WHAT PRICE DEMOCRACY?

Blue Wedges and the hurdles to public interest environmental litigation

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The Blue Wedges' campaign against dredging of Port Phillip Bay in Melbourne has been a prominent environmental protest with high profile in the media in 2007 and into 2008. The campaign has been among a number of community-led challenges to major infrastructure and project developments in recent years, including the protest against the Tasmanian pulp mill and the Victorian desalination plant. Community groups from around the Melbourne bay area strongly supported the anti-dredging campaign, although the Victorian state government remained adamant that it would proceed. The Blue Wedges Coalition undertook a series of legal actions challenging decisions by state and federal government. The campaigners were unsuccessful in seeking an injunction in the Victorian Supreme Court,[1] in a Federal Court challenge to Ministerial approval under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the *'EPBC Act'*) in early 2008,[2] and the group also failed in a later appeal.[3]

Dredging of Port Phillip Bay has now commenced, although it continues to attract local protest, and be dogged by controversy. While the cases raise significant issues of administrative law and judicial review, they also raise wider concerns about the function of civil protest in Australia, including the pursuit of costs orders against community public interest groups. In particular, the Blue Wedge trajectory of litigation reveals the financial and procedural barriers that exist in the legal system for civic groups seeking to challenge environmentally sensitive decisions. The Blue Wedges situation shares many characteristics that distinguish public interest litigation in the environmental context, where poorly-resourced community groups are pitted against major corporations and/or government authorities.[4] We argue that the capacity of community groups to undertake effective legal action in the public interest, and not to be unnecessarily impeded by financial and procedural hurdles, goes to the heart of a viable democracy. Accordingly, this article discusses the substantive legal issues that are relevant to public interest environmental litigation, before more fully exploring the procedural and strategic challenges community groups face when attempting to pursue public interest litigation in the environmental sphere.

Stifling debate?

A growing occlusion of public interest advocacy and action from the civic space has been a feature of the narrowing of policy and public debates in Australia over past decades. More recently, growing public concern over environmental matters spearheaded by climate change awareness, signals a clear need for greater community engagement on environmental decisions by government and industry. At a more discretely legal level, attention again needs to be turned to ensuring that public interest litigation and other forms of legal challenge to administrative decision-making are consonant with an open and free democracy. The current Chief Justice of the New South Wales Land and Environment Court argues that 'an essential forum for reasserting [public] participation in the governmental process is in the courtroom'.[5] While it is clear that there is a strong public interest in protection of the environment, just how that responsibility for safeguarding the public interest is to be discharged is a more vexed question.

Within Australia there is no legally enforceable environmental right per se that defines the public interest. At most, governmental authorities have general public duties of environmental protection. Typically, ministers have wide discretionary powers in relation to environmental decision-making. By contrast, many third-party groups in the community regard the public interest in a representative democracy as best protected by a vigilant community sector using the court process where necessary to enforce public duties, and to review administrative action. The capacity of citizens to access the courts is fundamental to overarching principles of the rule of law and equality before the law. Thus, as Joseph Sax noted in the early 1970s in his seminal work on environmental advocacy:

> The court pre-eminently is a forum where the individual citizen or community group can obtain a hearing on equal terms with the highly organised and experienced interests that have learned so skilfully to manipulate legislative and administrative institutions.[6]

Since the 1970s, legal reforms have occurred to facilitate community access to courts; but whether community groups do participate 'on equal terms with highly organised and experienced interests' can be questioned by reference to the Blue Wedges situation. Moreover, behind the accepted rhetoric of transparency and open government, still lie central issues about the capacity of public interest environmental groups to challenge executive decision-making, or the actions of major corporate entities, where their resources are stretched, and where financial and legal procedural barriers may exist.

REFERENCES

1. *Blue Wedges Inc v Port of Melbourne Corporation* [2005] VSC 305 (9 August 2005)('*Blue Wedges v Port of Melbourne Corporation*').
2. *Blue Wedges Inc v Minister for the Environment, Heritage & the Arts* (2008) 165 FCR 211 ('*Blue Wedges v Minister for the Environment I*').
3. *Blue Wedges Inc v Minister for the Environment, Heritage & the Arts* (2008) 157 LGERA 428 ('*Blue Wedges v Minister for the Environment II*').
4. Chris Tollefson, Darlene Gilliland and Jerry DeMarco, 'Towards a Costs Jurisprudence in Public Interest Litigation' (2004) 83 *The Canadian Bar Review* 475.
5. Justice Brian J Preston, 'The Role of Public Interest Environmental Litigation' (2006) 23 *Environmental and Planning Law Journal* 337, 337, referring to Joseph Sax, *Defending the Environment: a Handbook for Citizen Action* (1971), xviii.
6. Sax, above n 5.

