

Current state of SLAPP litigation in Australia

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First presented at

**Walkley Foundation for Journalism
10th National Public Affairs Convention
Sydney
18-19 May 2009**

**Re-published with minor variations
Gazette of Law and Journalism**

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State of debate in Australia

From one perspective we enjoy a robust state of public debate in Australia where scrutiny of issues, the exposure of corruption, criticism of politicians and public figures and often biting satire are a hallmark of our public affairs.

But regrettably that is from the perspective of the large publishers and the relatively few who enjoy access to their media; a thousand or so leading politicians, a couple of thousand public, business and sporting figures, even fewer administrators and academics, and that small club of a few hundred media commentators and presenters, many of whom have held their spots for years. With well established pre-publication legal advisers able to train and assist journalists and manage the absurd and costly process of legal defence, these publishers can budget for the large costs and the occasional damages award that flow from giving voice to 'the few'.

For 'the rest', the small and regional publishers, community groups, public interest NGOs and individuals, including local politicians, all outside the mainstream media engaged in criticism of action and conduct they consider to be contrary to the public interest, they often find themselves on the receiving end of threatened or actual legal process backed up by the looming terror of lawyers' costs.

The use of legal action against public interest debate has internationally been 'acronymed' SLAPP suits, '*strategic litigation against public participation*', a use of the law considered to chill debate and inhibit freedom of speech. This has been well documented over many years in Australia by many media lawyers, (see bibliography in 'Gunning for Change' Greg Ogle, Wilderness Society 2005 http://www.wilderness.org.au/pdf/Gunning_for_Change_web.pdf inc. my unpublished paper in 1999 to the Victorian Free Speech Committee, *Defamation Actions against Public Interest Debate*). We have advocated reform which has had some important success both in the reform of defamation law and in the enactment at least in the ACT of an anti-SLAPP Act following US State models.

Yet despite these reforms the SLAPP problem remains serious in Australia; the list of legal threats or actions is significantly added to every year, http://www.sourcewatch.org/index.php?title=SLAPP's_in_Australia. As reform seems to close one door, such as the denial of defamation rights to corporations, another door such as claims for misleading conduct under the *Trade Practices Act* is swung open. Lawyers constantly seek new avenues for claim as in the *Gunns Case* seeking to expand the economic torts and politicians propose extending restrictions as with Peter Costello's proposal to stop public promotion of consumer boycotts.

Judges are generally loath to stop the use of legal process. There are rules on abuse of process but they are seldom applied and generally require the court to find the proceedings are clearly oppressive or hopeless. None of the cases discussed in this paper were an abuse of process and were quite lawfully commenced and continued. The

problem is that legal process is very complex and expensive, favouring the wealthy and the established, so that this type of litigation has the effect of chilling and inhibiting free speech even when it is doomed to fail or brought on weak grounds.

This paper reviews the current state of the problem and suggests how 'the rest' must educate and equip themselves to participate in public debate. With care and training, together with the availability of lawyers willing to act pro bono or on low or contingent fees, there does remain scope for the less powerful to speak their minds.

Removal of corporate actions from defamation law and resort to the *Trade Practices Act*

The *Uniform Defamation Acts* were enacted across Australia in 2005 after over 25 years of pressure for reform and uniformity (eg *NSW Defamation Act 2005* http://www.austlii.edu.au/au/legis/nsw/consol_act/da200599/). Defamation claims by corporations had been a major source of the costly claims and threats over the years. Despite corporations usually not being able to quantify any actual loss, they relied on defamation damages being assumed. Corporations do not have 'hurt feelings' and in most cases there is no quantifiable commercial loss or damage flowing from indefensibly defamatory criticism.

The most important reform was removing the right of corporations to sue:-

s.9 (1) A corporation has no cause of action for defamation in relation to the publication of defamatory matter about the corporation unless it was an excluded corporation at the time of the publication.

(2) A corporation is an excluded corporation if:

(a) the objects for which it is formed do not include obtaining financial gain for its members or corporators, or

(b) it employs fewer than 10 persons and is not related to another corporation,

and the corporation is not a public body.

I think continuing the rights of small 'excluded' corporations was unnecessary and confusing because proprietors and managers will usually be personally identifiable in comments about such companies and have rights in defamation as individuals. But this does not detract from the major significance of the reform; we will not have a *McLibel* case in Australia nor will large Australian companies, often in mining, development and pharmaceuticals, be able to repeat their frequent use of defamation. The benefits have already begun.

The problem is that corporate lawyers have been quick to seek other avenues for their clients to stop criticism and debate about what they do. The main new playing field is s.52 of the *Trade Practices Act* which prohibits 'misleading or deceptive conduct in trade or commerce'. Most public issues debate is not 'in trade or commerce' but, as we shall see, the lawyers are trying to stretch that boundary and the judges are helping.

Another apparent restriction on the use of s.52 is that damages must be actually quantified and proven to have flowed from the criticism, which is often difficult,

compared with defamation claims where damages are assumed and estimated. But this has not inhibited use of s.52 for two reasons. First, assessment of damages is always late in a law suit and the risk of exposure costs is a powerful inducement to defendants to agree to settlements long before damage needs to be proven. Secondly, the well established free speech rules in defamation cases generally preventing ‘stop writs’, ie injunctions against publication, have not yet been carried over into s.52 cases, reflecting the fact that judges are seeing them more as commercial cases and less as free speech cases.

