Gunns v Marr & Ors, VSC 9575/2004
Gunns v Brown & Ors, TSC 251/2003
Gunns v Welch & Ors, TSC 178/2004
Doug Hall Enterprises v Morris, QDC 7/2006
AWI v Newkirk & Ors, FCA NSD 1630/2004
Harback Logging v Morris, TSC 452/2004
Takhar v Animal Liberation, SASC 754/2000
Chapmans v CCSA & Ors, SASC 81/1998
Chapmans v Dean Whittaker, SADC 310/1997
Chapmans v John Coulter & Ors, SASC 533/1997

URGENT

Gunning for Change

The Need for Public Participation Law Reform

CUT HERE
For Free Speech
Law Reform

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Gunning for Change

The Need for Public Participation Law Reform

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Contents

Author's Preface

Sitting in my office on 14 December 2004, having just completed the last stressful event of a long year, I was beginning to think of the coming holiday when the phone rang. The Wilderness Society National Campaign Director, Alec Marr's gravel voice simply said "We've got a problem. We've just been sued".

While I work for The Wilderness Society, I was not particularly involved in the campaign which lead to the suit which is *Gunns v Marr and Ors*, but Alec was ringing me because this was not the first time an environment group had been sued for its campaign activity. I had spent five years supporting a number of defendants in the infamous Hindmarsh Island bridge defamation cases – cases which had sent shock waves through the environment movement in South Australia and beyond in the 1990s. I had also spent four years defending Animal Liberation SA who were being sued over a visit to a battery hen shed.

As I told Alec to send me the Gunns writ, I had a sinking feeling as I remembered the long hours of necessary but useless work, and I saw not just my Christmas disappearing, but the alienating world of the legal system again opening up before me. I did not know then that the Statement of Claim was 216 pages long and even more impenetrable than most, but I did know that those years of being sued would provide valuable experience for the defendants in this latest case.

The first part of this report draws more widely on that experience to highlight the extent of an increasing problem – the chilling of public debate and political protest by a range of law suits brought against community activists and groups. The second part of the report examines the various law reforms and models for protecting public participation from this type of lawsuit.

This is not a treatise on the benefits of freedom of speech, nor a discussion of all the relevant case law and legislation – though there are ample references to follow this up if a reader is so inclined. Ultimately this is not a lawyer's view of the system. It is a view from someone who has seen too many people stressed and silenced by a legal system which doesn't protect fundamental democratic rights. It is a view from someone who doesn't believe that people should need a law degree or ten years tertiary education to be able to participate in political debate. It is a view from inside ordinary community organisations, and it is a story about the very real threats they face and what sort of law reform would work for those people and organisations. And it is a view at a time when the need for law reform has never been greater with the number of cases mounting and the scale and nature of the pleading in the Gunns case bringing the problem to a whole new level – not just for the environment movement, but for the whole of civil society.

The Wilderness Society has been thrown into this law reform issue by fate and by the Gunns case. But when political disputes become legal suits, issues of environmental protection also become issues of political rights and free speech – because without free speech, there will be no one to speak for our forests, our wild rivers, our vast arid lands and our unique marine life. Without a voice, those things will be lost. And that will be the saddest of silences.

Greg Ogle
December 2005

Summary

This paper highlights the increasing number of legal cases in which community activists have been sued in the civil courts for making statements or taking actions as part of non-violent political campaigns. The case brought by Tasmanian forestry giant, Gunns Ltd, in 2004 against 20 environmentalists including The Wilderness Society is the biggest, but by no means the only or the last case of this kind.

While it is up to the courts to deal with the facts of any individual case, the problem with such cases is that they can and do have the effect of silencing free speech and political protest. This silencing effect comes both from self-censorship due to a not unreasonable fear of litigation (given the enormous costs, stress and length of time involved in these cases), and also from the direct implications of the claims brought in cases like the Gunns case. The nature of Gunns' allegations of a "campaign" to interfere with its trade and business could, if argued successfully, effectively outlaw a whole range of activities (like attending meetings, making statements, lobbying government) which are not only lawful, but are core to our democratic rights.

In order to protect the public's right to participate in political debate and protest, law reform is needed. This paper notes legislation in the United States to protect this public participation and evaluates various Australian initiatives in the same direction. The new defamation laws introduced across Australia in 2005 have some good points in terms of protecting free speech, but don't go far enough or deal with the full extent of the problem – which increasingly is not limited to defamation actions. The Australian Greens have introduced bills into various state parliaments going beyond defamation, but ultimately these bills would rely on defendants proving an improper purpose on behalf of those who are suing them. In practice this would prove difficult and therefore the protection of free speech offered would be limited. A more far-reaching model put forward by lawyers in South Australia provides a better starting point for such legislation, while human rights legislation might also make a contribution to protecting the rights and ability of the community to participate in political debate.

Whatever the particular mechanism, the basic parameters for protection of the public's rights and ability to participate in public debate and political protest are clear:

- It requires purpose built legislation
- The legislation must go beyond defamation law and include all potential civil litigation
- The legislation must be framed around a positive right to public participation, not around a question of whether a case is an abuse of process (although outlawing such abuses may be part of the legislation)
- The right to public participation must be paramount so long as it is exercised genuinely, not actuated by malice or personal gain, and is within the broad parameters of being non-violent and respectful of property and race, sex, religion and sexuality.

The Gunns Case In Summary

Gunns v Marr & Ors

3 Plaintiffs v 20 Defendants

A billion dollar company
2 contractors
v
17 individuals
3 community groups

Version 3 of the Statement of Claim

714 paragraphs
221 pages
67, 462 words
600 pages of Further Particulars (details)
194 people referred to

The "Gunns20" Defendants

1. The Wilderness Society National Campaign Director, Alec Marr
2. The Wilderness Society Tasmania Campaign Coordinator, Geoff Law
3. The Wilderness Society CEO, Russell Hanson
4. The Wilderness Society former Corporate Campaigner, Leanne Minshull
5. The Wilderness Society Audio-Visual Producer, and award winning film maker, Heidi Douglas
6. The Wilderness Society Inc
7. Activist and Huon Valley resident, Adam Burling
8. Activist and journalism student, Louise Morris
9. Artist and musician, Simon Brown
10. Senator Bob Brown
11. Greens Tasmanian MP, Peg Putt
12. Long time environmentalist and author, Helen Gee
13. Activist Ben Morrow
14. Lucaston grandmother, Lou Geraghty
15. Sydney law student, Neil Funnell
16. Independent film maker, Brian Dimmick
17. Huon Valley Environment Centre
18. Burnie Dentist, Peter Pullinger
19. Hobart physician, Frank Nicklason
20. Doctors for Native Forests Inc

PART 1 THE PROBLEM

The Gunns Case, and More

In December 2004 the Tasmanian forestry giant, Gunns Ltd, sued The Wilderness Society, five of its staff, and 14 other conservation groups and individuals (including Green Members of Parliament, Bob Brown and Peg Putt).[1] Somewhat bizarrely, the case about protests over Tasmania's forests was brought in the Victorian Supreme Court where Gunns claimed some $6.3m damages alleging that the defendants had interfered with the company's trade and business and contractual relations, and that the conservationists had conspired to injure Gunns by illegal means. There were nine discrete actions in the claim which include media statements, what Gunns claim was unlawful lobbying of shareholders, customers and governments, and protest actions in the forests and at woodchip mills. And overlaying all these actions has been the notion of a broad campaign (or conspiracy) against Gunns which makes all defendants liable for all actions - even where no direct involvement in particular actions is alleged.

In July 2005, an amended statement of claim was lodged but the claims were struck out by Justice Bongiorno,[2] and a third version of the statement of claim was lodged in August 2005.

