NATIVE TITLE HOT SPOTS

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National Native Title Tribunal

Replacing the applicant – must use s. 66B

Sambo v Western Australia [2008] FCA 1575

Siopis J, 22 October 2008

Issue

The main issue before the Federal Court was whether people could be removed from the group constituting 'the applicant' for a claimant application pursuant to Order 6 rule 9 of the Federal Court Rules (FCR) or whether s. 66B of the *Native Title Act 1993* (Cwlth) (NTA) was the only option. It was found that, as a result of amendments made to the NTA in 2007, any change to the constitution of the applicant must be made in accordance with s. 66B.

Background

The claimant application relevant to this case is in the Central West Goldfields region of Western Australia. Pursuant to s. 61(2)(c), seven of the people where jointly 'the applicant' for the claim. Five of those seven people sought to have the other two, Sue Wyatt and Victor Cooper, removed either:

- because they were no longer proper or necessary 'parties' to a proceeding under O 6 r 9 of the FCR; or
- pursuant to s. 66B(1), in circumstances where no meeting of the native title claim group was held to authorise a change to the constitution of the applicant.

The evidence filed in support of the notice of motion indicated that the relationship between those who sought the orders (the movers) and the other two members of the group comprising the applicant had broken down. It was submitted that the conduct of Ms Wyatt and Mr Cooper had hindered the progress of the application and that the court should find they had ceased to be proper or necessary parties to a proceeding within the meaning of O 6 r 9(b) of the FCR.

No claim group meeting had been held to authorise the replacement of the applicant with a differently constituted group of people. The expense, time and other personal resources required in order to arrange a meeting of the 300 members of the native title group, who lived in widely dispersed places, were given as reasons for not doing so.

The movers submitted that:

- they were authorised to bring the application on the basis that they were willing and able to act reasonably in the timely management and advancement of the claim and in other ancillary matters;
- no authorisation of the persons comprising the applicant could be reasonably construed as permitting the conduct alleged in respect of Ms Wyatt and Mr Cooper;

- the conduct of the Ms Wyatt and Mr Cooper demonstrated they were no longer willing and able to act as members of the applicant.

Earlier relevant decisions

His Honour Justice Siopis set out the relevant provisions and noted that, in *Chapman v Queensland* (2007) 159 FCR 507 (2006) 154 FCR 233 (*Chapman*) and *Butchulla People v Queensland* (2006) 154 FCR 233 (*Butchulla People*), her Honour Justice Kiefel had taken the view that:

- the persons comprising the applicant were authorised to act personally and not collectively; and
- Order 6 rule 9 of the FCR could be used to change the constitution of the applicant in certain circumstances.

His Honour Justice Spender followed this reasoning in *Doolan v Native Title Registrar* (2007) 158 FCR 56 (*Doolan*).

Amendments to the NTA

On 1 September 2007 (after the decision in *Chapman*), the NTA was amended to:

- expand the circumstances in which s. 66B(1)(a) would apply to include the death or incapacity of a member of the applicant or a member consenting to being removed; and
- repeal s. 64(5), which provided for an amendment to be made to replace the applicant with a new applicant.

The court noted that, in the Explanatory Memorandum to the Native Title (Technical Amendments) Bill 2007 (EM), it was said that 'proposed section 66B would be the only mechanism through which any changes to the applicant could be made'— at [27].

Siopis J was of the view that the amendments are inconsistent with:

- Kiefel J's view in *Chapman* that 'it should not be inferred that it was intended that s. 66B(1) be the only means' of altering the constitution of the applicant;
- the premise underlying the decisions in *Butchulla People*, *Chapman* and *Doolan*, i.e. that the authorisation given by the claim group is personal to each member of the applicant, rather than being given to the particular group of persons comprising the applicant collectively—at [28] to [29].

According to his Honour:

- reading s. 66B(1)(a)(i) with s. 66B(1)(b), it was clear that, even when a person comprising the applicant has died, Parliament's intention is that 'there is to be an authorisation by the claim group of the replacement applicant, whether or not the deceased person is replaced by another person as part of the applicant';
- since the passing of the 2007 amendments, the only means whereby 'any changes can be made to the composition of the applicant' is via s. 66B;

- the decisions in *Butchulla People*, *Chapman* and *Doolan* have been superseded by the amendments—at [29] to [30].

Given those findings, the court rejected the contention that Ms Wyatt and Mr Cooper could be removed by reference to O 6 r 9 of the FCR on the basis that each was not a proper or necessary party—at [30].

Alternative – minority no longer authorised
The movers submitted in the alternative that Ms Wyatt and Mr Cooper could be removed pursuant to s. 66B(1) because their conduct was such that they no longer had the authority to act on behalf of the claim group. His Honour rejected this contention because:

> There was no evidence as to the terms on which the members of the applicant were originally appointed. However, even if it could be said that the authority of [the minority applicants]... has ceased in accordance with the terms of their original appointment..., that would not be sufficient for the applicant movers to succeed...[T]he applicant movers have not been authorised by a claim group meeting to bring this motion to replace the applicant as currently constituted with an applicant as constituted by the five applicant movers. There has, therefore, been no compliance with s 66B(1)(b)—at [32].

Decision
The notice of motion to change the constitution of the applicant was dismissed.

Replacing deceased applicant - s. 66B

JED (Deceased) v Western Australia [2008] FCA 1684

Siopis J, 23 October 2008

Issue
The issue before the Federal Court was whether to make a order to replace the two people named as the current applicant with a group of six people, pursuant to s. 66B of the *Native Title Act 1993* (Cwlth).

Background
Both of the people named as the applicant in the Esperance Nyungar claimant application were deceased. The six persons who were proposed to replace them were all members of the native title claim group.

An application to replace of the current applicant may be made pursuant to s. 66B(1)(a)(ii) if the current applicant, or one or more of the persons comprising the current applicant, has died or become incapacitated. Pursuant to s. 66B(1)(b), those bringing the application for replacement must be authorised by the claim group to do so.

Despite concerns raised by the State of Western Australia and some other respondents, the court was satisfied on the evidence that sufficient notice was given of the meeting to authorise the six people proposed as the replacement applicant. The court was also satisfied that the proper decision-making process was followed to give authority to those comprising the proposed replacement applicant—at [7] to [8].

Decision
His Honour Justice Siopis made an order under s. 66B(1) that the current applicant be replaced. The applicant was also granted leave to amend the application—at [9] to [10].

ILUA registration – judicial review

Fesl v Delegate of the Native Title Registrar [2008] FCA 1469

Logan J, 1 October 2008

Issue
The main issues arising in this case, which deals with review of a decision to register an indigenous land use agreement (ILUA), were whether:

- it was part of the Native Title Registrar's function to make an assessment as to whether the Traveston Crossing Dam Agreement was an ILUA as defined in the *Native Title Act 1993* (Cwlth) (NTA);
- there was evidence before the Registrar's delegate to justify the decision to register the agreement;
- the delegate failed to take into account relevant considerations.

The court decided to dismiss the application for review.

Background
Queensland Water Infrastructure Pty Ltd (QWI) is responsible for the development of the proposed Traveston Crossing Dam in South East Queensland. It entered into negotiations for an ILUA with persons who claimed to hold native title to the project area. An agreement was entered into and an application to have it registered was made to the Registrar. On 14 April 2008, a delegate of the Registrar decided to register the agreement on the Registrar of Indigenous Land Use Agreements. Eve Fesl, Nurdon Serico and Tex Chapman (the applicants in this case) sought judicial review of the decision to register under the *Administrative Decisions (Judicial Review) Act 1977*.

Grounds of review
The applicants submitted that the delegate made errors of law or improperly exercised the power conferred upon her in finding that the agreement must be registered. The court categorised the grounds of review as being:

- 'no evidence' grounds;
- failure to take into account allegedly relevant considerations;
- whether the Traveston Crossing Dam Agreement may be characterised as an ILUA in the light of the Cultural Heritage Investigation Management Agreement (CHIMA) provisions of the agreement, the provisions of the *Aboriginal Cultural Heritage Act* 2003 (Qld) or otherwise.

Statutory scheme

His Honour Justice Logan made some preliminary observations about the ILUA provisions of the NTA, including that:

- an agreement which meets the requirements of ss. 24CB to 24CE of the NTA is an 'area agreement' ILUA;
- pursuant to s. 24CB, an area agreement must be about one or more of a number of specified matters about an area;
- subsection 24CD(1) provides that it is mandatory that all persons in the relevant 'native title group' be parties to an area agreement;
- a 'native title group' is an artificial statutory construct and, in accordance with s. 24CD(3)(a), the 'native title group' in this case consisted of the person or persons who *claim* to hold native title in relation to the land or waters of the relevant area;
- section 24CE provides that an area agreement may be made for such consideration or be subject to such conditions as the parties agree, provided they are lawful;
- the application for registration must include a statement to the effect that all reasonable efforts had been made (including by consulting all representative Aboriginal/Torres Strait Islander bodies for the area) to ensure that all persons who hold, or may hold, native title in relation to the agreement area have been identified and that all of the persons so identified have authorised the making of the agreement;
- when ss. 24CG(3)(b)(ii) and 251A are read together in the context of the NTA as a whole, authorisation of the making of an area agreement by a majority of those who comprise a 'native title group' is possible, i.e. the word 'all' in s. 24CG(3)(b)(ii) does not mean that 'a single dissentient or non-participant will invariably have an ability to veto the authorisation of an agreement';
- section 24CL obliges the Registrar to register an area agreement if two conditions are met, the first of which was not applicable in this case and the second of which goes to the Registrar's consideration of the authorisation requirements—at [17] to [20], [23], [25] to [26], [30] to [32].

Objects of the NTA and the ILUA provisions

According to the court:

> The statutory provision for the making of an area agreement in respect of an area even where there are no registered native title claimants or registered native title bodies corporate [as in this case] balances two of the main objects of the Native Title Act. Out of an abundance of caution and evidencing the recognition by the Parliament of the importance of native title, it liberalises membership of a "native title group" in those circumstances to the extent of permitting those who do nothing more than claim to hold

native title in relation to an area to have an opportunity to be heard and to have an opportunity to participate in decision-making. In this fashion the provision can be seen as a benign endeavour, out of an abundance of caution, to preserve native title where it may exist, fulfilling the object in s 3(a) Native Title Act. At the same time, by permitting the making in such circumstances of a consensual agreement the effect of which may be to extinguish native title by a future act done under the authority of a registered agreement, the Native Title Act serves the object in s 3(b) by establishing a way in which a future dealing concerning native title may proceed—at [21].

Meaning of 'considers' and the role of the court on review

As was noted, the second condition for registration, found in s. 24CG(3)(b) is that:

> [T]he Registrar **considers** that the requirements in paragraph 24CG(3)(b) (in summary, relating to identifying native title holders and ensuring that they have authorised the making of the agreement) have been met (emphasis added).

His Honour looked at the meaning of the word 'considers' in this context, noting (among other things) that:

- as a matter of construction, the use of the verb 'considers' places s. 23CG(3)(b) within the category of laws the operation of which 'is made conditional upon the opinion or satisfaction as to certain matters of a designated authority or person';
- in relation to the judicial review of a 'satisfaction' based decision, it has been said that the authority must act in good faith, not merely arbitrarily or capriciously and that, where the matter is a one of opinion or policy or taste, it may be difficult to show error or that the decision could not reasonably have been reached;
- pursuant to s. 24CL(3), the delegate was required to made a value judgment on the basis of the evidence before her;
- it is not for the court on judicial review 'to decide on the merits of matters which were consigned by the Parliament to the Registrar...to "consider"'—at [33], [48] and [56].

Should the Registrar determine whether the agreement is an ILUA?

QWI had raised the question of whether or not it was part of the Registrar's function, when making a decision about registration pursuant to s. 24CJ, to make an assessment as to whether or not 'what was presented for registration was an ILUA'—at [35].

