The muzzling of the Dingo Forest Mob

*SLAPP – Strategic Litigation against Public Participation – does it exist in Australia? Is it a useful term? **James Prest** looks at the SLAPP concept and what's happening in the United States and draws comparisons with some Australian experiences.*

'JUST ANOTHER interview' thought Chris Sheed, Australian forest activist. During the May 1993 interview, he told the familiar story of the trashing of the ancient forest heritage for 'essential' purposes such as forklift pallets and telegraph pole stays. He made the usual plea for support. What he didn't know was that the NSW Forestry Commission was listening and taking notes.

In June 1993 Chris Sheed and 'unnamed persons' were summoned to appear in the NSW Supreme Court by the NSW Forestry Commission. The undertaking sought by the Comission was that Sheed and 'unnamed persons' be restrained from 'conduct for the purpose of and having, or likely to have, the effect of soliciting unknown persons from trespassing' in the Dingo and Bulga State Forests in NSW – the forests Sheed was referring to in his interview.

The 'unnamed persons' were also later dragged into the Supreme Court – 32 people, many of whom had only a tenuous connection with forest protests and some not at all.

Although Justice Windeyer rejected the 'unnamed persons' aspect of the claim, nonetheless it appears that the Forestry Commission used the proceedings to *subpoena* police records of all the 32 defendants. As one activist said: 'it appears that the aim has been to create personal profiles of the opponents to old growth logging'.[1] (see *Chain Reaction* Number 69, 'The right to protest under threat' for more detail.)

SLAPP suits

Harassment of a similiar kind has become so common in the United States that it has been given a special name: the SLAPP suit – Strategic Litigation Against Public Participation. What makes a SLAPP suit? There are four features:

- politically active defendants;
- allegations including interference with contract, defamation, conspiracy, intimidation, nuisance, and abuse of process;[2]
- damages claims exceeding the real extent of losses; and
- inclusion of 'unnamed persons' or 'John and Jane Doe' in the list of defendants.[3]

Thousands of these suits are filed every year in the United States. In a nine year study of 228 suits filed since 1983, it was found that defendants were sued for an average of $9 million damages. The highest claim was $100 million.[4]

Most SLAPPs in the US are filed in disputes over metropolitan land development issues. Other targets are citizens who speak out against pollution, health hazards, or destruction of wilderness. The most frequent filers are real estate developers, property owners, alleged polluters, public utilities, police officers, and State and Local Governments.[5]

The target is anyone who speaks out. The commonest actions provoking a SLAPP are collecting signatures for a petition, filing litigation, making formal protests to government, reporting violations of the law, appearing at public hearings of Committees, boycotting or organising pickets and demonstrations. SLAPP suits are an attempt to 'privatise public debate'.[6] According to a Canadian analyst: 'the real purpose of a SLAPP is to intimidate activists...into silence, to chill like minded onlookers, and to force activists to squander valuable time and scarce funds on a concocted legal battle which can drag on for years, instead of the original issue.'[7]

The tactic of using a lawsuit as a means of gaining information about the inside workings of protest groups is not new. It was attempted as long ago as 1982 in California when the Coors beer company sued two political groups who were promoting a boycott of its beer. Coors sought and gained access to membership lists, and information about the group's internal procedures and funding sources, but access was overturned on appeal.[8]

The 'unnamed persons' aspect of the Dingo mob litigation has also happened before overseas. In the West

Coast Canadian province of British Columbia, two recent SLAPP cases have involved such claims. On Earth Day 1991, 35 activists trying to stop logging in the Tsitika Valley on Vancouver Island were sued by logging company McMillan Bloedel claiming they were: engaged in an unlawful conspiracy; injuring the company's business and reputation; interfering with business; and creating a nuisance. McMillan Bloedel demanded C$102,000 damages plus unspecified general and punitive damages, plus costs, and interest. They included 'persons unknown' and the 25,000 member Western Canada Wilderness Committee as targets.