Pushing broader public debate into ‘trade or commerce’

Published material must first be ‘in trade or commerce’ to fall under s.52. If it is not, then even if it is misleading about a corporation, s.52 gives no remedy.

The High Court nearly 20 years ago in *Concrete Constructions* [1990] HCA 17 ruled on what conduct is and what is not ‘in trade and commerce’ for purposes of the *Trade Practices Act* and the *Fair Trading Acts* of the states and territories:-

‘...it is plain that s.52 was not intended to extend to all conduct, regardless of its nature, in which a corporation might engage in the course of... its overall trading or commercial business. ... What the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character. Such conduct includes, of course, promotional activities in relation to, or for the purposes of, the supply of goods or services to actual or potential consumers... (par 8)

Therefore what trading corporations and traders do in the political process, even if for the purpose of enhancing the political or regulatory environment in which they carry on business, is not part of their trading activities.

It follows that the conduct and activities of commercial operators and lobby groups in seeking to influence government, including seeking to influence public opinion as part of the political or regulatory process, will not generally be ‘in trade and commerce’ and so will not require scrutiny under the misleading and deceptive conduct provisions.

There will always be scope to cross that line. This happens, for example when an industry lobby group acting for the benefit of members generally, or a commercial venture on its own account, publishes information as part of a public debate which is also in fact a marketing promotion, likely to be perceived by the ordinary public as designed to promote products or services within the market rather than only influence political decisions. Eg., *Tobacco Institute of Aust Ltd v Aust Federation of Consumer Organisations Inc* (1992) 38 FCR 1

Recent cases however show lawyers seeking to stretch the law far beyond the High Court ruling and to constrain public affairs debate using s.52.

Australian Wool Innovation Ltd (AWI) v. People for the Ethical Treatment of Animals (PETA) [2005] FCA 290 and [2005] FCA 1307

PETA is a US based international animal rights lobby group, www.peta.org, that conducted a public campaign against the Australian wool industry's practice of "mulesing" sheep and against live exports which it claimed were cruel and unethical. PETA wrote to retailers urging them not to purchase Australian wool products until the two practices end and publicly urged consumers not to buy wool and sheep products.

The wool industry's promotional organisation, Australian Wool Innovation Ltd (AWI), federally supported with public funds and not itself a wool trader, could have publicly debated PETA, negotiated with it, countered its arguments in the press. Instead it sued PETA, its president and seven associated people in the Federal Court, claiming a raft of commercial illegality:-

- collusive secondary boycotts under [s45D](#) and [45DB](#) of the [Trade Practices Act](#);
- unconscionable conduct under [s51AA](#) of the TPA;
- the economic torts of conspiracy and intimidation.

All the claims were first struck out by the Federal Court ([\[2005\] FCA 290](#)), as quite inadequately specified but the Court allowed a second attempt which this time added a claim for misleading conduct under s.52. AWI also sought an injunction preventing PETA from publishing material that would be harmful to retailers' trade, and staging anti-mulesing protest demonstrations at retailers' premises. For good measure AWI applied to join a further 103 persons or companies as applicants and a further 6 persons as additional respondents to the proceedings.

After the strike out the Sunday Age reported that an AWI director:-

...suggests his group will seek to wear PETA down financially. "If we have a massive bill, so have they got a massive bill, This industry is extremely well financed and these sorts of crises are catered for. The Australian wool industry is not going to walk away from something it's been building up for 200 years."

The Federal Treasurer, Peter Costello, weighed in, describing PETA as 'ignorant' and proposing to amend the law so the ACCC can bring legal action on behalf of all Australian farmers against those who are trying to boycott their wool 'on these spurious grounds'. (The *Trade Practices Act* does not prohibit boycotts generally, only certain collusive primary and secondary commercial boycotts directed against specific targets.)

I think the High Court's *Concrete Constructions* ruling clearly placed this conduct outside 'trade or commerce' but the Federal Court approved the s.52 claim going ahead [\[2005\] FCA 1307](#) and allowed the papers to be served in America, deciding that PETA had a prima facie case to answer that its statements were of fact not opinion and that they were made 'in trade and commerce' rather than being in the course of public protest over alleged cruel and unethical practices.

AWI said the key factors establishing PETA was acting 'in' commerce were, (par 10) it:-

- (a) undertakes campaigns about business activities or goods which involve the use of or which affect animals;

- (b) raises funds by way of contributions and donations from members of the public for PETA campaigns, inter alia, by generating publicity for its campaigns and promoting any success achieved by such campaigns;
- (c) promotes the sale of, offering for sale and selling clothing and merchandise;
- (d) operates websites for the purposes of its business; and
- (e) invests in companies including companies which are engaged in the business of selling Australian Wool Garments.

Many public interest lobby groups do all these things, including investing in companies whose policies they seek to change, without considering themselves to be engaging in commercial activity. Most public interest groups sell T-shirts and books as part of their fund-raising and awareness campaigns.

The Federal Court (pars 13-19) reviewed the other cases on what is ‘in’ trade, adding
 Even if it be assumed ... that PETA’s business included the conduct of the Australian Wool Campaign and the raising of monies to fund that campaign, it does not necessarily follow that the making of the relevant representations was conduct **in** trade or commerce. The representations were not made in the course of a trading or commercial relationship. The applicants’ [AWI’s] case, however, is that the representations in question were designed to induce consumers not to buy goods made of Australian Wool, to support the activities of PETA by donations, and to acquire non-wool products manufactured by or under the auspices of PETA....

