FEDERAL COURT OF AUSTRALIA

No TasWind Farm Group Inc v Hydro-Electric Corporation (No 2) [2014] FCA 348

Citation:	No TasWind Farm Group Inc v Hydro-Electric Corporation (No 2) [2014] FCA 348
Parties:	**NO TASWIND FARM GROUP INC v HYDRO-ELECTRIC CORPORATION**
File number(s):	TAD 33 of 2013
Judge(s):	**KERR J**
Date of judgment:	4 March 2014
Catchwords:	**PRACTICE AND PROCEDURE** – security for costs – strength of applicant's case – claim of misleading and deceptive conduct – impecuniosity of applicant – whether public interest litigation – whether order for security would stultify action – security for costs ordered
Legislation:	*Australian Consumer Law* ss 4, 18, 29, 236 *Hydro-Electric Corporation Act 1995 (Tas)* s 5 *Trade Practices Act 1974* s 51A
Cases cited:	*Andrews v Caltex Oil (Australia) Pty Ltd* (1982) 60 FLR 261 *Byron Shire Businesses for the Future Inc v Byron Shire Council* (1994) 83 LGERA 59 *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 *Friends of Hinchinbrook Society Inc v Minister for Environment* (1996) 69 FCR 1 *Gunns Limited v Tasmanian Conservation Trust* [2012] TASSC 51 *Hearn v O'Rourke* (2003) 129 FCR 64 *Meribee Pastoral Industries Pty Ltd v Australian and New Zealand Banking Group Ltd* (1998) 193 CLR 502

No TasWind Farm Group Inc v Hydro-Electric Corporation (No 1) [2014] FCA 347
Pathway Investments Pty Ltd v National Australia Bank [2012] VSC 97
Tasmanian Conservation Trust v Gunns Ltd [2012] TASSC 18

Date of hearing:	3 March 2014
Date of last submissions:	3 March 2014
Place:	Hobart
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	93
Counsel for the Applicant:	Mr A Wood
Solicitor for the Applicant:	Mr J Walker
Counsel for the Respondent:	Mr D Barclay
Solicitor for the Respondent:	Page Seager Lawyers

IN THE FEDERAL COURT OF AUSTRALIA
TASMANIA DISTRICT REGISTRY
GENERAL DIVISION **TAD 33 of 2013**

BETWEEN:	**NO TASWIND FARM GROUP INC** **Applicant**
AND:	**HYDRO-ELECTRIC CORPORATION** **Respondent**

JUDGE: **KERR J**
DATE OF ORDER: **4 MARCH 2014**
WHERE MADE: **HOBART**

THE COURT ORDERS THAT:

1. The Applicant provide security for costs of the Originating Application to the Respondent in the sum of $35,000 by:
    (a) payment into Court of $20,000 within 7 days, and
    (b) payment into Court of $15,000 prior to the Court allocating a trial date for the application.
2. The application be stayed pending the Applicant's compliance with these orders.
3. The parties within 7 days file and serve succinct written submissions of no more than one page as to the costs of the application for security for costs.

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

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JUDGE:	**KERR J**
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PLACE:	**HOBART**

REASONS FOR JUDGMENT

1 This is an application by the respondent Hydro-Electric Corporation for the applicant No TasWind Farm Group Inc to provide security for costs. The respondent's application was brought in the same interlocutory proceedings as those in which the respondent sought other relief. In respect of those other issues the court has concluded that the applicant had no reasonable prospects of success in respect of its claim for damages pursuant to s 236 of the *Australian Consumer Law* and has given summary judgment with costs in favour of the respondent in respect of that aspect of the proceeding: see *No TasWind Farm Group Inc v Hydro-Electric Corporation (No 1)* [2014] FCA 347. These reasons interrelate with my earlier interlocutory decision but concern only the respondent's seeking security for costs.

2 The respondent seeks orders that the proceedings on the Originating Application be stayed unless security be provided on the following terms:

(a) $50,000.00 within 7 days of order;

(b) a further $15,000.00 within 14 days of the Respondent filing a defence (since filed); and

(c) a further $100,000.00 prior to the Court allocating a date for trial.

3 The respondent says the applicant should not be permitted to burden the respondent with the potential costs of these proceeding were it to be unsuccessful. It submits that the applicant is relevantly impecunious in that it will be unable to satisfy an order for costs were it to lose. It submits that the applicant's case has low prospects of success and argues that the respondent should not be put to needless expense.

4 It also submits that the applicant, as an incorporated association, is merely a nominal plaintiff and that it is its members who stand to benefit from the litigation. It submits that they elected to incorporate the applicant strategically to avoid personal liability.

