Abstract

Participation from the Deep Freeze: "Chilling" by SLAPP suits

Strategic Lawsuits Against Public Participation or SLAPP suits are a relatively recent legal phenomenon. These lawsuits aim to stifle the ability of the public to speak out against controversial developments and proposals in the public arena. The lawsuits are filed in an effort to divert the resources and emotional efforts of the targets so the status quo is maintained. SLAPP suits were identified in the 1980's following groundbreaking research by Professors George Pring and Penelope Canan at the University of Colorado. The SLAPP method, engaged to punish people from speaking out, was described as "chilling". This paper intends to provide an overview the SLAPP process and outline the adverse effects of suppressing democratic freedoms in this way. Case studies are used to demonstrate how widespread this phenomenon is in many jurisdictions of Europe, South-East Asia, the Pacific and North America. Focus is placed on the Gunns 20 litigation, which arose out of a controversial proposal to construct a pulp mill in the Bell Bay area of South West Tasmania and source materials from old growth forests. Finally, the paper outlines some responses to SLAPP suits including anti-SLAPP legislation, SLAPP-back suits and procedural reform through the courts.

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Introduction

Since the warning shots about the effects of pesticides on the environment were fired by Dr Rachel Carson in 1962,[1] it was thought that humans had matured to recognise the intrinsic, rather than merely instrumental, value of nature. The development of environmental jurisprudence during the period immediately following the publication of Dr Carson's work was a response to growing frustration with the government agencies that were failing to prevent pollution accidents and their dire effects on the health and well-being of human and non-human occupants of the planet. Many of the reforms to environmental regulation in the developed world during this period were directed toward protection of specific environmental sectors (e.g. air, water and so on) from the adverse effects of a broader range of activities. Legal systems provided wider access rights to the courts by the community to hold governments, corporations and individuals to account. A number of specialised courts and tribunals were also developed to give voice to those rights, such as the Land and Environment Court of NSW, the Environment Court of NZ and the National Environmental Dispute Co-ordination Commission in Japan.[2]

Notwithstanding the significant improvements that have occurred in environmental regulation since the 1970s, major pollution incidents like Love Canal in the United States (1974), Bhopal in India (1984), the Gulf of Mexico in the United States (2010) and more recently Fukushima in Japan (2011) provide a stark reminder of the need for effective legal and political systems in striving to attain good environmental governance.[3]

I acknowledge the editorial assistance of Mr Guy Dwyer and Mr Matthew Preston, both employed by the Land and Environment Court of NSW.

[1] R Carson, *Silent Spring* (Houghton Miffin Company, 1992) 1-357.

[2] G Pring and C Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative, 2009) xi.

[3] Pring and Pring, above n 2. See also G Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 7th ed, 2010) 17.

One area that remains inadequately addressed is the increasing usage of SLAPP suits. The emergence of this sinister trend of SLAPP suit use alongside more positive developments in environmental jurisprudence was formally identified in the academic literature in 1984. During that year, Professors George Pring and Penelope Canan from the University of Denver undertook a detailed study on an increasing and destructive phenomenon coined by them as SLAPP, or Strategic Lawsuits Against Public Participation, suits.[4]

Professor Pring points out:

> [t]he apparent goal of SLAPPs is to stop citizens from exercising their political rights or to punish them for having done so. SLAPPs send a clear message: that there is a "price" for speaking out politically. The price is a multimillion-dollar lawsuit and the expenses, lost resources, and emotional stress such litigation brings.[5]

The aim of this paper is to give an overview of the modern phenomenon of a SLAPP suit, particularly in the environmental context. It shall examine the varying forms a SLAPP suit takes, document its destruction of democratic freedoms and analyse the ways in which various countries have attempted to counteract its effect to protect human rights, particularly in relation to the rights of public participation, freedom of expression and peaceful assembly.

What are SLAPP suits?

Professor Pring noted that the phenomenon of SLAPP suits started in the 1970s when:

[4] The results of this study formed the basis for the classic text on SLAPP suits – G W Pring and P Canan, *SLAPPs: Getting Sued for Speaking Out* (Temple University Press, 1996).
[5] G W Pring, 'SLAPPs: Strategic Lawsuits Against Public Participation' (1989) 7 *Pace Environmental Law Review* 3, 5-6.

> [w]e saw committed, hard-charging activists become frightened into silence, supporters drop out, resources diverted, fund-raising wither, public-issue campaigns flounder, and community groups die.[6]

As mentioned above, the Professors commenced their study of SLAPP suits in 1984. The study involved examination of 228 lawsuits which fulfilled four criteria, namely:

1. a civil complaint or counterclaim (for monetary damages and/or injunction),
2. filed against non-governmental individuals and/or groups,
3. because of their communications to a government body, official, or the electorate,
4. on an issue of some public interest or concern.[7]

SLAPPs are often unsuccessful in terms of a verdict, but one must appreciate that this is not their objective. Rather, the filing of these suits aims to achieve one key outcome; namely, the destabilisation of their targets (e.g. public interest environmental groups and activists). The effect of these suits is to "chill" the future participation of their targets in political and legal processes. Legally, SLAPPs will often "masquerade as ordinary lawsuits, which contributes to some courts' inability to distinguish and deal with them readily. They come camouflaged as any of six ordinary torts".[8] Those actions include defamation, interference with contract, business economic loss, anti-trust and restraint of trade. The SLAPPs are filed in relation to many issues, such as planning, complaints against public officials and employees, environmental rights, animal rights, human rights, neighbourhood disputes and consumer protection.

Even if the defendants choose to fight the given matter to a concluded trial and judgment, any success achieved will often be a pyrrhic victory. This is due to the

[6] Ibid 7.
[7] Ibid 8.
[8] Ibid 8-9.

fact that they are in the court process for an average of three (3) years and cannot prevent the threat, and further filing, of SLAPP suits.[9]

SLAPPs can allow the party filing them to use the court system to transform the original dispute from one conducted in the public arena to one conducted in a private, adjudicative judicial-arena. "Not only are parties' resources diverted from the original issue, the new forum typically will not be able to resolve the problem … limited as it is to adjudicating the camouflage".[10]

Who are the targets of SLAPP Suits?

As noted above, SLAPP suits are not restricted to environmental issues; other important public issues involve consumer rights, animal rights, tenancy and employment issues. In the context of environmental disputes, Beder notes that:

> [t]he targets of these lawsuits are generally not radical environmentalists or professional activists. They are ordinary middle-class people who are concerned about their local environment and have no history of political activity. They are often the organisers of opposing groups, or perceived trouble-makers...Lawsuits are usually aimed at intimidating middle-class citizens who have assets and mortgages

[9] Ibid 10-11.
[10] Ibid 12.

