SLAPPs

Strategic Lawsuits Against Public Participation

Coming to a controversy near you

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In 1991 business people attending the Third Annual Pollution Law Conference in Sydney and Melbourne were presented with a paper entitled 'Legal Rights of Industry Against Conservationists'[1] advising them about legal action that could be taken against environmental activists. Conference attendees were told about developments in the US which were relevant to Australia, including the widespread use of lawsuits to intimidate or 'chill-out' environmentalists.

Every year thousands of people are sued in the USA for speaking out against governments and corporations. Multi-million dollar law suits are being filed against individual citizens and groups for circulating petitions, writing to public officials, speaking at, or even just attending, public meetings, organising boycotts and engaging in peaceful demonstrations.[2] These law suits have been labelled 'Strategic Lawsuits Against Public Participation' or SLAPPs by University of Denver academics Penelope Canan and George Pring, who have been studying such suits for more than a decade with the help of funding from the US National Science Foundation.

Canan and Pring define a SLAPP as being a civil court action which alleges that injury has been caused by the efforts of individuals or nongovernment organisations to influence government action on an issue of public interest or concern.[3] They began their research after they noticed an increasing number of environmentalists were being named as defendants in large civil damage cases.[4] They found that 'SLAPPs are filed by one side of a public, political dispute to punish or prevent opposing points of view.'[5]

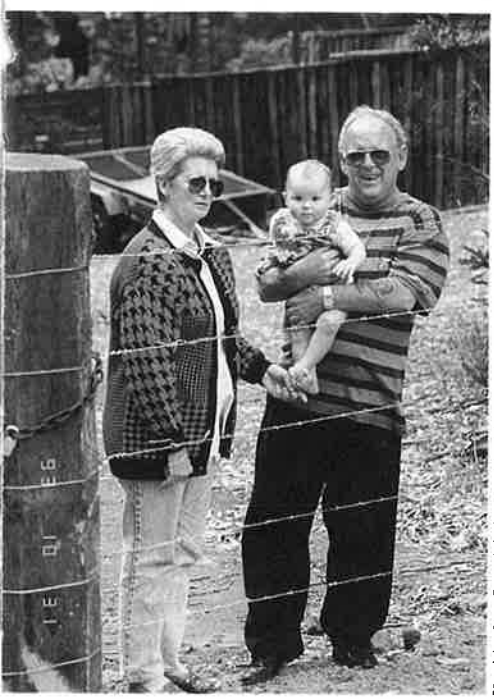
People using SLAPPs in this way cannot directly sue people for exercising their democratic right to participate in the political process so they have to find technical legal grounds on which to bring their cases. Such grounds usually include defamation, conspiracy, nuisance, invasion of privacy or interference with business/economic expectancy.[6] At the Pollution Law Conference in 1991, business people were told 'The lesson for Australia contained in SLAPP suits is that the US cases are based on causes of action available in Australia' and that US experience concerning SLAPP suits is 'indicative of possible future developments in Australia.'[7]

Indeed several Australians have faced or are currently facing such law suits. For example, Jim and Jenny Donohoe and Tim Tapsell have been SLAPPed for supporting a Local Environment Plan that proposed rezoning rural land near Helensburgh as environmentally protected land. The developers wanted the land to be rezoned for residential development and one of the larger landholders sued them for conspiring with each other 'to damage or destroy the financial and commercial interests of the Plaintiffs with the sole or predominant purpose of injuring the commercial interests of the Plaintiffs.'[8]

The Helensburgh SLAPP Case

In 1986 the Helensburgh District Protection Society was formed after Wollongong City Council proposed that the town of Helensburgh, on the southern edge of Sydney, be dramatically expanded. Members of the Protection Society believed such development would be environmentally damaging. The Donohoes and Tim Tapsell were active members of the society, Tim Tapsell acting as spokesperson on several occasions and Jenny Donohoe as secretary. The Protection Society opposed a number of development proposals in the following years including a

Wollongong City Council plan in 1990 to rezone land in the green belt between Sydney and Wollongong, adjoining the Royal National Park as residential land. There were 5103 submissions in response to the plan, the vast majority opposing the urban expansion, and as a result the council dropped the plan in 1991.[9] The following year the council put a new plan on public display which included the rezoning of much of the land as 'environmental protection'. Public submissions were invited on the plan.



