

STANDING COMMITTEE ON LEGAL AFFAIRS

**Court Procedures (Protection of Public
Participation) Amendment Bill 2005**

MAY 2007

Report 4

Committee Membership

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Resolution of Appointment

On 7 December 2004 the Legislative Assembly for the Australian Capital Territory resolved to establish a general purpose standing committee, called the Standing Committee on Legal Affairs:

to perform the duties of a scrutiny of bills and subordinate legislation committee and examine matters related to community and individual rights, consumer rights, courts, police and emergency services, corrections including a prison, governance and industrial relations, administrative law, civil liberties and human rights, censorship, company law, law and order, criminal law, consumer affairs and regulatory services.

Terms of Reference

On Wednesday, 14 December 2005, the ACT Legislative Assembly passed the following resolution:

That, notwithstanding the provisions of standing order 174:

(1) the Court Procedures (Protection of Public Participation)

Amendment Bill 2005 be referred to the Standing Committee on Legal Affairs for inquiry and report; and

(2) on the Committee presenting its report to the Assembly, resumption of debate on the question "That this Bill be agreed to in principle" be set down as an order of the day for the next sitting.

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RECOMMENDATIONS

RECOMMENDATION 1

That the Court Procedures (Protection of Public Participation) Amendment Bill 2005 not be proceeded with.

RECOMMENDATION 2

That a Bill be introduced into the Assembly to protect public participation and which specifically:

- **contains a positive right to public participation**
- **provides for a declaration that actions are public participation [and only public participation] and therefore protected. [This will not protect activity which is of itself unlawful or the subject of civil action; for example defamatory statements will still be defamatory statements and a declaration that they are public participation cannot be a defence];**
- **provides for exemplary and punitive damages.**

RECOMMENDATION 3

That the starting point for any proposed legislation might be the proposed Bill set out in Appendix F and submitted by the ACT Greens in December 2006.

STANDING COMMITTEE ON LEGAL AFFAIRS

1 CONDUCT OF THE INQUIRY

- 1.1 On 14 December 2005 the ACT Legislative Assembly referred the private member's bill, the Court Procedures (Protection of Public Participation) Amendment Bill 2005 (the Foskey bill) to the Legal Affairs Committee for consideration and report. The Bill was introduced into the Assembly by Dr Deb Foskey, [ACT Greens] on 29 June 2005.
- 1.2 Once the Bill was referred in December 2005, the legal Affairs Committee invited submissions on the subject and took evidence from interested groups and individuals. Nine submissions were received and the Committee held hearings in Canberra and Melbourne. Details of submissions and hearings are contained in Appendices A and B.
- 1.3 The original Bill and the explanatory statement are at Appendix C. Alternative draft bills are at Appendices D and E and are considered later in the report.
- 1.4 The threat or reality of strategic litigation has risen to prominence of late with the ongoing saga of the Gunns litigation in the Supreme Court of Victoria. This type of litigation or the threat of litigation has been an effective tool over at least the last 10 years in Australia for those who wish to silence their critics.
- 1.5 In this vein, the Committee draws attention to Exhibit 2 tabled by the Wilderness Society at public hearing, the 'Public Interest Lawyers' Statement in Support of Public Participation Law Reform'. This statement with the signatories names appended is at Appendix F. The statement in part says:

The increasing phenomenon of litigation against community participation in public issues by comment or action has the serious effect of intimidating the community, chilling public debate and silencing voices which should be heard in a democratic society. In addition, these lawsuits against public participation create enormous stress and financial burden for the people and groups who are sued and clog our court systems with arguments which belong in political rather than legal arenas.

Free speech and robust public debate, together with the ability to participate in community and political activity without fear of litigation, are fundamental rights in a democratic society. The increasing and widespread use of

defamation law, trade practices laws and economic torts laws against public participation must be wound back.¹

1.6 The Committee endorses the sentiments expressed in the statement, that is that:

- ⇒ Community debate and public participation are fundamental to a democratic society;
- ⇒ The use of litigation by powerful interests, be they government or private interests, to chill public debate is of increasing concern, and
- ⇒ A legislative response to protect the fundamental right to freedom of speech and participation in public debate on political issues may be required.

1.7 The Committee has endeavoured to consider the draft Bill, critical comment and alternative proposals to obtain a fair legal regime to ensure that human rights are protected and that people and organisations can be involved in public debate and criticism of policies, proposals or activities without the threat of litigation. Should the ACT Legislative Assembly choose to proceed with law reform in this area, it will consolidate the ACT's reputation as a jurisdiction which actively protects and promotes human rights.

¹ Exhibit 2, *Public Interest Lawyers' Statement in Support of Public Participation Law Reform*, tabled 4 April 2006

2 BACKGROUND TO THE BILL

- 2.1 The Courts Administration (Protection of Public Participation) Amendment Bill 2005 is intended as a mechanism to assist in ensuring that litigation, or the threat of litigation, cannot be used as a chilling factor in public debate. Strategic litigation to silence community debate on public controversies became prominent in the United States in the 1980s and a comparable trend has emerged in Australia over the past decade.²
- 2.2 What is meant by strategic litigation is the use or threat of the use of a law suit such as a defamation action, an action in tort for damages or an action under the trade practices legislation (to name the most prominent examples) which is instituted simply to silence any further criticism and effectively 'chill' public debate. The acronym used to describe such suits is SLAPP, "strategic lawsuits against public participation", coined by American sociologists Pring and Canan after observing a growing trend in the use of litigation as a strategic tool by large corporations within the United States to silence "community input into public controversies, and leave the corporations in control of the debate"³.
- 2.3 SLAPP suits are civil court actions which allege an injury resulting from the efforts of individuals or non-government organisations to influence government action on an issue of public interest or concern:
- ...SLAPPs are filed by one side of a public, political dispute to punish or prevent opposing points of view.⁴
- 2.4 The consequences for a person or individual being sued are potentially very serious. As a result, the mere threat of legal action by a corporation, wealthy individual or government funded litigant is often sufficient to silence critics,

² Walters B, *Slapping on the Writs: Defamation, Developers and Community Activism*, UNSW Press, 2003, p 14

³ *ibid*

⁴ Pring G W and Canan P, "'SLAPPs'--'Strategic Lawsuits Against Public Participation' in Government -- Diagnosis and Treatment of the Newest Civil Rights Abuse", in *Civil Rights Litigation and Attorney Fees Annual Handbook*, Clark Boardman, 1993, p 380

particularly where those critics are private individuals and their personal assets are at risk.

- 2.5 Even in Australia, multi-million dollar lawsuits are being filed against individuals, community groups and/or environmental organisations for 'circulating petitions, writing to public officials, speaking at, or even just attending, public meetings, organising boycotts and engaging in peaceful demonstrations.'⁵ The Gunns case against 20 defendants, discussed later in the report, is a very good example of the use of litigation to attempt to silence critics such as the Wilderness Society and other environmental activists.
- 2.6 The Environmental Defender's Office in South Australia, in the preface to a law reform proposal for that state, argued that there was a need for law reform to address the growing problem of strategic litigation:

This proposal has been prepared for the Environmental Defender's Office to help address what is seen as a growing problem in South Australia. Over the last decade, many clients of our Office have been subject to threats of legal action because they have spoken out in defence of the environment. In some cases, threats have been directed to individuals and groups who do no more than exercise their legal and democratic right to comment on matters of public interest, such as development proposals. The number of such threats which eventuate in legal proceedings is also growing throughout Australia.⁶

- 2.7 The Foskey Bill, therefore, aims to address this attack on public debate by providing a mechanism to assess the bona fides of a lawsuit and to deter the pursuit of lawsuits strategically targeted towards the silencing of public debate on matters of public interest.
- 2.8 Dr Foskey, in introducing the Bill, stated:

These lawsuits, seemingly on the rise in Australia, are intended to silence and intimidate activists, activist organisations, investigative journalists or any outspoken individual or group on matters of public interest...most SLAPP cases are lost in the courts, but before that happens it can take

⁵ *ibid*

⁶ Conservation Council of SE Region and Canberra, Submission 1, Attachment, p 1

years, considerable dollars and emotional strength out of the defendants while discussion about the real public policy that started the public debate in the first place is displaced.⁷

- 2.9 While court rules of procedure and amended defamation law go some way towards limiting the prevalence of such suits, there still remains a need for a mechanism by which the court can formally assess an action, potentially taken for the primary purpose of chilling public debate. Quite often, it is the threat of legal action, substantiated or otherwise, which is used to silence a critic. The Foskey bill is an attempt to ensure free and open public debate through a mechanism which will intercept potential SLAPP suits.

The history of SLAPP suits and origins of the Bill

- 2.10 In Australia, the use of litigation to quell public debate has developed along similar lines to that in the USA, and has not been restricted to actions by large corporations. As noted above, powerful individuals, industry lobby groups and public bodies such as local councils have also used litigation to ensure that any criticism of their activities is diminished or extinguished.
- 2.11 Professor Sharon Beder highlighted the problem in an article for the *Current Affairs Bulletin*⁸. In the article she drew attention to a paper entitled 'Legal Rights of Industry Against Conservationists'⁹, which had been distributed to delegates attending a pollution law conference¹⁰. The paper advised of legal action that had been taken against environmental activists in the US, the point being that the US developments were relevant to Australia, that is that similar kinds of actions could be brought against troublesome critics of industry and the like.¹¹

⁷ ACT Legislative Assembly Debates, 29 June 2005, p 2412

⁸ Beder, S. 'SLAPPs--Strategic Lawsuits Against Public Participation: Coming to a Controversy Near You.' *Current Affairs Bulletin*; Volume 72, No 3, October/November 1995, p 22

⁹ Jamieson R and Plibersek R, 'Legal Rights of Industry Against Conservationists', paper presented to Third Annual Pollution Law Conference, Sydney 28-29 October and Melbourne 30-31 October 1991

¹⁰ Beder, S. op cit, p 22

¹¹ ibid

- 2.12 One of the more identifiable features of strategic litigation has been described as making what should be a public issue the subject of private litigation. Among other things, private litigation enables the person issuing proceedings to request that the defendant be subject to court orders mandating that the defendant not speak publicly about the proceedings and any incidental matters, thereby further chilling debate.
- 2.13 The usual scope of strategic litigation has included protests against a matter, oral or written statements against a matter of public interest, misconduct, or prosecution for alleged criminal wrongs. While most claims have sought damages for defamation, there are also examples of strategic litigation alleging breaches of the Trade Practices Act, breach of contract, interference with trade, libel or slander, economic torts, fair trading and even conspiracy.¹²
- 2.14 Government bodies and ministers, including local government bodies, statutory authorities, developers and some large corporations are among the more common categories of legal persons launching litigation, with defendants typically including newspapers, journalists, environmental activists, activist organisations, private citizens and those people/organisations publishing the content.
- 2.15 Sharon Beder points out that the primary purpose of most SLAPP litigation is not the ostensible damages claimed, 'rather their aim is to harass, intimidate, and distract their opponents'.¹³ Beder goes on to say:

They 'win' the court cases when their victims 'are no longer able to find the financial, emotional, or mental wherewithal to sustain their defence. They win

¹² Collation of information from: Donald, B. *Defamation Actions Against Public Interest Debate*. Speech delivered to Free Speech Committee of Victoria on 22 April 1999; Foskey, D (14 December 2005). *Committee to examine anti-SLAPP Bill*. Press Releases: ACT Greens. [Online] <http://act.greens.org.au/public/?m=200512>; Walters, B (2003). *Slapping on the Writs: Defamation, Developers and Community Activism*. University of New South Wales Press Ltd: Sydney; Beder, S. 'SLAPPs--Strategic Lawsuits Against Public Participation: Coming to a Controversy Near You.' *Current Affairs Bulletin*; volume 72, number 3. October/November 1995; Wikipedia the free encyclopaedia [Online] http://en.wikipedia.org/wiki/Main_Page; Submission 1, Conservation Council of the South East Region & Canberra; and Submission 2, The Wilderness Society Inc

¹³ Beder S, "A SLAPP in the Face of Democracy", *Democratic Audit of Australia*, December 2004, p 2

the political battle even when they lose the court case if their victims and those associated with them stop speaking out against them.¹⁴

2.16 In his book, *Slapping on the Writs*¹⁵, Brian Walters SC, catalogues a range of matters where litigation has occurred or has been threatened in order to chill public debate on issues as diverse as:

- ⇒ The publication of a purchaser's guide to the harvesting of timbers from old growth forests;
- ⇒ the protection of a local grassy woodland from development into a sewerage farm;
- ⇒ the development at Lorne of a 126 multi-storey apartment block on the site of an historic property, Erskine House;
- ⇒ the development of Crown Casino and comments by a prominent Melbourne architect on the approach to appropriate planning processes by the Chair of the Casino project;
- ⇒ comments by the Inter-Church Gambling Tasking Force on the Casino project and the potential harm ensuing from the operation of the facility;
- ⇒ proceedings against a person living in a residential area where an extension of media premises into that residential area was proposed, even where the person had no involvement in the production of a brochure advertising a protest meeting, which took place on her premises;
- ⇒ the Hindmarsh Island marina and bridge development and actions by the Chapmans, the developers, for defamation against opponents of the bridge;
- ⇒ a resort development at Hinchinbrook Island and threatened actions by Keith Williams, the developer, against critics of the development.

