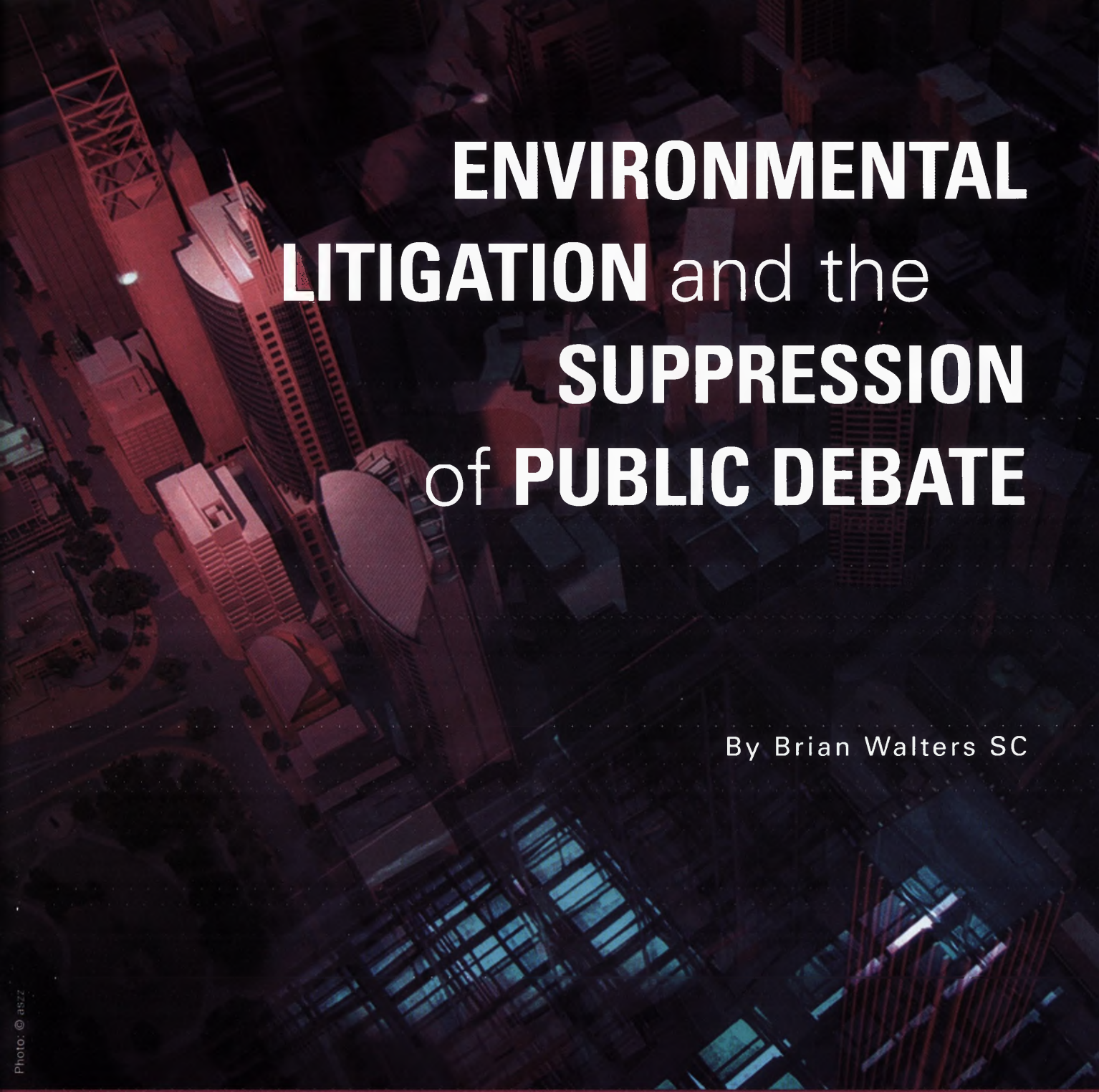

ENVIRONMENTAL LITIGATION and the SUPPRESSION of PUBLIC DEBATE

By Brian Walters SC

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The High Court first ruled on environmental issues in the mid-70s when it considered two cases concerning sand mining on Fraser Island.[1]

In the first of these cases, John Sinclair, on behalf of himself and the Fraser Island Defence Organisation (FIDO), had objected to the grant of a further mining licence, and called considerable evidence at the hearing before the mining warden to support that objection.

The mining regulations made it mandatory for the warden to reject the application 'if it is his opinion that the public interest or right will be prejudicially affected by the granting of the application'. The evidence went to this issue, and was substantially unanswered. However, the mining warden recommended the grant of the licence, 'as I am unable to conclude from this evidence that the interests of the public *as a whole* would be prejudicially affected by the granting of the leases' (emphasis added). In treating the objectors as representing only a small section of the public, and not >>

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the public 'as a whole', the mining warden avoided the mandatory obligation placed upon him.

