Stop the SLAPP

Protecting Free Speech in Australia

Human Rights Law Centre

Acknowledgement of Country

The Human Rights Law Centre acknowledges the lands on which we work and live, including the lands of the Wurundjeri, Bunurong, Gadigal, Ngunnawal, Darug, and Wadawurrung people.

We pay our respect to the Elders of these lands, waters, and skies, both past and present.

We recognise that this land always was and always will be Aboriginal and Torres Strait Islander land because sovereignty has never been ceded.

We acknowledge the role of the colonial legal system in establishing, entrenching, and continuing the oppression and injustice experienced by First Nations peoples and that we have a responsibility to work in solidarity with Aboriginal and Torres Strait Islander people to undo this.

With thanks

To everyone who assisted in the production of this report, in particular:

- Dr Bob Brown
- Senator Tony Sheldon

Please note

This report aims to provide general information only.

It is not intended to be legal advice and should not be relied upon as such. This report does not suggest any illegal conduct on the part of any individual or organisation named.

Views expressed by external contributors to this report are those of the contributors and do not necessarily reflect the official position of the Human Rights Law Centre.

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Cover image: AGL v Greenpeace Australia Pacific press conference before a court hearing in Sydney. Credit: © James Zadro / Greenpeace.

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Foreword

Legal bullying of ordinary Australians as well as community groups, by big corporations with 'attack-dog' law firms, is on the rise.

The bullies are mostly aggressive billionaires or rich companies which can tax-deduct their legal costs while threatening citizens with bankruptcy or the closure of their community organisation.

This behaviour has become known worldwide as SLAPP, standing for Strategic Litigation Against Public Participation.

The remedy to the undemocratic menace of SLAPP is anti-SLAPP legislation and it is already in place in some advanced countries.

When Gunns, Australia's biggest logging company, slapped 20 Tasmanian people and groups with a $6.3 million writ two days before it announced plans for one of the world's biggest pulp mills, its aim was to stymie environmental opposition.

There were no anti-SLAPP laws in Australia.

I was one of the 20 and know how much my friends suffered simply because they had been involved in campaigns to save Tasmania's forests and wildlife.

Gunns' SLAPP writ left some defendants seeking medical attention for their anxiety and insomnia as they sought legal representation and faced numerous, lengthy and expensive court hearings held in Melbourne, not Hobart, to suit Gunns' plan.

Gunns' SLAPP writs diverted the energy of Tasmania's environmentalists from saving the forests to saving themselves, something expected more in a police state than a democracy.

In the end Gunns' legal challenge collapsed, as did the company itself.

This very important work, from the Human Rights Law Centre, a guide to why and how Australia should catch up with similar jurisdictions overseas and pass laws to outlaw such outrageous, anti-social behaviour by vested interests in the future.

For the sake of human rights and civic decency, it is high time that the Federal Parliament enacted anti-SLAPP legislation.

Dr Bob Brown
Former Senator for Tasmania
Member of the Gunns 20
bobbrown.org.au

Image: Dr Bob Brown.
Credit: Bob Brown Foundation.

Case study: Gunns 20.

In December 2004, Gunns Ltd, Australia's then largest wood-chipping export company, filed a lawsuit against 20 environmental activists and three organisations, known collectively as the Gunns 20. Among those sued were prominent environmental figures, including Greens Senator Bob Brown (as he then was) and The Wilderness Society.

Gunns sought $6.3 million in damages for what it described as "ongoing damaging campaigns and activities" against the company's logging operations. The lawsuit was initiated just two days before Gunns referred its controversial pulp mill to the Federal Government for assessment, leading many to view the legal action as a strategic effort to silence criticism.

Despite public outrage at Gunns' actions and widespread support for the activists, the case placed immense financial and emotional strain on those targeted. Some feared for their family homes, and the complex legal accusations, including conspiracy, made it difficult for the group to even communicate with each other.[1]

The lawsuit sparked major community backlash, as public criticism mounted against Gunns for its heavy-handed tactics. This outrage fuelled a powerful campaign targeting Gunns' financiers, shareholders, and international customers, which ultimately damaged the company's reputation and market value.[2]

Activists collaborated globally, reaching out to major global paper companies and pressuring Gunns' main financial backers, making it clear to them that Gunns' actions were out of step with environmental and social expectations in Australia.[3]

Nevertheless, the defendants secured strong legal representation, including several high-profile barristers such as Julian Burnside KC and Mark Dreyfus KC – now Commonwealth Attorney-General. Over time, the legal team dismantled Gunns' initial claims. In one hearing, the judge described Gunns' statement of claim as incomprehensible, stating that even explorers like Burke and Wills would have been overwhelmed by its complexity.[4]

As the case progressed, Gunns began to drop major parts of its claims, including allegations of interference with contracts and conspiracy. In 2009, the case began to unravel further when mediation led to settlements in favour of many of the defendants.

Gunns agreed to pay The Wilderness Society $350,000 while accepting only $25,000 in damages, and several individual defendants were cleared without having to pay damages or legal costs.

By February 2010, just days before the trial, Gunns dropped the case entirely and paid the remaining four defendants over $150,000.[5] Gunns was placed into liquidation in March 2013.

Image: Dr Bob Brown was one of 20 people targeted by Gunns.
Credit: Bob Brown Foundation.

Executive Summary

Strategic lawsuits/litigation against public participation (**SLAPPs**) are legal actions which have the effect of intimidating, silencing, or financially burdening individuals and organisations advocating in the public interest.

These actions, commonly filed by powerful actors like corporations, wealthy individuals or governments, often target human rights defenders, journalists, whistleblowers, activists or civil society groups for their advocacy on matters in the public interest.

