Cheedy v Western Australia (No 2) [2011] FCA 305

Gilmour J, 1 April 2011

Issue

The issue before the Federal Court was whether to order costs against an applicant following the dismissal of motions to stay a judgment of the court and two determinations made by the National Native Title Tribunal.

Background

The background to this matter is provided in the summary of *Cheedy v Western Australia* [2010] FCA 1305, summarised in *Native Title Hot Spots* Issue 34. Following those proceedings, FMG Pilbara Pty Ltd applied for an order that the applicant pay its costs on the stay applications.

Costs – s. 85A not applicable

Justice Gilmour held that:

- while the appeal before the primary judge was instituted pursuant to the provisions of s. 169(1) of the *Native Title Act 1993* (Cwlth) (NTA), the appeal from that decision came before the court pursuant to s. 24(1)(a) of the *Federal Court of Australia Act 1976*(Cwlth) (FCA);
- the court was acting as the Full Court under s. 25(2B)(ab) of the FCA exercising appellate jurisdiction; and
- the applicants reliance on the provisions of s. 169 of the NTA as a 'platform for the submission as to the extended reach' of s. 85A was 'misconceived' ;
- although the motions for stay orders were not appeals they were made in appellate proceedings;
- there were no reasons why costs ought not to follow the event—at [7] applying *Murray v Registrar of the National Native title Tribunal* (2003) 132 FCR 402 at [10] to [12].

Decision

The applicant was ordered to pay FMG Pilbara Pty Ltd's costs to be taxed if not agreed.