A strong case against AWI’s argument was *Orion Pet Products v. RSPCA* [\[2002\] FCA 860](#) finding the RSPCA was not ‘in’ trade. However, underscoring the way legal process can burden the protestor in the early stages of a case, the Federal Court in the PETA case ruled (par 21):-

The decision in *Orion Pet Products* provides foundation for a speculation that the applicants’ claim may ultimately fail, but ... I do not think that it can be said that the proposition that the representations were made in trade or commerce *is so hopeless that it should be struck out* [*my emphasis*] without embarking upon the factual enquiry.

The *PETA Case* then was sent to mediation, a process now mandatory in the Federal Court, though not inexpensive either. It settled with both sides of course claiming victory. AWI claimed it had won a ‘landmark commitment’. No costs were paid either way, no confidentiality was accepted and the deal was that PETA would cease its call for a consumer boycott of any ‘*specific* retailer’ of mulesed wool products (ie not a general call for a boycott) but only so long as:-

- (a) a training program has been established, rolled out and is being satisfactorily implemented for woolgrowers across Australia, to educate, train and support those woolgrowers who mules their sheep about animal husbandry and farm management practices that may be implemented by those woolgrowers to manage and reduce the incidence of fly-strike to reduce mulesing;
- (b) a system has been implemented for identifying unmulesed Australian wool throughout the Australian wool supply chain, including a label available to garment manufacturers and retailers who wish to identify a non-mulesed garment at the retail level;
- (c) a system has been implemented to periodically collect, collate and publish data to identify:
 - (i) the proportion of non-mulesed sheep in Australia each year; and

- (ii) the proportion of non mulesed wool to mulesed wool produced in Australia each year; and
- (d) AWI has established a genetic research program which is subject to biannual review by a panel of independent experts ('the Panel') to be agreed by PETA and AWI, and that AWI is satisfactorily implementing any Panel-recommended changes and providing biannual reports to PETA, retailers and the Panel, which the Panel will review to assess whether AWI is satisfactorily implementing the program and the program is making adequate progress.

Not a bad result for an 'ignorant' organisation acting on 'spurious grounds' and a result which suggests that if AWI had negotiated in the beginning instead of suing, the 'massive' legal costs it was willing to incur, using public funds, would not have been necessary.

But there is little comfort here for small groups or individuals. The Federal Court's approach, which in my view is wrong in terms of the High Court *Concrete Constructions* ruling, only encourages litigation; unless a case against a public interest group is 'hopeless' it can go ahead.

PETA is a very large international lobbyist with over \$30 m annual contributions so it could absorb legal costs to achieve an objective. Smaller outfits cannot absorb costs as the next case illustrates.

***Schwabe Pharma (Aust) Pty Ltd v AusPharm.Net.Au Pty Ltd* [\[2006\] FCA 868](#)**

Legal costs stopped a private consumer watchdog dead in its tracks in publishing a consumer report and pursuing it with the regulator. Again, I consider the limits of s.52 were stretched well beyond the High Court ruling.

Schwabe sells a herbal product brand named Tebonin developed from Ginkgo biloba by its founder Dr Schwabe, which it claims relieves tinnitus, the ringing and buzzing in the ears. A group of pharmacy professionals established AusPharm Consumer Health Watch run by a company Auspharm.Net.Au Pty Ltd, owned by some of them, to look:-

- ...critically at the claims made by non-prescription health related products in the pharmacy marketplace, assesses the therapeutic claims they make against the existing research, looks at product safety and the value for money, engages in dialogue with the product sponsor and then publishes its findings. Its primary aim is to help consumers make informed choices about these products.

Its reports on products would be produced under a procedure set out on its website including time for response and reply, and would then be published and sent to regulatory agencies.

Auspharm's report on Tebonin, published on its website and sent to the Therapeutic Goods Administration for investigation by its complaints resolution panel, disputed the claims for effectiveness. Schwabe contended the report had not been produced in compliance with the stated procedure. Instead of writing to the TGA pointing this out and presenting its own material in support of its product so the regulator could make up its

own mind, Schwabe, as it was entitled to do, commenced a suit in the Federal Court under s. 52 for misleading or deceptive conduct in trade or commerce.

They didn't claim the report was misleading. They argued only that it was misleading to claim that the report had been compiled following the Auspharm stated process when it had not. They sued for an interim injunction until a full trial could be held. The TGA under its rules, because litigation was on foot, suspended any consideration of the complaint from Auspharm.

Being only an interim application, the Federal Court made its decision only on a prima facie basis and accepted Schwabe's case on misleading conduct (par 41) to that extent. That's surprising enough but more so was the Court's acceptance of the argument, again prima facie, that this consumer watchdog reporting and complaint process by Auspharm was '*in trade or commerce*'. The Court said this was so because the Auspharm website was interlinked with three other websites run by Auspharm.Net.Au Pty Ltd which ran sponsorship announcements and commercial endorsements (par 71). In addition 'the economic methodology for sustaining the services provided by the three inter-related sites is to secure revenues from commercial participants on any one of the bases identified in the advertising terms and conditions' (par 72).

In my view the Court simply failed to focus on the character of the conduct, as required by the High Court, which was public debate on the effectiveness of a product being offered to the public. Because participation in that public debate was financed from private sources, the public debate conduct also became commercial.

An interim injunction was granted, costs awarded, the TGA continued its embargo pending the final trial so the public interest in having disputed claims determined by the regulator was halted. However the costs had defeated the consumer advocate group. They could not afford to go to trial so they consented to a permanent injunction.

