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

Morich v Western Australia [2008] FCA 1567

Gilmour J, 13 October 2008

Issue

The issue in this case was whether the Federal Court should, of its own motion, dismiss the unregistered application for a determination of native title pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA). The application was 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 Morich application, made on behalf of the Wom-ber people, failed the registration test on 10 September 2007. The court, of its own motion, directed the parties to file and serve submissions in relation to s. 190F(6).

It was not submitted, nor was there any evidence to suggest, that since failing the registration test the applicant had either applied to the National Native Title Tribunal pursuant to s. 190E(1) for reconsideration or made an application to the court pursuant to s. 190F(1) for review of the delegate's decision.

As s. 190F(6)(a) was satisfied, the question was whether or not, in the opinion of the court, 'there is no other reason why the application should not be dismissed'—see s.190F(6)(b).

Applicants' submissions

The applicant submitted that the application should not be dismissed for (among others) the following reasons:

- amendments to the NTA over the years, combined with a lack of legal representation, made it almost impossible to progress the claim;
- the applicants' ancestors 'have never given away their rights to the land and waters within their traditional lands' and their lands were taken 'by forcible means or genocide';
- members of the Wom-ber claimant group were willing to continue mediation with SWALSC to progress the amalgamation of all of the overlapping claims, if agreed to by all other overlapping claimant groups;
- recent research conducted on the Wom-ber group demonstrated a connection to the biological descendants of named persons on which the native title claim group description of the Wagyl Kaip/Southern Noongar claim group is formulated;
- no one person, government official or organisation had the right to remove their claim against their wishes and they wanted the right to claim their heritage.

Decision

His Honour Justice Gilmour noted that the Explanatory Memorandum to the Native Title Amendment Bill 2006 at [4331] stated that the criterion set out in what became s. 190F(6) would 'ensure that applications are not dismissed where there is good reason for a claim remaining in the system, despite being unregistered'. The example given in the EM of a 'good reason' was a case where, despite the fact that the claim was unregistered, it was close to reaching resolution—at [9] to [10].

In this case, Gilmour J was of the view that:

- the Wom-ber application overlapped various other underlying claims and the proposals to combine it with underlying claims, or merge it with the Single Noongar claim #1 had been 'mooted in the past without coming to fruition';
- it was unlikely that the application would be quickly resolved;
- none of the submissions raised by the applicants constituted a 'good reason why the application should not be dismissed';
- the application should be dismissed—at [11] to [13].

His Honour noted dismissal of the application would not prejudice the rights of the claim group to be part of another claim or to make a further application once 'connection' research was completed—at [13].