5 In response the applicant submits that there were good reasons other than avoiding personal liability which motivated the members of the previous unincorporated Group to incorporate the applicant and that in any event the alternative to conducting this litigation through an incorporated association would have been to conduct the action as a representative proceeding which would have been inconvenient, slow and organisationally inefficient. The applicant submits that this litigation should be regarded as a public interest proceeding. It submits that the *Australian Consumer Law* is legislation which was intended to confer rights irrespective of standing on parties in order to enforce federally legislated norms of corporate behaviour. It denies that those who are members of (or who are otherwise standing behind) the applicant have any relevant personal interests distinct from the public interest articulated by the applicant. It says that its objects specifically envision it taking action of the kind now before the court.

6 The applicant accepts that its resources will not enable it to meet in full any costs order if it is unsuccessful following a hearing but submits that it has obtained pledges in the sum of $20,000.00 towards any such adverse order. It submits that any shortfall in costs that the respondent would suffer if it won would be derisory by comparison with the overall cost of the project and declining to order security for costs would not work any substantial injustice to the respondent.

7 It submits that if the court was to order security for costs in the sum sought by the respondent ($165,000.00) that would effectively terminate these proceedings.

Consideration

8 The law that governs an application for security for costs is well settled and is not in dispute. A decision to make such an order involves the exercise of discretion and is to

be exercised where it is necessary or appropriate to the performance of the functions of the court. As was held by Holt AsJ in *Tasmanian Conservation Trust v Gunns Ltd* [2012] TASSC 18 (upheld on appeal), there are no rigid rules of practice that must be followed.

9 Even if security is ordered it will not necessarily be in the sum sought. The court's power to order security may require a broad-brush approach and a balance between ensuring that adequate and fair protection is provided to the party seeking security and avoiding injustice to the other party: *Pathway Investments Pty Ltd v National Australia Bank* [2012] VSC 97 at [55] per Davies J.

10 The respondent's written submissions at [10] and [11] dated 4 February 2014 referred the court to the judgment of Kirby J in *Meribee Pastoral Industries Pty Ltd v Australian and New Zealand Banking Group Ltd* (1998) 193 CLR 502 at [26]:

> 10. In *Meribee*, Kirby J noted that while it would be wrong to attempt to hedge the jurisdiction by adherence to rules and practices, there are certain factors which the Court should consider. They included: whether a party could meet an adverse costs order; whether the litigation raised issues of general public importance apart from the interests the plaintiff; that a party has limited or no assets in the jurisdiction; and the strength of the plaintiff's case. Kirby J noted that "*Doubtless there are as many further considerations as there are cases*".
>
> 11. The governing consideration is what the justice of the case requires.

11 The applicant accepted those propositions and I proceed on the basis that they conveniently summarise the law that governs the exercise of the discretion that I am called upon to exercise. Where other cases appear to assist I refer to them in the course of these reasons.

The strength or weakness of the applicant's case

12 An important consideration universally accepted to be relevant in deciding whether or not to grant an application for security for costs is the court's evaluation of an applicant's prospects of success.

13 Mr Barclay submits on behalf of the respondent that this evaluation must be undertaken notwithstanding the court's assessment of the merits of the case at this interlocutory stage can be no more than "impressionistic". I accept that submission. I also accept his submission that the weaker the applicant's case the more the court should be ready to consider ordering security for costs.

14 Mr Barclay submits that the applicant's case has low prospects of success.

15 A critical issue is whether or not the respondent's alleged conduct and statements were "in trade or commerce". The respondent's pleadings put in issue whether the respondent's conduct was, and whether any representations made by it or on its behalf were, relevantly "in trade and commerce".

16 The applicant ultimately cannot succeed if whatever the Hydro-Electric Corporation did and said, even if done and said as alleged, was not done and said by those authorised by it "in trade and commerce" within the meaning of the *Australian Consumer Law*. Mr Barclay submitted that the applicant had given no authority in support of the proposition that the respondent's conduct was "in trade and commerce" as so defined.

17 The words "in trade and commerce" are to be understood as words located within the *Australian Consumer Law*. So construed they convey a narrower meaning than that which is comprehended within the extent of the expression "with respect to trade and commerce" found in the Constitution to express the broad legislative power of the federal parliament: see *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594.

18 Mr Barclay submits (perhaps with reference to what was said by Dowsett J in *Hearn v O'Rourke* (2003) 129 FCR 64 at [29] in a passage reproduced in Miller's *Australian Competition and Consumer Law Annotated* (34th ed) at 1566 without the learned author acknowledging that his Honour was in dissent in that case) that it is implausible that any trial judge could be persuaded that the Hydro-Electric Corporation's conduct could be described as being of a commercial nature and as such within the meaning of the expression "in trade and commerce" for the purposes of the *Australian Consumer Law*.

19 In interpreting the *Australian Consumer Law* effect must be given to the ordinary meaning of the words "trade or commerce". Modern economies continue to evolve and what would be understood as coming within the ordinary meaning of trade and commerce continues to be shaped by that evolution. The precise limits of what conduct is or is not in trade or commerce cannot be stated in abstract. Analogies are of limited value: see the majority judgment of Finn and Jacobson JJ in *Hearn v O'Rourke* at [12]. In my opinion, notwithstanding his reference to the dissenting judgment Dowsett J, Mr Miller correctly summarises the effect of the relevant authorities at 1566 when he states the characterisation "of what imports a trading or commercial character in relation to a particular activity which, without more, would not have that character" is often difficult to discern and "is a matter to be determined on the facts of each case".

