



This article explores a new phenomena threatening public participation in decision-making processes called SLAPP. It remains a relatively unknown problem but the serious effects it could have are emphasised and solutions to the problem are considered.

When a couple of hundred concerned residents gathered at a rally on an early Sunday morning in April, they stood in the rain and listened to each speaker oppose the redevelopment of the White City tennis centre. Residents from community groups across the city, members of Federal Parliament, State Parliament, Local Government - the Greens, the ALP and the Liberal Party- formed an unusual alliance through their concern, as each voiced a commitment to "Save White City".

But it was soon apparent that the common concern did not end there, and a secondary theme emerged as each speaker took his or her turn on the podium.

It began with Independent MP Clover Moore, who prefaced her speech with the following disclaimer: "Not wanting to get another letter, I reserve the right to be slightly wrong, up or down. And I would like to add that this is the first occasion in 13 years of representing my constituents and doing the job that I am elected to do that I have had such a threatening letter."

Paddington resident Catherine Cusak then spoke of "the cold fury" she felt when she learned of a letter directed to the ACE residents group, of which she is a member, warning group members they could face personal legal action for defamation.

And Mike Kenderes, also from ACE, reminded the group "although it's very heavy-handed tactics, we obviously need to be careful".

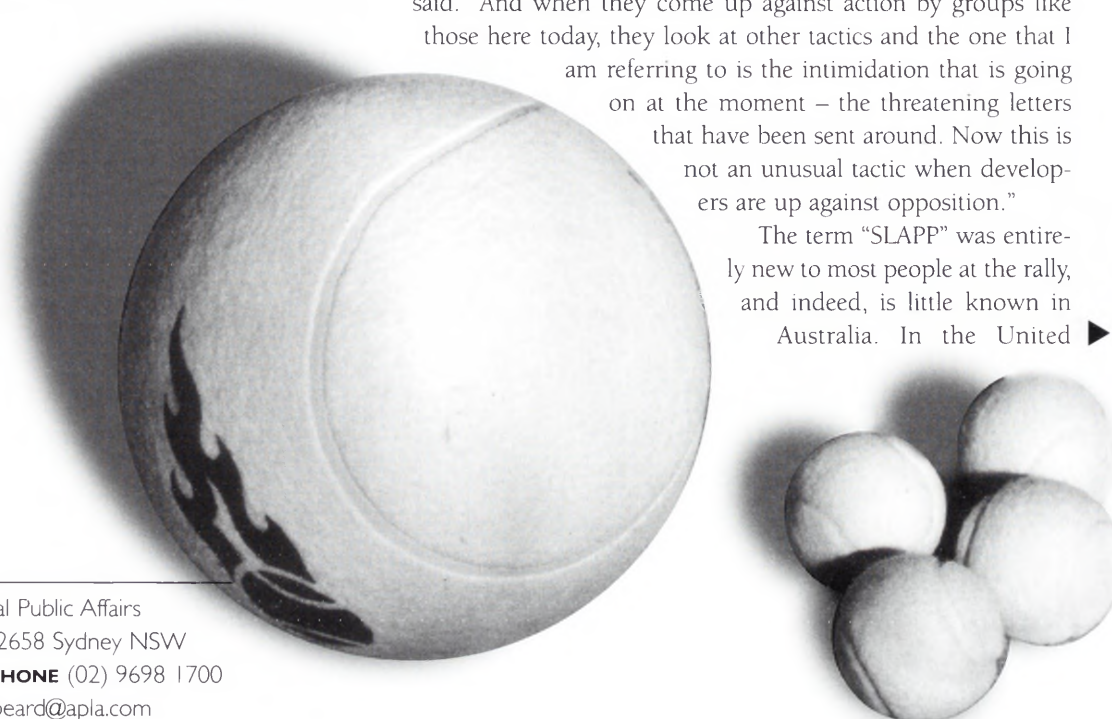
These comments related to a recent turn in the Save White City campaign. In the week leading up to the rally, as group members worked on circulating petitions and pamphlets and erecting posters, certain individuals were sent letters threatening personal legal action.

