Animal Defenders Office
Using the law to protect animals

<u>CASE NOTE</u>: *Snowy Mountain Bush Users Group Inc v Minister for the Environment* [2024] NSWSC 711

On 14 June 2024 Harrison CJ of the Supreme Court of NSW handed down his decision in *Snowy Mountain Bush Users Group Inc v Minister for the Environment* [2024] NSWSC 711[1] to refuse the grant of an injunction to stop the aerial culling of brumbies in Kosciuszko National Park.[2]

What is interlocutory relief?

An interlocutory inunction refers to relief granted on a preliminary basis to stop conduct before the issue is decided at the main legal hearing. Applications for interlocutory relief are generally made where an issue is urgent, and if waiting for the main hearing would risk considerable harm being done. Losing an application for an injunction does not mean that the main hearing is doomed, as different legal issues are considered.

What does an applicant need to prove to get an injunction?

An applicant for interlocutory relief needs to establish three key elements on the balance of probabilities: that (1) there exists a serious issue to be tried; (2) damages will be an inadequate remedy; and (3) the balance of convenience favours granting an injunction.

In this case, the plaintiff, Snowy Mountain Bush Users Group Inc (**SMBUG**), succeeded on elements (1) and (2), but failed on element (3), and so was unsuccessful in its application. The Court's analysis of these legal elements sheds light on key issues that animal groups face when challenging inhumane practices on an urgent basis.

Did the plaintiff have standing?

As a preliminary issue, the Court had to decide whether SMBUG possessed legal 'standing' to seek an injunction. Naturally, SMBUG's legal rights were not (directly) affected by the aerial shooting, so to possess standing to seek an injunction, the group had to demonstrate a 'special interest' in the subject matter; that is, that it had more than a 'mere intellectual or emotional concern,' and has taken 'sufficient, concrete active steps' to give effect to its particular concerns in the matter (at [24]).

The Court found that SMBUG *did* possess a special interest sufficient *for the purposes of* the interlocutory hearing, based in part on evidence that it had 'for some time been actively advocating for the sustainable use of the park and the heritage value of wild horses' (at [27]). However, this does not guarantee that the plaintiff will be found to have standing at the main hearing, which will involve a more detailed consideration of their interest in the matter, including participation in government consultation and making submissions on the relevant legislation and Management Plan.

Was there a serious issue to be tried?

The Court agreed that there is a serious issue to be tried (ie the application is not frivolous), but the likelihood of success was not high enough in and of itself to grant injunctive relief. That is, while the plaintiff's case was not 'doomed to fail', it could not be characterised as anything more than 'arguable' (at [19]). By way of example, the Court said that a key legal argument advanced by SMBUG is that the aerial shooting is in breach of s 10 of the *Kosciuszko Wild Horses Heritage Act 2018*,[3] (**the Act**) and this raises detailed questions of statutory interpretation (at [20]).

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[1] Snowy Mountain Bush Users Group Inc v Minister for the Environment [2024] NSWSC 711 (14 June 2024) (austlii.edu.au).
[2] To be precise, the notice of motion filed by the plaintiffs on 7 May 2024 was dismissed. Under the notice, 'the plaintiff seeks urgent interlocutory relief prohibiting the defendants from continuing aerial shooting of wild horses, and from continuing culling operations of any type, in the park in circumstances where it appears that this would reduce the numbers of wild horses in the park below 3,000.'
[3] Section 10 provides as follows: **10 Adopted plan must be carried out and given effect to** An adopted plan must be carried out and given effect to by the Chief Executive.

Were damages an inadequate remedy?

The Court found that it was 'trite to observe that the plaintiff does not seek, and could presumably never demonstrate, any right or entitlement to damages' (at [29]).

Did the 'balance of convenience' favour the granting of an injunction?

In this case the balance of convenience threshold was not met, and this was ultimately fatal to SMBUG's application for an injunction. The critical obstacle facing SMBUG was its failure to provide an *undertaking as to damages*. The group lacked sufficient financial resources to meet an adverse costs order due to it consisting entirely of volunteers and having limited capacity for raising funds.

The projected losses for the defendants (the Minister and Department of the Environment) of the granting of an interlocutory injunction were valued at over $250,000. These expenses flowed from the need to suspend culling operations and then remobilise upon an injunction coming to an end, including transport and travel costs for staff, equipment hire, and operational inconvenience caused by rescheduling helicopters. In light of such potential losses and the uncertainty of the outcome of the main hearing, SMBUG's inability to provide an undertaking as to damages meant that the balance of convenience test was not met. In making this assessment, Harrison CJ noted at [39] that:

> It is tempting in the context of a contest between a Government department or statutory corporation or similar and an incorporated body representing well-meaning and passionate members of the community with genuinely held and commendable concerns for the welfare of feral horses, to discount the significance of costs of this type upon the implied assumption that they amount to a small proportion of a very much larger budget and/or that they can in such circumstances be absorbed or incurred with minimal long-term and short-term impact. I consider that any such temptation should be resisted.

The inability to provide an undertaking as to damages is not *necessarily* determinative in every case. However, the Court's review of the relevant authorities made clear that this factor could be outweighed by other countervailing considerations only in the most extreme special circumstances, and that considerations such as the financial position of the applicant and relief being in the public interest are highly unlikely on their own to be sufficient.

The delay in bringing the proceedings, which meant that aerial culling was well under way by the time of the proceedings, was also a factor that counted against SMBUG.

In relation to other important factors, Harrison CJ found that[4]:

- 'There is no evidence that satisfies me on the balance of probabilities that horses are being killed in a way that causes them unnecessary and unjustifiable pain. Aerial culling operations have been ongoing for some considerable time, and have been, and will be, the subject of observation and assessment by the RSPCA. That organisation has attested to the use of best practice and compliance with the *Prevention of Cruelty to Animals Act*.'
- 'Moreover, there is no evidence that satisfies me on the balance of probabilities that the number of horses that might be killed between now and 1 July 2024 will or may fall under the 3,000 threshold, which is not engaged until 30 June 2027 in any event.'
- 'Additionally, suspension of the control operations threatens the environment, with feral horses being recognised as a key risk to the park, including a number of vulnerable species. I accept that, having regard to the time between now and the final hearing, that factor assumes less significant than others.'
- 'Finally, public access to areas of the park is being limited at present to enable the control operations to take place. Any injunction may extend the time during which public access is constrained in this way.'

Where to next?

The main hearing has been listed in the Supreme Court of NSW on 1-2 July 2024, where SMBUG will seek to attain: (1) a declaration that the Minister and/or Secretary is acting in breach of s 10 of the *Act*; (2) an injunction to stop the aerial horse culling in Kosciuszko National Park; (3) a declaration that the amended Kosciusko National Park Wild Horse Heritage Management Plan is invalid; (4) an order that the Minister's decision to adopt the Management Plan be set aside.

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[4] At [49]-[52].