20 I therefore turn to the facts as I understand them on the limited materials available to the court in this interlocutory application. The respondent Hydro-Electric Corporation is a Tasmanian Government Business Enterprise. It is a corporation for the purposes of the *Australian Consumer Law*. There is scant evidence before the court on the point but it seems not in dispute that the ordinary business of the respondent is the generation and sale of electricity. Nor is it in dispute that the Hydro-Electric Corporation participates in the national electricity market: Mr Barclay took the court to s 5 of the *Hydro-Electric Corporation Act 1995 (Tas)* which sets out its functions and powers.

21 There also appears to be no dispute that the Hydro-Electric Corporation, at all relevant times, had in contemplation the possibility of establishing a wind farm on King Island. In pursuit of that objective the respondent acted in its own name and under the trading names TasWind and TasWind King Island.

22 It appears from evidence before me that the respondent chose, before committing itself to a substantial investment in that regard, to undertake a programme of community consultation with the residents of King Island. The reason it did so is not in evidence but I am prepared to take judicial notice of the fact that, rightly or wrongly, many previous industrial developments in Tasmania have faced significant community opposition. I am prepared to infer that the respondent would not have undertaken a programme of community consultation unless it thought that consulting with the residents of King Island was relevant to its decision making regarding the proposed wind farm.

23 The precise nature of what the respondent said and did in the course of those community consultations is in contest but it seems open to me in these interlocutory proceedings to accept, despite the respondent's pleadings in para 9A of its Defence to the Amended Statement of Claim that it made no representations that "it was an essential feature of the Proposed Wind Farm Development that the Respondent would only proceed to the feasibility study of the Proposed Wind Farm Development if it had the broad support of the residents of King Island" that the respondent did make various representations to the residents of King Island to the effect that it would not proceed with its proposal to construct a wind farm on King Island unless its proposal had broad community support.

24 It is common ground between the parties that the respondent paid for and facilitated a poll of the residents of King Island to enable them to express their views as to whether or not they supported the Wind Farm proposal. That is consistent with some

representation of the nature asserted by the applicant having been made. It is hard to think why a poll would otherwise be thought necessary or appropriate. The respondent did not adduce any evidence to suggest this court should reach a different conclusion.

25 The threshold question is whether any such representations, whatever their specific content, should be seen as having been made in trade or commerce.

26 In my opinion, on the limited materials before me, it is impossible to conclude otherwise than that the respondent by its own choice made the requirement that a wind farm have broad community support relevant to it proceeding with the project. The project was one which, if implemented, was intended to become part of the respondent's suite of renewable energy generation assets. The applicant submits that a proponent able to go to the market asserting it had a social licence and broad community support would have a commercial advantage in raising funds. I decline to make that finding. There was no evidence to that effect. However, equally the respondent did not adduce any evidence to suggest I should not make a finding that its decision to give the King Island community a role in its decision making processes was reached for other than sound commercial reasons. Mr Barclay did not suggest any other reason.

27 In my view it is not unlikely that a trial judge would conclude that all of the steps taken by the respondent to assess the viability of its project, including TasWind's expenditure on community consultations and its undertaking polling of the views of the residents of King Island were actions taken in pursuit of the respondent's core business—that of facilitating the generation and sale of renewable energy notwithstanding that they were taken at the preliminary stage of a large project and were undertaken to determine whether or not that large and expensive project should proceed. Understood in that context those steps appear to fall within the ordinary meaning of something done by the Hydro-Electric Corporation "in trade or commerce".

28 Accordingly I find that the applicant does not have a weak case in so far as it proceeds on the basis that the respondent was acting "in trade or commerce" within the meaning of the *Australian Consumer Law*.

Previous legal advice

29 I therefore turn to the other bases upon which the respondent submits the applicant's case is weak.

30 I put to one side submissions that prior to the applicant's incorporation the No TasWind Group had received independent legal advice that the cause of action with the best prospects of success would be an action in estoppel, estimated only at 50-50.

31 I make no criticism of the lawyer who provided the advice who is not acting in this proceeding (and who has not been heard as to any instructions received or the circumstances in which the advice was provided) but even if what a lawyer advised before the applicant's incorporation is relevant the short answer to that submission is that this court's interlocutory decisions in this case have proceeded on the basis that that then advice was flawed.

32 Earlier views expressed by the unincorporated Group's then lawyer have no relevance to the strength or weakness of the applicant's case as now pleaded.

33 For the same reason I place no weight on Mr Graham's statements made after receiving that advice to members of the Group about the case being all a bit nebulous and "this is an esoteric business and in law—its right out there" (and similar) as having any objective relationship to the strength or otherwise of the applicant's case as now before the court.