The case was launched at a time when the Tasmanian forest issue was the centre of major political controversy. Conservationists had long protested the logging and woodchipping of old growth forests, the burning and 1080 poison which were part of standard forestry practice, and the consequences of these actions for the forests and wildlife of Tasmania. The campaign stepped up in mid 2004 with large rallies and public meetings across the country on World Environment Day. The widespread community concern led to Tasmania's forests becoming a major issue in a Federal Election in October 2004 where both sides of politics committed to protect the forests (albeit to different degrees). When the case was launched, the arguments over the details of the government's forest package had not been resolved. Just days after the writ was issued, Gunns announced a controversial proposal to build a major pulp mill in the north of Tasmania.

Of course the Gunns case is not the first time environmentalists or community activists have been sued as a result of their campaigns. Brian Walters' book,

1. *Gunns v Marr & Ors*, Victorian Supreme Court, No. 9575 of 2004.
2. *Gunns Limited v Marr & Ors* [2005] VSC 251 (18 July 2005).

Slapping on the Writs, documents a number of cases from the infamous and allegedly defamatory bumper sticker "Barwon Water – Frankly Foul" to the threats and cases over the proposed Oyster Point development at Hinchinbrook Island in north Queensland. Included in Walters' list are the Hindmarsh Island Bridge defamation cases in the 1990s where some five cases were brought against 14 individuals and community groups, as well as nine cases against commercial media outlets.[3] The last of those cases only ended in 2005.

The Hindmarsh Island Bridge Defamation Cases

Tom, Wendy and/or Andrew Chapman

- **v** Dean Whittaker
- **v** Margaret Allen & Neal Draper
- **v** John Coulter & Australian Democrats
- **v** Conservation Council of SA, Friends of Goolwa & Kumarangk, Kumarangk Coalition, Chris & Greg Lundstrom
- **v** CCSA, Margaret Bolster, David Shearman & Richard Owen
- **v** Rural Press Ltd (*Victor Harbor Times*)
- **v** Nationwide News (*The Australian*) - twice
- **v** ACP Publishing (*The Bulletin*)
- **v** Festival City Broadcasters (*Radio 5AA*)
- **v** Australian Broadcasting Commission
- **v** Network Ten Ltd (TV Channel 10)
- **v** Channel 7
- **v** John Fairfax Publishing (*Australian Financial Review*)
- **v** Federal Capital Press (*The Canberra Times*)

...the Gunns case is the highest profile of a wave of new cases which use industrial and commmercial law in relation to environmental and other community protest.

However, the Gunns case is not only larger than those cases, it is of a different nature. The cases Walters documents were all defamation cases, but the Gunns case is the highest profile of a wave of new cases which use industrial and commercial law in relation to environmental and other community protest. In 2000, after a midnight "inspection" of a battery egg farm, Animal Liberation South Australia was sued for trespass and for interference with trade and business and conspiracy to injure.[4] In 2004, People for the Ethical Treatment of Animals (PETA) and a variety of other individuals were sued for conspiracy and for hindering trade (an offence under the *Trade Practices Act*) by Australian Wool Innovation. PETA and others had (allegedly) called for a boycott of Australian wool in the US over the issue of mulesing.[5] And Animal Liberation SA and activist Ralph Hahnheuser are also being sued for trespass and hindering trade and commerce – again under the *Trade Practices Act* – for allegedly causing damage to trade by putting pizza ham in the feed of sheep destined for export to the Middle East, thus allegedly rendering it unfit for that market.[6]

3. Brian Walters, *Slapping on the Writs: Defamation, Developers and Community Action* (1st ed, 2003). Ch See also, Bruce Donald 'Defamation Actions Against Public Interest Debate' (Paper delivered to the Free Speech Committee of Victoria 22nd April 1999).
4. While the case is still going, the self-represented defendants have been successful in getting these economic torts withdrawn after obtaining orders for the discovery of financial records of the chicken farmer (as part of making out his case, the farmer was obliged to demonstrate economic loss).The case is now "simply" an action for trespass, and a defamation action over the publication of a T-shirt. *Takhar v Animal Liberation SA Inc & Or,* SASC 754 of 2000.
5. *Australian Wool Innovation v Ingrid Newkirk & Ors*, Federal Court [2004] NSD 1630. Mulesing is cutting flesh from the rear of sheep to avoid painful flystrike - or to avoid the cost of shearing that part of the sheep ["crutching"]).
6. *Rural Export & Trading (WA) Pty Ltd and Or v Ralph Hahnheuser and Animal Liberation SA Inc*, Federal Court [2004] V495.

Most recently, back in the forests, one of the Gunns defendants, Louise Morris, has been sued in a separate matter for conspiracy and unlawfully interfering with trade and business in relation to logging protests in the Dennison Valley.[7] And in November 2005, NSW logging contractor Bruce Mathie and Sons sought injunctions against nine forest activists who had allegedly interfered with access to logging coupes in Wandella State Forest in NSW.[8]

The most obvious impact of these cases and threats is the possible effect of scaring people into silence.

The cases mentioned here are exemplary rather than an exhaustive list of all cases against activists and the type of damages claimed varies. Some, like the pizza ham action and some actions in the Gunns case, are allegedly a direct stopping of business, while the PETA case and most of the Gunns case against The Wilderness Society are about broader political processes. However, taken together, these sorts of actions suggest that industrial and commercial torts (which have long been used against trade unions - indeed the conspiracy torts were developed in the nineteenth century to prevent the development of trade unions) now appear to be escaping their origins and entering a broad political arena. In this arena they have serious implications for civil liberties and the ability of the community to participate in protest and political debate.

Threats

Beyond the actual cases, there is also an alarming incidence of the issuing of threats to sue. A high profile recent example of this was in the Queensland town of Maleny where community activists were threatened with litigation for damages allegedly arising from their actions in opposing a supermarket development in their town. To date no suits have been launched, but the threats still caused confusion, concern and alarm. Similarly, threatening letters were also issued to numerous people in the Hindmarsh Island Bridge and Hinchinbrook disputes,[9] and in the 2002 South Australian state election, presumably as a marker that SA is a leader in civil litigation against activists, three separate ministers threatened to sue community groups for statements critical of the government.[10]

While often no actual litigation follows a legal threat, the legal letterhead is often enough to panic recipients and many of the implications are the same as when cases are actually brought.

Impacts on Free Speech

The issue in this paper 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.

The most obvious impact of these cases and threats is the possible effect of scaring people into silence. This "chilling effect" of large lawsuits on public debate has

7. *Harback Logging Pty Ltd v Morris*, Supreme Court of Tasmania, No. 452 of 2004. Gunns itself had twice previously sued forest protesters (although the cases were discontinued). *Gunns v Brown & Ors,* Supreme Court Tasmania 251 of 2003, *Gunns v Welch & Ors,* Supreme Court of Tasmania, 178 of 2004.
8. *Bruce Mathie and Sons Pty Ltd v Daines & Ors* [2005] Supreme Court of NSW. More details at <http://www.thebegavalley.com/4159.0.html>
9. Walters, above n 3, 42, 46-8.
10. The groups included The Wilderness Society SA Branch, and Animal Liberation.

As the European court recently found in relation to the McLibel case, where hamburger giant McDonalds sued two activists from a small London group, situations where individuals with few resources are pitted against large companies are inherently unjust.

been noted in a variety of cases. After groundbreaking study of such cases in America, authors George Pring and Penelope Canan coined the term SLAPP suits (Strategic Litigation Against Public Participation) to describe cases which have the effect of chilling free speech.[11] However, as the Conservation Council of SA was sued for referring to litigation brought against them as a SLAPP suit, it is a term perhaps best avoided in Australia.[12]

This chilling effect comes from both the confusion about being thrown into a foreign system and from the financial threats to defendants. When a case is begun there are endless phone calls and meetings as defendants scramble to try to understand the legal claims made against them. The sums of money involved are truly scary for many people who risk losing houses and life savings, sometimes over fairly trivial allegations or complaints about perhaps one sentence out of countless statements made in the course of a campaign.

