independent legal advice which further complicated taking a joint approach to defending it. The remaining five stuck it out to the end with a combination of *pro bono* (ie offered free of charge) legal advice and paid legal advice. This was a lonely phase of the process as the writ had the effect of intimidating the community and people were reluctant to be identified with the action.

The group took their advice, apologised and paid \$10,000.

The case was an enormous setback to the community campaign – few wanted to risk involvement if they were likely to be sued.

Nevertheless the protest continued. A committed group left their homes and took up residence on site hoping to forestall the chainsaws. Impromptu blockades of protestors' cars held up the heavy machinery.

The trees were numbered and photographed so that Barwon Water's false figures could be reliably disputed. Brave individuals locked on to machines or trees. Some endeavoured to get their message across with theatre and mime. A lone horseman broke police lines carrying a huge red flag bearing the message 'STOP'.

But wider numbers and the consequent political pressure that this would involve were not marshalled.

In the end, Barwon Water felled the trees, witnessed by grieving members of the community.

After the trees were felled protestors on site were outnumbered by about three to one by police and hired security guards.

Those members of the community had been silenced by the defamation writ brought against them.

We are free to speak of the Bannockburn event because Mr De Stefano has now been the subject of far more serious allegations than any on the bumper sticker.

In February 2003 Frank De Stefano was sentenced to ten years' jail, with a minimum of seven years, for stealing \$8.3 million from clients of his

accountancy practice. This included a \$5 million damages payout to a client who had been made a quadriplegic.

One of the features of this case, common in suits designed to silence community protest, is that the writs were served on Christmas eve – a time when it is difficult to obtain legal advice, so that a pall of tension is cast over the festive season.

Those who paid out \$10,000 for this action will not see their money – or the trees - again. As a result of the writ – which never came to court – the fate of the Bannockburn woodland was decided without the community being able to make a full contribution to the issues.

A feature of this case, very common in SLAPP suits, was the service of the writs on Christmas eve. This creates maximum impact, as the persons sued will have difficulty obtaining legal advice, and it casts a pall of uncertainty over the festive season.

Being Forest Friendly

My own journey in relation to SLAPP suits began in 1999 when a friend Alan Gray rang me. It was the Thursday before Easter, and I was about to go on holidays. I could hear the fear in his voice. He sounded devastated. “Brian,” he said, “I’m not feeling good – all I have worked to build for my family – my house and my business – could go down the drain.”

Alan was then, and still is, the editor of Earth Garden magazine. He had written a book called “Forest Friendly Building Timbers”. BBC Hardware had agreed to stock the book throughout Australia

Just before the close of business for the Easter holidays (Easter time, not Christmas, this time), the solicitors for the National Association of Forest Industries sent him a letter threatening to take him to court for deceptive and misleading conduct under the *Trade Practices Act*, because the book made a number of statements about the logging industry which they disputed.

The statements were all sourced and quoted from government reports. They were indisputable. And there were good statutory defences under the TPA anyway. But this would not matter – Alan Gray could not afford to bankrupt himself in order to prove he was right. Even a few days in court would be crippling.

NAFI demanded the shredding of all copies of the book, and an undertaking not to repeat any of these statements. Otherwise, off to the Federal Court. Alan, unable to face the prospect of even a short Federal Court hearing, was at the point of capitulation.

The irony was that the Trade Practices Act is meant to be about consumer protection, and the logging industry wanted to keep information from consumers to protect its own interests.

It was the modern equivalent of a mediaeval book burning.

I arranged for Alan to send the letter and the book immediately.

I said to him that the letter meant the book would enjoy greatly increased sales, and not to worry. We prepared a reply telling NAFI to get lost and then sent the correspondence to every journalist we could think of.

It got a run in every paper, and eventually Professor Alan Fels (head of ACCC) offered the public opinion that the NAFI letter itself may well amount to deceptive and misleading conduct, because anyone who knew the workings of the TPA would know that the threat they made was empty.

We taunted NAFI to bring proceedings. They didn't. The book was at the top of the non-fiction best seller list for months.

There was one dark aspect of the outcome. BBC Hardwares issued a press release which said:

BBC Hardware Limited today withdrew from sale in its stores a booklet titled "Forest-Friendly Building Timbers".

This follows a threat of legal action against BBC Hardware by the National Association of Forest Industries, which took exception to the publication.²

NAFI's threat of legal action was baseless. They did not even issue any proceedings. But still their threat pushed "Forest-Friendly Building Timbers" off the shelves of the major hardware chain which had supported it.