SLAPPs exploit the law, not to resolve genuine legal disputes but rather to silence or discourage participation, advocacy or activism. These strategies create financial and emotional strain on those they target.

SLAPPs are a growing threat to free speech and democracy in Australia, particularly as they erode fundamental rights and freedoms enshrined in international human rights law, including our rights to public participation, the freedoms of assembly, association, and expression.

Key findings from this report illustrate the harmful impact of SLAPPs on Australian civil society.

Case studies like the Gunns 20 case, the Aldi and the Transport Workers Union lawsuit, and Dr. Ken Harvey's battle with SensaSlim highlight the severe financial, emotional, and legal consequences faced by those advocating for public interest causes.

The use of SLAPPs to stifle dissent also creates a chilling effect on public discourse and hinders transparency, accountability, and environmental, and human rights advocacy.

To address the use of SLAPPs, this report recommends urgent legislative protections of the kind which have been introduced in Canada and the United States of America. It is vital that governments across the country act to protect public participation and free speech in Australia.

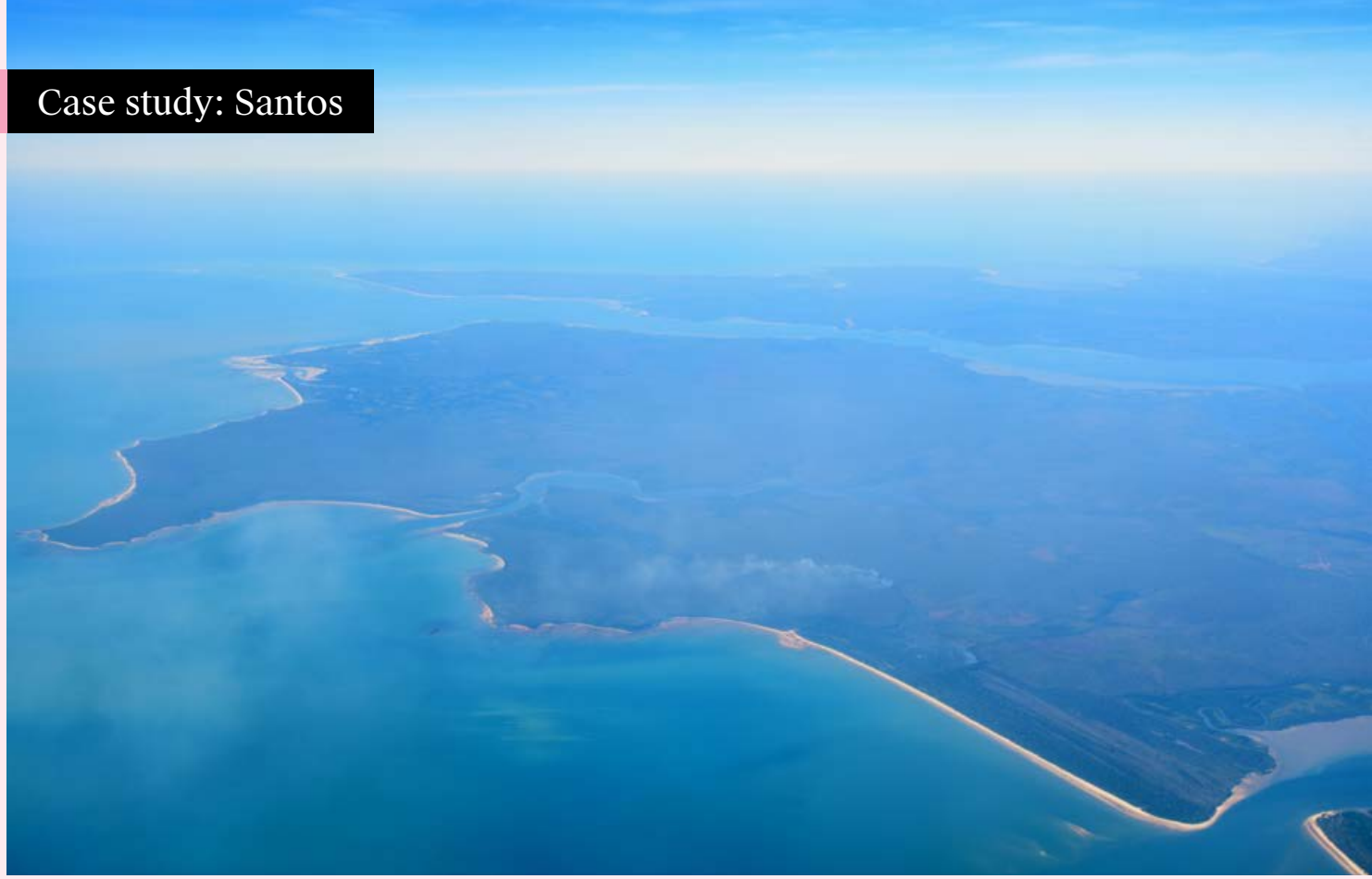
Australia has one anti-SLAPP law in place in the Australian Capital Territory (**ACT**). This law represents a commendable and crucial first step towards protecting public participation. It also demonstrates recognition within Australia of the need for legal safeguards against SLAPPs.

However, the ACT law is not fit for purpose in addressing the scope and sophistication of SLAPPs. Its limited jurisdiction and narrow focus lack the comprehensive protections necessary to adequately shield individuals and organisations advocating for the public good.

To truly be effective, a robust, nationally consistent approach to anti-SLAPP legislation is essential. Without such protections, SLAPPs will continue to be used to silence advocacy and activism, erode accountability, and undermine democracy.

