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

Taylor v Western Australia [2008] FCA 1675

McKerracher J, 12 November 2008

Issue

The issue before the court was whether it should dismiss the Taylor Group's claimant application pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (the 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), 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 Taylor Group's application was filed in the Federal Court in September 2001. It covers an area in the south-west Geraldton region of Western Australia. The applicants were not represented by Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (Yamatji), the representative Aboriginal/Torres Strait Islander body for the area, or otherwise legally represented.

The application first underwent, but did not meet, the requirements for registration on 15 July 2002. The Registrar was then required to reconsider the application for registration as a consequence of the 2007 amendments to the NTA. On 8 November 2007, the Registrar's delegate decided that the application must not be accepted for registration because it did not satisfy (among others) four of the conditions contained in s. 190B. As required by s. 190D(3), the Registrar's delegate gave the court notice that s. 190F(5)(a) applied i.e. the delegate had formed the requisite opinion.

Since the applicant was notified of the Registrar's decision, no application had been made to the court for review of the registration test decision pursuant to s. 190F(1). Further, the application had not been amended. Note that reconsideration by the National Native Title Tribunal under s. 190 E(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 by representative body

Yamatji is discussing an alternative settlement agreement (ASA) under s. 86F with the State of Western Australia. Yamatji submitted (among other things) that:

- the state was committed to negotiating an ASA to resolve a number of native title claims in the Southern Yamatji region, including the Taylor Group's application;
- however, the state's commitment was subject to the proviso that the agreement was inclusive of all traditional Indigenous interests in the area, that it is dealing with the 'right people' and there was a single agreement with a single entity to sign the agreement;
- if the Taylor Group claim remained on foot, but the claimants did not participate in the alternative settlement process, it could prejudice the other claims in the process due to the state's requirements.

The state adopted the submissions filed by Yamatji.

The National Native Title Tribunal's mediation report of June 2008 stated that:

- some members of the Taylor Group had successfully sought representation on the working group of the overlapping registered Amangu claim and other Taylor Group families had accepted representation on the combined working group for the proposed ASA but Mr Taylor had not attended any of the meetings;

- the Tribunal remained willing to assist with for the resolution of the four overlaps to the Taylor claim but none of the respondents, including the state, intended to mediate with the Taylor Group claim in its own right;
- there was no scope for a mediated determination of the application.

Decision

On the basis of the history of this application, his Honour dismissed the application because he was satisfied, for the purposes of s. 190F(6), that:

- the application had not been amended since it was considered by the Registrar's delegate;
- there was no evidence or indication that the application was likely to be amended in a way that would lead to any different conclusion by the Registrar; and
- there was no other reason why the application should not be dismissed—at [23].