> that could be seized and are less threatening to young activists without assets who have little to lose.[11]

The filing of SLAPP suits serves not only to scare off potential opponents, it can also distract key antagonists from the main controversy and shift the balance of power by sapping time, financial resources and energy of people defending the suit. The most disconcerting aspect of this problem is that the filers of SLAPP suits are bringing their claims on the basis of statutory rights that were both originally designed for, and intended to be used by, vulnerable groups in society to protect themselves. This point is well illustrated by reference to three Australian case examples.

Firstly, in 2004, Australian Wool Innovation (AWI) sued US-based People for Ethical Treatment of Animals (PETA) for alleged breaches of the then *Trade Practices Act 1974* (Cth) – now the *Competition and Consumer Act 2010* (Cth)[12] – by engaging in misleading and deceptive conduct.[13] PETA had lobbied international retailers to boycott Australian wool products as it failed to stop the growers using mulesing (cutting off sheeps' tails to avoid painful flystrike). AWI claimed the PETA campaign caused economic loss and filed the action on the basis of a consumer law designed to protect consumers rather than a wool industry group. The case was settled after a deal was struck between the two parties;[14] PETA agreed to cease the boycotts of stores selling Australian wool products and Australian wool growers would cease mulesing by 2010.

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[11] S Beder, 'SLAPPs – Strategic Lawsuits Against Public Participation: Coming to a Controversy Near You' (1995) 72 *Current Affairs Bulletin* 22, 22.

[12] See *Competition and Consumer Act 2010* (Cth) s 2, which aims to "enhance the welfare of Australians through the promotion of competition and fair trading as well as providing consumer protection".

[13] See *Australian Wool Innovation Ltd v Newkirk* (No 2) [2005] FCA 1307, [5]-[9].

[14] *Business-Managed Environment – Australian SLAPP examples*, available at <http://www.herinst.org/BusinessManagedDemocracy/environment/SLAPPs/Australia.html> (last accessed 7 November 2012).

Second, in 2010, global warming protesters were sued for $500 million in lost profits pursuant to s 25 of the *Victims Support and Rehabilitation Act 1996* (NSW), a law intended to protect victims of violent crime.[15] The protesters managed to affect a shutdown of coal loading terminals in Newcastle for several hours on 26 September 2010. The protestors' campaign began at before dawn and the last protestor was finally arrested and taken away by 3.00pm.[16]

Professor Clive Hamilton noted the Orwellian inversion of the use of this legislation by the corporate Goliaths in claiming that they were being victimised when their day-to-day business operations contribute "to tens of thousands of death around the world each year".[17]

Third, in 1997 a university lecturer (Miles Lewis) was sued by property developer Lloyd Williams for labelling him "a cowboy...who doesn't take notice of the law" in comments made to *The Age* newspaper in Victoria.[18] Lewis formed this view because Williams was alleged to have constructed an apartment building without the required planning approvals. At the time of Lewis' comments, Williams was constructing the controversial Melbourne Casino. When the defamation proceedings were instituted, Lewis was isolated by both his employer (the University of Melbourne) and the publisher of the comments (i.e. *The Age* newspaper). The proceedings were intimidating and shifted community debate about the Casino development. The proceedings were not discontinued until the Casino development was well on its way.[19]

[15] The object of this legislation is to provide support and rehabilitation for victims of crimes of violence, establish a compensatory scheme and fine persons found guilty of such crimes to fund the scheme: see *Victims Support and Rehabilitation Act 1996* (NSW) s 3.
[16] Rising Tide Australia, *Activists shut down world's biggest coal port*, available at <http://www.risingtide.org.au/activists-shut-down-worlds-biggest-coal-port> (last accessed 15 November 2012).
[17] Business-Managed Environment – Australian SLAPP examples, above n 14.
[18] Ibid.
[19] Ibid. See also B Walters, *Slapping on the Writs: Defamations, Developers and Community Activism* (UNSW University Press, 2003) 8.

In another scenario, police charged protesters who had glued themselves to logging machinery in the Badja State Forest in NSW with “intimidation” of the logger. The person alleged to have been intimidated was at the time of the offence many kilometres away. The Local Court found the protesters guilty of this charge and they were fined $4,000. The police indicated that the proceedings were a useful blueprint for future management of civil disobedience. The Australian Council of Civil Liberties

has supported an appeal against the conviction, noting the "outrageous" interference with the "basic right to protest".[20]

Can public authorities use SLAPP suits?

In *Ballina Shire Council v Ringland*,[21] Ballina Shire Council sued the Chairman of the Clean Seas Coalition (CSC), Mr Bill Ringland, a local NGO, for comments made by him which were published in a local newspaper called *The Northern Star*. The defamation action was based on the fact that Mr Ringland's comments on the Council's practice of disposing of effluent into the sea implied they were secretly pumping untreated sewage into the sea, thereby breaching conditions of their pollution licence. The Council demanded an apology from Ringland who refused to supply it. The newspaper, *The Northern Star*, on the other hand, printed a full apology on its own behalf and suggested that the CSC was trying to discredit the Council.

In the Supreme Court, Ringland argued that the Council did not have the power to sue for defamation. On appeal, the NSW Court of Appeal held in Ringland's favour[22] noting, however, that individual councillors could sue for defamation.[23] In the Court of Appeal decision, Gleeson CJ noted that there were few judgments about public authorities suing for defamation and he observed: "[t]o treat government institutions as having a "governing reputation" which the common law will protect against criticism on the part of its citizens is, to my mind, incongruous."[24] The Court noted that Ringland could sue the Council for abuse of process, and that the Council could sue Ringland to recover the costs of the meeting the defamation law suit. The Council was ordered to pay 75% of Mr Ringland's costs.[25]

[20] Business-Managed Environment – Australian SLAPP examples, above n 14. See *Crimes Act 1900* (NSW) s 545B (the maximum penalty is two years imprisonment or a fine imposed by the Local Court).
[21] (1994) 33 NSWLR 680.
[22] Ibid at 696 (Gleeson CJ), 711 (Kirby P).
[23] Ibid at 684 (Gleeson CJ), 711 (Kirby P).
[24] Ibid at 691(Gleeson CJ).
[25] Ibid at 696 (Gleeson CJ).

