

## ***Cheedy v Western Australia (No 2)* [2010] FCA 1154**

McKerracher J, 26 October 2010

### **Issue**

The issue before the Federal Court was whether to award costs following the dismissal of an appeal brought under s. 169 of the *Native Title Act 1993* (Cwlth) (NTA). It was decided no order as to costs should be made.

### **Background**

In *Cheedy v Western Australia* [2009] NNTTA 91, summarised *Native Title Hot Spots Issue 33*, two appeals under s. 169 against future act determinations made by the National Native Title Tribunal under s. 38 were dismissed. Parties were then invited to make submissions as to costs.

### **Costs**

According to s. 85A of the NTA, the parties bear their own costs unless the court orders otherwise. However, as Justice McKerracher noted:

[W]hile the rule in s 85A NTA does not ... have direct application ... it may be relevant to the exercise of the discretion under s 43 of the ... FCA [the *Federal Court of Australia Act 1976* (Cwlth)] ... . It is appropriate in the exercise of s 43 FCA discretion ... to take into account all relevant matters including the nature of the proceeding, the question of whether important and novel questions are being responsibly pursued and the desirability of resolution of those questions without costs being imposed adversely as a penalty—at [8].

The court was satisfied the appeal proceedings met all the criteria identified in *Murray v Registrar, National Native Title Tribunal* [2003] FCA 45, upheld in *Murray v Registrar, National Native Title Tribunal* (2003) 132 FCR 402; [2003] FCAFC 220, namely:

- the proceedings were centrally concerned with provisions of the NTA;
- there was public interest in determining the correct construction of those provisions;
- it was in the interests of justice that no costs orders be made.

### **Decision**

For the reasons note above, the court decided that ‘the appropriate disposition in exercise of the discretion’ under s. 43 of the FCA, taking into account ‘the spirit’ of s. 85A of the NTA, was that there be no order as to costs.