

Injunction sought to prevent removal from claims register

Harrington-Smith v Native Title Registrar [2007] FCA 414

Lindgren J, 12 March 2007

Issue

This case is about two applications seeking orders to restrain the Native Title Registrar from removing or (in one case) amending the entry on the Register of Native Title Claims relating to claimant applications that had been dismissed by the Federal Court until any appeal proceedings had been heard and determined. The main issue was the meaning of the word ‘dismissed’ in the context of s. 190(4)(d) of the *Native Title Act 1993* (Cwlth) (NTA).

Background

Justice Lindgren had (among other things) dismissed three claimant applications: Wongatha and Cosmo Newberry in their entirety and, in so far as the area it covered overlapped the area covered by the Wongatha claim area, Wutha: see *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31, summarised *Native Title Hot Spots Issue 24*.

Paragraph 189A(b) of the NTA provides that the Registrar of the Federal Court must, ‘as soon as practicable’, notify the Native Title Registrar (the Registrar) of the details of any decision or determination of the court that covers a claim. Subsections 190(4)(d) and (e) relevantly provide that, if notice is received pursuant to 189A(b), the Registrar must, as soon as practicable:

- if the application in question has been dismissed or otherwise finalised—remove the entry on the Register of Native Title Claims (the Register) that relates to the claim; or
- in any other case—amend the entry on the Register that relates to the claim so that it only relates to the matters in relation to which the application has not been finalised.

On an oral application by Wongatha’s counsel when judgment was delivered on 5 February 2007, Lindgren J ordered that notice under s. 189A(b) should be delayed for 14 days. This was because the reasons for decision were lengthy and his Honour thought it might be arguable that the expression ‘as soon as practicable’ permitted a fortnight’s delay. A subsequent request to extend that order was declined on the basis that, ‘whatever the position may have been immediately upon delivery of judgment ... , by 19 February 2007 it could no longer be said that it was not practicable’ for notice pursuant to 189A(b) to be given—at [5] to [6].

On 23 February 2007, after receipt of notice given in accordance with s. 189A(b), the Registrar advised the relevant parties that, by 4:00 pm on 28 February 2007, the

entries in relation to Wongatha and Cosmo claims would be removed from the Register and any entry in relation to Wutha would be amended in accordance with ss. 190(4)(d) and (e).

On 27 and 28 February 2007, applications were made to the court seeking orders restraining the Registrar from doing as he proposed. The 'final' relief claimed in each proceeding was an injunction directed to preserving the status quo until any appeal against the orders of 5 February 2007 was heard and determined. Separate 'interlocutory' relief was also apparently sought until the applications for final relief were determined—at [10].

At the hearing on 28 February 2007, Lindgren J noted that:

- if the word 'dismissed' in s. 190(4)(d) was satisfied by the orders of 5 February 2007, the court would have no power to order the Registrar to refrain from doing what was proposed;
- on the other hand, if the applicants' argument was correct, the statutory provisions would not oblige the Registrar to do what was proposed and any removal or amendment would be unlawful—at [11].

His Honour ordered the Registrar not to remove or amend the relevant entries on the Register until 13 March 2007 or further order of the court to allow all parties time to file and serve submissions on this point.

The submission made on behalf of the native title parties was that the word 'dismissed' in s. 190(4)(d) did not bear its literal meaning. Lindgren J disagreed because: "I think it clear beyond reasonable argument that the word 'dismissed' is satisfied by a dismissal at first instance following a trial"—at [14].

Lindgren J gave three reasons. The first was that ss. 189A and 190(4) are concerned with 'applications'. Section 61 provides for the applications that may be made under Div 1 of Pt 3 of the NTA. One of those is a 'native title determination application', which may be either a claimant or a non-claimant application. The orders of 5 February 2007 were made in respect of claimant applications. An appeal is not, and is not an aspect of, a claimant application—at [15].

The second was that Part 7 of the NTA reflects an intention that the Register, which is a public register available for inspection, be kept up to date. The frequent use of the expression 'as soon as practicable' in many of the relevant provisions emphasised that intention. If a claimant application remained on the Register after it had been dismissed by the court, then that legislative intention would be frustrated—at [16] to [18], referring to ss. 63, 64(3) and (4), 66, 66A, 66B(3) and (4), 186(1)(g) and 187.

The third was that, until a claimant application was heard and determined, it was not known whether the claimants did, or did not, have native title in relation to the area claimed. Therefore:

The Register represents a compromise between conflicting interests pending the hearing and determination of a claim. That compromise is that the Registrar is

required to enter particulars of a claim [made in a claimant application] where [the Registrar] ... is satisfied of certain matters on a prima facie basis. Registration gives rise to certain benefits to [registered native title] claimants Once there has been a dismissal, the reason for the compromise has disappeared, and one would expect the prima facie position to be supplanted—at [19].

Decision

The proceedings were dismissed—at [20].

Postscript

As a result of this decision, on 13 March 2007 the Registrar removed the details of the Wongatha and the Cosmo Newberry claims from the Register and amended the entry in relation to the Wutha claim in so far as it related to the area also covered by the Wongatha claim.