The Donohoes ... access to their property blocked ... refuse to be intimidated

In all its activities the Protection Society was careful not to name individual persons or companies so as to avoid defamation suits and so the Donohoes and Tapsell were shocked to be served with a writ in 1993. According to the writ against them, they had forwarded letters to the council promoting rezoning; printed and arranged for about 1085 people to sign copies of letters promoting the rezoning which they delivered to council; and written articles in favour of the rezoning which were subsequently published. They do not deny any of this. The developers argue that the effect of this rezoning (for environmental protection) would be to prevent them from developing their land and that 'the defendants were aware of that effect and sought to achieve that effect'.[10] They therefore sought to claim damages from the defendants for those losses. The developers also claim that the published articles were inaccurate and misleading because, amongst other things, the articles claimed that environmental damage will result from residential development in the area.

The defendants claimed that far from conspiring to deprive the developers of their profits they were responding to a request by Wollongong City Council for the public to make submissions on the Local Environment Plan. In fact the successful operation of the NSW Environmental Planning and Assessment Act depends on public submissions. The defendants argued that their submissions supported rezoning for environmental reasons; they wanted to prevent pollution of the Hacking River, prevent proliferation of urban sprawl, protect natural and native flora and fauna in the area and preserve the natural buffer between Wollongong and Sydney.[11]

Aided by the efforts of the Helensburgh District Protection Society, Wollongong City Council received over 7000 submissions this time with over 5000 of them supporting the rezoning for environmental protection. The council decided to go ahead with the rezoning but was forced by the Minister for Planning, who had been lobbied by the developers, to hold a commission of inquiry.

Shortly before the inquiry, the Donohoes were threatened with further legal action for lobbying to have the inquiry cancelled.[12] At the opening of the inquiry Jenny Donohoe told the Commissioner that her submission could be jeopardised because of the legal action against her.[13] Consequently the Commissioner was concerned that the legal action might jeopardise the inquiry itself. As a result the developers made an undertaking not to further prosecute the existing Supreme Court case till the conclusion of the inquiry and not to pursue any action as a result of statements made at the inquiry. Nevertheless the Donohoes' lawyers warned them that such an undertaking had no legal force and the Donohoes' ability to participate in the inquiry was severely hampered because of the forthcoming case. According to Jenny Donohoe others were also affected when they heard of the writ and removed their submissions from the inquiry.

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1 Robert Jamieson and Ray Plibersek, 'Legal Rights of Industry Against Conservationists', paper presented to Third Annual Pollution Law Conference, Sydney 28-29 October and Melbourne, 30-31 October 1991.
2 George W. Pring and Penelope Canan, '"SLAPPs" – "Strategic Lawsuits Against Public Participation" in Government – Diagnosis and Treatment of the Newest Civil Rights Abuse', in *Civil Rights Litigation and Attorney Fees Annual Handbook*, Clark Boardman, 1993, p.380.
3 Pring and Canan 1993, *op.cit.*, p.384.
4 Katherine Bishop, 'New Tool of Developers and Others Quells Private Opposition to Projects', *The New York Times*, 26 April 1991.
5 Pring and Canan 1993, *op.cit.*, p.381.
6 *Ibid.*, pp. 384-5.
7 Jamieson and Plibersek, *op.cit.*, pp.10-11.
8 Supreme Court, Ensile Pty Ltd and Lady Carrington Estates Pty Ltd vs James Edward Donohoe, Jennifer Donohoe and Timothy Tapsell, Amended Statement of Claim, filed 10th May 1994.
9 R.D.Walshe, 'Storm over Helensburgh', leaflet, Sutherland Shire Environment Centre, 1995.
10 Supreme Court, *op. cit.*
11 Supreme Court, Ensile Pty Ltd and Lady Carrington Estates Pty Ltd vs James Edward Donohoe, Jennifer Donohoe and Timothy Tapsell, Defence, October 1993.
12 Correspondence, Gye Perkes & Stone Lawyers to Messrs Ashton Stedman, 20 June 1994.
13 Althea Mouhtouris, 'Legal action mars inquiry', *Illawarra Mercury*, 6 July 1994, p.7.

