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FCA 1863

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The Wilderness Society Inc. v The Hon. Malcolm Turnbull, Minister for the Environment and Water Resources [2007] FCA 1863 (30 November 2007)

Last Updated: 30 November 2007

FEDERAL COURT OF AUSTRALIA

**The Wilderness Society Inc. v The Hon. Malcolm Turnbull, Minister
for the Environment and Water Resources [\[2007\] FCA 1863](#)**

PRACTICE AND PROCEDURE – Costs – discretion to award costs – public interest litigation – applicant brought proceeding in public interest – applicant wholly unsuccessful - whether public interest nature of proceeding sufficient reason to deny costs to successful respondents. **Held:** costs awarded to the successful respondents - public interest considerations relevant but not sufficient to alter usual rule that costs follow the event.

[Administrative Decisions \(Judicial Review\) Act 1977](#) (Cth) [ss 5](#) and [6](#)
[Judiciary Act 1903](#) (Cth) [s 39B](#) [Environment Protection and Biodiversity Conservation Act 1999](#) (Cth) [Federal Court of Australia Act 1976](#) (Cth) [s 43](#) [Land and Environment Court Act 1979](#) (NSW) [s 69\(2\)](#)

Judicature Act 1890 (UK) s 5 *Australian Conservation Foundation v Forestry Commission* (1988) 81 ALR 166 cited *Buddhist Society of Western Australia (Inc) v Shire of Serpentine-Jarrahdale* [[1999](#)] [WASCA 55](#) referred to *Donald Campbell & Co Ltd v Pollak* [1927] AC 732 followed *Friends of Hinchinbrook Society Inc v Minister for the Environment (No. 5)* [[1998](#)] [FCA 432](#); (1998) 84 FCR 186 cited *Latoudis v Casey* [[1990](#)] [HCA 59](#); (1990) 170 CLR 534 referred to *Mees v Kemp (No 2)* [[2004](#)] [FCA 549](#) cited *Oshlack v Richmond River Council* [[1998](#)] [HCA 11](#); (1998) 193 CLR 72 applied *R v Industrial Disputes Tribunal; ex parte American Express Co Inc* [1954] 2 All ER 764 distinguished *Ruddock v Vadarlis (No. 2)* [[2001](#)] [FCA 1865](#); (2001) 115 FCR 229 applied *Save the Ridge Inc v Commonwealth* [[2006](#)] [FCAFC 51](#); (2007) 230 ALR 411 referred to *South West Forest Defence Foundation v Department of Conservation and Land Management (No 2)* [[1998](#)] [HCA 35](#); (1998) 154 ALR 411 cited *Sorell Council v State of Tasmania (No 2)* [[2004](#)] [TASSC 101](#) distinguished *The Investors for the Future of Tasmania Inc. v Minister for the Environment and Water Resources* [[2007](#)] [FCA 1179](#) cited **THE WILDERNESS SOCIETY INC. v THE HON. MALCOLM TURNBULL, MINISTER FOR THE ENVIRONMENT AND WATER RESOURCES AND GUNNS LIMITED** TAD 15 OF 2007 MARSHALL J30 NOVEMBER 2007 MELBOURNE (HEARD IN HOBART)

**IN THE FEDERAL COURT OF AUSTRALIA
TASMANIA DISTRICT REGISTRY**

TAD 15 OF 2007

BETWEEN:

THE WILDERNESS SOCIETY INC

Applicant

AND:

**THE HON. MALCOLM TURNBULL, THE
MINISTER FOR THE ENVIRONMENT AND
WATER RESOURCES**

First Respondent

GUNNS LIMITED

Second Respondent

JUDGE: MARSHALL J
DATE OF ORDER: 30 NOVEMBER 2007
WHERE MADE: MELBOURNE (HEARD IN HOBART)
THE COURT ORDERS THAT:

1. The applicant pay the respondents' costs of the proceeding, to be taxed in default of agreement.
2. The second respondent's motion dated 9 November 2007 is dismissed, without adjudication of its merits, with no order as to the costs of the motion.

Note: Settlement and entry of orders is dealt with in Order 36 of the [Federal Court Rules](#).