As the European court recently found in relation to the McLibel case, where hamburger giant McDonalds sued two activists from a small London group, situations where individuals with few resources are pitted against large companies are inherently unjust.[13] The time and resources required to fight cases are an ongoing strain. Even where cases are withdrawn or do not go to trial, the immediate costs and the potential of enormous costs can hang over defendants for years. And if the case does go to trial, the actual costs can be beyond the reach of many people, particularly because even if the defendants eventually win, a costs award is unlikely to cover anywhere near all the expense. Walters points out that may community activists have chosen to apologise for statements simply because they were not in a position to fight a protracted and expensive case.[14] Such decisions are not without personal and political anxiety.

The personal costs of all these cases is high: stress, anxiety, exhaustion; relationships and family life stretched, sometimes to breaking point.

There is also a perceived and confusing element of randomness where sometimes people are sued for comments previously made by others with no complaint (as in the Hindmarsh Island Bridge cases), or where there is no clear reason as to why some people were sued and not others (eg. the Gunns case). The legal lines are not clear. For example, who would have thought hosting meetings in your house could be used as a claim against you?[15] In the Hindmarsh Island cases defamation claims which were identical were struck out as being unarguable in some cases but not others. It was completely unclear why even within one case similar claims were struck out and others not – and the judges continued to disagree with each other as to what was defamatory all the way up to and including the Appeal court.[16] With this lack of clarity on the bench, it is impossible for ordinary members of the community to determine what is appropriate to say on any given issue. The personal costs of all these cases is high: stress, anxiety, exhaustion; relationships and family life stretched, sometimes to breaking point. By the time of the second appeal in one of the Hindmarsh Island bridge cases, one activist reported feeling physically sick every time they had to address the case. In

11. George W Pring and Penelope Canan, SLAPPS: Getting Sued for Speaking Out (1st ed, 1996), 3.
12. *Chapman & Ors v Conservation Council & Ors* [2002] SASC 4 (21 January 2002), 77.
13. *Case of Steel and Morris v The United Kingdom* (15 February 2005) Application No. 68416/01, Eur Court HR. Judgement cited by Lisa Ogle, 'Should Corporations be entitled to sue for defamation?' (Paper presented to the EDO National Conference, Sydney, 14 May 2005), 7-8.
14. Walters, above n 3,17, 26.
15. Walters cites a case in Sydney where a Marrickville resident was sued for hosting a meeting of residents concerned about a local development. Walters, above n 3, 34-35. There are also allegations in the Gunns case of people hosting meetings in their house as part of the campaign. See *Gunns v Marr & Ors*, Statement of Claim (Version 3), para 271, 706 (n).

addition, ironically, given that these legal cases are alleged to be about defending the rights and reputations of those bringing the case, the litigation can also give rise to legally privileged attacks on the reputations of the defendants. Richard Owen, an award-winning environmentalist, underwent sustained attack on his reputation throughout the Conservation Council's Hindmarsh Island Bridge trial, and the judgement was offensive to him and others.[17] In the Gunns case, serious allegations of criminal behaviour were made against a number of individuals and received wide publicity – only to be withdrawn against several of the defendants in later versions of the statement of claim.[18]

The Campaign of Richard Owen

In a scathing judgement, Justice Williams described the award-winning Hindmarsh Island environmentalist, Richard Owen as "clever", "prepared to embrace almost anything (short of physical violence)" and described Mr Owen's campaign as "ugly" (para 106). The broad community base of the community campaign was ignored, but the judge outlined the specifics of this ugly campaign, as follows:

In summary Mr Owen involved himself in the following steps:

1. He approached a meeting of the Conservation Council on 21 May 1993 and solicited the Council's support for opposition to the bridge building on environmental grounds.
2. He secured appointment to Conservation Council's EARAG sub-committee (Environmentalists and Aborigines Reconciliation Action Group).
3. He took steps to incorporate an organisation called the Friends of Goolwa and Kumarangk (a group of anti bridgers)…
4. He wrote letters … to members of Government and he provided detailed argument (upon reading of planning documents) for overturning the bridge building arrangements…
5. He provided briefing material to the media …
6. He participated in covert operations* conducted under the name "Kumarangk Coalition" for the purpose of putting activities beyond the reach of court injunctions.
7. He acted as a public face of the Kumarangk Coalition.
8. He became a member of the Executive of the Conservation Council and used that position … for the purposes of protest against the building of the bridge.
9. He went in search of argument justifying opposition to the bridge but he also looked to see how those involved with the bridge could be "targeted". ...
10. He took part in the "counselling" of anti bridge pickets and he personally picketed the bridge site and attended protest meetings.
11. He participated in the composition of various letters and leaflets (… expressed in extravagant terms in its criticism of developers).

* Editors note: No "covert operations" were identified in the judgement.
Chapman & Ors V Conservation Council of SA & Ors [2002] SASC 4 (21 January 2002), para 99, 106 and 101.

16. Greg Ogle, 'Defamation Processes and the Hindmarsh Island Bridge Campaign' (1999-2000) 4, Indigenous Law Bulletin, 8. The Appeal judgement is at *Conservation Council of SA & Ors v Chapman & Ors*, [2003] SASC 398.
17. *Chapman & Ors v Conservation Council & Ors* [2002] SASC 4 (21 January 2002). For commentary, see Greg Ogle, 'Just When You Thought It Was Safe to Talk About Hindmarsh Island' (2002) 5, 15 *Indigenous Law Bulletin*, 16-17.
18. See media release, The Wilderness Society, "Gunns Should Apologise for Legal Claims" (Media Release 25 November 2005) <http://www.wilderness.org.au/campaigns/corporate/gunns/apology/>

...experienced activists can also turn the court process into publicity for their case, but this rarely balances the time input in the long term, and the boldest of activists can also be silenced by the fears of others around them.

Even where cases are brought against hardened activists unlikely to be intimidated, the writ can still impact on political debate. Experienced activists have been prevented from participating in public debates simply because the amount of work required to fight a case stopped or detracted from the campaign activity they would otherwise undertake. In the Gunns case, while the campaign to protect forests continued in Tasmania, The Wilderness Society initially had to pull senior campaigners off campaign work in other states to deal with the case – something which impacted on its ability to participate in vital environmental debates far removed from Tasmanian forests.

Of course experienced activists can also turn the court process into publicity for their case, but this rarely balances the time input in the long term, and the boldest of activists can also be silenced by the fears of others around them. This was certainly the case in the Hindmarsh Island campaign and, in the Gunns case, a student newspaper refused to print an article on the problems with Gunns' proposed pulp mill for fear of litigation. The publishers of the newspaper withdrew the article after seeing a letter from Gunns which simply said that "Gunns Limited has serious concerns with statements and assertions contained within."[19] There was nothing more, despite the request from the author of the article for Gunns to specify any problems they had with the article.

Escaping Economic Actions

The escaping industrial and commercial claims open the way not just for larger damages claims than would be the case in defamation matters, but also for suits against a much wider range of activities. Their scope is so wide (and so vague) that they threaten to make normal political protest impossible.

These chilling effects of civil litigation against community activists are a serious impediment to public participation in political debate. However, while these effects are real and serious, they remain only derivative effects – by-products of the lawsuits. Perhaps even more chilling is the direct impact on public participation of the escaping commercial and industrial litigations.

The escaping industrial and commercial claims open the way not just for larger damages claims than would be the case in defamation matters, but also for suits against a much wider range of activities. Their scope is so wide (and so vague) that they threaten to make normal political protest impossible. This is particularly the case with the claim of interference with trade using unlawful means, and especially when, as in the Gunns case against The Wilderness Society, it is combined with conspiracy claims or claims of an overarching campaign.