... the capacity of community groups to undertake effective legal action in the public interest and not to be unnecessarily impeded by financial and procedural hurdles goes to the heart of a viable democracy

Reforming environmental law

Much of the evolution of environmental law can be traced through longstanding efforts to reform legal procedural barriers, such as the *locus standi* rules that prevented many public interest environmental groups from challenging substantive questions of law. In Australia, a major impediment to public interest environmental litigation has been removed with a widening of the common law standing tests,[7] and the adoption of broad standing rules under legislation in many States.[8] These reforms have facilitated greater access to courts. The Blue Wedges situation is instructive here, as the group was not denied standing in any forum, although the issue of standing was raised.[9] In the first Federal Court hearing, the community group was able to take advantage of broadly framed provisions, with Justice Heerey determining that Blue Wedges qualified for an express conferral of standing under s 487 (3) *EPBC Act*.

While some procedural barriers have been overcome, other procedural hurdles still operate to prevent public interest groups from effective participation, even if granted standing. Two such barriers are:

(1) the inability to provide an undertaking as to damages when seeking an injunction, and
(2) the possible costs of unsuccessful litigation, especially when the other party is government and/or a major corporation.[10]

Context for the Blue Wedges litigation

Seeking injunctive relief

The Blue Wedges Coalition is a group of environmentalists, residents of the Melbourne Port Phillip Bay region, and regional businesses, such as tourism operators, who objected to the dredging of Port Phillip Bay.[11] Port Phillip Bay is the indented sea shores around the City of Melbourne. The Port of Melbourne Corporation, a statutory authority, proposed a major project of port expansion in early 2002, involving the deepening of shipping channels in the Bay to allow access for bigger container ships, the so-called 'super tankers'. The project was referred to the then Federal Environment Minister in 2002 by the Port of Melbourne Corporation. The Minister determined that the project constituted a controlled action under s 75 *EPBC Act* and laid down controlling provisions relating to Ramsar[12] wetlands of international importance, listed threatened species, listed migratory species, and an action involving Commonwealth land.[13]

Under relevant Victorian legislation, an Environmental Effects Statement was required to assess the impact of the proposed dredging.[14] The initial Statement, prepared by the Port of Melbourne Corporation, was referred to an independent technical panel which found many deficiencies in the assessment. The panel recommended further assessment by way of a supplemental Environmental Effects Statement. As part of the revised investigation, the Port of Melbourne Corporation proposed a trial dredge, forecasted to amount to 5 per cent of the whole project. Issues arose as to whether the trial dredging constituted 'work' on the project. 'Work' under the project could not lawfully commence until environmental assessment was complete.

In this context, the Blue Wedges Coalition sought an interlocutory injunction in the Victorian Supreme Court aimed at stopping the trial dredging. Typically when a plaintiff seeks an injunction, the plaintiff is required to give an undertaking as to damages. Given the size of the port expansion and dredging project, such damages were likely to be many millions of dollars. As a coalition of volunteer community groups, Blue Wedges Inc was unable to raise necessary funds. Instead, the group argued for an exemption from the undertaking requirement, as the breach of the *Environment Effects Act* 1978 (Vic) was so clear that 'public interest demanded an interlocutory injunction be granted in any event'.[15]

A ground for exemption exists based on the criterion of exceptional circumstances where there is proven danger of irremediable harm or serious damage. The judge found that the potential for irremediable harm was uncertain, as the full dredging might never proceed, while the financial loss to the port authority was immediate and clearly discernible. This discounting of future harm that cannot be 'directly' ascertained or costed is a familiar impediment to successful action for environmental protection as cost/benefit formulas are heavily weighted toward present costs.[16] Similarly here, the judge gave pre-eminence to immediate and 'direct' costs to be incurred by the port authority, finding that no exceptional circumstances had been established,[17] thus no exemption on public interest grounds was available.

