Costs — determination of native title

Ngalakan People v Northern Territory [2003] FCA 23

O'Loughlin J, 28 January 2003

Issue

This case deals with an application for an order for costs made on behalf of the Ngalakan People. It relates to further argument by the Northern Territory and the native title holders heard by Federal Court in proceedings in which a determination of native title in favour of the Ngalakan People was made.

Background

The area the subject of the determination is situated on the southern bank of the Roper River, approximately 320 km south east of Katherine. The further argument before Justice O'Loughlin related to the width of the areas that had been excluded from the claim as roads over which the public had a right of way, whether or not gazetted streets had extinguished native title and whether or not the determined native title rights and interests were held on an exclusive basis. The first two issues were resolved by his Honour in terms more favourable to the Territory than the native title holders. The native title holders were successful in relation to the third point.

Subsection 85A(1) provides that, unless the court orders otherwise, each party to a proceeding must bear their own costs. One of the grounds upon which the court can depart from this it where it is satisfied that any unreasonable act or omission by one party has caused another party to incur costs: s. 85A(2).

Decision

The court ordered that each party pay its own costs, as this followed the 'spirit' of s. 85(1) of the NTA. It was noted that:

> [N]ative title is something new and the law is still grappling with it. The respondent, not unreasonably, required the applicants to prove their entitlement to native title and resisted ... a claim for exclusivity ... . [T]he applicants pursued their claim ... with acceptable vigour—at [16].