2.17 The book describes a range of situations and outcomes where litigation or the threat of litigation had been used primarily to silence critics of persons, organisations or specific development proposals. The concern expressed throughout the book is the danger this poses for our civil liberties, in particular, freedom of speech. Given that free speech is a fundamental element for a healthy and informed democracy, the chilling of debate in this way is of

¹⁴ ibid

¹⁵ Walters B, op cit,

fundamental concern as it has the very real potential to undermine our democratic institutions.

- 2.18 What has been evident over the last several years is a broader approach to litigation, utilising not only defamation law and 'stop writs' but also litigation in tort and on trade practices grounds. Citing the Gunns case, concern was expressed at public hearing about this worrying trend, the witness arguing:

...the attempt is quite clear to make perfectly lawful activities like lobbying politicians, putting out media releases and even lobbying customers, into some grand conspiracy or some campaign to harm the company.¹⁶

- 2.19 The essence of the debate is summed up in the following extract from evidence given at public hearing:

We could do a quick quiz on what we think is suable. Is stating that anybody who wants to put a suburban housing estate in the middle of an estuary must have rocks in their head suable? Is providing accommodation or meeting places to protesters suable? Is writing to a corporation asking them to put environmental conditions on their purchases suable? Is agreeing to actions which would stop work on an industrial site for a day suable if it is done for political purposes? What about manufacturing a product in breach of laws protecting a corporation's rights in manufacturing? What about organising a boycott of a bus line because of travel restrictions on passengers?

Ask yourselves if they are suable. The fact is that the first four of those were parts of cases I've dealt with—either Hindmarsh Island cases or the Gunns case. The second last one, which seems, on its face, to be one of the more serious issues—manufacturing a product in breach of a corporation's rights to manufacture—is a description of Gandhi's salt march which led to Indian independence. The last one—organising a boycott of bus lines because of travel restrictions—was, of course, the Montgomery bus boycott which launched the civil rights movement in America.

These rights and the ability of the community to participate in public debate in these ways seem to me to be crucial for social change. When you look at the

¹⁶ Transcript of evidence, 4 April 2005, p 12

report and the experiences of the groups, there's no doubt that litigation threatens that right.¹⁷

Strategic litigation in the United States

- 2.20 California is the most significant jurisdiction to actively legislate to protect public participation and ensure that defendants in SLAPP suits are able to have the cases struck out and/or are able to claim appropriate damages.
- 2.21 There are three sections of the Californian Code of Civil Procedure which deal directly with SLAPP suits. In 1992, California enacted s 425.16, which was intended to prevent the misuse of litigation in SLAPP suits. It provided for a special motion which a defendant can file at the outset of a lawsuit to strike out a complaint where the complaint arises from conduct that falls within the rights of petition or free speech. When special motions are brought under an anti-SLAPP law, there is binding authority holding that the movant's special motion to dismiss must be granted unless it is devoid of any reasonable factual support or any arguable basis in law.¹⁸
- 2.22 On 6 September 2003, s 425.17 was enacted to correct abuse of the anti-SLAPP statute by prohibiting anti-SLAPP motions in response to certain public interest lawsuits and class actions, as well as actions against a business that arise from commercial statements or conduct.
- 2.23 The statute was further strengthened on 6 October 2005 when section 425.18 was signed into law to facilitate SLAPP victims in recovering damages through a 'SLAPPback' or malicious prosecution action against the SLAPP filers and their attorneys after the underlying SLAPP had been dismissed.
- 2.24 There is also legislation elsewhere in the United States which builds on the Californian legislation, more specifically the ability for SLAPP victims to sue attorneys acting for SLAPP filers for malicious prosecution.

¹⁷ Transcript of evidence, 4 April 2005, p 12

¹⁸ *Margolis v McCarthy* 2000 Mass. App. Div 12.

Sanctions against attorneys in the US

- 2.25 In Illinois, the ability for defendants in SLAPP suits to recover damages against the attorneys representing SLAPP filers has been written into the Illinois Legal Ethics Rules. Rule 3.1 and the various sub-rules prescribe the professional and personal consequences an attorney could face in acting for a client they know, or should reasonably know, brought and/or maintained an unmeritorious lawsuit.
- 2.26 Illinois Supreme Court Rule 137 prescribes the process to be followed by an attorney to avoid judicial sanction for abusive litigation practices. The attorney signing a pleading, motion or other paper is certifying that after reasonable inquiry the attorney knows or believes there is a reasonable factual and/or legal basis for the lawsuit or pleading.
- 2.27 This appears to be the standard applied to attorneys acting in lawsuits all over the United States; an attorney who breaches this standard will be deemed to have acted in bad faith or for an improper purpose.
- 2.28 Professional sanctions against an attorney who acts in unmeritorious lawsuits include disciplinary action, judicial sanctions and/or disbarment. Personal sanctions include personal liability in a malicious prosecution action and for damages awarded in that action.

Differences in the Australian and US approaches

- 2.29 As previously noted, a special motion to dismiss an action under anti-SLAPP legislation in the United States must be granted unless it lacks reasonable factual support or any arguable basis in law. This suggests that the American courts read the rights of petition and free speech broadly rather than narrowly. The situation is not the same in Australia.
- 2.30 Whilst the *Human Rights Act* protects the right of free speech in the ACT, it is not a constitutionally recognised right. While the High Court recognised the right to freedom of speech in *Theophanous*,¹⁹ that case has since been read down

¹⁹ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 184

to apply only to political communication.²⁰ In cases following *Theophanous*, the High Court indicated that the right to freedom of speech would be read restrictively, choosing a narrower interpretation over a broader one.

- 2.31 While American courts allow an action for malicious prosecution whether or not the case subject to the action was a civil or criminal law suit, this is again different to the approach of the Australian courts. In Australia, the tort of malicious prosecution is a civil action for misconduct in a criminal lawsuit. Australian courts have indicated a strong reluctance to extend the tort to include actions for a civil wrong.²¹

Strategic litigation in the ACT

- 2.32 While strategic litigation has historically not been a significant problem within the ACT, there have still been instances of the abuse of court processes or the threat of such processes. One example is threatened action by the National Zoo and Aquarium against protests by Animal Liberation:

...a couple of years ago the zoo here was planning an expansion. I am somewhat out of touch but I was brought into it from Adelaide. The zoo sent Animal Liberation here a letter threatening them with legal proceedings if they proceeded with the protest against the zoo. Of course that sent Animal Liberation here into a flap because they had never seen anything like this. Because of my involvement in cases in South Australia, they got in touch and we talked about it... Because they were able to draw on the experience of other groups elsewhere, they were able to make that backfire a bit.²²

- 2.33 Dr Ogle went on to say:

Regardless of the rights and wrongs of the zoo expansion—I've got no idea—it seems to me to be fairly fundamental that a group of people can have a small, peaceful protest about animal welfare outside a facility like a zoo and not have to go through the hassle of legal threats.²³

²⁰ *David Russell Lange v Australian Broadcasting Corporation* [1997] HCA 25

²¹ See, for example, *Commonwealth Life Assurance Society Limited v Brian* (1935) 53 CLR 343, *Martin v Watson* (1996) 1 AC 74, or *Sourian v State of NSW* [1999] NSWSC 1173.

²² Transcript of evidence, 4 April 2005, p 11

²³ *ibid*

- 2.34 Of note also is the hybrid nature of the ACT jurisdiction, that is its state and local government functions. In particular, the planning function is one area in which strategic litigation has traditionally occurred, where opponents of specific planning proposals have publicly criticised planning proposals and been the subject of litigation or the threat of litigation.²⁴
- 2.35 The Committee is mindful also of the many national bodies headquartered in the ACT. Given the significance of the ACT as a focus of national life, the Committee considers that legislation protecting freedom of speech on matters of public interest should be considered.

Free speech

- 2.36 Free speech underpins a democratic society, by making possible an informed population; the protection of freedom of speech is therefore a fundamental requirement for the safeguarding of a democratic society. Brian Walters argues that the chilling of public debate is detrimental to democracy and must be resisted. He stated:

Freedom of speech is a fundamental requirement for a democratic society. Since democracy depends on the exchange of ideas and opinions, and community requires communication between its members, it is essential that citizens have the freedom, in any medium, to engage in public debate, to express points of view, and to make their own responses to the world around them. Freedom of expression permits knowledge to flourish and prejudices to be challenged, and diminishes the alienation of those who are not heard.²⁵

- 2.37 The ACT has also legislated to protect free speech. Section 16 of the ACT's *Human Rights ACT 2004* specifically provides for the protection of freedom of expression:

²⁴ See Walters B, op cit, p 14

²⁵ *ibid*, p 52

16 Freedom of expression

(1) *Everyone has the right to hold opinions without interference.*

(2) *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.*

2.38 Notwithstanding the existence of specific legislation protecting free speech in the ACT, activists who speak out run the risk of being sued. In a jurisdiction which prides itself on its human rights initiatives and protections, the ability for democracy to be undermined by curtailing free speech is a significant concern.

2.39 Dr Greg Ogle stated at public hearing:

Similarly, as much as I am a supporter of human rights Bills, the ACT's Human Rights Bill is a balancing act. The qualification in clause 28 of that Bill gives no guidance as to where to draw the line, no guidance as to how to protect the right of assembly or the right to free speech.²⁶

2.40 The Committee is concerned that there is a serious threat to citizens' freedom of speech and consequently participation in debate in a democratic society.

2.41 The Committee is mindful that the ACT's reputation as a promoter and protector of human rights requires that action be taken to protect freedom of speech, including the freedom to participate and comment on political affairs and matters of public interest.

2.42 While the Committee recognises that the problem is not a significant one at present for the ACT, there is certainly potential for strategically motivated lawsuits to severely hamper free speech and restrict debate on contentious issues. The necessity for the legislation lies in underpinning the right to free speech in the Human Rights Act and to ensuring that controversial matters can be debated freely without fear of legal liability.

²⁶ Transcript of Evidence, 4 April 2006, p 13

3 DEFAMATION, NATIONAL LEGISLATION AND THE GUNNS CASE

Defamation proceedings and national legislation

- 3.1 One of the major areas of litigation for chilling debate has been the threat or actual use of defamation proceedings. Defamation law has long been a matter of concern for a number of reasons, not least because of the inconsistency between jurisdictions, leading to forum shopping by applicants.
- 3.2 In the late 1970s, the Australian Law Reform Commission [ALRC] published a report, *Unfair Publication: Defamation and Privacy*, in which the Commission concluded that defamation law as it then stood 'unduly impeded the flow of information on public affairs' for the following reasons:
- ⊖ In some jurisdictions truth alone was not a defence to a defamation action; the publication had to be 'in the public interest';
 - ⊖ A defence of fair reporting of certain specified proceedings was permitted but the lists differed from jurisdiction to jurisdiction;
 - ⊖ Defamation actions were often instigated without intention to proceed to trial, but to inhibit further publication on the subject – a 'stop writ'.²⁷
- 3.3 Much of the 1979 ALRC criticisms remained valid until the change to the defamation laws in 2004-2005. In March 2004 the Commonwealth proposed uniform national defamation legislation²⁸, giving the states until the scheduled meeting of the Standing Committee of Attorneys General on 29-30 July to unanimously agree to national amending legislation. The Commonwealth threatened the states with Commonwealth legislation if the states did not adopt national uniform defamation laws in a timely fashion.
- 3.4 All states have now enacted uniform defamation laws, largely based on NSW and ACT legislation, the jurisdictions considered to have the most developed

²⁷ Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report 11, 1979, p x

²⁸ Attorney General, *Outline of Possible National Defamation Law*, released March 2004

statutory defamation laws in Australia. The changes to the defamation law in the ACT were concentrated in the following areas:

- ⇒ the right of large corporations to sue for defamation was removed;
- ⇒ truth alone became a complete defence, a defendant being no longer required to prove that material was published for the public benefit; and
- ⇒ the maximum amount of damages that can be awarded is capped at \$250,000.²⁹

3.5 In particular, s 115 of the Act states that one of the objects of the chapter is:

- (b) to ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance.