Mr Sinclair and FIDO took the case to the Queensland Supreme Court, seeking mandamus to compel the mining warden to act according to law, but were unsuccessful. However, the High Court (Barwick CJ, Gibbs, Stephen, Jacobs and Murphy JJ) unanimously upheld John Sinclair's appeal and granted mandamus – effectively preventing the mining from proceeding.

The second case arose when the Commonwealth established a Commission of Inquiry into Fraser Island Mining, and used its powers to prevent the export of minerals from Fraser Island, pending the outcome. The mining company, Murphyores Inc Pty Ltd, challenged the validity of the prohibition on exports and sought an injunction to prevent the Commission of Inquiry proceeding. It also sought a declaration that the Minister could not make a decision for the purpose of environmental protection under the Constitution.

The High Court (Barwick CJ, McTiernan, Gibbs, Stephen, Mason, Jacobs and Murphy JJ) unanimously rejected the claims of Murphyores, holding that the Commonwealth was validly exercising its trade and commerce power.

John Sinclair grew up in Maryborough in Queensland. He studied agriculture and became a district organiser for the Young Farmers. After qualifying at night school, he was employed as a teacher with the Queensland Education Department.

Sinclair heard about Fraser Island from his parents, who had honeymooned there. When he finally visited the place, it fulfilled his 'almost mythical expectations'. He subsequently became the driving force behind FIDO.

During his campaign to protect Fraser Island, not only the mining industry but also the Bjelke-Petersen government attacked him relentlessly. John Sinclair's wife received threatening phonecalls. His children's bike tyres were slashed. He himself was booed when he led his scout troop into the arena at the Maryborough Show.

In the Queensland Parliament, Sinclair was repeatedly vilified by National Party MPs with false and scandalous allegations.

He was an employee of the Queensland Education Department, and although attempts were made at high levels to dismiss him, there was no basis for doing so, as he fulfilled all his duties as required. Without warning, and a week into the school year, the Education Department transferred him from Maryborough to a specially created post in Brisbane – although he had not applied for it. Married and with school-age children, the disruption to his life may readily be imagined. John Sinclair duly reported for work in Brisbane, and just as he was growing accustomed to the new routine – and again with no warning – the Department moved him to Ipswich.

John Sinclair made a submission to the Commonwealth's Commission of Inquiry. In that submission, he attacked the mining company Murphyores for 'corruptly obtaining its leases and licences'. There was no question of a defamation suit, as the statements were protected by parliamentary privilege.

FIDO published a small newsletter for its members and supporters. As a service to the local community group, a small firm (the Hervey Bay Publishing Company), printed it at low cost. Believing that parliamentary privilege would attach to a report of the proceedings, John Sinclair included his submission to the Commonwealth's inquiry in the newsletter.

Realising that privilege probably did not attach to this publication, Murphyores sued John Sinclair and others for defamation.

For Murphyores, this was a low-cost strategy. Their legal expenses were tax deductible. For John Sinclair, who was not engaged in this campaign for personal profit, they would not be. Murphyores could leave it to their lawyers to run the case. Sinclair could hardly afford any legal help, and the time taken to prepare for the litigation was an immense burden for him, since he could not obtain any leave from his employer. If Murphyores lost, they would only have to pay some legal fees. If they won, they would ruin John Sinclair, who had lobbied so successfully against their activities.

John Sinclair was under immense pressure to do something to relieve the burden from others – particularly the Hervey Bay Publishing Company. They had done the right thing by trying to help a community group with its newsletter, and now they were immersed in this immense litigation. Murphyores made it clear that they would not let this small business out of the action unless John Sinclair apologised and paid damages. For his own part, John Sinclair was prepared to fight the case, but he knew that it could bankrupt Hervey Bay Publishing. Eventually, three days before the hearing, he caved in, apologised, and paid out a significant but undisclosed sum to Murphyores.

Then the Education Department sent him on another sequence of unsolicited transfers and achieved the desired result – his resignation. In those days, this meant abandoning superannuation – in his case amounting to $250,000. His family life in tatters, and having filed for bankruptcy, he moved to Sydney, where he was unemployed for six months, a refugee from a state whose heritage at Fraser Island and Cooloola he had done so much to protect.

Today, Fraser Island is world-heritage listed and a mecca for people from all around the world – a wonderful resource for refreshment and inspiration. It would have been lost to Queensland and to the world if not for John Sinclair and FIDO. And yet the legal system did not protect those who

spoke out, and the personal cost to John Sinclair has been all too clear.

