

Redefining Democracy- SLAPP By SLAPP

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SLAPP suits in the environmental context

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- Targets of SLAPP suits
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SLAPP suits in the environmental context

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SLAPP suits in the environmental context

- Anti-SLAPP methods
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Summary

- Strategic Lawsuits Against Public Participation (SLAPP) suits are a relatively modern legal phenomenon which 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

Summary

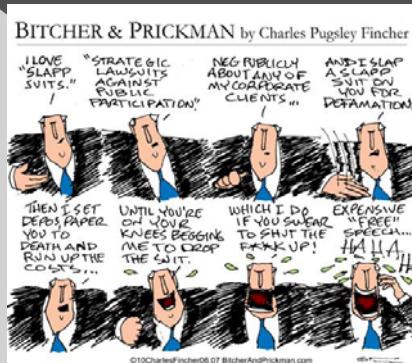
- The paper intends to overview the process of the SLAPP suit
- They have emerged in many jurisdictions apart from the USA including Canada, Kazakhstan, Russia, Japan and Australia and are based on multiple legal bases
- A number of case studies are used to demonstrate the adverse effect on public participation but a major focus will be on the Gunns 20 case in Australia

Summary

- Recent developments which have emerged to counteract and stifle some of the instances of the SLAPP suit, will be described including anti-SLAPP legislation, SLAPP-back suits and court procedural developments

SLAPP suits defined

- SLAPP – acronym for Strategic Lawsuits Against Public Participation
- Lawsuits and threats of legal action against individuals and organisations designed to suppress any action to “speak out” against controversial proposals & projects



History and Characteristics of SLAPP suits

- Term “SLAPP” arose of research by Professor George Pring & Professor Penelope Canan in 1980’s in the University of Denver, Colorado
- Examined 228 lawsuits which fulfilled four (4) criteria:
 - Civil action or cross-claim
 - Filed against non-government organisation personnel (individuals or groups)
 - Arising out of communication to governmental body official or the electorate
 - Concerns an issue of controversy in the public interest

Targets of SLAPP suits

- Broad range of targets
- Targets include:
 - Activists
 - Ordinary middle classed people concerned about local issues
 - Often organisers of local community groups
 - Non-government organisations



Adverse Effects of SLAPP suits

- ◉ Distracts targets & public away from issue of controversy
- ◉ Involves targets in protracted & stressful expensive process which may involve litigation
- ◉ Shifts balance of power in favour of instigator of SLAPP suit as they often have deep pockets &/or powerful connections

Adverse Effects of SLAPP suits

- ◉ Can be inappropriate use of statutory bases for SLAPP suits
- ◉ Examples include:-
 - > Australian Wool Innovations (AWI) sued People for Ethical Treatment of Animals (PETA) for breaches of the Trade Practices Act (now Competition and Consumer Act 2010)
 - > Global Warming Protestors were sued for \$500 million in lost profits when their protests temporarily shutdown a coal loader. The action was based on the Victims Support and Rehabilitation Act 1996 (NSW) – this law is intended to protect victims of crime

Adverse Effects of SLAPP suits

- ◉ Protestors were charged with “intimidation” of a logging contractor in Badja State forest.
- ◉ Protestors were found guilty & fined \$4,000 even though the contractor was kilometres away from the site at the time of the offence.

Effects of Being SLAPPED

- ◉ Financial:
 - > May not be able to engage lawyers for defence
 - > Courts may order security for costs undertaking for damages against Defendant
 - > May not qualify for Legal Aid
- ◉ Physical:
 - > Stress on target and family
 - > Health deterioration

Effects of Being SLAPPED

- ◉ Emotional:
 - > Targets’ family and professional relationships may break down
 - > Feelings include isolation, fear and despair
- ◉ Professional:
 - > Professional indemnity insurers advise against lawyers taking on public interest litigation that may be identified as SLAPP suits
 - > Lawyers risk disciplinary action if SLAPP suits go awry
 - > SLAPP suit instigators may encourage non-compliance with environmental law
 - > Can affect the costs and quality of the regulatory system

Multi-Jurisdictions of SLAPP Suits

- ◉ In many jurisdictions including:
 - Australia
 - > USA
 - > Canada
 - > NZ
 - > Japan
 - > Kazakhstan
 - > Russia
 - > UK

Case Studies – Gunns 20 Case

- 14 December 2004 – Gunns Ltd (Gunns) filed 216 page, \$6.3 million claim for damages against a group of conservationists and conservation organizations (Gunns 20)
- Defendants included:
 - Penniless grandmother who (opposed logging in her district)
 - Senator Bob Brown and Senator Peg Putt (then prominent pro-conservation politicians)
 - Doctor who raised health concerns about woodchip piles
 - A filmmaker who had worked very closely with conservation groups (including the Wilderness Society)
 - The Wilderness Society
 - Several other activists