34 That is not to say that what Mr Graham said in those e-mails regarding his willingness to commence legal proceedings merely to be a nuisance to the respondent should be ignored given Mr Graham's role in the then unincorporated Group and now in the management of the applicant—what he said may be relevant to the ultimate discretion to award or not award security for costs but his then views based on advice no longer relied on are not relevant to the actual strength or otherwise of the applicant's case.

Novelty of claim regarding the lack of a social licence

35 A central plank of Mr Barclay's attack on the strength of the applicant's case is then set out in paragraphs 7 and 8 of his written submissions dated 4 February 2014:

> 7. The applicant's claim is novel. It alleges that representations were made by employees or agents of the respondent to the effect that "if the response to the survey and achieves a result of less than 60% in favour of proceeding to a feasibility study, the respondent will not carry out a feasibility study". The applicant alleges that, such representations having been made and there being only a 58.77% favourable response to the survey, the respondent does not have a social licence and is bound not to proceed with the feasibility study or the wind farm generally.
> 8. The respondent denies that any representations made were to the effect alleged by the applicant, nor could any such representations have been interpreted by a

> reasonable person in that way….

36 In response Mr Wood on behalf of the applicant submits that the respondent has misconceived the applicant's case in characterising it as if it were about a single representation—the 60% representation—and submits that the applicant's case, while comprehending that representation, is broader: namely that the respondent repeatedly represented it would not proceed with its wind farm project unless it obtained a "Social Licence" from the King Island community in the form of broad community support and that those representations were relevantly made in circumstances in which the respondent was engaging in conduct that was misleading or deceptive or likely to mislead members of the public in contravention of s 18 of the *Australian Consumer Law* and which were in themselves false and misleading representations in contravention of s 29 of the *Australian Consumer Law*.

37 I am not persuaded that Mr Barclay does misapprehend the applicant's case. At paragraph 30 of Mr Barclay's written submissions he identifies as a reason for the applicant's case not enjoying strong prospects of success that it appears to

> rely on a finding that there is such a legal creature as a "social licence" and even upon such a finding being made, that the "social licence" confers rights on a person which are capable of being enforced in a court.

38 In my view there is considerable force to Mr Barclay's submission in so far as it concerns the notion of a social licence delinked from the 60% representation. I harbour considerable doubt that what is conveyed by the notion of "social licence" can be identified with such precision as would enable a court to conclude that any particular practice fell within or outside of its scope. It seems to me arguable that the notion of "social licence" may be better understood as construct of social and political discourse rather than of law and that it is potentially too amorphous and protean in nature to be applied as the criterion for a judicial declaration. The applicant's written submissions of 19 February 2014 at para 13(d) themselves refer to what Professor Paul Redmond has said of the notion: inter alia that it "represents a form of enlightened management practice, voluntarily adopted and beyond any legal obligation…" I do not go so far as to suggest that the case put forward by the applicant is unarguable. At trial the evidence may establish that the use of the expression "social licence", understood in the particular context of this case, conveyed a more fixed and certain meaning than I apprehend. However, on the materials before me in these interlocutory proceedings I have significant doubt that that will be the case.

39 Notwithstanding the analogy that Mr Wood suggested in his oral submissions that the applicant's pleading that the respondent has wrongfully claimed to have approval by way a "social licence" from the King Island community to proceed with the wind farm project is indistinguishable in its legal underpinnings from a wrongful claim that a manufacturer has approval to produce clothing with markings on it from the International Olympic Committee, if the applicant's case was merely that the respondent had misleadingly claimed a "social licence" for the wind farm, then, notwithstanding the thoughtful submissions made by Mr Wood, I would conclude that the prospects of the applicant succeeding at trial were slight.

The 60% representation

40 However, the alleged 60% representation stands in a different position. The applicant pleads that the respondent made representations to the effect that it would accept that any result obtained in the poll demonstrating less than 60% support of the King Island community would not constitute broad support sufficient for the Wind Farm scheme to proceed.

41 If the evidence led at trial was to establish that that representation was made, and that that representation was made in breach of the *Australian Consumer Law*, there seems to me in principle no reason why, subject to the range of discretionary considerations that apply to the grant of declaratory and other relief sought, that the applicant could not succeed. I accept that relief would be discretionary but in the end the respondent did not press its argument that there was anything in the terms of the *Hydro-Electric Corporation Act 1995 (Tas)* which would constrain the court from making such an order.