3.6 One of the major weapons utilised by large corporations as a chilling mechanism has been the threat of defamation action - 'a tactic of sending letters threatening to commence action is often successful in getting critical stories watered down or pulled before they are published'.³⁰ The model Bill proposed by Brian Walters was largely aimed at ensuring that defamation actions could not be used by large organisations in this way to silence critics.

3.7 However, the changes to the defamation laws now mean that corporations have no cause of action in defamation, unless they are non-profit or contain fewer than 10 persons.³¹ These changes mean that, so far as public comment or public action is concerned, large corporations are unable to sue or threaten to sue in defamation, and when they do, truth is a complete defence. These amendments have given substantial protection to activists and critics of matters insofar as possible actions in defamation are concerned.

Other causes of action

3.8 However, the concern now is the trend towards other causes of action, particularly in trade practices law and tort law, specifically economic loss. For example, David Jones Pty Ltd has recently instituted proceedings under s 53 of the *Trade Practices Act 1974* against the Australia Institute, alleging misleading

²⁹ <<http://findlawaustralia.com.au/avantgo/newsHeadlines>>

³⁰ Miriam Lyons, *All Rights Reserved*, 13 July 2005, <www.newmatilda.com>

³¹ *Civil Law Wrongs Act 2002*, s 121(2)

and deceptive conduct.³² In another case under the same legislation, Australian Wool Innovation has taken People for the Ethical Treatment of Animals [PETA] to court over its criticism of mulesing and live sheep exports.

The Gunns case

- 3.9 However, the most significant of the recent actions is the Gunns matter. On 13 December 2004, Gunns Ltd instituted proceedings in tort for damages for economic loss against 20 defendants; some of whom were organisations and some were individuals, including the Wilderness Society and Greens Senator Bob Brown.³³
- 3.10 The proceedings were instituted in Melbourne, despite the applicant and most of the defendants being in Tasmania. Gunns was seeking total damages of \$6.3 million for economic loss and catalogued nine separate sets of allegations, five of which were designated as logging operations disruption campaigns and four of which were said to constitute instances of 'corporate vilification'.³⁴
- 3.11 The original statement of claim was 216 pages long, with an amended statement of claim of 360 pages being presented to the defendants several days before the strike out hearing on 4 July 2006. The court found the statement of claim so convoluted and poorly presented that it was thrown out of court and Gunns was requested to provide another. Over the past 2 years, Gunns has filed at least three separate statements of claim, all of which were rejected by the court, with Justice Bongiorno giving Gunns until 19 October 2006 to advise whether they would be filing a further statement of claim. On 17 November 2006 Gunns' lawyers provided three *proposed* statements of claim relating to some of the matters but seeking more time to file amended statements of claim in relation to other matters. A full chronology of the proceedings is at Appendix G.
- 3.12 During the course of the proceedings:
- Gunns changed lawyers several times;

³² Sydney Morning Herald, 5 February 2007, p 3

³³ *Gunns Ltd v Marr & Ors* [2005] VSC 251

³⁴ *ibid*, para 10

- ⇒ Costs have invariably been awarded against Gunns;
- ⇒ Claims against some defendants have been dropped;
- ⇒ Gunns has been responsible for delaying proceedings, by not attending or by late filing of claims and amended claims.

3.13 Both the time taken up with the case and the financial resources needed to defend the action have been considerable, with proceedings still in the early stages. There are also additional costs involved for defendants in having to travel to Melbourne for hearings.

3.14 The proceedings are a manifest illustration of the need for law reform to protect free speech and the community's right to participate in public debate in Australia. They also clearly demonstrate the potential litigants with significant resources have for silencing unpalatable criticism of their commercial activities. It should be noted that the costs are borne disproportionately, even where court costs are awarded against the applicant. Sharon Beder sums up the situation:

The cost to a developer is part of the costs of doing business, but the cost of a court case could well bankrupt an individual or an environmental group. In this way the legal system serves best those who have large financial resources at their disposal, particularly corporations. Such a case takes an average of three years and even if the person being sued wins, it can cost them tens of thousands of dollars in legal fees. Personal and emotional stress, disillusionment, diversion of time and energy, and even divisions within families, communities and groups can result.

3.15 It should be noted that, at a hearing in early April 2007, the Gunns amended statement of claim was accepted by the Victorian Supreme Court, with the defendants being required to respond by 4 May 2007. The amended statement of claim seeks \$339,699 in general and special damages, plus unspecified aggravated and exemplary damages. The original statement of claim sought \$6.4 million in damages, \$1.1 million in general damages and \$5.2 million in aggravated and exemplary damages.

4 SCOPE OF THE BILL

Outline of the Bill

- 4.1 The broad purpose of the Bill is to underpin public participation in debate through protecting 'the right of the public to act in support of social, community and political causes without fear that they will be attacked through the courts by spurious but nonetheless debilitating court action'³⁵.
- 4.2 The Bill aims to achieve this purpose by providing 'a mechanism to assess whether a lawsuit is bona fide and to deter strategic law suits against public participation, or SLAPPs.'³⁶
- 4.3 The Bill amends the Court Procedures Act by inserting a new section, Part 4A as follows:
- a) Clause 37A sets out the objects of Part 4A which ...are to encourage public participation and deter people from starting cases which improperly interfere with public participation.
 - b) Clause 37 B provides definitions for Part 4A.
 - c) Clause 37C sets out the concept of 'improper purpose', that is a proceeding:
 - ≡ Which intervenes with public participation; or
 - ≡ Where there is no reasonable expectation of the case succeeding; or
 - ≡ Where the intent of the case is to silence public participation, to divert resources from public participation to legal proceedings or penalises engagement in public participation;
 - d) Clause 37D defines 'public participation' as publication or conduct aimed at influencing public opinion on issues of public interest. It does not include unlawful behaviour;
 - e) Clause 37E allows a defendant to apply to the court to have a case dismissed if they consider the proceeding against them is brought or maintained for an improper purpose.
 - f) Clause 37F provides that the Court may make an order dismissing the proceeding if on the balance of probabilities the proceeding was commenced or continued for improper purposes. It also provides that where a case is

³⁵ Assembly Debates, 29 June 2005, p 2413

³⁶ *ibid*, p 2412

dismissed on grounds of improper purpose the court may order the plaintiff – the person that started the court process – to pay costs and damages to the defendant. In addition where an order for dismissal is not made but the court is satisfied that there are grounds of improper purpose the court may: order the plaintiff to provide security of costs for the defendant's costs and damages; or, order that the case not be settled or discontinued without the approval of the court. The court can impose conditions it considers appropriate.

- g) Clauses 37G and 37H set out the mechanism and situations by which the court can order the plaintiff to pay the costs of the defendant's costs in relation to the case.
- h) Clause 37I allows both parties and other parties to present evidence and arguments for their case.
- i) Clause 37J provides that costs to be paid to the defendant as a consequence of this new Part 4 of the Act can be paid out of any security for costs paid under an order via section 37F (3)(a).³⁷

4.4 The phrases 'improper purpose' and 'public participation' are fundamental to the operation of the Bill in terms of identifying strategic lawsuits and the potential remedies available to defendants in such cases.

4.5 *Public participation* is defined under the Bill as:

...a publication or conduct aimed at influencing public opinion or promoting or furthering lawful action by the public or by any government entity in relation to an issue of public interest, but does not include a publication or conduct—

- (a) in relation to which a prosecution has been started; or
- (b) that is a breach of a territory law; or
- (c) that contravenes an order of a court; or
- (d) that intentionally or recklessly causes physical injury; or
- (e) that intentionally or recklessly causes damage to or destruction of property; or
- (f) that is trespass to land; or
- (g) by way of advertising for commercial goods or services; or
- (h) that a court otherwise considers to be unlawful or unwarranted interference by the defendant with someone's rights or property.

4.6 In order to prove that proceedings were brought or maintained for an *improper purpose* the defendant must demonstrate to the Court that:

³⁷ Explanatory Statement, Court Procedures Amendment (Protection of Public Participation) Amendment Bill 2005, p 2

- ⇒ the publication or conduct in relation to which the proceedings are brought is public participation;
- ⇒ the plaintiff could have no reasonable expectation that the proceedings would succeed, and
- ⇒ a purpose for bringing the proceedings is:
 - a) to discourage the defendant or anyone else from engaging in public participation; or
 - b) to divert the defendant's resources from public participation to the proceeding; or
 - c) to penalise the defendant for engaging in public participation.

4.7 Section 37E(1) of the Bill allows a defendant to apply within a 60-day time frame to have a case summarily dismissed if the defendant 'considers that the proceeding was brought or is being maintained for an improper purpose'.³⁸ If a defendant in a proceeding seeks such an order:

...the parties may present evidence and make arguments about whether the proceeding was brought or maintained for an improper purpose, whether or not the evidence or arguments relate to a claim made by the plaintiff in the proceedings.³⁹

4.8 This requirement is also subject to the defendant satisfying the court that on the balance of probabilities, when viewed objectively, the proceeding was brought or is being maintained for an improper purpose.

Remedies

4.9 Summary dismissal of the proceedings is one remedy available to defendants. However the court is also able to exercise its discretion and make a costs order against the plaintiff or order punitive or exemplary damages to the defendant.⁴⁰

4.10 Where the proceedings are not dismissed by order of the court, the defendant can still be afforded protection by way of an order for security of costs⁴¹ against the plaintiff and/or an order mandating court approval prior to

³⁸ ACT Legislative Assembly Debates, 29 June 2005, p 2413

³⁹ S 37I (1)

⁴⁰ S 37F (2)

⁴¹ Security of costs means security sometimes required of a party to litigation in order to assure payment of expenses.

settlement or discontinuance of the proceeding.⁴² This protection is available at either the pre-trial or hearing stages of a proceeding.

The Walters' Bill

- 4.11 The framework of the Bill under consideration was based on the legislative model proposed by Mr Brian Walters. The Walters' Bill⁴³ was drafted to stand independently of existing legislation and there are some major differences between the Walters Bill and the Court Procedures (Protection of Public Participation) Amendment Bill 2005.
- 4.12 The Walters' Bill provided for the following:
- ⊖ Public participation was a defence to defamation;
 - ⊖ Corporations were unable to sue for defamation;
 - ⊖ No public servant or politician could sue for defamation;
- 4.13 The focus of the Walters' Bill is the use of defamation proceedings as a form of strategic litigation. Given the reforms to defamation law around the country, the use of defamation proceedings has now been limited, although not impossible. Individuals still retain the right to sue and it is not fanciful that large corporations would undertake proceedings which are ostensibly in the name of an individual director or office holder, but which are funded by the corporation/organisation.
- 4.14 However, in this regard, the Committee notes that, given the necessity to set out a cause of action at the time of issuing the writ, something which was not required during the period when 'stop writs' were routinely applied for, there is more of a discipline imposed on plaintiffs, which will also go some way to ensuring that frivolous or vexatious defamation suits do not progress. If the cause of action is not sufficiently robust in the initial writ, defendants have a range of interlocutory procedures available to them.

⁴² Sections 37F (3), 37G and 37 H

⁴³ Walters B, op cit, pp 66 – 75

- 4.15 The definitions of 'improper purpose' and 'public participation' have some superficial differences, but the practical effects of these provisions in both Bills are largely identical.
- 4.16 In both Bills, in order for a defendant to be able to pursue a remedy, they would need to prove that:
- ⊖ the plaintiff could have no reasonable prospect of success;
 - ⊖ the reason for bringing the claim was to discourage the defendant and others from engaging in public participation, or to divert the defendant's resources from public participation to the proceedings, or
 - ⊖ to penalise the defendant for engaging in public participation.
- 4.17 The sole difference produced by the different definitions of improper purpose and public participation is that in the Walters' bill public participation could continue to stand as a defence to defamation even where there is no judicial support for the claim that a proceeding is being run for improper purposes.

