

LAW & CULTURE



GAGGED: THE GUNNS 20 AND OTHER LAW SUITS

Greg Ogle; Envirobook, 2009; 114 pp; \$21.95 (paperback)

This short and timely book written by self-proclaimed 'bush lawyer' Greg Ogle documents the 'chilling' (p 2) effect that civil litigation can and does have on protest and freedom of speech in Australia. Ogle, while not a qualified lawyer, worked extensively on the defence of several SLAPP (Strategic Litigation Against Public Participation) suits from 1998 until 2009 and maintains a website providing information and strategy advice for protestors who are being sued for their actions.¹

As Ogle demonstrates, SLAPP suits are not only about the threat of a potentially ruinous damages bill. Regardless of the success of the actions, they dramatically curtail public participation by monopolising the time, money and energy of defendants, thereby curtailing their ability to campaign and discouraging other people's involvement. Many such suits are brought for activities we might consider 'a normal part of a robust democracy' (p 3) such as speaking to the media, protesting and attending meetings. The book focuses in detail on suits brought across three different activist campaigns, highlighting the differing strategies and responses of the communities involved.

Chapter 2 deals with 11 years of litigation waged against opponents to the controversial Hindmarsh Island Bridge. In total, 16 separate defamation suits were initiated by Chapmans, the company seeking to build the bridge, several of them against mainstream media outlets. Ogle focuses primarily on the cases against the Conservation Council of South Australia² and the Kumarangk coalition, a 'genteel' and 'fairly conservative' (p 10) community group that had received a Reconciliation Award for its previous activities. Ogle describes this group as 'the broadest and most dynamic activist group I had seen in more than a decade' (p 15). He describes how the fear and confusion spawned by the litigation effectively snuffed out a campaign that had seen thousands of people protest and widespread media coverage, leaving

those involved intimidated, demoralised and suffering from anxiety and stress. The suit stretched on for several years after the bridge was built. While the Conservation Council survived, successfully defeating 17 of the 18 defamation claims against them, it weathered years of litigation and legal costs and was ordered to pay damages of \$130,000 for the successful claim concerning six words in their magazine, *Environment South Australia*. Ogle describes the effect as 'a huge impact and a silencing of community voices across a broad campaign' (p.3).

Chapter 3 deals with a very different organisation. Animal Liberation had illegally entered a battery chicken farm and taken footage, which it then released to the media. Upon being sued, these defendants took a different approach to that taken in either the Hindmarsh Bridge or later Gunns 20 litigation. Refusing to be intimidated, this small, more adventurous outfit with no money or assets to lose engaged with the legal process as a way of generating support for their cause. The self-represented defendants, not being lawyers, were free of professional obligations and could not be expected to know proper procedure. They therefore had the freedom to play with the legal process, make counterclaims, garner media attention, fill their pleadings with accounts of animal suffering and other tactics that legal professionals would not have dreamt of using, including serving documents on the other party dressed in a chicken suit.

Animal Liberation's methods and defences, while unorthodox, were ultimately successful. Even with this humorous approach, however, a toll was exacted. Over time, media interest flagged and the internal strain led to acrimony and the loss of several important members of the organisation. Ogle is also candid about the effects of his involvement in these cases on his own personal life, as two important partnerships over a decade fell apart, in part due to the constant stress and relentless workload.

About half of Ogle's book deals with the 'Gunns 20' case — the longest and most expensive of its kind to run in Australia.³ This book is essential reading for anyone

wanting to gain an understanding of this very complicated case quickly. The author's frustration at not being able to use similar tactics to the Animal Liberation campaign is palpable, but the Wilderness Society, being one of the principal defendants, was a large organisation with assets to lose, and the case was handled along conventional lines. Again, the personal toll on ordinary people's lives was extreme. However, the case still appears to have backfired against its plaintiffs, as the David-and-Goliath aspect of Tasmania's largest logging company suing activists and grandmothers seems to have only deepened opposition to Gunn's beleaguered pulp mill. This is evidenced by recent shareholder calls for a change of senior management and the removal of the pulp mill project and Gunns chairman John Gay to a newly-formed company, Southern Star.⁴

Ogle states that 'the lines around the right to protest, and what is and is not legitimate public participation' (p 4) should not be defined by civil litigation because 'the civil law draws those lines way short of what most people would accept as democratic behaviour' (p 4). Ogle's preferred approach in these cases is not to take a potentially doomed moral high ground — which may be indefensible — but to engage, counterclaim, promote to the media, and complicate the case as much as possible, thereby turning a would-be SLAPP suit back against its instigators by creating maximum expense and embarrassment for the other party. He acknowledges that this is only really possible where educated, savvy people without much by way of assets have the time and the temerity to do so. He states:

It is a curious thing that community activists under threat or in contact with the legal system often seek a [pro bono] lawyer and then expect the lawyer to get them out of trouble or to make their case. They effectively cede the legal strategy (which is also the political strategy) to lawyers. In many cases, defendants are actually silenced by their own lawyers' advice about the potential legal risks of talking about ongoing cases. It is a strange abandonment of the usual approach of community activists which centres on empowerment (pp 51–2).

The book finishes with calls for anti-SLAPP legislation of the kind now seen in half of the US states, and makes a brief analysis of the Australian Capital Territory anti-SLAPP

legislation, which is the first of its kind to be passed in Australia, albeit heavily diluted from its original form by a 'timid parliament' (p 112). It includes model legislation which has been developed by the Public Interest Law Clearing House. Overall, the book is well worth reading for an insight into a contested field of law that stands to be increasingly important as environmental issues become more pressing.