Now is the time for policymakers and legislators to implement laws and policies which defend our fundamental rights. These include the freedom of expression on issues of public interest which affect us all, and protections to ensure that our legal system is not misused by the powerful to stifle our vital public discourse.

Case study: Santos



A recent high-profile case, *Munkara v Santos*, highlights critical issues at the intersection of public interest advocacy, climate and environmental justice, and the protection of First Nations culture. The case involves Santos, one of Australia's largest fossil fuel corporations.[6]

In the Federal Court, a group of Tiwi Islanders led by Simon Munkara, Carol Puruntatameri and Maria Tipuamantumirri, sought to stop the construction of the Barossa Gas Export Pipeline by Santos. The group claimed that the pipeline, set to transport gas from the Timor Sea to Darwin, would impact sacred sites and disturb cultural Songlines.[7] Although the court initially granted a temporary halt to the project, it ultimately ruled in favour of Santos, allowing the pipeline to proceed.[8]

Santos argued that some climate advocacy groups and the Tiwi Islanders' legal representatives, the Environmental Defenders Office (**EDO**) went beyond their traditional roles and acted as 'activist organisations' by supporting litigation against the pipeline.[9]

Santos is seeking indemnity costs, which would require the opposing parties to pay nearly all of the legal expenses incurred by Santos – which could be upwards of $8 million.[10]

As part of this effort, Santos obtained court subpoenas for internal documents from a number of environmental organisations, regarding any support they provided to the plaintiffs. Santos contended that the information within these documents could justify extending financial responsibility to these organisations. The court agreed that correspondence between the plaintiffs' legal representatives and the climate advocacy groups could be subject to review.[11]

While the losing party to litigation is usually obliged to pay the winning party's costs, this case is unusual as Santos requested orders for costs from the Court from the third-party supporters of the losing party.[12]

The case has led some observers to assert that 'Santos is engaging in a form of "lawfare" that seeks to scare off future challenges to its oil and gas expansion plans. It has turned the Munkara case into what can be characterised as a strategic lawsuit against public participation, or "SLAPP".'[13]

This case could have significant implications for others involved in public interest advocacy and legal action, including community legal centres and other non-profit organisations.

Image: Aerial photograph of Nguyu (Bathurst Island) one of the Tiwi Islands, used under Creative Commons licence. Credit: Bahnfrend.

Introduction

SLAPPs, or strategic litigation against public participation, are legal actions initiated by (or threatened to be initiated by) powerful entities – including individuals, corporations, and governments – aimed at silencing dissent, stifling community activism, and intimidating those who speak out in the public interest.

These lawsuits can take various forms, including civil, criminal, or administrative mechanisms. The defining feature of SLAPPs is not the specific legal mechanism employed but rather the misuse of power and legal processes to suppress critical voices.

In a healthy democracy, public participation is not only our right but a fundamental pillar of accountability and social progress. All people, but particularly human rights defenders, activists, journalists, whistleblowers and civil society groups acting in the public interest, must be free to raise their voices without fear of reprisal.

This report focuses on SLAPPs as a tool of coercion and control in Australia, highlighting the urgent need for robust protections to safeguard our right to speak out without fear of legal reprisal.

This report comes at a key moment.

In December 2024, we mark 20 years since the notorious "Gunns 20" case, a defining example of a SLAPP in Australia. The Gunns 20 case, in which twenty environmental activists and human rights defenders were sued by a logging company, exposed the serious risk these legal tactics pose to public interest advocacy.

Purpose of this report

The purpose of this report is to inform policymakers, civil society organisations, and the public about the human rights dangers of SLAPPs. It aims to highlight how SLAPPs can undermine democratic participation and makes recommendations for urgent legislative reform to protect those who speak up for the public good.

SLAPPs are not just a legal problem – they represent a broader attack on the principles of justice and equality.

Without robust legal protections from SLAPPs, individuals and organisations face the risk of financial ruin, public vilification, and long-term damage to their reputations. Australian governments and legislators must act to safeguard the voices that are essential to our democracy and uphold Australia's legal obligations to protect human rights.

This report makes recommendations as to critical anti-SLAPP legislative changes which are urgently needed to address the imbalance of power in these legal battles. By implementing these laws, governments can ensure that public participation – and all of our rights – are not only protected but strengthened.

Definition of terms used in this report

- **Costs**: the legal expenses involved in bringing or defending a case, such as lawyers' fees and court fees. A court may order the losing party to pay the winning party's costs.
- **Damages**: money that a court orders one party to pay another as compensation for loss, injury, or harm caused by their actions.
- **Defendant or respondent**: the person or organisation against whom a legal case is brought. They are the party defending themselves in court.
- **Discovery**: the process in which both sides in a dispute exchange information and evidence before a trial. This can include the exchange of documents, witness statements, and other relevant materials.
- **Plaintiff (or applicant)**: the person or organisation that brings a legal case against someone else, seeking compensation or another legal remedy.
- **SLAPP**: strategic litigation/lawsuits against public participation. These are legal actions, or threats of legal action, that use abusive tactics with the aim or effect of suppressing public participation and critical reporting or advocacy on public interest matters

Image: Supporters for defending whistleblowers in Adelaide.
Credit: Thomas Feng, Human Rights Law Centre.

Image: Protest at the Parliament of South Australia. Used under Creative Commons licence. Credit: Michael Coglan.

SLAPPs

What are SLAPPs?

