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Wilderness Society Inc v Hon Malcolm Turnbull, Minister for Environment and Water Resources [2008] FCAFC 19 (4 March 2008)

Last Updated: 12 March 2008

FEDERAL COURT OF AUSTRALIA

Wilderness Society Inc v Hon Malcolm Turnbull, Minister for Environment and Water Resources [\[2008\] FCAFC 19](#)

PRACTICE & PROCEDURE – s 43 [Federal Court of Australia Act 1976](#) (Cth) – discretion to award costs – circumstances justifying departure from the general rule – public interest litigation – **Held:** unsuccessful appellant ordered to pay a percentage of each respondent’s costs. [Environment Protection and Biodiversity Conservation Act 1999](#) (Cth) s 42 [Federal Court of Australia Act 1976](#) (Cth) s 43 *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [\[2008\] FCA 8](#) – considered *Oshlack v Richmond City Council* [\[1998\] HCA 11](#); [\(1998\) 193 CLR 72](#) – considered *Perrett v Commissioner of Superannuation* [\(1991\) 29 FCR 581](#) – cited *Ruddock v Vadarlis (No 2)* [\(2001\) 115 FCR 229](#) – considered **THE WILDERNESS SOCIETY INC v HON MALCOLM TURNBULL, MINISTER FOR ENVIRONMENT AND WATER RESOURCES AND GUNNS LIMITED** **TAD 21 OF 2007** **BRANSON, TAMBERLIN AND FINN** **JJ4 MARCH 2008** **SYDNEY**

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

TAD 21 OF 2007

**ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF
AUSTRALIA**

BETWEEN: **THE WILDERNESS SOCIETY INC**
 Appellant
AND: **HON MALCOLM TURNBULL, MINISTER FOR**
 ENVIRONMENT AND WATER RESOURCES
 First Respondent

 GUNNS LIMITED
 Second Respondent

JUDGES: **BRANSON, TAMBERLIN AND FINN JJ**
DATE OF ORDER: **4 MARCH 2008**
WHERE MADE: **SYDNEY**
THE COURT ORDERS THAT:

1. The appellant pay 70% of the costs, including reserved costs, of the first respondent.
2. The appellant pay 40% of the costs, including reserved costs, of the second respondent. 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 21 OF 2007

**ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF
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BETWEEN: THE WILDERNESS SOCIETY INC
Appellant

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

GUNNS LIMITED
Second Respondent

JUDGES: BRANSON, TAMBERLIN AND FINN JJ
DATE: 4 MARCH 2008
PLACE: SYDNEY

REASONS FOR JUDGMENT

INTRODUCTION

1 On 22 November 2007 this Court ordered, Tamberlin J dissenting, that this appeal be dismissed (see [\[2007\] FCAFC 175](#); [98 ALD 512](#)). At the request of the appellant the costs order additionally pronounced on that day was revoked and directions made for the filing and service of written submissions on costs. Following the publication by Heerey J of his Honour's reasons for judgment in *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [\[2008\] FCA 8](#) the parties were invited to file and serve supplementary written submissions on the issue of costs.

SUBMISSIONS

The Appellant

2 The appellant initially submitted that:

1. the first respondent (the Minister) should be entitled to less than all of his costs on a party/party basis to reflect the public interest nature of the litigation; and
2. the second respondent (Gunns) should be entitled, at most, to a small

proportion of its costs of the appeal on a party/party basis to prevent the unfair imposition of two sets of costs and to recognise that it was the decision of the Minister that was impugned in this litigation and no relief was sought against Gunns.

3 By its supplementary submissions the appellant argued that the considerations that led Heerey J to conclude in *Blue Wedges* that no order for costs should be made should similarly persuade the Court to make no order for costs.

The Minister

4 The Minister submitted that it would be appropriate for the usual rule concerning costs to be applied and for the Minister to be awarded his costs of the appeal. He argued that *Blue Wedges* was distinguishable from this appeal on two grounds; first, that it was a first instance proceeding, and secondly, that the disparity in legal representation to which Heerey J drew attention in *Blue Wedges* was not a factor on this appeal.

Gunns

5 Gunns submitted that it was entitled to its costs of and incidental to the appeal, including reserved costs and the costs of the application for costs, on a party/party basis. Like the Minister, Gunns placed reliance on the difference between a decision at first instance and on appeal. Additionally, Gunns argued that the authorities disclose that the fact that a proceeding was brought in the public interest does not provide a sufficient reason by itself for refusing a successful respondent its costs.

CONSIDERATION

6 As Black CJ and French J noted in *Ruddock v Vadarlis (No 2)* ([2001](#)) [115 FCR 229](#) at [9], the Court's power to award costs pursuant to [s 43](#) of the [Federal Court of Australia Act 1976](#) (Cth) is not fettered by any stated legislative presumption about the manner of its exercise. Nonetheless, it must be exercised judicially and not against a successful party except for some reasons connected with the case.