At the end of 1994 the Commissioner recommended that more than three quarters of the land be zoned for 'environmental protection' and the remaining lands be subject to further studies before it is zoned. Most recently the newly elected NSW Government was reported as banning large-scale residential development at Helensburgh at least till the results of a three year study into Sydney's air quality has been completed.[14] But the writ still hangs above the heads of the Donohoes and Tapsell. The developers show no sign of bringing it to court and it remains in limbo, able to be activated whenever the developers feel it might be useful.

The writ has already cost the defendants thousands of dollars, even though the case has yet to come to court. It has also taken its toll in stress and sickness within the families involved. Recent changes to the Legal Aid Commission, reinstating legal aid for public interest environment matters, may mean that they will have some limited financial support if the case goes to court. But for Jenny Donohoe there is no doubt that SLAPPs do work to intimidate community minded citizens and to victimise key individuals so that their voice is not heard.

Harassment, Intimidation and Diversion

In the US such cases seldom win in the courts. The charges often seem extremely flimsy and the damage claims outrageously large.[15] Most are dismissed by the courts and 77 per cent of those that are heard by the courts are won by the people being sued. Less than ten percent of such cases in the USA result in a court victory for the filer of the action.[16] However companies and organisations taking this legal action are not doing so in order to win compensation from the victims of their attacks. Rather their aim is to harass, intimidate and distract their opponents.

One trial judge pointed out:

> The conceptual thread that binds [SLAPPs] is that they are suits without substantial merit that are brought by private interests to 'stop citizens from exercising their political rights or to punish them for having done so'... The longer the litigation can be stretched out, the more litigation that can be churned, the greater the expense that is inflicted and the closer the SLAPP filer moves to success. The purpose of such gamesmanship ranges from simple retribution for past activism to discouraging future activism.[17]

The cost to a developer is part of the costs of doing business but the cost of a court case to an individual is huge. In 1983 the US Supreme Court stated in one such SLAPP case that a lawsuit may be used 'as a powerful instrument of coercion or retaliation' and no matter how flimsy the case the defendant 'will most likely have to retain counsel and incur substantial legal expenses to defend against it...'.[18]

Such a case takes an average of three years and even if the person being sued wins it can cost tens of thousands of dollars in legal fees. Personal and emotional stress, disillusionment, diversion of time and energy, and even divisions within families, communities and groups can also result. For example George Campbell organised his neighbours to protest against the expansion of an airport near their homes in Worcester, Massachusetts. After he was threatened with a lawsuit from the city council for $1.3 million he thought he was going to lose everything and ended up in hospital as a result of the stress. The council dropped the suit a few weeks later.[19]

Not only does a SLAPP deter those involved from participating freely in political debate, it also deters other citizens from speaking freely and confidently about local public issues. Dixie Sefchek says that when she and three other leaders of Supporters To Oppose Pollution (STOP) were SLAPPed it was 'like a death threat to your organisation. People, organizations, and churches stopped giving money. Individuals resigned their memberships.' The suit was later dropped and the landfill they opposed (because wastes were to be buried in the ground) was ordered to be closed a few years later because of contamination of the groundwater.[20]

Research by Penelope Canan in fact shows that people who know about SLAPPs are more cautious about speaking out publicly than those who have never heard of them.[21] This intimidation of public discussion is referred to as 'chilling'. Judges in one US court decried a SLAPP for this very reason:

> [W]e shudder to think of the chill ... were we to allow this lawsuit to proceed. The cost to society in terms of the threat to our liberty and freedom is beyond calculation... To prohibit robust debate on these questions would deprive society of the benefit of its collective thinking and ... destroy the free exchange of ideas which is the adhesive of our democracy.[22]

One tactic used is to include John Does and Jane Does and 'unnamed persons' as defendants to 'spread the chill'.[23] This is a way of claiming that there are additional 'offending' citizens who could not be identified before the suit was filed and leaves the way open to sue other citizens later.

