Australian Conservation Foundation Incorporated v Minister for the Environment and Energy (No 2) - [2017] FCAFC 216

FEDERAL COURT OF AUSTRALIA

Australian Conservation Foundation Incorporated v Minister for the Environment and Energy (No 2) [2017] FCAFC 216

Appeal from:	*Australian Conservation Foundation Incorporated v Minister for the Environment* [2016] FCA 1042
File number:	QUD 726 of 2016
Judges:	**DOWSETT, MCKERRACHER AND ROBERTSON JJ**
Date of judgment:	15 December 2017
Catchwords:	**COSTS** – appeal from a decision dismissing a judicial review challenge – alleged error by the Minister in failing to determine the "impact" of combustion emissions on the Great Barrier Reef – consideration of s 527E of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) – where the appeal was dismissed
Legislation:	*Administrative Decisions (Judicial Review) Act 1977* (Cth) *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) s 527E

Date of hearing:	Determined on the papers
Date of last submissions:	22 September 2017
Registry:	Queensland
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	10
Counsel for the Appellant:	Mr S Holt QC with Mr E Nekvapil
Solicitor for the Appellant:	Environmental Defenders Office (Qld) Inc
Counsel for the First Respondent:	Mr R Lancaster SC with Mr G del Villar
Solicitor for the First Respondent:	Australian Government Solicitor
Counsel for the Second Respondent:	Mr D Clothier QC with Mr S Webster
Solicitor for the Second Respondent:	Ashurst Australia

ORDERS

QUD 726 of 2016

BETWEEN: AUSTRALIAN CONSERVATION FOUNDATION INCORPORATED

Appellant

AND: **MINISTER FOR THE ENVIRONMENT AND ENERGY**
First Respondent

ADANI MINING PTY LTD ACN 145 455 205
Second Respondent

JUDGES: **DOWSETT, MCKERRACHER AND ROBERTSON JJ**

DATE OF ORDER: **15 DECEMBER 2017**

THE COURT ORDERS THAT:

1. the appellant pay each respondent's costs of the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1. The second respondent ("Adani") proposes to develop a coal mine in Central Queensland. On 14 October 2015 the first respondent (the "Minister") approved the proposed development pursuant to the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (the "Conservation Act").

The appellant ("ACF") sought review of that decision pursuant to s 39B of the *Judiciary Act 1903* (Cth) (the "Judiciary Act") and the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the "ADJR Act"). Griffiths J dismissed the application. We have previously upheld that decision.

2. The Minister and Adani seek orders that ACF pay their costs of the appeal. Although costs are in the discretion of the Court, the parties accept that there is a general expectation that costs will follow the event. ACF submits that for a number of reasons, such orders should not be made in the present case. It submits that factors to be considered include:

    - that its motivation was to ensure obedience to environmental law and preservation of an important part of the environment;
    - that a significant number of members of the public shared its view;
    - that it sought no financial gain from the litigation;
    - that the basis of the challenge was arguable;
    - that there is a public interest in the approval decision itself, and equally in whether it has been reached according to law;
    - that the application raised novel questions of general importance and some difficulty as to the approval process under the Act; and
    - that there was not an unreasonable delay in bringing the application.

3. ACF further submits that:

    - it is in a special position as "Australia's national conservation body", having an explicit purpose of protecting the Great Barrier Reef (the "Reef"); and
    - that polls show substantial support for protection of the Reef and substantial concern about "global warming".

4. Concerning these matters, we make three observations:

    - first, it may be that those holding such supportive views are more likely to participate in surveys than are those who have other, or no views on the subject;
    - second, it is not clear to us that those supportive persons would necessarily support extended and expensive litigation, particularly if the prospects of success were low, and there was a risk that they might have to pay for such litigation; and
    - third, persons who may have approved of the litigation at first instance would not necessarily have approved of the appeal, having regard to its prospects of success.

5. The Minister must be seen as the primary representative of the public interest. That public interest may include the economic and social benefits of the proposed project. Further, Adani's undoubted interest cannot be completely discounted. Whilst we accept that the Conservation Act is complex, we do not accept that it, as a whole, or s 527E, in isolation, is "impenetrable" or

"tortured". We find it difficult to reconcile the appellant's submission that thousands of projects have been referred for assessment under the Conservation Act with the assertion that the issues raised on appeal have wide implications for the operation of the Act. We would have thought that those thousands of applications must have thrown some light on the legislation. We generally adopt the respondents' submissions concerning the nature of the issues raised on appeal. Whilst those issues required a disciplined analysis of the legislation, there was nothing particularly difficult about them, or about other aspects of the appeal.

6. Whilst we accept that ACF has special standing in connection with environmental matters concerning the Reef, we do not accept that it had any reason to believe that the Minister had failed to comply with the requirements of the Act. As we observed in our reasons, we consider that ACF's case really seemed to be based upon the view that the decision could not be correct because the proposal would have an impact on the Reef. Hence we do not accept that ACF was justified in seeking to "ensure obedience to environmental law". It may have been seeking to preserve an important part of the environment, but the means adopted were based on misconceptions concerning the legislation. We accept that issues concerning the Reef and climate change are matters of great importance to the Australian community generally. However it does not follow that misconceived litigation should be conducted at the expense of parties who have correctly understood the law.

7. For reasons advanced by the second respondent we do not treat as relevant the fact that ACF's prosecution of the appeal was not motivated by an expectation of financial gain. Such an argument may have been more persuasive at first instance than on appeal. Further, it is clear that ACF has substantial assets, presumably held for advancement of its views concerning environmental issues. We see no reason why such funds should be used to finance prosecution of proceedings designed to vindicate such views, but not for the purpose of meeting the usual consequences of unsuccessful litigation.

8. Finally, we do not accept that the appeal was clearly arguable. As we have observed, the appeal was, in a number of respects, based on misconceptions concerning the legislation, the Minister's decision and the primary Judge's reasons.

9. Whilst we do not question the correctness of the approach to costs taken by the primary Judge, we consider that on appeal, any departure from the general rule would be unjustified.

10. We order that the appellant pay each respondent's costs of the appeal.

I certify that the preceding ten (10) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Dowsett, McKerracher and Robertson.

Associate:

Dated: 15 December 2017

Cited by:

Burragubba v State of Queensland (No 2) [2018] FCAFC 65 (26 April 2018) (Dowsett, McKerracher and Robertson JJ)

1. On 25 August 2017 the Court dismissed an appeal in this matter, initially ordering that the appellant pay the respondents' costs of the appeal. The respondents were Adani Mining Pty Ltd ("Adani"), the State of Queensland ("Queensland") and the National Native Title Tribunal (the "NNTT"). The NNTT submitted to any order that the Court might make in the proceeding. On the same day, the Court, similarly constituted, gave judgment in appeal no QUD 726 of 2016 (the "ACF appeal"), dismissing that appeal and ordering that the parties provide written submissions as to costs. The appellant in those proceedings was Australian Conservation Foundation Incorporated ("ACF"). The respondents were the Minister for the Environment and Energy (the "Minister") and Adani. The Court subsequently ordered that the appellant pay each respondent's costs of the appeal. See *Australian Conservation Foundation Incorporated v Minister for the Environment and Energy (No 2)* [2017] FCAFC 216 .