IN THE FEDERAL COURT OF AUSTRALIA
TASMANIA DISTRICT REGISTRY

TAD 15 OF 2007

BETWEEN: THE WILDERNESS SOCIETY INC.
Applicant

AND: THE HON. MALCOLM TURNBULL, THE
MINISTER FOR THE ENVIRONMENT AND
WATER RESOURCES
First Respondent

GUNNS LIMITED
Second Respondent

JUDGE: MARSHALL J
DATE: 30 NOVEMBER 2007
PLACE: MELBOURNE (HEARD IN HOBART)

REASONS FOR JUDGMENT

1 The Wilderness Society Inc (TWS) applied under [ss 5](#) and [6](#) of the [Administrative Decisions \(Judicial Review\) Act 1977](#) (Cth) (AD(JR) Act) and [s 39B](#) of the [Judiciary Act 1903](#) (Cth), seeking judicial review of two administrative decisions made by the first respondent, the then Minister for the Environment and Water Resources (Minister), pursuant to the

Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act). Those decisions concerned the construction and operation of a pulp mill at Bell Bay, Tasmania. The second respondent, Gunns Limited (Gunns), was made a party to the proceeding on the application of TWS by reason of its interest in the construction and operation of the pulp mill.

2 Judgment in the substantive proceeding in this case was published on 9 August 2007. The Court dismissed the application wholly in favour of the first and second respondents. In that judgment, orders as to costs were reserved and an order made that the parties file and serve written submissions on the question of costs within 21 days of the primary judgment. Written submissions were received from the parties. I set out below my reasons for making the usual costs order in favour of the wholly successful respondents.

THE SECOND RESPONDENT'S SUBMISSIONS

3 Gunns seeks orders that TWS pay its costs on a party and party basis, including reserved costs and the costs of the application for costs.

4 The Court's jurisdiction to award costs in a proceeding derives from [s 43](#) of the *Federal Court of Australia Act 1976* (Cth) (Federal Court Act) which provides that, except as provided by any other Act, the award of costs is in the discretion of the Court or Judge. The discretion so conferred is unconfined, save for any relevant provision of another Act that alters that position and save that it must be exercised judicially.

5 In *Donald Campbell & Co Ltd v Pollak* [1927] AC 732 the House of Lords examined the Court of Appeal's discretion to award costs, framed in similar terms to the Federal Court Act, by s 5 of the *Judicature Act 1890* (UK). In that case Viscount Cave LC said at 811-812 (Viscount Dunedin, Lord Phillimore and Lord Carson agreeing):

A successful defendant ... has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff; ... and the Court has an absolute and unfettered discretion to award or not to award them. This discretion like any other discretion, must of course be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason

connected with the case.

6 More recently, that statement of principle was followed in *Ruddock v Vadarlis (No. 2)* [2001] FCA 1865; (2001) 115 FCR 229 by Black CJ and French J at 234. That principle has been re-stated many times, for example, in *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534 Dawson J said at 557:

Whilst the discretion was absolute and unfettered, it was to be exercised judicially, that is to say, not by reference to irrelevant or extraneous considerations, but upon facts connected with or leading up to the litigation. A successful party in a non jury case had, in the absence of special circumstances, a reasonable expectation of obtaining an order for costs in his favour, but no right until he obtained an order; nevertheless, it was said that a court should not exercise the discretion against a successful party "except for some reason connected with the case": *Donald Campbell & Co v Pollak* ...

Further support for that proposition is found in *Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72 where McHugh J (in dissent) said at 96:

Although the statutory discretion is broadly stated, it is not unqualified. It clearly cannot be exercised capriciously. Importantly, the discretion must be exercised judicially in accordance with established principle and factors directly connected with the litigation ...

...

By far the most important factor which courts have viewed as guiding the exercise of the costs discretion is the result of the litigation.

7 Gunns submits that costs should follow the event. Gunns points to the practice of this Court that ordinarily costs follow the event. In that case, the unsuccessful party pays the costs of the successful party, the principle being that the successful party is compensated for the costs of running a successful case. In support of that proposition, Gunns points to a number of authorities including *Latoudis* per Mason CJ at 543, where his Honour states that:

costs are not awarded by way of punishment of the unsuccessful party.

They are compensatory in the sense that they are awarded to indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings ...

8 Further, in *Oshlack* McHugh J states at 97 that "the 'usual order as to costs' embodies the important principle that, subject to certain limited exceptions, a successful party in litigation is entitled to an award of costs in its favour". Gunns' submissions point out that TWS was wholly unsuccessful on all points raised under ss 5 and 6 of the AD(JR) Act and that it cannot claim to have been successful or partially successful on any point raised at trial. Further, Gunns states that it expended considerable funds in defence of its legitimate commercial interests and, as a result, it is appropriate to make the usual order as to costs, namely, that costs follow the event and the successful party have its costs paid by the unsuccessful party.