5 EVIDENCE

5.1 While submissions and witnesses were generally supportive of the objectives of the legislation, the evidence identified some potential problems with the legislation as it stood. Criticisms generally focussed on the following broad issues:

- ⇒ The Bill added nothing to existing law and overlapped or duplicated existing provisions;
- ⇒ The definition of public participation was problematic in that it was too narrow;
- ⇒ The need for the defendant to prove 'improper purpose' was also problematic.

Overlap with existing laws

5.2 While supporting the general objectives of the Bill, the Attorney General, the Law Society of the ACT, the Wilderness Society and the Conservation Council did not support the Bill in its current form.

5.3 The Attorney General argued that legislation in this area required 'examination of the appropriate balance between the rights of individuals to protest and the rights of commercial interests to do their business without improper hindrance' and generally concluded that 'the current Bill did not reflect a detailed consideration of these factors'.⁴⁴

5.4 The submission argued that not only were there potential obstacles to the effective implementation of the Bill, but that there was a tendency for the new provisions to overlap with existing legislation:⁴⁵

- ⇒ Part 14.2 of the *Civil Law (Wrongs) Act 2002* already requires solicitors to certify that their proceedings have a reasonable prospect of success and

⁴⁴ Attorney General, Submission 3, p 2

⁴⁵ *ibid*, p 1

allows for a court to impose penalties through costs if those prospects are not substantiated⁴⁶;

- ⇒ Part 9.2 of the same Act makes provision for the resolution of defamation matters without litigation, by affording publishers an opportunity to offer amends, the offer being a defence to any continued action by a plaintiff.⁴⁷

5.5 The ACT Law Society argued that the provisions of the proposed Bill were 'largely unnecessary, unrealistic or likely to be ineffective', suggesting that existing Supreme Court Rules allow a defendant and/or the court to deal with an improper claim.⁴⁸ The Law Society further argued that s188 of the *Civil Law Wrongs Act 2002* already required a lawyer filing proceedings to certify that the proceedings have reasonable prospects of success.⁴⁹

5.6 The ACT Law Society stated that the following powers were already available to the Supreme Court under its existing rules:

- ⇒ Order 66 r10B provides a power for the Registrar of the Court to reject documents which amount to an abuse of process.
- ⇒ Order 29 rule 4 SCR provides a general power to the court to deal with any pleadings if they disclose no reasonable cause of action or if they are frivolous or vexatious. The Court may strike out the pleading in whole or part, stay or dismiss proceedings or enter judgment against a party.
- ⇒ Further strike out powers against scandalous matters, or matters which may prejudice, embarrass or delay a fair trial are provided in SCR Order 23 rule 28 and Order 32 rule 8.
- ⇒ Order 34A rule 30 SCR provides a general power to the Court to stay proceedings.
- ⇒ Order 17 SCR provides for a defendant to seek summary judgment against a plaintiff if an action is frivolous or vexatious or that there is a good defence on the merits.

⁴⁶ Section 37C of the *Court Procedures (Protection of Public Participation) Amendment Bill 2005* overlaps with Part 14.2 of the *Civil Law (Wrongs) Act 2004* (ACT)

⁴⁷ Attorney General, Submission 3, p 1

⁴⁸ *ibid*, p 1

⁴⁹ ACT Law Society, Submission 4, p 1

Order 33A SCR allows the court to stay or dismiss proceedings because of undue delay or want of prosecution by a plaintiff or claimant.⁵⁰

5.7 The argument about the court's power to stay proceedings was criticised by Brian Walters. He suggested that while the power to stay proceedings was available, reliance on *Williams v Spautz*⁵¹ was problematic, because a defendant must show improper purpose and an intention not to prosecute the case to finality, that is:

To read from the headnote... "Proceedings are brought for an improper purpose and thus constitute an abuse of process where the purpose of bringing them is not to prosecute them to a conclusion but to use them as a means of obtaining some advantage for which they are not designed or some collateral advantage beyond what the law offers".⁵²

5.8 Brian Walters suggested that at present 'improper collateral purpose' is generally a matter to be decided by a judge, without legislative guidance and that legislative guidance as to what public participation and improper purpose mean would be helpful in guiding the outcome of litigation.⁵³

5.9 The Law Society also noted that, under general law, courts have wide powers to order costs against a solicitor who pursues litigation predominantly for some collateral purpose,⁵⁴ and that the new court procedures rules give to the courts power to order costs against a lawyer.⁵⁵ However, the efficacy of this sanction is questionable, given the rarity of courts imposing sanctions against lawyers.

5.10 In evidence to the Committee, Dr Steven Hausfeld, in expressing concern that the Bill was likely to be ineffective, stated:

The submission I make is that, broadly speaking, if there has been some interference with a right it cannot be public participation, so the Bill has no operation. If there has been some interference with or breach of the law or

⁵⁰ *ibid*, p 2

⁵¹ [1992], 174 CLR, 509

⁵² Transcript of Evidence, 20 July 2006, p 47

⁵³ *ibid*

⁵⁴ *Flower & Hart v White Industries (Qld) Pty Ltd* [1999] 87 FCR 134

⁵⁵ ACT Law Society, Submission 4, p 3

interference with someone else's rights, then a court would generally find now that there was a cause of action that the plaintiff could have. That would generally prevent a dismissal or a strike-out. So the existing law and the proposed Bill would come up with the same result. If there has not been any breach of law or interference with someone else's rights, then the matter might be a matter of public participation; but, if there has not been any unlawful activity or any interference with someone else's rights, then a court would now strike it out, or would dismiss it, because there is no cause of action revealed.⁵⁶

- 5.11 The ACT Law Society's submission pointed out that the ability for a defendant to claim 'improper purpose' and to have proceedings stayed or summarily dismissed already exists as an inherent power of the court, and one which is not dependent on a specific court rule.⁵⁷ The Law Society argued that 'improper purpose' at common law already extends to any collateral purpose, 'that is any predominant purpose not about seeking judgment on the issue in the proceedings'.⁵⁸

Public participation and improper purpose

- 5.12 The Attorney General suggested that the objective of early resolution of disputes at a pre-court stage could be compromised by the necessity for the phrase 'improper purpose' to be judicially determined.⁵⁹
- 5.13 The Law Society also had concerns about the definitions of 'improper purpose' and 'public participation', the two core concepts of the Bill. The submission suggested the definition of 'improper purpose' is an arguably narrower definition than courts already consider under the common law and existing rules, where it is an open class and not restricted to the defined categories in the Bill:

Accordingly, this core definition in the Bill effectively renders the Bill unnecessary given existing common law and court rules.⁶⁰

⁵⁶ Transcript of Evidence, 4 April 2006, pp 24-25

⁵⁷ ACT Law Society, op cit, p 2, citing *Williams v Spautz*[1992] 174 CLR 509

⁵⁸ *ibid*, p 2

⁵⁹ Attorney General, op cit, p 1

5.14 The ACT Law Society also stated that the definition of public participation in s 37D 'substantially renders the Bill nugatory'. The submission considers that s37D(h) in particular, is unhelpful, in that if the exception applies then the conduct is not public participation and the plaintiff could pursue litigation against the defendant, but if it does not apply, then a court would not consider that the defendant's action was unlawful or unwarranted or constituted interference with someone's rights or property. In such a case, the Law Society considered it unlikely that a court would hold that the plaintiff had any justiciable cause of action⁶¹, the upshot being that the Bill adds nothing to the current law.

Costs orders

5.15 One of the objectives of the Bill is to ensure that defendants are able to recover costs and expenses incurred as a result of being the subject of litigation. The Law Society argued that the Bill will be ineffective in meeting this objective, because there is no provision in the Bill for indemnity or solicitor-client costs. The submission stated:

Since the Bill provides no new criteria to be applied by the courts in considering the imposition of punitive or exemplary damages, one can only assume that the courts will continue to apply existing criteria – that is to continue to apply the law as it was prior to any enactment of the Bill. To the extent that the Bill proposes an entitlement to damages for improper proceedings it raises a problematic issue without providing guidance to the courts as to how to implement any such provision and it goes well beyond existing law.⁶²

5.16 The Law Society is concerned that s37A(a)(iii), reimbursement for reasonable costs and expenses as a result of becoming embroiled in the litigation, will not be effective.⁶³ The submission stated:

⁶⁰ ACT Law Society, op cit, p 5

⁶¹ *ibid*, p 6

⁶² *ibid*, p 4

⁶³ *ibid*, p 4

This is because none of its provisions expressly provide for indemnity or solicitor-client costs. Thus, to the extent that the Bill provides for a court to order costs, such costs would usually be costs on a party-party basis, leaving solicitor-client costs for the hapless defendant who was made subject to the sort of proceedings the Bill is directed against. Of course, the courts retain their existing wide discretion to order indemnity or solicitor-client costs in appropriate cases.⁶⁴

Proposals for an improved legislative mechanism

5.17 The Wilderness Society suggested that, whatever the specific mechanism, the basic mechanism required to ensure public participation comprised four elements:

- ⇒ purpose built legislation;
- ⇒ legislation which went beyond defamation law and included all potential civil litigation;
- ⇒ legislation 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 within the broad parameters of being non-violent and respectful of property and race, sex, religion and sexuality.⁶⁵

5.18 While the Wilderness Society supported the objective of the Foskey Bill, they argued that the Bover-Parnell model proposed for South Australia offered a better legislative scheme; that the Courts Administration Amendment Bill itself was problematic in terms of its framing and definitions. In particular, the Wilderness Society recommended that the legislation establish a positive right to public participation and that the Bill be redrafted along the lines of the Bover-Parnell model.⁶⁶

⁶⁴ *ibid*, p 3

⁶⁵ Ogle, *Gunning for Change: The Need for Public Participation Law Reform*, Exhibit 1, p 5

⁶⁶ Wilderness Society, Submission 2, Attachment

5.19 Dr Ogle also argued that the framing of the issue in terms of the plaintiff's purpose rather than the community's rights and the defendant's rights was problematic:

The core issue in terms of protecting public participation is the effect of these lawsuits, not the intention of somebody who brought them, so it seems to me that it is a better model to posit the right to public participation as a positive right, rather than simply trying to limit infringements or intentional infringements on it.⁶⁷

5.20 Dr Ogle suggested that model put forward by Travis Bover and Mark Parnell was a more appropriate one, in that it first established that there was a right to public participation and there were then three main elements used to protect that right.⁶⁸ The protections are:

- ⇒ a declaration from a summary court that a matter is the one of public participation;
- ⇒ the summary dismissal of claims relating to public participation; and
- ⇒ the introduction of a statutory tort of improper interference with public participation, that is where a person can prove that there is an improper purpose they can sue.⁶⁹

5.21 Generally speaking, the Wilderness Society advised that the concerns they have over the draft Foskey Bill are addressed in the Bover Parnell model.⁷⁰

5.22 The Conservation Council suggested to the Committee that a legislative framework protecting public participation should comprise four distinct legal mechanisms:

- ⇒ Immunity from litigation for all civil causes of action with the exclusion of criminal activities, physical violence or damage to property;
- ⇒ Appropriate deterrence measures;
- ⇒ A means by which a proceeding which unjustifiably interferes with the right to public participation can be summarily dismissed, expediently and inexpensively; and

⁶⁷ Transcript of Evidence, 4 April 2006, p 13

⁶⁸ Transcript of Evidence, 4 April 2006, p 13

⁶⁹ *ibid*, p 14

⁷⁰ *ibid*, p 14

- ⇒ A means by which damages can be recovered when a person's right to public participation is unjustifiably interfered with.⁷¹
- 5.23 The Committee notes the preferred principles or 'essential features' in relation to an amended Bill listed by Brian Walters in evidence to the Committee in Melbourne, that is:
- ⇒ A definition and protection of public participation;
 - ⇒ A ready means to promptly dispose of a SLAPP suit generally, and
 - ⇒ Provision for an award of punitive damages against a litigant who brings a SLAPP suit.⁷²
- 5.24 The Committee has some reservations on the Conservation Council's requirement for immunity from all civil litigation, considering this to be too broad a criterion and tending towards making public participation a defence to a civil action. Similarly, the Committee is concerned that the fourth point raised by the Wilderness Society, the paramountcy of the right to public participation, is problematic.