There are other examples of public authorities threatening to initiate proceedings resembling a SLAPP suit, including the NSW Forestry Commission's action against 32 protestors in the Bulga and Dingo Forests[26] and the suit filed against the Environmental Defender's Office NSW, a public interest environmental legal centre, for defamation over public comments in the *Summertime Chickens*[27] case against Galston residents.

The "chilling" effect of SLAPP suits on the exercise of democratic freedoms

As one can appreciate from the overview conducted above, SLAPP suits serve to stifle the ability of citizens to adequately engage in public participation. On a more general level, SLAPP suits will often serve to prevent the effective exercise of democratic freedoms. However, before examining this serious issue (as reflected in case studies from multiple jurisdictions), it is appropriate to add some context to this issue by tracing first the emergence of modern democratic freedoms and then the road to environmental justice rights.

Ancient and modern conceptualisations of democracy

> 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.[28]

Chief Justice Gleeson further observed the incongruity of using the courts to stifle such public participation.[29] The origins of modern democracy may be traced back to Ancient Greece. Kittrie considers that only the Greek city-state of Athens

[26] *NSW Forestry Commission v Sheed* (Unreported, Supreme Court of NSW – Equity Division, Windeyer J, 9 June 1993).
[27] See New South Wales, *Parliamentary Debates*, Legislative Council, 30 August 2000, 8533-8534 (Lee Rhiannon – discussing *Summertime Chickens* case); B Donald, 'Defamation Actions Against Public Interest Debate' (Paper presented to the Free Speech Committee of Victoria on 22 April 1999), available at: <http://www.ccsa.asn.au/HIB/Bruce_Donald_article.html> (last accessed 12 November 2012).
[28] See *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 691 (Gleeson CJ).

[29] Ibid.

established and practised governance based on modern democratic principles.[30] He posits that Greek democracy began with the *Constitution of Solon* in 593BC and continued for around a century between 463 BC and 378 BC.[31] The modern version of democracy emerged with the Declaration of Independence and the passing of the *US Constitution* in 1776, which was ratified in 1788.[32] In the mid 19th century, several other countries such as Belgium, Switzerland and England joined the short list of democratic nations.[33]

During the first half of the 20th century, a wide variety of nations, including most of the countries in Western Europe, together with Japan, India, Israel and Lebanon, were attracted to the democratic model of governance. In the 21st Century, 60% of the world's population, and 44% of the population of South East Asia, live in countries described as free democracies which safeguard political and civil liberties, and ensure that political systems are subject to the rule of law.[34]

Early Greek models of democracy were criticised for many matters including over-bureaucratisation, inequalities between the rich propertied minority and the less wealthy majority of men and its exclusion of women, slaves and non-citizens. Modern notions of democracy are, however, synonymous with possessing certain freedoms. As Macrides and Brown note:

> [t]he distinctiveness of democracy is that people can choose and change their government … [t]he dominant Western view of democracy is … procedural … characterized by free elections, free expression, and free parties.[35]

[30] N N Kittrie, 'Democracy: An Institution Whose Time Has Come – From Classical Greece to the Modern Pluralistic Society' (1993) 8 *American University Journal on International Law and Policy* 375, 376-377.
[31] Ibid 377.
[32] Ibid.
[33] Ibid.
[34] S Repucci and C Walker, 'Meeting the Democratic Governance Challenge', available at http://www.freedomhouse.org/report/countries-crossroads-2005/meeting-democratic-governance-challenge (last accessed 12 November 2012).
[35] R C Macrides and B E Brown (eds), *Comparative Politics: Notes and Readings* (Dorsey Press, 1964) 145 (cited in Kittrie, above n 30, 384).

Along with transparency, inclusiveness and accountability, two other vital components have been identified as being necessary for democratic governance: namely, freedom of the press and an independent judiciary.[36] The role of the courts in suppressing the destructive power of SLAPP suits will be referred to later in the paper.

Repucci and Walker have observed that:

> [s]ound governance cannot be achieved by decree. Consensual decision-making is required, in which leaders are chosen through free and fair elections and institutions ... to share information and hold the authorities accountable. Open channels between the government and civil society operating under the rule of law – can contribute to strengthening regime legitimacy.[37]

It is at this point that the invidiousness of the SLAPP suit is most obvious: it has the potential to destroy the targets' fundamental democratic freedoms, including freedom of expression and freedom of participation. Many commentators have more recently exposed the links between open democratic government, the protection of human rights and environmentally sustainable development. For example, the former High Commissioner for Human Rights expressly linked good governance to an enabling environment conducive to the enjoyment of human rights and "promoting growth and sustainable development".[38] Further, Article 21 of the *Universal Declaration of Human Rights* recognises the importance of participatory governance, in particular the right to take part in governance (Article 21(1)) and the right of equal access to the public service (Article 21 (2)).

[36] Repucci and Walker, above n 34.
[37] Ibid.
[38] United Nations Human Rights (Office of the High Commissioner for Human Rights), *Good Governance and Human Rights*, United National Human Rights, available at <http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernance> (last accessed 19 December 2012).

Article 28 recognises the value of encouraging social and international order with the aim of fully realising the rights and freedoms set out in the Declaration. These rights include intrinsic human rights (Article 1), the right to life, liberty and security (Article 2) and the right to recognition everywhere as a person before the law (Article 6).

The two International Covenants on Human Rights are couched in language that places emphasis on the duties and roles of governments in securing respect for the realisation of all human rights. Article 2 of the *International Covenant on Civil and Political Rights* requires State parties to respect those rights and to take steps to give effect to protection of those rights. The *International Covenant on Economic, Social and Cultural Rights* requires that States should take steps to fully realise the human rights set out in the Covenant. These rights include the right to work (Article 6), the right to access social security (Article 9) and the right to an adequate standard of living (Article 11).

It is noteworthy that draft anti-SLAPP legislation proposed in Victoria and discussed later in this paper has given statutory expression to those links by including protection of human rights such as the right to freedom of expression; the right to peaceful assembly and the freedom of association; and the right to take part in public life.[39] In the same vein, the *Filipino Procedural Rules for Environmental Cases* (2010) discussed later has as one of its objectives in Rule 1 (Section 3) the provision of "a simplified, speedy and non-expensive procedure for the enforcement of environmental rights and duties recognised under the Constitution and international agreements".[40] Part of the protection is the anti-SLAPP provision in Rule 6.

The Road to Environmental Access Rights

Notwithstanding alternative non-Western concepts and philosophies that nature was important and dominant, Professors Godden and Peel note that:

[39] See PILCH, *Submission to the Victorian and Commonwealth Attorneys-General: A Draft Bill for an Act to Protect Public Participation* (14 May 2009) 18 (s 2).
[40] Republic of the Philippines Supreme Court, *Rules of Procedure for Environmental Cases*, AM No. 9-6-8-SC (effective 29 April 2010).