The action against John Sinclair was an early Australian example of a 'SLAPP' suit – an acronym for Strategic Litigation Against Public Participation.

Today, Murphyores would not be able to sue John Sinclair for defamation, as the uniform defamation laws have limited the rights of corporations to bring defamation proceedings. This change is welcome: however, the right to sue for defamation should be removed from corporations altogether.

Other causes of action are still available to corporations like Murphyores who wish to silence their critics. Ironically, one of the favoured causes of action is the *Trade Practices Act* (TPA).

Alan Gray, the editor of *Earth Garden* magazine, wrote a book called *Forest Friendly Building Timbers*. BBC Hardware agreed to stock the book throughout Australia

Just before the close of business for the Easter holidays in 1999, the solicitors for the National Association of Forest Industries (NAFI) sent him a letter threatening to sue him for deceptive and misleading conduct under the TPA, because the book made a number of statements about the logging industry that NAFI disputed.

The statements were all sourced and quoted from government reports. They were indisputable. And there were good statutory defences under the TPA. But this would not matter – Alan Gray could not afford to bankrupt himself in order to prove he was right. Even a few days in court could be crippling.

NAFI demanded the shredding of all copies of the book, and an undertaking not to repeat any of the statements made in it. Alan, unable to face the prospect of even a short Federal Court hearing, was at the point of capitulation.

The irony is that the TPA is meant to be about consumer protection, but the logging industry wanted to use it to keep information from consumers and to protect its own interests.

With pro bono legal help, Alan prepared a reply refusing NAFI's demands, and sent the correspondence to every journalist he could think of.

It was covered in every paper, and eventually Professor Alan Fels (then head of ACCC) offered the public opinion that the NAFI letter itself may well amount to deceptive and misleading conduct, because anyone who knew the workings of the TPA would know that the threat they made was empty.

Alan Gray's book was at the top of the non-fiction bestseller list for months.

There was one dark aspect of the outcome, however. BBC Hardware issued a press release, which said:

> 'BBC Hardware Limited today withdrew from sale in its stores a booklet titled *Forest-Friendly Building Timbers*.
>
> This follows a threat of legal action against BBC Hardware by the National Association of Forest Industries, which took exception to the publication.'[2]

NAFI's threat of legal action was baseless. They did not even >>

issue proceedings. But still, their threat pushed *Forest-Friendly Building Timbers* off the shelves of the major hardware chain that had supported it.

This illustrates the way some big business operators misuse the court system – frequently without having to take proceedings at all, let alone have them decided by a court.

PETA

People for the Ethical Treatment of Animals (PETA) has conducted a public campaign against the wool industry's practice of 'mulesing' sheep and against live exports.

As part of its campaign, PETA wrote to retailers urging them not to purchase Australian wool products until the two practices end.

The wool industry's promotional organisation, Australian Wool Innovation Ltd (AWI), which is federally funded, recently began legal action against PETA in the Federal Court, relying on the boycott provisions of the TPA. AWI has also asked the Federal Court to grant it an injunction preventing PETA from publishing material that would be harmful to the retailers' trade, and staging anti-mulesing protest demonstrations at retailers' premises.

After two years of preliminary legal manoeuvring, the case is set down for trial in October 2007.

Now that the dispute is before the Court, PETA will have an opportunity to present its case and to oppose the claims made.

However, whatever the merits or otherwise of mulesing and live sheep exports, if the Federal Court decides that the TPA allows an industry organisation to successfully sue in response to criticism of industry practices, this will have serious adverse implications for public discussion of controversial issues that are of interest to consumers.

Consumers should be able to mount campaigns about industrial practices, and the community should be able to hear their arguments. Industry is well able to present its case to the community without running off to court.

After the first AWI statement of claim was struck out, the *Sunday Age* made the following comment:

> 'AWI appears to agree that the case has little chance of proceeding in its current form, but is prepared to drag out its campaign until it can sue for damages in the US.
>
> AWI's chairman, the former Howard minister, Ian McLachlan, suggests his group will seek to wear PETA down financially.'

The paper quotes Mr McLachlan as saying:

> 'If we have a massive bill, so have they got a massive bill. This industry is extremely well-financed and these sorts of crises are catered for. The Australian wool industry is not going to walk away from something it's been building up for 200 years.'

The AWI is certainly well-financed. It receives substantial funding from the federal government.

The federal treasurer, Peter Costello, has entered the arena. Describing PETA as 'ignorant', he said that Australian farmers should have a right to pursue compensation for any losses. "We're going to amend the law so the ACCC can bring legal action on behalf of all Australian farmers, on behalf of those who are tying to boycott their wool, and boycott their wool on these spurious grounds," he said.

Mr Costello denies the move is an attack on the freedom of speech.