Supplementary legislative proposal

- 5.25 Subsequent to receipt of the Conservation Council's supplementary submission, attaching an amended Bover-Parnell model, on 19 December 2006, the ACT Greens submitted a further alternative proposed Bill, the Protection of Public Participation Bill, for the Committee's consideration.⁷³ While the amended Bill was largely based on the Mark Parnell Private Member's Bill, introduced into the South Australian Parliament on 6 December 2006, it had been slightly re-worded to accord with ACT legislative drafting standards. The Parnell Private Member's Bill is at Appendix D and the draft Bill as submitted by the ACT Greens is at Appendix E.
- 5.26 The draft proposal submitted by the Greens largely accords with the criteria set out by Brian Walters.

⁷¹ Conservation Council of the South East Region & Canberra, Submission 1, p 1

⁷² Transcript of Evidence, 20 July 2006, p 46

⁷³ ACT Greens, Submission 10, 19 December 2006

5.27 The amended Bill differs from the Foskey bill in that it is a stand alone bill, not an amending bill, with the following provisions:

- ⊖ A different purpose clause/amended 'objects' clause;
- ⊖ An amended definition of public participation, by omitting part (h) of s37D(h) in the Amendment Bill;
- ⊖ Procedures for a declaration from the Magistrates Court that certain conduct constitutes public participation and is thereby protected;
- ⊖ Procedures for dismissal of proceedings in the Magistrates and Supreme Courts;
- ⊖ The ability for courts to award costs as they see fit and for exemplary and punitive damages.

5.28 The protection of the right of public participation was very firmly supported by the Conservation Council and the Wilderness Society. Dr Hausfeld also supported this aspect of the Wilderness Society's proposal, arguing that the proposal in effect required a statutorily defined tort of interfering with the right of public participation :

One of the other broad things that arise is that the upshot of the Wilderness Society submission earlier was that there should be a right of public participation and there should be a statutorily defined tort of interfering with that right. Looked at in the broad, that in effect creates a human right of public participation and says that that right can be sued upon individual against an individual. This is a personal view that I have not, because it is a new matter that was raised immediately before me, discussed with others in the Law Society, but can I say that I frankly applaud that.⁷⁴

5.29 The proposed alternative Bill still contains a definition of 'improper purpose' but without the controversial s(h):

- (6) For this Act, a proceeding is taken to be commenced or maintained against a defendant for an *improper purpose* if —
 - (a) the defendant's conduct that would be the subject of the proceeding is public participation; and
 - (b) when viewed on an objective basis —
 - (i) there is no reasonable expectation that the proceeding will succeed; and
 - (ii) a purpose for commencing or maintaining the proceeding is—

⁷⁴ Transcript of Evidence, 4 April 2007, p 26

- (A) to discourage the defendant (or anyone else) from engaging in public participation; or
- (B) to divert the defendant's resources away from public participation to the proceeding; or
- (C) to otherwise penalise the defendant for engaging in public participation.⁷⁵

5.30 Public participation is defined in the amended proposal as:

7 Meaning of *public participation*

Public participation means conduct aimed (in whole or in part) at influencing public opinion, or promoting or furthering action by the public, a corporation or government entity in relation to an issue of public interest, but does not include conduct-

- (a) that contravenes an order of a court or constitutes contempt of a court; or
- (b) that constitutes vilification based on race, sex, sexuality, ethnicity, nationality or creed; or
- (c) that causes or threatens to cause physical injury or damage to property; or
- (d) that constitutes trespasses on a place of private residence; or
- (e) if-
 - (i) the conduct is communication by a party to an industrial dispute between an employer and employee, former employee, contractor or agent; and
 - (ii) the communication relates to the subject matter of the dispute; or
- (f) advertising goods or services for commercial purposes; or
- (g) that incites others to engage in conduct mentioned in paragraphs (a), (b), (c) or (d).

5.31 The definition of 'public participation' in the Bover-Parnell model and the Greens submission is almost identical. This definition is preferred to the definition contained in the original Bill, in that it:

⁷⁵ ACT Greens, op cit, Attachment, reproduced at Appendix E

...has a more objective approach to the question of whether the action has the effect of stifling public participation as distinct from looking at the question of whether the purpose of bringing the action was to stifle public participation. Procedurally it is, I must say, simpler for a court to determine the objective effect rather than the subjective purpose.⁷⁶

- 5.32 Further, s 8 of the proposed Bill specifically states that it is not a defence to a prosecution for an offence that the defendant's conduct constituted public participation.
- 5.33 In relation to costs orders, given the expense of defending any sort of litigation and the general tendency of the courts to only award court costs, there is an inequality of opportunity before the courts in any event. Hence the need for awards of punitive and exemplary damages provided for in the amended Bill.
- 5.34 A positive right to public participation is protected by enabling a person to obtain from the Magistrate's Court a declaration that conduct amounts to public participation. This declaration process to some extent addresses the need to ensure that conduct declared to be public participation renders a person 'immune from prosecution' but that can only be the case if no cause of action lies as a result of the conduct in any case. It is this declaration process that is the most problematic aspect of any legislative scheme and in the Bill proposed by the ACT Greens.

⁷⁶ Transcript of Evidence, 20 July 2006, p 46

6 COMMITTEE CONCLUSIONS AND RECOMMENDATIONS

- 6.1 From submissions and evidence given at public hearing it has become clear to the Committee that the Bill as originally proposed by Dr Foskey will not address all the difficulties currently being experienced by those threatened with or involved in litigation as a result of speaking out on matters of public interest. However, the Committee is also of the view that a better legislative model has been produced as a result of its inquiry which the ACT Legislative Assembly should consider.
- 6.2 The Committee notes the extensive involvement of the Wilderness Society in strategic litigation, both in the Hindmarsh Island series of cases and as a defendant in the Gunns proceedings and the consequential contribution that the Wilderness Society has been able to make to the inquiry. The Committee acknowledges the Society's concern that the original Bill did not go far enough in terms of protecting 'the community's right and ability to participate in political debate and protest'⁷⁷ and that the Bill should be amended to establish a positive right to public participation.⁷⁸
- 6.3 The Committee notes the Wilderness Society's suggestion that the mechanism to protect public participation must acknowledge the paramountcy of the right to public participation. However, the Committee considers this goes too far, that the better option is for legislation to recognise the right of public participation. The primacy or otherwise of the right of public participation vis-à-vis other rights and actions will then be something that should be determined by the courts as for any other legal issue.

⁷⁷ The Wilderness Society Inc, *op cit*, p 1

⁷⁸ *ibid*, p 3

- 6.4 The Committee has other specific comments in relation to the following:
- The power to stay proceedings
 - Costs orders
 - Referral to SCAG

Power to stay proceedings

- 6.5 The Committee notes the Law Society's emphasis on powers currently available to the courts to stay proceedings. However, the Committee is also mindful of the comments by the Wilderness Society and Brian Walters, that the legal threshold for a stay is high, that courts will almost always give the plaintiff their day in court⁷⁹ and the difficulty of what is required to show 'improper collateral purpose'⁸⁰.
- 6.6 Further, while the *Supreme Court Act 1933* in some respects is broader than the draft Bill in that it actively prevents a vexatious litigant from instigating future litigation and thus foreseeable misuse of the judicial process, it is necessary for a pattern of behaviour to be demonstrated. In many instances, there is no pattern of behaviour over a period of time able to be demonstrated. For this reason, a Bill which protects public participation would prevent such misuse by allowing the defendant in such cases to raise an objection prior to or during initial proceedings.⁸¹ In practical terms, this mechanism translates into a real possibility that the potential for vexatious or improper litigation can be alleviated without the need to demonstrate a pattern of behaviour. It may also act as a deterrent on those threatening litigation, given that defendants will have the ability to put a stop to inappropriate proceedings relatively quickly and efficiently.

Costs orders

- 6.7 While the Committee notes the comments made by the Law Society regarding costs, the Committee considers that the ability of the courts to order costs

⁷⁹ Wilderness Society, Submission 1, supplementary submission, p 1

⁸⁰ Transcript of Evidence, 20 July 2006, p 47

⁸¹ Division 4A.2 of the Court Procedures (Protection of Public Participation) Amendment Bill 2005

against a solicitor is an insufficient remedy, and that it is the plaintiff who should bear the costs of anti-public participation litigation.

- 6.8 Further, even where costs orders are awarded against a litigant such as Gunns, this may not necessarily be punitive and defendants remain out of pocket for legal expenses incurred apart from actual court costs. In addition, litigants such as Gunns have the financial ability to fund such litigation, including any potential costs orders, which become tax deductible as an expense of doing business.

Referral to SCAG

- 6.9 The Attorney General proposed that, as an alternative and preferred course of action, the matter be considered by the Standing Committee of Attorneys General [SCAG] with a view to working towards a nationally based regulatory system, thereby discouraging 'forum shopping'.⁸²
- 6.10 The Committee does not support the referral of the matter to SCAG. The Committee feels that working through the SCAG process is a time consuming one and there is no guarantee that the ACT will get the outcome that it wants. In the same way that the ACT was a pace setter for human rights legislation, the Committee feels that the ACT can again be the groundbreaking jurisdiction for anti-SLAPP legislation.
- 6.11 The Committee also notes the suggestion from the officials from the Department of Justice and Community Safety that, 'given the firm stand taken by the Victorian Supreme Court in the Gunns case, it may be appropriate to observe the developments in that action before finalising legislation aimed at discouraging similar actions'⁸³. The Committee considers that to delay action on this matter because of one case before one judge in a court in another state is not at all appropriate. The Gunns' litigation could continue for many years and may eventually result in an appeal court determination.
- 6.12 The Committee further considers that, no matter what the outcome in the Gunns case, there is still a requirement for protection from the threat of

⁸² Attorney General, op cit, p 2

⁸³ Transcript of Evidence, 4 April 2006, p 3

litigation. Financial and emotional stress can still be the result and, if litigation ensues, defendants will still be considerably out of pocket in terms of legal fees and other costs involved in fighting an action against a powerful opponent. The Committee considers that it is appropriate for 'elected representatives to assist in the evolution of legal concepts' and not wait for the concept of abuse of process to evolve'.⁸⁴

Conclusions

- 6.13 The Committee supports the objective of the proposed Bill, that is that public participation should be protected in some way. The Committee is mindful that there may be some challenges in developing the legislation to ensure that it is effective in protecting public participation without any adverse consequences in terms of increased litigation and longer time lines. The legislation also has to do more than what is currently available to the courts under existing procedural rules.
- 6.14 The Committee is therefore of the view that, while the Bill under consideration cannot be supported, a legislative scheme is an appropriate means to address this problem. The Committee is also of the view that the amended proposal by the ACT Greens could be the starting point.
- 6.15 The Committee agrees that any legislative regime needs to define and grant a positive right to public participation, that there should be a mechanism enabling the timely disposal of improperly brought litigation and that there should be provision for punitive damages to act as a deterrent.
- 6.16 The Committee considers, therefore, that it is appropriate for legislation to be introduced into the ACT Legislative Assembly now so that members of the public and community organisations are able to speak out freely on matters of public interest or controversy without danger of being sued and with some degree of legal protection and remedies available to them.
- 6.17 The Committee therefore makes the recommendations set out below.

⁸⁴ Transcript of Evidence, 20 July 2006, p 48

RECOMMENDATION 1

- 6.18 **That the Court Procedures (Protection of Public Participation) Amendment Bill 2005 not be proceeded with.**

RECOMMENDATION 2

- 6.19 **That a Bill be introduced into the Assembly to protect public participation and which specifically:**
- **contains a positive right to public participation**
 - **provides for a declaration that actions are public participation [and only public participation] and therefore protected. [This will not protect activity which is of itself unlawful or the subject of civil action; for example defamatory statements will still be defamatory statements and a declaration that they are public participation cannot be a defence];**
 - **provides for exemplary and punitive damages.**

RECOMMENDATION 3

- 6.20 **That the starting point for any proposed legislation might be the proposed Bill set out in Appendix F and submitted by the ACT Greens in December 2006.**

Mr Zed Seselja MLA

Chair

[8 May 2007]

APPENDIX A: List of Submissions

Sub No	Author
1	Conservation Council of the SE Region & Canberra
2	The Wilderness Society
3	ACT Attorney General
4	ACT Law Society
5	The Wilderness Society [supplementary submission]
6	Mr Don Nicol
7	Tuggeranong Community Council
8	The Environmental Defender's Office
9	Conservation Council of the SE Region & Canberra
10	ACT Greens

APPENDIX B: Public hearings and witnesses

4 April 2006 [Canberra]

Department of Justice and Community Safety

Mr Brett Phillips, Deputy Chief Executive

Mr David Snell, Manager, Legal Policy, Public Law Group

Mr Peter Quinton, Director, Legal Policy, General Law Group

The Wilderness Society

Dr Greg Ogle, Legal Coordinator

Ms Virginia Young, National Strategic Campaign Co-ordinator'

ACT Law Society

Dr Steven Hausfeld

Conservation Council of SE Region and Canberra

Ms Trish Harrup, Director

20 July 2006 [Melbourne]

Mr Brian Walters, SC, President, Liberty Victoria and Vice-President, Free Speech
Victoria

**APPENDIX C: Courts Administration (Protection
of Public Participation)
Amendment Bill 2005 and
Explanatory Statement**

2005

THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Dr Deb Foskey)

Court Procedures (Protection of Public Participation) Amendment Bill 2005

Contents

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1 Name of Act	
2 Commencement	
3 Legislation amended	
4 New part 4A	

2005

THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Dr Deb Foskey)

Court Procedures (Protection of Public Participation) Amendment Bill 2005

A Bill for

An Act to amend the *Court Procedures Act 2004*

The Legislative Assembly for the Australian Capital Territory enacts as follows:

1 Name of Act

This Act is the *Court Procedures (Protection of Public Participation) Amendment Act 2005*.