9 Gunns submits that there are no recognised exceptions to the usual order that costs follow the event that would apply to this case. Gunns submits there are no special circumstances or factors connected with the case that would justify a departure from the usual order as to costs, such as, disentitling conduct, or "misconduct relating to the litigation, or the circumstances leading up to the litigation": see, *Oshlack* per McHugh J at 97. Gunns claims that it had no choice but to defend the litigation as it constituted a substantial attack on its legal interests under the EPBC Act and on its commercial interests as the designated proponent of the pulp mill proposal. Absent any recognised exceptions to the general rule, Gunns submits, costs should follow the event.

10 Furthermore, Gunns argues that the concept of 'public interest litigation' is not a recognised exception to the rule that costs follow the event. In support of that proposition, Gunns relies on *Oshlack* where Brennan CJ said at 75 that the public interest nature of the proceeding "does not provide a sufficient reason by itself for refusing the successful respondent its costs", and McHugh J at 91 characterised the public interest as "irrelevant" to the question of costs. In particular, Gaudron and Gummow JJ approved of the concept that "something more" than the characterisation of litigation as "public interest litigation" is needed before a successful respondent is denied its costs: see, *Oshlack* at 91. Importantly, this is so because the concept of 'public interest litigation' is "a 'nebulous

concept' unless given... further content of a legally normative nature": see, *Oshalck* per Gaudron and Gummow JJ at 84.

11 In any event, Gunns submits that the current proceeding was not brought in the public interest. As far as the motives of the applicant in instituting the proceeding against the first respondent, Gunns claims that TWS litigated as part of a deliberate campaign to stop development of the pulp mill. Gunns says TWS did not bring the proceeding to test any question of law concerning the administration of the EPBC Act or for any reasons of broader public interest. In this case, Gunns claims, the litigation was brought as an attack on its legitimate commercial interests.

12 The status of the applicant as an advocate for environmental protection is said not to be a sufficient reason to deny Gunns its costs. Support for this argument is found in *Australian Conservation Foundation v Forestry Commission* (1988) 81 ALR 166 at 171 per Burchett J, where his Honour states, in similar circumstances to the present case:

If a body is set up to pursue causes, which its founders consider to be in the public interest, ... it does not follow that those proceeded against should be deprived of the ordinary protection of a right to an order in respect of their costs.

This proposition was also quoted with apparent approval by the Full Court in *Friends of Hinchinbrook Society Inc v Minister for the Environment* (No. 5) [\[1998\] FCA 432](#); (1998) 84 FCR 186 at 188.

THE FIRST RESPONDENT'S SUBMISSIONS

13 The first respondent Minister also seeks his costs.

14 The Minister submits that the Court should make the usual order as to costs that the unsuccessful party pay the costs of the successful party. The Minister points out that it was wholly successful on all points raised at trial and that there is no reason that would warrant departure from the usual order that costs follow the event.

15 There is no need to revisit the arguments made in support of these propositions as they are adequately set out in Gunns' submissions above, save to say that the Minister also rejects the contention that because the

proceeding was brought in the public interest this is reason enough to depart from the usual order. The Minister says there is no general rule that costs will not be awarded in a case that raises matters of public interest: see, *Oshlack* per Gaudron and Gummow JJ at 98-100. The Minister points to the case of *Save the Ridge Inc v Commonwealth* [\[2006\] FCAFC 51](#); (2007) 230 ALR 411, a case in which an application was brought to challenge decisions of the responsible Minister made under the EPBC Act, and where the Full Court said at 413 that "there is no special costs regime applicable to 'public interest' litigation". That case refers to the case of *South West Forest Defence Foundation v Department of Conservation and Land Management (No 2)* [\[1998\] HCA 35](#); (1998) 154 ALR 411 at 412 per Kirby J in support of the proposition that there is no special costs regime applicable to public interest litigation. Further, the Full Court in *Save the Ridge* at 413 quotes with approval the comments of the Full Court of the Supreme Court of Western Australia in *Buddhist Society of Western Australia (Inc) v Shire of Serpentine-Jarrahdale* [\[1999\] WASCA 55](#) per Kennedy, Wallwork and Murray JJ who said at [11]:

In our opinion great care must be taken with the concept of public interest litigation that it does not become an umbrella for the exercise of discretion with respect to costs in an unprincipled, haphazard and unjudicial manner

...

The passage was also quoted with approval by Weinberg J in *Mees v Kemp (No 2)* [\[2004\] FCA 549](#) at [\[19\]](#).

16 In addition, the Minister submits that *Save the Ridge* is authority for two relevant propositions. First, that a proceeding brought for reasons other than personal financial gain is not sufficient reason to depart from the usual order as to costs. Second, that the extended standing provisions of ss 478 and 488 of the EPBC Act do not alter the rules relating to payment of costs. Accordingly, the Minister submits that he should receive his costs of the litigation.

