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Details of Filing

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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 QUD 1017 of 2015

AUSTRALIAN CONSERVATION FOUNDATION INCORPORATED
Applicant

MINISTER FOR THE ENVIRONMENT
First Respondent

ADANI MINING PTY LTD ACN 145 455 205
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS ON COSTS

1. The usual rule is that costs follow the event; in other words, the unsuccessful party pays the costs of the successful party.[1] In this case, the Minister was wholly successful. Furthermore, no aspect of the Minister's conduct warrants a departure from the usual order as to costs.

2. The applicant may contend, however, there are special circumstances concerning the 'public interest' that would warrant a departure from the usual rule, and therefore no order for costs should be made.

3. Any such submission should be rejected.

4. There is no general rule that costs will not be awarded in a case raising matters of public interest.[2] In *Hollier v Australian Maritime Safety Authority (No 2)*, Heerey, Whitlam and North JJ observed:[3]

> In a common law jurisdiction decisions of the courts, in private as well as public law, often clarify the law or lay down new law for the benefit of citizens, taxpayers, traders, patentees, insurers and insureds, landlords and tenants, etc etc. To that extent, much litigation has a public interest going beyond the interests of the parties. But this feature is inherent in common law litigation and provides no ground for departure from the usual rule as to costs.

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1 See, for example, *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at [11] (Black CJ and French J); *Scott v Secretary, Department of Social Security (No 2)* [2000] FCA 1450 at [2] (Beaumont and French JJ); *Save the Ridge Inc v Commonwealth* (2006) 230 ALR 411 ('*Save the Ridge*') at [6] (Black CJ, Moore and Emmett JJ); *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* [2016] FCAFC 80 at [71] (Allsop CJ, Foster and Gleeson JJ**)**.

2 *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at 237-238 [18]-[21] (Black CJ and French J); *Bat Advocacy NSW Inc v Minister for Environmental Protection, Heritage and the Arts (No 2)* (2011) 280 ALR 91 at [13] (Emmett, McKerracher and Foster JJ**)**;

3 [1998] FCA 975 at [13].

Filed on behalf of the First Respondent , Minister for the Environment

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5. In *Save the Ridge Inc v Commonwealth*,[4] moreover, the Full Federal Court quoted with approval the observations of the Western Australian Court of Appeal in *Buddhist Society of Western Australia (Inc) v Shire of Serpentine-Jarrahdale*:[5]

> 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...In our view, the denial of costs to successful litigants upon the ground that the litigation bears a public interest character should continue to be the rarity…

6. Consistent with these statements, the fact that proceedings are not brought for financial gain is not, by itself, a sufficient reason for departing from the usual order as to costs.[6]

7. Nor does the fact that a body may be established to pursue matters that may be in the public interest.[7] In *Australian Conservation Foundation v Forestry Commission*, for example, Burchett J considered the exercise of the discretion as to costs in an unsuccessful application under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).[8] His Honour noted the general rule that costs in judicial review matters followed the event unless there were special circumstances that justified an exception, and he stated:[9]

> If a body is set up to pursue causes, which its founders consider to be in the public interest, and which generally may be in the public interest, by means including court proceedings against others, 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 in the event the claims made against them prove unfounded.

8. Neither of the factors mentioned in paragraphs 6 and 7 would therefore warrant a departure from the usual order as to costs.[10]

9. Any claims by the applicant that significant numbers of the public shared its stance and there was significant media attention in the proceedings, even if they could be substantiated, would establish no more than that the proceedings were of interest to some members of the public.[11] Such factors should carry little, if any, weight in the exercise of the Court's discretion to award costs.

10. That the issues broadly involved climate change and the Great Barrier Reef does not support a different position. The applicant's legal challenge was to the approval of one mining project and, as explained in the next paragraph, it was resolved on limited grounds.

11. The proceedings here did not require the Court to resolve 'novel question[s] of much general importance and some difficulty'.[12] The argument turned principally on the construction of the Minister's statement of reasons, not on the construction of highly important provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('the EPBC Act'). In relation to each of the grounds in its amended application

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4 *Save the Ridge* (2006) 230 ALR 411at [6] (Black CJ, Moore and Emmett JJ).

5 [1999] WASCA 55 at [11].

6 *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at 237-238 [18] (Black CJ and French J);

7 *Save the Ridge* (2006) 230 ALR 411at [15]-[16] (Black CJ, Moore and Emmett JJ).

8 (1988) 81 ALR 166.

9 (1988) 81 ALR 166 at 171.

10 Furthermore, the applicant's ability to invoke ss 487 and 488 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) would not convert the applicant's challenge into 'public interest' litigation and warrant a departure from the usual order as to costs: see *Save the Ridge* (2006) 230 ALR 411at [17]-[19] (Black CJ, Moore and Emmett JJ).

11 Compare *Bat Advocacy NSW Inc v Minister for Environmental Protection, Heritage and the Arts (No 2)* (2011) 280 ALR 91 at [17] (Emmett, McKerracher and Foster JJ) (distinguishing between matters that are of interest to the public and matters of public interest).

12 *Save the Ridge* (2006) 230 ALR 411 at [13] ((Black CJ, Moore and Emmett JJ).

for review, the applicant contended that the statement of reasons should be interpreted in a particular way; the challenge failed because the Court applied the well-established principles in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[13] to the statement of reasons[14] and rejected the interpretation urged by the applicant. Thus:

(i) ground 2 of the amended application focused on the absence in the Minister's statement of reasons of any direct or explicit reference to ss 82 or 527E.[15] However, the statement demonstrated that the Minister had implicitly applied s 527E[16] and s 82;[17]

(ii) ground 3 was based on an alleged failure to take into account the precautionary principle. The preconditions for applying the precautionary principle in s 391 of the EPBC Act were lacking, however, because the Minister's statement of reasons contained no finding that there was any threat of serious or irreversible damage to the Great Barrier Reef as a result of the mine;[18]

(iii) while ground 1 did involve the scope of Article 4 of the World Heritage Convention, it also depended on a submission that the Minister's consideration of s 137 was confined to scope 1 and 2 emissions. Yet the statement of reasons could not be properly construed in that way.[19] Further, the applicant's literal construction of Article 4 did not give effect to the *Vienna Convention on the Law of Treaties 1969* or account for earlier authorities on the scope of Australia's obligations under that Convention.[20] Its rejection was inevitable.

12. No warrant therefore exists for departing from the usual rule as to costs because the proceeding required the Court to address 'novel question[s] of much general importance and some difficulty'.

13. Accordingly, the first respondent seeks an order that the applicant pay the first respondent's costs of the proceeding.

G Del Villar
5 September 2016

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AGS lawyer
for and on behalf of the Australian Government Solicitor
Lawyer for the First Respondent

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13 (1996) 185 CLR 259.

14 See [2016] FCA 1042 at [140]-[153].

15 [2016] FCA 1042 at [155].

16 [2016] FCA 1042 at [162]-[163].

17 [2016] FCA 1042 at [167]-[174].

18 [2016] FCA 1042 at [184].

19 [2016] FCA 1042 at [201]-[204].

20 See [2016] FCA 1042 at [190]-[200].