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

## *George on behalf of the Gurambilbarra People v Queensland* [2008] FCA 1518

**Logan J, 10 October 2008**

**Issue**

The issue in this case was whether the Federal Court should, of its own motion, dismiss the Gurambilbarra People's unregistered 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 application should not be dismissed. This was the first case in which the court gave reasons for judgment that set out the proper approach to the exercise of the power found in s. 190F(6). It was decided the application should be dismissed.

**Background**

The Gurambilbarra People's application was made in April 2005 and amended in December 2005. In April 2006, a delegate of the Native Title Registrar decided the claim made in the amended application must not be accepted for registration. The application was further amended in January 2008. In April 2008, the Registrar's delegate decided that the further amended application did not meet all of the merit conditions found in s. 190B and so the application must not be registered. The applicant did not subsequently apply for a reconsideration of the delegate's decision by the Tribunal pursuant to s. 190E(1). Nor was application made to the court for review of the delegate's decision pursuant to s. 190F(1). In May 2008 the court, of its own motion, called on the applicant to show cause at the next directions hearing why the application should not be dismissed pursuant to s. 190F(6) of the NTA.

**New power to dismiss**

His Honour Justice Logan set out ss. 190F(5) and 190F(6) of the NTA, both of which were inserted when the *Native Title (Technical Amendments) Act 2007* (Cwlth) (*Technical Amendments Act*) commenced.

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 court was of the view, and applicant did not contest, that the 'conditions precedent to the engagement' of s. 190F(6) (i.e. s. 190F(5)) were fulfilled in this case—at [6] and [7].

**Section 190F(6) as a screening mechanism**

The court noted (among other things) that:

- registration is 'a significant step' because it is 'a condition precedent to the enjoyment of a wide variety of rights by the applicant';
- if the Registrar is required to apply the test to the application, then, subject to s. 190A(6A), the Registrar must not accept the claim made in the application for registration unless it meets all of the conditions found in ss. 190B and 190C;
- in this case, the delegate found that the application did not meet all of the conditions of s. 190B(5) and was, therefore, obliged not to register the claim—see [9] to [16].

Later, Logan J commented that:

> [T]he registration test found in Pt 7 is "not a screening mechanism for *access* to the Federal Court" (my emphasis)...However, the presence now of s 190F(6)...and the particular occasion for its engagement provided by s 190F(5) does indicate that satisfaction of the registration test has ramifications for whether an application should be allowed to *remain* on the Court's list. Further, given that the Act confers the choice of a full right of review by the Court of the registration refusal decision and vests in the Court a discretion as to whether the application should be dismissed, that the registration decision is initially made by an administrative official is not indicative of an impermissible interference by the Executive with the exercise of the judicial power of the Commonwealth. It is s 190F(6) which provides the "screening mechanism"—at [50].

**Need for show cause proceeding**

The State of Queensland did not move for dismissal but did submit it was open for the court to do so of its own motion. It was noted that, while it was 'relevant' that the state had not moved to strike out the application under s. 190F(6), it was not necessary for it to do so because:

> The Court is empowered under this sub-section to dismiss an application of its own motion. That may perhaps evidence a recognition by the Parliament that, even where the claim made in an application has proved incapable of furnishing, even at the registration stage, a factual basis for the assertions mentioned in s 190B, a respondent body politic may be unable or unwilling to seek dismissal of that application. If so, that recognition is unarticulated in secondary materials.

> It does not do to speculate further on the Parliament's motivation for conferring such a power on the Court. The fact is that the power exists and its exercise is necessarily attended with a procedural fairness obligation; hence a need for a show cause proceeding—at [66] to [67].

**Relevance of the decision that s. 190B not met**

After noting that the court was not undertaking a judicial review of the delegate's decision, Logan J extracted what appeared to be 'particular key passages' from the delegate's reasons in relation to s. 190B(5). His Honour noted in particular the delegate's references to the relevant authorities—at [23] to [31].

