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

Whalebone v Western Australia [2008] FCA 1678

McKerracher J, 12 November 2008

Issue

The issue in this case was whether the Federal Court should of its own motion dismiss the Bindurrna People's claimant 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.

These provisions were inserted into the NTA by the *Native Title Amendment Act 2007* (Cwlth). The court noted that the Explanatory Memorandum to the Native Title Act Amendment Bill 2006 (EM) provides an 'insight into the rationale behind the introduction of the new dismissal power':

> 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 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', with an example of

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

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

The Bindurrna People's application was filed on 14 January 2005. The application covers an area of 1,500 square kilometres between the Ngarluma Yindjibarndi determined area and the Kariyarra claim in the north-west Pilbara region of Western Australia.

On 9 September 2005, the Native Title Registrar's delegate decided not to accept claim made in the application for registration. The Bindurrna People's 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 reconsidered the application for registration. On 21 September 2007, it was not accepted for registration because, among others, it failed to meet all of the conditions found in s. 190B.

Since failing the registration test for the second time, the applicant had neither applied to the National Native Title Tribunal pursuant to s. 190E(1) for reconsideration nor made an application to the court pursuant to s. 190F(1) for review of the delegate's decision. On 18 December 2007, the parties were directed to file submissions 'in relation to the disposition of the application having regards to the outcome of the registration test'—at [24].

Submissions

The applicants' submissions were directed primarily to s. 190F(6)(b). It was contended the court should take 'account issues of fairness and opportunity' in relation to the application, including that the applicant had no significant legal assistance in the past 'but there is a strong probability of solicitors being appointed and of funding being available'. It was also submitted that the issues raised in s. 190F 'should not be undertaken without a full examination of the evidence and an opportunity to call witnesses and cross examine them'.

The state submissions referred to a regional Tribunal mediation report (dated June 2008) which stated that the Tribunal continued to mediate a dispute between the Bindurrna claimants and the neighbouring Kariyarra claimants and that the dispute would affect the negotiated outcome of both applications if it was not resolved. As the state was not a party to the negotiations, it was unable to make an informed submission on whether there was any other valid reason why the application should not be dismissed.

Decision

The application was dismissed because, on the basis of the history, his Honour was satisfied that:

- nothing in the submissions of the applicants raised 'any more than generalised hopes and possibilities';
- the application had not been amended and there was no clear evidence that the application was likely to be amended in a way that would likely lead to a different conclusion by the Registrar;
- there was no other reason why the application should not be dismissed—at [21] to [22] and [29] to [32].