Bullen v Western Australia (No 2) [2010] FCA 1206

Siopis J, 29 September 2010

Issue

The issue before the Federal Court was whether to make an order for costs in circumstances where an applicant had successfully sought a declaration in relation to the construction of certain provisions of the *Native Title Act 1993* (Cwlth) (NTA). The relevant proceeding was not one to which s. 85A of the NTA applied.

Background

The relevant declaration was successfully sought in *Bullen v Western Australia* [2010] FCA 900, summarised in *Native Title Hot Spots* Issue 33. The applicant subsequently contended that, as s. 85A did not apply, the respondents should pay the costs of the application. The respondents contended that the court should exercise its discretion in respect of costs by applying the 'spirit' of s. 85A.

Bona fide dispute

Justice Siopis held that, in this case, there was 'a bona fide dispute which gave rise to arguable issues on both sides' and 'proved difficult to resolve'. Therefore, his Honour held that it was appropriate to apply the 'spirit' of s. 85A of the NTA to the question of costs—at [8] to [10], referring to *Murray v Registrar of the National Native Title Tribunal* (2003) 132 FCR 402; [2003] FCAFC 220.

Declining applicant's offers

The applicant contended that, even if it was appropriate to apply the spirit of s. 85A, the court should take account that an offer to negotiate an indigenous land use agreement (ILUA) which would have rendered the proceeding 'otiose' was declined, as was an offer of consent orders for mediation. The applicant further contended this conduct was 'analogous to them having unreasonably declined to enter into a compromise agreement'. However, the court held that the respondents did not act unreasonably in declining to accept the applicant's offers because this was a 'difficult [case] ... to resolve, with good arguments on both sides'—at [12] to [13]

Decision

The 'spirit' of s. 85A should apply, i.e. each party should bear its own costs.