According to his Honour:

> An understanding of the basis upon which either before the Registrar or on later review it was considered that the conditions in s 190B...were not met is relevant to the making of a prediction of the fate on reconsideration of an amended application but otherwise the inability of the application to meet those conditions is a given—at [52].

**Section 84C jurisprudence not relevant**

The applicant submitted that the jurisprudence in relation strike-out of an application under s. 84C was relevant to the application of s. 190F(6), i.e. the 'reticence which customarily attends the summary dismissal' of a proceeding should be shown when considering dismissal under s. 190F(6)—at [35].

The question was formulated by Logan J as:

> [W]hether s 190F(6), like s 84C, merely highlights a particular basis for summary dismissal leaving the general law on that subject applicable or whether it, too, should be regarded as providing a unique power of dismissal which "is to be construed and applied according to its terms, not under the influence of 'muffled echoes of old arguments' concerning other legislation"—at [37], referring to *Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404, at 414.

In the court's view, s. 190F(6) 'on its face' provides a 'wholly self-contained power of dismissal' because, if the conditions precedent in s. 190F(5) are fulfilled, s. 190F(6) is engaged, with the relevant considerations being paragraphs (a) and (b) of that provision—at [39].

In Logan J's view:

> That Parliament has provided a particular basis in s 190F(5)...upon which the power to dismiss in s 190F(6) is enlivened and that, within s 190F(6), para (a) itself provides for an evaluative and predictive judgment for the Court to make in relation to an application indicates that the question of whether an application ought to be dismissed is not to be approached by reference to an a priori assumption that the jurisprudence which attends, for example, dismissal of an application under s 84C of the Act is relevant...I reject the submission that...the jurisprudence in relation to s 84C is relevant by analogy to the question of whether or not to dismiss an application under s 190F(6)—at [52].

**Approach to s. 190F(6)(a) – predictive assessment required**

His Honour held that:

- the 'immediate end' to which s. 190F(6)(a) is directed is whether there is any feature of the application which has changed, or is 'likely' to change, in the future 'which would lead to a different registration decision by the Registrar';
- the court must form the requisite opinion on this point before the power to dismiss could be exercised;
- the meaning of 'likely' in the context of s. 190F(6)(a) was 'elusive' and neither the relevant authorities nor the secondary materials relating to the Technical Amendments Act were of much assistance;
- the fact that dismissal 'without a hearing on the merits' may be a consequence of the application of s. 190F(6)(a) was 'one reason' not to construe the word 'likely' as meaning 'more likely than not';
- another was that 'is not likely to be amended in a way that would lead to a different outcome once considered by the Registrar' in s. 190F(6)(a) 'unusually' requires the court to make 'a predictive assessment' of both the prospect of the application being amended and the outcome of fresh consideration of the amended application by the Registrar;
- construing 'likely' to mean 'more probable than not' could lead to embarrassment of the court making the prediction, of the Registrar (when making that fresh registration decision) and in any reconsideration or review proceedings;
- for these (and other) reasons, construing 'likely' to mean 'what would reasonably be regarded as a real chance irrespective of whether that chance is greater than 50 per cent, as opposed to nothing more than a mere possibility' seemed an appropriate approach—at [40], [43] to [49] and [51] .

However, in this case, the court did not need to reach a final conclusion as to the meaning of the word 'likely' in s. 190F(6)(a) because 'the evidence in relation to the prospect of amendment of the application did not rise beyond the level of a mere possibility'—at [53].

**Approach to s. 190F(6)(b) – 'other reason' for not dismissing**

As to s. 190F(6)(b), Logan J noted that:

- paragraph 190F(6)(b) seemed to have been 'added out of an abundance of caution as something of a "fail safe" so as to enable justice to be done in the circumstances of a particular case';
- however, that did not mean it constituted 'an invitation to preserve an application on the basis of whimsy or sympathy';
- the 'other reason' must be 'something other than the prospect that the amendment of the application will occasion a different outcome' on the s. 190B conditions when the amended application is considered by the Registrar;
- the opinion based on that 'other reason' provides a basis for preserving an application even though it was not accepted for registration because s. 190B was not met, review remedies are exhausted, there has been no amendment of the application and the court could not be satisfied that amendment of the application would bring about no different outcome;

- while 'one might think that, the circumstances warranting the formation of that opinion would be very singular indeed', it was neither necessary nor appropriate to 'delineate in advance what those circumstances might be' since they would be case specific—at [41] to [42].

