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

Hogan v Western Australia [2009] FCA 610

McKerracher J, 2 June 2009

Issue
The issue in this case was whether the Federal Court should, of its own motion, dismiss the Nullarbor People's claimant application pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA). It was decided the application should be dismissed.

Background
The application concerned was on 30 September 1998. It was amended twice in 1999. The application covers about 78,000 square kilometres in south-eastern Western Australia. On 19 October 2001, pursuant to s. 190A of the NTA, the Native Title Registrar's delegate decided the application must not be accepted for registration because it did not satisfy all of the condition found in ss. 190B and 190C, in particular ss. 190B(2), 190B(5) to 190B(7) and 190C(2). Section 190B contains the 'merit' conditions of the test.

When the *Native Title Amendment Act 2007* (Cwlth) (the Amendment Act) commenced, the application had to be tested again because it was made after 30 September 1998 but before 15 April 2007 and was not on the Register of Native Title Claims when the Amendment Act commenced—see Item 89 of Part 2, Schedule 2 of the Amendment Act. On 19 July 2007, the Registrar told the applicant that the registration test was to be re-applied. On 13 November 2007, the Registrar's delegate decided the application must not be accepted for registration because it did not satisfy ss. 190B(2), 190B(5) to 190B(7) and 190C(4). On 29 November 2007, the parties were ordered to file any motions or submissions in relation to failing to pass the registration test by 19 May 2008. When the matter came before the court on 2 June 2009, nothing had been filed and the applicant's legal representative had been unable to take any instructions.

Operation of s. 190F(6)
Justice McKerracher noted that s. 190F(6) gives the court power to dismiss a claimant application on its own motion or on the application of a party if:
the court is satisfied that the application 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 should not be dismissed.

Pursuant to s. 190F(5), the power to dismiss is available 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 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.

McKerracher J referred to and adopted Logan J's analysis of the principles applying to the application of s. 190F(6) in *George v Queensland* [2008] FCA 1518, summarised in *Native Title Hot Spots* Issue 29—at [7] to [11].

Decision

The application was dismissed because the court was satisfied it had not been amended since it was rejected by the delegate, there was no evidence 'or indication' that it was likely to be amended in a way that would lead to the Registrar reaching any different conclusion and there was no other reason why it should not be dismissed. It was noted that there was nothing to prevent the applicant from filing 'a properly constituted claim' in the future—at [19] to [20].