42 The *Australian Consumer Law* has been amended to clarify its application to representations going to future matters. Section 4 is partly new and is important. Subsections (1) and (2) were formerly s 51A(1) and (2) of the *Trade Practices Act 1974.* Subsections (3) and (4) are new. In its current form it provides:

> *4 Misleading representations with respect to future matters*
> (1) If:
> (a) a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act); and
> (b) the person does not have reasonable grounds for making the representation;
> the representation is taken, for the purposes of this Schedule, to be misleading.
> (2) For the purposes of applying subsection (1) in relation to a proceeding concerning a representation made with respect to a future matter by:
> (a) a party to the proceeding; or

> (b) any other person;
> the party or other person is taken not to have had reasonable grounds for making the representation, unless evidence is adduced to the contrary.
> (3) To avoid doubt, subsection (2) does not:
> (a) have the effect that, merely because such evidence to the contrary is adduced, the person who made the representation is taken to have had reasonable grounds for making the representation; or
> (b) have the effect of placing on any person an onus of proving that the person who made the representation had reasonable grounds for making the representation.
> (4) Subsection (1) does not limit by implication the meaning of a reference in this Schedule to:
> (a) a misleading representation; or
> (b) a representation that is misleading in a material particular; or
> (c) conduct that is misleading or is likely or liable to mislead;
> and, in particular, does not imply that a representation that a person makes with respect to any future matter is not misleading merely because the person has reasonable grounds for making the representation.

43 Section 4 has the consequence that a statement about a future matter is deemed misleading unless the person making it produces evidence that they had reasonable grounds for making it. Even if evidence is adduced, there may not be reasonable grounds for the statement having been made. Further, the statement may be misleading even if the maker had reasonable grounds for making it (s 4(4)). Section 4 has important consequences for corporations conducting their affairs and, I infer, to the discretion to grant relief.

44 The relevant facts (Applicant's Amended Statement of Claim paragraph 8(c)) that would establish the making of misleading statement have been pleaded and particulars have been supplied. They are, of course, denied by the respondent.

45 I have very limited evidence before me. I cannot plausibly determine on those materials what the likelihood is of the matters pleaded being made out. I accept that the evidence may ultimately establish that they cannot. However, given that the respondent did not cross-examine either of the applicant's witnesses to the effect that the claimed representations were not made or, if made could not carry the construction the applicant places upon them, there is nothing at this stage of these proceedings to allow me to conclude, for the purposes of the respondent's application for security for costs, that the applicant's case, in that regard, is relevantly weak.

The applicant as a nominal plaintiff

46 The applicant brings these proceedings consistently with the objects listed in its constitution. That the applicant otherwise has no interest in these proceedings is immaterial. Incorporated association and companies can bring proceedings in the asserted

public interest under the *Australian Consumer Law*: see *No TasWind Farm Group Inc v Hydro-Electric Corporation (No 1)* [2014] FCA 347.

47 The respondent seeks to distinguish that ordinary circumstance from the present on the basis that the applicant was incorporated merely as a device to avoid the members of the previously unincorporated group (who are now its members) being exposed to the risk that if they pursued this litigation in their own names costs orders might be made against them.

48 There is considerable evidence consistent with that proposition. Mr Graham, who was one of the key leaders of the former unincorporated Group and a member of the applicant, was cross-examined. He did not dispute having said that if there was a (financial) risk he would not bring these proceedings in his own name. The respondent's written submissions of 4 February and 19 February refer to many examples of other similar statements. Given the overwhelming nature of that evidence I do not think it useful or necessary to set out point by point everything in the evidence that points to Mr Graham and other members of the formerly unincorporated group having acted to incorporate the applicant with the intention that this litigation could proceed without any risk to their personal financial positions. Ultimately that seems uncontentious. It is true that under cross-examination Mr Graham maintained that another reason for the incorporation of applicant was to improve the organisation of those who opposed the wind farm proposal but he conceded that the applicant was incorporated "in essence" to bring these proceedings.

49 That circumstance is a relevant factor in favour of the Court making an order in favour of security for costs. However, in my opinion it would be wrong to make too much of this point so as to regard it as decisive. A very great proportion of modern trade and commerce and even some private activity is now undertaken through the agency of bodies deliberately established to take advantage of the limited liability that incorporation provides for. The respondent itself is an incorporated body such that, save in exceptional cases such as were it to be trading whilst insolvent, those who carry on its business as its directors have no personal liability for its debts. Even accepting as I do that the applicant was incorporated with a view to obtaining similar protection for the former members of the unincorporated Group it is difficult to see why, without more, that circumstance should be regarded as something as more than one factor in evaluating whether or not to make an order for security for costs.

50 That is not to deny that security for costs will usually be awarded (and should be) where any third person uses an impecunious plaintiff (whether incorporated or not) as a vehicle to pursue a matter in which they, rather than the impecunious litigant, are in truth the moving actor whose interests will be vindicated by the litigation which has been commenced. However the cases in which this principle has been applied appear to be limited to those in which litigation has been brought for a third party's "benefit". A 'benefit' in this context is usually understood to be something in the nature of a personal right in property or in interest having economic value.