Logan J held that:

- an agreement will only be an ILUA if it meets the requirements of ss. 24CB to 24CE of the NTA;
- if it does not, the Registrar is both entitled and obliged not to register it on the Register, even if the conditions in s. 24CL were otherwise met;
- the extent to which the Registrar has cause in a given case to investigate whether an agreement presented for registration meets those requirements may depend upon whether, and to what extent, there is an assertion of non-compliance;

- however, the absence of any such assertion would not confer validity on an agreement which manifestly did not meet those requirements;
- the delegate was perfectly entitled, as a matter of good public administration, to reach a preliminary view about whether the agreement was an ILUA prior to giving notice of the application for registration;
- a decision to register an agreement that was not an ILUA would be 'no decision under s. 24CJ';
- the applicants were entitled to raise grounds going to whether the agreement was an ILUA—at [37], [39] and [41] to [42].

Lawfulness of CHIMA provisions

By the time the delegate came to make the registration decision (i.e. after the close of the notification period), she had received a submission that the CHIMA provisions of the agreement contravened the ACH Act and were conditions that were contrary to law and so in violation of the requirement in s. 24CE(1) . The delegate referred back to the earlier finding that the agreement was an ILUA (the pre-notification assessment) and stated that, in making the registration decision, 'there is no scope for me to consider this point and I have no further comment in relation to this assertion'.

The court held that:

- while the delegate was entitled to make a pre-notification assessment of whether the agreement was an ILUA, this did not mean that whether the agreement was, in law, an ILUA is 'thereby quarantined from scrutiny upon an application for the judicial review of the registration decision';
- having made an initial (pre-notification) assessment, the delegate's reasons evidenced a rigidity of thinking, i.e. that what she had to consider was circumscribed by s. 24CL;
- if a condition of an agreement for which registration was sought was unlawful, a question arose as to whether that agreement was one which could be registered either at all or only if the offending condition were severable;
- while the delegate was not obliged to narrowly scrutinise the agreement looking for any condition which may be unlawful in the absence of the question having been raised, once it was raised, the delegate was in error in deciding that she could not deal with it when making the registration decision—at [85] and [88] to [89].

While this meant that one of the grounds of review was made out, the question of whether or not the delegate's decision ought to be set aside depended on whether or not the agreement contained terms and conditions that were unlawful—at [90].

Did agreement contravene the ACH Act?

Logan J went on to consider the provisions of the ACH Act and whether the ILUA was in contravention of that Act. His Honour considered that it was apparent that the Queensland State Parliament had decided to treat an ILUA under the NTA as an alternative way of meeting, in particular circumstances, the ACH Act's main purpose

of providing effective recognition, protection and conservation of Aboriginal cultural heritage—at [100].

His Honour held that:

- the ACH Act was designed to complement the NTA;
- under the ACH Act, an agreement with an Aboriginal party was an *alternative* to an ILUA for the purposes of the ACH Act and so not every agreement must be with an Aboriginal party as defined in the ACH Act;
- the agreement was not one which was contrary to law;
- the fact that the delegate did not advert to the submission that the agreement was contrary to law was erroneous on her part but the submission itself was predicated upon an erroneous view as to the construction of the ACH Act;
- therefore, there was no basis for setting aside the decision to register the agreement—at [101] and [103].

Second condition for registration – no evidence grounds

The applicants for review submitted there was no evidence or material to justify the decision by the delegate that the second condition was met, i.e. that all persons who hold, or may hold, native title to the agreement area had authorised the making of the agreement.

In particular, it was submitted that there was no evidence from which the delegate could reasonably be satisfied that:

- the Gubbi Gubbi People and the Kabi Kabi People were part of the same wider group;
- the Gubbi Gubbi People did not adhere to a mandatory traditional decision making process;
- there was no mandatory traditional decision making process applicable;
- the Gubbi Gubbi People withdrew from the agreement making process.

Logan J held that, on the evidence, it was open to the delegate to conclude that:

- the Kabi Kabi and Gubbi Gubbi and other variant spellings were ways of naming one broader group of related persons who, together, assert native title interests in relation to the project area;
- the Kabi Kabi people did not have a traditional decision-making process that dealt with the making of ILUAs—at [54] to [56].

On authorisation, it was submitted that s. 251A was premised on the existence of a single community or other group and that the section could not apply if the community or group were not established on the evidence.

Logan J considered the authorities for authorisation under s. 251B, which deals with the authorisation of claimant applications. It was noted (among other things) that:

- in cases where there is no relevant traditional decision-making process, s. 251B did not mandate any particular decision-making process, i.e. all that is required is

that it is agreed to and adopted by the persons in the native title claim group or compensation group;
- 'agreed to and adopted by' in s. 251B(b) imports giving a reasonable opportunity to participate in the adoption of the process and the making of decisions pursuant to that process to those who can be located and who are capable of doing so;
- section 251A 'plays an identical role' in relation to authorisation by the 'native title group' to the role s. 251B plays in relation to 'native title claim group' authorising the making of a claimant application—at [71] to [72].

Logan J was of the view that:

> [E]ach of the propositions which I have distilled from cases concerning s 251B has like application, *mutatis mutandis*, to the meaning and effect of s 251A and in relation to the impact of that section on "authorisation" for the purposes of s 24CG(3)(b)(ii)...In turn that means that the Delegate was entitled to conclude that the "second condition" for which s 24CL of the Native Title Act provides was satisfied—at [72].

In this case, it was found that:
- the process which led up to the so-called 'authorisation meeting' of 11 August 2007 was lawful, as was the process of decision-making at that meeting;
- the non-participation or, as the case may be, dissent of the applicant did not affect the validity of the authorisation decision which was made in respect of the making of the agreement;
- there was evidence before the delegate by reference to which she was entitled to conclude that the authorisation decision had been duly made and that each person who comprised the applicants in this matter had been given a reasonable opportunity to participate in the adoption of a decision-making process and in the decision-making process itself;
- the delegate was therefore entitled to conclude that the second condition found in s. 24CL was satisfied—at [74].

Relevant considerations for the second condition

The applicants argued that the delegate failed to take into account the following 'relevant considerations':
- membership of the Gubbi Gubbi People was based on matrilineal descent from the two apical ancestors whereas membership of the Kabi Kabi People was based on cognatic descent from a number of additional apical ancestors;
- Gubbi Gubbi People have a mandatory traditional decision-making process in relation to matters affecting land;
- the fact that the Gubbi Gubbi People disputed the decision making process adopted at the authorisation meeting and did not authorise the making of the ILUA;
- the evidence showed that the Gubbi Gubbi People were not afforded the opportunity to separately consider the terms of the ILUA.

Logan J was of the view that:

- section 24CL 'makes provision for registration of an agreement only if particular conditions are satisfied, and forbids registration if they are not';
- therefore, the s. 24CL conditions are 'relevant considerations' and, so far as the second condition is concerned, what is made 'relevant' is that the Registrar considers that the requirements of s 24CG(3)(b) are met;
- in considering that question, it is s 24CG(4) which supplies the matters that are 'relevant' and whether, 'in fact', the requirements of s 24CG(3)(b) are met is *not* a 'relevant consideration';
- because the s. 24CL conditions are imposed only in respect of an ILUA as defined in ss. 24CB to 24CE and because the Registrar is only empowered under s 24CJ to register such an agreement, 'it necessarily follows that whether the application concerns such an "agreement" is also a "relevant consideration"'—at [77] to [78].

His Honour concluded that:

- the delegate's reasons indicated that she did consider that the agreement had been authorised and that, in making her decision, she took that fact (i.e. her opinion that this requirement had been met) into account;
- the delegate did, therefore, take into account a relevant consideration;
- further, the delegate was entitled to reach the conclusion that that there was but one clan or tribal group;
- the applicants for review had an opportunity to participate in the decision-making process and it was entirely up to them to decide the extent to which they would participate;
- there was no obligation on the part of the delegate in the circumstances to afford what the applicants for review termed 'the Gubbi Gubbi people' a separate opportunity to consider whether or not to authorise the making of the agreement—at [79] to [80].

Decision

The application to review the decision of the Registrar's delegate to register the agreement as an ILUA was dismissed.

Dismissal under s. 190F(6) – failed merit conditions of registration test

George on behalf of the Gurambilbarra People v Queensland [2008] FCA 1518

Logan J, 10 October 2008

Issue

The issue in this case was whether the Federal Court should, of its own motion, dismiss the Gurambilbarra People's unregistered claimant application pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA) if, in the circumstances, the applicant failed to show cause why the application should not be dismissed. This was the first case in which the court gave reasons for judgment that set out the proper approach to the exercise of the power found in s. 190F(6). It was decided the application should be dismissed.

Background

The Gurambilbarra People's application was made in April 2005 and amended in December 2005. In April 2006, a delegate of the Native Title Registrar decided the claim made in the amended application must not be accepted for registration. The application was further amended in January 2008. In April 2008, the Registrar's delegate decided that the further amended application did not meet all of the merit conditions found in s. 190B and so the application must not be registered. The applicant did not subsequently apply for a reconsideration of the delegate's decision by the Tribunal pursuant to s. 190E(1). Nor was application made to the court for review of the delegate's decision pursuant to s. 190F(1). In May 2008 the court, of its own motion, called on the applicant to show cause at the next directions hearing why the application should not be dismissed pursuant to s. 190F(6) of the NTA.

New power to dismiss

His Honour Justice Logan set out ss. 190F(5) and 190F(6) of the NTA, both of which were inserted when the *Native Title (Technical Amendments) Act 2007* (Cwlth) (*Technical Amendments Act*) commenced.

Subsection 190F(6) provides that the court may, of its own motion or on the application of a party, dismiss a claimant application if:

- the court is satisfied that the application in issue has not been amended since consideration by the Registrar, and is not likely to be amended in a way that would lead to a different outcome once considered by the Registrar; and
- in the opinion of the court, there is no other reason why the application in issue should not be dismissed.

Subsection 190F(5) provides that s. 190F(6) applies if:

- in the Native Title Registrar's opinion, the claim made in the application does not satisfy all of the merit conditions found in s. 190B or it is not possible to determine whether all of those conditions are met because of a failure to meet all of the procedural and other conditions found in s. 190C; and
- the court is satisfied that all avenues for judicial review or reconsideration by the National Native Title Tribunal have been exhausted without the claim being registered.

The court was of the view, and applicant did not contest, that the 'conditions precedent to the engagement' of s. 190F(6) (i.e. s. 190F(5)) were fulfilled in this case—at [6] and [7].

Section 190F(6) as a screening mechanism

The court noted (among other things) that:

- registration is 'a significant step' because it is 'a condition precedent to the enjoyment of a wide variety of rights by the applicant';
- if the Registrar is required to apply the test to the application, then, subject to s. 190A(6A), the Registrar must not accept the claim made in the application for registration unless it meets all of the conditions found in ss. 190B and 190C;
- in this case, the delegate found that the application did not meet all of the conditions of s. 190B(5) and was, therefore, obliged not to register the claim—see [9] to [16].

Later, Logan J commented that:

> [T]he registration test found in Pt 7 is "not a screening mechanism for *access* to the Federal Court" (my emphasis)...However, the presence now of s 190F(6)...and the particular occasion for its engagement provided by s 190F(5) does indicate that satisfaction of the registration test has ramifications for whether an application should be allowed to *remain* on the Court's list. Further, given that the Act confers the choice of a full right of review by the Court of the registration refusal decision and vests in the Court a discretion as to whether the application should be dismissed, that the registration decision is initially made by an administrative official is not indicative of an impermissible interference by the Executive with the exercise of the judicial power of the Commonwealth. It is s 190F(6) which provides the "screening mechanism"—at [50].

