

Stay of order to dismiss application pending appeal

Wiri People # 2 v Queensland [2006] FCA 1069

Greenwood J, 15 August 2006

Issue

The issue before the Federal Court was whether to stay orders of Justice Dowsett made on 6 October 2005 and 19 June 2006 pending the determination of an appeal to the Full Court of the Federal Court.

Background

On 19 June, Dowsett J made the following orders:

- a self-executing order made on 6 October 2005 had taken effect and Wiri People #2 claimant application stood dismissed;
- leave to appeal the self-executing order of 6 October 2005 was refused;
- an extension of time for compliance with the order made on 6 October 2005 was refused;
- leave to appeal from the third order was granted—see *Wiri People #2 v Queensland* [2006] FCA 804, summarised in *Native Title Hot Spots Issue 21*.

The applicant sought stay of the first and third orders pending an appeal to the Full Court of the Federal Court.

The operative order

The applicant contended that the operative order was the order of 19 June 2006, rather than the orders of 6 October 2005. Justice Greenwood held that:

- the order of 6 October 2005 was the source of the dismissal of the application; and
- therefore, the order made on 19 June 2006 was declaratory of the construction of the order of 6 October 2005 and not, therefore, an operative order—at [24].

The application for stay

His Honour:

- held that, since the first of the 19 June 2006 orders was not an operative order effecting a dismissal, he would not stay the operation of the declaration;
- refused to stay the third order made on 19 June 2006 because the refusal of an extension of time for compliance was the subject of leave to appeal;
- held that, if that appeal was meritorious, the court had the power to set aside the third order and extend time to enable an amended application to be filed, thus reinstating the application;
- considered that an application to stay a refusal to extend time was apt to be construed as an order extending time;

- stayed the first order from 6 October 2006 pending the determination of the appeal to the extent that the order of 6 October 2005 provided prospectively that the application stands dismissed;
- made the stay conditional upon an undertaking by the applicant to (among other things) expeditiously prosecute the appeal—at [26] to [27].