SLAPPs often do not go to trial because the objective, to scare off potential opponents, can be achieved merely by the threat of the court case. Kim Goldberg points out that 'company lawyers will usually go to great pains to warn activists of impending defamation suits. After all, why waste time

and money filing legal papers to initiate a lawsuit if the mere threat of a suit will silence your critics?'[24]

Another effect of the SLAPP is to distract the key antagonists from the main controversy and use up their money, time and energy in the courtroom, where the issues are not discussed. Activists use the political arena to expand the debate, enrol other citizens on their side and spread the conflict. The firms and developers that utilise SLAPPs are trying to subvert and circumvent that political process 'by enlisting judicial power against their opponents.'[25] SLAPPs

> are an attempt to 'privatise' public debate—a unilateral effort by one side to transform a public, political dispute into a private, legal adjudication, shifting both forum and issues to the disadvantage of the other side.[26]

SLAPPs can also shift the balance of power giving the firm filing the SLAPP suit the upper hand when they are losing in the political arena.[27] Action tends to be taken against citizens who are successfully opposing them because those taking the action are afraid that they will not win in the public, political forum.[28] In the courts, the wealth of the disputants and their ability to hire the best lawyers can influence the outcome. Moreover,

> Whereas in the political realm the filer is typically on the defensive, in the legal realm the filer can go on the offensive, putting the target's actions under scrutiny.[29]

Prolonged litigation can even achieve community compliance through delay and loss of sustained interest in the broader public.

Can Government SLAPP? The Ballina Case

SLAPPs are not just the province of private companies and developers either. Bill Ringland, chair of the NSW North Coast Clean Seas Coalition, was sued by his local council for putting out a press release that the council claimed was defamatory. The press release, which was quoted in the local paper, *The Northern Star*, said that sewage 'will continue to be pumped out surreptitiously at night' from the local ocean outfall.[30] Ringland was referring to Ballina Shire Council practice of discharg-

14 'Carr environment policy cancels out Helensburgh residential plan', *St George and Sutherland Shire Leader*, 20 July 1995, p. 15.
15 Kim Goldberg, 'SLAPPs Surge North: Canadian Activists Under Attack', *The New Catalyst* 25, Winter 1992/3, p.2.
16 Peter Nye, 'Surge of SLAPP Suits Chills Public Debate', *Public Citizen*, Summer 1994, p.15.
17 Quoted in Pring and Canan 1993, *op.cit.*, p.382.
18 Quoted in *ibid.*, p.381.
19 Catherine Dold, 'SLAPP Back!', *Buzzworm: The Environmental Journal* Vol. IV, N° 4, July/Aug 1992, p.36.
20 Tobi Lippin, 'Uncivil Suits', Technology Review Vol. 94, N° 3, 14 April 1991, p.15.
21 Dold, *op.cit.*, p.36.
22 Quoted in Pring and Canan 1993, *op.cit.*, p.382.
23 Pring and Canan, *op. cit.*, p.387.
24 Goldberg, *op.cit.*, p.2.
25 Penelope Canan and George Pring, 'Strategic Lawsuits Against Public Participation', *Social Problems* Vol. 35 N° 5, December 1988, p.515.
26 Pring and Canan 1993, *op.cit.*, p.381.
27 Chris Tollefson, 'Strategic Lawsuits Against Public Participation: Developing a Canadian Response', The *Canadian Bar Review* 73, 1994, p.207.
28 George Pring, Penelope Canan and Vicky Thomas-McGuirk, 'SLAPPS: A New Crisis and Opportunity for the Government Attorney' part 1, *National Environmental Enforcement Journal*, April 1994, p.7.
29 Tollefson, *op.cit.*, p.207.
30 "Sewage will still flow into sea, group says', *The Northern Star*, 2 April 1993.

ing sewage effluent at night from its treatment ponds and the fact that most local residents were unaware of this practice. The council chose to interpret the use of the word 'sewage' in Ringland's press release as raw sewage rather than treated sewage and the word 'surreptitiously' as secretly and unlawfully and therefore claimed that the press release was falsely accusing the council of breaching its license requirements.