Need for show cause proceeding

The State of Queensland did not move for dismissal but did submit it was open for the court to do so of its own motion. It was noted that, while it was 'relevant' that the state had not moved to strike out the application under s. 190F(6), it was not necessary for it to do so because:

> The Court is empowered under this sub-section to dismiss an application of its own motion. That may perhaps evidence a recognition by the Parliament that, even where the claim made in an application has proved incapable of furnishing, even at the registration stage, a factual basis for the assertions mentioned in s 190B, a respondent body politic may

be unable or unwilling to seek dismissal of that application. If so, that recognition is unarticulated in secondary materials.

It does not do to speculate further on the Parliament's motivation for conferring such a power on the Court. The fact is that the power exists and its exercise is necessarily attended with a procedural fairness obligation; hence a need for a show cause proceeding—at [66] to [67].

Relevance of the decision that s. 190B not met

After noting that the court was not undertaking a judicial review of the delegate's decision, Logan J extracted what appeared to be 'particular key passages' from the delegate's reasons in relation to s. 190B(5). His Honour noted in particular the delegate's references to the relevant authorities—at [23] to [31].

According to his Honour:

> An understanding of the basis upon which either before the Registrar or on later review it was considered that the conditions in s 190B...were not met is relevant to the making of a prediction of the fate on reconsideration of an amended application but otherwise the inability of the application to meet those conditions is a given—at [52].

Section 84C jurisprudence not relevant

The applicant submitted that the jurisprudence in relation strike-out of an application under s. 84C was relevant to the application of s. 190F(6), i.e. the 'reticence which customarily attends the summary dismissal' of a proceeding should be shown when considering dismissal under s. 190F(6)—at [35].

The question was formulated by Logan J as:

> [W]hether s 190F(6), like s 84C, merely highlights a particular basis for summary dismissal leaving the general law on that subject applicable or whether it, too, should be regarded as providing a unique power of dismissal which "is to be construed and applied according to its terms, not under the influence of 'muffled echoes of old arguments' concerning other legislation"—at [37], referring to *Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404, at 414.

In the court's view, s. 190F(6) 'on its face' provides a 'wholly self-contained power of dismissal' because, if the conditions precedent in s. 190F(5) are fulfilled, s. 190F(6) is engaged, with the relevant considerations being paragraphs (a) and (b) of that provision—at [39].

In Logan J's view:

> That Parliament has provided a particular basis in s 190F(5)...upon which the power to dismiss in s 190F(6) is enlivened and that, within s 190F(6), para (a) itself provides for an evaluative and predictive judgment for the Court to make in relation to an application indicates that the question of whether an application ought to be dismissed is not to be approached by reference to an a priori assumption that the jurisprudence which attends, for example, dismissal of an application under s 84C of the Act is relevant...I reject the

submission that...the jurisprudence in relation to s 84C is relevant by analogy to the question of whether or not to dismiss an application under s 190F(6)—at [52].

Approach to s. 190F(6)(a) – predictive assessment required

His Honour held that:

- the 'immediate end' to which s. 190F(6)(a) is directed is whether there is any feature of the application which has changed, or is 'likely' to change, in the future 'which would lead to a different registration decision by the Registrar';
- the court must form the requisite opinion on this point before the power to dismiss could be exercised;
- the meaning of 'likely' in the context of s. 190F(6)(a) was 'elusive' and neither the relevant authorities nor the secondary materials relating to the Technical Amendments Act were of much assistance;
- the fact that dismissal 'without a hearing on the merits' may be a consequence of the application of s. 190F(6)(a) was 'one reason' not to construe the word 'likely' as meaning 'more likely than not';
- another was that 'is not likely to be amended in a way that would lead to a different outcome once considered by the Registrar' in s. 190F(6)(a) 'unusually' requires the court to make 'a predictive assessment' of both the prospect of the application being amended and the outcome of fresh consideration of the amended application by the Registrar;
- construing 'likely' to mean 'more probable than not' could lead to embarrassment of the court making the prediction, of the Registrar (when making that fresh registration decision) and in any reconsideration or review proceedings;
- for these (and other) reasons, construing 'likely' to mean 'what would reasonably be regarded as a real chance irrespective of whether that chance is greater than 50 per cent, as opposed to nothing more than a mere possibility' seemed an appropriate approach—at [40], [43] to [49] and [51] .

However, in this case, the court did not need to reach a final conclusion as to the meaning of the word 'likely' in s. 190F(6)(a) because 'the evidence in relation to the prospect of amendment of the application did not rise beyond the level of a mere possibility'—at [53].

Approach to s. 190F(6)(b) – 'other reason' for not dismissing

As to s. 190F(6)(b), Logan J noted that:

- paragraph 190F(6)(b) seemed to have been 'added out of an abundance of caution as something of a "fail safe" so as to enable justice to be done in the circumstances of a particular case';
- however, that did not mean it constituted 'an invitation to preserve an application on the basis of whimsy or sympathy';
- the 'other reason' must be 'something other than the prospect that the amendment of the application will occasion a different outcome' on the s. 190B conditions when the amended application is considered by the Registrar;

- the opinion based on that 'other reason' provides a basis for preserving an application even though it was not accepted for registration because s. 190B was not met, review remedies are exhausted, there has been no amendment of the application and the court could not be satisfied that amendment of the application would bring about no different outcome;
- while 'one might think that, the circumstances warranting the formation of that opinion would be very singular indeed', it was neither necessary nor appropriate to 'delineate in advance what those circumstances might be' since they would be case specific—at [41] to [42].

Full Court in *Gudjala People #2*

The applicant submitted that, subsequent to the delegate's decision, there had been a 'softening' in the approach to s. 190B(5) in the decision made by the Full Court in *Gudjala People #2 FC* but did not develop the point. Logan J considered the guidance offered by the court at [90] to [92] on the relationship between ss. 62 and 190A and the ramifications of that relationship for the application of the requirements of s. 190B(5).

In making the evaluation under s. 190F(6)(a) of the prospect of a different outcome following amendment, it was 'necessary' to be informed by what was said in *Gudjala People # 2 FC*. However, Logan J noted that it was not clear that the delegate's conclusions in relation to s. 190B(5) in this case were 'wholly attributable' to Dowsett J's decision at first instance. Therefore:

> In the absence of a more developed and particularised submission as to the ways in which, having regard to her reasons, his Honour's reasons for judgment [at first instance] in the *Gudjala People # 2* case impacted upon the Delegate's reasons and how the outcome may have differed in light of the observations of the Full Court further consideration of this subject is not, in my opinion, warranted—at [64].

However, it was noted that later judicial authority disclosing that the Registrar's approach to s. 190B was 'overly rigorous' may provide an 'other reason' for the purposes of s. 190F(6)(b)— at [63].

Evidence in this case

The evidence and submissions filed on the applicant's behalf by the North Queensland Native Title Representative Body Aboriginal Corporation (NQLC) stated that:

- a consultant anthropologist was engaged in April 2008 to review material relevant to a number of claims previously the responsibility of the Central Queensland Land Council Aboriginal Corporation and for which NQLC now had responsibility, including the one before the court;
- the consultant had recommended a detailed review of existing material for this claim before a 'connection' research program was established but this was dependent on a number of things, including additional funding and the availability of consultant anthropologists;

- while the applicant has not ruled out further amending the application, it would consider it its position once further anthropological research had been undertaken;
- the leadership provided by those authorised as the applicant for the claim to the native title claim group in activities like the negotiation of an indigenous land use agreement was not possible prior to the filing of the application and 'that progress would be lost were the application to be struck out'.

Findings in this case

Logan J held:

- there must be some evidence before the court which provides a reasonable foundation for the predictive value judgment called for in s. 190F(6)(a);
- evidence as to the prospect of amendment in this case 'did not rise beyond the level of a mere possibility', i.e. it raised a possibility that at 'some uncertain time in the future, further evidence might possibly be obtained which might, in turn, possibly generate an amendment of an unidentified kind of the application in its present form';
- this was 'a long way short of what is needed, even taking a benign view of the meaning to be given to the word "likely"';
- it was 'quite impossible on the evidence to reach any predictive conclusion at all' as to whether amendment would lead to a different result;
- it was 'inherently likely that...a long lead time might attend the obtaining of anthropological evidence';
- while it could be inferred that those authorised to be the applicant had 'gained recognition as leaders which facilitated other beneficial endeavours', it was 'not at all clear...why their qualities of leadership would be lost' if the application was dismissed;
- in any case, 'collateral advantages only at best tangentially related to the presence' of a claimant application on the court's list did not 'provide a reason not to dismiss this application';
- evidence gathered to date would not be 'destroyed by the dismissal of the application' and dismissal under s. 190F(6) would not result 'in a determination on the merits of the application' or prevent the bringing of a further application 'if that is the course advised'—at [53], [56] to [57], [64] and [71] to [72].

Decision

Logan J dismissed the application because he was satisfied that:

- it has not been amended since it was considered by the delegate;
- that it was not likely to be amended in a way that would lead to a different outcome once considered by the Registrar;
- there was no other reason why the application should not be dismissed—at [73] to [74].

Taylor v Western Australia [2008] FCA 1675

McKerracher J, 12 November 2008

Issue

The issue before the court was whether it should dismiss the Taylor Group's claimant application pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (the NTA). The application was dismissed.

Background

Subsection 190F(6) provides that the court may, of its own motion or on the application of a party, dismiss a claimant application if:

- the court is satisfied that the application in issue has not been amended since consideration by the Registrar, and is not likely to be amended in a way that would lead to a different outcome once considered by the Registrar; and
- in the opinion of the court, there is no other reason why the application in issue should not be dismissed.

Subsection 190F(5) provides that s. 190F(6) applies if:

- in the Native Title Registrar's opinion, the claim made in the application does not satisfy all of the merit conditions found in s. 190B or it is not possible to determine whether all of those conditions are met because of a failure to meet all of the procedural and other conditions found in s. 190C; and
- the court is satisfied that all avenues for judicial review or reconsideration by the National Native Title Tribunal have been exhausted without the claim being registered.

His Honour Justice McKerracher referred to the Explanatory Memorandum to the Native Title Act Amendment Bill 2006 (Cwlth), which provides 'an insight into the rationale behind the introduction' this new power to dismiss:

> Currently, while unregistered applications do not receive certain procedural benefits that attach to registered claims (such as the right to negotiate), unregistered applications may still proceed to determination. There is presently no requirement on claimants to amend their claim to meet the requirements of the registration test. The amendments inserted by item 73 are intended to provide a greater focus on the responsibility of applicants to take steps to improve the quality of their claims, recognising that poor quality claims are a burden on the native title system—at [4].

The court also noted that the EM stated that what became s. 190F(6) would 'ensure that applications are not dismissed where there is good reason for a claim remaining in the system, despite being unregistered'. The example of a 'good reason' given was a case where, despite the fact that a claim was unregistered, it was 'close to reaching resolution'—at [6] to [7].

McKerracher J adopted the analysis of Logan J in *George on behalf of the Gurambilbarra People v Queensland* [2008] FCA 1518 (summarised in *Native Title Hot Spots* Issue 29) as to operation of s. 190F(6).

The Taylor Group's application was filed in the Federal Court in September 2001. It covers an area in the south-west Geraldton region of Western Australia. The applicants were not represented by Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (Yamatji), the representative Aboriginal/Torres Strait Islander body for the area, or otherwise legally represented.

The application first underwent, but did not meet, the requirements for registration on 15 July 2002. The Registrar was then required to reconsider the application for registration as a consequence of the 2007 amendments to the NTA. On 8 November 2007, the Registrar's delegate decided that the application must not be accepted for registration because it did not satisfy (among others) four of the conditions contained in s. 190B. As required by s. 190D(3), the Registrar's delegate gave the court notice that s. 190F(5)(a) applied i.e. the delegate had formed the requisite opinion.