51 I acknowledge that in *Andrews v Caltex Oil (Australia) Pty Ltd* (1982) 60 FLR 261 Lockhart J stated (in obiter) that it was not necessary to confine the notion of benefit to a financial benefit. That may be correct but I have found no instance where, when the asserted interests are no more than vindication of public rights, the principle has been applied. I have not been referred to any case in which a corporation pursing "public interest" litigation has been held to be litigating for a third party just because the individual members of the community who are its members might themselves also have taken individual legal action. I am not prepared to hold that the notion of interest should be expanded to that degree.

52 In *Friends of Hinchinbrook Society Inc v Minister for Environment* (1996) 69 FCR 1 at 21, Branson J stated:

> The applicant is an incorporated association of persons concerned with the environment. In one sense, every association is a front for its members: they stand behind it and may be assumed themselves to support the objectives of the association and, generally speaking, the association's actions in intended advancement of those objectives. There is, however, in my view a very real difference between the relationship of a member of a non-profit association formed to advance a public interest to the association of which he or she is a member, and the relationship of a shareholder to the company in which he or she holds shares. The benefit which a shareholder might expect to obtain from litigation conducted by a company will ordinarily be, whether directly or indirectly, financial. Members of a non-profit association will not ordinarily benefit financially from litigation instituted by the association. The benefit which they might obtain from such litigation is likely to be constituted by intellectual or emotional satisfaction.

53 In cross-examination Mr Graham acknowledged that the campaign against the respondent's proposed wind farm had received financial support from the owner of a national tourism business Mr James. Mr James (who Mr Graham said runs a national business 'Flight Centre") is not a member of the applicant. He had paid $76,000.00 to a public relations company in support of the campaign.

54 This was the high point of any evidence that might suggest the litigation is being pursued to advantage a third party. In my view the evidence does not come close to establishing that this case is being pursued to vindicate Mr James's economic interest and for his benefit. What I have received by way of evidence at this stage is limited and my conclusions must be only "impressionistic." However no injustice will be done if I am wrong. If it is established at the hearing that contrary to the impressions I have formed that this litigation has been conducted for the benefit of any third party the court has the power to award costs against any non-party in whose interests the proceedings are found to have been brought. There is no suggestion that Mr James is relevantly impecunious or that an order of that kind could not be made and enforced.

55 That remote prospect aside I can identify nothing to justify a finding on my part that any member of the formerly unincorporated Group possesses a relevant interest which will be vindicated by the proceedings brought by the Applicant. And as Lockhart J also noted in *Andrews v Caltex Oil (Australia) Pty Ltd* at 266:

> It must not be forgotten that there are two aspects of "benefit", namely, first that the proceeding is not brought for the benefit of the applicant, and, second, that it is brought for the benefit of some other person. Proof of the former does not necessarily establish the latter.

56 Had their standing to bring proceedings been in issue and had any member of the former unincorporated Group chosen to litigate in his or her own right, on the limited evidence before me, I would have been compelled to find that he or she could not point to their having any interest in the subject matter of the litigation beyond that which they held in common with every other resident of King Island.

57 It is because the relevant provisions of the *Australian Consumer Law* allow any person to bring proceedings without any requirement of such an interest that permits this litigation to be brought.

58 On the state of the evidence as I conceive it, none of the members of the formerly unincorporated Group had any relevant interest in the litigation and neither they nor any of its current members were using the applicant to pursue the litigation for their benefit.

59 I am entitled to take the circumstances of the applicant's incorporation into account as a relevant consideration in favour of the respondent's application for security for costs (see *Byron Shire Businesses for the Future Inc v Byron Shire Council* (1994) 83 LGERA 59 at 61 per Pearlman J) but for the reasons I have explained at [50] given the

ubiquitous use of the corporate form for such purposes it is simply one of the factors relevant to the exercise of the Court's discretion and, as with all such factors, is not necessarily decisive. The governing consideration remains what the justice of the case requires.

60 I reject the respondent's proposition that these proceedings should be found by this court to have been brought by the applicant as a nominal plaintiff for the benefit of the former members of the unincorporated Group, or any of them or the benefit of any other third party.

Capacity for the applicant to meet an order for costs if unsuccessful: Impecuniosity

61 It is common ground that the applicant has limited financial resources currently available to it. Its balance sheet (DG 3) discloses current net assets of only $21,244.31.

62 The applicant has a duty to the court to make full disclosure of its financial position. It may be doubted that it complied with that obligation. Mr Graham's affidavit states at paragraph 48 that "the Association has been able to raise the sum of $20,000 that could be paid into Court to meet a portion of Hydro Tasmania's costs if our action is unsuccessful and a costs order is made against the Association".

63 Under cross examination it emerged that that sum was not held by the Association. Rather it represented pledges that had been made by unidentified members of the King Island community to meet various amounts to that total if called upon to do so in the event of the litigation being unsuccessful.

64 There is also no evidence before the court as to what might be the terms of the applicant's counsel's retainer but Mr Graham suggested that some part if not all of the current net assets of the Association were held in anticipation of their being applied to counsel's fees. Despite that there is nothing in the accounts the applicant disclosed that speaks to any such present or contingent liability.

