

Dismissal of claim made in response to future act notice – s. 94C

***Webb v Western Australia* [2007] FCA 1342**

French J, 28 August 2007

Issue

The issue in this case was whether the Federal Court should dismiss a native title determination application pursuant to s. 94C of the *Native Title Act 1993* (Cwlth) (the NTA) as a consequence of receiving a report pursuant to s. 66C of the NTA from Native Title Registrar (the Registrar).

Background

Under the *Native Title Amendment Act 2007* (Cwlth) (the 2007 amendments), s. 94C was inserted into the NTA. That section requires the dismissal of claimant applications made in response to future act notices if certain conditions are met. Section 66C, also inserted by the 2007 amendments, provides that the Native Title Registrar may advise the Registrar of the court of any applications that meet the criteria established by s. 94C for dismissal. On 29 June 2007, the Registrar provided a report pursuant to s. 66C which was ‘basic and tabular in form’ – at [5].

Purpose of ss. 94C and 66C

According to the court:

[T]he purpose of s 94C is to provide for summary dismissal of native title determination applications that have been filed to secure procedural rights with respect to future acts covered by the right to negotiate provisions of ... the NT Act. The mechanism for summary dismissal is enlivened when ... the procedural rights are effectively exhausted and the native title determination application is not being pursued to a mediated or litigated determination. This broad characterisation of the effect of the provisions is subject to their precise language. The report of the Native Title Registrar ... is a statutory means for drawing to the attention of the Court applications which may meet the conditions for dismissal under s 94C— at [8].

Justice French noted that:

- the occasion for considering dismissal of native title determination applications under s. 94C arose upon the establishment of the facts set out in that section and the court must decide for itself that the facts existed;
- importantly, the court is not required to proceed to consider mandatory dismissal of a native title determination application, even where the facts set out in the Registrar’s report are undisputed or otherwise made out;
- paragraph 94C(1)(e) contemplates requiring an applicant to produce evidence in support of the application or to take steps to have the claim resolved or to consider whether the applicant has failed, within a reasonable time, to take steps to have the claim resolved;

- any such judgment would require an assessment of whether the applicant had engaged with the mediation process for which the NTA provides or had prepared or complied with directions for steps to be taken with a view to the trial of the action;
- the court does not proceed to consider dismissal until there has been a failure to comply with its direction under s. 94C(1)(e)(i) or there has been a failure to take steps within a reasonable time to have the claim resolved—at [10] to [11].

French J concluded that:

[B]efore it gets to the point of considering mandatory dismissal the Court has a degree of leeway ... to move the applicants forward. The mandatory dismissal power, in effect, provides a tool or sanction to be used by the Court to dispose of applications lodged to get procedural rights and not otherwise being pursued—at [12].

Decision in this case

In his Honour's view, it was plain that the application in question was not filed simply to acquire procedural rights because:

- it covered a much greater area than that affected by the relevant future act notices;
- the applicants were working with the National Native Title Tribunal in the mediation process;
- the application took its place in a regional timetable of claims, having regard to available resources and regional priorities—at [13].

Therefore:

- this was not a case where the applicants had failed, within a reasonable time, to take steps to have the claims in the application resolved; and
- no direction pursuant to s 94C(1)(e) was necessary in the circumstances—at [13].

French J simply noted the Registrar's advice and indicated that this was the procedure he proposed to follow in future when such advices were provided and the occasion for consideration of mandatory dismissal did not arise—at [14].