Since the applicant was notified of the Registrar's decision, no application had been made to the court for review of the registration test decision pursuant to s. 190F(1). Further, the application had not been amended. Note that reconsideration by the National Native Title Tribunal under s. 190 E(1) was not available in this case because that provision only applies to applications made, or amended, after 31 August 2008—see items 107 and 123 the *Native Title (Technical Amendments) Act 2007* (Cwlth).

Submissions by representative body

Yamatji is discussing an alternative settlement agreement (ASA) under s. 86F with the State of Western Australia. Yamatji submitted (among other things) that:

- the state was committed to negotiating an ASA to resolve a number of native title claims in the Southern Yamatji region, including the Taylor Group's application;
- however, the state's commitment was subject to the proviso that the agreement was inclusive of all traditional Indigenous interests in the area, that it is dealing with the 'right people' and there was a single agreement with a single entity to sign the agreement;
- if the Taylor Group claim remained on foot, but the claimants did not participate in the alternative settlement process, it could prejudice the other claims in the process due to the state's requirements.

The state adopted the submissions filed by Yamatji.

The National Native Title Tribunal's mediation report of June 2008 stated that:

- some members of the Taylor Group had successfully sought representation on the working group of the overlapping registered Amangu claim and other Taylor

Group families had accepted representation on the combined working group for the proposed ASA but Mr Taylor had not attended any of the meetings;
- the Tribunal remained willing to assist with for the resolution of the four overlaps to the Taylor claim but none of the respondents, including the state, intended to mediate with the Taylor Group claim in its own right;
- there was no scope for a mediated determination of the application.

Decision

On the basis of the history of this application, his Honour dismissed the application because he was satisfied, for the purposes of s. 190F(6), that:
- the application had not been amended since it was considered by the Registrar's delegate;
- there was no evidence or indication that the application was likely to be amended in a way that would lead to any different conclusion by the Registrar; and
- there was no other reason why the application should not be dismissed—at [23].

Allison v Western Australia [2008] FCA 1560

Gilmour J 13, October 2008

Issue

The issue in this case was whether the Federal Court should, of its own motion, dismiss a claimant application pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA) if, in the circumstances, the applicant failed to show cause why the applications should not be dismissed. The court dismissed the application.

Background

Subsection 190F(6) provides that the court may, of its own motion or on the application of a party, dismiss a claimant application if:
- the court is satisfied that the application in issue has not been amended since consideration by the Registrar, and is not likely to be amended in a way that would lead to a different outcome once considered by the Registrar; and
- in the opinion of the court, there is no other reason why the application in issue should not be dismissed.

Subsection 190F(5) provides that s. 190F(6) applies if:
- in the Native Title Registrar's opinion, the claim made in the application does not satisfy all of the merit conditions found in s. 190B or it is not possible to determine whether all of those conditions are met because of a failure to meet all of the procedural and other conditions found in s. 190C; and
- the court is satisfied that all avenues for judicial review or reconsideration by the National Native Title Tribunal have been exhausted without the claim being registered.

The application in this case, also known as Sir Samuel 2, was made in 1998 and covered an area in the Goldfields of Western Australia. On 24 August 2007, the Registrar's delegate decided that the claim made in the application did not meet all of the conditions of the registration test, including some of those found in s. 190B. As required by s. 190D(3), the Registrar's delegate gave the court notice that s. 190F(5)(a) applied i.e. that the delegate had formed the requisite opinion.

The applicant did not apply to the Tribunal for a reconsideration of the application pursuant to s. 190E(1). Nor was application made to the court for review of the registration test decision pursuant to s. 190F(1). Further, the application had not been amended subsequent to the decision.

In April 2008, the court directed the parties to file and serve submissions to show cause why the application should not be dismissed pursuant to s. 190F(6). The Goldfields Land and Sea Council, which acts for the applicant in this matter, advised the court that it had not received instructions to make any submissions to the court.

Decision

His Honour held that the application should be dismissed because:

- there was no evidence, and there were no submissions, that 'this application is likely to be amended at all, never mind in a way that would lead to a different outcome once considered by the Registrar';
- there was nothing before the court as to whether or not there is another reason why the application should not be dismissed—at [6] to [7].

Collard v Western Australia [2008] FCA 1562

Gilmour J, 13 October 2008

Issue

The issue in this case was whether the Federal Court should, of its own motion, dismiss five unregistered claimant applications pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA). The court dismissed all five applications. As the reasons for dismissal are the same in all five cases, please refer also to *Collard v Western Australia* [2008] FCA 1563, *Collard v Western Australia* [2008] FCA 1564, *Collard v Western Australia* [2008] FCA 1565, *Collard v Western Australia* [2008] FCA 1566.

Background

Subsection 190F(6) provides that the court may, of its own motion or on the application of a party, dismiss a claimant application if:

- the court is satisfied that the application in issue has not been amended since consideration by the Registrar, and is not likely to be amended in a way that would lead to a different outcome once considered by the Registrar; and
- in the opinion of the court, there is no other reason why the application in issue should not be dismissed.

Subsection 190F(5) provides that s. 190F(6) applies if:

- in the Native Title Registrar's opinion, the claim made in the application does not satisfy all of the merit conditions found in s. 190B or it is not possible to determine whether all of those conditions are met because of a failure to meet all of the procedural and other conditions found in s. 190C; and
- the court is satisfied that all avenues for judicial review or reconsideration by the National Native Title Tribunal have been exhausted without the claim being registered.

The five polygon applications before the court, referred to as the Collard applications, were lodged over areas in the Southwest of Western Australia on behalf the Noongar People. All five failed the registration test.

The court directed the parties to file and serve submissions to show cause why the Collard applications should not be dismissed pursuant to s. 190F(6) of the NTA. It was accepted that, once the applicant in each case conceded there would be no amendments made in the near future, the question for the court was whether or not, in the court's opinion, there was any other reason why each of the applications should not be dismissed—at [9].

Applicants' submissions

It was not submitted, and there was no evidence to suggest that, since failing the registration test, the applicant for any of the five applications had either applied for a reconsideration by the National Native Title Tribunal pursuant to s. 190E(1) or made an application to the court pursuant to s. 190F(1) for review of the registration test decisions.

In the court's view, the effect of the applicant's submission in each case was that the relevant application should not be dismissed for (among others) the following reasons:

- each application was likely to be withdrawn (i.e. resolved) in the future once negotiations with the representative body to obtain acknowledgment of the status of those comprising the applicant as Noongar elders were completed;
- the applicant had been unable to obtain legal representation to assist in amending each application;
- there are sites of strong cultural significance in the areas covered by each application—see [6] to [11].

The applicant conceded that it was unlikely that any of the applications would be amended in the near future and that negotiations with the representative body were currently in abeyance.

Decision

His Honour Justice Gilmour held that all five applications should be dismissed because:

> None of these matters [i.e. those raised in the applicants' submissions] are of a kind which...might demonstrate another reason, in the circumstances where the criteria under s 190F(6)(a)...have been satisfied, why the application should not be dismissed—at [11].

Evans on behalf of the Koara People v Western Australia [2008] FCA 1557

Gilmour J 13, October 2008

Issue

The issue in this case was whether the Federal Court should, of its own motion, dismiss an unregistered claimant application pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA). It was decided that the application should be dismissed.

Background

Subsection 190F(6) provides that the court may, of its own motion or on the application of a party, dismiss a claimant application if:

- the court is satisfied that the application in issue has not been amended since consideration by the Registrar, and is not likely to be amended in a way that would lead to a different outcome once considered by the Registrar; and
- in the opinion of the court, there is no other reason why the application in issue should not be dismissed.

Subsection 190F(5) provides that s. 190F(6) applies if:

- in the Native Title Registrar's opinion, the claim made in the application does not satisfy all of the merit conditions found in s. 190B or it is not possible to determine whether all of those conditions are met because of a failure to meet all of the procedural and other conditions found in s. 190C; and
- the court is satisfied that all avenues for judicial review or reconsideration by the National Native Title Tribunal have been exhausted without the claim being registered.

The Koara People lodged an amended application over part of the Goldfields in Western Australia. In January 2008, a delegate of the Native Title Registrar decided pursuant to s. 190A that the claim made in the application must not be registered because, relevantly, it did not meet all of the conditions of s. 190B. Subsequent to the delegate's decision, the applicant did not apply for review of the delegate's decision pursuant to s. 190F(1). Note that reconsideration by the National Native Title Tribunal under s. 190E(1) was not available in this case because that provision only applies to applications made, or amended, after 31 August 2008—see items 107 and 123 the *Native Title (Technical Amendments) Act 2007* (Cwlth).

The court, of its own motion, directed the parties to file and serve submissions to show cause why the application should not be dismissed pursuant to s. 190F(6). The Goldfields Land and Sea Council, which acts for the applicant, advised the court that it had specific instructions not to make any submissions to the court.

Decision

The application was dismissed because his Honour Justice Gilmour held that:

- there was no evidence, and there were no submissions, that the application was likely to be amended, 'never mind in a way that would lead to a different outcome once considered by the Registrar';
- there was nothing before the court as to whether or not there was any other reason why the application should not be dismissed—at [6] to [7] and [9].

Martin v Western Australia [2008] FCA 1677

McKerracher J, 12 November 2008

Issue

The issue before the court was whether it should dismiss the Widi Mob's claimant application pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (the NTA). The application was not dismissed because, in the circumstances of this case, the court could not conclude that there was no other reason why the application should not be dismissed.

Background

Subsection 190F(6) provides that the court may, of its own motion or on the application of a party, dismiss a claimant application if:

- the court is satisfied that the application in issue has not been amended since consideration by the Registrar, and is not likely to be amended in a way that would lead to a different outcome once considered by the Registrar; and
- in the opinion of the court, there is no other reason why the application in issue should not be dismissed.

Subsection 190F(5) provides that s. 190F(6) applies if:

- in the Native Title Registrar's opinion, the claim made in the application does not satisfy all of the merit conditions found in s. 190B or it is not possible to determine whether all of those conditions are met because of a failure to meet all of the procedural and other conditions found in s. 190C; and
- the court is satisfied that all avenues for judicial review or reconsideration by the National Native Title Tribunal have been exhausted without the claim being registered.

The Widi Mob's application was lodged with the National Native Title Tribunal in August 1997. It was amended on four occasions between February 1999 and January

2000. It was assessed by a delegate of the Native Title Registrar and found not to meet the conditions for registration under s. 190A of the NTA in May 1999 and again in July 2000.

Widi Mob's last amended application was made after 30 September 1998 and before 15 April 2007 and was not on the Register of Native Title Claims when the *Native Title Amendment Act 2007* (Cwlth) commenced. Therefore, the Registrar was required to reconsider the application for registration. On 24 August 2007, the Registrar's delegate decided that the application should not be accepted for registration because it did not satisfy ss. 190C(2), 190C(4), 190B(5) and 190B(6). Since the applicant was notified of the Registrar's decision, no application seeking leave to amend the Widi Mob application had been filed and no application to the Tribunal for a reconsideration pursuant to s. 190E(1) had been made (although it seems in this case that section did not apply – see items 107 and 123 the *Native Title (Technical Amendments) Act 2007* (Cwlth)). Nor was application made to the court for review of the decision pursuant to s. 190F(1).

By the time of the court's decision, the sole applicant had passed away.

Applicant's submissions

In December 2007, the applicant informed the court they were proposing to amend the application to address the problem of authorisation early in 2008. Those amendments did not occur. On 30 June 2008, it was submitted that the application should not be dismissed because s. 190F(6) required the court to take into account issues of 'fairness and opportunity', including (among other things) that:

- the applicant had had no significant legal assistance until November 2006;
- the applicant had been homeless for about 10 years, making record keeping and getting instructions difficult;
- negotiations to engage an anthropologist to assist in preparing amendments to the application had started and so the matter should be adjourned to December when a better assessment of the merits may be possible; and
- alternatively, the resolution of the issues raised by s. 190F(6) should not be undertaken without a full examination of the evidence and an opportunity to call witnesses and cross examine them.