65 I do not suggest any want of honesty on Mr Graham's part but the picture he and the applicant presented was not complete.

66 The evidence as to the likely costs of these proceedings to trial is equally unhelpful—albeit for different and more understandable reasons. The respondent filed an affidavit sworn by Mr Roy Nicholas Wallace, a partner of Page Seager Lawyers with carriage

of the matter for the respondent. Mr Wallace gave an estimate of the total party and party costs inclusive of counsel's fees as within the range of $225,730.00 to $240,730. Mr Wallace was not required for cross-examination.

67 The applicant filed a responding affidavit sworn by James Brisdon Walker. Mr Walker was not then but is now solicitor on the record for the applicant. Under cross examination Mr Walker did not dispute the validity of Mr Wallace's general calculations.

68 However as with all such estimates their reliability depends on the assumptions that underlie them. The court raised two particular matters with Mr Barclay where the assumptions upon which that evidence had been given appeared to the court to no longer be justified. First, that it had been agreed as between the parties that there would be no utility in requiring attendance at mediation such that the costs estimated for the attendances in that regard should be disregarded. Second that with active case management and with the proceedings now streamlined following the court's summary judgment in favour of the respondent on the s 236 issues that an estimate of 10 days for the length of the trial was unsupportable and that much of the materials relevant to the proceedings could be put in evidence on affidavit without requiring the attendance of witnesses.

69 Mr Barclay very properly conceded both points. He indicated that he thought two days would be required for expert evidence but, with the s 236 issues resolved that the whole trial would be likely to take no more than five days.

70 I do not propose to substitute my own estimate of what as a result of those concessions the party and party costs might amount to following a five days trial. Whatever the amount I accept, even on those different assumptions, it will be substantially in excess of the funds the applicant currently has to hand. I have no evidence to suggest that the applicant is likely to have possession of or to seek a significantly larger amount in the near future absent it being required by an order of this court to engage in fundraising in order to provide sufficient security for costs to meet any order that it might make.

71 Despite the unsatisfactory state of the evidence discussed above I am prepared to conclude that the applicant is relevantly impecunious. The material before the court establishes reasonable grounds for the respondent to be fearful that if the action proceeds to trial the applicant will not be able to satisfy an order for costs if it were to lose.

Would the order for security for costs as sought stultify the action?

72 At paragraph 51 of his affidavit Mr Graham deposed that:

> If the Association is ordered to provide security for costs in more than a nominal amount or an amount exceeding the amount of the fund it has been able to raise deposed to in paragraph 48, [$20,000] it would be unable to proceed with the action.

73 I have earlier drawn attention at [63]-[65] to the unsatisfactory nature of the evidence regarding the applicant's financial position. However, Mr Barclay, despite cross-examining Mr Graham on other matters relevant to the Association's financial position did not put to him that the Association could be required to give security in the sums sought by the Respondent without that stultifying the action.

74 Taking a broad-brush approach to the evidence, I find that requiring the applicant to provide security in the sum of $165,000.00 would place the applicant in a position where it could not further proceed and would stultify the action.

75 However I do not think that the evidence rises so far as to establish that an order for security for costs in a lesser amount would necessarily do so. I conclude that it is reasonable to assume that the applicant could raise some additional funds were it required to do so.

Public Interest Litigation?

76 In his affidavit at [37] Mr Graham stated:

> The Association… says it is bringing its action in furtherance of the public interest in having a binding determination made as to whether Hydro Tasmania does have broad support of the King Island Community; whether it can represent that it has such support in the manner in which it is currently making such representations; and whether it is entitled to proceed with its Wind Farm Scheme.

77 Mr Wood accordingly submitted that the court should hold that these proceedings stand in a different light to ordinary commercial litigation for the purpose of ordering security for costs. The proceedings should be held to be public interest litigation.

78 On balance, albeit not without some hesitation, I am prepared to accept that these proceedings do stand in a different circumstance to ordinary litigation and that the applicant is entitled to be regarded as pursuing public interest litigation. My reason for that conclusion is not because these proceedings are being pursued in the interests of the environment or public health or some such factor. The case before me raises no allegation of failure by the respondent to take such considerations properly into account. Individual

members of the applicant may believe that there is an underlying environmental or health issue at stake in whether or not the King Island wind farm proposal proceeds but no evidence to that effect was adduced and the pleadings before the court do not address that. Nor should the court be taken to be expressing any view as to the merits of the respondent's proposal—such considerations have no relevance to this decision.

79 I conclude that this litigation can be regarded as being public interest litigation in the context of this application for security for costs for two interrelated reasons.

80 The court has given summary judgement in favour of the respondent preventing the applicant claiming damages pursuant to s 236 of the *Australian Consumer Law*. There is thus no aspect of a commercial claim remaining on foot.