What is so silly in my view about this example is that, the legal case having ended, the TGA panel then went ahead to consider the complaint. The panel determined that it was "misleading" of Schwabe to claim that the overwhelming scientific evidence found Ginkgo biloba was effective in relieving the symptoms of tinnitus. Instead, it concluded that the evidence only supported the claim that Tebonin may provide relief from the symptoms. The panel also found misleading the company's claim that "scientific evidence for Tebonin is extensive, unequivocal, of exceptional scientific quality, and not subject to any serious question." It recommended that certain of Schwabe's advertisements be withdrawn.

And the most telling postscript to this case is what happened afterwards as reported in the AusPharm(e)news for Thursday April 5, 2007 by Dr Harvey, one of the senior members of Auspharm:-

Subsequently, I met with the principals of Schwabe et. al in order to clear the air over these matters. We agreed that all parties lost through the action that eventuated. Both bore the cost of litigation. AusPharm Consumer Health Watch disbanded. Schwabe et al. had their reputation damaged and lost sales as a result.

... We agreed that many of the claims made for complementary medicines listed on the Australian Register of Therapeutic Goods do not appear to be supported by appropriate evidence. We were both supportive of a regulatory process that demanded a higher standard of evidence to support the promotional claims made.

... We were both supportive of more stringent standards by the TGA with respect to the chemical composition of herbal products.

In conclusion, discussions with Schwabe et al. have reiterated that "jaw, jaw" is always better than "war war". Our experience shows that even once bitter opponents can often find areas on which they can work together *if only they stop communicating via lawyers and sit down face-to-face* (my emphasis).

David Jones v. Australia Institute

Possibly encouraged by the Schwabe case, David Jones set out to stretch the limits of publications in trade and commerce using s.52 when it sued the Australia Institute, and its Director personally, over a media release and report about the Institute's study '*Corporate Paedophilia- sexualisation of children in Australia*' focussing on advertising and marketing. The Media release said:-

Major retail chains such as David Jones and Myer have jumped on the bandwagon. When family department stores show no conscience on these issues, or are inured to the effects of their behaviour, the situation is very unhealthy.

(It is important to stress that David Jones said there was no justification for this attack and I do not suggest otherwise; I set out the material to understand the use of s.52 in the dispute.)

David Jones chose not to debate the matter but to sue, claiming that the media release was misleading and deceptive in trade and commerce and should be stopped. The claim also sought removal of David Jones ads from an electronic supplement to the report. (Myer did not sue.)

The Institute (www.tai.org.au) is a not for profit company limited by guarantee which describes itself as 'an independent public policy research centre funded by grants from philanthropic trusts, memberships and commissioned research'. It has deductible gift and tax exempt status as a charitable organisation. David Jones said the Institute's conduct was in trade or commerce because, in summary, it:-

- gets paid for its research and raises funds for research
- sells, promotes and advertises its books and research and discussion papers
- gets member subscriptions and provides member services
- runs a website

Most public interest groups do all those things. The Institute's defence referred to its public purpose role and said it was not in business.

While the High Court ruling would in my view clearly exclude s.52 as a remedy for David Jones to counter the attack, the successes against public interest groups in other cases before the Federal Court at least in the initial stages of litigation, as well as cost, appear to have induced the Institute to settle. The Institute removed the media release and deleted David Jones material from the electronic appendix. Because the settlement is

confidential, we cannot know whether any admissions were made or costs paid; hopefully not given the unlikelihood of success for David Jones at trial.

This case illustrates the use of litigation, using laws which do not appear likely to apply, rather than debate. David Jones was fully entitled to respond in open debate that the Institute was wrong, to examine how the report was prepared and to criticise those involved if it chose. It's just that use of litigation under s.52, while an avenue which the law allowed them, was not in my view the way they could or should go as a public corporation.

Suing under s.52 for a complaint to a regulator:-*Snowy Mountains Organic Dairy Products v. Kinnear*

Consumer affairs regulators are there to decide, among other things whether commercial claims may mislead consumers. If a trader requests a consumer regulator to examine the claims of a company who supplies goods the trader sells, even though it relates to their trade, surely in terms of the High Court test, that conduct does not have the character of trade, its character is participation in the public regulatory process; the written request by the trader could not be attacked under s.52, or so you would think.

Scott Kinnear is a retailer of organic and whole foods who also has a role in certification of organic products as a director of Biological Farmers of Australia, a co-op society whose members are organic food growers and traders (www.bfa.com.au). BFA owns a company Australian Certified Organic authorised by AQIS to certify organic growers and producers as required for export. Australia does not yet have a requirement for domestic organic certification.

There is probably little doubt that much of what Kinnear does is in trade and commerce. He did two things however that would not seem to be 'in trade or commerce' that had him sued by Snowy Mountains Organic Dairy Products, both actions raising free speech issues.

First in 2004 he wrote to Victorian Consumer Affairs, a letter not otherwise published, asking them to examine the truthfulness of Snowy labeling its milk and cream organic, setting out his reasons for concern in that regard. Nine months later he went on the Country Hour on the ABC in his capacity as a BFA director first noting that Consumer Affairs was investigating whether, since Snowy's products were not certified, it was misleading and against the law to label them organic and second explaining that the certification process was not yet a requirement for domestic use of the organic label, a situation BFA and others were lobbying to change and which would benefit the public.