Yamatji's submissions

The representative body for the area, Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (Yamatji), submitted that:

- the Widi Mob application overlapped the registered Badimia claimant application and the Badimia were a respondent party to the Widi claim but extensive discussions over a number of years had failed to resolve the overlap issue;
- if the State of Western Australia accepted the Badimia's connection material, negotiations towards a consent determination could be held up by the overlap;

- because the Widi Mob's claim was unregistered, no prejudice would be suffered if it was struck out and there was nothing to prevent the Widi Mob from filing a properly constituted claim in the future;
- Yamatji was not aware of any other reason why the claim should not be dismissed;
- Yamatji was involved in discussions with the state regarding a proposed alternative settlement under s. 86F to resolve native title claims in the Southern Yamatji region and the Widi mob application was one of five applications that overlapped parts of the alternative settlement area;
- three of those applications, including Widi Mob, were presently before the court in relation to ss. 190F(5) and (6);
- the state was committed to negotiating an alternative settlement, provided it was inclusive of all traditional Indigenous interests in the area, the state was satisfied that it is dealing with the 'right people' and there was a single agreement with a single entity to sign it;
- given these conditions, if the Widi Mob claim remained on foot but the claimants did not participate, it could prejudice the other claims in the alternative settlement process.

The state adopted the submissions filed by Yamatji.

Decision

His Honour Justice McKerracher was satisfied that the application had not been amended since it was considered by the delegate and there was no evidence or indication that it was likely to be amended in a way that would lead to any different conclusion by the Registrar—at [35].

However, the court could not conclude that 'there [was] no other reason why the application should not be dismissed'. The sole applicant had passed away and it was intended to seek to substitute a replacement applicant. Therefore, his Honour allowed a limited time for this to occur but indicated that:

> In light of the particular history concerning this application and the fact that the applicant could lodge a fresh application even if this application were dismissed, I would impose reasonably strict time limits for the future conduct of this application— at [37].

Morich v Western Australia [2008] FCA 1567

Gilmour J, 13 October 2008

Issue

The issue in this case was whether the Federal Court should, of its own motion, dismiss the unregistered application for a determination of native title pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA). The application was dismissed.

Background

Subsection 190F(6) provides that the court may, of its own motion or on the application of a party, dismiss a claimant application if:

- the court is satisfied that the application in issue has not been amended since consideration by the Registrar, and is not likely to be amended in a way that would lead to a different outcome once considered by the Registrar; and
- in the opinion of the court, there is no other reason why the application in issue should not be dismissed.

Subsection 190F(5) provides that s. 190F(6) applies if:

- in the Native Title Registrar's opinion, the claim made in the application does not satisfy all of the merit conditions found in s. 190B or it is not possible to determine whether all of those conditions are met because of a failure to meet all of the procedural and other conditions found in s. 190C; and
- the court is satisfied that all avenues for judicial review or reconsideration by the National Native Title Tribunal have been exhausted without the claim being registered.

The Morich application, made on behalf of the Wom-ber people, failed the registration test on 10 September 2007. The court, of its own motion, directed the parties to file and serve submissions in relation to s. 190F(6).

It was not submitted, nor was there any evidence to suggest, that since failing the registration test the applicant had either applied to the National Native Title Tribunal pursuant to s. 190E(1) for reconsideration or made an application to the court pursuant to s. 190F(1) for review of the delegate's decision.

As s. 190F(6)(a) was satisfied, the question was whether or not, in the opinion of the court, 'there is no other reason why the application should not be dismissed'—see s.190F(6)(b).

Applicants' submissions

The applicant submitted that the application should not be dismissed for (among others) the following reasons:

- amendments to the NTA over the years, combined with a lack of legal representation, made it almost impossible to progress the claim;
- the applicants' ancestors 'have never given away their rights to the land and waters within their traditional lands' and their lands were taken 'by forcible means or genocide';
- members of the Wom-ber claimant group were willing to continue mediation with SWALSC to progress the amalgamation of all of the overlapping claims, if agreed to by all other overlapping claimant groups;
- recent research conducted on the Wom-ber group demonstrated a connection to the biological descendants of named persons on which the native title claim

group description of the Wagyl Kaip/Southern Noongar claim group is formulated;
- no one person, government official or organisation had the right to remove their claim against their wishes and they wanted the right to claim their heritage.

Decision
His Honour Justice Gilmour noted that the Explanatory Memorandum to the Native Title Amendment Bill 2006 at [4331] stated that the criterion set out in what became s. 190F(6) would 'ensure that applications are not dismissed where there is good reason for a claim remaining in the system, despite being unregistered'. The example given in the EM of a 'good reason' was a case where, despite the fact that the claim was unregistered, it was close to reaching resolution—at [9] to [10].

In this case, Gilmour J was of the view that:
- the Wom-ber application overlapped various other underlying claims and the proposals to combine it with underlying claims, or merge it with the Single Noongar claim #1 had been 'mooted in the past without coming to fruition';
- it was unlikely that the application would be quickly resolved;
- none of the submissions raised by the applicants constituted a 'good reason why the application should not be dismissed';
- the application should be dismissed—at [11] to [13].

His Honour noted dismissal of the application would not prejudice the rights of the claim group to be part of another claim or to make a further application once 'connection' research was completed—at [13].

Phillips v Western Australia [2008] FCA 1676

McKerracher J, 12 November 2008

Issue
The issue in this case was whether the Federal Court should, of its own motion, dismiss the Widi Binyardi people's unregistered claimant application pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA). The application was dismissed.

Background
Subsection 190F(6) provides that the court may, of its own motion or on the application of a party, dismiss a claimant application if:
- the court is satisfied that the application in issue has not been amended since consideration by the Registrar, and is not likely to be amended in a way that would lead to a different outcome once considered by the Registrar; and
- in the opinion of the court, there is no other reason why the application in issue should not be dismissed.

Subsection 190F(5) provides that s. 190F(6) applies if:

- in the Native Title Registrar's opinion, the claim made in the application does not satisfy all of the merit conditions found in s. 190B or it is not possible to determine whether all of those conditions are met because of a failure to meet all of the procedural and other conditions found in s. 190C; and
- the court is satisfied that all avenues for judicial review or reconsideration by the National Native Title Tribunal have been exhausted without the claim being registered.

His Honour Justice McKerracher referred to the Explanatory Memorandum to the Native Title Act Amendment Bill 2006 (Cwlth) (EM), which provides 'an insight into the rationale behind the introduction' this new power to dismiss:

> Currently, while unregistered applications do not receive certain procedural benefits that attach to registered claims (such as the right to negotiate), unregistered applications may still proceed to determination. There is presently no requirement on claimants to amend their claim to meet the requirements of the registration test. The amendments inserted by item 73 are intended to provide a greater focus on the responsibility of applicants to take steps to improve the quality of their claims, recognising that poor quality claims are a burden on the native title system—at [4].

The court also noted that the EM stated that what became s. 190F(6) would 'ensure that applications are not dismissed where there is good reason for a claim remaining in the system, despite being unregistered'. The example of a 'good reason' given was a case where, despite the fact that a claim was unregistered, it was 'close to reaching resolution'—at [6] to [7].

McKerracher J adopted the analysis of Logan J in *George on behalf of the Gurambilbarra People v Queensland* [2008] FCA 1518 (summarised in *Native Title Hot Spots* Issue 29) as to operation of s. 190F(6).

The Widi Binyardi application was filed in the court on 16 December 2004. The application covers an area in the central Geraldton region of Western Australia. It overlaps several other applications. The Widi Binyardi applicants are not represented by the representative Aboriginal/Torres Strait Islander body for the area, Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (Yamatji). Nor do they have any other legal representative.

The Widi Binyardi application was made after 30 September 1998 and before 15 April 2007 and was not on the Register of Native Title Claims when the *Native Title Amendment Act 2007* (Cwlth) commenced. Therefore, the Registrar was required to reconsider the application against the conditions of the registration test. This was done on 24 August 2007, when the Registrar's delegate decided that it must not be accepted for registration because, among others, it did not satisfy all of the conditions of s. 190B.

Since the delegate's decision, the applicant had not made an application to the court pursuant to s. 190F(1) for review of the delegate's decision. Reconsideration by the National Native Title Tribunal under s. 190E(1) was not available in this case because that provision only applies to applications made, or amended, after 31 August 2008—see items 107 and 123 the *Native Title (Technical Amendments) Act 2007* (Cwlth).

Submissions

The fourth respondent, Yamatji, submitted that:

- given the Widi Binyardi claim was unregistered, it did not attract procedural rights in relation to future acts;
- should the claim be dismissed, there was nothing to prevent the Widi Binyardi claim group members from filing a properly constituted claim in the future;
- it was not aware of any prejudice that might be suffered by the Widi Binyardi claim group members should the application be struck out;
- it was not aware of any reason why the claim should not be dismissed.

The State of Western Australia adopted Yamatji's submissions.

Decision

His Honour dismissed the application because, on the basis of the history, the court was satisfied that:

- the application had not been amended since the delegate's decision made;
- there was no clear evidence or indication that the application was likely to be amended in a way that would lead to any different conclusion by the Registrar;
- there was no other reason why the application should not be dismissed—at [19].

Walker v Western Australia [2008] FCA 1558

Gilmour J 13, October 2008

Issue

The issue in this case was whether the Federal Court should, of its own motion, dismiss a claimant application pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA). The application was dismissed.

Background

Subsection 190F(6) provides that the court may, of its own motion or on the application of a party, dismiss a claimant application if:

- the court is satisfied that the application in issue has not been amended since consideration by the Registrar, and is not likely to be amended in a way that would lead to a different outcome once considered by the Registrar; and
- in the opinion of the court, there is no other reason why the application in issue should not be dismissed.

Subsection 190F(5) provides that s. 190F(6) applies if:

- in the Native Title Registrar's opinion, the claim made in the application does not satisfy all of the merit conditions found in s. 190B or it is not possible to determine whether all of those conditions are met because of a failure to meet all of the procedural and other conditions found in s. 190C; and
- the court is satisfied that all avenues for judicial review or reconsideration by the National Native Title Tribunal have been exhausted without the claim being registered.

Dolly Walker and Kado Muir filed a claimant application over areas of the Goldfields in Western Australia in December 2000. The Native Title Registrar's delegate decided that the claim made in the application did not meet all of the conditions of the registration test on 24 August 2007, including conditions found in s. 190B (the merit conditions). Subsequent to that decision, the applicant did not apply to the court for review of the decision pursuant to s. 190F(1). Reconsideration by the National Native Title Tribunal under s. 190E(1) was not available in this case because that provision only applies to applications made, or amended, after 31 August 2008—see items 107 and 123 the *Native Title (Technical Amendments) Act 2007* (Cwlth).

The court, of its own motion, directed the parties to file and serve submissions to show cause why the application should not be dismissed pursuant to s. 190F(6). The Goldfields Land and Sea Council, which acts for the applicant in this matter, advised the court that it not received instructions to make any submissions to the court.

Decision

The application was dismissed because his Honour Justice Gilmour held that:

- there was no evidence, and there were no submissions, that the application was likely to be amended at all, 'never mind in a way that would lead to a different outcome once considered by the Registrar';
- there was nothing before the court as to whether or not there was another reason why the application should not be dismissed—at [6] to [7] and [9].

Walker v Western Australia [2008] FCA 1559

Gilmour J 13, October 2008

Issue

The issue in this case was whether the Federal Court should, of its own motion, dismiss a claimant application pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA). It was decided that the application should be dismissed.

Background

Subsection 190F(6) provides that the court may, of its own motion or on the application of a party, dismiss a claimant application if:

- the court is satisfied that the application in issue has not been amended since consideration by the Registrar, and is not likely to be amended in a way that would lead to a different outcome once considered by the Registrar; and

- in the opinion of the court, there is no other reason why the application in issue should not be dismissed.

