

Defamation Defender Speaks Out

Brian Walters, SC, President of Liberty Victoria and a prominent civil liberties and defamation lawyer, spoke at a Castan Centre public lecture at the Monash University Law Chambers on the 9th of August. His talk, *Suing into Submission: Using Litigation to Quell Dissent*, was a lively dissection of the way that corporations have used the courts in Australia to stifle protest and public discussion.

This type of litigation – commonly known as SLAPP Suits (Strategic Lawsuits Against Public Participation) – has a long history overseas, the most famous case being the “Mc Libel” litigation in the UK. In that case, McDonalds sued two activists for defamation and became embroiled in a litigation that lasted for 314 sitting days and cost it more than 10 million pounds in legal costs. McDonalds won judgment of 35,000 pounds but lost the publicity war by a large margin.

Mr Walters focused, however, on the fact that most SLAPP suits have much greater success and they have been used in Australia more widely than one might think. The litigation often takes the form of defamation proceedings but may also involve claims related to trespass to land (in the case of demonstrations) and allegations of breaches of the *Trade Practices Act*.

Mr Walters commenced by talking of the problems encountered by community groups in attempting to stop the recent dredging trial in Port Phillip Bay: their request for an interlocutory injunction was torpedoed when they were required to provide an undertaking to pay costs if they were unsuccessful. Costs were expected to be \$32 million. As a result, the injunction was not granted and the allegation that the activity is unlawful was not tested by a court. This case is similar to the Mount Etna Bat Caves case in 1989, where a mining company was able to destroy a rare bat cave because the Central Queensland Speleological Association withdrew its challenge to the legality of the action when asked to deposit a significant amount of money with the court to cover possible legal costs.

More recently, Barwon Water successfully used defamation proceedings to quell the public outcry over its plans to obliterate a woodland and replace it with a sewerage treatment facility, despite the fact that the land was protected under four separate listings in the *Victoria Flora and Fauna Guarantee Act*. Protesters came up with a bumper sticker which read “Barwon Water, Frankly Foul”, a reference to Barwon Water’s chairman, Frank de Stefano. Mr de Stefano sued a group of the protesters for defamation and his litigation was funded entirely at Barwon Water’s – and therefore taxpayers’ – expense. Facing crippling legal bills and a massive time commitment, the group apologized and paid \$10,000 in compensation. Community dissent crumbled and, as Mr Walters pointed out, by the time Mr de Stefano was convicted and jailed for theft of \$8.3 million from clients of his accountancy practice some years later, the wood was long gone and so was the \$10,000.

According to Mr Walters, writs are often timed to cause the most damage. In the Barwon water case, the defendants were served on Christmas Eve, ensuring that they could not get legal advice and would spend the Christmas break fearing

the consequences.

There are, however, tactics which protesters can use in return. Mr Walters’ favourite tactic is to involve the media as soon as a threat is made. In the case of his friend, Alan Gray, a logging industry association threatened to sue him for breaches of the *Trade Practices Act* for assertions made in his book, *Forest Friendly Building Timbers*. Mr Walters alerted the media of the threat and the association backed down. The book went on to top the non fiction best-seller list for several months.

The same course of action worked when Yarra Trams threatened the Public Transport Users’ Association, however such tactics are risky and hardly reliable. When they fail, litigation is stacked in favour of corporations which get tax deductions for legal fees and almost always have far deeper pockets. The clear message of Mr Walter’s speech was that the playing field has to be leveled. In most US states, SLAPP suits are now prohibited by legislation and New South Wales has recently amended the law to prohibit all but the smallest companies from suing for defamation. Mr Walters concluded by saying that this is a matter of free speech, which is recognized in the Universal Declaration of Human Rights and is a cornerstone of western civilization. “It is essential that citizens have the freedom, in any medium, to engage in public debate” said Mr Walters. “Freedom of expression permits knowledge to flourish and prejudices to be challenged, and diminishes the alienation of those who are not heard”.

Mr Walter’s is the author of Slapping on the Writs: Defamation, Developers and Community Activism (UNSW Press 2003). His paper Suing Into Submission: Using Litigation to Quell Dissent” is available at <http://www.law.monash.edu.au/castancentre/events/2005/walters-paper.pdf>.



Brian Walters addresses the audience at Monash University Law Chambers