The council, via its solicitors, demanded an apology from Ringland, who declined. *The Northern Star*, however, printed a full apology on its own behalf, saying that it accepted 'the view of the Ballina Shire Council that there is no sewage being put into the sea by the council.'[31] The newspaper also suggested that the Clean Seas Coalition was unjustifiably trying to discredit the council.[32]

The judge for the defamation case referred the case to the Court of Appeal of the Supreme Court of NSW to determine whether a council had the power and authority to sue for defamation, whether it could sue for injurious falsehood and whether the costs of a special meeting of council could constitute special damages. Ringland was represented from the beginning by a group of concerned lawyers led by Clive Evatt, QC. The court found (in a 2 to 1 decision) that a council could not sue for defamation (although individual councillors could).

Judge Gleeson noted that there were only two reported cases of a local authority suing for defamation in England and none completed in NSW. In his judgement he stated that

> The idea of a democracy is that people are encouraged to express their criticisms, even their wrong-headed criticisms, of elected governmental institutions, in the expectation that this process will improve the quality of the government. The fact that the institutions are democratically elected is supposed to mean that, through a process of political debate and decision, the citizens in a community govern themselves. To treat government institutions as having a 'governing reputation' which the common law will protect against criticism on the part of citizens is, to my mind, incongruous.[33]

Yet the Court of Appeal found that Ringland could sue the council for abuse of process and also that the council could sue Ringland for the costs of a special meeting resulting from the alleged injurious falsehood. Both matters were referred back to the original court for trial but they are likely to be settled out of court.[34]

Other Forms of Legal Harassment

In Australia legal means have also been used against protesters involved in civil disobedience. In one case five protesters superglued and bolted themselves onto logging machinery in Badja State Forest in NSW. They were charged with 'intimidating' the logger who was 600m away at the time. Normally such protesters have been charged with trespass but most such charges are dismissed by the courts. The criminal charge of 'intimidation' has been on the statute books for almost 100 years and carries with it the possibility of gaol sentences. It was only recently discovered by local police who say they will use it more often in future. In 1993 the protesters were found guilty and fined $4000 in the first conviction of this kind. The Australian Council of Civil Liberties backed an appeal against the convictions saying that they were an 'outrageous' interference with the 'basic right to protest'.[35]

In other cases the Trade Practices Act has been used against environmental activists. The Act contains 'secondary boycott provisions' that were originally introduced to stop trade union actions, including strikes. These made it illegal for a group of people to interfere with the provision of services or products that one party has contracted to provide to another party.[36]

This Act was used against Greenpeace Australia in March 1991. The ship *Western Odyssey* was undertaking seismic testing in Victorian waters for BHP to investigate the feasibility of drilling for oil.[37] Greenpeace was concerned about the impact that the sonic booms would have on the Southern Right Whale, because the area was a breeding and calving ground for the whales. (The area is now a whale sanctuary). It was also concerned about the environmental impact of offshore drilling. BHP had said that it would not drill whilst the whales were calving but Greenpeace campaigners felt they could not trust them to stop a multi-million dollar operation for six months of the year.[38]

Greenpeace Australia, using the *Rainbow Warrior*, interfered with the seismic testing by continually moving a buoy that the testing boat was dragging behind it to receive the resonations from the sonic booms. This interfered with their measurements. In response BHP used section 45D of the Trade Practices Act to gain a court injunction to stop Greenpeace from coming near the testing boat. The injunction was taken out against Greenpeace, as well as the captain of the *Rainbow Warrior*, Joel Stewart, and the campaign coordinator, Molly Olson.[39]

The application to the court also 'sought declarations against Greenpeace for conspiracy and trespass and an order for damages.' The 1991 Pollution Law Conference was told that this was an excellent example of legal action being used against environmentalists 'as it highlights the combination of a number of different types of actions (breach of

Section 45D, interference with agreements, conspiracy and trespass) with a range of remedies (injunctions and damages)'.[40] Greenpeace and the individuals involved were worried that damages, including the costs such as the hire of the boat and lost oil production, could amount to millions of dollars. But BHP withdrew the charges before the case reached court.