Further south on Vancouver Island, 37 activists, John and Jane Doe, 'Persons Unknown', and the Carmanah Forestry Society were the target of a SLAPP filed by New Zealand multinational Fletcher Challenge, for having dared to protest the company's clearfelling of temperate rainforest in the Walbran Valley.[9]

Canadian logging corporations are also claiming civil damages whenever someone is convicted of criminal offences arising from blockades. Imagine being convicted for trespass arising out of blockade protest and then being served with a writ demanding the payment of damages to logging contractors! Defenders of Clayquot Sound on Vancouver Island have been sued for damages because of alleged losses in timber sales.

Linguistic imperialism?

Is the term 'SLAPP' a gimmicky Americanism? Is it useful in Australia? To answer this question, we must classify the types of SLAPPs. There are three different scenarios:

- SLAPPs against blockaders;
- SLAPPing of persons who sue government or corporation using 'citizen suit' provisions; and
- SLAPPing of people who take the lesser step of complaining about corporate behaviour to government through official channels by signing petitions, speaking out in the media or at Parliamentary Committee hearings or making FOI requests.

The inventors of the term, Penelope Canan and George Pring of the Political Litigation Project, University of Denver, Colorado, argue that it isn't pointless, as 'it helps people by identifying what is happening to them, and gives them psychological support, because they know it is not just them getting sued'. The reason why SLAPP won't reach the same proportions in Australia is because there are fewer citizens suing companies and government for their environmental misdeeds. Apart from NSW, there are no 'open standing' provisions in Australian environmental laws which might have allowed anyone to sue the government.[10]

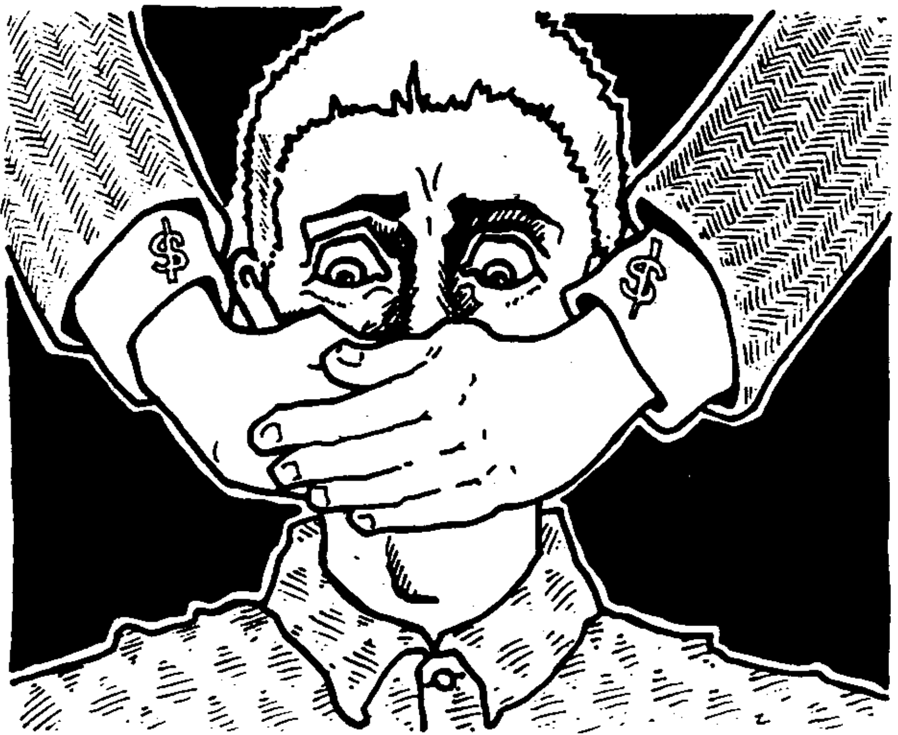
Many SLAPPs in the United States are 'counter-litigation', filed when citizens sue company or government over dodgy government approvals.

Is SLAPP redundant?