SLAPPs are legal actions, or threats of legal action, that use abusive tactics with the aim or effect of suppressing public participation and critical reporting or advocacy on public interest matters.[14]

These cases are not merely seeking redress for a legal claim. They are a deliberate strategy to exploit imbalances in financial, political, or societal power to silence, intimidate or exhaust the resources of those who speak out.[15]

SLAPPs typically involve three main elements:[16]

1. The claimant or pursuer is an economically or politically powerful state or non-state entity, like a corporation or an individual.
2. The defendant or target is a person or organisation raising awareness *on a matter of public interest*, like community organisations, climate defenders, journalists, or other human rights defenders.
3. The issue at stake involves public participation, which includes any statement or activity related to the exercise of the freedom of expression or right to peaceful assembly on a matter of public interest.

Matters of public interest could include matters like corporate accountability or wrongdoing, environmental protection, human rights violations, whistleblowing, or corruption. SLAPPs convert these matters into legal disputes, often through exaggerated or disproportionate claims, such as excessive damages or penalties.[17]

Abusive legal tactics are a hallmark of SLAPPs and may include:[18]

- Filing multiple or coordinated lawsuits, including cross-border actions.
- Prolonging proceedings through delays, excessive discovery requests, or amended pleadings.
- Targeting outspoken individuals rather than the organisations they represent.

The objective of SLAPPs is to punish and silence critics raising public interest concerns through financial and emotional strain. Even when a case is dismissed, the toll on the defendant can be immense.

Relevant human rights law

SLAPPs undermine our human rights, including the rights to freedom of assembly, expression, association and the right to public participation.[19] These are rights under international human rights law which Australia is legally obliged to uphold.

Article 25 of the *International Covenant on Civil and Political Rights* (**ICCPR**) protects the right to participate in public affairs, voting, and equal access to public service, stating:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
>
> (c) To have access, on general terms of equality, to public service in [their] country.[20]

Similarly, Article 19 of the *ICCPR* protects the right to freedom of expression, stating:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of [their] choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

As a signatory to the *ICCPR*, Australia is legally required to respect, protect, and fulfil these rights. This includes ensuring that all people within Australia's jurisdiction are able to freely exercise their rights to participate in public life and express their opinions, without unreasonable restrictions or fear of reprisals.

Both the *ICCPR* and the *Universal Declaration of Human Rights*[21] (***UDHR***) enshrine the fundamental rights necessary for democratic participation, including the rights to peaceful assembly and association.[22]

The United Nations Human Rights Committee which oversees implementation and can hear complaints under the ICCPR, has emphasised the indispensable nature of these freedoms, particularly the freedoms of conscience and expression, as they are the foundation of free and democratic societies.[23] The freedom of expression is not only a right in and of itself but a necessary condition for transparency and accountability – both of which are fundamental to the promotion and protection of human rights.[24]

Moreover, governments must ensure that individuals are protected from intimidation and attacks aimed at silencing the exercise of the right to free expression, particularly human rights defenders, whistleblowers, journalists and lawyers who are often most engaged in the gathering and analysis of information relating to human rights issues.[25]

Importantly, the right to participate in public affairs is not only limited to voting; it extends to public debate, dialogue, and the organisation of individuals and groups to exert influence on political processes.[26]

Guaranteeing the right to participate in public affairs also includes guaranteeing and protecting the freedom of expression, right to peaceful assembly, and association, all of which are essential for all people to fully participate in public affairs.[27]

While international human rights law does permit restrictions on these rights, such restrictions must adhere to strict and specific criteria. They must be: prescribed by law; necessary to respect the rights or reputation of others (in the case of expression) or to protect national security, public safety, public order, public health, or morals. The limitations must be proportionate to the aim pursued and be non-discriminatory.[28]

International jurisprudence highlights that limitations on these rights should never aim to discourage their legitimate exercise, which is precisely the intent of SLAPPs.[29]

Additionally, any penalties imposed on those exceeding the limits of the freedoms of expression, assembly and association must themselves be proportionate.[30] However, SLAPPs rarely meet this standard and fail to balance rights in accordance with human rights law. They aim to silence and intimidate those who speak out.[31]

Other relevant human rights instruments

The Aarhus Convention

Another key instrument is the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*,[32] known more commonly as the Aarhus Convention. The Aarhus Convention provides valuable legal protections relevant to SLAPPs.

Adopted in 1998, the Aarhus Convention empowers individuals and civil society organisations by guaranteeing three core rights with regards to environmental matters: access to information, public participation in decision-making, and access to justice.

The Aarhus Convention explicitly protects individuals and groups from penalisation, persecution, or harassment for participating in environmental matters, effectively calling for measures against SLAPPs in environmental contexts.[33] By 2024 it has been signed by 38 countries.

While Australia has not signed or ratified the Aarhus Convention, doing so would signal a legal and political commitment to upholding public participation rights in line with international best practices.

The UN Guiding Principles on Business and Human Rights

The *United Nations Guiding Principles on Business and Human Rights*, adopted by the UN Human Rights Council in 2011, are the authoritative, internationally agreed framework, for how governments and companies can prevent, address and remedy human rights abuses committee in business operations.[34] The Guiding Principles outline that companies have a responsibility to respect human rights. Using SLAPPs goes against this responsibility to not cause or contribute to human rights violations.[35]

The United Nations Working Group on Business and Human Rights has emphasised the importance of human rights defenders in holding companies accountable and has reminded businesses that they should identify, prevent, and reduce human rights risks for human rights defenders.[36]

The Declaration on Human Rights Defenders

The *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (**the Declaration**) was adopted by the United Nations General Assembly in 1998 on fiftieth anniversary of the *Universal Declaration of Human Rights*.

While not legally binding on its own, the Declaration is grounded in existing human rights legal obligations from other international law sources.[37] As it was adopted by consensus after over a decade of negotiation, it also carries significant moral weight.