The Trade Practices Act has seldom been used in this way but its use has often been threatened. One such threat was by the Forest Products Association against the North East Forest Alliance activists who were trying to prevent logging in the Chaelundi wilderness area. A separate court case which declared logging in this area illegal saved the activists in this case at the last minute. It was also used by Australian Pulp and Paper Manufacturers (APPM) in 1993 to threaten the Wilderness Society in Tasmania, which was campaigning against the export of woodchips, and by the Federal Airport Corporation against fishing people who were interfering with the dredging of Botany Bay to construct a third runway for Sydney's Kingsford Smith airport. The fishing people were concerned that the dredging would adversely affect the bay and therefore reduce their fish catches by up to 75 percent. The Australian Consumers Association (ACA) and the Australian Federation of Consumers Organisations (AFCO) have had legal advice that consumer boycotts against environmentally damaging products might also be illegal under the same Act.[41]

Who are the Targets?

As in the case of the use of the Trade Practices Act, SLAPPs are not restricted to environmentalists, and have covered other issues such as consumer protection issues in both the US and Australia.[42] Canan, in her study with Pring, found that those filing the suits assumed that economic rights were superior to public interests. 'The idea is that because a business has money at stake, business should receive priority over civic, communal opposition'.[43]

The targets of these lawsuits are generally not radical environmentalists nor professional activists. They are ordinary middle-class people who are concerned about their local environment and have no history of political activity.[44] They are often the organisers of opposing groups, or perceived trouble makers.[45] When over 100 people protested whilst mangroves were cleared at Hinchinbrook, only one woman was sued by the developer for trespass and damages – Margaret Thorsborne, 67, who had been one of the leaders of the campaign to stop development in the area. The action was later withdrawn but not before it had cost her considerable worry and money for lawyers' fees.[46]

Identity of First Party in 100 US SLAPPs[47]

	Targets	Filers
Individual Participants		
Family member	7	1
Citizen	38	4
Voluntary Organisation member	3	2
Economic role (eg owner)	8	20
Occupational role	8	25
Group Participants		
Industry group	1	39
Labor organisation	1	1
Public interest group	14	2
Civic/social organisation	13	1
Political organisation	2	0
Membership organisation	5	2
Total	**100**	**100**

The concentration on local resident protestors rather than professional environmentalists is no accident either. Local residents often have most to lose and do not have the support and ideological commitment that a professional environmentalist in a large environmental organisation usually has. Law suits are usually aimed at intimidating middle-class citizens who have assets and mortgages that could be

31 'No sewage in ocean: Apology', *The Northern Star*, 10 April 1993.
32 *Ibid.*
33 Gleeson, CJ, Judgement, Council of the Shire of Ballina v Ringland, The Supreme Court of NSW Court of Appeal, 25 May 1994, p.19.
34 Personal communication, Bill Ringland, 1995.
35 Daniel Lewis and Deborah Cornwall, 'Trial of Greens "Risk to Rights"', *oz.green*, 12 July 1993; James Prest, 'The Muzzling of the Dingo Forest Mob', *Chain Reaction* 70, January 1994, p.22.
36 Personal communication, Alistair Harris, former Trade Union Liaison Officer, Greenpeace Australia, April 1995.
37 Jamieson and Plibersek, *op.cit.*, p.4.
38 Personal communication, Lara Crew, former Greenpeace campaigner, April 1995.
39 *Ibid.*
40 Jamieson and Plibersek, *op.cit.*, p.4.
41 Alistair Harris, Trade Union Liaison Officer, Wilderness Society, evidence to the Senate Committee on Employment, Education and Training, 20 August, 1993.
42 Dold, *op.cit.*, p.36.
43 Nye, *op.cit.*, p.15.
44 Pring and Canan 1993, *op.cit.*, p.380.
45 Stephen Keim, 'Dealing with SLAPP Suits', *Australian Environmental Law News*, N°2, June 1994, p.42.
46 Personal communication, David Haigh, July 1995.
47 Reproduced in Canan and Pring, *op.cit.*, p.511.