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REFERENCES

1. *The Bush Lawyer's Guide to Avoiding and Surviving Civil Litigation* <<http://users.senet.com.au/~gregogle/index.htm>> at 13 April 2010.
2. *Chapmans & Ors v Conservation Council & Ors* (2002) SASC 4; *Chapmans v Conservation Council, FOGAK & Ors* SADC 1366 of 1997.
3. *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].
4. ABC Stateline, Tasmania 'Gunns Chairman to step down' 23 April 2010 <abc.net.au/news/video/2010/04/23/2881730.htm> at 4 May 2010.

WHITELOCKE ON LAWMANSHIP

Bullstrode Whitelocke KC, Gordon/Abbot Publishing, 2009 (3rd ed), 171 pp, \$20 (paperback), available from <lawmanship.blogspot.com>.

Whitelocke on Lawmanship is something distinctive and possibly unique: an intentionally comedic legal textbook. My impression is that the form is so ripe with possibility that its true authors — who remain fashionably anonymous but can reasonably easily be identified on Google — may have invented a new genre.

The book purports to be a learned treatise on 'Lawmanship' by eminent Sydney silk, Bullstrode Whitelocke KC. Lawmanship is not a concept capable of satisfactory definition (the closest Mr Whitelocke gets is 'effective communication executed with an aristocratic dignity no longer common in the colonies') but it is ultimately unimportant — the real subject of Mr Whitelocke's book is Mr Whitelocke.

Apparently, the learned author was born in 1921 in Bowral, NSW and was a boyhood friend of Sir Donald Bradman. He attended

the Kings School, Parramatta, where he was awarded colours for 'punctuation and his dedication to the fagging system' and found early distinction by reason of his insistence on the archaic spellings 'shewed' and 'connexion'. He proceeded, inevitably, to the NSW bar. There he became known as the 'the Velvet Salamander' by dint of his 'cunning, patience, and flamboyant garmentry'. Sometime in the 1970s (chronological order is not one of his strengths) he appointed himself KC — rather than QC — on the basis that it had been 'widely, and correctly, acknowledged that his achievements prior to King George V's death had already warranted his elevation to that rank.'

His practice appears to have been evenly divided between the High Court of Australia, the Refugee Review Tribunal (despite legal representatives not generally being permitted before that body) and the Dust Diseases Tribunal. Notwithstanding copious statistical demonstrations of his success as an advocate (each triumphant graph 'adjusted for errors of fact and law') his talents do not appear to extend beyond an ability to lock his knees and so stand for days at a stretch, circular breathing, and a genius for distraction (including the patented 'Whitelocke drop').

Mr Whitelocke is at once magnificent and shabby. He is a vainglorious, name-dropping, self-referencing snob. Yet he is so desperate for his readers' admiration, so blatant and ingenious in his exaggerations and outright lies, so expansive in his range of historical, sporting and cultural references, and so proud of his dazzling array of cheap courtroom tricks that it becomes hard not to feel some perverse affection for him.

There is no better way to get the flavour of this unusual work than to set out a few passages. The following are from the first substantive chapter, 'How to Project Yourself: Image is Everything':

For men aspiring to greatness, the importance of a pleasant countenance is not a new development. Looks have been an important aspect of advocacy and persuasion since the birth of Julian of Norwich in 1342 at which time man first became able to discern the pleasant from the repulsive. Indeed, the

great persuader himself, Heraclitus, was considered almost supernaturally handsome. (p 2) But his natural good looks have not made him complacent:

I was lucky enough to begin greying around the temples at age seventeen (17), and, indeed, in my halcyon days, was known as the 'Silver Canetoad' around the Union Club. I am now blessed with probably the thickest head of hair of any octogenarian in Australia. But rest on my profuse, hoary laurels I do not: I continue to strive for perfection. Through dedication and the constant application of lemon juice and a curling iron, I have managed to train my hair to grow in the colour, texture and style of a judicial wig. This natural hairpiece gives me around-the-clock gravitas, whether I am drafting, hunting or even just visiting the corner store (p 2).

He also warns against conventional anti-ageing treatments:

As our friends in the Orient have discovered, age is strongly correlated with wisdom. Like fine wine and Mr Bing Lee, the modern lawman benefits from the depth, interest and character that age provides. I implore you to do what you can to prematurely age your face. Ian 'Molly' Meldrum used to spend long hours in front of industrial grade heaters, periodically basting his face with a tonic of ammonia and basil pesto, to obvious effect. His inexorable rise in the face of a manifest lack of talent and suspected communist sympathies should be all the proof you need (p 3).

And so Mr Whitelocke goes on for 15 surprisingly well-sustained chapters, covering philanthropy, conversation, preparation, courtroom tactics, disruption (in and out of court), the written word and politics. There is also a bizarre chapter titled 'Dealing with Juniors, Solicitors and Inferiors Generally' where the reader is introduced to Tron J — a computer simulated judge invented by Mr Whitelocke and 'programmed to deal out the withering personal criticisms necessary to prepare an aspiring lawman for his first appearance in a real courtroom' (p 75).

Mr Whitelocke does more than mete out advice. He also provides samples of his written work for us to marvel at and learn from. He illustrates the importance of 'drafting in the correct narrative voice' as follows:

I use the narrative voice of the very pious when writing character references for myself