THE APPLICANT'S SUBMISSIONS

17 TWS submits that the Court should make no order as to costs. In the alternative, it contends the first respondent Minister should be entitled to

50% of his costs, and the second respondent Gunns should either not be entitled to its costs or, at most, a small proportion of its costs, significantly less than 50%.

18 TWS relies on the existence of the Court's discretion not to award costs in favour of a successful party. In particular, TWS submits that the public interest nature of the proceedings is a recognised basis for departing from the usual order as to costs: see, *Ruddock* per Black CJ and French J at 236 who said that despite the difficulties associated with the broad meaning of the 'public interest':

The term may best be seen as an envelope or class description for a range of circumstances which, upon examination, may be found to be relevant to the question whether there should be a departure from the ordinary rule that costs follow the event.

19 The breadth of the discretion to award costs against a successful defendant is explored in the case of *Oshlack* where Gaudron and Gummow JJ (Kirby J agreeing) held at 91 that the trial judge's discretion to award costs under [s 69\(2\)](#) of the [Land and Environment Court Act 1979](#) (NSW) had not miscarried when he took into consideration the "special circumstances" of the case including the motivation of the litigant, the public interest and notoriety generated by the case, and the difficult points of law raised by the case. That case stands for the principle that the Court's discretion is broad and it is necessary for the trial judge to weigh any special circumstances, including public interest considerations, that are connected with or leading up to the litigation, in determining whether to deny a wholly successful respondent its costs.

20 For TWS, the overriding public interest is said to be twofold. First, the protection of the environment generally and second, the proper administration of justice, that is, the public interest that decision making under the EPBC Act is lawfully undertaken.

21 Furthermore, TWS submits that the present case reveals additional factors that would warrant a departure from the usual order as to costs. They are:

- the statutory nature of the decisions made by the Minister including the complex environmental, factual and legal setting in which the decisions

were made;

- the identity of the applicant and the nature of the challenge brought by TWS concerning the issues raised and the merits of the argument; and
- the importance of access to the courts to enable judicial supervision of important environmental issues.

22 The first point raises arguments in favour of the importance of the proper administration of justice and of the EPBC Act. The EPBC Act contains important matters relating to the conservation and management of the Australian environment including matters concerning Australia's international obligations. These submissions point out that the Gunns pulp mill is a massive undertaking with a significant impact on the environment and that the approval or otherwise of the pulp mill remains a matter of great controversy both within and outside Tasmania.

23 In regard to the second point, TWS submits that it has brought the proceeding solely in the public interest and not for a private or personal gain. TWS is a community-based environmental advocacy organisation whose mission is to protect, promote and restore wilderness and natural processes across Australia for the survival and ongoing evolution of life on Earth: The Wilderness Society (The Wilderness Society, Hobart) <http://www.wilderness.org.au/> viewed 20 October 2007. The extended standing provisions of s 487 of the EPBC Act are said to allow for such public interest litigation by TWS.

24 On the third point, TWS submits that encouraging access to the courts is a legitimate reason for departing from the usual orders as to costs. TWS submits that a costs order in its favour will preserve the role of public interest litigants in the Federal Court, thereby allowing for decisions made by the Minister under the EPBC Act to be scrutinised in the public interest.

TWS Alternative Submissions

25 In the alternative, TWS submits that the Minister should only be awarded 50% of his costs. The reason for the submission is that two applications were brought challenging the Minister's decisions on substantially identical grounds, one by TWS and one by The Investors for

the Future of Tasmania Inc (IFT): see, *The Investors for the Future of Tasmania Inc. v Minister for the Environment and Water Resources* [2007] FCA 1179. Both cases were heard together and evidence in one was evidence in the other. Therefore, in order to justly compensate the Minister only a 50% award of costs is justified against TWS and likewise a 50% award against IFT.

26 In regard to Gunns' costs, as stated, TWS submits that Gunns should not be awarded its costs. TWS points to a number of reasons why this should be additional to the public interest considerations outlined above. TWS submits that there was no reason for Gunns to actively participate in the proceeding because the proceeding brought by TWS sought only to impugn the decisions of the Minister. Accordingly, Gunns' case was entirely derivative of the Minister's case and there was no need for it to defend the proceeding. In support of this proposition, TWS says that the EPBC Act is not intended to protect the interests of proponents such as Gunns. Any commercial imperative or discrete commercial interest that a proponent might have is extraneous to the EPBC Act and the only interest that Gunns can be said to have is that the Minister's decisions are made according to law. That interest was always going to be properly defended by the Minister, so it is submitted.