Subsection 190F(5) provides that s. 190F(6) applies if:

- in the Native Title Registrar's opinion, the claim made in the application does not satisfy all of the merit conditions found in s. 190B or it is not possible to determine whether all of those conditions are met because of a failure to meet all of the procedural and other conditions found in s. 190C; and
- the court is satisfied that all avenues for judicial review or reconsideration by the National Native Title Tribunal have been exhausted without the claim being registered.

Dolly Walker and others filed an amended claimant application over areas of the Goldfields in Western Australia. The claim made in the amended application failed the registration test on 24 August 2007. Subsequent to the decision of the Native Title Registrar's delegate, the applicant did not apply to the court for review of the decision pursuant to s. 190F(1). Reconsideration by the National Native Title Tribunal under s. 190E(1) was not available in this case because that provision only applies to applications made, or amended, after 31 August 2008—see items 107 and 123 the *Native Title (Technical Amendments) Act 2007* (Cwlth).

The court, of its own motion, directed the parties to file and serve submissions to show cause why the application should not be dismissed pursuant to s. 190F(6). The Goldfields Land and Sea Council, which acts for the applicant in this matter, advised the court that it not received instructions to make any submissions to the court.

Decision

The application was dismissed because his Honour Justice Gilmour held that:

- there was no evidence and there were no submissions that the application was likely to be amended, 'never mind in a way that would lead to a different outcome once considered by the Registrar';
- there was nothing before the court as to whether or not there is another reason why the application should not be dismissed—at [6] to [7] and [9].

Whalebone v Western Australia [2008] FCA 1678

McKerracher J, 12 November 2008

Issue

The issue in this case was whether the Federal Court should of its own motion dismiss the Bindurrna People's claimant application for a determination of native title pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA). The application was dismissed.

Background

Subsection 190F(6) provides that the court may, of its own motion or on the application of a party, dismiss a claimant application if:

- the court is satisfied that the application in issue has not been amended since consideration by the Registrar, and is not likely to be amended in a way that would lead to a different outcome once considered by the Registrar; and
- in the opinion of the court, there is no other reason why the application in issue should not be dismissed.

Subsection 190F(5) provides that s. 190F(6) applies if:

- in the Native Title Registrar's opinion, the claim made in the application does not satisfy all of the merit conditions found in s. 190B or it is not possible to determine whether all of those conditions are met because of a failure to meet all of the procedural and other conditions found in s. 190C; and
- the court is satisfied that all avenues for judicial review or reconsideration by the National Native Title Tribunal have been exhausted without the claim being registered.

These provisions were inserted into the NTA by the *Native Title Amendment Act 2007* (Cwlth). The court noted that the Explanatory Memorandum to the Native Title Act Amendment Bill 2006 (EM) provides an 'insight into the rationale behind the introduction of the new dismissal power':

> Currently, while unregistered applications do not receive certain procedural benefits that attach to registered claims (such as the right to negotiate), unregistered applications may still proceed to determination. There is presently no requirement on claimants to amend their claim to meet the requirements of the registration test. The amendments inserted by item 73 are intended to provide a greater focus on the responsibility of applicants to take steps to improve the quality of their claims, recognising that poor quality claims are a burden on the native title system—at [4].

The court also noted that the EM stated that the criterion set out in what became s. 190F(6) would 'ensure that applications are not dismissed where there is good reason for a claim remaining in the system, despite being unregistered', with an example of a 'good reason' being a case where, despite the fact that a claim was unregistered, it was 'close to reaching resolution'—at [6] to [7].

His Honour Justice McKerracher adopted the analysis of the principles applicable to the operation of s. 190F(6) by Logan J in *Christine George on behalf of the Gurambilbarra People v Queensland* [2008] FCA 1518, summarised in *Native Title Hot Spots* Issue 29.

The Bindurrna People's application was filed on 14 January 2005. The application covers an area of 1,500 square kilometres between the Ngarluma Yindjibarndi determined area and the Kariyarra claim in the north-west Pilbara region of Western Australia.

On 9 September 2005, the Native Title Registrar's delegate decided not to accept claim made in the application for registration. The Bindurrna People's application was made after 30 September 1998 and before 15 April 2007 and was not on the Register of Native Title Claims when the *Native Title Amendment Act 2007* (Cwlth) commenced. Therefore, the Registrar was required reconsidered the application for registration. On 21 September 2007, it was not accepted for registration because, among others, it failed to meet all of the conditions found in s. 190B.

Since failing the registration test for the second time, the applicant had neither applied to the National Native Title Tribunal pursuant to s. 190E(1) for reconsideration nor made an application to the court pursuant to s. 190F(1) for review of the delegate's decision. On 18 December 2007, the parties were directed to file submissions 'in relation to the disposition of the application having regards to the outcome of the registration test'—at [24].

Submissions

The applicants' submissions were directed primarily to s. 190F(6)(b). It was contended the court should take 'account issues of fairness and opportunity' in relation to the application, including that the applicant had no significant legal assistance in the past 'but there is a strong probability of solicitors being appointed and of funding being available'. It was also submitted that the issues raised in s. 190F 'should not be undertaken without a full examination of the evidence and an opportunity to call witnesses and cross examine them'.

The state submissions referred to a regional Tribunal mediation report (dated June 2008) which stated that the Tribunal continued to mediate a dispute between the Bindurrna claimants and the neighbouring Kariyarra claimants and that the dispute would affect the negotiated outcome of both applications if it was not resolved. As the state was not a party to the negotiations, it was unable to make an informed submission on whether there was any other valid reason why the application should not be dismissed.

Decision

The application was dismissed because, on the basis of the history, his Honour was satisfied that:

- nothing in the submissions of the applicants raised 'any more than generalised hopes and possibilities';
- the application had not been amended and there was no clear evidence that the application was likely to be amended in a way that would likely lead to a different conclusion by the Registrar;
- there was no other reason why the application should not be dismissed—at [21] to [22] and [29] to [32].

Wongyabong v Western Australia [2008] FCA 1561

Gilmour J, 13 October 2008

Issue

The issue in this case was whether the Federal Court should, of its own motion, dismiss a claimant application pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA). The application was dismissed.

Background

Subsection 190F(6) provides that the court may, of its own motion or on the application of a party, dismiss a claimant application if:

- the court is satisfied that the application in issue has not been amended since consideration by the Registrar, and is not likely to be amended in a way that would lead to a different outcome once considered by the Registrar; and
- in the opinion of the court, there is no other reason why the application in issue should not be dismissed.

Subsection 190F(5) provides that s. 190F(6) applies if:

- in the Native Title Registrar's opinion, the claim made in the application does not satisfy all of the merit conditions found in s. 190B or it is not possible to determine whether all of those conditions are met because of a failure to meet all of the procedural and other conditions found in s. 190C; and
- the court is satisfied that all avenues for judicial review or reconsideration by the National Native Title Tribunal have been exhausted without the claim being registered.

The application in this matter was made over an area of the Goldfields in Western Australia. A delegate of the Native Title Registrar decided it failed the registration test on 23 January 2008 and, in particular, that it failed to meet all of the conditions found in s. 190B(5). The applicant did not apply to the Tribunal for a reconsideration for registration pursuant to s. 190E(1). Nor was application made to the court for review of the delegate's decision pursuant to s. 190F(1).The court, of its own motion, directed the parties to file and serve submissions to show cause why the application should not be dismissed pursuant to s. 190F(6).

The Goldfields Land and Sea Council, which acts for the applicant in this matter, advised the court that it had not received any instructions to make any submissions to the court.

Decision

The application was dismissed because his Honour Justice Gilmour held that:

- there was no evidence, and there were no submissions, that the application was likely to be amended, 'never mind in a way that might lead to a different outcome;

- there was nothing before the court as to whether or not there is another reason why the application should not be dismissed—at [6] to [7] and [9].

Separate proceedings – regional sea claim

Akiba v Queensland (No. 4) [2008] FCA 1446

Finn J, 23 September 2008

Issue
In this case, the Federal Court made an order pursuant to s. 67(2) of the *Native Title Act* 1993 (Cwlth) that different parts of the area covered by a claimant application be dealt with in separate proceedings.

Background
The Torres Strait regional sea claim (TSRSC) covers waters in, and adjacent to, the Torres Strait. The application was filed in 2001. The hearing was to commence on 29 September 2008. However, recently, two overlapping claims were filed.

Splitting the proceedings
His Honour Justice Finn ordered, pursuant to s. 67(2), that different parts of the area covered by the TSRSC are to be dealt with in separate proceedings, to be called the Part A proceedings and the Part B proceeding. Part A will deal with the area of the TSRSC which is unaffected by the overlapping applications. Part B will deal with the area of the TSRSC that is affected by the overlapping claims—at [4].

Finn J noted that Part A is ready for trial while Part B, which must now be dealt with together with the overlapping applications, is 'not nearly ready for hearing'—at [6].

Decision
The court ordered that the Torres Strait regional sea claim be separated into two separate proceedings called the Sea Claim Part A proceeding and Sea Claim Part B proceeding. The Sea Claim Part A proceeding remains subject to previous programming orders, while those relating to the Part B proceedings were vacated.

Non-compliance with orders – risk of dismissal

Gia People v Queensland [2008] FCA 1696

Rares J, 17 October 2008

Issue

In this case, there had been repeated non-compliance with Federal Court orders in relation to claimant applications made on behalf of the Gia People and the Birri-Gubba People. Further orders were made. If these are not complied with, the applications will stand dismissed.

Background

These two claims were previously represented by the Central Queensland Land Council (CQLC). On 23 July 2007, the court was informed that CQLC intended to file two new claims over the relevant area and then combine all four claims so as to regularise both proceedings consistent with anthropological research that had been undertaken.

The North Queensland Land Council (NQLC) had subsequently been allocated responsibility for the matters as part of the reorganisation of representative body functions that commenced on 1 July 2008. There had been non-compliance with court orders from March and May 2008 for the further progress of both claims. His Honour Justice Rares noted that:

> It is a tragedy that the applicants, who as long ago as over nine years before today brought proceedings in this court for the adjudication of their claim to native title rights, have been so failed by their lawyers and representative bodies. Even in an attempt to explain matters to the Court today, no proper investigation of the material filed on their behalf in the Court and relied on before the Court had been made—at [17].

Regularise, reconstitute or stand dismissed

Rares J held that:

- in light of the history of non-compliance and lack of diligence in the prosecution of these matters by those representing the applicants, certainty needed to be brought to the proceedings;
- the applicants must regularise or reconstitute the claims within a reasonable time;
- certain actions, including meetings of the applicants for the provision of instructions, must be undertaken;
- if these orders are not complied with by 30 October 2009, the matters would stand dismissed under Order 35A of the Federal Court Rules, i.e. for failing to comply with orders of the court or failing to prosecute with due diligence—at [18] and [19].

Party status – former representative body

Bennell v Western Australia [2008] FCA 1633

Siopis J, 5 November 2008

Issue

The issue before the court was whether the former representative body for the area, the Noongar Land Council, retained a sufficient interest to remain as a party to a claimant application (known as the Single Noongar claim) made in respect that area. This matter was brought before the court by the current representative body for the area, the South West Aboriginal Land and Sea Council (SWALSC). The court ordered that the Noongar Land Council cease to be a party.

Background

In 1996, the Noongar Land Council (NLC) was appointed as a representative body under the *Native Title Act 1993* (Cwlth) (NTA). It became a party to the Single Noongar claim based on its status as a representative body at the time it was joined and its application to be recognised as a representative body under a new regime for representative bodies introduced by the *Native Title Amendment Act 1998* (Cwlth). NLC subsequently failed to secure recognition as a representative body under the new regime and, therefore, ceased to have any statutory role or functions under the NTA.