It's a good example of the way some big business operators misuse the court system – frequently without even having to take proceedings. In this case we called their bluff, and that's a good lesson in how to deal with SLAPP suits – stick together, go public, and don't let them get away with it.

PETA

² BBC Hardware Media Statement 8 April 1999

People for the Ethical Treatment of Animals (PETA) has conducted a public campaign against the wool industry's practice of "mulesing" sheep and against live exports.

As part of its campaign, PETA approached retailers by letter urging them not to purchase Australian wool products until the two practices end.

As a result, the industry's promotional organisation, Australian Wool Innovation Ltd (AWI), has commenced legal action against PETA in the Federal Court, relying on the Trade Practices Act. AWI has asked the Federal Court to grant it an injunction preventing PETA from publishing material that would be harmful to the retailers' trade, and staging anti-mulesing protest demonstrations at retailers' premises.

Now that the dispute is before the Court, it is, of course, entirely a matter for the Federal Court to decide what the parties' legal rights and responsibilities are and PETA will have an opportunity to present its case to the Court in opposition to the grant of injunctive relief.

However, if the Federal Court decides that the *Trade Practices Act* enables an industry organisation to sue in response to criticism of industry practices, it will have serious adverse implications for public discussion of controversial issues that are of interest to consumers.

On 22nd March last Hely J struck out the Statement of Claim in the PETA case. It remains to be seen whether the case will be repleaded.

The Sunday Age made the following comment

AWT 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.

AWT's chairman, the former Howard minister Ian McLachlan, suggests his group will seek to wear PETA down financially.

The paper quotes Mr McLachlan as saying:

"If we have a massive bill, so have they got a massive bill, This industry is extremely well financed and these sorts of crises are catered for. The Australian wool industry is not going to walk away from something it's been building up for 200 years."

The community should be able to mount and hear a campaign about mulesing and about live sheep exports without the threat of litigation.

Don't corporations have rights too?

What is the reality when large corporations sue their critics?

The corporate world is better able to access the justice system than community groups or individuals, because litigation is expensive. Not merely court fees, which are considerable, but lawyers' fees are such that the average person has no chance of funding major litigation.

Developers and other commercial organizations enjoy tax advantages when they sue their critics – the expenses are tax deductible because they are part of the income-earning enterprise. But for the community group or individual who acts altruistically, without seeking a profit, there will be no tax-deductibility. The community group has a significant financial disadvantage right there. The corporation will achieve a significant tax benefit for each dollar it spends. The community group will have to pay its own way.

The average person sued by a corporation stands to lose their home. If they win - the best they can hope for is to have some of their legal costs paid by the corporation. Even if they are successful they will generally have to pay thousands to their own lawyers to cover the shortfall ordered by the court. Either way, the community group faces crippling financial risk.

The corporation and its officers are under none of these pressures. Indeed, if they win, they have the prospect of being awarded substantial damages. Generally the person sued has no such prospect.

Another factor, quite apart from the cost, is the time litigation takes. The ABC's "Moonlight State" 4 corners program ran in 1988. It led to the Fitzgerald Royal Commission and a change of government in Queensland. But the litigation against Chris Masters, who put the program together, continued for over 13 years. During that time litigants cannot just leave it to their lawyers. They have to respond to detailed legal documents, such as interrogatories, which take enormous time. They have to give instructions for a myriad of decisions to be taken along the way. It will hang over them throughout that time.

Where people use their spare time trying to improve the world, as well as juggling professional and family responsibilities, litigation is likely to completely consume their time, and at least keep them away from further campaigning. This in itself is a win for the corporation concerned.

When community groups or individuals are sued, they feel shame, there can be bitterness and falling out under the stress of the litigation, and others who see the dilemma they are in are deterred from speaking out themselves. This chill effect is one of the main reasons for SLAPP suits.

The vast majority of SLAPP suits are not decided by the courts on the merits. They are decided by the financial pressures. The person sued can no longer pay for their lawyer, and a deadline is missed. The other side enters judgment. Or the person sued just gives up and files for bankruptcy.

Taking SLAPP suits on is all very well, and can make a big difference – look at McLibel. But what a cost to those who took it on – 10 years of their lives. No income. Not a great career choice.

In the real world, people are silenced by the mere issuing of SLAPP suits.

Of course corporations should be allowed to approach the courts – but they should not be permitted to abuse the court system, using their corporate power to exhaust and silence their critics rather than to have the court redress genuine and legally recognized grievances. When they do that, they should be stopped.