Interference with or hindrance of trade is a generic claim which can be brought under the *Trade Practices Act 1974* or as a common law tort of interference with trade and business by unlawful means, although the tort has only been successfully claimed once in Australia.[20] The unlawful acts required as part of the tort may be fairly trivial (eg. regulatory breaches or minor trespass, including acts which are not damaging to the party bringing the case), or they may be acts like defamation which could have been pleaded as a separate tort. More importantly, under the

19. The article has since been published on the internet, but not to the student population it was meant for. The article is at: <http://tasmaniantimes.com/index.php/weblog/comments/big-brother-and-the-pulp-mill/>
20. *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* [1991] 1 VR 637.

Trade Practices Act certain environmental activities are immune from claims of hindrance with trade, so the tort potentially allows a mechanism to bypass the immunity provided by parliament – an immunity granted to ensure freedom of environmental protest.[21]

Of course the traditional claim of plaintiffs (ie. those bringing the case) is that these laws and lawsuits do not prevent protest but rather protect economic rights. In this view, protest to and about government is fine, but not protest to do with private business. This distinction between "legitimate lobbying" and unlawful campaigning (a distinction drawn in the Hindmarsh Island bridge judgement[22]) ignores (or seeks to keep beyond reproach) the power of corporations in modern society. It is also unworkable at the level of community politics. There are historical examples where successful campaigns sometimes result in loss or disruption to the businesses which were engaged in the activity campaigned against. Presumably, those with the British salt monopoly could have sued Gandhi for his salt march, South African businesses may have had a claim against anti-apartheid activists and the cotton kings of pre-civil war America would have a claim against anti-slavery advocates. Few would dispute the legitimacy of campaigning on such issues, even if there is a resultant economic loss. Yet it is precisely such economic loss which gives rise to these legal claims.

....the traditional claim of plaintiffs (ie. those bringing the case) is that these laws and lawsuits do not prevent protest but rather protect economic rights. In this view, protest to and about government is fine, but not protest to do with private business.This distinction between "legitimate lobbying" and unlawful campaigning (a distinction drawn in the Hindmarsh Island bridge judgement) ignores (or seeks to keep beyond reproach) the power of corporations in modern society.

Whether in fact any economic loss is actually suffered as a result of community protest is a matter for the court to decide in any particular case. However, beyond just the generic issue of suing conservationists for alleged economic loss, the Gunns pleading adds an additional and concerning way of rendering protest unlawful through its pleading of conspiracy and an overarching "campaign against Gunns".

Conspiracy/"Campaign" Implications

When the case was first brought, Gunns pleaded an overarching conspiracy against them by all the defendants. While the pleading was confusing, the allegation of conspiracy proceeded on the basis that all defendants were liable for all actions in the case – even where no direct involvement in particular actions was pleaded. This overarching conspiracy was changed in the second and third pleading of the statement of claim to a pleading of an overarching campaign against Gunns – the campaign itself being an interference with trade and business by unlawful means. The unlawful means were largely the actions which formed the rest of the case, but the "campaign" was viewed as being more than the sum of those acts and a further $500,000 was claimed as damages for the campaign.[23]

This "campaign" included not just the alleged unlawful actions in the writ, but as Gunns' lawyer explained to court, it also involved a host of other alleged actions which were interwoven with the unlawful activity. For example, in reference to the Japanese customers, what was complained of was:

> a whole barrage of representations being made, threats, both express and

21. Commonwealth *Parliamentary Debates*, Senate, 11 October 1996, 4017, 16 October 1996, 4244.
22. *Chapman & Ors v Conservation Council & Ors* [2002] SASC 4 (21 January 2002), 94.
23. *Statement of Claim (Version 3) Gunns v Marr & Ors*, above n 2,708.

> implied, information being communicated, photographs of demonstrations going on in the Styx and elsewhere, with Japanese banners explaining what people are doing and reports in newspapers, media releases and the like, management advice, representations to government, attacks on government and so on ...[24]

Various defendants allegedly took part in this campaign often simply by attending meetings, training protesters, or because the defendants and others were claimed to be "agents" for other defendants, or had a common strategy or understanding of how they should protest. According to Gunns' lawyers, this common understanding triggered action at a "direction or a signal from one of the Generals" of The Wilderness Society or other groups.[25]

The alleged unlawful campaign against Gunns includes a whole range of actions which are not only legal in themselves, but are also core to our democratic rights (eg. lobbying government).

This centralised "command-control" view of a social movement may be at odds with most people's experience of the anarchy of movements, but a number of politically concerning issues come out of this legal attack. The alleged unlawful campaign against Gunns includes a whole range of actions which are not only legal in themselves, but are also core to our democratic rights (eg. lobbying government). Yet these things suddenly become suable when viewed as part of an overall campaign which includes other allegedly unlawful acts – even when those acts are done by other people.

Concern about such implications will directly affect the ability of the community to meet together if conspiracy claims, or claims of being part of an overarching campaign, may mean that people can be held responsible for actions in which they had no part, simply because they shared the same political objectives, were movement leaders, or because they may have worked with particular people on some other actions. While conspiracy law requires an actual agreement to do particular activities, the fact that such claims can even be made (and the subsequent fear of being tied into such claims) is concerning because the logic of the argument would make any notion of a coalition of groups impossible. Creating networks, sharing skills, spreading news of an issue into other relevant community groups, in short, all the things that are generally regarded as building a successful community campaign, would expose organisations to potential liabilities for the actions of other groups or individuals who may have participated in those campaigns.

Further, on this logic, any community organisation would have to vet its volunteers and staff to ensure that they did not communicate with anyone likely to commit an unlawful act in a similar political cause. On these lines, one judge has interrogated an activist on why he continued to associate with a protestor who had removed survey pegs from a construction site. This judge even dug out the particular passage of the criminal code and got the activist to read it out.[26]

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24. Transcript of Proceedings, *Gunns v Marr & Ors* (Victorian Supreme Court, 6 July 2005), 51.
25. See para 706 of the Statement of Claim (Version 3) Transcript of Proceedings, *Gunns v Marr & Ors* (Victorian Supreme Court, 6 July 2005), 51.
26. *Chapman v Conservation Council of SA & Ors* [2002] SASC 4, 1692 (Williams J, during argument, 1692).

The legal lines of what constitutes conspiracy, agency and liability are also unclear, and these issues, along with the rest of the pleading, have been challenged in the Gunns case. However, even where such strike outs are successful, the issue is largely about the form of the pleading, not the implications of the claims being made. There remains the threat that such cases can be brought as long as the form of the pleadings is in order.

In these circumstances it is simply impossible even for well-informed community activists to understand the legal limits to protest, and if they sought legal advice it may well be something like:

> *"Well, you might be able to call for boycotts or the stopping of whole industries, but not call for the same thing against any individual player in that industry; and if you do refer to any individual company, then you can't criticize or try to stop anything it currently has a contract for, but you may be able to call for a boycott or stopping of future actions (where there is no contract), unless the tort of interference with trade and business is found to exist in Australia (which we don't fully know) in which case you can't do that either – and in all cases you must act alone or else you could be sued for conspiracy."*

This hardly encourages public participation in political debates and the experience in several cases has been that one of the things which silences defendants is their own lawyer's advice. This is a problem not of the lawyers, but of the law itself because the law simply fails to protect the public's right to free speech and political participation. The financial and emotional costs to the individuals involved, and the costs to the community if we do not have free public debate, mean that it is time to change those laws.

PART 2 TOWARDS A SOLUTION

The Need for Law Reform

There is no doubt that lawsuits against community activists can and do have a chilling effect on freedom of speech and the rights and ability of the community to engage in political action. As one US judge said, "short of a gun to the head, a greater threat to [free] expression can scarcely be imagined"[27]. However, it is not all gloom and doom. The scale and high profile of the Gunns case gives the incentive and the opportunity to bring about law reform to ensure that the right to public participation is properly protected.