The Declaration reaffirms that existing rights and obligations must be fully applied to the specific challenges faced by human rights defenders. This includes protecting their ability to secure funding, share information, form associations, and participate in public discourse without undue interference.[38]

The Declaration details both the rights of human rights defenders and the duties of governments in supporting these rights. It references numerous protections, such as the right to peacefully assemble, to access and distribute information on human rights, and the importance of the ability to challenge government policies that hinder these freedoms.[39]

Additionally, the Declaration emphasises a shared responsibility for all individuals to support and protect human rights, and it underscores the importance of aligning domestic laws with international human rights standards to uphold the highest protections for all human rights defenders, including those involved in public interest advocacy.[40]

Recent developments

In late 2024, Professor Margaret Satterthwaite, the current United Nations Special Rapporteur on the independence of judges and lawyers (**Special Rapporteur**), presented her report *Justice is Not for Sale: The Improper Influence of Economic Actors on the Judiciary* to the United Nations General Assembly.[41] The report addresses the increasing influence of economic power in the judicial sphere and its impact on democratic processes and human rights.

The Special Rapporteur notes that as governments become increasingly dependent on private actors due to diminishing government resources, judicial independence and equality before the law became vulnerable to improper economic influence.[42] Her report highlights that economic inequality often leads to unequal power and influence, with the wealthiest 1% controlling 43% of global financial assets.[43] This concentration of economic power allows the super-rich, often through multinational corporations, to exert undue influence on legal systems and structures-including through their use of SLAPPs.[44]

Of the 474 SLAPPs identified by the Special Rapporteur since 2015, the majority involved criminal charges, mostly in the global South, while civil SLAPP cases are more prevalent in the global North.[45]

Forum shopping by transnational corporations – choosing jurisdictions with fewer anti-SLAPP protections – is reportedly used to further disadvantage their targets. This tactic, alongside criminal accusations against advocates, is particularly common in cases relating to industries such as mining, agriculture, and livestock.[46]

Despite existing anti-SLAPP laws in some jurisdictions, the Special Rapporteur notes that enforcement is inconsistent, particularly as many countries lack a clear definition of SLAPPs. Also, that a lack of awareness among judges, prosecutors, and lawyers means that SLAPP cases are often treated as ordinary civil or criminal cases, ignoring their human rights implications.[47] Furthermore, law firms themselves can exacerbate the harmful impact of SLAPPs by continuing to advise and represent SLAPP claimants.

The Special Rapporteur stresses that for justice systems to resist SLAPPs effectively, governments must establish robust frameworks to dispose of SLAPP cases, sanction SLAPP claimants, and ensure reparations for victims.[48]

Sexual harassment and SLAPPs

SLAPP tactics are also used against those who speak up about sexual violence or other forms of gender-based harm in the workplace.

In 2024, The University of Sydney published research which found that in Australia, defamation concerns notices (the first step in commencing defamation proceedings) are routinely used against victim-survivors who speak up about sexual harassment at work.[49] Because defamation damages are, on average, four times higher than that of sexual harassment, the study found that these defamation threats work to threaten victim-survivors into stopping their complaints.[50] In this way, SLAPPs are not confined to the commencing of proceedings as they can achieve their intended effect with pre-litigation measures.

Unlike in Australia, many US jurisdictions have strong anti-SLAPP legislation which privileges the communications of sexual harassment claims and prevents retaliatory defamation claims. The National Women's Law Centre in the US has also developed strong state-by-state SLAPP guidance and set up litigation support funds to assist people who speak up about sexual harassment and violence.[51]

Whistleblowers and SLAPPs

SLAPPs are not only used against human rights defenders and journalists, they can also target whistleblowers who expose wrongdoing within corporations. Disclosure of this wrongdoing is often in the public interest. By filing civil or criminal claims against those who reveal misconduct, corporations exploit SLAPPs to intimidate and silence whistleblowers who raise serious matters of public concern.

These lawsuits impose severe consequences on individuals who bring critical information to light which is in the public interest, as many as 8 in 10 whistleblowers report suffering harm at work as a result of speaking up.[52]

The harm reaches beyond the workplace, with whistleblowers in Australia facing criminal prosecution or civil claims for the taking of documents needed to prove their claims. These legal actions have a chilling effect on any whistleblower thinking about speaking up.

Case study: Troy Stolz and ClubsNSW

Mr Troy Stolz, formerly the head of anti-money laundering and compliance at ClubsNSW, uncovered that over 90% of ClubsNSW member clubs were failing to meet anti-money laundering obligations, creating a significant risk that money laundering was occurring through poker machines.

In 2022, Mr Stolz disclosed this information to Andrew Wilkie MP, who then exposed the findings in Parliament under parliamentary privilege.[53]

ClubsNSW pursued Mr Stolz and his wife with a civil claim for breach of the confidentiality obligations in his contract of employment.[54] They also sought an injunction against Mr Stolz, to stop him from speaking negatively about ClubsNSW. The group later went further, by seeking to have Mr Stolz convicted of criminal contempt for his public comments.[55]

Jeff Morris, a former Commonwealth Bank employee whose whistleblowing helped spark the 2017 Royal Commission into misconduct in the banking and financial sector, said of Mr Stolz's case: "This is typical of how corporations with deep pockets use the courts system as a blunt instrument to beat whistleblowers into submission."[56] James Packer also said ClubsNSW's behaviour was "ruthless unethical behaviour".[57]

Mr Stolz faced great financial detriment from the proceedings. Eventually, ClubsNSW and Mr Stolz settled out-of-court.

Mr Stolz's disclosures revealed a failure by ClubsNSW member clubs to comply with anti-money laundering obligations, which could pose serious risks of enabling criminal activity, including money laundering through poker machines.