> [i]n Western societies the organic worldview was increasingly displaced from the sixteenth century onwards. The idea of some interconnection was retained, but nature came to be seen, more and more, as inferior to humanity…".[41]

Western legal systems were largely reactionary based on a command-and-control system of environmental regulation. These legal systems would use a variety of tools falling under the umbrella of command-and-control regulation, including land-use regulation, compensation schemes through common law actions in tort (e.g. nuisance and trespass), and statutory-based rights. The legal system still reinforced the community view that nature was an inferior resource base for human exploitation and did not possess any intrinsic legal rights.

As mentioned above, the environmental protection movement of the 1970s was born out of other social and political change, especially relating to human rights. The environmentalist movement challenged traditional common law approaches to environmental regulation (or lack thereof) arguing that law should be reformed to protect more than mere property rights.[42] Forward thinking US academics proposed that legal rights of representation should be extended to trees and other natural objects.[43]

With greater recognition of the importance of protecting the environment and the need to develop more creative and flexible methods of protection, came the emergence of broader concepts of governance in environmental law. Greater emphasis was placed on public participation, and open and accountable government. There was also global recognition of the fact that sound environmental governance constituted a fundamental prerequisite to achieving sustainable development.[44]

[41] L Godden and J Peel, *Environmental Law: Scientific, Policy and Regulatory Dimensions* (Oxford University Press 2010) 19.
[42] Ibid 20.
[43] R Nash, "The Rights of Nature: A History of Environmental Ethics (University of Wisconsin Press, 1989); C Stone, 'Should Trees Have Standing? Towards Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review* 450.
[44] United Nations Human Rights (Office of the High Commissioner for Human Rights), above n 38.

In 1992, 178 governments signed the *Rio Declaration* affirming that public participation is an essential element of good environmental governance.[45] As Pring and Pring note, such participation is supported by access to information, and access to legal remedies and relief.[46]

Principle 10 of the *Rio Declaration* establishes the three basic "pillars" of good environmental governance – transparency, inclusiveness and accountability. These pillars were the foundation for the creation of the concept of access to environmental justice.

The drive to incorporate principles of good environmental governance is demonstrated in several international instruments, including the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (1998) (widely referred to as the *Aarhus Convention*). This instrument attempts to establish best practice for public participation in environmental matters.[47]

Professors Godden and Peel have linked public participation in environmental governance to achieving effective engagement in public policy debates, decisions about sustainability and the need for environmental protection.[48] Further this participation allows for a range of views to be expressed and develop best policy outcomes. "Law is critical to this process in its protection of the rights of civil society to engage in such discourse through concepts such as free speech."[49] As noted earlier, the intention of SLAPP suits is to do the opposite; namely, block public participation, and suppress freedoms of expression and association. Thus, it seems counter-intuitive for legal systems to tolerate such an intrusion on the exercise of

[45] *Rio Declaration on Environment and Development* (adopted on 16 June 1972), available at <http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163> (last accessed 19 December 2012)
[46] Pring and Pring, above n 2, x.
[47] *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 447.
[48] Godden and Peel, above n 41, 88.
[49] Ibid.

people's fundamental rights and freedoms (both substantively and procedurally). With this in mind, the paper now moves on to consider in more detail the effect a SLAPP suit may have on the people engaged in one.

Effects of Being SLAPPed

SLAPP suits have the potential to result in financial, emotional and physical effects like the ripples caused by a stone thrown into a pond. Such effects clearly manifest themselves in circumstances where a person is threatened with or embroiled in a SLAPP suit. Often, participants will display symptoms of physical stress, experience difficulty in maintaining employment, and struggle to maintain familial and other relationships during the course of proceedings. However, it should be recognised that:

> the harm SLAPPs cause is not limited to the defendants; the public at large also feels the effects. SLAPPs threaten public rights that are critical to the functioning of our democratic system and have a direct detrimental impact on democratic participation and dialogue.[50]

SLAPP suits may also have the effect of encouraging businesses to take a more cavalier approach to compliance with environmental laws in the knowledge that the public will be reluctant to speak out against non-compliance for fear of being SLAPPed. SLAPP suits can affect the costs and quality of the regulatory system including the interactions between citizens, environmental regulators and polluting entities. It can even "change the beliefs of one group about the powers and actions of another".[51]

SLAPP suits have also had an effect on legal representatives of public interest litigators. In Ontario, Canada, professional indemnity insurers have warned Ontario lawyers about the risks of malpractice when representing public interest clients. "A

[50] Ecojustice, *Breaking the Silence: The Urgent Need for Anti-SLAPP Legislation in Ontario* (Canadian Environmental Law Association, November 2010) 8.
[51] Ibid 9.

public interest group may look on its lawyers as a knight on a white charger but when things go wrong, the group may quickly turn on the lawyer".[52]

However, it is conceivable that legal representatives who are found to have been involved in a SLAPP suit may find themselves the target of a personal costs order and disciplinary action by their professional body. The existence of SLAPP suits is well documented in both the original, survey-based study by Professors Pring and Canan in the US, and in other academic studies in Canada and Australia.

> It is well documented that SLAPPs are used to deter public participation in the US and there is evidence that the use of SLAPPs is spreading to Canada, the UK, Russia and Kazakhstan. It is likely that SLAPPs are used in many other European countries, although they may not yet be recognised as a specific tool used by opponents of public participation.[53]

In Australia, the use of a SLAPP suit has not been as common as in North America but it is expected that this mechanism will be increasingly used to silence criticism and attempts to attain accountability from public authorities, private bodies and individuals.[54]

Case Studies

Australia

> The case brought by Tasmanian forestry giant Gunns Ltd in 2004 against environmentalists, including the Wilderness Society is the biggest in Australia to date, but by no means the last case of this kind.[55]

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[52] Ibid. See also M Scott and C Tollefson, 'Strategic Lawsuits Against Public Participation: The British Columbia Experience' (2010) 19 *Review of European Community and International Environmental Law* 45; SourceWatch, 'NSW SLAPPs', available at <http://www.sourcewatch.org/index.php/NSW_SLAPPs> (last accessed 7 January 2012).
[53] J Gleeson, 'Strategic lawsuits against public participation' in S Stec (ed), *Handbook on Access to Justice under the Aarhus Convention* (The Regional Environmental Center for Central and Eastern Europe, March 2003) 59, 59.
[54] Beder, above 11, 25.
[55] G Ogle, 'Gunning for Change: The Need for Public Participation Law Reform' (The Wilderness Society Inc), available at <http://www.wilderness.org.au/pdf/Gunning_for_Change_web.pdf> (last accessed 19 December 2012).