Subsequently, a Supplementary Environmental Effects Statement for the port expansion and dredging was finally released in March 2007, including the results of the trial dredge. Public submissions were allowed on

7. Roger Douglas, 'Uses of Standing Rules 1980–2006' (2006) 14 *Australian Journal of Administrative Law* 22.

8. See, eg, the 'open' standing conferred by s 123 *Environmental Planning and Assessment Act 1979* (NSW).

9. At Victorian Supreme Court level, Justice Mandie did not consider it necessary to determine the standing issue. See *Blue Wedges v Port of Melbourne Corporation* [2005] VSC 305 (9 August 2005) at [14].

10. Another potential barrier that was not an issue in Blue Wedges may be an order by the court for an applicant to provide security for costs; that is financial security for the costs that may be awarded against him/her if the case fails, s 56 *Federal Court Act 1976*.

11. See Blue Wedges Inc website <bluewedges.org>.

12. The Convention on Wetlands of International Importance, commonly referred to as the Ramsar Convention, was signed in the Iranian town of Ramsar in 1971.

13. *EPBC Act*, ss 16, 17B, 18, 18A, 20, 20A, 26, 27A.

14. Pursuant to *Environment Effects Act 1978* (Vic), s 4(1).

15. *Blue Wedges v Port of Melbourne Corporation* [2005] VSC 305 at [10].

16. This phenomenon occurs through the application of discount rates to future values such as long term harm to the ecosystems of the bay.

17. *Blue Wedges v Port of Melbourne Corporation* [2005] VSC 305 at [12]/[13].

a relatively narrow basis, and a panel formed by the Victorian government to conduct public hearings. Final assessment reports were delivered in October 2007. In late October 2007, the Minister for Planning made his assessment that the full dredging should proceed subject to relevant works approvals. The Victorian Minister for the Environment approved the project in November and provided the new federal Minister for the Environment with the final combined environmental effects statement. The federal Minister, Peter Garrett, approved the project on 20 December 2007.

The first Federal Court action

In January 2008, Blue Wedges brought an action in the Federal Court against the federal Environment Minister, with the Port of Melbourne Corporation and the State of Victoria as second and third respondent. Blue Wedges sought judicial review of the federal Minister's decision under s 31 *EPBC Act* to approve the dredging project.

Blue Wedges argued that the approval could not be given, since the project by this time differed substantially from the original project referral in 2002, and thus could not have been the proper subject of a referral and subsequent approval. Alternatively Blue Wedges argued that, even if the Court considered the 2007 action as not relevantly different, the Minister was unable to make an informed decision since the environmental impacts were not adequately assessed and the Minister should have requested further information under s 132 *EPBC Act*.[18]

Justice Heerey did not concur. On the first argument he found that the 'action' in its 2007 form was essentially the same action as in the 2002 referral, ie being a proposal for the deepening of shipping channels. The 'action' remained the same, even if the changes to the scale and scope of the project were substantial. On the second ground the Court found that the obligation to seek further information was discretionary and relied on the Minister's own satisfaction as to adequacy of the information. The Court stated:

> ... the very fact that the Federal Minister made the Approval Decision provides a very strong indication that the Federal Minister believed he had sufficient information to make an informed decision.[19]

The substantive findings give rise to concern. Firstly, that even major changes to a project do not alter the fundamental character of an 'action' that is to be assessed. A channel deepening is a channel deepening, irrespective of altered scope, and presumably scale of impact. Secondly the conclusion that if a Minister makes a decision then, by virtue of that fact, they necessarily have sufficient information on which to make that decision. This problematic reasoning highlights the need for forums that can incorporate merits review of technical information. Further, without such forums in place, it demonstrates the critical importance of ensuring that access to justice by groups to seek review on such questions is not impeded by financial matters.

The second Federal Court action

The second action was initiated after the federal Minister for the Environment gave a statement of reasons for the approval decision under the *EPBC Act* in January 2008. The grounds of review included:

(1) the failure to take into account the principles of ecologically sustainable development under s 136(1) *EPBC Act*;

(2) that the ministerial decision did not comply with s 131(1) *EPBC Act*; and

(3) that the minister did not consider relevant matters under s 136(1)(a) *EPBC Act*, such as the impact of maintenance dredging, oil spills and the removal of toxic sediment.