In the Supreme Court, Snowy sued Kinnear, the ABC, the Country Hour presenter and reporter for defamation, a right it would no longer have under the reformed law because it is a corporation. It claimed harsher meanings flowed from a statement that an investigation is on foot, namely conclusions that Snowy was 'reasonably suspected' of false ads and claims, that it 'warranted being investigated' and 'had made questionable

claims'. (In the same defamation action Herald and Weekly Times and its reporter were sued over an article on organic certification referring to Snowy later the same month but in which Kinnear and the ABC had played no part at all.)

Arguably statements of 'under investigation' are not held to produce meanings of 'reasonably suspected' of unlawful conduct or that the person 'warrants' the investigation but the Victorian Supreme Court said those meanings were capable of arising so the case could proceed for a jury to decide. *Snowy Mountains Organic Dairy Products Pty Ltd v ABC* [\[2006\] VSC 138](#).

In the Federal Court Snowy sued Kinnear personally under s.52 for false and misleading conduct in trade or commerce for writing his letter to Consumer Affairs. Snowy took issue with the truth and accuracy of what he had privately told Consumer Affairs. No quantification of any commercial loss was stated in the claim, only legal and some management costs and unspecified reputation damage.

In my view the action, though open in law to be commenced by Snowy, was ill-founded because the request to the regulator was not conduct that itself had the character of trade and commerce but was a reference for a ruling by a public regulatory body. As a matter of principle, participation in such a process with a public regulator should not be the subject of litigation. S. 52 should not be used for publications of this nature. The remedy is to challenge the claims before the regulator, not ask a court to penalise someone for engaging the regulator.

Yet again the regulator put its inquiry on hold because legal proceedings were on foot; I don't know why regulators think they should do this as it hardly serves the public interest which they are established to protect. Consumer Affairs itself was sued for confirming its inquiry to ABC and HWT, reported in [\[2008\] VSC 405](#) at par 6. The cases bogged down into yet another massive lawyer-fest for four years, a successful Federal Court application for them all to be combined, [\[2006\] FCA 1361](#) and Supreme Court disputes over documents and settlement deeds, all referred to at [\[2008\] VSC 405](#). The cases all finally settled on undisclosed terms

The defamation settlement required HWT to publish an 'apology' which was really just a statement:-

... the Weekly Times published a series of articles about organic farming. One article mentioned Snowy Mountains Organic Dairy Products Pty Ltd and an inquiry into that company by Consumer Affairs. The Weekly Times wishes to clarify that it was not suggesting in the article that Snowy Mountains has been found to have engaged in any wrong doing in the advertising of its products. The Weekly Times apologises if anyone misunderstood the article.

Curiously a day later the ABC told its audience the case had been settled, read that HWT apology out on the Country Hour but said it did not apologise for its broadcast. Kinnear published no apology. The settlement of the s.52 case involved no public statement which does not surprise me as in my view it had no legs at all!

And that was it, from the public's point of view, for years of litigation and a likely couple of hundred thousand dollars in costs for the 4 or 5 law suits. At least Snowy achieved Consumer Affairs not completing any investigation. It cannot be in the public interest for a regulator to postpone for years an inquiry it has decided should be commenced. And no-one will ever know whether any damages or costs were paid either.

Damages cap

The second main reform of the *Uniform Defamation Acts* was to cap damages at \$250k indexed and now at \$280k. Has this been a positive contribution to public affairs debate?

Not really in my view, first because that level of damages would be ruinous for any ordinary person, NGO, community group or independent regional publisher and secondly, the real problem in litigation is lawyers' costs rather than damages. When large city law firms charge out partners at \$500-600ph and senior barristers clip the ticket at over \$5000 per day then, even with the limits on costs claims that apply under the court cost assessment system, this can soon mean any defendant knows they will face massive costs even to start defending a claim let alone finish.

Another costs disadvantage to defenders of public interest litigation is that costs of those suing them will be tax deductible if the protest relates to trading activities on revenue account. Calls for boycotts on trade would be included in that but probably that does not extend to protests against a project as a whole.

What this does mean, as suggested later, is that the costs factor makes it essential for everyone in public affairs debate to learn the basic law and get access to legal support before publishing.

Public interest defence and s.30 of the *Uniform Defamation Acts*

When reviewing where we stand in Australia with public affairs debate, we need to assess whether the so-called 'public interest' defence, a reform of the defamation law developed over many years by the courts rather than parliaments, has the potential to free up public debate. We also need to ask whether the reformulation in the Uniform Defamation Acts of general qualified privilege has a potential in a mass media context to become a statutory public interest defence.

The common law defence of qualified privilege in relation to government and political discussion was established in its current form by the High Court in *Lange v. ABC* [1997] HCA 25. In summary it is:-

A defamatory communication made to the public on government or political matters at Commonwealth, State, Territory level or local government level is protected or lawful if the person's conduct in publishing the material was reasonable which means the person:-

- had reasonable grounds for believing it was true and did not believe the allegation to be untrue
- took proper steps, so far as they were reasonably open, to verify the accuracy

- sought and published a response from the person defamed except where the seeking or publication of a response was not practicable or it was unnecessary to provide an opportunity to respond.

This defence is important because, although stated by the High Court as a qualified privilege-type defence rather than a constitutional right of free speech, it expressly applies to mass media communications whereas older forms of qualified privilege only apply in more restricted publication contexts.

The general assessment of lawyers is that the *Lange* public interest privilege defence will not be of significant assistance because the criteria for ‘reasonableness’ are too limiting for the usual way in which publishing of critical information occurs.