SWALSC sought to have the NLC removed from the proceedings on the ground that it lacked a qualifying interest, relying upon ss. 84(8) and 84(9) of the NTA, which relevantly provide that:

- the court may, at any time, order that a person (other than the applicant) cease to be a party to the proceedings;
- the court is to consider making such an order if it is satisfied that the person never had, or no longer has, interests that may be affected by a determination in the proceedings.

A qualifying interest

His Honour Justice Siopis noted that:

- the functions of a recognised representative body, set out in Pt 11, Div 3 of the NTA, are directed towards assisting native title claimants in relation to matters associated with native title related claims;
- pursuant to ss. 66(3)(a) and 84(3), a representative body under the NTA has the standing to become a party to a native title determination application;
- pursuant to s. 203AD(4) (part of the new representative body regime), there can be only one representative body for each designated area at any one time;

- as a result, a representative body that was unsuccessful in its application to be recognised lost its status and had to make way for a new representative body in accordance with s. 203FC—at [16] to [19].

The NLC failed to secure recognition as a representative body under the new regime but sought to stay on as a party in order to represent dissident interests within the Single Noongar claim group. Siopis J found that the NTA does not provide for any entitlement for a body to become, or remain, a party to a native title determination proceeding on that basis—at [20] to [23].

Decision
The court ordered that NLC cease to be a party to the Single Noongar claim because it did not have a sufficient interest entitling it to be, or continue to be, a party to that proceeding—at [24] to [25].

Costs - judicial review of ILUA registration

Fesl v Delegate of the Native Title Registrar (No 2) [2008] FCA 1479

Logan J, 2 October 2008

Issue
The issue before the Federal Court was whether to make a costs order against those who had unsuccessfully sought review, under the *Administrative Decisions (Judicial Review) Act* 1977 (Cwlth) (AD(JR) Act), of a decision to register an ILUA. In the event, no order as to costs was made.

Background
The background to this matter is set out in *Fesl v Delegate of the Native Title Registrar* [2008] FCA 1469, summarised in *Native Title Hot Spots* Issue 29. Queensland Water Infrastructure Pty Ltd (QWI), the second respondent, sought an order that the applicants pay its costs of and incidental to the judicial review application.

Relevance of s. 85A of the NTA
His Honour Justice Logan noted that:

> It was common ground as between QWI and the Applicants that, strictly, the judicial review application was a proceeding under the AD(JR) Act not under the *Native Title Act*. There was though considerable debate as to the relevance, if any, in relation to the awarding of costs, of s 85A of the *Native Title Act*—at [3].

It was noted that:
- while s. 85A of the NTA did not apply to a proceeding under the AD(JR) Act, the court could take into account the 'spirit' of s. 85A in exercising it discretion as to costs under s. 43A of the *Federal Court of Australia Act*;

- in any case, the court appeared to be bound to do so—at [12] to [19], referring to the decision of the Full Court in *Murray v Registrar of the National Native Title Tribunal* (2003) 132 FCR 402.

Decision

Logan J found that there should be no award of costs. In arriving at this conclusion, his Honour took into account (among other things) that:

- the applicants for review genuinely believed there were significant Aboriginal cultural heritage issues involved;
- one of the applicants, Dr Fesl, was an Aboriginal party for the area under the *Aboriginal Cultural Heritage Act 2003* (Qld) and this status gave her an interest in the interface between that Act and the NTA;
- the judicial review proceeding involved a construction of important provisions of the NTA relating to ILUAs and there were some novel issues of public importance;
- the applicants for review, within the limits of the resources available to them, prosecuted the application with 'due diligence' and 'enjoyed a degree of forensic success'—see [21] to [23].

It was noted that:

> QWI['s] interests...could hardly be described as private. It is an emanation of the State...specifically charged with the construction of a project considered necessary for the supplementation of the water supply in South East Queensland. It had a very particular public interest in the due administration and construction of the provisions governing the registration of an area agreement in the *Native Title Act*. In that regard,...the Applicants have at least secured this Court's guidance as to matters which the Registrar and delegates can and should take into account when deciding a registration application—at [26].

Determination of native title by consent

Eringa, Eringa No.2, Wangkagurru/Yarluyandi and Irrwanyere Mt Dare Native Title Claim Groups v South Australia [2008] FCA 1370

Lander J, 11 September 2008

Issue

The main issue for the Federal Court in this case was whether, pursuant to ss. 87 and 87A of the *Native Title Act 1993* (Cwlth) (NTA), three consent determination recognising the existence of native title should be made. It was decided that the determinations should be made.

These are the first determinations recognising the existence of native title over a South Australian national park. They consolidate a co-management arrangement that has existed in the management of the national park for more than 10 years.

Background

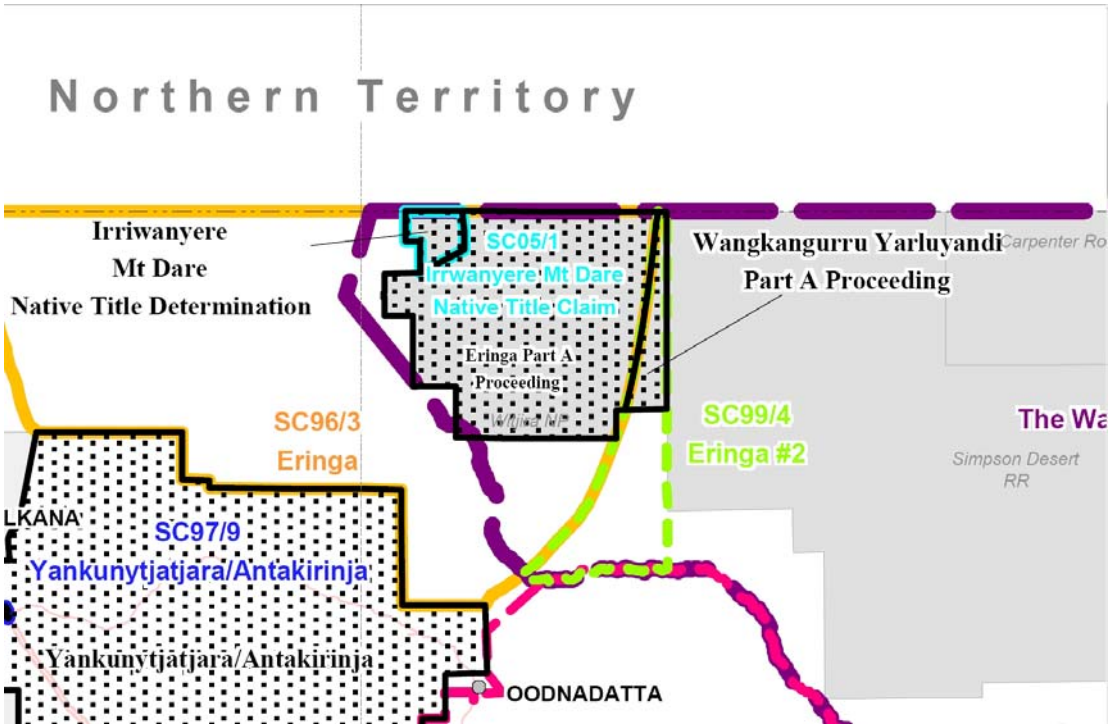
Four separate claimant applications were made over areas along the northern border of South Australia (referred to as the Wangkangurru/Yarluyandi (WY), Eringa, Eringa No. 2 and Irrwanyere Mt Dare applications, with WY also covering part of Queensland). Each claim area included part of the Witjira National Park (the national park) and each also overlapped with area covered by one or more of the other applications.

The national park was subject to a reservation for that purpose. It was vested in the Crown in right of the State of South Australia under the *National Parks and Wildlife Act 1972* (SA) (NPWA). Prior to the creation of the national park in 1985, the whole area was either held under various pastoral leases, pastoral permits, water reserves and miscellaneous leases or was vacant Crown land.

At the time of judgment, the national park was subject to two leases made pursuant to s. 35 of the NPWA. The first was a 99 year lease between the Minister for the Environment and Natural Resources (the minister)and Irrwanyere Aboriginal Corporation (the IAC) for (among others) the purposes of use and occupation by Aboriginal people having traditional association with the national park and the enhancement of their social and cultural aspirations. The IAC lease covered most of the national park. It was dated 5 October 1995 and was 'expressed not to have any extinguishing effect on the native title rights and interests of those Aboriginal peoples'—at [3].

The second lease, between the minister and Driveline Pty Ltd, dated 1 July 1989 (the Mount Dare homestead lease), was for the purpose of a tourist facility.

While the native title claim group for each application was different, the proposed native title holders for each of the proposed determinations were identical, i.e. those Lower Southern Arrernte and Wangkangurru people who have a traditional connection to the determination area as described in Schedule 2 of each proposed determination. The proposed determination areas covered the whole of the national park, the whole of the Irrwanyere Mt Dare application and part of the other two applications—see the map below.



The original WY, Eringa and Eringa No. 2 applications were filed between August 1997 and May 1998. In March 2002, the WY claim was referred to the National Native Title Tribunal (NNTT) for mediation, with the Eringa and Eringa No.2 claimants being entitled to participate.

The overlap between the three claims, primarily over the national park, was one of the issues dealt with in mediation. As the lease to the IAC covered most of that area, and IAC was comprised of members of each of the claim groups with a claim over the national park, it was agreed that the IAC would assume responsibility for each of the claims in the overlap area.

With the overlap issue resolved, the NNTT facilitated further negotiations with the state and the representative body for the area. As a result, it was agreed (among other things) that the Irrwanyere Mt Dare application should be made over the Mt Dare homestead lease, specifically for the purposes of attracting the application of s. 47A because the lease was, at that time, held by the Indigenous Land Corporation. (At the time of the making of the other three applications, it was held by Driveline Pty Ltd and so s. 47A did not apply.) Further, an indigenous land use agreement and a co-management agreement relating to the national park were executed in August 2007. The ILUA sets out how rights are exercised in the national park and acknowledges the separate co- management agreement (CMA) for the park between the State and the IAC.

Following the completion of the negotiations facilitated by the NNTT, the parties sought orders:

- to ensure that the overlapping portions of each of the claim areas were dealt with in the same proceeding, effectively splitting the determination area into three, non-overlapping proceedings, pursuant to s. 67;
- for a determination of native title under s. 87 in relation to the area covered by the Irrwanyere Mt Dare application and determinations over parts of the area covered by the other applications under s. 87A.

Should the determinations be made?

His Honour Justice Lander determined that:

- it was appropriate to make the order sought under s. 67;
- the requirements for orders making the proposed consent determinations were met and so the court was empowered to make them;
- it was appropriate for the court to do so in the light of the state's submissions and the attached summary of the evidence in support of the determinations (filed by the state on behalf of all of the principal parties)—at [14] and [16] to [19].

The court noted that:

- the Lower Southern Arrernte and Wangkangurru are two 'closely interrelated and interpenetrating yet distinct societies', with the link of the claimants to the area covered by the national park at sovereignty being 'evidenced by numerous ancestors of the contemporary claimants who were born at various places in the area during the late nineteenth century';
- the continued existence and vitality of the societies' traditional laws and customs was said to have traditionally been passed down through patrifilial association, which more recently evolved into a cognatic form, though with an emphasis in the Lower Southern Arrernte claimants on patrifilial association where that can be established;
- accordingly, the manner in which the claimants have gained rights and interests is systematic and traditional;
- that the two individual societies were 'united in their acknowledgment and observance of traditional laws and customs' was demonstrated by contemporary evidence of how that was achieved;
- for the Lower Southern Arrernte, this included evidence from claimants about an age-based hierarchy, the visiting and cleaning sacred sites, that children are taught about bush tucker in the national park, the gender and other restrictions placed on ritual and religious information and behaviour and the handing down of names, initiation ceremonies, particular kinship terms, songs and stories;
- for the Wangkangurru claimants, the evidence concerned a regional system of authority, an age-based hierarchy, belief in spiritual sanctions, the handing down of names and kinship terms, the passing down of knowledge, stories and the use of bush tucker—at [28] to [30].

