Costs - judicial review of ILUA registration

Fesl v Delegate of the Native Title Registrar (No 2) [2008] FCA 1479

Logan J, 2 October 2008

Issue

The issue before the Federal Court was whether to make a costs order against those who had unsuccessfully sought review, under the *Administrative Decisions (Judicial Review) Act* 1977 (Cwlth) (AD(JR) Act), of a decision to register an ILUA. In the event, no order as to costs was made.

Background

The background to this matter is set out in *Fesl v Delegate of the Native Title Registrar* [2008] FCA 1469, summarised in *Native Title Hot Spots* Issue 29. Queensland Water Infrastructure Pty Ltd (QWI), the second respondent, sought an order that the applicants pay its costs of and incidental to the judicial review application.

Relevance of s. 85A of the NTA

His Honour Justice Logan noted that:

> It was common ground as between QWI and the Applicants that, strictly, the judicial review application was a proceeding under the AD(JR) Act not under the *Native Title Act*. There was though considerable debate as to the relevance, if any, in relation to the awarding of costs, of s 85A of the *Native Title Act*—at [3].

It was noted that:

- while s. 85A of the NTA did not apply to a proceeding under the AD(JR) Act, the court could take into account the 'spirit' of s. 85A in exercising it discretion as to costs under s. 43A of the *Federal Court of Australia Act*;
- in any case, the court appeared to be bound to do so—at [12] to [19], referring to the decision of the Full Court in *Murray v Registrar of the National Native Title Tribunal* (2003) 132 FCR 402.

Decision

Logan J found that there should be no award of costs. In arriving at this conclusion, his Honour took into account (among other things) that:

- the applicants for review genuinely believed there were significant Aboriginal cultural heritage issues involved;
- one of the applicants, Dr Fesl, was an Aboriginal party for the area under the *Aboriginal Cultural Heritage Act 2003* (Qld) and this status gave her an interest in the interface between that Act and the NTA;
- the judicial review proceeding involved a construction of important provisions of the NTA relating to ILUAs and there were some novel issues of public importance;

- the applicants for review, within the limits of the resources available to them, prosecuted the application with 'due diligence' and 'enjoyed a degree of forensic success'—see [21] to [23].

It was noted that:

> QWI['s] interests...could hardly be described as private. It is an emanation of the State...specifically charged with the construction of a project considered necessary for the supplementation of the water supply in South East Queensland. It had a very particular public interest in the due administration and construction of the provisions governing the registration of an area agreement in the *Native Title Act*. In that regard,...the Applicants have at least secured this Court's guidance as to matters which the Registrar and delegates can and should take into account when deciding a registration application—at [26].