

## Costs – unreasonable conduct

### *Birri-Gubba (Cape Upstart) People v Queensland* [2008] FCA 659

Rares J, 14 May 2008

#### Issue

The issue for the Federal Court was whether to make an order for costs against the Birri-Gubba People in relation to the State of Queensland's preparation for, and appearance at, directions hearings on the issue of the preservation of evidence. The proposal to preserve evidence was later abandoned by the Birri-Gubba People without any explanation as to why. It was decided the Birri-Gubba People should pay 50 per cent of the state's costs on the basis that they had acted unreasonably so as to cause the state to incur costs unnecessarily.

#### Background

Central Queensland Land Council (CQLC) represented the Birri-Gubba People in these proceedings, which relate to a claimant application brought on their behalf. At the request of CQLC, orders were made, and a number of directions hearings held, between 1 December 2006 and 17 October 2007 for the purposes of both identifying witnesses whose evidence should be preserved and preparing plans for the conduct of the hearing of that evidence.

On 17 October 2007, a solicitor employed by the CQLC filed an affidavit deposing that she had not received instructions from the applicant group regarding the need to preserve the evidence of any person. The request for preservation hearings was, therefore, abandoned with no explanation as to why there had been a change of course. The state applied for an order for costs against the Birri-Gubba People.

#### Relevant law

After reviewing the history of the proceedings, Justice Rares set out the court's general jurisdiction to order costs in s. 43 of the *Federal Court of Australia Act 1976* (Cwlth) (FCA). It was then noted that this power was 'constrained' by s. 85A(1) of the *Native Title Act 1993* (Cwlth) (NTA), pursuant to which the parties to a proceeding must bear their own costs unless the court orders otherwise.

Subsection 85A(2) of the NTA provides that:

Without limiting the Court's power to make orders under subsection (1), if the Federal Court is satisfied that a party to a proceeding has, by any unreasonable act or omission, caused another party to incur costs ... the Court may order the first-mentioned party to pay some or all of those costs.

His Honour noted (among other things) that:

- while s. 85A(1) removed any expectation that costs would follow the event, the court retained an overriding discretion as to costs;

- while the exercise of that discretion did not require a finding that there had been unreasonable conduct, or that special circumstances existed, the extent of the court's discretion in cases where a party had acted unreasonably was put 'beyond doubt' by s. 85A(2);
- the party relying upon s. 85A(2) must satisfy the court that the other party's conduct involved unreasonable acts or omissions that caused the party to incur those costs—at [22] to [23] and [37].

### **Unreasonable conduct**

Rares J decided that:

[I]t was unreasonable of the Birri-Gubba People to present a total of five lists [of potential witnesses], none of which, on final consideration, produced even one person whom they wished to call this case—at [37].

It was noted (among other things) that:

- the Birri-Gubba People were, at all times, represented by lawyers and the CQLC and so were not unrepresented litigants 'unable to make informed forensic judgements';
- no proper, considered attention was given to the inclusion of any of the persons in the five lists that were provided by CQLC on behalf of the Birri-Gubba People, evidenced by the fact that no such witness was identified;
- on a number of occasions in open court, the state of CQLC's preparation was disclosed as being in 'disarray' and, while no doubt there was a 'sincere attempt' to identify potential witnesses, it did not appear to have been undertaken by a lawyer familiar with litigation;
- further, it was not undertaken with a view to determining whether any of the persons identified ought to be called and what evidence they could give until (ultimately) the forensic decision was taken not to call any of them;
- it should be recognised that substantial costs 'over and above' that which would ordinarily be incurred native title proceedings had been visited upon the state by the unreasonable way the Birri-Gubba People conducted the issue of preservation of evidence;
- it would be unjust to require the state to bear the whole of those costs when all of the preparation for, and appearances at, the various directions hearings on the issue of preservation of evidence had, in the end, been 'a waste of time and resources'—at [37] to [39].

### **Decision**

The state was awarded 50 per cent of its costs relating to the preparation for, and appearance at, directions hearings between 1 December 2006 and 17 October 2007 on the issue of what evidence ought to be preserved—at [40].