Let the People Speak

Brian Walters SC*

With the recent controversy over the issue of a writ by Gunns Ltd against The Wilderness Society, Senator Bob Brown and others, there has been widespread community discussion about SLAPP suits ('Strategic Litigation Against Public Participation'), and whether they are a threat to democracy.

In working with Free Speech Victoria, I have campaigned in relation to the issue of SLAPP suits, culminating in writing *Slapping on the Writs: Defamation, Developers and Community Activism* (Walters 2003). In this article, I have taken some case studies — including some I have written about before — in order to draw out the issues in relation to litigation against community groups.

PETA

People for the Ethical Treatment of Animals (PETA) conducted a public campaign against the Australian wool industry's practice of 'mulesing' sheep and live sheep export. Mulesing is the practice of cutting flaps of skin from a lamb's rear, and is intended to prevent fly strike. The industry has announced it will phase out the practice.

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

As a result, the industry promotional organisation, Australian Wool Innovation Ltd (AWI), commenced legal action against PETA in the Federal Court of Australia.

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 and anti-live sheep export 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.[1]

It is not the point of this paper to discuss the issue of mulesing or live sheep exports. But the PETA case raises wider issues about our legal system and its use when individuals or community groups voice criticisms of the powerful.

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1 On 22 March 2005 Hely J struck out the statement of claim in the PETA case. It remains to be seen whether the Applicants will plead the case again.

In this case, an industry organisation has invoked the *Trade Practices Act 1974* — which is intended to enhance consumer protection — in order to silence a community group which has criticized its industrial practices.

Frankly Foul

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 cost, 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* (i.e. 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 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.

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.[2] 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.

Erskine House, Lorne

Erskine House was built in the 1860s on Crown Land on the foreshore at Lorne, in Victoria.

Before the Great Ocean Road was completed in the 1930s, reaching Lorne was a major expedition across the Otway Ranges, and visitors to this isolated place enjoyed warm hospitality, lovely beaches and remote bush. For entertainment in the evenings they gathered to share their talents.

After the Great Ocean road came and Lorne developed as a town, Erskine House retained its charm as an old-style guest house, gradually adding facilities to keep up with the times.

Erskine House developed a special place in the lives of many Victorians — in some families, three generations honeymooned there. Walking out through the back gate onto the beach, or enjoying the beautiful lawns and mature trees, city dwellers found it an ideal retreat.

BCR Asset Management acquired the lease over Erskine House, and proposed a significant development of the site, involving 126 apartments built in multi-storey blocks on the perimeter of the property. The development would completely alter the character of Erskine House, and have a serious impact on the Lorne foreshore.

Any such development would depend on approval from the Victorian government, which owned the land.

The Lorne Planning and Preservation League has been in existence for thirty five years. Its purpose is to safeguard the natural and built environment of Lorne. The League had a significant contribution to make in relation to the development of Erskine House.

The Age sent a journalist, Keith Dunstan, to Lorne, and he wrote a story from the developers' point of view (Dunstan 1999a). He did not set out the concerns of the Lorne Planning and Preservation League in relation to the proposed development.

Lorne residents, and particularly members of the Lorne Planning and Preservation League, were upset by the story. They wanted to put their side of the issue. On behalf of the League, its secretary, Ruth Hawley, wrote to *The Age* (Hawley 1999b).

Ruth Hawley was a respectable grandmother who had worked as a teacher and had faithfully served the community for years. She was no firebrand, but she believed it was important to stand up for Lorne.

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2 *R v De Stefano* [2003] VSC 68.