In mid-December of 2004, the Legal Co-ordinator of The Wilderness Society (Dr Greg Ogle) received news of impending SLAPP-style litigation initiated by Gunns Ltd (Gunns) from the National Campaign Director (Alec Marr).[56]

The claim was lodged in the Supreme Court of Victoria where Gunns claimed $6.3 million in damages against 20 defendants. The case was filed in response to a campaign by conservationists against the logging and wood-chipping of old growth forests, the burning of the forests and the use of chemicals used as part of standard forestry practice and the consequences for the health and biodiversity of the forests. The defendants were comprised of various stakeholders, including non-government organisations (NGOs), politicians, a film maker, students and others. The claim alleged that the Defendants had: 1) interfered with Gunn's trade, business and contractual relations; and 2) conspired to injure Gunns by illegal means (namely, unlawful lobbying of Gunns shareholders, customers and governments via the media and protest actions in the forests and at the woodchip mills).

Underlying the nine grounds of claim was the proposition that the broad activist campaign made the Defendants liable for all of the actions. The Statement of Claim filed by Gunns was a very long document. The third amended version of it was 221 pages long, with 600 pages of further and better particulars.

The issues raised by the conservation lobby became part of the political debate prior to Australia's federal election in October 2004. Upon the commencement of the case, the Federal Government's forestry policy and program had not yet been finalised and Gunns announced a controversial proposal to build a pulp mill in Bell Bay in north Tasmania. The Gunns' litigation provides an example of a new wave of SLAPP suits based not on defamation, as earlier cases had been, but on breaches of industrial and commercial law.[57] Ogle observes:

> the issue.....is not the legal merits or the factual basis of any of the cases. Rather, the issue is the impact of cases like these on the community's right and ability to participate in public debate and engage in political protest.[58]

[56] *Gunns Ltd v Marr and Ors* [2005] VSC 251 ("The Gunns 20 Case").
[57] See also, eg, *Australian Wool Innovation Ltd v Newkirk* (No 2) [2005] FCA 1307; *Rural Export and Trading (WA) Pty Ltd v Hahnheuser* [2007] FCA 1535.
[58] Ogle, above n 55, 9.

In October 2005, the then Managing Director and Executive Chairman of Gunns, Mr John Gay, claimed that the legal action was taken after careful consideration "to protect the Company from actions by a number of environmentalists and environmental groups".[59]

In December 2006, Gunns filed a Fourth Amended Statement of Claim eliminating all claims in relation to the corporate lobbying "campaign" against Gunns. Four of the Defendants had proceedings discontinued including Bob Brown and Peg Putt (who were members of the Australian Senate at the time). From 2007-2010, after many preliminary hearings which included expensive legal costs, a number of other defendants had their cases discontinued.

In April 2009, after failing to obtain Court orders to gain access to confidential documents of the Wilderness Society, Gunns agreed to discontinue the cases against the primary environmental NGO in the action, The Wilderness Society (and a number of its officers), paying them $325,000 net in costs. The cases against the last four Defendants were discontinued on the night before the trial in January 2010,[60] with Gunns paying a further $155,088 to the Defendants.

As the legal action was concluding, a backlash against Gunns occurred. In November 2009, the share price was dropping. The adverse fallout was further felt by Gunns in 2011 when it suffered a loss of $355.5 million in 2011 (from a profit of $28.5 million in 2010).[61] Gunns reported a net loss in the year to 30 June 2011 of $355.5 million. This dropped again to a loss of $903.9 million.[62] The losses were

[59] See SourceWatch, 'Gunns SLAPPs at 20 Australian Environmentalists', available at <http://www.sourcewatch.org/index.php?title=Gunns_SLAPP's_20_Australian_Environmentalists> (last accessed 11 December 2012).
[60] Ibid.
[61] Gunns Limited, *Gunns Limited Annual Report 2011*, available at <http://gunns.com.au/Content/uploads/documents/ASX_RELEASE_-_2011_10_24_-_2_-_Gunns_Limited_-_Annual_Report_-_2011.pdf> (last accessed 15 January 2013); B Butler, 'Gunns bosses may face class action", *The Sydney Morning Herald* (online), 26 September 2012, available at <http://www.smh.com.au/business/gunns-bosses-may-face-class-action-20120925-26je4.html> (last accessed 15 January 2013).
[62] For 2012 losses, see Gunns Limited, *2012 Preliminary Final Report* (31 August 2012), available at <http://gunns.com.au/Content/uploads/documents/ASX%20RELEASE%20-%202012%2008%2031%20-%202012%20Preliminary%20Final%20Report.pdf>.

attributed to "significant changes in conditions in the export woodchip market".[63] On 25 September, Gunns released a statement noting the appointment of a voluntary administrator which was Prentice Parberry Barilla Advisory (PPB Advisory).[64]

Other consequences that resulted include:

- eleven Tasmanian Councils being among the 857 unsecured creditors with unpaid debts of $420,000 out of a total of $70 million;[65] and
- Macpherson and Kelly (a law firm) considering whether to file a class action on behalf of investors over the alleged failing of the Gunns 2008 and 2009 managed investment schemes, on the basis of "Gunns running out of money and not having been in a strong position to deliver on the project".[66]

SLAPP Suits in Other Jurisdictions

Canada

In a comprehensive report on the call for anti-SLAPP legislation in Ontario, Williams and Nadarajah, on behalf of Ecojustice (an environmental NGO) with Pamela Shapiro, documented a number of recent cases that have been described as SLAPP suits:[67]

- A defamation suit was filed against a community group and a number of its directors by the Toronto Port Authority for adverse comments about the industrialised development of the Toronto waterfront. The claim was for CAD$850,000 in damages. The Defendants argued in defence that the suit was a SLAPP aimed at stifling legitimate debate.[68]

[63] Gunns Limited, above n 61, 5.
[64] See PPB Advisory, *PPB Advisory Appointed Voluntary Administrators of Gunns Limited and Gunns Plantations Limited* (25 September 2012), available at <http://www.ppbadvisory.com/news/d/2012-09-25/ppb-advisory-appointed-voluntary-administrators-of-gunns-limited-and-gunns-plantations-limited>.
[65] A Andrews, "Gunns' trail of council debt", *The Examiner* (online), 27 November 2012, available at <http://www.examiner.com.au/story/1147330/gunns-trail-of>, (last accessed 15 January 2013).
[66] B Butler and L Battersby, 'Gunns may follow Great Southern suit', *The Age* (online) 30 October 2012 <http://www.theage.com.au/business/gunns-may-follow-great-southern-suit-20121029-28fkp.html> (last accessed 15 January 2013).
[67] Ecojustice, above n 50, 11.
[68] Ibid.