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Of course there are alternatives to law reform. Brian Martin has encouraged the art of "backfire" – using the court processes and publicity to make SLAPP suits backfire by generating more publicity for the cause.[28] This approach was made famous in the McLibel case which generated such bad publicity for McDonalds that it effectively took such litigation off the agenda for major corporations for more than a decade. Most of the suits against community environmental campaigners (at least in Australia) in the last ten years have been brought by medium size businesses – often developers with all their eggs in one basket. Similarly, Animal Liberation in SA has been adept at using the court processes for publicity, and it has consciously tried to develop a paradigm for dealing with these cases in the courts.

As inspirational as such cases and struggles can be, in the end these possibilities are not available to all defendants. Some cases simply will not be able to capture the public imagination, or defendants may lack the resources to use the case politically; and even where there are such publicity/political wins, these do not necessarily translate into legal wins, so there can still be a big cost to defendants. Ultimately, any such "backfire" initiatives need to be supplemented (and hopefully made redundant) by law reform.

The US Examples

The United States already has had considerable law reform activity. Pring and Canaan, who first described the problem with SLAPP suits also proposed legislation to protect public participation based on the US First Amendment.[29]

27. NY Supreme Court Judge J. Nicholas Colabella in *Gordon v Marrone* 155 Misc. 2d 726, 736 (Sup. Ct. 1992).
28. Brian Martin and Truda Gray 'How to Make Defamation Threats Backfire' (2005) 27, 1 Australian Journalism Review 157, 160.
29. Pring and Canaan, above n 11, 201.

...law reform is on the agenda – albeit somewhat timid reform from the perspective of guaranteeing the community's right and ability to participate in public debate and political activity.

Many American jurisdictions have now introduced anti-SLAPP legislation in various forms.[30] This legislation ranges from limited models which allow for summary dismissal of actions brought for an improper purpose (British Columbia), or dismissal of actions with no prima facie merit (California), to more far-reaching laws like the Rhode Island, Massachusetts and Minnesotta statutes where cases which relate to reasonable public participation can be dismissed regardless of the merits of the case.[31] The differences in these models are discussed below in relation to potential legislation.

In Australia there is no such legislation to protect public participation in the political process. However, law reform is on the agenda – albeit somewhat timid reform from the perspective of guaranteeing the community's right and ability to participate in public debate and political activity.

Defamation Law Reform

In November 2004, nearly 25 years after the Australian Law Reform Commission recommended the adoption of uniform defamation laws, the State Attorneys-General agreed to a model set of defamation provisions which each state would enact by 2006. This agreement was itself prompted by the Commonwealth threatening to use its powers in relation to media and telecommunications to legislate new laws over the top of the states if the states did not act.[32] The driver for these reforms was the need for uniformity in laws across Australia rather than the need to grant additional protections for free speech. Nonetheless, there are a variety of provisions in the new uniform laws which do promote freedom of speech and have been welcomed by a range of stakeholders.[33]

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Arguably the most important initiative of the new laws is the removal of the rights of corporations to sue for defamation.[34] The arguments for and against corporations' rights to sue for defamation have been summarised elsewhere,[35] and were key to the debates in various parliaments.[36] Suffice to say here that the imbalance of resources when a corporation sues a community group or activist has long been identified as fundamentally unfair and one of the key things which makes defamation law a vehicle for chilling public participation.

However, on the one hand the removal of a corporation's right to sue in defamation is a fairly blunt instrument for dealing with the problem of SLAPP suits because it stops all defamation actions, not just those relating to genuine acts of public participation. But on the other hand, this reform by no means guarantees the safety of a community member in criticising corporate behaviour. Private corporations employing less than 10 people can still sue in defamation, and the reform would have done nothing to prevent the litigation in the Hindmarsh Island

30. 25 US states have passed Anti-SLAPP Laws, with an additional 10 bills pending in other states. See *Other States: Statutes and Cases* (1996) California Anti-SLAPP Project <http://www.casp,net/menstate.html> at 23 November 2005.
31. Travis Bover and Mark Parnell, *A Protection of Public Participation Act for South Australia*, Environment Defenders Office (SA) Inc. at <http://www.edo.org.au/edosa/Research/Public%20Participation.htm>
32. Angus Martyn *The Commonwealth Plan for Reforming Defamation Laws in Australia* (2004-05) Research Note, No.4 Parliamentary Research Service <http://www.aph.gov.au/library/pubs/rn/2004-05/05rn04.pdf> at 23 November 2005.
33. Free Speech Victoria, Discussion Paper of the State and Territory Attorneys-General proposal for Uniform Defamation Laws; Media Entertainment and Arts Alliance, "Introducing Uniform Defamation Laws" http://www.fsvonline.org/docs/, Editorial, 'One defamation law for all', *The Age* (Melbourne), 9 March 2005, 18.
34. s9, Model Defamation Provisions.
35. Lisa Ogle, above n 13.
36. See: New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 September 2005, 89; Victoria, *Parliamentary Debates*, Legislative Assembly, 4 October 2005, 1122; South Australia, *Parliamentary Debates*, House of Assembly, 13 September 2005, 3313; Queensland, Parliamentary Debates, Legislative Assembly, 9 November 2005, 3864; Western Australia, *Parliamentary Debates*, Legislative Assembly, 13 September 2005, 5160.

bridge cases where the party bringing the cases was not the development company but was the individual directors of the company.

More than that, as the SA Attorney-General was keen to emphasise, corporations retain ample legal instruments to defend themselves from erroneous claims and attacks, namely actions in tort (injurious falsehood) or misrepresentation under the *Trade Practices Act*.[37] For the individual and community activist, the end result of the new defamation laws may simply be a change in the types of actions brought against them (although even this might be an advance in that these other actions may be harder to sustain as they usually require evidence of actual harm, whereas defamation law simply assumes damage to reputation).

The major winner from the abolition of the corporation's right to sue in defamation would appear to be the big media players who are now assured that when a defamation case is litigated, they are the only major corporates at the table. However, a free commercial media is part of a vibrant democracy, and if investigative journalists and community activists get more speaking space in that media without the sword of defamation hanging overhead, the abolition of the corporate right to sue for defamation will be a welcome advance.

The uniform defamation laws also contain other provisions which will enhance the space for public debate, including:

- the limitation of the time period for bringing actions to 12 months;[38]
- the ability to stop litigation or have a defence by making a reasonable offer to make amends prior to litigation;[39]
- the extension of the defence of truth to all jurisdictions.[40]

The defence of innocent dissemination being extended, including to cover internet service providers, will also help as legal threats aimed at ISPs in the past have been successful at getting material removed from campaign websites.[41]

However, in terms of a broad free speech agenda and community level politics, some of the changes, while going in the right direction, are simply tinkering at the edges. Abolishing exemplary damages (which have rarely been awarded) and capping damages payouts at $250,000 is fine, but the cost is still scarily high for ordinary people.[42] Many of the other modifications will need an engaged (and expensive) legal brain to be utilised for free speech.

Technical changes to already complex defences are not likely to give the community confidence in speaking out. Moreover, as noted above, defamation is only one area of civil law threat to free speech, and increasingly the cases being brought against community activists are not defamation cases.

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Moreover, as noted above, defamation is only one area of civil law threat to free speech, and increasingly the cases being brought against community activists are not defamation cases.

37. South Australia, *Parliamentary Debates, House of Assembly*, 13 September 2005, 3319 (The Hon MJ Atkinson, AG).
38. s12, Model Defamation Provisions.
39. s14-24, Model Defamation Provisions.
40. s29 Model Defamation Provisions.
41. s36, Model Defamation Rules extends the defence. For the story of the ISP being threatened, see Greg Ogle, 'Tricky Legal Business: The Impact of Legal Processes on the Campaign Against the Hindmarsh Island Bridge', (Paper presented at the Defending The Defenders: Protest, the Environment & the Law Conference, Sydney, 24 October 1998).
42. The changes are at s41 and s39 respectively, Model Defamation Provisions.