When NSW Greens MP Lee Rhiannon took the stage at the rally, she gave these threats a name. "There's actually now a name for it," she said, "It's called SLAPPs, and this stands for Strategic Litigation Against Public Participation.

"These people are used to getting their own way," Rhiannon said. "And when they come up against action by groups like those here today, they look at other tactics and the one that I am referring to is the intimidation that is going on at the moment - the threatening letters that have been sent around. Now this is not an unusual tactic when developers are up against opposition."

The term "SLAPP" was entirely new to most people at the rally, and indeed, is little known in Australia. In the United

# SLAPPed down



**Louise Beard** is the National Public Affairs Manager of APLA, GPO Box 2658 Sydney NSW 2001, DX 22515 Surry Hills **PHONE** (02) 9698 1700 **FAX** (02) 9698 1744 **EMAIL** lbeard@apla.com

States, however, the familiarity of the term is the result of a strong anti-SLAPP movement, which has also led to the introduction of anti-SLAPP laws in 11 states.

"The term was coined by two professors of law and sociology from the University of Denver, George Pring and Penelope Canan," says Barbara Arco, an academic from the University of Miami.

"They characterise a typical SLAPP as a civil lawsuit filed against private individuals or organisations that have spoken out on issues of public interest or social significance," she explains. "The underlying strategy is aimed at intimidating an individual from engaging in particular behaviour believed to be detrimental to the SLAPP filer."

Although these suits routinely fail in Court, they tend to achieve their purpose via their devastating economic effects on the group or individual, which silences it into submission.

David Ratcliff, from the Association of Trial Lawyers of America (ATLA) adds that SLAPP cases have been documented in a number of countries outside of the United States, and lists England, Canada, South Korea, Singapore, Pakistan, France, New Zealand and Australia as examples. He maintains that the legislative situation in these countries is said to be similar to the U.S. in the 1980s - that is, when the U.S. was just confronting the SLAPP suit problem.

In Australia people are just starting to learn about it now. Mark Parnell, a solicitor from the Environmental Defenders Office (EDO) in South Australia says that over the last four years he has had a handful of clear SLAPPs through the EDO.

"Often these are developers trying to frighten objectors - even in relation to legally-mandated public consultation processes. For example, the local council is obliged to notify neighbours about certain types of development. The neighbours exercise their statutory right to comment by writing a submission. The submission ends up on the Council agenda which ends up in the council library and voila - publication to the world. The developer then seeks retraction with threat of legal action, the neighbours get spooked and stop objecting to the development."

The Kumarangk Legal Defence Fund Inc (KLDF) in South Australia was not so easily spooked. In fact, it went a step further than most community objectors - objecting to SLAPPs themselves.

The KLDF was formed in response to a series of defamation cases brought by marina developers Tom, Wendy and Andrew Chapman against a number of people and organisations opposed to building the Hindmarsh Island Bridge. There have also been a number of actions against mainstream media organisations.

The KLDF website states: "The KLDF is not part of the campaign against the Hindmarsh Island bridge: it has been established solely to support those being sued in connection with the campaign. We are concerned at the way the slow, painful and impenetrable working of the legal system can impact upon community campaigns and the community's ability to speak about environmental issues and issues of public interest".

But this public concern generated further retaliation. Early in the campaign, in August 1997, the KLDF organised a Forum on Understanding Defamation Law. They invited four local Adelaide legal people to offer their perspectives on the role of



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the law in matters of protest and free speech.

The result: two formal complaints were lodged against one of the speakers, Mark Parnell. This included a complaint to the SA Legal Practitioners Conduct Board that Parnell had incited known trouble makers to break the law and advised

protest organisers to encourage large crowds at demonstrations. Both complaints were dismissed.

Most recently, the KLDF's web site was closed down after a complaint received by the Internet Service Provider claiming that they would be liable for alleged defamatory material.

"No commercial ISP is going to be interested in whether or not the defamation claim is arguable, it is much safer for them to drop the site," said a spokesperson for the KLDF.