- A developer sued opponents of a resort in the town of Innisfil on Lake Simcoe for $90 million in damages. A costs application was made in a related appeal against the parties, local citizens and their lawyers before the Ontario Municipal Board. The action for costs was dismissed but the hearing lasted 17.5 days with significant legal fees, expenses and stress.[69]

- Barrick Gold and Banro were filing proceedings for $1 million in damages against Éditions Écosociété and authors Denault, Abadie and Sacher for libel over the publication of "Noir Canada, Pillage, Corruption et Criminalité en Afrique", claiming that the Defendants had acted to harm their international reputation.[70]

Kazakhstan

A citizen, Ms Chernova, representing NGO Caspiy Tabigaty asserted that the developer seeking approval for a local development project had heavily polluted the site. Chernova's remarks conflicted with an environmental monitoring laboratory engaged by the developer (LTD Monitoring), who testified at a public hearing into the development application that no increases in discharges of pollutants were observed. The director of LTD Monitoring filed a lawsuit for KZT $1 million (USD $7,000) for compensation for moral harm done to the company by Chernova's statements.[71]

Chernova engaged the Atyrau Public Prosecutor to defend her against the allegations. The City Court failed to resolve the claim after seven (7) months and several witnesses being called. On 31 December 2000 the Court ruled that the matter was closed without a decision. Notwithstanding the absence of a decision, the Public Prosecutor required a fee of KZT $20,000 (US $141) from Chernova for its representation. "The excessive fee required of Chernova for her representation [directly related to the EIA] is an additional hurdle to public participation and access to justice".[72]

Russia

[69] Ibid.
[70] Ibid.
[71] S Stec (ed), *Handbook on Access to Justice under the Aarhus Convention* (The Regional Environmental Center for Central and Eastern Europe, March 2003) 157-158.
[72] Ibid 158.

In February 1996, Nikitin, a former Captain of the Russian Navy was arrested and his passport was confiscated by the Federal Russian Security Police (FSB). He was accused of high treason by spying. In particular, Nikitin was alleged to have conspired with a Norwegian NGO (Bellona), who was supposedly paying him to gather classified information for the purpose of a report on the alleged inadequate handling of radioactive waste by the Russian Northern Fleet. Part of Bellona's report contained information about the radiation hazards posed by the Russian Northern Fleet submarines and its degraded nuclear waste storage sites.

Nikitin defended himself on the basis that the information was already public. He had been detained on the basis of charges that the Russian Constitutional Court found to be in violation of Articles 48 and 123(3) of the *Russian Constitution*. Nikitin was provided with a lawyer to defend him and was also given support by Amnesty International. Nikitin was eventually released from custody and placed under "city arrest". The Deputy Prosecutor-General stated that while there was no espionage, a continued investigation would be necessary. The FSB disagreed and brought fresh charges against Nikitin in 1997 based on allegedly invalid decrees.

The FSB were vigilant in pursuit of Nikitin and after several cases in various courts, the Chairman of the highest legal authority of the Russian Federation, Mr Lebedev affirmed that Mr Nikitin had committed no crime and was acquitted. Nikitin received a new passport to replace the confiscated one.

After five years of court proceedings, being placed under city arrest and accruing considerable fees, Nikitin's criminal matter was resolved. The tax authorities then launched an investigation into the tax implications of Nikitin's legal defence (which was still ongoing in 2002).[73] It was observed that "[w]hile the FSB might have lost the case, it did succeed in sending a message to those who might wish to spread other truths about risks to public health and the environment".[74]

There were no repercussions against those responsible for the waste of time and money, or those responsible for harassment, in pursuing the case against Nikitin and

[73] Ibid 179-181.
[74] Ibid 179.

other parts of state authorities. The tax department continued to conduct investigations into tax irregularities against Nikitin.

Japan

An article published in the weekly magazine, *Shukan Kinyobi,* on 16 December 2011 by journalist Minoru Tanaku alleged that there was collusion between the President of a nuclear safety company (Shiro Shirakawa), the nuclear industry of Japan, politicians and possibly organised crime. In May 2012, a lawsuit was filed against the journalist by Mr Shirakawa alleging that the description of him by Tanaka as a "fixer" was insulting and defamatory.[75]

In Japan the word 'fixer' has the connotation that the person described has arranged profitable business deals using dubious and possibly illegal methods.[76] Tanaka alleged money had been filtered through Shirakawa's company. He also studied the links between Shirakawa, key executives of the nuclear industry, former Tokyo Electric Power Company president Hiroshi Araki and the Kokkasho Reprocessing Plant. The lawsuit claimed Tanaka owed Shirakawa ¥67,000,000 in damages and attorney fees together with the cost of publishing a corrective article.

Prior to the initial hearing, it is alleged that Tanaka received a letter from Shirakawa warning of the financial consequences for Tanaka if there was an adverse court ruling.[77] Tanaka has described the lawsuit as a SLAPP suit:

> [i]t is obvious that this trial is a nuclear SLAPP suit from a person who has high advantages as the head of an enterprise working for the nuclear industry and who is against an individual journalist.[78]

Tanaka was unsuccessful in the first trial and in the second judgment there was a settlement noted. It is alleged that Shirakawa has previously brought lawsuits that

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[75] N-K Stucky and J Adelstein, *Japan's independent journalism on trial with Tanaka* (Committee to Protect Journalists, 17 September 2012), available at <http://cpj.org/blog/2012/09/japans-independent-journalism-on-trial-with-tanaka.php> (last accessed on 26 December 2012).
[76] Ibid.
[77] Reporters without Borders, *Nuclear industry entrepreneur seeks massive damages from freelancer* (11 July 2012), available at <http://en.rsf.org/japon-nuclear-industry-entrepreneur-10-07-2012,42991.html> (last accessed 26 December 2012).
[78] Ibid. See also N-K Stucky, 'Japan's "Nuclear Mafia" Pursuing Lawsuit to Muzzle Investigative Journalist' (Japan Subculture Research Center, 10 July 2012), available at <http://www.japansubculture.com/japans-nuclear-mafia-pursuing-law-suit-to-muzzle-investigative-journalist/> (last accessed 26 December 2012).