Interestingly, the statement accompanying the judgment contained the following:

> There are people in our community who hold very strong views opposing the project. Our law gives them the right to challenge the decision of a Minister of State before an independent judge. We should never lose sight of the value of this right given by our system of law to members of our community.[20]

Nonetheless, the Court found that the minister, while required to take into account ecologically sustainable development principles, did not need to do so with respect to each protected, economic or social matter. A global consideration was sufficient. On the second ground, the Court found on the evidence that the Environment Minister had considered whether other federal ministers with relevant portfolios should comment, and had determined not to call for comment. In determining if there was a failure to consider relevant matters, the Court looked to the objectives of the Act, finding that given the minimal risks of oil or chemical spills and the lack of evidence of significant impact of toxic sediment removal, that such matters were not implicitly within the scope of applicable considerations. The Court found against Blue Wedges Inc, but reserved its decision on costs.[21]

The need for merits review

The findings on the grounds of appeal need to be set against Justice North's comments on the function of judicial review in the second Federal Court action:

> It is not the function of the Court to make a judgement as to whether the channel deepening project is a good thing or a bad thing or whether it is harmful to the environment or not.[22]

While this constrained role for the court is consistent with accepted legal principles of judicial review, it highlights the inadequacies of the current judicial review process for much environmentally-sensitive decision-making. The absence of independent merits review by a specialist court, such as the New South Wales Land and Environment Court, limits re-examination to questions of form and not substance, which is all the more limiting in that the environmental impact assessment ('EIA') process has long been critiqued for its overly procedural emphasis. Notwithstanding the availability of expert and technical reference during the EIA process, it is vital that another independent source of review is available. Risk assessment, while clothed in the numeracy of scientific and technical methodology, remains a value-based exercise.[23]

18. *Blue Wedges v Minister for the Environment I* (2008) 165 FCR 211, 226.

19. Ibid 225–227.

20. *Blue Wedges v Minister for the Environment II* (2008). Statement available at fedcourt.gov.au.

21. *Blue Wedges v Minister for the Environment II* (2008) 157 LGERA 428, 447/448, 454, 458–460.

22. Above n 20 at [9] and also *Blue Wedges v Minister for the Environment II* (2008) 157 LGERA 428, 467.

23. Ray Kemp, 'Risk perception: the assessment of risks by experts and by lay people — a rational comparison?' in Bayerische Rück (ed), *Risk is a construct: perceptions of risk perception* (1993).

When aligned in context with the purported potential use of anti-terrorism legislation against Blue Wedges Inc by the Victorian government, the policy objectives seem less laudable and certainly less transparent.

Research has demonstrated that in risk assessment there can be systemic and other sources of bias and inaccuracy operating amongst 'expert opinion'.[24] Given that the EIA process relies heavily on expert opinion and prediction of risk, an independent source of merits review would be more consistent with open government and transparency of decision-making.

Given these factors already operating in the sphere of public interest environmental litigation, the procedural and financial barriers faced by individual citizens and community groups in bringing legal actions exacerbate the problems of ensuring an adequate and effective review of environmental decision-making in the public interest.

Finding financial resources

If public participation in a liberal democracy is to be more than empty rhetoric it is critical that citizens and community groups are enabled to effectively engage 'on equal terms with highly organised and experienced interests' in the decision-making process in environmental projects with strong public interest dimensions.[25]

Undertaking as to damages

In an application for an injunction, most community groups are unable to give an undertaking for the substantial amount of money needed in major infrastructure projects such as the dredging.[26] While technically, public interest exemptions are available, the decision in the initial Blue Wedges action illustrates the difficulties involved. The 'balancing formula' used to establish the exemption, pits well established commercial costs and economic development agendas against less certain, but nonetheless potentially significant future impacts. Without sufficient resources to overcome the immediate financial hurdle of meeting an undertaking as to damages, community groups are faced with an implicit decision about the respective priorities at the procedural level. Indeed, prior to reforms to standing principles, the determination of *locus standi* also acted to preclude trial of substantive issues. In early environmental cases, to deny standing to community groups effectively was to make the judgment that only economic interests were important and that other 'interests' were the preoccupations of 'busybodies and cranks and persons actuated by malice'.[27]

Meeting the costs of public interest injunctive relief

A similar point can be made with respect to the general financing of most community groups that take action against a state government or major corporate 'Goliath'. Governments and corporations are able to field considerable legal expertise and often such entities will be 'repeat players' in litigation.[28] More widely, Walters suggest that a disparity of access to courts constitutes a gap in the rule of law, as the executive government and agencies, are unable to be held to account by the community.[29] Further, the underlying model in most injunctive relief applications whereby the common law treats a public interest group as if it is defending a private financial interest also militates against an effective inclusion of community-based actors. Such actors may well find difficulties in meeting the assumptions of financial and organisational viability upon which participation in the expensive litigation process is predicated.

