

***Cheedy v Western Australia* [2010] FCA 1305**

Gilmour J, 25 November 2010

Issue

The issue was whether to stay two future act determinations of the National Native Title Tribunal (the Tribunal) under s. 38 of the *Native Title Act 1993* (Cwlth) (NTA) and a Federal Court order dismissing s. 169 appeal proceedings pending the outcome of an appeal to the Full Court.

Background

The s. 169 proceedings were dismissed in *Cheedy v Western Australia* [2010] FCA 690 (summarised in *Native Title Hot Spots Issue 33*). The appellant sought orders that both judgment in that matter and the determinations of the Tribunal in *FMG Pilbara Pty Ltd/Cheedy/Western Australia* [2009] NNTTA 91 and *FMG Pilbara Pty Ltd/Wintawari Guruma Aboriginal Corporation/Cheedy/Western Australia* [2009] NNTTA 99 be stayed pending the outcome of an appeal to the Full Court.

Orders of the primary judge incapable of being stayed

The orders of the primary judge were that each of the s. 169 appeals be dismissed. Justice Gilmour held that the orders were not executory and so could not be stayed because there was nothing upon which a stay of execution could operate—at [29] to [31].

Order of the Tribunal incapable of being stayed

Gilmour J held that the power to make stay orders was not apt in this case because future act determinations made by the Tribunal were permissive in nature and did not require anything to be done by either the appellant or the proponent, FMG Pilbara Pty Ltd (FMG)—at [32].

Seeking injunction more appropriate course of action

His Honour noted that the appellant could have sought orders under ss. 23 or 25(2B)(ab) of the *Federal Court of Australia Act 1976* (Cwlth) to restrain FMG from taking any steps to obtain the mining leases the subject of the Tribunal's determinations pending disposition of these appeals—at [34]. In this case:

The appellant was invited both by senior counsel for FMG and by the Court to pursue such a course. Indeed, FMG indicated its preparedness upon the usual undertaking as to damages ... to treat the motions as embracing such an application. However, the appellant's counsel steadfastly declined to take up this invitation—at [35].

Decision

The notices of motion were dismissed.