

# ACTIVISM

## 'Gunns 20' reaches a final settlement

PENELOPE SWALES looks behind the headlines at the real costs of the case

The now notorious 'Gunns 20' case finally reached settlement on the 28 January 2010.<sup>1</sup> Sixteen of the original 20 defendants had either settled or been dropped from the suit since the case began in December 2004. Pursuant to the January settlement, the remaining four defendants are paying no costs or damages, nor are they giving any undertakings, while Gunns has agreed to pay \$155 088 in costs. Company secretary Wayne Chapman described the decision as 'commercial'.<sup>2</sup> The case cost Gunns close to \$3 million, much of which is tax-deductible. The company was previously ordered to pay costs of over \$450 000, making it the longest running and most expensive case of its kind in Australia. Gunns received approximately \$200 000 in settlements from various defendants, settling with others for no payment at all.

The Gunns 20 case is widely considered a SLAPP suit ('Strategic Lawsuit Against Public Participation') and has been a matter of deep concern both for environmentalists and civil libertarians wary of rising civil litigation by corporations against those opposing their activities. In its bid to override widespread community dissatisfaction with its timber operations in Tasmania, Gunns has led a trend that goes beyond the more traditional use of defamation and trespass suits against activists to use of the *Trade Practices Act 1974* (Cth), and commercial torts, such as unlawful interference in trade and business and unlawful interference in contractual relations.

SLAPP suits are not necessarily intended to win. Gunns would have been unlikely to recover the \$6.3 million originally sought from the defendants and spent millions pursuing greatly reduced claims, most recently seeking \$82 000 in specific damages for disrupted forestry activities plus a potential \$80 000 in punitive damages. Rather, the aim of a SLAPP suit is to tie up the time and resources of activists and discourage community dissent. Such suits raise serious questions about use of the legal system to stifle public participation in areas of legitimate community concern.

Included in Gunns' first two statements of claim were worrying allegations of 'conspiracy'. If successful, this could have rendered activists liable not only for acts that breached the criminal law, but a range of legal activities central to public participation in a functioning democracy, such as lobbying government and attending meetings. This claim, framed as a malicious 'Campaign Against Gunns', sought to hold people legally responsible for acts done by other members of organisations such as the Wilderness Society or even of affiliated organisations such as Doctors for Forests.

Clearly such a finding would be disastrous for dissent in civil society, and one would hope no such finding would be made. However, the success of the suit is only part of the issue if it effectively discourages involvement in protest for fear of expensive and stressful legal

action. The conspiracy and defamation allegations were dropped after the third statement of claim was struck out in August 2006.<sup>3</sup>

A separate defamation suit was subsequently brought against Dr Frank Nicklason for publically raising concerns about potential health effects of the woodchip pile at Burnie Wharf.<sup>4</sup> This case was settled in October 2009 with the defendant paying no costs or damages, only providing a letter of apology for not consulting Gunns before making his comments. The remaining torts being claimed were interference in contractual relations and trespass.

The case has led to calls for anti-SLAPP legislation of the kind now adopted by over half of jurisdictions across the United States, with PILCH putting forward draft legislation in Victoria. To date, only the ACT has introduced some weak legislation<sup>5</sup> though the introduction of uniform defamation laws in 2006 has offered some improvement as regards freedom of speech. Greens MPs have introduced bills in various jurisdictions across the country, but these proposals are inadequate, still requiring defendants to prove an improper use of the suit against them, rather than offering positive protection against the bringing of such suits.

The Gunns 20 case, while it may have succeeded in taxing the resources of the activists involved, does not seem to have quelled community opposition to the company's operations — in particular, the construction of the controversial pulp mill that was announced two days after the Gunns 20 case was first lodged. On 19 November 2009, 57 people — including popular former television personality Peter Cundall — were arrested at an anti-pulp-mill protest in Hobart, amid accusations of corruption, cronyism and calls for a Royal Commission into the pulp mill assessment and approval process.

The suit has drawn international criticism, damaged the company's reputation and possibly contributed to the significant drop in Gunns' share price. As of January 2010, the company was unable to secure finance for construction. However, Gunns remains undeterred regarding litigation, and is pursuing a separate case in trespass against thirteen activists for protests staged at its Triabunna pulp mill.<sup>6</sup>

There are currently in the region of 50 SLAPP suits being pursued around Australia.<sup>7</sup> The final outcome of the Gunns 20 case may appear a victory for activists, but it has cost the defendants five years of expensive, stressful and often baffling legal wrangling. While the law continues to permit, and even encourage such actions — with tax deductibility for expenses — the public's rights to protest and free speech remain severely curtailed.

PENELOPE SWALES is a law student at Monash University.

© 2010 Penelope Swales

### REFERENCES

1. See *Gunns v Burling & Ors* [2004] VSC 9575; *Tasmanian Pulp & Forest Holdings & Gunns Forest Products v Burling & Ors* [2009] VSC 4173. See also *Gunns Ltd v Marr (No 5)* [2009] VSC 284.
2. 'Gunns pays \$155,088 to end protestor legal action', *The Examiner* (Launceston), 29 January 2010.
3. *Gunns v Marr (No 2)* [2006] VSC 329.
4. *Gunns v Nicklason* [2007] SCV 5526.
5. *Protection of Public Participation Act 2008* (ACT).
6. See *Gunns Ltd v Alishah (No 3)* [2009] TASSC 103.
7. See *SLAPP's in Australia*, SourceWatch <[sourcewatch.org/index.php?title=SLAPP's\\_in\\_Australia](http://sourcewatch.org/index.php?title=SLAPP's_in_Australia)> at 3 February 2010.