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

Martin v Western Australia [2008] FCA 1677

McKerracher J, 12 November 2008

Issue

The issue before the court was whether it should dismiss the Widi Mob's claimant application pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (the NTA). The application was not dismissed because, in the circumstances of this case, the court could not conclude that there was no other reason why the application should not 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 Widi Mob's application was lodged with the National Native Title Tribunal in August 1997. It was amended on four occasions between February 1999 and January 2000. It was assessed by a delegate of the Native Title Registrar and found not to meet the conditions for registration under s. 190A of the NTA in May 1999 and again in July 2000.

Widi Mob's last amended application was made after 30 September 1998 and before 15 April 2007 and was not on the Register of Native Title Claims when the *Native Title Amendment Act 2007* (Cwlth) commenced. Therefore, the Registrar was required to reconsider the application for registration. On 24 August 2007, the Registrar's delegate decided that the application should not be accepted for registration because it did not satisfy ss. 190C(2), 190C(4), 190B(5) and 190B(6). Since the applicant was notified of the Registrar's decision, no application seeking leave to amend the Widi

Mob application had been filed and no application to the Tribunal for a reconsideration pursuant to s. 190E(1) had been made (although it seems in this case that section did not apply – see items 107 and 123 the *Native Title (Technical Amendments) Act 2007* (Cwlth)). Nor was application made to the court for review of the decision pursuant to s. 190F(1).

By the time of the court's decision, the sole applicant had passed away.

Applicant's submissions

In December 2007, the applicant informed the court they were proposing to amend the application to address the problem of authorisation early in 2008. Those amendments did not occur. On 30 June 2008, it was submitted that the application should not be dismissed because s. 190F(6) required the court to take into account issues of 'fairness and opportunity', including (among other things) that:

- the applicant had had no significant legal assistance until November 2006;
- the applicant had been homeless for about 10 years, making record keeping and getting instructions difficult;
- negotiations to engage an anthropologist to assist in preparing amendments to the application had started and so the matter should be adjourned to December when a better assessment of the merits may be possible; and
- alternatively, the resolution of the issues raised by s. 190F(6) should not be undertaken without a full examination of the evidence and an opportunity to call witnesses and cross examine them.

Yamatji's submissions

The representative body for the area, Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (Yamatji), submitted that:

- the Widi Mob application overlapped the registered Badimia claimant application and the Badimia were a respondent party to the Widi claim but extensive discussions over a number of years had failed to resolve the overlap issue;
- if the State of Western Australia accepted the Badimia's connection material, negotiations towards a consent determination could be held up by the overlap;
- because the Widi Mob's claim was unregistered, no prejudice would be suffered if it was struck out and there was nothing to prevent the Widi Mob from filing a properly constituted claim in the future;
- Yamatji was not aware of any other reason why the claim should not be dismissed;
- Yamatji was involved in discussions with the state regarding a proposed alternative settlement under s. 86F to resolve native title claims in the Southern Yamatji region and the Widi mob application was one of five applications that overlapped parts of the alternative settlement area;
- three of those applications, including Widi Mob, were presently before the court in relation to ss. 190F(5) and (6);
- the state was committed to negotiating an alternative settlement, provided it was inclusive of all traditional Indigenous interests in the area, the state was satisfied

that it is dealing with the 'right people' and there was a single agreement with a single entity to sign it;
- given these conditions, if the Widi Mob claim remained on foot but the claimants did not participate, it could prejudice the other claims in the alternative settlement process.

The state adopted the submissions filed by Yamatji.

Decision

His Honour Justice McKerracher was satisfied that the application had not been amended since it was considered by the delegate and there was no evidence or indication that it was likely to be amended in a way that would lead to any different conclusion by the Registrar—at [35].

However, the court could not conclude that 'there [was] no other reason why the application should not be dismissed'. The sole applicant had passed away and it was intended to seek to substitute a replacement applicant. Therefore, his Honour allowed a limited time for this to occur but indicated that:

> In light of the particular history concerning this application and the fact that the applicant could lodge a fresh application even if this application were dismissed, I would impose reasonably strict time limits for the future conduct of this application— at [37].