Internationally Recognised Human Rights

After the Second World War, and in particular the barbarous tyrannies of Nazism, the world determined to learn from that episode. In 1948 the United Nations debated and passed the Universal Declaration of Human Rights.

The first three paragraphs of the Preamble are as follows:

PREAMBLE

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy **freedom of speech and belief** and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

And let me also read article 19 of the Declaration:

Everyone has the right to **freedom of opinion and expression**; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Since then the UN has also agreed on the International Covenant on Civil and Political Rights, article 19 of which again confirms the right to freedom of expression.

Australia is a signatory to these great human rights documents, but apart from the ACT, which last year passed an excellent Human Rights Act, we have never given legislative force to the universally recognized principles of human rights. Australia is the only western country not to have done so.

The importance of Free Speech

So why is free speech important?

Without open speech, there is no real democracy. Votes will be delivered in information blackout, the voters deceived by those who control their sources of information. Citizens will not lobby about some problems, for they will not know of them.

Public opinion will be manipulated by the powerful, and the enrichment and greater wisdom that comes from reflection through communication with each other will be lost.

Our political system is predicated on the capacity of citizens to contribute. Citizens can vote for representatives. Citizens can themselves stand for election. Citizens can become involved in lobbying over a particular issue or to further the electoral standing of a particular party or community group.

The theory is that decisions are not imposed by arbitrary force, but by citizens learning from each other, persuading each other, so that good government may grow from a sharing of ideas.

But it is not just a question of our system of government. The community is not merely some ether that binds us together – it is the conversations between us. Our discussions together – our communications – are the community.

At a deeper level this concerns the well-being of members of our society. Many in our community – particularly young people with all their idealism and all they have to contribute - are literally dying from alienation. One way or another, they are repeatedly told – this is not your world – your contribution is not wanted. Conform, consume, or get lost. Many of them, in an act of defiance against a system which seems so alien to them, or perhaps out of justifiable indifference, don't even bother to vote. SLAPP suits are one way – of many – in which they are given the message that questioning entrenched interests will be crushed. We are all the losers.

Since democracy depends on the exchange of ideas and opinions, and community requires communication between its members, it is essential that citizens have the freedom, in any medium, to engage in public debate, to express points of view, and to make their own responses to the world around them. Freedom of expression permits knowledge to flourish and prejudices to be challenged, and diminishes the alienation of those who are not heard.

Legislation

Words matter. They can hurt and harm, as well as bring wisdom and healing. The same words that inspire one hearer will outrage another. To silence speech is to stifle the good with the bad.

Australia has no comprehensive protection of community members when speaking about matters of public interest or lobbying for change. Commentary on these things ought to be the function of citizens. They should be protected from vexatious court proceedings designed to shut them up.

The phenomenon of writs to stop discourse has received judicial recognition in Australia. As Sir William Deane said in *Theophanous v Herald and Weekly Times* (1994) 182 CLR 184

the use of defamation proceedings in relation to political communication and discussion has expanded to the stage where there is a widespread public perception that such proceedings represent a valued source of tax-free profit for the holder of high public office who is defamed and an effective way to “stop” political criticism, particularly at election times. (Indeed, the phrase “stop writ” has entered the language.)

In the United States and Canada, SLAPP suits have grown to the point where legislatures have enacted laws to protect public participation. Almost every state in the US has now done so, and some Provinces in Canada³.

These laws have various forms, but three features are:

- (a) they protect public participation – the exchange of ideas for the purpose of democratic decision-making - and make statements in that context privileged⁴,

³ For example: [Delaware Code Sections 8136 - 8138](#); [Code of Georgia § 9-11-11.1](#); [Hawaii Revised Statutes, Chapter 634E](#); [Indiana Code 34-7-7](#); Louisiana Code of Civil Procedure Art. 971; [Section 5-807 Annotated Code of Maryland](#) (HB 930); Massachusetts Statutes Chapter 231, Section 59H; Minnesota Statutes Annotated Chapter 554; Missouri RSMo Sec 537.528; [Nebraska Revised Statutes §§ 25-21,241 through 25-21,246](#); [Nevada Revised Statutes §§ 41.635 - 41.670](#); [New Mexico Statutes §§ 38-2-9.1 and 9.2](#); New York Civil Rights Law 70-a and 76-a; [Oregon Revised Statutes §§ 30.142 - 30.146](#); [Tennessee Code Annotated §§ 4-21-1001 through 4-21-1004](#); Washington [RCW 4.24.500 - 4.24.520](#) (this is the first modern anti-slapp legislation, enacted in 1989 – it was amended in 2002 to take account of several court decisions)