"But we are pleased to say that the KLDF website has been established at another address," he added.

Parnell explains the problem as being that while SLAPP is a known term in activist circles in Australia, the very act of referring to SLAPP-happy developers' tactics as SLAPP could be regarded as defamatory. Therefore the term is used generically, but not to describe any particular developers.

He adds that, unlike the United States, there is no anti-SLAPP movement in Australia as such. "But the work of Bob Burton and others comes close," says Parnell, "the first step is always to document and identify the trend".

Bob Burton is an Australian conservationist who co-authored the book *Secrets and Lies: The Anatomy of an Anti-Environmental PR Campaign*. The book, which sold out after it was first published in New Zealand in August 1999, was written following the leak of "a big bunch of internal PR documents from Shandwig, the PR firm hired to advise the [New Zealand] government owned logging corporation, Timberlands," said Burton.

"The book provides insights into how legal threats were used against lobbyists and journalists as one tactic in the political campaign" he explains. "The whole tactic was to amplify their voices while simultaneously, discrediting and silencing the voices of dissent. Nothing was too small for them to go out of their way to make sure dissenting opinion was rendered invisible".

In fact, Burton believes that 'SLAPPers' focus deliberately on individuals with few resources "who are usually punished for pretty innocuous comments".

Which is precisely what Catherine Cusak said of the White City threats.

"The gross inaccuracies referred to [in the legal threats] are very minor. I consider these are very heavy-handed tactics, especially when we are only trying to present our position," she said.

"A good example is that most public participation comes in the form of a letter to the editor, or a quote in the paper. The fact that they go after the individual but not the paper says it all. What it says is that they won't hesitate to punish people who express a view, but at the same time the media outlet is an important ally not to be put offside," argues Burton.



He explains that the SLAPP tactic can be effective but it relies on ignorance, and of the many legal threats, very few ever proceed to Court.

"But as long as they don't have quick access to legal advice, people will be silenced. They say 'I'd like to express my views, but I don't want to lose my house.' And although it is usually without any real prospect that the people have been defamed, this undermines the ability to have a democratic debate, because they don't know any better and they don't have the money or legal resources to find out."

There is a general belief amongst activists that the introduction of anti-SLAPP legislation in Australia would be a welcome improvement.

"I think it is really urgently needed," says Rhiannon, "We need to expose it for what it is."

Sharon Beder, author of *Global Spin*, which dedicates a chapter to SLAPPs, also calls for legislation that prevents law suits being used to intimidate and harass people.

However, Burton believes that legislation based on the US models would not solve the problem entirely, rather it should be centred on reforming the broader framework.

This includes asking why companies are able to take defamation action in the first place and why their legal costs are tax deductible.

Parnell agrees, producing the following list: "Start by reforming the laws of defamation. Extend qualified privilege. Introduce fast-track court processes to kill off SLAPP suits early.

Re-define laws dealing with abuse of process. Hit 'SLAPPers' with costs and punitive damages."



Activists also believe there is a need for Australians to be empowered through knowledge of SLAPPs. Says Burton, "once people know that there have been a hell of a lot of legal threats against people like them, their view changes from personalised fear and insecurity to seeing it as a systematic action against a group of people. It shifts from a personal to a civil liberties question."

The likelihood of greatly increasing awareness in Australia is, however, doubtful. Burton says the dissemination of information is hampered by the argument that even defining SLAPPs can be defamatory. Indeed, some see this as the biggest obstacle facing reform. As the KLDF will tell you from its own experience, the problem has grown beyond the mere silencing of public participation, to actually silencing public comment about SLAPP.

"As long as threats continue against journalists and community groups, as long as they are silenced, the whole issue of SLAPP itself is rendered invisible. Ultimately, this inhibits political momentum against broader reform," sums up Burton.

"The biggest problem is that we often don't hear about SLAPPs because people become so intimidated," said Lee Rhiannon.

"With White City it was different," she said. "Most of the people involved had resources, they were tertiary educated, so they were less afraid to speak out - they could stand their ground. But most people get scared and intimidated and we don't hear anything." ■



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