seized and are less threatening to young activists without assets who have little to lose. Kelpie Wilson, who was one of six activists SLAPPed in Oregon by a logging company, argues that

> Non-violent civil disobedience, historically a political tool of great importance to this country, is no longer a viable option for many activists ... in future activists will probably have to divide into two camps. Those who do direct action will have to stay lean, mean and low on the food chain. They can't keep suing us when they don't get anything out of it.[48]

However, in Britain, McDonald's, one of the largest companies in the world, has made the mistake of suing two unemployed activists who have nothing to lose and much to gain from the case. Dave Morris and Helen Steel allegedly were distributing London Greenpeace pamphlets 'What's Wrong With McDonald's. (London Greenpeace is an anarchist group not affiliated to Greenpeace International.) The publicity generated by the case has meant that the original pamphlet has had massive distribution around the world. 'In the UK alone, over a million leaflets have been distributed since the writs were slapped on us' says Steel.[49] Their views are being broadcast from the court around the world whilst McDonald's struggles to minimise the poor publicity. It has been reported in an article in *The Independent* entitled 'McLibel Two make silly burgers of McDonald's' that McDonald's is now attempting to end the action in secret negotiations with the activists.[50]

Because this is a libel case Morris and Steel have no right to legal aid and are defending themselves against McDonald's top lawyers. Even before the case went to trial in 1994 there had been several years of pre-trial hearings. It is now the longest running libel trial in UK history.[51]

Steel claims that in the past people have been intimidated by McDonald's threats of law suits and backed off from criticisms of the company. Morris argues that a climate of fear had been created and the word had gone out that if you said anything against McDonald's you would get a writ.

> **'... the Trade Practices Act, common law and other legal measures are being used by government authorities and private companies to inhibit free speech and political activism in Australia.'**

McDonald's claims that it is taking the action to establish the truth. Prior to the case McDonald's infiltrated the meetings of London Greenpeace to gather evidence against them and the private investigators who did this later gave evidence at the trial. McDonald's has also been successful in petitioning the judge not to have a jury for this case, arguing that the issues were too complex for a jury to understand.[52]

Morris and Steel are now supported by an international 'McLibel Support Campaign' which is raising money to help with costs. They intend to call about 170 witnesses to give evidence against McDonald's practices and products. To win their case Morris and Steel have to prove that every statement in the pamphlet is true. They are also suing McDonald's in what is termed a SLAPP-back (sometimes also used by US targets of SLAPP suits), for distributing leaflets calling them liars.[53]

Conclusions for Australia

So far SLAPPs have been relatively infrequent outside of the US. In the US 'the enactment of statutory regimes contemplating or requiring public input' and the liberalisation of the rules of who can take court action on environmental matters means that citizens have 'unprecedented access to government and the courts with respect to decisions affecting the environment.' SLAPPs are a tactical response by pro-development business interests to the increasingly effective use that environmental and citizens groups make of these opportunities.[54]

There is no shortage of legal mechanisms available to developers and polluters in Australia to use against vocal critics and activists. In the past developers have often succeeded without having to resort to such tactics. However, it can be expected that if residents' and environmental groups become more effective in Australia, there will be an associated increase in the use of lawsuits by developers and businesses to counter them. Already the Trade Practices Act, common law and other legal measures are being used by government authorities and private companies to inhibit free speech and political activism in Australia.

