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

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].