

Indemnity costs to be paid forthwith

Tullock v Western Australia [2010] FCA 351

Gilmour J, 13 April 2010

Issue

The issue in this case was whether a person who unsuccessfully sought to change the native title claim group description in a claimant application should pay the costs of the applicant for that claimant application.

Background

In December 2007, Les Tullock, Friday Jones, Elisabeth Wonyabong and Cyril Bingham (the Tarlpa applicant) filed a claimant application in the Federal Court. In November 2008, Reynold Allison filed a notice of motion seeking the removal of an apical ancestor from the native title claim group description in that application, the removal of the descendants of that apical ancestor from the native title claim group and his own removal as a member of that claim group but did not actively pursue the matter until June 2009, when it was listed for a directions hearing in July 2009. However, the directions hearing had to be adjourned to 5 August 2009. The court made an order requiring Mr Allison to file and serve an affidavit explaining the reasons why that which ought to have been done had not been done but no such affidavit was filed. The day before the hearing, Mr Allison's legal representative advised that instructions not to proceed further with the motion had been received. At the hearing, the notice of motion was dismissed and Mr Allison was ordered to make submissions as to costs before 20 August 2009. No such submission was filed.

The Tarlpa applicant submitted that:

- Mr Allison's motion was without merit and served little, if any, practical purpose;
- the motion was discontinued without reason but, no doubt, because that course was considered to be in Mr Allison's own best interests;
- the Court should exercise its discretion under O 62 r 3 of the Federal Court Rules to order that costs shall be payable forthwith and the Tarlpa applicant entitled to have its bills taxed forthwith, referring to *O'Mara v Minister for Lands* [2008] FCA 84, summarised in *Native Title Hot Spots Issue 27*.

Section 85A applied

As Mr Allison's notice of motion 'arose out of a native title determination application' pending in the court, Justice Gilmour was satisfied s. 85A of the NTA applied to the question of costs, i.e. unless the court orders otherwise, each party to a proceeding must bear his or her own costs. However, (but without in any way controlling or limiting the court's discretion in any way), s. 85A(2) puts beyond doubt that the court may decide 'otherwise' if satisfied a party to a proceeding has, by any unreasonable act or omission, caused another party to incur costs in

connection with the institution or conduct of the proceeding. In such a case, that party may be ordered to pay some or all of those costs—at [20] to [25].

Decision

His Honour held that the motion was, as a matter of law, without merit and also accepted the Tarlpa applicant's unchallenged submissions. Therefore, Mr Allison was ordered to pay the Tarlpa applicant's costs in relation to the motion, including the question of costs, on an indemnity basis to be taxed and payable forthwith—at [28].