As Jenny Donohoe from Helensburgh, NSW says, for a relatively small amount of money 'anyone can put up a statement of claims against you' whether or not they have any evidence to support their case. What is more it does not take much for a public statement to be defamatory but the defences

which are available to a defendant, for example that the statement is fair comment and made in good faith, have to be established in court. This means that it is unlikely that a writ can be summarily dismissed by the courts in Australia without a full hearing.[55]

Several US states have responded to the epidemic of SLAPP cases with legislation aimed at making it more difficult for developers to sue. Californian Senator Bill Lockyer, a supporter of such legislation, argued that 'Our courts are being used by wealthy and special interests to prevent citizens from speaking out on legitimate public controversies.'[56] California, New York, Washington, Nevada, Florida, Texas and several other states have all introduced such legislation. In New York, for example, people filing lawsuits have to show that the person being sued acted in malice and with 'reckless disregard for the truth'.[57]

In countries where the constitution does not guarantee the right of citizens to petition government it is more difficult for state or provincial governments to enact legislation to discourage SLAPP suits.[58] However, in Australia a majority of the High Court ruled in 1992 that there is an implied protection of free speech in the Commonwealth Constitution. Stephen Keim, Barrister-at-Law, argues that this implied freedom of speech could be used to make it more difficult for SLAPP writs to operate.[59] Keim believes that there is scope for test cases to explore the potential of this doctrine of representative government as a way of summarily dismissing suits that offend against the citizens' right to communicate among themselves on matters of public importance.

Another option is for people who are targeted for SLAPPs to SLAPP-back (or sue the developers in return). Some people in the US have won large amounts of money in this way. In Australia, the torts of abuse of process and malicious prosecution are available for this purpose[60] but such responses depend on the willingness and financial ability of those involved to use them. Special legislation is required to deal with the phenomenon of SLAPPs in a more integrated and comprehensive way.

As far back as 1991 the ALP National Conference resolved to provide a legal framework 'to ensure that registered organisations and community organisations and their members are able to exercise their right to take industrial action and other legitimate forms of demonstration consistent with the principles of freedom of association, without legal penalty such as the secondary boycotts provisions of the Trade Practices Act and common law actions...' The purpose of this resolution was to protect trade unions and community groups such as Greenpeace.[61] We are still awaiting such a legal framework that would protect citizens' rights to participate in the democratic process.

The development of a climate of fear that dissuades citizens from speaking out on matters of public interest and discourages activists from continuing the 'honourable tradition' of civil disobedience is a threat to democracy and healthy political debate in this country. Of course lawsuits are not the only way to dissuade healthy debate on issues of importance.[62] Yet it is worrying that litigation is increasingly utilised to intimidate people who cannot be influenced through pressure from employers or professional associations.

48 Kelpie Wilson, 'Sapphire Six Sacrificed by Oregon Supreme Court', *Earth First!* Mabon 1993, p.30.
49 Danny Penman, 'McLibel Two make silly burgers of McDonald's', *Sydney Morning Herald*, 30 June 1995.
50 *Ibid.*
51 Anon, 'McLibel', *Chain Reaction* 72, 1994, p.9; Background Briefing, Radio 2RN, Australian Broadcasting Corporation, 30/4/95.
52 *Ibid.*
53 *Ibid.*
54 Tollefson, *op.cit.*, p.205.
55 Keim, *op.cit.*, p.45.
56 Bishop, *op.cit.*
57 Diana Jean Schemo, 'Silencing the Opposition Gets Harder', *New York Times*, 2 July 1992; Pring, Canan and Thomas-McGuirk, *op.cit.*, p.7.
58 Goldberg, *op.cit.*, p.2.
59 Keim, *op.cit.*, p.44.
60 Keim, *op.cit.*, pp.47-8.
61 Jamieson and Plibersek, *op.cit.*, p4.
62 See for example Brian Martin et al, eds, *Intellectual Suppression: Australian Case Histories, Analysis and Responses*, Angus and Robertson, North Ryde, 1986; Sharon Beder, 'Engineers, Ethics and Etiquette', *New Scientist*, 25 September 1993, pp.36-41.