The Age published her letter on 8th August 1999, as follows:

'Lorne Order'

I am appalled at the trite news article on the subject of Erskine House in 'A Grand Plan to be Their Guests' (1st August). Obviously, Keith Dunstan has happy childhood memories of holidays at Erskine House and these caused him to lapse into sentimentality instead of considering the consequences. He has not considered the scope of the proposed development: 126 apartments placed in blocks around the perimeter of the 4.3 hectare site, obscuring views of the sea. Further he has not mentioned the sacrifice of pleasant lawns and mature trees, which contribute to Lorne's character, Lorne, one of our state's prime tourist destinations, is facing ruin at the hands of developers aided by the government. Further, this property is not privately owned. It belongs to the people of Victoria and is held on leasehold by financier BCR Asset Management, which seems set to make a financial killing at the expense of the people. We have no certainty that BCR will not sell off individual apartment leases in the future, further removing this prime foreshore land from public use. It appears that Dunstan has been seduced by big business. Many Lorne people will be very disappointed in him (Hawley 1999b).

The response was fast and sharp. Mrs Hawley was not in Lorne on the day her letter was published, but in Ballarat. She was just bringing her grandson home from his music lesson, when a letter was hand-delivered from Finlaysons, the South Australian lawyers for BCR Asset Management.

The letter read:

Mrs Ruth Hawley,

Dear Madam,

Erskine House

We act for BCR Asset Management Pty Ltd. Our client has consulted us in relation to certain statements published by you in relation to Erskine House.

A letter published under your name in the Age newspaper on 8th August 1999 contains material that is misleading and deceptive, as well as being grossly defamatory to our client. Among other things, your letter suggests that our client has no concern for the heritage, culture or people of Lorne; is willing to sacrifice the heritage, culture and people of Lorne purely for its own financial gain; regards the people of Lorne as expendable; is acting to the detriment of the Lorne community; has conspired with the government and the media; is corrupt, is dishonest and has ulterior motives.

By reason of the publication of your letter, our client has been damaged in its business reputation and may suffer further loss or damage.

In order to mitigate the damage caused by your defamatory publication, our client requires that you immediately publish an apology in the Age newspaper, in the terms enclosed. If a letter in those terms is not published by 15th August 1999, our client requires that on 17th August 1999 you publish at your own expense an advertisement in a prominent position in the newspaper containing the same terms.

Our client reserves all rights available to it at law, including the right to issue proceedings both for injunctive relief and damages.

Yours faithfully,

Gary McWade,

Partner, Finlaysons.

They gave her a draft apology and retraction which they required her to publish at her own expense, as follows:

Erskine House

On 8th August 1999, a letter signed by me was published in the Age under the heading 'Lorne Order' commenting on proposals for the redevelopment of Erskine House. I acknowledge that the letter is defamatory of BCR Asset Management. The defamatory imputations and allegations I made in the letter are false and represent an unfounded and unfair attack on BCR Asset Management. I unreservedly apologise for any loss or damage I've caused or may have caused BCR Asset Management as a result of my letter. I retract all defamatory imputations contained in the letter, undertake not to further publish the letter, and not to publish any other such statements in the future.

Ruth Hawley,

Lorne.

Ruth Hawley immediately made an appointment with her solicitor to try and solve the problem.

The solicitor was evidently no expert in defamation law. He went through Ruth's letter sentence by sentence and he picked faults with it.

He rang Gary McWade at Finlaysons who told him that his client was very serious in pursuing the issue and if an apology were not published by the following Monday the matter would go to the Federal Court on that day. Ruth Hawley was told by her solicitor that she had two options: she could either apologise, as asked, or face defending a case in the Federal Court.

Defending a case in the Federal Court was out of the question. The cost of even a single day in court would ruin Ruth Hawley financially.

She apologised.

The advertisement cost about $1,000, and it amounted to an admission that she had acted wrongly in making statements about the controversy.

In addition to the apology, Ruth Hawley was required not to repeat the statements in her letter to *The Age*.

This is how Ruth Hawley described the experience later:

> I can't tell you the shame that I felt about this. I'd been treated like a criminal, and I felt like a criminal. It was all advertised in the Age in a prominent position. Because there were people I knew who would have read it, I didn't go out for four weeks. The shame was awful.
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> However, time has gone by, I've received support from my husband, my friends at Lorne, and I'm thankful for that. Time does help ... I can tell you that I'll always feel injured by this experience.

