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

Phillips v Western Australia [2008] FCA 1676

McKerracher J, 12 November 2008

Issue

The issue in this case was whether the Federal Court should, of its own motion, dismiss the Widi Binyardi people's unregistered claimant application 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.

His Honour Justice McKerracher referred to the Explanatory Memorandum to the Native Title Act Amendment Bill 2006 (Cwlth) (EM), which provides 'an insight into the rationale behind the introduction' this new power to dismiss:

> Currently, while unregistered applications do not receive certain procedural benefits that attach to registered claims (such as the right to negotiate), unregistered applications may still proceed to determination. There is presently no requirement on claimants to amend their claim to meet the requirements of the registration test. The amendments inserted by item 73 are intended to provide a greater focus on the responsibility of applicants to take steps to improve the quality of their claims, recognising that poor quality claims are a burden on the native title system—at [4].

The court also noted that the EM stated that 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 of a 'good reason' given was

a case where, despite the fact that a claim was unregistered, it was 'close to reaching resolution'—at [6] to [7].

McKerracher J adopted the analysis of Logan J in *George on behalf of the Gurambilbarra People v Queensland* [2008] FCA 1518 (summarised in *Native Title Hot Spots* Issue 29) as to operation of s. 190F(6).

The Widi Binyardi application was filed in the court on 16 December 2004. The application covers an area in the central Geraldton region of Western Australia. It overlaps several other applications. The Widi Binyardi applicants are not represented by the representative Aboriginal/Torres Strait Islander body for the area, Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (Yamatji). Nor do they have any other legal representative.

The Widi Binyardi 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 against the conditions of the registration test. This was done on 24 August 2007, when the Registrar's delegate decided that it must not be accepted for registration because, among others, it did not satisfy all of the conditions of s. 190B.

Since the delegate's decision, the applicant had not made an application to the court pursuant to s. 190F(1) for review of the delegate's decision. 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).

Submissions

The fourth respondent, Yamatji, submitted that:

- given the Widi Binyardi claim was unregistered, it did not attract procedural rights in relation to future acts;
- should the claim be dismissed, there was nothing to prevent the Widi Binyardi claim group members from filing a properly constituted claim in the future;
- it was not aware of any prejudice that might be suffered by the Widi Binyardi claim group members should the application be struck out;
- it was not aware of any reason why the claim should not be dismissed.

The State of Western Australia adopted Yamatji's submissions.

Decision

His Honour dismissed the application because, on the basis of the history, the court was satisfied that:

- the application had not been amended since the delegate's decision made;
- there was no clear evidence or indication that the application was likely to be amended in a way that would lead to any different conclusion by the Registrar;

- there was no other reason why the application should not be dismissed—at [19].