

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

## *Evans on behalf of the Koara People v Western Australia* [2008] FCA 1557

Gilmour J 13, October 2008

### Issue

The issue in this case was whether the Federal Court should, of its own motion, dismiss an unregistered claimant application pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA). It was decided that the application should be dismissed.

### 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 Koara People lodged an amended application over part of the Goldfields in Western Australia. In January 2008, a delegate of the Native Title Registrar decided pursuant to s. 190A that the claim made in the application must not be registered because, relevantly, it did not meet all of the conditions of s. 190B. Subsequent to the delegate's decision, the applicant did not apply for review of the delegate's decision pursuant to s. 190F(1). Note that reconsideration by the National Native Title Tribunal under s. 190E(1) was not available in this case because that provision only applies to applications made, or amended, after 31 August 2008—see items 107 and 123 the *Native Title (Technical Amendments) Act 2007* (Cwlth).

The court, of its own motion, 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, advised the court that it had specific instructions not to make any submissions to the court.

### **Decision**

The application was dismissed because his Honour Justice Gilmour held that:

- there was no evidence, and there were no submissions, that the application was likely to be amended, ‘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 was any other reason why the application should not be dismissed—at [6] to [7] and [9].