The costs of taking action

Cost decisions in judicial review proceedings

Usually, an unsuccessful litigant bears the costs of the other party or parties, but courts have a discretion. In the first Federal Court appeal, Justice Heerey chose to exercise the wide discretionary power of the court to award costs[30]. Justice Heerey followed the High Court's reasoning in *Oshlack v Richmond City Council*[31] by refraining from making a cost order against the unsuccessful Blue Wedges Inc.[32]

In *Oshlack* the High Court ruled that the public interest nature of litigation can be a valid discretionary consideration for a trial judge to abstain from following the usual 'cost follows event' rule.[33] The existence of a public interest as 'prime motivation' is not, however, considered to be sufficient, in and of itself. Rather, there have to be 'sufficient special circumstances to justify a departure from the ordinary rule of costs'.[34] As Justice Kirby succinctly summed up:

> [A] discrete approach has been taken to costs in circumstances where courts have concluded that a litigant has properly brought proceedings to advance a legitimate public interest, has contributed to the proper understanding of the law in question and has involved no private gain.[35]

Accordingly, Justice Heerey found the matter to be one of high public concern and identified strong public interest in the approval decision. Interestingly, the Court quoted *The Age*, 'Top Five Issues of the Week' finding Blue Wedges ranked third behind items on an Australian test cricketer and Hillary Clinton! Further, the Court found that the case raised novel questions regarding statutory construction, as deemed relevant by the Federal Court in the *Save the Ridge* case.[36] Thus Blue Wedges' first appeal, while unsuccessful, was in a

24. See Mark Burgman et al, 'Who is an expert? Defining expertise for environmental risk analysis' forthcoming; copy on file with the authors.

25. Sax, above n 5.

26. Brian Walters, 'Suing into Submission: Using Litigation to Quell Dissent' (Paper presented at the Castan Centre for Human Rights Law, 9 August 2005), law.monash.edu.au/castancentre/events/2005/walters-paper.pdf at 5 November 2008.

27. *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 35 (per CJ Gibbs).

28. Marc Galanter, 'Why the "Haves" come out ahead: Speculations on the Limits of Social Change' (1974) as cited in Stephen Bottomley, Neil Gunningham and Stephen Parker, *Law in Context* (1994), 65.

29. Walters, above n 26, 5.

30. s 69(2) of the *Federal Court of Australia Act 1976*.

31. *Oshlack v Richmond City Council* (1998) 193 CLR 72.

32. *Blue Wedges v Minister for the Environment I* (2008) 165 FCR 211, 227/228.

33. *Oshlack v Richmond City Council* (1998) 193 CLR 72, 80/81 and 91 per Gaudron and Gummow JJ.

34. Justice Stein in the primary decision in the Land and Environment Court of New South Wales, *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236 at 246.

35. *Oshlack v Richmond City Council* (1998) 193 CLR 72, 124 per Kirby J.

36. *Save the Ridge Inc v Commonwealth* (2006) 230 ALR 430 at [11]–[12].

small way offset by not having to bear the burden of party-party costs in the Federal Court. Justice Heerey's decision can be regarded as endorsement of the general principle of support for public interest litigation and acknowledgement of the financial difficulties facing community groups.

Analysis of other recent public interest environmental litigation, as well as the pursuit of a costs award in the second Blue Wedges appeal, reveals the disparate trajectory of costs decisions in public interest environmental litigation. Costs orders against an unsuccessful public interest environmental group typically may exceed the financial resources of the group. Unable to meet the financial costs involved, groups may be forced into liquidation and cease operating.[37] Given the financial stringencies already facing most environmental advocacy groups, a costs order in unsuccessful litigation may be a major deterrent to litigating in the public interest. In this context, it does not seem that community groups or concerned citizens are always able to, '... obtain a hearing on equal terms with the highly organised and experienced interests'.

