

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA  
IN CHAMBERS

**CITATION** : AREVA NC (AUSTRALIA) PTY LTD -v- SUMMIT  
RESOURCES (AUSTRALIA) PTY LTD  
[No 2] [2008] WASC 10 (S2)

**CORAM** : MARTIN CJ

**HEARD** : ON THE PAPERS

**DELIVERED** : 1 FEBRUARY 2008

**SUPPLEMENTARY  
DECISION** : 18 DECEMBER 2008

**FILE NO/S** : COR 112 of 2007

**BETWEEN** : AREVA NC (AUSTRALIA) PTY LTD  
(ACN 003 337 782)  
Plaintiff

AND

SUMMIT RESOURCES (AUSTRALIA) PTY LTD  
(ACN 009 188 078)  
First Defendant

SUMMIT RESOURCES LTD (ACN 009 474 775)  
Second Defendant

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*Catchwords:*

Costs - Appropriate terms of costs order

*Legislation:*

*Corporations Act 2001 (Cth), s 247A*

*Legal Practice Act 2003 (WA), s 215*

*Legal Practitioners (Supreme Court) (Contentious Business) Determination 2006 (WA)*

*Result:*

Paragraph 4 of the orders made on 3 September be varied to read: 'The defendants pay the plaintiff's cost of the action, to be taxed if not agreed including costs incurred after 3 September 2007 but not including any costs of inspecting the documents produced'

'In a taxation of costs pursuant to par 4 of the orders made on 3 September, the limit imposed by item 11 of the Legal Practitioners (Supreme Court) (Contentious Business) Determination 2006 (WA) be removed'

*Category:* B

**Representation:**

*Counsel:*

Plaintiff	:	No appearance
First Defendant	:	No appearance
Second Defendant	:	No appearance

*Solicitors:*

Plaintiff	:	Minter Ellison
First Defendant	:	Clayton Utz
Second Defendant	:	Clayton Utz

**Case(s) referred to in judgment(s):**

Areva NC (Australia) Pty Ltd v Summit Resources (Australia) Pty Ltd [2007]  
WASC 207

Areva NC (Australia) Pty Ltd v Summit Resources (Australia) Pty Ltd [2008]  
WASC 10

1     **MARTIN CJ:** On 8 July 2008 I gave my reasons for concluding that Areva is entitled to an order pursuant to s 215 of the *Legal Practice Act 2003* (WA) removing the limit which would be imposed by an item of the applicable legal costs determination in the taxation of the costs awarded in its favour in the substantive proceedings. I directed Areva to provide a minute of the orders proposed to give effect to those reasons by 18 July 2008, and further directed that the defendants provide submissions in relation to the terms of that minute by 29 July 2008.

2             Areva's minute of proposed orders was filed on 24 October 2008. The defendants filed a competing minute and submissions in opposition to Areva's minute on 31 October 2008. Areva filed submissions in opposition to the defendants' submissions on 11 November 2008. The parties have agreed that I should resolve these issues on the papers, without an oral hearing.

3             The competing minutes and submissions reveal two substantive issues. The first concerns whether the costs order which I made on 3 September 2007 should be expressed in terms of the costs of the proceedings pursuant to s 247A of the *Corporations Act 2001* (Cth) generally, or whether the costs order should be expressed by reference to only the first four categories of documents which Areva sought to inspect. The second issue concerns whether the costs order ought to extend to the costs of inspecting the documents produced pursuant to orders made under s 247A to the extent that such inspection was necessary to determine whether any further production of additional documents was necessary.

4             I will deal with each of those issues in turn.

5             Areva sought inspection of five categories of documents pursuant to s 247A of the *Corporations Act*. At the time of my substantive determination of that application in September 2007 (*Areva NC (Australia) Pty Ltd v Summit Resources (Australia) Pty Ltd* [2007] WASC 207), I made orders in terms of the first four categories sought, but adjourned Areva's application in relation to the fifth category, on the basis that I concluded that the fifth category had been included (at [46]):

as a kind of 'sweeper' or 'catch all', designed to pick up any documents not otherwise included in the specific categories enunciated in the first four items'.

6             Areva utilised the adjournment of its application in respect of category 5 as a vehicle to subsequently apply for inspection of documents

falling into two specific categories. In relation to one of those categories, after initial dispute, the documents were provided voluntarily. In relation to another category, being what is described as the 'Eggers statement', I determined that orders should be made for inspection of the statement, without determining whether the statement fell within the first four categories in respect of which inspection had been ordered, or the fifth category (*Areva NC (Australia) Pty Ltd v Summit Resources (Australia) Pty Ltd* [2008] WASC 10).

7       The inclusion of the fifth category of documents did not significantly expand the scope or argument at the time of the hearing and determination of the substantive application. Further, it is arguable that the fifth category served a legitimate forensic purpose, as the vehicle for the ventilation of subsequent issues relating to the inspection of documents. Accordingly, this does not seem to me to be a case in which there should be separate orders made by reference to discrete issues upon which an otherwise successful party has failed. Accordingly, the appropriate orders are that the defendants pay the plaintiff's costs of the proceedings to be taxed without regard to the limit imposed by item 11 of the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2006* (WA), including costs of the proceedings incurred subsequent to 3 September 2007.

8       Turning to the question of whether I should direct that the costs of the proceedings subsequent to 3 September 2007 should include the costs of inspecting the documents produced in order to determine whether production of additional documents was necessary, it is conceded by Areva that ordinarily the costs of a party inspecting documents produced under s 247A would not be met by the party producing those documents. However, it submits that it should have the costs of inspection to the extent that inspection was necessary in order to assess the adequacy and completeness of the documents provided for inspection.

9       This submission proceeds upon the premise that there is some severable and identifiable cost attributable to some part of the inspection of the documents carried out for the purpose of assessing the completeness of the documents produced, as compared to their inspection for other purposes – notably, in this case, the proceedings brought pursuant to s 237 of the *Corporations Act*. I do not accept that premise. Areva sought production of the documents for a purpose – in this case that purpose being its proceedings pursuant to s 237 of the *Corporations Act*. In order to fulfil that purpose, it was necessary for Areva to carefully inspect and analyse the information contained within the documents. That

process is inherently likely to identify issues as to the adequacy or completeness of the documents provided for inspection, but those issues are a by-product of the inspection undertaken for a fundamentally different purpose, and not an end in itself. Put another way, as Areva was always going to carefully inspect the documents produced in any event, I do not accept that Areva should have part of its costs of inspection merely because that inspection served more than one purpose. Accordingly, I do not propose to make the directions sought in respect of the inspection of documents.

10           It will, however, be noticed that the orders that I propose include Areva's costs of the proceedings after 3 September 2007. For an abundance of clarity, the purpose of that order is to capture Areva's costs of the proceedings after that date relating to such things as the Eggers statement.

11           Accordingly, for these reasons, the orders will be:

1.       (a)     par 4 of the orders made on 3 September be varied to read: 'The defendants pay the plaintiff's cost of the action, to be taxed if not agreed including costs incurred after 3 September 2007 but not including any costs of inspecting the documents produced';
- (b)     'In a taxation of costs pursuant to par 4 of the orders made on 3 September, the limit imposed by item 11 of the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2006* (WA) be removed'.