81 I also discern there is a public interest in the enforcement of the laws of the Commonwealth. The provisions of the *Australian Consumer Law* articulate enforceable norms of acceptable corporate behaviour capable of being brought before this court by any person, irrespective of any requirement on their part to establish standing. Assuming the respondent was acting in trade or commerce as I have concluded a trial judge would be likely to hold, the community to whom it made representations is entitled to expect it comply with those norms. I do not, of course, suggest that it did not comply with those norms: that is merely the applicant's assertion at this point and would be for the trial judge to determine if the matter proceeds. By passing the *Australian Consumer Law*, Parliament clearly intended that these standards be readily enforceable and that their enforcement would be consistent with the public interest. I accept that sometimes a person who seeks to enforce such standards may have a direct commercial interest—and may even be a competitor. In such a case it may well be more appropriate in the context of an application for security for costs to regard the proceedings they bring as no more than ordinary commercial litigation but in this instance no such suggestion can be made of the applicant.

The respective capacity of the parties: proportionality

82 The applicant drew the Court's attention to *Gunns Limited v Tasmanian Conservation Trust* [2012] TASSC 51. In that case the Supreme Court of Tasmania recognised that the proportionality between the security sought and the total project cost was a relevant factor to take into account. Mr Wood submitted

> in the present case, the respondent's project has an estimated value of 2 billion. That is its own estimate it seeks an order for security for costs totalling $165,000. The

> proportion of the estimated overall cost of the project in this case is roughly 0.00825% or approximately half that in the Gunns Case.

He submits that no injustice would be done to the respondent in refusing to order security for costs.

83 The court accepts that the proportionality principle has been established in a number of cases. Whatever the estimated value of the respondents project (and I have been unable to find a statement in the evidence which clearly establishes it) the evidence is consistent with the Court concluding that as a proportion of the total costs of the project overall, were it to proceed, any unmet costs in these proceedings would be of trifling significance. Mr Barclay did not suggest otherwise. I accept this to be a relevant factor in favour of the position argued for by the applicant to be weighed in the overall discretionary decision the Court must make.

Conclusions

84 The court must consider and weigh the totality of the circumstances. Some of the factors I have addressed above favour an order being made for security for costs. Others favour the contrary. In the end, applying a broad brush judgement, I am satisfied that I should make an order for security for costs. The considerations that have influenced the court most significantly in that regard are the failure of the applicant to fully disclose its financial position and the fact that it can be understood that the former members of the unincorporated Group (who are now its members) facilitated the applicant's incorporation essentially as a device to avoid their being exposed to the risk that if they pursued this litigation in their own names had costs orders been made against them.

85 However, I am not persuaded I should make the orders sought by the respondent. The orders sought by the respondent would, on the findings I have made, stultify the litigation and prevent a case which I have found to have been brought in the public interest and which has not been held to be without possible legal merit going to trial.

86 I am satisfied that the resources available to the applicant are greater than it put before the court. The evidence establishes that neither the applicant nor its members have made attempts to increase the resources held to satisfy any adverse costs order. Balancing that conclusion I have found that to require the applicant to raise the further funds sought by the respondent would be unrealistic and would lead to the litigation being stultified.

87 I also take into account that the length of the trial will be substantially less than the respondent initially contended for.

88 In the interlocutory proceedings earlier disposed of by this court by its order for summary judgement the parties agreed as between themselves that a reasonable but modest amount for the court to award by way of a global figure for the costs of those proceedings was $7000.00. Those interlocutory proceedings took up substantial court time and preparation from the parties equivalent, in my estimate, to at least a full day. When security for costs is awarded it is rarely a full indemnity even for predictable party and party costs. Given that the length of a trial is now estimated to be no more than five days I am prepared to use the sum of $7000.00 per day as a fair estimate of what is reasonable for this court to award by way of a modest requirement for security for costs.

89 For five days of trial that would amount to $35,000.00.

90 The applicant currently has to hand funds in excess of $20,000. In the absence of any evidence that any part of those funds are due and owing to its counsel or any other party I think it reasonable for the court to expect that the applicant could make payment into court in at least that sum without delay.

91 I also think it reasonable to infer that the members of the applicant have not exhausted their capacity to raise further funds and that given their success in the past in raising funds for their campaign a modest additional amount of money could be raised by them should they decide to continue with these proceedings.

92 Subject to any submissions from counsel regarding the precise terms of these orders I therefore propose to order that the applicant provide security for the respondent's costs of the originating application on the following terms (a) that the applicant make payment into Court of $20,000 within seven days of these orders and (b) a further $15,000 prior to the court allocating a date for the trial of the application and that the application be stayed pending the applicant's compliance with that order.

93 The parties have leave to file short written submissions as to what orders should be made with respect to costs of this application.

I certify that the preceding ninety-
three (93) numbered paragraphs are

a true copy of the Reasons for
Judgment herein of the Honourable
Justice Kerr.

Associate:

Dated: 8 April 2014