**Full Court in *Gudjala People* #2**

The applicant submitted that, subsequent to the delegate's decision, there had been a 'softening' in the approach to s. 190B(5) in the decision made by the Full Court in *Gudjala People #2 FC* but did not develop the point. Logan J considered the guidance offered by the court at [90] to [92] on the relationship between ss. 62 and 190A and the ramifications of that relationship for the application of the requirements of s. 190B(5).

In making the evaluation under s. 190F(6)(a) of the prospect of a different outcome following amendment, it was 'necessary' to be informed by what was said in *Gudjala People # 2 FC*. However, Logan J noted that it was not clear that the delegate's conclusions in relation to s. 190B(5) in this case were 'wholly attributable' to Dowsett J's decision at first instance. Therefore:

> In the absence of a more developed and particularised submission as to the ways in which, having regard to her reasons, his Honour's reasons for judgment [at first instance] in the *Gudjala People # 2* case impacted upon the Delegate's reasons and how the outcome may have differed in light of the observations of the Full Court further consideration of this subject is not, in my opinion, warranted—at [64].

However, it was noted that later judicial authority disclosing that the Registrar's approach to s. 190B was 'overly rigorous' may provide an 'other reason' for the purposes of s. 190F(6)(b)— at [63].

**Evidence in this case**

The evidence and submissions filed on the applicant's behalf by the North Queensland Native Title Representative Body Aboriginal Corporation (NQLC) stated that:

- a consultant anthropologist was engaged in April 2008 to review material relevant to a number of claims previously the responsibility of the Central Queensland Land Council Aboriginal Corporation and for which NQLC now had responsibility, including the one before the court;
- the consultant had recommended a detailed review of existing material for this claim before a 'connection' research program was established but this was dependent on a number of things, including additional funding and the availability of consultant anthropologists;
- while the applicant has not ruled out further amending the application, it would consider it its position once further anthropological research had been undertaken;
- the leadership provided by those authorised as the applicant for the claim to the native title claim group in activities like the negotiation of an indigenous land use

agreement was not possible prior to the filing of the application and 'that progress would be lost were the application to be struck out'.

**Findings in this case**

Logan J held:

- there must be some evidence before the court which provides a reasonable foundation for the predictive value judgment called for in s. 190F(6)(a);
- evidence as to the prospect of amendment in this case 'did not rise beyond the level of a mere possibility', i.e. it raised a possibility that at 'some uncertain time in the future, further evidence might possibly be obtained which might, in turn, possibly generate an amendment of an unidentified kind of the application in its present form';
- this was 'a long way short of what is needed, even taking a benign view of the meaning to be given to the word "likely"';
- it was 'quite impossible on the evidence to reach any predictive conclusion at all' as to whether amendment would lead to a different result;
- it was 'inherently likely that...a long lead time might attend the obtaining of anthropological evidence';
- while it could be inferred that those authorised to be the applicant had 'gained recognition as leaders which facilitated other beneficial endeavours', it was 'not at all clear...why their qualities of leadership would be lost' if the application was dismissed;
- in any case, 'collateral advantages only at best tangentially related to the presence' of a claimant application on the court's list did not 'provide a reason not to dismiss this application';
- evidence gathered to date would not be 'destroyed by the dismissal of the application' and dismissal under s. 190F(6) would not result 'in a determination on the merits of the application' or prevent the bringing of a further application 'if that is the course advised'—at [53], [56] to [57], [64] and [71] to [72].

**Decision**

Logan J dismissed the application because he was satisfied that:

- it has not been amended since it was considered by the delegate;
- that it was not likely to be amended in a way that would lead to a different outcome once considered by the Registrar;
- there was no other reason why the application should not be dismissed—at [73] to [74].