Greens' Law Reform Proposals

In response to the increasing number of cases against community activists which go beyond defamation, the Greens have introduced a broader "Bill to Protect Public Participation" into various state parliaments. These bills are largely based on draft legislation put forward by Brian Walters,[43] although the Greens are more explicit about "balance" in rendering the object of the bill as being to protect public participation while "at the same time preserving the right of access to the courts for all proceedings and claims that are not brought or maintained for an improper purpose".[44]

Beyond this good initiative on defamation, the Greens' bill allows a court to order payment of a security for costs or a summary dismissal of an action where a case is brought for an improper purpose. This appears to provide a mechanism for short-circuiting SLAPP suits, but the framing of the bill would limit its usefulness.

The Greens' bills constrain defamation actions by removing the rights of *all* corporations to sue, as well as removing the rights of individuals (eg. company directors or officers) to sue for comments about corporate behaviour. Additionally, the bills would remove the rights of politicians, public servants or public officials to sue for defamation for comments made about their conduct in office or their fitness for office (unless they could prove malice). These initiatives would certainly have prevented most of the litigation highlighted by Walters, and would generally provide adequate protection for public participation from defamation suits.

Beyond this good initiative on defamation, the Greens' bill allows a court to order payment of a security for costs or a summary dismissal of an action where a case is brought for an improper purpose.[45] This appears to provide a mechanism for short-circuiting SLAPP suits, but the framing of the bill would limit its usefulness. The bill is framed in reference to the improper purpose of the person bringing a case, defined as being the attempt to dissuade or punish political opponents for the act of public participation. In practice though, it may prove near impossible to prove an improper purpose because the person bringing a case would simply point to alleged damage and their right to their day in court. In a sense, the Greens' bill still operates in the paradigm of those bringing a case - asking the question about their motive - rather than focusing on the *effect* of a case on the community's right to public participation.

The definition of public participation utilised in the Greens' bill would also need to be widened if the bill was to fully protect the right to free speech and political protest. The definition in the bill is "communication or conduct aimed at influencing public opinion, or promoting or furthering lawful action by the public or by a government body, in relation to an issue of public interest", but the bill explicitly excludes a range of activities.[46] Many of these excluded activities often form part of peaceful community protest, for example, a simple banner drop could be still be suable because of exclusions for acts that constitute trespass or the catch all of interference with rights to property. While criminal sanctions are normally expected to apply for such activities, it is a different question as to whether civil liability is appropriate where a defendant can be penalised literally thousands of

43. Walters, above n 3, 66-75.
44. s3 in the Protection of Public Participation Bill 2005 (SA), as tabled in the House of Assembly, 21 September 2005. The defamation provisions in the Greens' bill were not included in the bill put to the ACT parliament. Court Procedures (Protection of Public Participation) Amendment Bill 2005 (ACT).
45. Ibid., s10, s11(4).
46. Ibid., s5 (1).

times the amount of money that the parliament has decided is the appropriate fine for a criminal action.

Many of the actions in the Gunns case would not be protected by the Greens' bill because the Gunns case is an action for trespass or for unlawful interference with the rights of the company, or because the actions aimed to influence corporate rather than public or government behaviour. Many of these actions would therefore fall outside of the definition of the public participation which to be protected.

The Next Step

Thus while the Greens' bill would provide an important step for the protection of public participation, ultimately it does not go far enough. A model needs to be developed which begins from the premise that public participation is one of the most fundamental rights in a democratic society and needs to be protected by strong legislation.

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One proposal which fits this model has been put forward by Bover and Parnell in a paper released by the South Australian Environmental Defenders Office. The paper discusses the need to protect public participation, and offers guidelines (drafting instructions) for a model bill (Reproduced in Appendix 1 here). They define public participation widely:

> communication or conduct aimed, in whole or in part, at influencing public opinion, or promoting or furthering action by the public or corporations or by any government body, in relation to an issue of public interest, but does not include communication or conduct that:
>
> 1. constitutes vilification based on race, sex, sexuality, ethnicity, nationality or creed, [per relevant State and Commonwealth legislation]
> 2. causes or threatens physical injury,
> 3. causes damage to property,
> 4. attempts to incite others to cause or threaten physical injury or damage to property.[47]

This is clearly a wider definition than the Walters/Greens' bill in that it lacks exclusions for such things as trespass (although criminal and property damage remains suable),[48] and perhaps more importantly, it explicitly includes influencing corporate behaviour as a legitimate and protected activity.

The Bover-Parnell model establishes public participation as a positive right and effectively provides three mechanisms to protect that right:

1. a court declaration as to public participation (s5);
2. summary dismissal of claims relating to public participation (s6) ;
3. the introduction of a statutory tort of Improper Interference with the Right to Public Participation (s7).[49]

47. See s4 of the Draft Bill proposed by Travis Bover and Mark Parnell, A Protection of Public Participation Act for South Australia, Environment Defenders Office (SA) Inc. at <http://www.edo.org.au/edosa/Research Public%20Participation.htm>
48. The Bover-Parnell bill also lacks the exclusion for subjudice communications and commercial advertising and breaches of court orders which are in the Greens' bill, though this is probably more of an oversight than an intention to extend the definition of public participation.
49. Draft Bill, above n 47.

In the first instance, if a person is threatened with legal action which they believe is inconsistent with their right to public participation, then that person can apply to a Magistrate's court for a declaration that the conduct complained of was an act of public participation. Such a declaration would carry substantial moral and political weight. Given that such an order would be accompanied by a costs order, and would open the door to summary judgement if proceedings were brought, it is hoped that this provision would provide a substantial disincentive to bring SLAPP type actions.

If however legal actions were brought, a defendant would have a right to bring an application to dismiss the action – with the defendant having only to prove that their conduct was an act of public participation and it was reasonable in the circumstances. The intention of those bringing the case is irrelevant here. The logic is simply that if the conduct complained of is a genuine act of public participation, then it should be protected. It is a much more realistic ask for a defendant to establish prima facie that their own conduct was reasonable than to have to try to establish that the motive of the person bringing the case was improper. This would make the summary dismissal provision usable and provide a level of protection for public participation, both through the court process and also because community activists could be more confident that a case would not go forever and that they could put their side at an early stage.

...the aim of the bill proposed by Bover and Parnell is not to give a carte blanche to all attacks on corporate behaviour.

Potential Problems

Given the objection of many (mainly Liberal) politicians around the country to the removal of corporations' right to sue for defamation, it is important to note that the aim of the bill proposed by Bover and Parnell is not to give a carte blanche to all attacks on corporate behaviour. For instance, in the defamation debate in the South Australian parliament, an MP raised an example of the need to protect a corporation where a competitor or someone with a grudge claimed that the food from a particular restaurant had given customers food poisoning.[50] This should still be actionable, although Bover and Parnell's definition of the public participation which is to be protected may be problematic here. Arguably even this type of attack on a corporation by a competitor is still be aimed at "influencing public opinion" or promoting particular actions by corporations and might therefore come under the definition of public participation to be protected. However, this is clearly not the intention as the authors suggest that:

> The complete test for whether an instance of public participation constitutes an acceptable exercise of the right and is therefore exempt from litigation would require the defendant to demonstrate that there were honestly held and sufficiently arguable reasons behind the public participation and that the public participation was motivated in whole or in part by the aim of influencing public opinion or promoting or furthering action by the public or by any government body.[51]

50. This was an example raised in the South Australian parliament debates on the defamation laws, where it was rebuffed because the restaurant owner would still have rights to sue for injurious falsehood or under the *Trade Practices Act*. See South Australia, *Parliamentary Debates*, House of Assembly, 13 September 2005, 3317 (The Hon L Penfold, Member for Flinders).
51. Bover & Parnell, above n 47.

Following the Californian model, the onus is on the defendant to prove their act is one of public participation, but this can be established through a showing of facts in pleadings, affidavit evidence and, if necessary, in testimony at a summary hearing.[52] Again, this is an easier threshold for defendants than having to prove that those bringing the case acted improperly, but it does provide some level of protection against malicious claims masquerading as public participation. Thus, by showing their record of genuine concern for the environment, an environmentalist could be protected when criticising a development's environmental impact, but the protection would not apply if they had launched into an attack on the sexual politics of a developer.