appeared to be SLAPP suits against publishers of journal articles in the Gekkan FACTA, the Chuo Journal and the Tokyo Outlaws. However these allegations cannot be substantiated as the cases were settled.[79]

Response to SLAPP Suits

Litigation Response – SLAPP-back Suits

A SLAPP-back suit may be defined as litigation filed by the targets against the instigators of the original SLAPP suit. The use of court processes and high media exposure may result in generating more publicity for the issues being debated. This approach was used in the *McLibel case*[80] where McDonalds, one of the largest corporations in the world, sued two unemployed activists (Dave Morris and Helen Steel) from London Greenpeace for handing out pamphlets with the title "What's Wrong With McDonald's". The litigation suit brought by McDonalds aimed to suppress the critical information but instead generated more publicity for the activists.[81] Morris and Steel were supported by an international campaign to assist with the legal costs of defence. They also sued McDonald's for distributing leaflets calling them liars.[82]

Professors Pring and Canan point out that SLAPP-back suits are "exercises in irony".[83] They are generally a valid use of the court process to vindicate the rights of the target of the original SLAPP suit to express an opinion and/or protest against a proposal or action. "Even though SLAPP-backs are not a panacea, the risk of having to defend against them may prove the most effective SLAPP deterrent of all".[84]

There are some spectacularly successful SLAPP-back cases in the USA in terms of vindication for the SLAPP-back applicant, amount of damages and public message that abuse of process will not be tolerated.[85] However the SLAPP-back approach will

[79] Stucky and Adelstein, above n 75.
[80] *McDonald's Corporation v Steel and Morris* [1997] EWHC QB 366.
[81] Beder, above n 11, 8.
[82] Ibid.
[83] Pring and Canan, above n 4, 168.
[84] Ibid 169.
[85] Ibid 36-45.

not always be successful: "[s]ome cases will not be able to capture the public imagination, or defendants may lack resources to use the case politically."[86] Political success of a campaign does not always result in legal success. SLAPP-back needs the support of law reform to protect the democratic right to participate.

Anti-SLAPP Legislation

A number of jurisdictions in North America and Australia have passed legislation designed to counteract SLAPP suits by protection of public participation rights.

United States

In the United States many states have passed anti-SLAPP legislation. In 1989, Washington was the first state to pass such legislation. Currently there are 28 American states (including Hawaii, New York, California and Utah) and Guam (a US territory) that have anti-SLAPP legislation.[87] Other jurisdictions, including the US federal government and states such as Idaho, are proposing such legislation.[88]

Canada

In Canada, Quebec has passed anti-SLAPP legislation entitled "An Act to amend the Code of Civil Procedure to prevent improper use of the courts and promote freedom of expression and citizen participation in public debate".[89] The legislation came into effect on 4 June 2009 and there are calls for similar legislation in Ontario.

Australia

Australian Capital Territory (ACT)

[86] Ogle, above n 55.
[87] Ecojustice, above n 50, 28.
[88] The US Federal Government has limited anti-SLAPP legislation such as criminal penalties for witness intimidation or protecting 'whistleblowers' – see Canan & Pring, above n 4, 90. See also The Public Participation Project, *Fighting for Free Speech*, available at http://www.anti-slapp.org/your-states-free-speech-protection/ (last accessed 13 March 2013).
[89] See M-A Sheppard, 'Quebec Government Introduces Anti-SLAPP Legislation', *Slaw* (online), 18 June 2008, available at <http://www.slaw.ca/2008/06/18/quebec-government-introduces-anti-slapp-legislation/> (last accessed 15 January 2013).

The ACT has enacted the *Protection of Public Participation Act 2008* (ACT). The aim of the law is to protect public participation against vexatious litigation to suppress such participation. If it can be proved that civil litigation interferes with public participation, the court has a discretion to impose a civil penalty and indemnity costs in certain circumstances. Those costs are payable to the ACT; not the Defendant.[90]

The ACT legislation has been criticised for not protecting public participation in a positive way and uses the reasonable person test to determine whether the litigation has an improper purpose.[91] Public participation is "conduct that a reasonable person would consider is intended (in whole or part) to influence public opinion, or promote or further action by the public, a corporation or government entity in relation to an issue of public interest".[92] The legislation has a number of exceptions including communication or discriminatory actions of those that cause property damage or involve trespass.[93] The legislation requires that the Defendant must prove the Plaintiff's litigation is improper which is difficult and does not apply to cases of defamation[94] (which are the basis for many SLAPP suits).

South Australia

In South Australia, a draft bill entitled Protection of Public Participation Act 2001 was proposed by EDO SA.[95] The aim of the bill was to protect and encourage public participation simultaneously incorporating punitive provisions to discourage litigation to unjustifiably interfere with this right. To date, the bill has not been enacted.

Victoria

Draft legislation similar to the South Australian model has been proposed in a comprehensive report by the Public Interest Clearing House (PILCH).[96] In the draft Bill the purpose of the legislation is to protect and encourage public participation (s

[90] *Protection of Participation Act 2008* (ACT) s 9(2).
[91] Ecojustice, above n 50, 41.
[92] *Protection of Participation Act 2008* (ACT) s 7(1).
[93] PILCH, above n 39, 8-9.
[94] *Protection of Public Participation Act 2008* (ACT) s 9(2).
[95] EDO SA, *A Protection of Public Participation Act for South Australia*, available at <http://www.edo.org.au/edosa/research/public%20participation.htm> (last accessed 15 January 2013).
[96] PILCH, above n 39.

2(1)) and protect and promote human rights as set out in ss 15, 16 and 18 of the *Charter of Human Rights and Responsibilities Act 2006* (s 2(2)). Those rights include:

- The right to freedom of expression (s 2(2)(a));
- The right to peaceful assembly and freedom of association (s 2(2)(b)); and
- The right to take part in public life (s 2(2)(c)).

Certain types of expression are excluded if they constitute discrimination, vilification, deprivation of liberty, trespass to premises or are by a party to an industrial dispute, cause considerable injury to property or person, incite persons to engage in such actions or is made in trade or commerce (Section 3). Section 4 establishes the statutory right to public participation. A court may make an order for summary dismissal (s 6(1)), punitive or exemplary damages (s 6(4)) in addition to the usual costs order for a successful action.