Image: Poker machines, used under Creative Commons licence.
Credit: Yamaguchi 先生

The need for Anti-SLAPP laws:

Our current legal framework leaves our communities, and human rights defenders in particular, vulnerable by allowing the powerful to use SLAPPs to silence dissent and undermine public participation. This is not just a legal issue; it is a threat to our democracy.

Currently, the Australian Capital Territory is the only jurisdiction in Australia with anti-SLAPP laws. The Australian Capital Territory's *Protection of Public Participation Act 2008* (**the Act**) established a mechanism for courts to assess whether a SLAPP lawsuit is genuine.

The Act has a narrower scope when compared to the best examples of anti-SLAPP laws internationally; for example, the Act expressly excludes defamation from its scope. Unlike international jurisdictions, the Act requires the defendant to demonstrate that the plaintiff's cause of action is for an improper purpose. While commendable, the Act does not provide a strong model to base future Australian anti-SLAPP laws on.

Around the world, particularly in North America and Europe, robust anti-SLAPP laws exist which Australia could look to as models. These laws are informed by human rights standards and protections. The best of these laws share common features, including ensuring the swift dismissal of frivolous lawsuits and providing protections for speaking out on matters of public interest.

Under many of these anti-SLAPP laws, the person or organisation being sued in a civil matter can apply to strike out the case against them early in the proceedings because it involves speech on a matter of public interest.

The Centre for Free Expression at the Toronto Metropolitan University has evaluated and ranked 37 of these anti-SLAPP laws including laws in Australia, three Canadian provinces (Ontario, British Columbia and Quebec), 32 US states and the District of Columbia.[58]

They found that effective anti-SLAPP laws require certain key elements. These are:[59]

- **Broad scope**: A wide definition of 'public interest', ensuring a broad range of speech and activities are protected from SLAPPs.
- **Shifting the burden of proof**: The defendant needs only to show their actions relate to a matter of public interest, and the plaintiff must then meet a high threshold to prove the claim has merit.
- **Staying proceedings**: Legal proceedings between the parties should be paused while a motion to dismiss is being heard, which would prevent defendants incurring substantial legal costs before a case is resolved.
- **Presumptive award of costs to the defendant**: Courts should be allowed to award costs to the defendant if the motion to dismiss a suit succeeds, but not to the plaintiff if it fails.
- **Expedited hearing**: Anti-SLAPP motions should be heard on an expedited basis to avoid unnecessary delays and costs for defendants.
- **Right to immediate appeal**: Defendants should have the right to an immediate appeal if the motion to dismiss is denied, with clear timelines for the appeal set out in the legislation.
- **Additional damages provision**: Courts should be allowed to award damages or sanctions to deter plaintiffs from filing similar, frivolous actions in the future.
- **Statutory interpretation provision**: The legislation should be written to ensure a broad or liberal interpretation of its provisions to maximise its protections.

It is important to note that these features may not be relevant to all types of SLAPPs, as the mechanisms used to pursue SLAPPs can extend beyond civil litigation to include criminal law and administrative procedures. The contexts and legal tools of SLAPPs vary widely, making it challenging to address them through a single legal framework.

Additionally, the complexity of Australia's legal system, with courts and tribunals operating at different levels and jurisdictions across the country, further complicates the implementation of uniform anti-SLAPP laws.

Australia does not have a federal Human Rights Act to clearly define and protect fundamental human rights. As a result, the harmful impact of SLAPPs on these rights is less visible and harder to fully understand.

Nevertheless, these features provide valuable insights and serve as examples of how other jurisdictions have sought to address the problem of SLAPPs. They are presented here as a starting point for considering how similar protections could be tailored to the Australian context.

Case study: Protection of Public Participation Act 2015 (Ontario, Canada)

Ontario's anti-SLAPP law was ranked as being the best of all of those considered by the Centre for Free Expression.

Ontario's anti-SLAPP law is broad in scope and contains strong procedures, including imposing a low bar on a defendant to bring an anti-SLAPP motion, a provision for all proceedings to be stayed (including staying any related tribunal hearings), and a right to an immediate appeal if a defendant's motion is denied. However, Ontario's anti-SLAPP law is limited in two respects.

Firstly, although the defendant has a right to an immediate appeal, the laws only provide for the appeal to be heard 'as soon as practicable', with no set time limit, hindering the right to an 'immediate appeal'. Secondly, there are no provisions for a court to presumptively award damages or sanction a plaintiff to deter similar actions in future.

Image: Protest in Canada.
Credit: Chris Yakimov.

Case study: New York's anti-SLAPP laws

New York's anti-SLAPP laws were recently amended and have since been ranked third by the Centre for Free Expression.

The scope of the anti-SLAPP laws in New York is wide, with 'public interest' defined broadly. There are also strong protections for defendants, including the staying of proceedings, and a right to an immediate appeal. Improvements to New York's anti-SLAPP laws included having a definite expediated timeframe after filing, and for a court to presumptively award damages or sanction a plaintiff to deter similar actions.

However, New York's anti-SLAPP provisions are not contained within a single comprehensive piece of legislation. While this has not impacted its strength (as evaluated by the Centre for Free Expression) it raises unnecessary difficulties for defendants having to navigate the protections afforded by these laws.

Case study: *Civil Practice and Remedies Code Title 2. Trial, Judgment, and Appeal* (Texas)

Texas' anti-SLAPP laws are ranked fourth by the Centre for Free Expression. They contain strong procedures, similar to those in Ontario and New York, including expediated time frames for hearings after filing and an entitlement to an expedited review if the defendant's motion is denied.