Case Studies – GUNNS 20 Case

- "All were joined in what was alleged to be a conspiracy guilty of the crime of corporate vilification" (Flanagan R "Out of Control" The Monthly at p.6 <http://www.themonthly.com.au>)
- SLAPP suit alleged that the Defendants sought through a variety of protest activities to destroy Gunns' profits

Case Studies – GUNNS 20 Case

- Prior to that Gunns had benefited from a sympathetic political environment which had contributed to the company being dominant in the woodchip industry
- The state of the Tasmanian economy was heavily linked to the Gunns' profitability
- This position changed when it was revealed that Gunns was involved in a corruption scandal and more bad press was to follow

Case Studies – GUNNS 20 Case

- "The perversity of the action was staggering: with the immense fortune it had made out of destroying Tasmanian forests, Gunns had launched an action that would if, successful, have redefined the practice of democracy as the crime of conspiracy" (Flanagan ibid p.6)



Political Impact

- Shortly after filing the writ, Gunns announced a controversial proposal to build a \$1.4 billion pulp mill – the largest infrastructure project in Tasmania and one of the biggest pulp mills in the world to be built 36 kilometres from Launceston
- Gunns' original development proposal changed from "environmentally friendly" to building a kraft-chlorine bleaching mill fuelled by 80% native-forest woodchips and involving dangerous chemicals

Political Impact

- ◉ The EIA process was riddled with controversy and resulted in the head of the Resources and Planning Development Commission, Julian Green, the leading scientific advisor and national pulp-mill expert, resigning for reasons of political interference
- ◉ Gunns withdrew from the EIA process
- ◉ The pulp mill proposal did not proceed for a number of reasons including a world-wide economic downturn and losses of 20% of market share to South American plantations

Economic Impact

- ◉ Gunns' share price dropped – in 2003 its share price was in excess of \$12 per share but by 2013 Gunns has been placed in receivership and its share price is \$0.16/share (at February 2013)

Legal Impact

- ◉ Statement of Claim in Gunns 20 litigation was 216 pages long and amended four(4) times
- ◉ Over a five year period each of the cases against Gunns 20 were settled
- ◉ Now Gunns faces litigation itself on several fronts including:
 - Over the ownership of the timber plantations
 - By shareholders against mismanagement of its investment schemes
 - Eleven Tasmanian Councils are taking action for debts of \$420,000 in fees and charges
 - Secured and unsecured creditors in the liquidation process

Reforms

- ◉ Anti-SLAPP legislation examples:
 1. USA – 28 American states have anti-SLAPP legislation and US federal government has limited statutory protection including against witness intimidation and whistleblowers
 2. Canada – Quebec, - Ontario (proposed)
 3. Australia – ACT, - Victoria and SA (proposed)

Anti-SLAPP legislation

- ◉ ACT legislation:
 - Protects rights of public participation
 - Aims to identify and suppress vexatious and frivolous litigation
 - Weaknesses include:-
 - Can exclude communication or discriminatory actions and actions that cause harm or involve trespass
 - Onus of proof is on target of SLAPP suit to prove Plaintiff's litigation is improper
 - Defamation actions are excluded

Other Anti-SLAPP Methods

- ◉ Constitutional protection of human rights including freedom of speech, freedom of peaceful assembly and freedom of public participation

Anti-SLAPP Court Rules

- ◉ Philippines – Procedural Rules for Environmental Cases
- ◉ Specific rules that allow for dismissal of a case if it is held to be an action to harass, vex, exert undue pressures or stifle any legal resources to enforce environmental laws

Conclusion

- ◉ This SLAPP story begins with the sale of a fern in London extracted unwisely from an old growth forest and ends with the corporate demise of Gunns Ltd – this is the ultimate backlash
- ◉ SLAPP Suits were identified in the 1980's following ground-breaking research by Professors George Pring and Rosemary Canan at the University of Colorado in Denver in the USA

Conclusion

- ◉ It was discovered at this time that the SLAPP method was engaged to punish people from speaking out – described as the “chilling” effect
- ◉ Effectively people were legally and financially oppressed from exercising their democratic rights and freedoms to express themselves, assemble in peaceful protest and participate generally in public life

Conclusion

- ◉ Anti –SLAPP legislation and Court procedural reform are the main methods to counteract the invidious stifling of hard-won democratic freedoms of expression, protest and peaceful assembly

Gunns 20-Victory at last!

- ◉ <http://www.youtube.com/watch?v=i6krMYfD05Q>

The future

- ◉ The American jurist and judge, Oliver Wendell Holmes in *Abrams v United States* (250 U.S. 616) reminds us:-
- ◉ “...the ultimate good desired is better reached by free trade in ideas... that the best test of truth is the power of the thought to get itself accepted in the competition of the market...[and] we should be eternally vigilant against attempts to check the expression of opinions that we loathe...”