As to connection, this Honour noted that this was maintained 'by the inheritance of rights from an ancestor', with other forms of physical connection existing:

> [T]hrough members visiting and cleaning sacred sites, teaching children about bush tucker in the Park, a claimant acting as a park ranger, and regular camping trips in the Park for the purpose of teaching dreaming stories to children. A number of claimants have also played an important role in the Park's land management—at [31].

It was also noted that the evidence showed:

- 'core' rights, including rights to claim country as one's own, acquire ownership and authority over knowledge and songs associated with the country, speak for country, be asked for permission to access country by 'non-owners' and make decisions about country;
- 'contingent' rights, including rights to access and occupy the country and to use the resources of the country—at [32].

Consent determination v contested determination

His Honour was careful to note that:

> The purpose of ss 87 and 87A of the Act is to facilitate and encourage the resolution of native title claims by agreement between the parties. Necessarily, the Court adopts a different approach to the task of deciding whether it is appropriate to enter a determination reached by agreement than it brings to the task of deciding whether native title should be recognised in a contested matter...Although there needs to be some foundation upon which the Court can exercise its jurisdiction, in matters in which the parties have reached agreement...the Court will have particular interest in whether the agreement has been freely entered into and on an informed basis...If that question is answered in the affirmative, the Court will consider the fact that an agreement has been reached as weighing in favour of the making of a determination of native title—at [33] referring to *Nangkiriny v Western Australia* (2002) 117 FCR 6; *Ward v Western Australia* [2006] FCA 1848; *Lovett v Victoria* [2007] FCA 474 and *James v Western Australia* [2002] FCA 1208.

Decision

Lander J was satisfied consider that it was appropriate to make orders sought in the terms proposed because:

- the evidence provided supported 'the claimed connection of the claimants to their country';
- the determination sought did not appear in any way to be unfair or unjust;
- all parties to the agreement were legally represented; and
- there was no suggestion that any party entered the agreement otherwise than by their own free will—at [34].

Determination – s.225

The court made three determinations recognising that native title exists in relation to each determination area. The native title rights and interests are held in each case by the Lower Southern Arrernte and Wangkangurru People as described in schedule 2 of each of the determinations and defined as people, which is primarily through patrifilial association. Section 47A applies to almost all of the determination area (i.e.

all but two small areas of the national park that have been 'fenced out' to the adjoining pastoral leases). The native title rights and interests are non-exclusive, with the exception of order 9(l) which is:

> The right to speak for and make decisions in relation to the Determination Area about the use and enjoyment of the Determination Area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the Native Title Holders.

The non-exclusive native title rights recognised are rights to:

- access and move about the area;
- live, camp and erect shelters;
- hunt, gather and use the natural resources of the area such as food, plants, timber, ochre and feathers;
- cook and light fires for cooking and camping purposes;
- use the natural water resources;
- distribute, trade or exchange the natural resources;
- conduct ceremonies and hold meetings;
- engage and participate in cultural activities on the area including those relating to births and deaths;
- teach on the area the physical and spiritual attributes of locations and sites within the area;
- visit, maintain and protect sites and places of cultural and religious significance to native title holders under their traditional laws and customs;
- be accompanied on the area by those people who, though not native title holders, are spouses or people required by traditional law and custom for the performance of ceremonies.

The native title rights are for personal, domestic or communal use and must be exercised in accordance with traditional laws and customs and state and Commonwealth laws, including the common law.

Other interests in relation to the determination area include:

- rights exercisable under the ILUA and CMA in accordance with their terms;
- interests created under the IAC Lease;
- interests of the Crown in right of South Australia;
- rights of the public to use and enjoy the area in accordance with the provisions of the NPWA and associated regulations (subject to the IAC Lease);
- rights to access land by an employee or agent or instrumentality of the state, Commonwealth or other statutory authority as required in the performance of statutory or common law duties;
- rights relating to those parts of the Park fenced into Macumba Station and Hamilton Station and habitually used by the pastoral lessees of those Stations.

These rights and interests co-exist with the native title rights and interests and prevail over them but do not extinguish them.

There are no native title rights in:

- minerals and petroleum as defined by the relevant South Australian legislation;
- areas covered by public works constructed, established or situated prior to 23 December 1996 or that commenced on or before that date.

Prescribed body corporate

Within six months of the date of the determination, the native title holders must nominate a prescribed body corporate for the purpose of s. 57(2) to perform the functions mentioned in s. 57(3).

Hayes on behalf of the Thalanyji People v Western Australia [2008] FCA 1487

North J, 18 September 2008

Issue

The issue before the Federal Court was whether to make a determination of native title pursuant to ss. 87 and 94A of the *Native Title Act 1993* (Cwlth) in terms of the proposed consent orders. The court decided that it was appropriate to make the determination in the proposed terms.

Background

The Thalanyji application was filed in 1999. The determination made recognises the existence of native title over an area of about 11,000 square kilometres in the West Pilbara region of Western Australia. Most of the area is pastoral land in the Shire of Ashburton. Some of it is in and around the Onslow town site and port area. The parties agreed to the terms of the determination in relation to most of the area covered by the application and to the dismissal of the application in respect of the balance of the area.

Five body corporate pastoral indigenous land use agreements (ILUAs) dealing with the practical co-existence issues between native title holders and pastoralists are scheduled to be executed after the determination. The National Native Title Tribunal has facilitated negotiations between the parties since May 2007.

Court's power under s. 87

His Honour Justice North noted that the court's power to make the orders sought under s. 87(1)(c) 'has been exercised in a variety of circumstances', from cases where judgment has been reserved following the hearing of all the evidence to cases where no evidence has been given—at [15] to [16], referring respectively to *Nangkiriny v Western Australia* (2002) 117 FCR 6 (*Nangkiriny*) and *Ward v Western Australia* [2006] FCA 1848 (*Ward*).

North J noted that, while the circumstances of each case must be considered, 'some principles are generally applicable' to the exercise of the power under s. 87, including that:

- section 87 focuses on agreement-making, which 'reflects the importance placed' by the NTA 'on mediation as the primary means of resolving native title applications';
- the court's power under s. 87 'must be exercised flexibly and with regard to the purpose for which the section is designed';
- in examining the appropriateness of an agreement under s. 87, the 'primary consideration...is whether there is an agreement and whether it was freely entered into on an informed basis';
- the court will take note of the fact that the parties have had independent and competent legal representation;
- in particular, the court needs to be satisfied at least that the State, through competent legal representation, 'is satisfied as to the cogency of the evidence upon which the applicants rely';
- the court may ask to be shown the evidence upon which the parties have based their decision to agree but only for the purpose of satisfying itself that those parties, particularly the State on behalf of the community generally, 'are acting in good faith and rationally'—at [18] to [20], referring to *Lovett v Victoria, Munn v Queensland* (2001) 115 FCR 109; [2001] FCA 1229, *Nangkiriny* and *Ward*.

Role of the State

North J expressed the view that:

> The way in which native title jurisprudence has developed provides a significant contextual factor which should influence a State respondent in specifying the extent to which applications should be investigated...In broad terms the learning relating to extinguishment has shown that successful applications will not interfere significantly with the rights and interests of respondent parties...
>
> This circumstance moderates the degree of verification required by a State respondent acting in the interests of citizens on questions such as the constitution of the relevant society at settlement, and the requirements of continuity in the acknowledgement of traditional laws and the observation of traditional customs...Section 87 is designed to avoid that necessity and all the disadvantages which are involved in the conduct of litigation—at [22] to [23].

While commending the State of Western Australia's approach in this case, North J emphasised that:

> [T]he Court is not in a position to know whether or not the connection material required to be provided by the applicants was excessive. There have been instances in other cases where excessive demands for information seem to have been made...[T]hat approach is inconsistent with the concept of agreement making provided by the Act—at [30].

Appropriate to make orders?

In this case:

- preservation evidence given by five senior, mostly elderly, Thalanyji people in September 2004 provided a 'firm foundation' for findings, had they been necessary, that there 'was and is a rich and enduring history of Thalanyji life in the area' and provided a strong basis for negotiating an agreement;
- the process adopted by the state was comprehensive and the Executive Director of the Office of Native Title swore an affidavit in support of the application setting out the process undertaken;
- all of the parties were represented by independent, competent lawyers;
- the preservation evidence allowed the court to hear the voice of the Thalanyji people directly and that evidence 'went a considerable way to establishing' the requirements for a determination of native title—at [24] to [26] and [31].

Adaptation and change

One 'important issue' was the significance of change in the traditional laws acknowledged and traditional customs observed by applicants. 'The history of the impact of white settlement on indigenous peoples means that change is an almost invariable feature of these cases'—at [28].

His Honour noted that:

- the state's acceptance in this case that any changes or adaptation to the Thalanyji laws and customs concerning land holding were acceptable demonstrated 'a liberal, flexible, fair and just application of the [relevant] principles';
- this approach was 'particularly appropriate' to the process envisaged by s. 87—at [30].

Decision

For the reasons summarised above, the court was satisfied it was appropriate to make the orders sought:

> For the Australian people generally today marks another step towards land justice for indigenous people. Each of these steps brings us nearer to a proper moral foundation of the nation. The orders reflecting the recognition of the ancient rights of the Thalanyji people will now be made in the terms agreed—at [45].

The court congratulated the parties for 'their efforts over a long period in arriving at this agreement' and noted that:

- no doubt, 'the work of...Tribunal...members Dan O'Dea and John Catlin who oversaw the mediation', was 'central to the positive outcome';
- Mr Bower, counsel for the applicants, described 'the great assistance given by the Tribunal to resolving the key problems of overlaps with other application areas'—at [32].

Prescribed body corporate

The Buurabalayji Thalanyji Aboriginal Corporation was determined to hold the determined native title in trust for the native title holders pursuant to section 56(2) of the NTA—at [34] to [42].

Determination

It was determined that:

- native title existed in relation to about 11,000 square kilometres;
- native title did not exist in relation to about 123 square kilometres; and
- the remainder of the application, covering about 7,310 square kilometres, should be dismissed.

The common law holders of native title are the Thalanyji people, being people who:

- are descended from certain named ancestors or adopted by their biological descendants in accordance with traditional law and custom;
- identify themselves as Thalanyji under traditional law and custom and are so identified by other native title holders; and
- have a connection with the land and waters in the determination area in accordance with Thalanyji traditional law and custom.

The native title rights and interests recognised over the part of the part of determination area where native title exists are non-exclusive rights to:

- enter and remain, camp, erect temporary shelters, travel over and visit the area;
- hunt, fish, gather and use the traditional resources of the area, with 'resources' defined to mean 'flora, fauna, and other natural resources such as charcoal, stone, soil, wood and resin but does not include P. Maxima [a species of pearl oyster]';
- take and use water, except any water captured by the pastoral lessees;
- engage in ritual and ceremony; and
- care for, maintain and protect from physical harm particular sites, areas and ceremonial or other sacred objects of significance.

Native title was determined not to exist in relation to a number of areas, including areas subject to various leases, the Onslow Port Area, areas subject to pastoral leases that had been improved in accordance with the terms of the lease, certain roads and public works, all freehold lands and areas in relation to the Dampier to Bunbury natural gas pipeline.

Other rights and interests in recognised in the determination area include those associated with:

- reserve lands;
- pastoral leases;
- various mining tenements and petroleum interests;
- public rights, including but not limited to public rights to fish and navigate
- access by an employee, agent or instrumentality of the state, Commonwealth or local government authority, as required in the performance of their duty, where such access would be permitted to private land.

Liberty to apply – pastoral improvements

The parties were granted liberty to apply:

- to establish the precise location of the boundaries of land on which the pastoral lease improvements had been constructed and any adjacent land or waters the exclusive use of which is necessary for the enjoyment of the improvements; and
- to establish whether any of the pastoral lease improvements had been constructed unlawfully.