7 In *Ruddock v Vadarlis (No 2)* at [17], Black CJ and French J noted the relevance to the exercise of the Court's discretion to award costs of an appeal raising a novel question of general importance. Their Honours cited *Perrett v Commissioner of Superannuation* ([\(1991\) 29 FCR 581](#)) at 594 where, in the context of a statutory appeal from the Administrative Appeals Tribunal, the Full Court said:

The court should consider the matter of costs, bearing in mind the result of the appeal but also taking into account the reasonableness of the applicant in bringing that appeal and the general importance of the clarification of the law for such an authority as the respondent.

8 The principal issues to be determined on this appeal concerned the proper construction of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("the [EPBC Act](#)"). They were thus issues of critical importance to the Minister in the performance of his responsibilities as the Minister responsible for the administration of that Act.

9 That difficulty attended at least the issue concerning the proper construction of [s 42](#) of the [EPBC Act](#) is demonstrated by the different views on this question adopted by Branson and Finn JJ, on the one hand, and Tamberlin J on the other. The reasons for judgment of the learned primary judge, which deal with the question somewhat summarily, suggest that this issue did not loom large at first instance. The evidence discloses that the difficulties attending the proper construction of certain provisions of the [EPBC Act](#), including [s 42](#), were probably not recognised by the Minister's departmental advisers. For these reasons, and notwithstanding the reasons for judgment of the primary judge, it was of general importance both to the Minister and to the public that the law concerning the proper construction of the provisions of the [EPBC Act](#) with which this appeal was concerned should be clarified.

10 Significance may also be seen to attach to the fact that the appellant was concerned, along with a large segment of the Australian community, to avoid harm to the Australian environment. The appellant was not seeking financial gain from the litigation; rather it appropriately sought to resolve a dispute, which had engaged the emotions of many, concerning the proper administration of the [EPBC Act](#) in the Court rather than elsewhere (see *Oshlack v Richmond City Council* [\[1998\] HCA 11](#); [\(1998\)](#)

[193 CLR 72](#) per Gaudron and Gummow JJ at [20] and [59] and Kirby J at [136]-[144]).

11 For the above reasons, while we do not consider it appropriate to withhold from the Minister an order for costs in his favour, we have concluded that it would be appropriate to limit the costs to be recovered by the Minister. In our view the appropriate order is that the appellant pay 70% of the Minister's party/party costs, including reserved costs, of the appeal.

12 For the following reasons we also consider it appropriate to limit the costs to be recovered by Gunns. Gunns had an obvious interest in the proceeding both at first instance and on appeal. It was its proposal to construct and operate a bleached Kraft pulp mill that was the subject of the decisions of the Minister that the appellant challenged. Gunns was for this reason a proper party to the proceedings. However, no conduct of Gunns was challenged by the appellants. Nor did Gunns have any reason to conclude that the Minister would not deploy appropriate legal resources to defend the appeal. On appeal, as at first instance, the Minister retained both senior and junior counsel to appear for him. Gunns also retained both senior and junior counsel. It was not apparent to the Court that Gunns' legal representatives saw their role as being principally to supplement, assuming it to be necessary, the written and oral submissions of the Minister. Rather, Gunns sought to participate on equal terms with the Minister in the defence of the appeal. This was illustrated by, but not limited to, Gunns substantial written submissions on the issue of whether the Minister had acted for an improper purpose.

13 Orders for costs are made to compensate a successful party. The ordinary rule that costs follow the event assumes that a successful party will have incurred costs because the unsuccessful party made it necessary for the successful party to do so (*Ruddock v Vadarlis (No 2)* per Black CJ and French J at [12]). Having regard to the fact that it was the Minister who was the more appropriate contradictor on this appeal, we consider that Gunns played a larger role in the appeal than was necessary. The extent to which the costs recoverable by Gunns should for this reason be limited is a matter of judgment or impression; it is not susceptible to precise calculation. In all the circumstances we have concluded that it is appropriate to limit the costs recoverable by Gunns to 40% of its party/party costs, including reserved costs, on the appeal.

ORDERS

14 As indicated above it will be ordered as follows:

1. The appellant pay 70% of the costs, including reserved costs, of the first respondent.
2. The appellant pay 40% of the costs, including reserved costs, of the second respondent.

I certify that the preceding fourteen (14) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Branson, Tamberlin and Finn JJ.
Associate:Dated: 4 March 2008

Counsel for the Appellant:	Ms D Mortimer SC and Mr R Niall
Solicitor for the Appellant:	FitzGerald and Browne Lawyers
Counsel for the First Respondent:	Dr M Perry QC and Mr D Brown
Solicitor for the First Respondent:	Australian Government Solicitor
Counsel for the Second Respondent:	Mr G Uren QC and Mr T Walker
Solicitor for the Second Respondent:	Freehills
Date of Hearing:	17, 18 and 19 October 2007
Date of Judgment:	4 March 2008

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