But even more limiting has been the speed with which the courts have confined what constitutes discussion of political and governmental matters. It will sadly surprise no-one that the first group the judges have carved out of that field has been the judges and the courts themselves.

Popovic and O’Shane were magistrates in Victoria and NSW who sued for defamation over strong criticism of the way they performed their duties. The appeal courts of both states ruled that the role and work of courts and judges are *not* political and governmental matters, relying on the opinion of NSW Chief Justice Spigelman that ‘The conduct of courts is not, of itself, a manifestation of any of the provisions relating to representative government’; *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* [2000] NSWCA 198. In *O’Shane* it was said that ‘...judicial officers occupy a place in the exercise of functions and powers affecting members of the community unlike the position of those public representatives and officials.’; *John Fairfax Publications v O’Shane* [2005] NSWCA 164.

I doubt many ordinary people would agree with the judges. I certainly don’t but I can take comfort that Victorian Justice Gillard in *Popovic* did not either and dissented, having no doubt the work of the courts is part of the governmental process. *Herald & Weekly Times Ltd & Bolt v Popovic* [2003] VSCA 161

There is a possibility that the reformulated statutory qualified privilege defence in s.30 of the *Uniform Defamation Act* (the old NSW s.22) may be applied to mass media and general public interest publications, despite no express words to that effect and despite a poor history with attempts to apply the old s.22 as a general public interest defence:-

- (1) There is a defence of qualified privilege for the publication of defamatory matter ... if the defendant [*publisher or speaker*] proves that:
 - (a) the recipient [*will this include the general public?*] has an interest or apparent interest in having information on some subject, and ...
 - (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances. [and]
- (2) ... the defendant [*publisher or speaker*] believes on reasonable grounds that the recipient has that interest.

(3) In determining ... whether ... publishing matter ... is reasonable in the circumstances, a court may take into account:

- (a) the extent to which the matter published is of public interest, and
- (b) the extent to which the matter published relates to the performance of the public functions or activities of the person, and
- (c) the seriousness of any defamatory imputation carried by the matter published, and
- (d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts, and
- (e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously, and
- (f) the nature of the business environment in which the defendant operates, and
- (g) the sources of the information in the matter published and the integrity of those sources, and
- (h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person, and
- (i) any other steps taken to verify the information in the matter published, and
- (j) any other circumstances the court considers relevant.

For a long time defendants have foundered on proving the 'interest' of the whole community in a particular matter. There have been no cases yet under this version but the 'reasonableness' list gives wide scope to judges to favour protection of reputation over protection of free speech. Its 'wait and see' with s.30.

Gunns and the failed attempt to expand the economic torts

The economic torts, (a tort in law is a civil wrong), establish legal rights to damages and injunctions against a range of conduct which damages a person's economic interests, so they have always been of value in the commercial world. They cover injurious falsehood, interference with contractual relations and conspiracy to cause harm.

When Gunns in 2004 launched its massive 215 page, 529 paragraph Statement of Claim against 20 defendants ranging from Bob Brown and the Wilderness Society to the 'tree huggers' and direct action trespassers, it tried to expand those economic torts into a new area it called 'corporate vilification'.

The claim was in two main parts :-

Intentional interference with trade by unlawful means, which covers the direct action against Gunns operations on the ground by both individuals and organised groups including the Wilderness Society. These are claims generally within the categories of recognised economic torts and the particulars given of the wide range of conduct in the nature of trespass, impeding work etc could bring them within that field of law. This is not to say the claims will be proven or that all the elements of relevant torts will be established.

Corporate vilification campaign, which generally covers the lobbying campaign at the business and bank level both within Australia and in Japan. The claims here sought to

expand the categories of the economic torts into the free speech area. The claims are not about activity on the ground and in my view do not fall within the recognised categories of economic torts of conspiracy to injure or interference with economic relations. The conduct alleged is not of itself unlawful ie lobbying and seeking to persuade banks, customers and shareholders. Furthermore, there was no quantified loss or damage alleged for any of them other than the unitemised trouble, inconvenience and aggravated heads of loss. In fact, apart from Gunns losing its Banksia Award, there were real no consequences of this part of the campaign alleged at all.

(There was also a specific defamation claim that has since been split off but continues despite the fact that it could not be started today against Gunns as a corporation.)

The first Statement of Claim was immediately amended to be 360 pages long but was struck out as confused and excessive after hundreds of lawyers' hours and many hearings [\[2005\] VSC 251](#). Version 3 was filed, now 221 pages but 714 pars and this too was struck out as embarrassing, excessive and unjust to the defendants [\[2006\] VSC 329](#). Still the Court did not rule that the corporate vilification claims had no basis in the law of economic torts and allowed Gunns yet another chance to amend. That is a classic illustration of how legal process favours a well financed litigant against small publishers and ordinary people and groups who must rely on pro bono and 'spec' lawyers. It takes an enormous amount of litigation before the litigant is declared 'vexatious'.

At this point Gunns changed lawyers and the new team dropped the entire corporate vilification claim against Bob Brown and others, pressing on with the direct action and defamation claims. But it would be two more years before Gunns would give up against the Wilderness Society and its associated defendants for their campaigning, agreeing to pay the Society \$350,000 in legal costs.

As part of the settlement, the Wilderness Society agreed to pay Gunns \$25,000 in damages for a protest in Tasmania's Styx Valley in November 2003. During previous settlements, the Wilderness Society and others had paid Gunns \$45,000 plus costs. The Wilderness Society is free to continue protesting to protect Tasmania's forests.