2 Commencement

This Act commences on the day after its notification day.

Note The naming and commencement provisions automatically commence on the notification day (see Legislation Act, s 75 (1)).

3 Legislation amended

This Act amends the *Court Procedures Act 2004*.

4 New part 4A

insert

Part 4A Protection of public participation

Division 4A.1 Preliminary

37A Objects of pt 4A

The objects of this part are—

- (a) encouraging public participation, and dissuading people from bringing or maintaining proceedings for improper purposes, by providing—
 - (i) an opportunity, at or before the trial of a proceeding, for a defendant to claim that, and for the court to consider whether, the proceeding is brought or maintained for an improper purpose; and
 - (ii) a way in which a proceeding that is brought or maintained for an improper purpose can be summarily dismissed; and
 - (iii) a way in which people who are subject to a proceeding that is brought or maintained for an improper purpose can obtain reimbursement for all reasonable costs and expenses incurred as a result; and
 - (iv) a way in which punitive or exemplary damages can be imposed in relation to a proceeding that is brought or maintained for an improper purpose; and
- (b) preserving the right of access to the courts for all proceedings that are not brought or maintained for an improper purpose; and
- (c) consistently with the *Human Rights Act 2004*, section 15, section 16 and section 17 (a), better protecting the following rights:
 - (i) the right of peaceful assembly and to freedom of association;
 - (ii) the right to freedom of expression;
 - (iii) the right to take part directly in the conduct of public affairs.

37B Definitions for pt 4A

claim means any claim for relief in a proceeding.

costs, of a defendant in relation to a proceeding, includes all of the reasonable costs and expenses incurred by the defendant in relation to the proceeding (including in taking action under this part).

defendant means a person against whom a proceeding is brought or maintained.

government means the Territory, the Commonwealth, a State, another Territory or a local government of a State.

government entity includes—

- (a) an instrumentality, officer or employee of the government; and
- (b) a contractor or anyone else who exercises a function on behalf of the government; and
- (c) any entity funded by government; and
- (d) an entity appointed or established by government or from which advice is requested by government.

improper purpose—see section 37C.

plaintiff means a person who brings or maintains a proceeding against a defendant.

proceeding means any proceeding brought in a court other than a prosecution for an offence, and includes a claim in a proceeding.

public participation—see section 37D.

37C Improper purpose

A proceeding is brought or maintained for an *improper purpose* if—

- (a) the publication or conduct in relation to which the proceeding is brought is public participation; and
- (b) the plaintiff could have no reasonable expectation that the proceeding would succeed; and
- (c) a purpose for bringing the proceeding is—
 - (i) to discourage the defendant or anyone else from engaging in public participation; or
 - (ii) to divert the defendant's resources from public participation to the proceeding; or
 - (iii) to penalise the defendant for engaging in public participation.

37D Public participation

Public participation is a publication or conduct aimed at influencing public opinion or promoting or furthering lawful action by the public or by any government entity in relation to an issue of public interest, but does not include a publication or conduct—

- (a) in relation to which a prosecution has been started; or
- (b) that is a breach of a territory law; or
- (c) that contravenes an order of a court; or
- (d) that intentionally or recklessly causes physical injury; or

- (e) that intentionally or recklessly causes damage to or destruction of property; or
- (f) that is trespass to land; or
- (g) by way of advertising for commercial goods or services; or
- (h) that a court otherwise considers to be unlawful or unwarranted interference by the defendant with someone's rights or property.

Division 4A.2 Proceedings brought for improper purposes

37E Application for summary dismissal

- (1) If a defendant in a proceeding in a court considers that the proceeding was brought or is being maintained for an improper purpose, the defendant may apply to the court for an order dismissing the proceeding.
- (2) The application must be made within 60 days after the day the originating process (however described) for the proceeding is served on the defendant.
- (3) The court must deal with the application as soon as practicable.
- (4) Unless the court orders otherwise, no further steps may be taken in the proceeding until the application has been heard and decided.
- (5) This section does not prevent a court from granting an injunction before the rights of the parties under this part are decided.

37F Orders available to defendant on application for summary dismissal

- (1) On an application under section 37E by a defendant in a proceeding, the court may make an order dismissing the proceeding if the defendant satisfies the court, on the balance of probabilities, that, when viewed objectively, the proceeding was brought or is being maintained for an improper purpose.
- (2) If the court makes an order dismissing the proceeding, the court may also make either or both of the following orders:
 - (a) an order that the plaintiff pay the defendant's costs in relation to the proceeding;
 - (b) an order that the plaintiff pay the defendant punitive or exemplary damages.
- (3) If the court does not make an order dismissing the proceeding but the defendant satisfies the court there is a realistic possibility that, when viewed objectively, the proceeding was brought or is being maintained for an improper purpose, the court may make either or both of the following orders:
 - (a) an order, on the conditions the court considers appropriate, that the plaintiff provide as security an amount to cover the costs and damages to which the defendant may become entitled under this part;
 - (b) an order that the proceeding must not be settled or discontinued without the approval of the court and on the conditions the court considers appropriate.

37G Order available to defendant on settlement or discontinuance etc of proceeding

- (1) This section applies if an order is made under section 37F (3) in a proceeding.
- (2) On an application for approval of the settlement or discontinuance of the proceeding, the court may, despite any agreement to the contrary between the

plaintiff and defendant, order the plaintiff to pay the defendant's costs in relation to the proceeding.

- (3) If—
- (a) the defendant applies for the proceeding to be dismissed for want of prosecution; and
 - (b) the plaintiff does not satisfy the court, on the balance of probabilities, that, when viewed objectively, the proceeding was not brought or maintained for an improper purpose; and
 - (c) the court dismisses the proceeding for want of prosecution;
- the court may order the plaintiff to pay the defendant's costs in relation to the proceeding.

37H Orders available to defendant at trial of proceeding

- (1) A defendant who has obtained an order under section 37F (3) in a proceeding may, at the trial of the proceeding, obtain either or both of the orders mentioned in section 37F (2) if—
- (a) the defendant alleges at the trial that the proceeding was brought or is being maintained for an improper purpose; and
 - (b) the proceeding is discontinued by the plaintiff or is dismissed; and
 - (c) the plaintiff does not satisfy the court on the balance of probabilities that, when viewed objectively, the proceeding was not brought or maintained for an improper purpose.
- (2) A defendant who has not obtained an order under section 37F (3) in a proceeding may, at the trial of the proceeding, obtain either or both of the orders mentioned in section 37F (2) if—
- (a) at least 60 days before the date set for the start of the hearing of the proceeding (or, with the court's leave, any shorter period before that date), the defendant gives the plaintiff written notice that the defendant intends to seek an order under this subsection; and
 - (b) the defendant satisfies the court there is a realistic possibility that, when viewed objectively, the proceeding was brought or maintained for an improper purpose; and
 - (c) the proceeding is discontinued by the plaintiff or is dismissed; and
 - (d) the plaintiff does not satisfy the court on the balance of probabilities that, when viewed objectively, the proceeding was not brought or maintained for an improper purpose.

37I Parties may present any evidence and argument

- (1) If a defendant in a proceeding seeks an order under this part in the proceeding, the parties may present evidence and make arguments about whether the proceeding was brought or maintained for an improper purpose, whether or not the evidence or arguments relate to a claim made by the plaintiff in the proceeding.
- (2) This section does not limit any other rights the parties may have to present evidence and make arguments.

37J Disposing of security

If a court makes an order under this part that the plaintiff in a proceeding pay the defendant's costs in relation to the proceeding, the order may provide for the costs to be paid out of any security provided by the plaintiff under an order made under section 37F (3) (a) in the proceeding.

Endnotes

1 Presentation speech

Presentation speech made in the Legislative Assembly on 2005.

2 Notification

Notified under the Legislation Act on 2005.

3 Republications of amended laws

For the latest republication of amended laws, see www.legislation.act.gov.au.

**THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY**

**COURT PROCEDURES (PROTECTION OF PUBLIC
PARTICIPATION) AMENDMENT BILL 2005**

EXPLANATORY STATEMENT

**Circulated by authority of
Deb Foskey MLA**

Court Procedures (Protection of Public Participation) Amendment Bill 2005**EXPLANATORY STATEMENT****Outline**

This Bill sets up a mechanism to assess whether a law-suit is bona fide. It aims to encourage participation in public interest matters by protecting the right of the public to participate in social and political activity on a range of issues, regardless of their access to resources.

The Bill does this by allowing a defendant to apply to the court to have a case dismissed if:

- it intervenes with public participation; or
- there is no reasonable expectation of the case succeeding; or
- the intent of the case is to silence public participation, to divert resources from public participation to legal proceeding or penalise for engagement in public participation.

Where a case is dismissed on such grounds the court may order the plaintiff – the party that initiated the court process – to pay costs and damages to the defendant.

In addition, where cases are not dismissed, a number of potential hurdles can be placed before the plaintiff in order to ensure the case is bona fide – these include: orders for security of the defendant's costs and damages; provisions requiring settlement of the case to come before the court; and, capacity to apply conditions such as paying the defendants costs and damages if the proceedings are settled or discontinued out of court.

Within this Bill public participation is defined as publication or conduct aimed at influencing public opinion on issues of public interest. It does not include unlawful behaviour.

The Bill protects the rights of:

- peaceful assembly and freedom of association;
- freedom of expression; and
- participating in the conduct of public affairs.

It does not inhibit the right of the plaintiff to distribute information or otherwise advance its cause. It seeks only to prevent the plaintiff from inhibiting the freedom of expression of others (in this case the defendant.)

Clause 1

The name of the Act

Clause 2

This is a technical clause, setting out the standard commencement provision.

Clause 3

This is a technical clause setting out the Act's amendment. The principal Act amended is the *Courts Procedures Act 2004*.

Clause 4

Clause 4 inserts a new division into Part 4 of the Act.

This new division creates provisions that allow a defendant to apply to the court to have a case dismissed if the proceeding is brought or maintained for the improper purpose of limiting public participation.

Clause 37A sets out the objects of Part 4A which in summary are to encourage public participation and deter people from starting cases which improperly interfere with public participation.

Clause 37B provides definitions for Part 4A.

Clause 37C sets out the concept of ‘improper purpose’ that is a proceeding:

- which intervenes with public participation; or
- where there is no reasonable expectation of the case succeeding; or
- where the intent of the case is to silence public participation, to divert resources from public participation to legal proceedings or penalises engagement in public participation.

Clause 37D defines ‘public participation’ as publication or conduct aimed at influencing public opinion on issues of public interest. It does not include unlawful behaviour.

Clause 37E allows a defendant to apply to the court to have a case dismissed if they consider the proceeding against them is brought or maintained for an improper purpose. Applications for dismissal must be made within 60 days of the proceeding starting and the court must deal with the application as soon as possible. The proceeding cannot progress until the application for dismissal has been decided.

Clause 37F provides that the court may make an order dismissing the proceeding if on the balance of probabilities the proceeding was commenced or continued for improper purposes. It also provides that where a case is dismissed on grounds of improper purpose the court may order the plaintiff – the person that started the court process – to pay costs and damages to the defendant. In addition where an order for dismissal is not made but the court is satisfied that there are grounds of improper purpose the court may: order the plaintiff to provide security of costs for the defendant's costs and damages; or, order that the case not be settled or discontinued without the approval of the court. The court can impose conditions it considers appropriate.