Other anti-SLAPP methods

Constitutional Protection in Australia

The *Commonwealth of Australia Constitution Act 1900* (UK) (the *Constitution*) does protect some democratic rights relating to public participation for Australian citizens and residents. These include rights of political communication, of association and assembly. As the Constitution does not have an entrenched Bill of Rights, these rights are implied. Former Chief Justice of the High Court of Australia Murray Gleeson points out that when it was originally drafted, the Constitution was focused on "pragmatism not ideology. [The *Constitution*] does not take the form of a Bill of Rights. Yet it would be a mistake to think that it does not contain guarantees of rights, freedoms and immunity".[97]

[97] M Gleeson, 'Aspects of the Commonwealth Constitution – Part 2' (Lecture 4 in the Boyer Lecture Series, 10 December 2000), available at http://www.abc.net.au/radionational/programs/boyerlectures/the_rule_of_law_and_the_constitution/3341020 (last accessed 13 March 2013).

It has been argued that there is an implied Commonwealth constitutional protection of free speech that may be instrumental in preventing SLAPP suits.[98] In 1992, the High Court in *Nationwide News Pty Ltd v Wills*[99] held that the doctrine of representative government, which the *Constitution* protects, presupposes the ability of elected representatives to communicate information, needs, views, explanations and advice. It is also predicated on the ability of citizens to use and discuss such information and opinions relevant to the exercise of power on their behalf.[100]

Anti-SLAPP Court Rules

General Court rules in all courts and tribunals have the ability to vet any vexations litigation designed to stifle public participation. In Australia, there has been a move from a party-controlled hearing to a process where the Court has greater control over the litigation process. Case management in litigation now involves increased curial supervision over, and management of, pre-trial procedures up to and including the trial. The objective of this management is the efficient resolution of disputes with regard to the real issues between the parties in the interests of justice.[101] One Australian example is Part 13 Rule 13.4 of the *Uniform Civil Procedure Rules 2005* (NSW), where the Court may order that the proceedings be dismissed generally if they are frivolous or vexatious, no reasonable cause of action is disclosed or the proceedings are an abuse of court process.[102]

United States

In the United States, in the absence of specific anti-SLAPP legislation, there are safeguards in statutes and state Supreme Court precedents that "grant a 'privilege'

[98] S Keim, 'Dealing with S.L.A.P.P. Suits' (1994) 2 *Australian Environmental Law News*, cited in Beder, above n 11.
[99] (1992) 177 CLR 1.
[100] Ibid at [19]-[20] (per Deane and Toohey JJ); [8] (per Gaudron J).
[101] P McClellan, 'Civil Justice Reform – What has it achieved?', available at http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/mccllellan140410.pdf (last accessed 13 March 2013).
[102] *Uniform Civil Procedure Rules 2005* (NSW) pt 13, r 13.4.

from being sued or other 'immunize' communications in some government contexts"[103].

Philippines

Environmental legislation recently passed in the Philippines contains anti-SLAPP provisions. A good example of this is provided by section 53 of the *Solid Waste Management Law* (Republic Act 90003). This section imposes a duty on the prosecutor or the Court to determine whether the litigation has been filed to "harass, vex, exert undue pressure or stifle such legal recourses".[104] This determination must be completed in 30 days. If this determination concludes that the litigation is a SLAPP suit the Court will dismiss the case and award costs and double (punitive) damages.[105]

However in 2010, the Supreme Court of the Philippines adopted, within its *Procedural Rules for Environmental Cases* (the Rules), specific rules regarding SLAPP suits. The Rules integrate a rights-based approach to environmental justice[106] and provide in Rule 6 that "(l)egal action to harass, vex, exert undue pressure or stifle any legal recourse that any person, institution or the government has taken or may take in the enforcement of environmental laws, protection of the environment or assertion of environmental rights shall be treated as a SLAPP suit. Hearing is summary in nature and if the court dismisses the action it may award damages, attorney's fees and costs of suit under a counter-claim if one is filed".[107]

Ramos considers it a little premature to predict the effect of the Rules but has considered their potential through a study of a recent pollution case where Mandaue City Green Court issued a temporary environmental protection order to stop the discharge of coal ash. Amidst wide media coverage, the Court personnel and parties visited the site of the coal dump and the coal power plants. The SLAPP suits provision contained in the Rules "should ensure that the filing of such suits against

[103] Pring and Canan, above n 4, 42-45 and 190.
[104] *Solid Waste Management Law* (Republic Act 90003).
[105] *Solid Waste Management Law* (Republic Act 90003) s 53.
[106] GE Ramos, 'Innovative Procedural Rules on Environmental Cases in the Philippines: Ushering In a Golden Era For Environmental Rights Protection' (2011) *IUCN Academy of Environmental Law e-Journal*, Issue 1, 185.
[107] Supreme Court of the Philippines, *Procedural Rules for Environmental Cases*, r 6.4.

environmental crusaders is no longer met with anxiety, sleepless nights and dread".[108]

Conclusion

The right of citizens to participate in and influence decision-making has, and continues to be, recognised throughout the world in both international and domestic (environmental) laws. Litigation designed to suppress and "chill" the exercise of such democratic freedoms by preventing any opposition to controversial policies and programmes is repugnant to true democracy based on the Rule of Law.

Bullying tactics of well heeled and politically influential parties to silence critics and deny the rights of participation, expression and protest must be vigilantly regulated. Various responses to this anti-democratic phenomenon have included SLAPP-back litigation, anti-SLAPP laws and rigorous enforcement of court/tribunal procedural rules to ensure there is a reduced chance of: abuse of process; compromising the ethical and legal duties of lawyers to the court, client and community and, waste of taxpayers' resources and money at the expense of more worthy cases. These solutions, whilst laudable, require a vigilant and fearless judiciary who will encourage the executive to pass effective anti-SLAPP legislation or enforce existing legislation to protect the targets of this legislation.[109]

> "[T]he free public expression of both good and bad ideas plays a role in our social ethos and our individual ideology – It is, therefore, not only acceptable, but also important that both good and bad public participation is freely allowed. For as the famous American [jurist] Justice Oliver Wendell Holmes Jr. once remarked, "…the ultimate good is better reached by free trade in ideas…[and] the best test of truth is the power of the thought to get itself accepted in the competition of the market…"".[110]

[108] Ramos, above n 106, 189.
[109] See N Nhev and H McDonald, 'By the People, for the People? Community Participation in Law Reform' (Law and Justice Foundation of NSW, Sydney 2010), available at <http://www.lawfoundation.net.au/report/lawreform> (last accessed 15 January 2013).
[110] EDO SA, above n 95 (citing Justice Oliver Wendell Holmes Jr).