⁴ Drawing on those models, I would suggest defining public participation as follows:

“public participation” means communication or conduct aimed at influencing public opinion, or promoting or furthering lawful action by the public or by any government body, in relation to an issue of public interest, but does not include communication or conduct

- (a) in respect of which an information has been laid or an indictment has been preferred in a prosecution conducted by the Director of Public Prosecutions,
- (b) that constitutes a breach of any enactment,
- (c) that contravenes any order of any court,
- (d) that intentionally or recklessly causes damage to or destruction of real property or personal property,
- (e) that intentionally or recklessly causes physical injury,

- (b) they empower courts at an early stage to strike out actions brought with the purpose of stifling free speech, and
- (c) they give the courts power to order plaintiffs who bring actions to silence the community to pay damages by way of punishment.

The statutes have now been applied in a number of cases. The volume of SLAPP suits has dropped enormously. Australians deserve the same protection.

With the growing phenomenon in Australia of SLAPP suits designed to have a chill effect on public involvement, it is high time similar laws were enacted here. Give us laws which protect public.

Uniform Defamation laws

A small but important step towards protection of public participation is the proposal by State and Territories Attorneys-General, in the context of developing uniform defamation laws, that corporations should lose the right to sue for defamation. This is opposed by the Federal Attorney-General.

Historically, defamation laws were about the protection of the reputations of individuals. There are taxation and other benefits in organising as a corporation. Unless people can speak freely about them, corporations would be free to operate without regard to community values. So often when corporations sue an individual they are outlaying a negligible amount of

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- (f) that constitutes trespass to real or personal property,
 - (g) by way of advertising for commercial goods or services; or
 - (g) that is otherwise considered by a court to be unlawful or an unwarranted interference by the defendant with the rights or property of a person;

money on a tax-deductible basis, whereas the individual stands to lose their home. If corporations are to be kept accountable, people should be free to speak about them.

The need for this change has received added urgency with the corporatisation of many public services. Why should a public transport company be able to sue patrons who criticise the way it provides services?

In 2003, Victoria's Public Transport Users' Association, a lobby group which promotes the interests of public transport users, was concerned about the removal of seats in trams operated by Yarra Trams. They published a pamphlet which contained a cartoon of a sardine can with "Yarra Sardines" on it. They called for more services, not less seats, and wrote "As a private operator, Yarra Trams is mainly focussed on cutting costs, rather than providing a useful service."

Yarra Trams wrote to the PTUA saying that these statements expose "our company to ridicule" and were "defamatory", and threatened, unless an undertaking was received within hours that the brochure would no longer be distributed, to take "appropriate legal action to prevent the offending pamphlet from being published".

The PTUA obtained legal advice, and refused to buckle. In fact, they called the press and distributed the brochures in front of them. But until they had that advice, they were very worried.

Yarra Trams is a company providing a service to the public. It should not have a right to sue to stop the public commenting on its performance. If corporations could not sue, threats like this one would not be made.

New South Wales has already changed its defamation laws to prevent corporations suing⁵. The legislation provides that a corporation “does not have the right to sue for defamation of the corporation”.

Conclusion

I mentioned earlier that the demand for pulping of Alan Gray’s book was the modern equivalent of a medieval book burning. Of course, there are more recent examples of this kind of activity. On 10 May 1933 in Berlin, students from the Wilhelm Humboldt University, all of them members of right-wing student organizations, took books from their university library and from other collections. Accompanying their actions with denunciations of the authors, they proceeded to toss thousands of volumes, by writers famous and obscure, foreign and native, into the flames of a bonfire. It lasted for hours, interrupted only by the incantation of Nazi songs and a speech by Propaganda Minister Joseph Goebbels.

They burnt the books of Albert Einstein and of Thomas Mann and of hundreds more. They also burnt the books of Helen Keller, the deaf, blind author who was a legend even then. In a wonderful gesture of reconciliation after the Great War she had donated the royalties of her books for all time to the German soldiers blinded in that conflict.

She wrote an open letter to the book burners, which I paraphrase:

History has taught you nothing if you think you can kill ideas. Tyrants have tried to do that often before, and the ideas have risen up in their might and destroyed them.

⁵ *Defamation Amendment Act 2002* (NSW)

You can burn my books and the books of the best minds in Europe, and you can even burn the writers, but in the end their ideas will seep through a million channels to quicken other minds, and your bonfires will be left a flickering, lurid darkness in the splendour of their united wisdom.

Brian Walters