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

Collard v Western Australia [2008] FCA 1562

Gilmour J, 13 October 2008

Issue

The issue in this case was whether the Federal Court should, of its own motion, dismiss five unregistered claimant applications pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA). The court dismissed all five applications. As the reasons for dismissal are the same in all five cases, please refer also to *Collard v Western Australia* [2008] FCA 1563, *Collard v Western Australia* [2008] FCA 1564, *Collard v Western Australia* [2008] FCA 1565, *Collard v Western Australia* [2008] FCA 1566.

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 five polygon applications before the court, referred to as the Collard applications, were lodged over areas in the Southwest of Western Australia on behalf the Noongar People. All five failed the registration test.

The court directed the parties to file and serve submissions to show cause why the Collard applications should not be dismissed pursuant to s. 190F(6) of the NTA. It was accepted that, once the applicant in each case conceded there would be no amendments made in the near future, the question for the court was whether or not, in the court's opinion, there was any other reason why each of the applications should not be dismissed—at [9].

Applicants' submissions

It was not submitted, and there was no evidence to suggest that, since failing the registration test, the applicant for any of the five applications had either applied for a reconsideration by the National Native Title Tribunal pursuant to s. 190E(1) or made an application to the court pursuant to s. 190F(1) for review of the registration test decisions.

In the court's view, the effect of the applicant's submission in each case was that the relevant application should not be dismissed for (among others) the following reasons:

- each application was likely to be withdrawn (i.e. resolved) in the future once negotiations with the representative body to obtain acknowledgment of the status of those comprising the applicant as Noongar elders were completed;
- the applicant had been unable to obtain legal representation to assist in amending each application;
- there are sites of strong cultural significance in the areas covered by each application—see [6] to [11].

The applicant conceded that it was unlikely that any of the applications would be amended in the near future and that negotiations with the representative body were currently in abeyance.

Decision

His Honour Justice Gilmour held that all five applications should be dismissed because:

> None of these matters [i.e. those raised in the applicants' submissions] are of a kind which...might demonstrate another reason, in the circumstances where the criteria under s 190F(6)(a)...have been satisfied, why the application should not be dismissed—at [11].