Seven defendants out of an original 20 remain in the scaled down case before the Victorian Supreme Court but they have rejected Gunns' settlement offer.

When Gunns launched this case, the defendants had held a public meeting with duct tape across their mouths on the basis that they had been silenced. They had not been silenced and I think they conceded too much power to Gunns by saying so. While it took time and the dedicated work of lawyers acting on 'spec', the bulk of the case collapsed and Gunns paid at least \$350,000 in costs. It is estimated that these costs combined with the previous settlements and interlocutory costs orders total about \$1m paid to other parties with Gunns own costs inevitably being at least in the hundreds of thousands.

Is this outcome a good sign for public affairs debate? At the end of it all the law was not expanded to create a tort of corporate vilification, the bulk of the case was abandoned, the

many defendants who had at the outset so publicly complained about being silenced were not silenced. But this all only happened because of a group of lawyers willing to work on the case for over 5 years mostly on a speculative basis. Unless major corporations use their ready access to media to publicly debate their opponents rather than suing, public affairs debate will continue to suffer.

Don't think it's 'In Club': *What Councillor Sutton said about Mayor Jones on the bus and in the lounge.*

In politics at all levels there is endless talk about people doing the wrong thing. The great ABC sitcom *Grass Roots* captured perfectly what goes on at local government level. One defamation case of recent years *Jones v. Sutton* [\[2004\] NSWCA 439](#) sounds a warning for conversations in the political process.

The Mayor of Warringah sued a fellow Councillor who had made derogatory comments about him to other Councillors and staff in a bus at the local government conference and late over drinks in the Council lounge when councillors were 'winding down', accusing him of misconduct:-

"He's up to no good. He bought a Council property in somebody else's name but I know that he bought it. He is not a very nice type."

"The worst thing about this matter was that the rocks dumped on the beach were dumped from trucks owned by Darren Jones [the Mayor]."

When the Mayor heard of this he could have denied the allegations in open Council and challenged the Councillor in the time honoured manner of 'put up or shut up'. Or he could have spoken to all councillors privately to the same effect. An investigation into the allegation was carried out by the General Manager and another councillor but neither the fact of nor the outcome of the investigation was reported to Council and the Councillor was not asked to provide evidence of her assertion. Instead the Mayor sued for defamation which of course he was entitled to do.

The Councillor did not defend by saying what she said was true so of course the allegations about the Mayor were not proven. Instead she said the Mayor 'was not likely to suffer harm', a defence under s.13 of the old Act, because the comments were in house and either not thought likely to be true by some who heard or not accepted at face value by others, the Councillor was a known political opponent of the Mayor in a faction-ridden Council and the Councillor was considered to be a person who made those sorts of claims;. The Councillor said the Mayor would not suffer harm and the trial judge agreed but said if she was wrong about that, his damage would be assessed at \$5000.

The Mayor appealed and the appeal court took his side, regarding the statements as seriously defamatory and therefore likely to cause harm within the Council environment. But the appeals court left damages at a very low \$5000 and allowed the Councillor costs relief through the Sutors Fund. The very low level of damages seems to contradict the appeal court's decision that the Mayor was likely to suffer harm. They would be unlikely to cover the costs he would still have paid after recovery of full indemnity costs from the Councillor, or rather from the Sutors Fund.

To me the winners here were the lawyers; the costs of a trial and an appeal will have been very substantial. It is hard to see how the Mayor benefitted from the long process. But it does sound a warning to players in local government, or government at any level for that matter, not to think in house scuttlebutt is necessarily safe speech and to impose a level of caution that will inhibit open debate in public affairs.

Public meetings and reports:-take great care!

Free speech has differing levels of protection in an important number of public forums and in reports of their proceedings but it is by no means the case that what is said in, or published about, public meetings gives any immunity from serious legal consequences.

And even long-standing defamation lawyers have difficulty clearly understanding what is protected under the law!

Sections 27-30 of the *Uniform Defamation Acts* set out the basic framework:-

- absolute privilege for what is said in parliaments and courts and in the reports of a long list of public authorities and boards; s.27
- a defence for material in or a fair summary of a wide range of *public documents* (including local government documents) published honestly for public information or education; s.28
- a defence for a fair report, published honestly for public information, of a wide range of '*proceedings of public concern*' from parliaments and courts through public authorities, local government, public company meetings and sporting bodies to general public meetings on 'matters of public interest'.
- but for what is actually *said in* those 'proceedings of public concern', there is *no* direct defence, only qualified privilege under s.30 (set out above) or the common law with the need to prove the audience has an *interest* in hearing the information and it was all done 'reasonably' under a long list of factors.

Picking your way through that is not for the amateur public meeting goer, or even for the professional politician. A salutary warning about the need for particular care in public meetings was given, again by the NSW Court of Appeal, in *Bennette v Cohen* [2009] [NSWCA 60](#).

NSW Greens MP Ian Cohen, attended two public meetings called to raise funds in support of a Byron Shire resident defending defamation litigation by a person the resident had been in bitter dispute with over a development and who had sued him over letters to the local paper.

The case reports that at the meetings Cohen called the person 'a thug and a bully' and said he 'improperly manipulated the system by bringing defamation proceedings for the purpose of stifling public protest'.

Cohen found no comfort in arguing the meeting was a place where ordinary qualified privilege applied. Nor did he claim protection under any of the sections of the Act.

(Cohen had initially argued for a *Lange* type public interest defence of qualified privilege but had abandoned that at the trial, a decision the appeal court plainly agreed with as they saw the matter as being of a confined local nature and not about the broader public interest.)

