

## NOTICE OF FILING

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### 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 4:20:35 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.

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**FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: QUEENSLAND  
DIVISION: GENERAL**

No: QUD1017/2015

**AUSTRALIAN CONSERVATION FOUNDATION INC**  
Applicant

**MINISTER FOR THE ENVIRONMENT**  
First Respondent

**ADANI MINING PTY LTD ACN 145 455 205**  
Second Respondent

**APPLICANT'S SUBMISSIONS ON COSTS**

1. The Applicant (**ACF**) respectfully submits in the circumstances of these proceedings the Court should exercise its discretion in relation to costs in a similar manner to the exercise of the discretion in *Blue Wedges Inc v Minister for Environment, Heritage and the Arts and Others* (2008) 165 FCR 211 at 227-228 [68]-[75] (Heerey J) (**Blue Wedges**) and *Buzzacott v Minister for Sustainability, Environment, Water, Population & Communities (No 3)* [2012] FCA 744 (Besanko J) (**Buzzacott**) and, thereby, order that each party bear its own costs or that there will be no order as to costs.
2. Alternatively, in the circumstances the Court could exercise its discretion in a similar manner to the Full Court<sup>1</sup> in *Wilderness Society Inc v Turnbull, Minister for Environment and Water Resources* (2008) 101 ALD 1; [2008] FCA19 (**Wilderness Society**) and, thereby, order that ACF pay 70% of the costs of the First Respondent and 40% of the costs of the Second Respondent.
3. ACF accepts that the starting point in considering the question of costs is that costs ordinarily follow the event and that there is no special costs regime applicable to "public interest" litigation.<sup>2</sup>
4. However, costs remain in the discretion of the Court<sup>3</sup> and relevant factors to be considered in cases such as this include:<sup>4</sup>
  - (a) that the unsuccessful party's motivation was to ensure obedience to environmental law and preservation of an important part of the environment;
  - (b) that a significant number of members of the public shared the view of the unsuccessful party;
  - (c) that the unsuccessful party sought no financial gain from the litigation;
  - (d) that the basis of the challenge was arguable;
  - (e) there is a public interest in the approval decision itself, and equally in whether it has been

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<sup>1</sup> Branson, Tamberlin and Finn JJ. See also *Northern Inland Council for the Environment Inc v Minister for the Environment* [2014] FCA 216 where Cowdroy J ordered the unsuccessful applicant to pay 80% of the costs of the First and Second Respondents in relation to the substantive application, which involved judicial review of a decision under the EPBC Act.

<sup>2</sup> *Save the Ridge Inc v Commonwealth* (2006) 230 ALR 411; [2006] FCAFC 51 at [6] (Black CJ, Moore and Emmett JJ); *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts (No 2)* (2011) 280 ALR 91; [2011] FCAFC 84 at [13] (Emmett, McKerracher and Foster JJ).

<sup>3</sup> *Federal Court of Australia Act 1976* (Cth), s 43.

<sup>4</sup> *Oshlack v Richmond River Council* (1998) 193 CLR 72 per Gaudron and Gummow JJ at [20], [49] and per Kirby J at [133], [136]-[144]; *Save the Ridge Inc v Commonwealth* (2006) 230 ALR 411; [2006] FCAFC 51 (Black CJ, Moore and Emmett JJ); *Blue Wedges* at [68]-[75]; *Buzzacott* at [5]-[13] and [18]-[26].

reached according to law;

- (f) the application raised novel questions of general importance and some difficulty as to the approval process under the Act; and
  - (g) there was not an unreasonable delay in bringing the application.
5. ACF was founded in the mid-1960s as Australia's national conservation body with a commitment to achieve a healthy environment for all Australian,<sup>5</sup> and the explicit purpose of protecting the Great Barrier Reef.<sup>6</sup> It has been instrumental in many major conservation campaigns in Australia, including the declaration of the Great Barrier Reef Marine Park in the 1970s.<sup>7</sup> As such it qualified for the express conferral of standing to bring proceedings such as the present one conferred by s 487(3) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the **EPBC Act**).
  6. ACF's motivation in commencing these proceedings was to ensure obedience with the EPBC Act and protection of the Great Barrier Reef as well as the protection of a critically endangered species, the Black-throated Finch (although the ground regarding this matter was ultimately not pursued reflecting the conclusion ACF reached that its concerns regarding the assessment of the impacts on this species were not impeachable through judicial review). ACF sought no financial gain from the litigation.
  7. The protection of the Great Barrier Reef is a matter of great public concern and a significant number of members of the community share the position of ACF. ACF represented its 340,000 supporters in taking this action.<sup>8</sup> Polling conducted for ACF show that 86% of Australian's agree that the Federal Government must make protecting the Great Barrier Reef an absolute priority.<sup>9</sup> Polling conducted for the Lowy institute shows 53% of Australians agree: "Global warming is a serious and pressing problem. We should begin taking steps now even if this involves significant costs".<sup>10</sup> The Climate Institute found that 72% of Australians were either concerned or very concerned about climate change.<sup>11</sup>
  8. Because the impacts on the climate and reef affect all Australians, the interest of the public in this case is not a mere intellectual or emotional concern but reflective of their concern in an issue that affects them. Thus, this is one of the few cases, such as in *Blue Wedges* and *Buzzacott*, where interest of the public and the public interest coincide. During the case (between November 2015 and August 2016) ACF's challenge of the Carmichael Coal Mine received over 1,500 media mentions across print, online, radio and TV mediums.<sup>12</sup> The Great Barrier Reef was rated the 2<sup>nd</sup> of the top media issues in Australia in 11-17 June 2016.<sup>13</sup>
  9. The EPBC Act is "complex"<sup>14</sup> and important nationally as the centrepiece of the Commonwealth's

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<sup>5</sup> Affidavit of Kelly O'Shanassy, affirmed on 6 November 2015 (**O'Shanassy Affidavit**) at [6]-[10].