Unlike Ontario and New York, Texas' anti-SLAPP laws provide a more robust mechanism to deter plaintiffs from repeating similar SLAPP actions by expressly allowing courts to award sanctions and not just damages against the plaintiff.

Texas' anti-SLAPP laws fall short in two areas. Firstly, despite having a broad application there are specific carve outs limiting their effectiveness. Secondly, only discovery is stayed, meaning other proceedings between the parties could potentially continue.

Image: New York State Assembly. Used under Creative Commons licence. Credit: Matt Wade.

Principles of strong and effective anti-SLAPP laws

The development of effective anti-SLAPP laws requires a thoughtful approach rooted in both the protection of our fundamental rights and the practical operation of our complex legal system.

To effectively protect public participation and to ensure our courts operate fairly and efficiently, Australian lawmakers should be guided by the following key principles when considering anti-SLAPP laws. As Australia considers its own legal response to SLAPPs, these principles must be at the heart of any new framework.

Principle 1: Protecting our fundamental human rights

At the core of any anti-SLAPP laws should be the protection of our human rights, like the freedoms of expression, association, assembly and rights to public participation and information.

SLAPPs have the effect of silencing commentary and advocacy on critical issues that affect our communities and our broader society. Therefore, anti-SLAPP laws must ensure that individuals and organisations can freely express their views without the looming threat of baseless, and often ruinous, legal action. They should be consistent with fully implementing Australia's international human rights law obligations. In the ACT, Queensland and Victoria they must be consistent with their respective human rights acts.

Principle 2: Facilitating just and efficient resolutions

Anti-SLAPP laws must enable courts to resolve claims in a just, efficient, timely, and cost-effective manner.

SLAPPs often impose significant financial and emotional burdens on those they target, even when the claims against them are meritless. Anti-SLAPP laws must be structured to facilitate the early dismissal of SLAPPs, minimising the unnecessary consumption of court resources and reducing the cost burden on their targets. In doing so, anti-SLAPP laws should reflect the overarching purpose of the courts – to deliver justice efficiently and fairly.

Principle 3: Addressing power imbalances

SLAPPs frequently involve a disparity in power and resources between parties, with the wealthy or powerful attempting to silence critics who have fewer financial means or resources.

Effective anti-SLAPP laws must empower courts and judges to identify when a claim is being used as a tool of intimidation or suppression rather than for legitimate legal purposes. Effective anti-SLAPP laws should require judges to assess whether the significant difference in resources between the parties creates an unfair advantage and, if necessary, take steps to counterbalance this disparity. This would ensure that legal disputes are fought fairly and not determined by power or financial advantage alone.

Principle 4: Deterring bad faith litigation

Anti-SLAPP legislation must be designed to deter claims brought in bad faith. Many SLAPPs are intended not to resolve legitimate disputes but to intimidate, exhaust, or financially drain the defendant.

To prevent this misuse of our legal system, strong anti-SLAPP laws must include mechanisms that penalise those who initiate such proceedings. Deterrence is vital to preventing the misuse of the courts and protecting public participation. This could involve awarding costs or damages to defendants in cases where claims are found to be frivolous or vexatious.

Case study: AGL Energy and Greenpeace Australia

In May 2021, Greenpeace Australia launched an advertising campaign targeting energy corporation AGL, following the release of a report that criticised AGL's environmental practices, including its continued operation of coal-burning power stations and perceived failure to meet renewable energy targets. The campaign, styled to mimic AGL's own branding, featured slogans such as "Still Australia's Biggest Climate Polluter" and "Generating Pollution For Generations." Central to the campaign was a modified version of the AGL logo, rebranded to refer to the company as "Australia's Greatest Liability."[60]

AGL sued Greenpeace, alleging copyright and trademark infringement over the use of its logo. Greenpeace defended the campaign under the "fair dealing" provisions of the *Copyright Act 1968* (Cth), arguing the modified logo was a parody or satire.

The Federal Court found that most of Greenpeace's uses of the AGL logo were lawful as they constituted fair dealing for the purposes of parody or satire. The Court held that the modified logo was used to highlight and ridicule the gap between AGL's claims of environmental responsibility and its actual practices. This juxtaposition was found to be parody and satirical.[61]

Furthermore, the Court found that Greenpeace's campaign aimed to provoke public debate about AGL's environmental record and promote corporate change. These objectives did not disqualify the parody or satire defence.[62] The use of the logo was deemed "fair" as it did not unfairly exploit AGL's copyright or trade mark, nor did it harm the market for AGL's logo itself.[63]

However, some uses of the logo were not protected under the parody or satire exception, such as the reproduction of the unmodified logo on protest placards and in certain social media posts.[64]

Image: AGL v Greenpeace Australia Pacific press conference before a court hearing in Sydney. Credit: © James Zadro / Greenpeace.

Image: Sensaslim was awarded a Shonky, an award for shonky products, by consumer action group Choice for "making snake oil look good". Credit: Choice.

Case study: SensaSlim

In 2011, public health physician Dr Ken Harvey submitted multiple complaints to Australian regulatory bodies, including the Therapeutic Goods Administration (**TGA**), the Complaint Resolution Panel (**CRP**), and the Australian Competition and Consumer Commission (**ACCC**), regarding the promotion of a weight loss product called SensaSlim.[65] Dr Harvey's complaints highlighted breaches of advertising regulations by SensaSlim.