Clauses 37G and 37H set out the mechanism and situations by which the court can order the plaintiff to pay the costs of the defendant's costs in relation to the case.

Clause 37I allows both parties and other parties to present evidence and arguments for their case.

Clause 37J provides that costs to be paid to the defendant as a consequence of this new Part 4 of the Act can be paid out of any security for costs paid under an order via section 37F (3)(a).

APPENDIX D: Bover-Parnell Model Bill

Protection of Public Participation Bill 2006

A BILL FOR

An Act to protect and encourage participation in public debate and matters of public interest, and dissuade persons and corporations from bringing or maintaining legal proceedings or claims that unfairly interfere with the right to public participation.

Contents

- 1 Short title
 - 2 Commencement
 - 3 Purpose of Act
 - 4 Interpretation
 - 5 Right to public participation
 - 6 Application for declaration that certain communications or conduct constitute public participation
 - 7 Summary dismissal of proceedings found to be an interference with right to public participation
-

The Parliament of South Australia enacts as follows:

1—Short title

This Act may be cited as the *Protection of Public Participation Act 2006*.

2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

3—Purpose of Act

The purpose of this Act is to protect and encourage public participation, and dissuade persons from bringing or maintaining, or threatening to bring or maintain, proceedings or claims that are an interference with another's right to public participation—

- (a) by providing means by which a person may obtain a declaration from the Magistrates Court that a particular communication or conduct of the person constitutes public participation; and
- (b) by providing—
 - (i) an opportunity, at or before the trial of a proceeding, for the Supreme Court to consider whether the proceeding, or a claim

within the proceeding, constitutes interference with the defendant's right to public participation; and

- (ii) a means by which such a proceeding or claim may be summarily dismissed and the defendant reimbursed for reasonable costs and expenses incurred as a result; and
- (iii) a means by which a person who has suffered unjustifiable interference with the person's right to public participation may be awarded punitive or exemplary damages.

4—Interpretation

In this Act, unless the contrary intention appears—

court means the Supreme Court;

government means local, state or federal government;

government body includes any government department, agency, employee, agent or other person with authority to act on behalf of a government body;

public participation means communication or conduct aimed, in whole or in part, at influencing public opinion, or promoting or furthering action by the public, a corporation or government body in relation to an issue of public interest, but does not include communication or conduct that -

- (a) contravenes an order of the court or is in contempt of court; or
- (b) constitutes vilification based on race, sex, sexuality, ethnicity, nationality or creed; or
- (c) causes or threatens to cause physical injury; or
- (d) causes or threatens to cause damage to property; or
- (e) trespasses upon a place of private residence; or
- (f) is within an industrial dispute between an employer, their employees or former employees, or
- (g) is by way of advertising for commercial goods or services; or
- (h) attempts to incite others to commit any of the conduct or communication referred to in paragraph (a) – (g) above.

5—Right to public participation

(1) A person has the right to public participation.

(2) However, it is not a defence to a charge of an offence against a person to claim that the person's communication or conduct the subject of the charge constituted public participation by the person.

6—Application for declaration that certain communications or conduct constitute public participation

(1) A person against whom legal proceedings have been, or may be, issued (the *applicant*) may apply to the Magistrates Court for a declaration that—

- (a) the communication or conduct the subject of the proceedings constitutes public participation by the applicant; and
 - (b) the issuing of proceedings or the threat to issue proceedings by a person (the *respondent*) against the applicant in respect of the applicant's communication or conduct is inconsistent with the applicant's right under this Act to public participation.
- (2) An application under subsection (1)—
- (a) must be served on the respondent; and
 - (b) must be heard by the Magistrates Court within 30 days of the date of service; and
 - (c) may be heard in the absence of the respondent.
- (3) The Court may not make a declaration under subsection (1) unless satisfied that the communication or conduct of the applicant was based on honest and reasonable belief on the part of the applicant and a person of similar disposition would believe that, at the time of the public participation, the communication or conduct was reasonable.
- (4) The Court may make such orders as it thinks fit (including an order as to costs) on an application under this section.

7—Summary dismissal of proceedings found to be interference with right to public participation

- (1) A defendant against whom a proceeding is brought or maintained who considers that the whole of the proceeding, or a claim within the proceeding, is inconsistent with the defendant's right to public participation under this Act may apply to the court for 1 or more of the following orders:
- (a) an order to dismiss the proceeding or claim (as the case may be);
 - (b) an order for reasonable costs and expenses;
 - (c) an order for punitive or exemplary damages against the plaintiff.
- (2) An application under this section must be brought within 60 days of the service of the originating process on the defendant, and must be dealt with by the court as soon as reasonably practicable (and any further application, procedure or other step in the proceeding is, unless the court otherwise orders, suspended until the application has been heard and decided).
- (3) Nothing in this section prevents the court from granting an injunction pending a determination of the rights under this Act of the parties to a proceeding.
- (4) If the defendant satisfies the court, on the balance of probabilities, on an application under this section that, when viewed on an objective basis—
- (a) the communication or conduct in respect of which the proceeding or claim was brought constitutes public participation; and
 - (b) the communication or conduct of the applicant was based on honest and reasonable belief on the part of the applicant and a person of similar disposition would believe that, at the time of the public

participation, the communication or conduct was reasonable, the court may make 1 or more of the following orders:

- (c) an order to dismiss the proceeding or claim (as the case may be);
 - (d) an order that the plaintiff pay all reasonable costs and expenses incurred by the defendant in relation to the proceeding or claim (as the case may be), including all reasonable costs and expenses incurred by the defendant in pursuing rights or remedies available under or contemplated by this Act in relation to the proceeding or claim;
 - (e) an order for punitive or exemplary damages against the plaintiff.
- (5) An order for punitive or exemplary damages may be made by the court on its own motion or on application by the defendant, but may only be made where the court is satisfied that a proceeding or claim (as the case may be) was brought or maintained for an improper purpose as defined by s(6).
- (6) A proceeding or claim is brought or maintained for an improper purpose if —
- (a) the publication or conduct in relation to which the proceeding or claim is brought is public participation; and
 - (b) the plaintiff could have no reasonable expectation that the proceeding or claim would succeed; and
 - (c) a purpose for bringing or maintaining the proceeding is—
 - (i) to discourage the defendant or anyone else from engaging in public participation; or
 - (ii) to divert the defendant's resources from public participation to the proceeding; or
 - (iii) to penalise the defendant for engaging in public participation.

**APPENDIX E: Proposed Model Bill [based on
supplementary submission from
ACT Greens]**

2006

THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

Protection of Public Participation Bill 2006

A Bill for

An Act to protect and encourage participation in public debate and matters of public interest, and discourage people and corporations from bringing or maintaining legal proceedings that interfere with another person's right to engage in public participation

The Legislative Assembly for the Australian Capital Territory enacts as follows:

1 Name of Act

This Act is the *Protection of Public Participation Act 2006*.

2 Commencement

This Act commences on the day after its notification day.

Note The naming and commencement provisions automatically commence on the notification day (see Legislation Act, s 75 (1)).

3 Dictionary

The dictionary at the end of this Act is part of this Act.

Note 1 The dictionary at the end of this Act defines certain terms used in this Act, and includes references (*signpost definitions*) to other terms defined elsewhere in this Act.

For example, the signpost definition ‘*improper purpose*—see section 6.’ means that the term ‘improper purpose’ is defined in that section.

Note 2 A definition in the dictionary (including a signpost definition) applies to the entire Act unless the definition, or another provision of the Act, provides otherwise or the contrary intention otherwise appears (see Legislation Act, s 155 and s 156 (1)).

4 Notes

A note included in this Act is explanatory and is not part of this Act.

Note See the Legislation Act, s 127 (1), (4) and (5) for the legal status of notes.

5 Purpose of Act

The purpose of this Act is to protect and encourage public participation, and discourage people from interfering with another person’s right to engage in public participation by commencing or maintaining, or giving notice of an intention to commence or maintain, a proceeding against the other person—

- (a) by giving a person the right to apply for a declaration from the Magistrates Court that the person’s conduct constitutes public participation; and
- (b) by providing—
 - (i) an opportunity, at or before the trial of a proceeding, for the Supreme Court to consider whether the proceeding (in whole or in part) commenced or maintained against a defendant constitutes interference with the defendant’s right to engage in public participation; and
 - (ii) if the Supreme Court finds that the proceeding does constitute interference with that right, for the summary dismissal of the proceeding and the awarding of costs to the defendant; and
 - (iii) for the awarding of punitive or exemplary damages to the defendant if the Supreme Court finds that the proceeding was commenced or maintained for an improper purpose.

6 Meaning of *improper purpose*

For this Act, a proceeding is taken to be commenced or maintained against a defendant for an *improper purpose* if—

- (a) the defendant’s conduct that would be the subject of the proceeding is public participation; and

- (b) when viewed on an objective basis—
 - (i) there is no reasonable expectation that the proceeding will succeed; and
 - (ii) a purpose for commencing or maintaining the proceeding is—
 - (A) to discourage the defendant (or anyone else) from engaging in public participation; or
 - (B) to divert the defendant's resources away from engagement in public participation to the proceeding; or
 - (C) to otherwise punish the defendant for engaging in public participation.

7 Meaning of *public participation*

Public participation means conduct aimed (in whole or in part) at influencing public opinion, or promoting or furthering action by the public, a corporation or government entity in relation to an issue of public interest, but does not include conduct—

- (a) that contravenes an order of a court or constitutes contempt of a court; or
- (b) that constitutes vilification based on race, sex, sexuality, ethnicity, nationality or creed; or
- (c) that causes or threatens to cause physical injury or damage to property; or
- (d) that constitutes trespasses on a place of private residence; or
- (e) if—
 - (i) the conduct is communication by a party to an industrial dispute between an employer and employee, former employee, contractor or agent; and
 - (ii) the communication relates to the subject matter of the dispute; or
- (f) advertising goods or services for commercial purposes; or
- (g) that incites others to engage in conduct mentioned in paragraphs (a), (b), (c) or (d).

8 Right to engage in public participation

- (1) A person has the right to engage in public participation.
- (2) However, it is not a defence to a prosecution for an offence that the defendant's conduct constituted public participation.

9 Declaration that certain conduct constitutes public participation

- (1) If a person (**A**) gives notice of an intention to commence a proceeding against another person (**B**) in relation to conduct of B, B may apply to the Magistrates Court for a declaration that—
 - (a) the conduct that would be the subject of the proceeding constitutes public participation; and
 - (b) commencing a proceeding against B would be inconsistent with B's right under this Act to engage in public participation.

- (2) An application under subsection (1)—
 - (a) must be served on A; and
 - (b) must be heard by the Magistrates Court not later than 30 days after the day when the application is served on A; and
 - (c) may be heard in the absence of A.
- (3) The Court may make a declaration under subsection (1) only if satisfied that—
 - (a) B honestly and reasonably believed that the conduct was justified; and
 - (b) the issuing of a proceeding against B would be inconsistent with B's right under this Act to engage in public participation.
- (4) The Magistrates Court may make the orders it considers appropriate (including orders as to costs) on an application under this section.

10 Dismissal of certain proceedings

- (1) A person against whom a proceeding is commenced (the *defendant*) who considers that the proceeding (in whole or in part) is inconsistent with the defendant's right to engage in public participation under this Act may apply to the Supreme Court for either or both of the following orders:
 - (a) an order dismissing the proceeding (in whole or in part);
 - (b) an order for costs in relation to the proceeding.
- (2) An application under this section—
 - (a) must be served on the plaintiff in the proceeding; and
 - (b) must be dealt with by the Supreme Court as soon as reasonably practicable.
- (3) Unless the Supreme Court otherwise orders, any further application, procedure or other step in the proceeding is suspended until the application under this section is decided.
- (4) The Supreme Court may make an order under this section if satisfied that—
 - (a) the conduct of the defendant constitutes public participation; and
 - (b) the defendant honestly and reasonably believed that the conduct was justified.
- (5) The Supreme Court may, on application by the defendant or on its own initiative, in addition to the orders mentioned in subsection (1), make an order for punitive or exemplary damages if satisfied that the proceeding (or part of the proceeding) was commenced against the defendant for an improper purpose.

Dictionary

(see s 3)

Note 1 The Legislation Act contains definitions and other provisions relevant to this Act.