<sup>6</sup> Affidavit of Kelly O'Shanassy, affirmed on 5 September 2016 (**Second O'Shanassy Affidavit**) at [2].

<sup>7</sup> Second O'Shanassy Affidavit at [3].

<sup>8</sup> Second O'Shanassy Affidavit at [4].

<sup>9</sup> Annexure KO6 to the Second O'Shanassy Affidavit.

<sup>10</sup> Annexure KO7 to the Second O'Shanassy Affidavit.

<sup>11</sup> Annexure KO8 to the Second O'Shanassy Affidavit.

<sup>12</sup> Second O'Shanassy Affidavit at [10].

<sup>13</sup> Annexure KO9 to the Second O'Shanassy Affidavit.

<sup>14</sup> As the Full Court noted *Esposito v Commonwealth of Australia* [2015] FCAFC 160; 235 FCR 1 at [22] per Allsop CJ, Perram and Flick JJ and the Court in these proceedings noted at [5] of the principal judgment.

environmental laws. Many thousands of projects have been referred for assessment under the Act.<sup>15</sup>

10. The application raised novel questions of general importance as to the approval process under the Act both in relation to the proper consideration of “impact” in ss 136 and 527E and the requirements imposed on decisions by s 137 to comply with Australia’s obligations under World Heritage Convention.<sup>16</sup> Mortimer J described the definition in s 527E as “almost impenetrable” and “tortured”.<sup>17</sup> Given this and the central role of the term “impact” in the operation of the EPBC Act, the issues raised by the proceedings have wide implications for the operation of the Act and are far from being “simply matters of fact which have no precedent value to future decisions about the EPBC Act”.<sup>18</sup> The clarification of the questions raised in the present proceedings will clearly assist in the future administration of the Act.
11. As often happens in litigation, after a full hearing the Court can reach a firm conclusion. But it by no means necessarily follows that the case of the party who loses could have been seen from the start as hopeless and without merit. Certainly that is not so in the present case.
12. Further, there was not unreasonable delay by ACF in bringing its application and ACF acted reasonably by narrowing its case by not pursuing its ground regarding the Black-throated Finch. The hearing was conducted efficiently and with commendable discrimination in the sense that ACF’s arguments were carefully formulated and put to the Court.<sup>19</sup>
13. Accordingly, although the Court has ordered that the application be dismissed, with respect the Court should order that each party bear its own costs or that there will be no order as to costs.
14. Alternatively, in the circumstances the Court could exercise its discretion in a similar manner to the Full Court<sup>20</sup> in the *Wilderness Society* and, thereby, order that ACF pay 70% of the costs of the First Respondent and 40% of the costs of the Second Respondent. As in the *Wilderness Society*, here the First Respondent was the more appropriate contradictor and the Second Respondent played a larger role than was necessary. No conduct of the Second Respondent was challenged by ACF and the Second Respondent did not have any reason to conclude that the First Respondent would not deploy appropriate legal resources to defend the application, yet the Second Respondent sought to participate on equal terms with the First Respondent in the defence of the application. The extent to which the costs recoverable by the Second Respondent should for this reason be limited is a matter of judgment or impression; it is not susceptible to precise calculation but 40% may be considered appropriate.<sup>21</sup>

**DATED:** 5 September 2016

SAUL HOLT QC  
DR CHRIS MCGRATH

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<sup>15</sup> Second O’Shanassy Affidavit at [5].

<sup>16</sup> See *Save the Ridge Inc v Commonwealth* (2006) 230 ALR 411; [2006] FCAFC 51 at [11]-[12] (Black CJ, Moore and Emmett JJ); *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts (No 2)* (2011) 280 ALR 91; [2011] FCAFC 84 at [19]-[22] (Emmett, McKerracher and Foster JJ).

<sup>17</sup> In *Tasmanian Aboriginal Centre Inc v Secretary, Department of Primary Industries, Parks, Water and Environment (No 2)* [2016] FCA 168 at [33] and [227] respectively, as noted by the Court in the principal judgment in these proceedings at [27].

<sup>18</sup> Contrast *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts (No 2)* (2011) 280 ALR 91; [2011] FCAFC 84 at [21] (Emmett, McKerracher and Foster JJ).

<sup>19</sup> *Buzzacott* at [22].

<sup>20</sup> *Wilderness Society* at [12]-[13] (Branson, Tamberlin and Finn JJ). See also *Northern Inland Council for the Environment Inc v Minister for the Environment* [2014] FCA 216 (Cowdroy J) (order for 80% of costs).

<sup>21</sup> *Wilderness Society* at [12]-[13] (Branson, Tamberlin and Finn JJ).