The court threw out the traditional qualified privilege defence and confirmed damages of \$15,000 and costs against Cohen:-

The existence of pending defamation proceedings does not allow supporters of defendants in such proceedings, who hold public meetings to raise funds for those defendants, to proceed at such meetings to insult the plaintiffs involved by publishing, gratuitously, defamatory allegations about them. There is no interest known to the law that protects persons who publish defamatory remarks in these circumstances. *They are regarded in law simply as officious busybodies (my emphasis).*(par 63)

Should public calls for boycotts be prohibited?

So what of Peter Costello's wish to have boycotts generally outlawed? As Brian Walters SC of the Victorian Free Speech Committee, and author of *Slapping on the Writs: Defamation, Developers and Community Action* (2003) has observed, such a change would be a massive intrusion on free speech and social change. The boycott, as an instrument of social change, has a long pedigree; the boycott in England over two centuries ago of sugar produced with slave labour in the West Indies; the 1760s American colonists campaign for "no taxation without representation" boycotting British goods; in the 1960s, as part of the civil rights campaign, black Americans boycotted businesses which refused to employ black workers; most of the world boycotted South African goods in order to bring an end to apartheid; regular calls in Australia for people to stop using banks who finance uranium or logging projects.

The Costello proposal was to empower the ACCC, which has the traditional role of supporting the consumer against business practices, to pursue consumer and lobby groups, such as the 'ignorant' PETA who advocate concerted action against businesses. Producers advertise, but anyone who counter-advertised would be targeted by government legal action – at taxpayer expense.

Thankfully on this issue, Mr Costello left the government benches. The view of free speech lawyers, which I endorse, is that consumers and lobby groups should be able to mount campaigns about industrial and commercial practices, including calling on the public to stop consuming certain goods or services and the community should be able to hear those campaigns. Industry is well able to present its case to the community without running off to court.

Anti-SLAPP legislation - *Protection of Public Participation Act 2008 ACT*

If SLAPP suits remain a significant issue in Australia, is there value in special legislation to control them?

In the aftermath of the launch of the *Gunns Case*, Greg Ogle of the Wilderness Society, led a group of senior media lawyers to endorse the emerging proposals for states to follow the US model and enact anti-SLAPP statutes which prohibit litigation against public participation. Only the ACT has so far taken up the challenge; the NSW Attorney General Debus at the time declined to act citing the defamation law reform as sufficient.

The *Protection of Public Participation Act 2008* ACT makes a person liable for a civil penalty,;-

- if the person starts or maintains a proceeding in relation to conduct that is **public participation** for an **improper purpose**, s.9 .
- ‘*public participation*’ (s.7) means 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.
- It is an ‘*improper purpose*’(s.6) if a reasonable person would consider that the main purpose for starting or maintaining the proceeding is—
 - to discourage the defendant (or anyone else) from engaging in public participation; or
 - to divert the defendant's resources away from engagement in public participation to the proceeding; or
 - to punish or disadvantage the defendant for engaging in public participation.

There have been no cases under this new ACT Act. Is it likely to be effective? Probably not. First the remedy is a civil penalty which requires government enforcement. Since no private right is expressed and the offence is not a crime, there may be an argument that a private person could not seek an injunction or lay an information against the SLAPP.

Second, the *main* purpose must be against public participation and courts may readily accept a private litigant’s argument that they are protecting legitimate rights. Comments such as the AWI chairman’s would of course help establish that their main purpose against PETA was to stop its public participation.

Self Protection

This brief survey tells us that defamation and publication law has to be taken very seriously indeed by anyone entering the public arena, even for comments that may be thought to be in a closed context.

No-one can afford to be ignorant about basic defamation law but getting educated is not simple. Readily accessible, simple guides to this area of law are limited. Sadly the ABC Media Law Handbook that was published at very low cost for over 10 years has not been re-issued although the last edition remains a valuable and comprehensible tool.

Mark Pearson at Bond University has developed an on-line advice service to help journalists diagnose whether they have a defamation problem. It does tend to require some prior knowledge of the law but it is quick and freely accessible.

<http://www.bond.edu.au/defamkit/aboutdefamation/index.asp>

With basic education people and groups in public campaigns can learn that *defamation is not always unlawful, only where there is no defence*. When you understand the law, the main protections now are:-

- you can say what you like about governments and public sector agencies - they can't sue, but particular politicians and bureaucrats can.
- you can criticise corporations with more than 10 employees, despite s.52.
- you can say what you like if you don't identify a particular person either directly or indirectly – but be careful its not obvious who you are talking about
- you can express honest opinions, even unreasonable ones, but the facts on which the opinions are based must be true and known; this is the *comment* defence.
- you can discuss what is said in parliaments and courts and many other public forums including local councils, if you do so fairly and honestly.
- you can speak about things which are true but beware because proving truth can be a real problem.

And don't have a nervous breakdown just because you get a lawyer's letter threatening legal action over what you have said. Such letters are common but they are not court proceedings and most do not result in actual litigation.

No small publisher, community group, NGO or even charitable organisation can afford *not* to have access to some legal support for sound pre-publication advice. Even if that does incur expense, it's an expense that is far outstripped by the cost of managing even the most speculative litigation.

However at the end of the day, ordinary people and small community and public interest groups can simply not afford even to be sued in the first place which will always mean there is scope for *strategic litigation against public participation*.

BRUCE DONALD
25 MAY 2009