"You can say what you like, you can be as ignorant as you like," he said. "There's no law that's going to stop ignorant commentary, but there will be a law which will allow the ACCC to stand up for Australian farmers where they suffer from a boycott."

Boycotts have a long pedigree of overcoming the disparity of resources between individuals pursuing social change and the powerful institutions holding them back. In England, one of the chief weapons used against the slave trade over two centuries ago was a boycott of sugar, which was produced with slave labour in the West Indies. The campaign focused particularly on British women, who generally made household-purchasing decisions. The result was spectacularly successful.

In the 1760s, American colonists campaigned for 'no taxation without representation', and bolstered their arguments by boycotting British goods.

In the 1960s, as part of the civil rights campaign, black Americans boycotted businesses that refused to employ black workers.

Most of the world boycotted South African goods in order to bring an end to apartheid.

However, Mr Costello proposes that consumers who

advocate boycotts should be punished. The ACCC, which has the traditional role of supporting the consumer against business practices, would be asked to pursue consumers who advocate concerted action against businesses. Producers advertise, but anyone who counter-advertised would be targeted by government legal action – at taxpayers' expense.

This development will undermine free speech. If implemented, the proposal would provide a major weapon for the powerful against those less powerful who criticise them. The inevitable consequence would be to chill public discourse. Many will avoid saying even what they know to be true if they have to go to the inconvenience and expense of defending it in court. This is especially so where there are no significant financial constraints on those bringing the action. The result will be a loss of freedom of expression and a high impost on our democracy.

Australia has no comprehensive protection of community members when speaking about matters of public interest or lobbying for change. Commentary on these things ought to be the function of citizens. They should be protected from vexatious court proceedings designed to shut them up.

The phenomenon of writs to silence public discourse has received judicial recognition in Australia. As Sir William Deane said, in *Theophanous v Herald and Weekly Times*:[3]

> 'the use of defamation proceedings in relation to political communication and discussion has expanded to the stage where there is a widespread public perception that such proceedings represent a valued source of tax-free profit for the holder of high public office who is defamed and an effective way to "stop" political criticism, particularly at election times. (Indeed, the phrase "stop writ" has entered the language.)'

As we have seen from the examples above, the phenomenon is not limited to defamation cases.

Here in Australia, apart from the narrow qualified privilege afforded by the High Court's decision in the *Lange* case,[4] freedom of speech has no general protection, and remains a residual right – a freedom to be exercised only after express inroads have been made into it. In the US, where the First Amendment to the Constitution guarantees freedom of speech, there has been a long tradition of seeing and countering threats to free expression.

In the US and Canada, SLAPP suits have grown to the point where legislatures have enacted laws to protect public participation. Almost every state in the US has now done so, and some provinces in Canada.[5]

Three common features of these laws are:

a) they protect public participation – the exchange of ideas for the purpose of democratic decision-making – and make statements in that context privileged;
b) they empower courts at an early stage to strike out actions brought with the purpose of stifling free speech; and
c) they give the courts power to order plaintiffs who bring actions to silence the community to pay damages by way of punishment.

The statutes have now been applied in a number of cases. The volume of SLAPP suits has dropped enormously.

With the growing phenomenon in Australia of SLAPP suits designed to chill public discourse, it is time similar anti-SLAPP laws were enacted here. While we are at it, we should join every other civilised nation by legislative recognition of the right to freedom of expression. ■

Notes: **1** *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473; *Murphyores v the Commonwealth* (1976) 133 CLR 1. **2** BBC Hardware Media Statement, 8 April 1999. **3** (1994) 182 CLR 184. **4** *Lange v The Australian Broadcasting Corporation* (1997) 189 CLR 520. **5** For example: Delaware Code Sections 8136 - 8138; Code of Georgia § 9-11-11.1; Hawaii Revised Statutes, Chapter 634F; Indiana Code 34-7-7; Louisiana Code of Civil Procedure Art. 971; Section 5-807 Annotated Code of Maryland (HB 930); Massachussetts Statutes Chapter 231, Section 59H; Minnesota Statutes Annotated Chapter 554; Missouri RSMo Sec 537.528; Nebraska Revised Statutes §§ 25-21,241 through 25-21,246; Nevada Revised Statutes §§ 41.635 - 41.670; New Mexico Statutes §§ 38-2-9.1 and 9.2; New York Civil Rights Law 70-a and 76-a; Oregon Revised Statutes §§ 30.142 - 30.146; Tennessee Code Annotated §§ 4-21-1001 through 4-21-1004; Washington RCW 4.24.500 - 4.24.520 (this is the first modern anti-SLAPP legislation, enacted in 1989 – it was amended in 2002 to take account of several court decisions).

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