Recent applications of the Oshlack principle

Even though judges can use discretion in cost decisions, the approach in *Oshlack* is not always applied in a manner that upholds the priority of public access to justice.[38] Indeed, in the *Pulp Mill* Case, Justice Marshall decided that appellant, The Wilderness Society Inc, should pay the costs of the successful respondents, comprising the then Federal Environment Minister Malcolm Turnbull and Gunns Limited. Arguably, many of the *Oshlack* considerations Justice Heerey took into account could have applied in the *Pulp Mill* Case. The Wilderness Society is a public interest group, the case was equally contentious, and widely covered by the media. It is arguable whether The Wilderness Society's case, 'was not in the nature of a test case nor did it raise especially difficult legal questions of general importance'[39] or whether this is indeed necessary, as the High Court in *Oshlack* deemed it as sufficient for the establishment of special circumstances that:

> [t]he basis of the challenge was arguable and had raised and resolved 'significant issues' as to the interpretation and future administration of statutory provisions relating to the protection of endangered fauna and relating to the ambit and future administration of the subject development consent.[40]

Indeed, on appeal on the question of costs, it was subsequently decided by the Full Federal Court (Branson, Tamberlin and Finn JJ) that the Federal Minister could only recover 70 per cent of costs, whereas Gunns Limited could only recover 40 per cent of its costs. The Court found that the case did clarify the proper construction of provisions of the *EPBC Act* and that the appellant did not seek financial gain from the litigation, instead aiming to avoid harm to the environment in the interest of a 'large segment of the Australian community'.[41]

However, several judges have pointed out that the discretionary power to make a cost decision against the ordinary costs rule does not grant a 'free kick' to public interest groups.[42] Courts choosing not to follow *Oshlack*, point out that *Oshlack* does not set up a special cost regime in public interest litigation, but only confirms the broad discretionary power that a court already possesses in relation to costs.[43]

Blue Wedges order as to costs July 2008

The central question of whether there were sufficient special circumstances to justify departure from the ordinary rules on costs was taken up again by Justice North in the latest cost decision in the Blue Wedges' litigation. Justice North clearly accepted that the general *Oshlack* approach did apply. However, he found that the 'sufficient special circumstances' criteria were not met as there were not significant issues raised as to the interpretation of the *EPBC Act*. The Court found that 'no novel point of construction or matter of particular importance' had to be determined.[44]

Blue Wedges had argued the 'special features' of the case, citing urgency as contributing to pleading several causes of action that were not pursued. The Court found that despite some allowance for error, '[t]he conduct of the applicant in continuing a case which could not be justified, and which it recognised could not be justified warrants the application of the ordinary rule.'[45]

Nonetheless, the Court clearly recognised the disparities at play in public interest environmental litigation. The total assets of Blue Wedges Inc were assessed as $2700. The Court canvassed whether an open offer on costs by the applicant would be appropriate. Blue Wedges offered to pay $1500. The Court's response to the rejection of this offer is worth quoting at length.

> It might be thought that the making of such an offer would be the end of the argument and that pursuing the matter beyond that point might be akin to seeking to squeeze blood out of a stone. However, that was not the position of the respondents, who pressed for orders. That was their entitlement. Their policy reasons for doing so must lie with them. The Court is not in a position to say whether the policy reasons are good or bad. Nonetheless, it should be observed that there is some curiosity about the strenuous persistence with which the orders continued to be sought.[46]

While the Court was reluctant to comment on the policy reasons behind such a strenuous pursuit of costs against a public interest litigant, at the very least, such a position does not seem synonymous with ensuring access to justice. The decision to vigorously pursue costs by the government and agency bodies involved was justified by the Federal Minister on the rationale of pursuing 'debt collection' in the public interest.[47] Legal counsel for the respondents argued that such recovery of costs was 'sought under proper principles by the successful party'.[48]

Despite such ostensibly laudable objectives, the clear import of such a strenuous seeking of costs by the 'Goliaths' against an unsuccessful 'David' signals another means by which the civic space of public participation in decision-making on major environmentally-sensitive proposals can be narrowed down yet again. When aligned in context with the

37. See, eg, the situation of Wildlife Whitsunday, a group that sought judicial review of the decision to allow a new coal mine to proceed. Kirsty Ruddock, 'The Bowen Basin coal mines case' in Tim Bonyhady and Peter Christoff (eds), *Climate Law in Australia* (2008).

