Costs – opposition to party status

Murray on behalf of the Yilka Native Title Claimants v Western Australia (No 2) [2010] FCA 926

McKerracher J, 26 August 2010

Issue
The question in this case was whether a costs order should be made in relation to an application opposing a number of people becoming parties to a claimant application made under the *Native Title Act 1993* (Cwlth) (NTA).

Background
In *Murray on behalf of the Yilka Native Title Claimants v Western Australia* [2010] FCA 595 (*Yilka*, summarised in *Native Title Hot Spots* Issue 33), the applicant for the Yilka native title claimants asked the court not to accept as parties 22 people who had filed notices of an intention to become a party. It was found that six of the 22 should not become parties. However, the court was not satisfied the other 16 should be 'precluded from becoming parties'. The legal representatives for those who made submissions were asked to agree to orders reflecting the decision made in *Yilka* or (if they could not agree), to file submissions. Agreement was reached on all issues except costs—at [1] to [5].

Statutory framework
Pursuant to s. 81 of the NTA, the Federal Court has 'exclusive jurisdiction to hear and determine applications ... that relate to native title'. In this case, the notice of motion filed by the Yilka applicant opposing party status related to a claimant application pending before the court. Therefore, Justice McKerracher was satisfied that s. 85A applied in relation to costs. Subsection 85A(1) provides that, unless the court orders otherwise, each party must bear his or her own costs. Without limiting the court's power under that provision, s. 85A(2) provides that a party may be ordered to pay some or all of any costs incurred by another party as a result of 'any unreasonable act or omission' of the first party. As noted, s. 85A(2) of the Act 'does not in any way limit' the discretion available under s. 85A(1) 'to order a party to pay the costs of an opposing party'—at [6] to [11].

Consideration
Those seeking costs argued it was not for the Yilka applicant to challenge the Form 5 notices and that, in doing do, the Yilka applicant caused they to incur extra costs in making submissions in response to that challenge. McKerracher J disagreed, noting that the challenge succeeded in six cases and, where it failed, it could not be said that bringing the challenge was unreasonable 'within the meaning' of s. 85A(2):

> I do not accept that the motion was totally without merit or that the applicant was acting unreasonably by putting comprehensive submissions before the Court. I do not consider the circumstances warrant a departure from the presumption that parties should pay their own costs—at [13].

Decision
There was no order as to costs. His Honour went on to make orders to reflect the reasons given in *Yilka*.