

Amendment of claimant application – appeal against dismissal

Wiri People # 2 v Queensland [2006] FCAFC 158

Stone, Allsop and Greenwood JJ, 10 November 2006

Issue

The issue before the Full Court of the Federal Court was whether to allow an appeal against a decision refusing leave to appeal from a ‘self-executing’ order dismissing a claimant application and for refusing an extension of time to comply with the order to file and serve an amended application. The appeal was allowed.

Background

- On 6 October 2005, Justice Dowsett ordered that the applicant for Wiri People #2 file and serve an amended application on or before 14 October 2005 and, in default thereof, the application would stand dismissed. On 19 June 2006 in *Wiri People #2 v Queensland* [2006] FCA 804 (as summarised in *Native Title Hot Spots Issue 21*), his Honour refused leave to appeal from the ‘self executing’ order and refused an extension of time to comply with that order. The applicant successfully sought a stay of the orders pending appeal: see *Wiri People # 2 v Queensland* [2006] FCA 1069, summarised in *Native Title Hot Spots Issue 21*

Factual inaccuracies

The Full Court held that Dowsett J made an error of fact of sufficient importance to permit the court to re-exercise the discretion by giving weight to matters containing factual inaccuracies—at [18].

The relevant paragraph of his Honour’s reasons was:

There is no requirement in the [*Native Title Act 1993* (Cwlth)] ... for grid co-ordinates. The matters which were of primary concern at the time that the order was made concerned constitution of the claim group and authorisation of the claim. Those difficulties would have been resolved by compliance with the order, notwithstanding that it may have been necessary further to amend the application to insert appropriate grid references if the applicants wished to proceed to registration in the Tribunal.

Compliance attempted

Justices Stone, Allsop and Greenwood held that:

- compliance was attempted, in that an affidavit was filed with a draft amended application annexed to the affidavit
- had the amendment been filed, there would have been compliance with the order even though, as an amended application, it might not have been such as to be able to proceed successfully to determination—at [17].

Decision

The appeal was allowed and the order of Dowsett J of 19 June 2006 refusing an extension of time for compliance with the self-executing order was set aside, with the court being of the view that, given the form of the order, the nearly successful attempt at compliance, the fact that the appellants had in court an updated, signed amended application and the undesirability of seeing rights of the appellants lost, time should be extended to allow an amended application to be filed—at [19].