Ruth Hawley did not get very good legal advice. She was entitled to say what she did, and there was no substantial cause of action against her. Indeed, the threat was misconceived, in that it was made in terms relating to the Trade Practices legislation.

But the lack of good legal advice is not surprising: not many lawyers have a good grasp of the defamation laws, and in this case there was a threat requiring action in a very short time frame. Ruth Hawley did not have the resources to shop around for an expert.

The threat was not made to *The Age*, which had published the letter, but only to her. There was every indication that this was a bluff.

Its members shell-shocked by these events, the Lorne Planning and Preservation League's opposition to the proposed development virtually ended. The chill effect of the experience froze them out of the debate.

A Victorian election was held shortly after this incident. The incoming Minister, John Brumby, was given the responsibility of considering the development at Erskine House. Because the Lorne community had been silenced by the threat of litigation, he was never aware of the depth of community opposition to this use of a publicly-owned asset.

The Minister approved the development.

Community input into this issue was effectively silenced. When that happened, democracy in Victoria was diminished.

Access to justice

The corporate world is more able to access the courts than community groups or private individuals. The main reason for this is money.

Litigation is an expensive business. There are court fees to be paid, and more onerously, there are lawyers' fees. Society is complex, and its laws are correspondingly complex. If the law is complex, defamation law is particularly so. Lawyers are able to charge high fees because their services are in demand, and they do charge those fees. It is a fact of life.

Legal costs are such that the average person is quite unable to finance a major piece of litigation.

It is not merely the financial cost of the lawyers involved, although that is a serious disincentive in itself. There are more reasons for imbalance.

Tax differences

Where a developer sues a local environment group for defamation (a frequent event) the developer's legal costs are tax deductible. The cost is claimed as an expense incidental to the generation of its income (i.e. by its development activities), and hence is tax deductible.

This is not so for environment groups or their members. Their involvement in public life is not for the purpose of generating income, and the expense is not tax deductible.

This means that the corporation will receive a significant tax reduction for each dollar it spends on legal action. The community group will have to pay its way without the hope of any such advantage.

Unequal financial resources

If the residents sued for defamation by a developer fail in defending the action, they will be required to pay damages (these can be hundreds of thousands of dollars) and ordered to pay costs — which can be even more. Usually they stand to lose their assets (most people are at risk of losing their homes) if they lose the case.

If they win, they will recover some, but not all, of their costs. Not all costs spent in defending a court case are recoverable when an order is made for costs, and the difference can amount to tens of thousands of dollars.

Either way, a community group is exposed to crippling financial risk.

The corporation suing, and its officers, are generally under none of this pressure: for them there might be a tax deductible expense, but if they lose, the most that will happen is

the payment of legal costs from the considerable assets of the corporation: they are not at risk of paying damages themselves.

The situation is even more unfair where public money is used to underwrite an action, as when public officials — even Ministers — bring actions against their critics from the public, and use public money to do so.

Unequal prospects

A developer suing a community group runs the case with the prospect of an award of damages at the end, but no risk of such an award against it. The community group, if successful, will receive an award of part of the costs only, and does not stand to gain any damages for the inconvenience of a baseless action.

Protection of Public Participation

One notorious developer told Penny Figgis, Vice President of the Australian Conservation Foundation, that his method of dealing with his environmental opponents was to call them liars and to sue them for defamation.

He is not alone.

A growing feature of public discourse in Australia is the use of SLAPP suits — strategic lawsuits against public participation — to silence debate which threatens powerful interests.

The term 'SLAPP' suit was coined in the United States, where such law suits developed as a public relations tool to silence community criticism of large corporations and developers. They became so common that now most states have enacted legislation against SLAPP suits.[3]

But the phenomenon 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.)

Although uniform defamation laws are now being considered in Australia, no State has given active consideration to legislation to protect public participation.