27 In support of that proposition, TWS points to authority that where two defendants have in effect common cause only one set of costs should be awarded; *R v Industrial Disputes Tribunal; ex parte American Express Co Inc* [1954] 2 All ER 764; *Sorell Council v State of Tasmania (No 2)* [2004] TASSC 101. Both cases can be distinguished from the present case on the basis that the successful defendants were joined on their own application and, in the latter case, the ultimately unsuccessful plaintiff enjoyed partial success on some minor points.

CONCLUSIONS

28 Having considered the foregoing it is clear that the Court's discretion to award costs pursuant to s 43 of the Federal Court Act is broad. Any attempt to confine its operation is likely to be counterproductive. It is incumbent upon the Court to exercise the discretion judicially, that is, upon reasons connected with or leading up to the litigation.

29 The settled practice of this Court, save where exceptional special circumstances apply, has been to order that costs follow the event. This practice reflects the outcome of the case and the facts or questions of law found in favour of the successful litigant. The unsuccessful party will typically pay the successful party's costs absent any recognised exception or special circumstances that would warrant a departure from the usual order.

30 The 'public interest' is a legitimate basis for departing from the usual order if it can be shown that, upon further examination, there are sufficient reasons connected with or leading up to the case or special circumstances that would warrant a departure from the usual order. Each case must turn on its facts and the relevant considerations through which it may be found appropriate to depart from the usual order are not closed. The real issue is not what is considered to be in the public interest or whether public interest considerations are a recognised exception to the usual rule, but rather, whether it can be said that there are sufficient public interest related reasons connected with or leading up to the litigation that warrant a departure from or outweigh the important consideration that a wholly successful respondent would ordinarily be awarded its costs.

31 The case is finely balanced. TWS points to a number of factors or special circumstances that support its contentions including: the protection of the environment; the proper administration of the EPBC Act; its altruistic motives in commencing the proceeding under the extended standing provisions of the EPBC Act; and the importance of not discouraging access to the courts. These considerations are all relevant. However, they could be common to many other proceedings challenging matters of public administration or matters concerning the protection of the environment. They are insufficient to wholly displace both respondents' legitimate expectations that, having enjoyed complete success, they would be awarded their costs. TWS's case was not in the nature of a test case nor did it raise especially difficult legal questions of general importance. The standing provisions of the EPBC Act do not alter the ambit of the discretion conferred by s 43 of the Federal Court Act even though s 487(3) of the EPBC Act specifically extends standing to organisations that are engaged in activities for, or whose object is, the protection or conservation of the environment: see, *Save the Ridge* at 415.

In the context of encouraging access to the courts, it is equally valid to say that a respondent should not be discouraged from mounting its defence in an appropriate fashion.

32 Further, TWS's alternative submission is flawed in that it claims that Gunns had no reason to actively participate in the proceeding and therefore, should not be awarded its costs. Gunns was made a party to the proceeding on the application of TWS and had a clear interest in defending the circumstances under which it made the referral of the pulp mill proposal to the Minister. Gunns was entitled to defend its interests in the proceeding brought by TWS and did so in an appropriate manner.

33 For these reasons TWS should pay the costs of the respondents.

The Notice of Motion

34 Subsequent to the closing date for the receipt of written submissions, Gunns filed a motion seeking the right to adduce further written submissions on the question of costs. At that stage the preparation of this judgment was well advanced. I delayed delivery of this judgment pending the outcome of the appeal from the substantive judgment. The appeal judgment was published on 22 November 2007: see, *The Wilderness Society Inc v The Hon. Malcolm Turnbull, Minister for the Environment and Water Resources* [\[2007\] FCAFC 175](#). The orders of the Full Court do not require me to revisit the reasoning contained in this judgment. It is also unnecessary to consider whether Gunns should be allowed to raise further submissions because, without the benefit of those submissions, I consider a costs order should be made in Gunns' favour. The most convenient and fairest course is to formally dismiss Gunns' motion without adjudication of its merits and make no order as to the costs of the motion.

I certify that the preceding thirty-four (34) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Marshall.

Associate:Dated: 30 November 2007

Counsel for the Applicant: Ms D S Mortimer and Mr R M Niall
Solicitor for the Applicant: Fitzgerald and Browne
Counsel for the First Respondent: Dr M Perry QC and Mr G Hill
Solicitor for the First Respondent: Australian Government Solicitor
Counsel for the Second Respondent: Mr A G Uren QC and Mr T J Walker
Solicitor for the Second Respondent: Freehills
Completion of written submissions: 31 August 2007
Date of Judgment: 30 November 2007

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