A claim that SLAPP is the latest development of 1993 in the anti-dissent war would be inaccurate. In the US, the 'counter' suing of activist environmental plaintiffs has been around since the early 1970s.[11] In Australia, trade unionists have been harassed with legal methods ever since unions existed, and so have environmental and heritage activists for a long time before 1993. One of the principal weapons is the old favourite – the threat of a defamation suit. In only one recent example Greenpeace was threatened during its campaign to expose pollution being dumped into Melbourne's waterways by pesticides manufacturer Nufarm.[1?] Defamation is a key part of SLAPP tactics in the United States.[13]

Last year, the Natural Resources Defence Council (NRDC) successfully brushed off a law suit from apple growers for 'product disparagement'. NRDC had agreed to be interviewed as part of a *60 Minutes* show about the fact that Uniroyal's apple additive 'Alar' was a probable human carcinogen.[1?] Also, in a Texas SLAPP case, a woman who described a landfill facility as a 'dump' was sued, and her husband was also sued because he 'failed to control his wife'.[15]

But even the more bizarre SLAPP tactics are not 'new' to Australia. An incident from 1983 shows that the 'unknown persons' tactic was employed long before the attempt at muzzling the Dingo Forest mob. In November 1983, six Adelaide heritage activists opposing the demolition of the 1859 Aurora



Hotel were served with writs demanding they cease picketting the Hotel. Development company Baulderstone asked the Soth Australia Supreme Court for an injunction restraining the Aurora Six and 'their servants or agents' from picketing, and indicated their intention to claim massive damages. The threat of being forced to pay Baulderstone's legal costs, as well as damages, was sufficiently large for five to undertake not to picket the site, being unable to run the risks. The attempt to gain an order against 'unnamed persons' was rejected by Justice Matheson.[16] The law suit made it clear that it was very dangerous for anyone with a public profile to be associated with the protest. The hotel was demolished on 2 December 1983.

Anything new about SLAPPs?

It represents a trend to resorting to civil claims for damages rather than criminal law to supress. The new developments in Australia are: unnamed defendants; mega damages claims; and the rediscovery of ancient offences. Local corporate lawyers are already hard at work identifying tools available to restrain dissent. Two recently compiled attempts to catalog available weaponry are both extensive and detailed.[17] They suggest resort to some ancient nasties such as unlawful association and assembly powers, and a host of anti-union torts. This suggests that the SLAPP phenomenon is not so much about the invention of new forms of legal action, but the dusting off of forgotten ones.

For example, when the NSW Police Service rediscovered the ancient anti union tort of intimidation lurking in section 545B of the NSW Crimes Act in 1993, they wasted no time in using it. In April, activists at the Badja State Forest in the Deua Wilderness in NSW were charged with 'intimidating' a logging contractor who was in fact 600 metres away at the time. The activists were superglued and bolted with Kryptonite locks onto machinery, but were found to have 'intimidated' the logger. The ugliest aspect of these convictions was that the guilty parties were required to pay economic compensation to the logger. For one defendant the bill amounted to $1,700. The charge continues to be used. In September 1993, four protesters in the Nalbaugh State Forest (Coolangubra) were also charged with intimidation.

Do SLAPP's Scare?

Empirical research from the United States suggests that some SLAPP targets are intimidated by the suit, but others become more activated than ever before. Perhaps this is because SLAPPs are typically 'legally meritless suits'.[18] Sheed of the Wingham group said 'we've been encouraged by it'; Canan and Pring found that 83 per cent of SLAPP suits were successfully defended.[19]

This does not mean that SLAPPs are seen as ineffective – as their main purpose is to scare, intimidate and divert activist resources and attention.

There are three ways activists can respond. The first is to 'SLAPP back', by filing counter-suits. In one US action, an activist who had been sued for $40m by a Silicon Valley developer, SLAPPed back, winning $260,000 in damages, successfully claiming malicious prosecution and abuse of process. Such tools are available in Australia. In a more extraordinary case, a group of US farmers who were sued for defamation by an agribusiness company counter-claimed, and were awarded $10.5m damages and $3m in costs.[20]

The second defence is to campaign for the introduction of anti-SLAPP legislation, copying laws passed in California and New York in 1992.[21] The third is to establish an Activists Legal Defence Fund, and to assist existing organisations such as the Environment Defender's Office to help activists under seige.

The connection between all these disparate stories is the ancient theme of corporations and government using the law to silence opponents. Tools exist to challenge SLAPPs, and half the battle is knowing that other activists are being SLAPPed.

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