Overall, the effect of the bill proposed by Bover and Parnell would be to make paramount and to protect the rights of public participation, even when there is a clash with an individual's economic right. While this may appear radical, the fact that legislatures in the United States have introduced similar anti-SLAPP legislation might suggest it is not as radical as first thought.[53]

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Abuse of Process

The third arm to the Bover and Parnell bill provides for a statutory tort of Improper Interference with the Right to Public Participation to enable defendants to sue if an action is brought or is maintained against them for the purpose of interfering with their right to public participation.

This formalises and arguably extends the existing tort of collateral abuse of process. This existing abuse of process tort allows for action where a court process is instituted for purposes beyond the purpose of the original tort. Thus, for instance, bringing a trespass claim should be about recovering damages or preventing future trespasses, not to punish, silence or harass political opponents who may have trespassed during the course of a protest. While this tort looks superficially attractive as an "anti-SLAPP cause of action, it has proved largely unhelpful. Beyond the difficulty of proving the intention of those originally bringing any action, until recently it was necessary to prove not just that a case was brought predominantly for improper motive, but that there was no proper motive at all.[54] The courts have also required that special damages need to be proven – ie. the ordinary legal costs are not enough to found the claim.[55]

Animal Liberation is South Australia has pleaded a counterclaim based on a SLAPP suit being an abuse of process, and while this counterclaim survived a strike out application, it remains to be seen what final approach the court will take. However, there appears little doubt that, where a defendant can prove that an original action was brought to improperly prevent or limit political participation, then the Bover-Parnell bill would clearly overcome the barriers of the common law tort and make such an abuse of process actionable.

52. Ibid.
53. s7 Draft Bill by Bover-Parnell.
54. The test now is whether the predominant motive for bringing the case was within the purposes of the tort. *Williams v Spautz & Ors* (1992) 179 CLR 509.
55. *Hanrahan v Ainsworth* (1985) 1 NSWLR 370, Hunt J at 374.

More Generic Solutions

Beyond the above types of laws specifically designed to protect public participation from the effects of civil litigation, there are also more general laws which may have a role. Human Rights legislation and a Bill of Rights are key possibilities here.

In response to issues raised by The Wilderness Society about the Gunns case, ACT Chief Minister, Jon Stanhope, pointed to the fact that the ACT Human Rights Act would guarantee freedom of speech.[56] In its relevant parts, the Act says:

> Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.[57]

In response to issues raised by The Wilderness Society about the Gunns case, ACT Chief Minister, Jon Stanhope, pointed to the fact that the ACT *Human Rights Act* would guarantee freedom of speech.

This is a fairly general statement of principle and it is unclear whether it would have legal teeth if it ran counter to other laws. *The Human Rights Act* itself provides that rights may be subject to reasonable limits set by Territory laws.[58] This reflects the type of qualification made in the International Covenant on Civil and Political Rights, the cornerstone of international human rights law, which allows for the right of freedom of speech to be constrained by laws necessary for the protection of the rights and reputation of others, or for national security, public order, public health or morals.[59] Such qualifications render broad statements of human rights meaningless because the argument becomes about appropriate balance rather than right to free speech. Indeed, the ACT Chief Minister made no claims that this Act would prevent "Gunns-type" litigation.

However, some assistance could be gained from legislating to clarify where to draw such legal lines – in effect, qualifying the qualification. This is proposed in the New Matilda's proposal for a national Human Rights Bill – the second qualification being that the restrictions on free speech allowed for in the law "shall not be interpreted so as to prevent participation of members in the public in issues of public interest where they do so without malice".[60]

In theory these limitations could also be overcome by a constitutional guarantee of free speech, such as a bill of rights, which would trump other laws where they became oppressive. Of course the Australian constitution is not a document of lofty ideals. The main freedom guaranteed in the constitution is the freedom to trade between states. The only freedom of speech to be found in it, the right the High Court found to be implied by a system of representative government, is severely constrained[61] and pales in comparison to the robust sentiments of the US constitution's First Amendment (admittedly often honoured in the breach). Importantly though, even this robust First Amendment right was not in itself sufficient in the US to deal with the silencing effects of civil litigation – hence the need for anti-SLAPP legislation in the various jurisdictions there.

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56. Letter from John Stanhope, Chief Minister & Attorney General (ACT) to The Wilderness Society Inc, 23 November 2005.
57. *Human Rights Act* 2004 (ACT), s16.
58. Ibid. s28.
59. *International Covenant on Civil and Political Rights,* 19.
60. Proposed Human Rights Act, s30. <http://www.newmatilda.com/admin/imagelibrary/images dIy3COn00VC8.pdf>
61. The constraint comes from the limited definitions of what constitutes the "government and political matters" about which communication is protected. See for instance, *Cornwall & Ors v Rowan,* [2004] SASC 384 (24 November 2004).

Ultimately, the human rights paradigm is probably limited by its traditional focus on asserting rights against government interference, rather than on cases involving civil litigation. Even where the state is held responsible for its failure to establish a fair civil court processes (as in the European Court's McLibel judgement) this is only at the end of a long legal process which is little use if the process has already silenced debate. Thus, whatever the merits of an Australian Bill of Rights, any such bill would probably still need to be supplemented by purpose built legislation of the types discussed above.

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Conclusion

Some clear conclusions can be drawn from this consideration of law reform options to protect free speech. The first and most obvious conclusion from the Gunns case and the other commercial cases is that in order to fully protect genuine acts of political participation, law reform needs to go beyond simply defamation issues. Moreover, the recent changes in defamation law utilise a fairly blunt instrument in simply banning corporations from suing for defamation. A more nuanced and broader approach is potentially provided by legislation which seeks explicitly to stop the litigation only where the intention (in the Greens' bill) or where the impact (in the Bover-Parnell model) is undesirable. These bills do not exhaust the possibilities for law reform, and some extra protection may be derived from human rights legislation or a bill of rights.

However, whatever form of legislative protection is utilised, the basic parameters remain the same. Because of the difficulty of proving a wrong intention in initiating a lawsuit against community activists, (and because ultimately the impact is the same regardless of the intention) legislation to fully protect the right of public participation needs to have that public participation as its foundation and framework. Further, it must be clear that where there is conflict with other rights (including economic rights), the right to public participation should be paramount so long as the exercise of public participation is genuine, not actuated by malice or personal gain and is within the broad parameters of being non-violent and respectful of property and race, sex, religion, sexuality.

There can be little doubt that such legislation is necessary given the proliferation of lawsuits highlighted in this paper, the impact of these suits on people's lives, and the chilling effect of these actions on public debate. Without it, we may well see not just more cases, but as the discussion of the claims of conspiracy and the "campaign against Gunns" showed, we may see the effective outlawing of a range of normal democratic political behaviour. With such legislation, we take another step towards protecting the free speech we need for accountability, proper decision making and the full expression of the democratic ideals of the Australian community.

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APPENDIX 1: The Bover-Parnell Model

An Act to Protect and Encourage Public Participation

Section 1 – Short Title

Section 2 – The Purposes of the Act

Section 3 – Definitions

Section 4 – The Right to Public Participation

Section 5 – Application for Declaration as to Public Participation

Section 6 – Application for Summary Dismissal

Section 7 – The Statutory Tort of Improper Interference with the Right to Public Participation

Section 1 - Short Title

This Act may be cited as the "Protection of Public Participation Act of 2001".