Note 2 For example, the Legislation Act, dict, pt 1, defines the following terms:

- Magistrates Court
- must (see s 146)
- proceeding
- Supreme Court
- under.

conduct includes communication.

government means the Territory, the Commonwealth, a State, another Territory or a local government of a State.

government entity includes—

- (a) an instrumentality, officer or employee of the government; and
- (b) a contractor or anyone else who exercises a function on behalf of the government.

improper purpose—see section 6.

public participation—see section 7.

Endnotes

1 Presentation speech

Presentation speech made in the Legislative Assembly on 2006.

2 Notification

Notified under the Legislation Act on 2006.

3 Republications of amended laws

For the latest republication of amended laws, see www.legislation.act.gov.au.

**APPENDIX F: Public Interest Lawyers'
Statement in support of public
participation law reform**

Public Interest Lawyers' Statement in Support of Public Participation Law Reform

As senior lawyers practising, advising and writing in the area of the law of public interest debate, we call on all Australian governments to implement law reform to protect the community's right and ability to participate in public debate and political activity without fear of litigation.

The increasing phenomenon of litigation against community participation in public issues by comment or action has the serious effect of intimidating the community, chilling public debate and silencing voices which should be heard in a democratic society. In addition these lawsuits against public participation create enormous stress and financial burden for the people and groups who are sued and clog our court systems with arguments which belong in political rather than legal arenas.

Free speech and robust public debate, together with the ability to participate in community and political activity without fear of litigation, are fundamental rights in a democratic society. The increasing and widespread use of defamation law, trade practices laws and economic torts laws against public participation must be wound back. It is no coincidence that societies where these rights of public participation are curtailed have historically been burdened with corruption, inefficiency and often disastrous decision making.

Legislation specifically to protect the community's right to public debate and participation has been introduced in 25 jurisdictions in the United States. We call on Australian governments to introduce similar laws and work together to achieve national or uniform legislation in Australia.

Statement Sponsors

Julian Burnside QC (Melbourne)
Brian Walters SC (Melbourne)
Associate Professor Spencer Zifcak (La Trobe - Melbourne)
Professor Hilary Charlesworth (ANU - Canberra)
Paul Heywood-Smith QC (Adelaide)
Professor Rob Fowler (Uni SA)
Stephen Keim SC (Brisbane)
Richard Coleman, Solicitor, John Fairfax Publications Pty Limited
(Sydney)
Bruce Donald AM (Sydney)

Supporting Signatories

We, the undersigned barristers, solicitors and legal academics and practitioners, similarly call on all Australian governments to implement law reform to protect the community's right and ability to participate in public debate and political activity without fear of litigation.

Donald K. Anton, Senior Lecturer, Australian National University
Peter Applegarth SC, Brisbane

(Adjunct) Professor Peter Bailey, Australian National University
Robin Banks, CEO, Public Interest Advocacy Centre, Sydney
Judith Bannister, Lecturer, Flinders University
Benedict Bartl, Solicitor, Hobart
Professor Gerry Bates, Australian National University
Paul Batley, Solicitor, Coffs Harbour
Adam Beeson, Lawyer, Hobart
Eliza Bergin, Solicitor, Melbourne
Charles Berger, Legal Adviser, Australian Conservation Foundation
Warwick Biggs, Barrister, Sydney
Hayley Blackman, Solicitor, Cairns
Vanessa Bleyer, Solicitor, Melbourne
Professor Ben Boer, Sydney University
Professor Stephen Bottomley, Australian National University
Josh Bornstein, Solicitor, Melbourne
Megan Bowman, Lecturer, Victoria University
Nick Brodribb, Legal Practitioner, Melbourne
Jim Brooks, Solicitor, Cairns
Roland Browne, Lawyer, Hobart

Holly Carcich, Solicitor, Adelaide
Kerry Clark, Solicitor, Adelaide
Pepe Clarke, Programs Director, Environmental Defender's Office, Sydney
Richard Coates, Solicitor, Adelaide
Andrew Collett, Barrister, Adelaide
Kerry Colmer, Solicitor, Adelaide
Associate Professor Damien Considine, University of Wollongong
Andrew Crockett, Senior Lecturer, Monash University
Liz Curran, Lecturer, La Trobe University

Lisa De Ferrari, Barrister, Melbourne
Associate Professor Andrea Durbach, University of NSW
Joan Dwyer OAM, Lawyer, Melbourne
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Kellie Edwards, Barrister, Sydney

Associate Professor Adrian Evans, Monash University
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Tracy Fantin, Barrister, Cairns
Dr Thomas Faunce, Senior Lecturer, Australian National University
Jess Feehely, Solicitor, Hobart
Tony FitzGerald, Lawyer, Hobart
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Dr Matt Harvey, Lecturer, Monash University
Dr Mary Heath, Flinders University
Megan Hender, Solicitor, Adelaide
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John Howie, Solicitor, Melbourne
Karen Hussey, Postdoctoral Fellow, Australian National University, Canberra
Jane Hutchinson, Lawyer, Hobart

James Johnson, Barrister, Sydney

Associate Professor John Keeler, Adelaide University
Simon Kenny, Lawyer, Alice Springs
Associate Professor Andrew Kenyon, Melbourne University
Duncan Kerr SC MP, Hobart
Peter Koutsoukis, Solicitor, Melbourne

Professor Ainslie Lamb AM, University of Wollongong
Simon Langsford, Solicitor, Adelaide
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Klaus Mueller, Barrister, Melbourne
Bernard Murphy, Solicitor, Melbourne

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Emeritus Professor Garth Nettheim AO, The University of NSW
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Lisa Ogle, Environmental Legal Consultant, Sydney
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Bob Whyburn, Solicitor, Sydney
Professor John Williams, Adelaide University

Matthew Zagor, Lecturer, Australian National University
Maria Zotti, Solicitor, Adelaide

31 March 2005

**APPENDIX G: Gunns' case chronology – "A
Brief History of Gunns v Marr &
Others" ⁸⁵**

⁸⁵ As set out in the webpage of the Wilderness Society;
<<http://www.gunns20.org/sites/gunns20.org/files/070112%20Chronology.doc>>

A BRIEF HISTORY OF *GUNNS v MARR & Ors*

- 13 Dec 2004 First Defendants served with Writ and Version one of statement of claim (216 pages).
- Jan - Feb 2005 Correspondence between **EMA Legal (lawyers for Gunns)** and Defendant legal teams regarding documents in statement of claim and problems with statement of claim.
- 11 Mar 05 **Directions Hearing**
- Plaintiffs don't attend.
 - Case moved to major torts list
 - Judge expresses concern about statement of claim
- 30 Mar 05 EMA Legal (for Gunns) writes to all Defendants seeking to adjourn Directions Hearing set for 8 April 2005
- 5 Apr 05 EMA Legal (for Gunns) requests adjournment of Directions Hearing from 8 April 05 to 22 April 05
- 8 Apr 05 **Directions Hearing**
- Timetable set for request and supply of Further and Better particulars
 - Strike out hearing foreshadowed for July.
- 22 Apr 05 Defendants lawyers make requests for Further and Better Particulars of the statement of claim.
- 10 Jun 05 Gunns' lawyers supposed to provide Further and Better Particulars by this day.
- 15 Jun 05 EMA Legal (for Gunns) file proposed new timetable pushing back date of strike out application. EMA Legal serves partial Further and Better Particulars.
- 17 Jun 05 **Directions Hearing**
- Requested by plaintiffs. They seek to push back timetable.
 - Judge refuses application and awards costs for the day to defendants.
 - 4 July 2005 confirmed for strike out
- Fri 1 Jul 05 Plaintiffs serve **Version 2** of the statement of claim in the afternoon (360 pages)
- 4 - 8 July 05 **Hearing on Strike Out application**
- Defendants 1,3,4,5,7,8,10,11,12,14,15,16,17,19 & 20 apply to strike out statement of claim
 - Defendants 2,6,9,13 & 18 reserve their rights to apply to strike the statement of claim.

- 18 Jul 05 **Judgment on Strike Out**
- Justice Bongiorno strikes out versions 1 and 2 of the statement of claim in its entirety and gives Gunns four weeks to write a new statement of claim.
- 15 Aug 05 **Version 3** of statement of claim served (221 pages).
- 17 Aug 05 **Mention**
- Costs awarded to defendants for 17 June 2005 directions hearing, strike out application and thrown away.
 - Timetable set for requesting and supplying particulars
- 14 Sep 05 Requests for Further and Better Particulars
- 26 Oct 05 Gunns' lawyers provide Further and Better Particulars
- 9 Nov 05 Defendants' lawyers advise court of their intention to make application to strike out version 3 of the statement of claim.
- 31 Jan 06 Defendants' lawyers file and serve their outline of argument (summary) in relation to the upcoming strike out application.
- 9 - 14 Mar 06 **Strike Out Hearing**
- Strike out application heard by Judge Bongiorno over Thursday, Friday and following Tuesday.
 - All defendants apply to strike out version 3 of the statement of claim on a variety of grounds.
 - Judge orders Gunns lawyers to compile all further and better particulars and correct statement of claim.
- 24 Mar 06 Gunns lawyers file and serve merged version of further and better particulars (641 pages) and corrected version of the statement of claim (version 3). This statement of claim is effectively the 4th version.
- 26 May 06 **Application**
- Lawyers for defendants 1,3,4,5 make an application before Mr Justice Bongiorno for additional costs orders relating to the award of costs following the first strike out application.
- 30 May 06 **Taxation call-over**
- Lawyers for defendants 10,11,12 and 19 seek a date for the court to determine how much Gunns owes these defendants in costs following the first strike out application. The figure is likely to be 60 – 75% of the actual legal fees normally charged by a solicitor.
- 12 July 2006 **Gunns change lawyers**

The court and lawyers for the defendants are advised that Gunns have changed lawyers. Hunt & Hunt are now Gunns lawyers, replacing EMA legal.

8 August 2006

Taxation

Taxing master (at the Supreme Court) awards defendants 10,11 and 12, Bob Brown, Peg Putt and Helen Gee, \$86,929.00 in costs in relation to the 1st and 2nd statements of claim in 2005.

28 August 2006

Judgment on March 2006 strike out application

Rejection of third statement of claim
Justice Bernard Bongiorno rejects Gunns third statement of claim in its entirety and gives them until 19 October to tell the court if it will try to introduce another statement of claim

5 October 2006

Gunns change lawyers (again)!

Hunt & Hunt who had replaced EMA legal were themselves replaced by Clayton Utz. Clayton Utz a large commercial law firm operating across Australia. They are well known for representing tobacco companies. It also appears the barristers Stephen Howells and Mark Irving have been sacked. Paul Santamaria S.C. is now doing the talking.

16 October 2006

Gunns ask for more time

Gunns' lawyers write to the Court seeking an extension of time to comply with the order made on 28 August 2006 that they advise the court and the defendants as to their future intentions in relation to the case. The letter states they intend to drop the "Campaign against Gunns" section of the claim which previously alleged a grand conspiracy to injure Gunns business.

17 November 2006 **Three Proposed Statements of Claim**

Gunns' lawyers provided three proposed statements of claim relating to the Lucaston, Triabunna, Styx, Hampshire and Burnie Woodchip Pile claims. They seek more time in relation to the corporate claims (which previously involved allegations of lobbying of Gunns banks and customers as well as the Banksia Foundation). The summons issued with these documents is set to be heard on 25 January 2007 in the Victorian Supreme Court.

13 December 2006 **Gunns drops some claims and defendants from the case**

Gunns' lawyers write to the court advising they do intend to proceed with the following claims:

- Japanese Customers Action
- Banks Action
- Banksia Awards action
- Campaign against Gunns

The letter also confirms the following defendants have been dropped from the case:

- Dr Peter Pullinger
- Doctors for Native Forests
- Senator Bob Brown
- Peg Putt MHA
- Helen Gee

15 December 2006 **Defendants lawyers respond**

The defendants' lawyers lodged their response to the three proposed statements of claim from Gunns. The responses differ between the defendants although most claim full costs for the wasted time spent on actions and defendants now dropped from the claim.

Note:

On 3 April 2007, the Victorian Supreme Court accepted an amended statement of claim by Gunns against 14 defendants, who have until 4 May 2007 to respond to that claim. A total of \$339,699 in general and specified damages is being claimed, plus unspecified aggravated and exemplary damages [pain and suffering or in a company's case, distress and embarrassment caused]. The original statement of claim was for a total of \$6.3 M in damages, \$1.1M general damages and \$5.2M in aggravated and exemplary damages.