38. See Douglas, above n 7; in only 6 out of 32 standing cases, where information on cost orders were available and the plaintiffs were unsuccessful, no cost orders or cost orders only partly in favour of the defendants were made.

39. *The Wilderness Society Inc v The Hon Malcolm Turnbull, Minister for the Environment and Water Resources and Gunns Limited* [2007] FCA 1863 (30 Nov 2007), at [31] ('*Pulp Mill* Case').

40. *Oshlack v Richmond City Council* (1998) 193 CLR 72, 80/81 per Gaudron and Gummow JJ.

41. *The Wilderness Society Inc v The Hon Malcolm Turnbull, Minister for the Environment and Water Resources and Gunns Limited* (2008) 157 LGERA 413, 415/416. Gunns was found to have 'played a larger role in the appeal than was necessary' and should therefore have only limited redress for its costs.

42. *Oshlack v Richmond City Council* (1998) 193 CLR 72, 124 per Kirby J, citing further caselaw.

43. See eg *Friends of Hinchinbrook v Minister for the Environment and ors* (1998) 99 LGERA 140, 142.

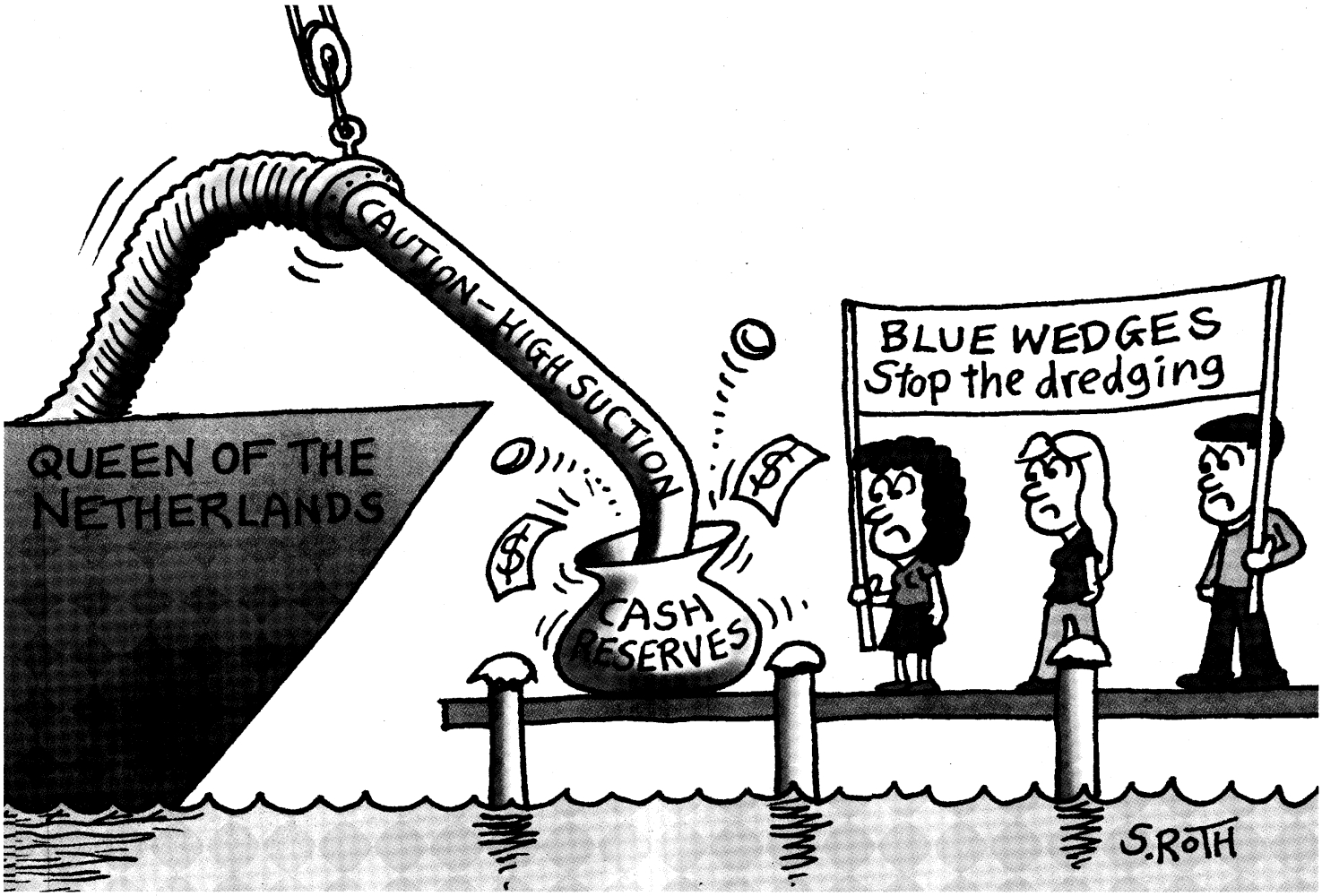
44. *Blue Wedges v Minister for the Environment, Heritage & the Arts* [2008] FCA 1106 (15 July 2008), at [6] and [10].

