

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 5/09/2016 3:02:56 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged:	Submissions
File Number:	QUD1017/2015
File Title:	Australian Conservation Foundation Incorporated v Minister for the Environment & Anor
Registry:	QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads 'Warwick Soden'.

Dated: 5/09/2016 3:03:06 PM AEST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Federal Court of Australia
District Registry: Queensland
Division: General

Australian Conservation Foundation Incorporated

Applicant

Minister for the Environment and another

First Respondent

SECOND RESPONDENT'S SUBMISSIONS AS TO COSTS

1. The applicant failed in its amended originating application dated 28 January 2016. In the ordinary course costs follow the event: *Federal Court Rules, r 40.04*. There is no good reason to depart from that position in this case.
2. The applicant contends that the Court's discretion should be exercised to depart from the general rule in this case because of the public character of the litigation.
3. The mere fact that litigation is capable of being characterised as in the public interest is not a sufficient basis to depart from the usual rule: *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [49]; *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at [13].
4. In this case neither the particular nature of the proceedings nor the status of the applicant warrant departure from the general rule.

Nature of the proceedings

5. The applicant ultimately pressed three contentions at the hearing (the fourth ground of review having been abandoned).
6. **First**, it contended that the Minister had misunderstood or misapplied s 527E of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).

This contention ultimately had two aspects:

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- (a) A contention about the proper reading of the Minister's reasons – which was unsuccessful based on the well-established principles in *Minister for Immigration and Ethnic Affairs v Wu Shang Liang* (1996) 185 CLR 259: Reasons at [140] – [154], [155] – [166];
- (b) A contention that the Minister should have come to a different decision – this was an attempt to achieve merits review by judicial review and was correctly rejected based on very well established principles: Reasons at [4], [173] – [174].

7. **Secondly**, the applicant contended that the Minister had misapplied the precautionary principle. Resolution of that question involved the application of well-established legal principles to the Minister's reasons. It did not involve anything novel: see Reasons at [177] and [184].
8. **Thirdly**, the applicant contended that the Minister had failed to comply with s 137 of the EPBC Act. But the applicant did not contend that s 137 created a jurisdictional fact and so its contention was resolved simply based on the proper construction of the Minister's reasons, which were against the applicant: Reasons at [204].
9. In the circumstances of this case, the contentions raised by the applicant were resolved against it by applying well established legal principles to the reasons given by the Minister. There were no substantial legal points of novelty or public importance at stake. Accordingly, the legal issues involved would not of themselves justify a special costs order.

Status of the applicant

10. One justification for departing from the normal rule that costs follow the event is that the prospect of an adverse costs order will discourage applicants of limited means from pursuing worthwhile claims in the public interest. But that aspect is not present in this case. The applicant is a large not-for-profit organisation. There is no evidence that it lacks means, or would be discouraged from pursuing public interest litigation by a costs order.
11. Further, this is not a case in which it can be said that the applicant had nothing to gain from succeeding in the litigation. To the contrary, it is a reasonable inference that it stood to benefit from increased media attention and donations from prosecuting the case, and could have expected an increase in support if it had succeeded. This is a long way from a case of an individual of limited means pursuing a claim in which he or she has no interest at all: compare *Mees v Kemp (No 2)* [2004] FCA 549 at [12], [21].

12. For the reasons set out above, the fact that the applicant may be able to broadly characterise the proceedings as having been brought in the public interest is not sufficient to justify departure from the normal rule that costs follow the event.