Soon after his complaints, Dr Harvey received a letter from SensaSlim Australia Pty Ltd, threatening legal action unless he withdrew his complaints. Despite these threats, Dr Harvey refused to back down, and in April 2011, SensaSlim filed a defamation claim against him, seeking $800,000 in damages.[66]

The defamation claim effectively paused all regulatory investigations into SensaSlim, as the *Therapeutic Goods Regulations 1990* at that time prohibited regulatory action being taken on a matter that was under legal proceedings. Although SensaSlim's initial claim was struck out for technical errors, SensaSlim was allowed to amend and resubmit it, prolonging the case and preventing the CRP and TGA from addressing other complaints against the company.[67]

In 2014, the Federal Court ruled that SensaSlim had engaged in misleading or deceptive conduct by concealing the involvement of conman Peter Foster in the company. Foster had created a fictitious Swiss research institute and fabricated claims that SensaSlim's efficacy was supported by a global clinical trial that never took place. Despite this, the company earned approximately $6.4 million from deceiving consumers.[68] SensaSlim has since been deregistered.

Image: Senator Tony Sheldon leading an action by the TWU. Credit: Transport Workers Union.

Case study: Aldi Supermarkets and the TWU

In 2017, Aldi initiated legal action against the Transport Workers Union (**TWU**) following a union-led public campaign that aimed to raise concerns about safety and wages in Aldi's supply chain.[69]

The TWU's campaign, which included pickets, leaflets, and media statements, claimed that Aldi's contracts were putting pressure on truck drivers, forcing them into unsafe working conditions.[70] Aldi responded by alleging that the union's campaign was damaging its business, and brought an array of legal claims, all of which were dropped before the trial except for those for misleading or deceptive conduct, and injurious falsehood.[71]

The Federal Court rejected Aldi's claims, finding that while some of the union's statements were "disingenuous", they did not meet the test of misleading and deceptive conduct as defined under the law.[72]

The court noted that although the TWU's campaign may have hurt Aldi's business, it did not meet the legal threshold for injurious falsehood, as there was no intent to injure the company.[73] The Court recognised that the TWU held genuine concerns about safety and believed Aldi could take more action to address those concerns.[74]

TWU National Secretary Michael Kaine celebrated the outcome and stated that the case demonstrated how companies like Aldi attempt to use legal avenues to silence workers.[75]

Recommendations

The use of SLAPPs in Australia threatens our fundamental democratic rights of free expression and public participation, especially on issues of shared public concern.

SLAPPs undermine the ability of civil society groups, environmental activists, human rights defenders, and others to hold governments, corporations and other entities accountable, posing a direct threat to democratic engagement and transparency.

To counter this growing menace, Australia must act swiftly to enact strong anti-SLAPP legislation. While the Australian Capital Territory has taken initial steps with the *Protection of Public Participation Act*, this framework alone is insufficient.

Comprehensive anti-SLAPP laws, guided by human rights standards, are urgently needed to ensure that those who speak out in the public interest are protected from legal bullying.

We call upon legislators and policymakers to take urgent action to protect against this incursion on fundamental rights in Australia. Without immediate reform, SLAPPs will continue to undermine the very foundations of our democracy, chilling the voices of those who dare to speak out for the common good.

It is the duty of government to ensure that public interest advocacy is not only safeguarded but encouraged, free from the fear of retribution through malicious litigation.

- **Recommendation 1**: The Federal Government should enact an Australian Human Rights Act. An Australian Human Rights Act would elaborate and protect our fundamental rights in our federal laws, including the rights to freedom of expression and peaceful assembly, and the right to public participation.

- **Recommendation 2**: All Australian Governments should enact comprehensive anti-SLAPP legislation guided by the principles in this report and the *Declaration on Human Rights Defenders*.

- **Recommendation 3**: The Federal Government should sign and ratify the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, also known as the Aarhus Convention, before its 4th Universal Periodic Review cycle before the United Nations Human Rights Council in 2026.

Epilogue

The Transport Workers Union (**TWU**) has been fighting to make transport jobs safer and fairer for over a century, but Aldi's legal assault on the union tried to make that fight illegal.

Truck driving is the deadliest profession in Australia, and Aldi has a reputation for being the bottom of the barrel when it comes to safety. Unlike Coles and Woolworths who have signed charters with the TWU on safety standards, Aldi continues to this day to operate like the wild west.

One Aldi driver said at a recent TWU rally that in his 15 years there, "Aldi would just fight back on any suggestion health and safety reps would put forward."

Aldi truck drivers raised concerns about being pushed to work dangerous long hours, without adequate pay, operating faulty trucks that weren't adequately maintained, safety procedures being skipped, working in stores and distribution centres with blocked fire exits, faulty electrics, and filthy floors, with rotting meat being left out, and no lighting during night deliveries.

Rather than work constructively with the union to resolve these issues, Aldi tried to tie the union's resources up with frivolous legal claims for almost three years, most of which were dropped prior to trial.

The only accusation that made it to trial was that of misleading and deceptive conduct. Not only was that charge thrown out by the Federal Court, but the Court agreed with the TWU that "the pressure put on drivers transporting Aldi goods inevitably, but regrettably, occasioned contraventions by drivers of safety standards imposed by Aldi."

In recognition of the life-threatening conditions imposed by bad actors like Aldi, the Albanese Government passed safe rates legislation earlier this year to raise minimum standards in the industry. These changes wouldn't have been possible without the years of campaigning by both the TWU and responsible employers – the very campaigning that Aldi tried to silence with its malicious SLAPPs.

The working rights we take for granted today were hard fought for and won by union members.

If multinationals like Aldi can silence working people and their unions through lawfare, the rights we have won, and the rights we have yet to win, are in grave danger.

Senator Tony Sheldon
Senator for New South Wales
National Secretary of the
Transport Workers Union 2006 to 2019
tonysheldon.au

Image: Senator Tony Sheldon speaking at a TWU rally.
Credit: Senator Tony Sheldon.

Senator Tony Sheldon, Senator for New South Wales.

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