Section 2 – The Purposes of the Act

The purposes of this Act are to:

(**a**) Protect and encourage public participation, and dissuade persons from threatening, bringing or maintaining proceedings or claims that unjustifiably interfere with this right, by providing;

(**i**) a means by which persons who are subjected to threats of legal proceeding or a claim that unjustifiably interferes with the right to public participation may obtain declarations that the conduct complained of in the threat amounts to public participation and for reimbursement for reasonable costs and expenses that they incur as a result of seeking such a declaration, and

(**ii**) an opportunity, at or before the trial of a proceeding, for a defendant to allege that, and for the court to consider whether, the proceeding, or a claim within the proceeding, unjustifiably interferes with the right to public participation,

(**iii**) a means by which such a proceeding or claim can be summarily dismissed,

(**iv**) a means by which persons who are subjected to a proceeding or a claim that unjustifiably interferes with the right to public participation may obtain reimbursement for reasonable costs and expenses that they incur as a result, and

(**v**) a means by which punitive or exemplary damages may be imposed in respect of a threat, proceeding or claim that is brought or maintained for an improper purpose.

(**b**) Preserve the right of access to the courts for all proceedings and claims that do not unjustifiably interfere with the right to public participation.

Section 3 – Definitions

In this Act:

> "court" means Supreme Court of South Australia unless otherwise stipulated;
>
> "government" includes the federal, state or a local government, and any branch, department, agency, official, employee, agent, or other person with authority to act on behalf of the federal, state or a local government;
>
> "proceeding" means any action, suit, matter, cause, counterclaim, appeal or originating application that is brought in any court or tribunal, but does not include a prosecution for an offence or a crime;
>
> "public participation" means communication or conduct aimed, in whole or in part, at influencing public opinion, or promoting or furthering action by the public or corporations or by any government body, in relation to an issue of public interest, but does not include communication or conduct that:
>
> constitutes vilification based on race, sex, sexuality, ethnicity, nationality or creed, [per relevant State and Commonwealth legislation]
>
> causes or threatens physical injury,
>
> causes damage to property,
>
> attempts to incite others to cause or threaten physical injury or damage to property,
>
> "reasonable costs and fees" shall be determined according to procedures established in the court rules.

Section 4 - The Right to Public Participation

All people enjoy a right to public participation, as is defined by this Act. This right does not however, provide a defence to criminal liability.

Section 5 - Application for Declaration as to Public Participation

(**1**) If a person against whom threats of legal proceedings are brought considers that the whole of the threatened proceeding or any claim within the proceeding is inconsistent with the right to public participation as declared in section 4, the person may bring an application before the Magistrates Court for a declaration that the conduct complained of is public participation within the meaning of this Act.

(**2**) When an application is brought under subsection (1), the application must be heard within 30 days of service, unless the court deems this inappropriate, and

(**3**) In any application made under subsection (1),

> (**a**) a successful applicant shall be entitled to recover costs and his or her legal counsel's fees,
>
> (**b**) the court may make an order awarding damages to a successful

applicant and/or denying the representative of the unsuccessful respondent the right to charge for the services of making the improper threat and responding to the application, if the court feels that making the threat was unreasonable in that the communication or conduct complained about obviously amounted to protected public participation,

(**c**) an unsuccessful applicant may be required to pay the costs of the respondent unless the Court finds that the application was reasonably made and in the public interest.

(**4**) At the hearing of the application the applicant must, on the balance of probabilities, demonstrate to the court that:

(**a**) The action complained of constitutes "public participation" within the meaning given to the term by this Act,

(**b**) The action complained of was based upon honestly and reasonably held beliefs, where "reasonableness" shall be satisfied by demonstrating that a reasonable person of similar disposition would agree that, at the time of the public participation, there was a reasonably arguable basis for the public participation.

In making its determination on these issues, the court will consider pleadings, affidavit evidence and if necessary, will receive testimony at a summary hearing. In order to establish the required standard of proof, the court shall require only a prima facie showing of facts which, if true, would support the applicant's claims.

(**5**) No determination nor the fact that such a determination was made under subsection 1 will be admissible in evidence at any later stage of the case, or in any other case.

(**6**) An order made under subsection (1) is appealable, subject to existing rules and procedures.

Section 6 - Application for Summary Dismissal

(**1**) If a defendant against whom a proceeding is brought or maintained considers that the whole of the proceeding or any claim within the proceeding is inconsistent with the right to public participation declared in section 4, the defendant may bring an application for an order to dismiss the proceeding or claim, as the case may be.

(**2**) When an application is brought under subsection (1),

(**a**) the application must be heard within 60 days of service, unless the court deems this inappropriate, and

(**b**) all further applications, procedures or other steps in the proceeding are, unless the court otherwise orders, suspended until the application has been heard and decided.

(**3**) In any application made under subsection (1),

(**a**) a prevailing defendant shall be entitled to recover costs and his or her legal counsel's fees,

(**b**) the court may make an order awarding damages to the prevailing defendant and/or denying the representative of the unsuccessful plaintiff the right to charge for the services of bringing and maintaining the improper proceeding and responding to the application if the court feels that bringing and maintaining the

proceeding was unreasonable in that it obviously related to protected public participation,

(c) if the court finds that an application made under subsection (1) is frivolous or is solely intended to cause unnecessary delay, the court may award costs and reasonable legal counsel's fees to the prevailing plaintiff.

(4) At the hearing of the application the defendant must, on the balance of probabilities, demonstrate to the court that:

(a) the action constituted "public participation" within the meaning given to the term by this Act,

(b) the action was based upon honestly and reasonably held beliefs, where "reasonableness" shall be satisfied by demonstrating that a reasonable person of similar disposition would agree that, at the time of the public participation, there was a reasonably arguable basis for the public participation.

In making its determination on these issues, the court will consider pleadings, affidavit evidence and if necessary, will receive testimony at a summary hearing. In order to establish the required standard of proof, the court shall require only a prima facie showing of facts which, if true, would support the defendant's claims.

(5) No determination nor the fact that such a determination was made under subsection 1 will be admissible in evidence at any later stage of the case, or in any other case.

(6) If the conditions in subsection (4) are satisfied, yet the court believes that the action still contains substantial merit as a compelling question of law or for some other reason, the court may elect to hear the matter in full. In such a circumstance, costs and counsel's fees for the hearing should be awarded to the defendant, there should be an order for security of the defendant's costs and legal counsel's fees arising from the trial and, if appropriate, the matter should be fast tracked.

(7) An order made under subsection (1) is appealable, subject to existing rules and procedures.

Section 7 – The Statutory Tort of Improper Interference With the Right to Public Participation

(1) If a person against whom a proceeding or a threat of a proceeding has been brought or maintained considers that the whole of the threat or proceeding, or any claim within the threat or proceeding has been, was brought, or was or is being maintained for the principle purpose of interfering with their right to public participation, that person may initiate a proceeding to seek an order for punitive or exemplary damages against the person who has made the threat, or brought or maintained the proceeding.

(2) At the hearing of the proceeding described under subsection (1) the plaintiff must, on the balance of probabilities, demonstrate to the court:

(a) that the action(s) which are the subject of complaint constitute "public participation" within the meaning given to the term by this Act,

(b) that those actions were based upon honestly and reasonably held beliefs, where "reasonableness" shall be satisfied by demonstrating that a reasonable person of similar disposition would agree that, at the time of the public participation, there was a reasonably arguable basis for the public participation, and

(**c**) that the threat or proceeding is or was made, brought or maintained for the principal purpose of:

i. dissuading the defendant from engaging in public participation,

ii. dissuading other persons from engaging in public participation,

iii. diverting the defendant's resources from public participation to the proceeding, or

iv. penalizing the defendant for engaging in public participation.

(**3**) If the plaintiff successfully demonstrates the satisfaction of these requirements to the court, the plaintiff may receive one or all of the following orders:

(**a**) that the defendant pay the plaintiffs' costs and reasonable legal counsel expenses incurred in pursuing rights or remedies available under or contemplated by this Act.

(**b**) that punitive and/or exemplary damages be awarded in an amount that the court deems appropriate.

If the proceeding in question is still being maintained, the court shall effect its immediate dismissal.

(4) An order made under subsection (3) is appealable, subject to existing rules and procedures.

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