45. Ibid [13].

46. Ibid [14].

47. Rick Wallace, 'Garrett to pursue costs from anti-dredging group' *The Australian* (Sydney), 17 July 2008, 9.

48. Peter Gregory, 'Blue Wedges may pay costs' *The Age* (Melbourne) 16 July 2008, 3.



purported potential use of anti-terrorism legislation against Blue Wedges Inc by the Victorian government,[49] the policy objectives seem less laudable and certainly less transparent. The need for legal reform in this area also becomes more compelling.

Reform in public interest environmental litigation

The reasoning in recent case law reveals unpredictability in the application of the principles applying to cost decisions in public interest litigation. The lack of a consistent and tightly principled approach to cost decisions in public interest litigation has been pointed out before.[50] In an early review, the Law Reform Commission more generally expressed a 'preference for rules rather than a broad discretion' to 'ensure predictability [and] transparency'.[51] In the case of public interest litigation, the Commission specifically endorsed public interest cost orders and support of public interest litigation by a public fund. No legislation realising these suggestions exists in federal law, and the coverage of state provisions is sketchy.[52]

At common law, Justice Kirby in *Oshlack* linked considerations of public interest standing with costs, reasoning that the purpose of legislation which allowed and encouraged public interest standing should be reflected in the cost decision.[53] This idea has been rejected in subsequent cases, with judges pointing out that their discretionary power regarding costs is not fettered by the standing provisions.[54] There is some merit in linking standing rules and costs award under a common rationale of establishing that the litigants bring an approach grounded in the serious matter to be tried. However in some instances, considerations which apply to the grant of standing may not always replicate the factors that might determine whether costs should be awarded against a public interest litigant. Accordingly, it is argued that reform of the costs rules in public interest environmental litigation to develop explicit criteria, perhaps based in part on the test in *Oshlack*, should be examined.

While a more detailed consideration of reform is beyond the scope of this current work, this article has highlighted the critical importance of the financial hurdles that can militate against effective participation by citizens and community groups. In view of the necessity of engaging the public in a more meaningful way in an era of strong environmental concern, and given the importance of public interest litigation to a viable democracy, a more holistic and systematic approach to costs awards should pertain. More widely, a general review of the financial and procedural support to be given to public interest environmental litigants should be undertaken to better give substantive effect to 'equality before the law' for litigants seeking to challenge decision-making in environmentally sensitive spheres.

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49. Clay Lucas, 'Counter-terrorism police want to speak to these people … who want a bay protection plan', *The Age* (Melbourne) 17 January 2008, 5.

50. Kellie Edwards, 'Costs and Public Interest Litigation After *Oshlack v Richmond River Council*', (1999) 21 *Sydney Law Review* 680, 702.

51. Australian Law Reform Commission, *Costs Shifting — Who pays for litigation?* (1995) Report No 75, at 2.14–2.17.

52. Some provisions in state law require 'public interest' considerations, eg in cost review applications in Queensland, see *Judicial Review Act 1991* (Qld), s 49 (2 b) and in a public interest cost order application in the Northern Territory, *Local Court Rules* (NT), s 38.10; for an overview of caselaw and policy initiatives in other Commonwealth jurisdictions see Tollefson, n 4.

53. *Oshlack v Richmond City Council* (1998) 193 CLR 72, 123 per Kirby J.

54. See, eg, Pulp Mill Case [2007] FCA 1863, (30 Nov 2007) at [31]; *Save the Ridge Inc v Commonwealth* (2006) 230 ALR 430 at [17]–[19].