In the United States, one feature of the model usually adopted is to accord qualified privilege to statements made on an occasion of public participation.

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

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3 For example: Delaware Code Sections 8136 – 8138; Code of Georgia § 9–11–11.1; Hawaii Revised Statutes, Chapter 634F; Indiana Code 34–7–7; Louisiana Code of Civil Procedure Art. 971; Section 5–807 Annotated Code of Maryland (HB 930); Massachussetts 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).

> **'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;
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> (b) that constitutes a breach of any enactment;
>
> (c) that contravenes any order of any court;
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> (d) that intentionally or recklessly causes damage to or destruction of real property or personal property;
>
> (e) that intentionally or recklessly causes physical injury;
>
> (f) that constitutes trespass to real or personal property;
>
> (g) by way of advertising for commercial goods or services; or
>
> (h) 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.

North American legislation also usually provides for a method of summary dismissal of proceedings, with defendants being awarded punitive or exemplary damages where actions are brought with the purpose of preventing 'public participation'. This imposes a real financial risk for a developer who wishes to stop criticism, and evens up the 'playing field'.

The need for such legislation is growing more urgent as litigation, or the threat of litigation, is used to freeze the community out of public debate where community participation threaten the interests of the powerful.

Our democratic political system is predicated on the capacity of citizens to participate effectively in the political process. Citizens vote for representatives. Citizens stand for election. Citizens lobby their representatives and political institutions concerning particular issues and to further the electoral prospects of a particular party or community group.

By its very nature, speech between different community sectors and interests involves competing: and conflicting ideas and policies: political campaigns, for example, are largely conducted on this basis. The vigorous free flow of competing ideas enables us to select our representatives. But as well as competition, speech has other functions: in our speech we learn from each other, we experiment, and build new ideas, and we grow in understanding, both individually and as a community.

The community is not merely a collection of individuals, and is not some mysterious ether that binds us together.

The community is the sum total of the interactions and conversations between its members.

When we limit discussion and debate between people, we limit community itself.

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.

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 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 suing.[4] The legislation provides that a corporation 'does not have the right to sue for defamation of the corporation'.

Conclusion

Corporations should be able to access the courts to have wrongs redressed. But they should not be permitted to use the courts to intimidate critics by the sheer financial muscle they can bring to bear — hoping to silence their opponents without ever having their complaint heard. That is an abuse of process.

The vast majority of suits brought by corporations against their critics never come to a hearing. The merits are never decided. All too often the financial pressures are such that defendants agree to remain silent about the issue they have been pursuing in return for the case against them being dropped. We are all the losers when that happens.

The community should be able to maintain campaigns on issues such as mulesing, and they should be able to hear and respond to such campaigns, without the risk of industry groups suing them.

In this country, community groups stand in a precarious place when powerful interests seek to silence their contribution to public debate.

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4 *Defamation Amendment Act 2002* (NSW).

When the threat of litigation is made, there is division within groups, there is bitterness, and there can be sell outs.

Australia is out of line with the rest of the developed world on free speech. There is much more liberty in the United States and in Europe to speak out on issues of public importance. Indeed, most developed countries in the world have a constitutionally recognised right of free speech. Australia is the only developed country not to have a legally recognised right of free speech.

There are many lawyers who assist community groups threatened with litigaton on a *pro bono* basis. There are contact groups, such as Free Speech Victoria, which facilitate this.

But they should not have to. The current system is not in the best interests of our society or of our democratic traditions.

It is time for legislated reform which protects community groups from the use of litigation to silence them.

It is time to speak.

Reference list

Dunstan, K (1999a) 'A Grand Plan to be Their Guests' , *The Age*, 1 August.

Hawley, R (1999b) Letters Page, *The Age*, 8 August.

Walters, B (2003) *Slapping on the Writs: Defamation, Developers and Community Activism*, UNSW Press, Sydney.

Case list

R v De Stefano [2003] VSC 68.

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