# Amendment to reduce claim area — authorisation, effect on s. 190F(6)

## *Champion v Western Australia* [2009] FCA 1141

**McKerracher J, 7 October 2009.**

**Issue**

The issues in this case included whether the applicant was authorised to exercise the right available under s. 64(1A) of the *Native Title Act 1993* (Cwlth) (NTA) to substantially reduce the area covered by a claimant application and, in any case, whether the application should be dismissed pursuant to s. 190F(6) of the NTA.

**Background**

Under s. 64(1A) of the NTA, a claimant application can be amended at any time to reduce the area of land or waters it covers. By notice of motion, the applicant sought leave to exercise this right in relation to the Kalamaia Kabu(d)n People's application (which relates to an area of the central Goldfields region in Western Australia) by filing a Form 19. (This form can be used to make 'simple' amendments in accordance with O 13 r 8 of the Federal Court Rules. If leave was granted, the requirements for amending a claimant application found in O 78 r 7 of the FCR, which include filing re-engrossed copies of application, would not apply.) The only proposed amendment would result in a reduction of the area covered by application by around 90%. Justice McKerracher sought written submissions to clarify that the applicant was authorised by the native title claim group to make the amendment.

**Authority was not qualified or limited**

The court noted (among other things) that the extent of an applicant's authority pursuant to s. 62A was considered in *Drury v Western Australia* (2000) 97 FCR 169; [2000] FCA 132 where, at [12], French J said:

> Section 62A expressly provides that in the case of a claimant application, the applicant may deal with all matters arising under the ... [NTA] in relation to the application. In my opinion such matters include the amendment of the application from time to time.

The evidence in this case was that the applicant was authorised at a meeting of the adult members of the claim group in November 2000 without any qualification or limitation. Authorisation was said to be given via a process of decision-making that, under the traditional laws and customs of the claim group, must be complied with when making decisions of this kind, i.e. pursuant to s. 251B(a). There was no evidence to suggest any departure from the mode of decision-making described in the application, which was that 'senior members meet to discuss issues affecting the group and communicate decisions reached to each of their respective families or sub-families'—at [8] to [9].

His Honour inferred that 'the persons comprising the applicant would be receiving ongoing guidance from the elders of the claim group in their conduct of the application'. However:

> If all of this were wrong ..., there would still be recourse for the members of the native title claim group ... to replace the current applicant pursuant to the provisions of s 66B ... and to instruct a new applicant to apply to restore the proposed excised portion of the claimed land and waters to the application—at [12]. (On reinstating an area originally claimed, see *Kogolo v Western Australia* (2000) 102 FCR 38; [2000] FCA 1036.)

Therefore, it was found there was no impediment on the applicant's authority to amend the application as proposed.

**_Coyne_ and _Daniel_ distinguished**

This case was contrasted with *Coyne v Western Australia* [2009] FCA 533 (*Coyne*, summarised in *Native Title Hot Spots* Issue 30), where authority was given subject to specific conditions. In that case, it was also specifically stated when authorisation was given that those constituting the applicant were eligible only while they remained 'willing and able'. The present case was also contrasted with *Daniel v Western Australia* [2002] FCA 1147 (summarised in *Native Title Hot Spots* Issue 2), i.e. there was no evidence here that a 'convention' had developed 'whereby significant decisions regarding the conduct of the application' were expected to be made at meetings of the claim group—at [10].

**Should the amendment be deferred?**

The applicant for an overlapping claimant application (Ngadju) sought to have the amendment deferred because mediation was underway. His Honour declined to do so, noting that: 'The amendment is a ... considerable geographic reduction. ... . Viewed from the perspective of other interests, the making of the proposed amendment would reduce the number of overlapping applications in the Central West area'–at [17] to [18].

The claim made in the application was not on the Register of Native Title Claims. Therefore, if the amendment to reduce the application was made, the amended application would have to go through the registration test following referral by the court to the Native Title Registrar under s. 64(4)—see ss. 190A(1) and 190A(6A)(b). In these circumstances, the court was of the view that the amendment would not prejudice any other party and it was better that 'the claim move forward without more delay'—at [20].

**Subsection 190F(6)**

As the application was unregistered, the most recent application of the registration test (in August 2007) was triggered when item 90 of the transitional provisions to the *Native Title Amendment Act 2007* (Cwlth) commenced. It resulted in the Registrar's delegate determining the application did not meet the requirements of test. In particular, it did

not meet all of the conditions found in s. 190B. No application for review of the delegate's decision by the court had been made—see s. 190F(5).

In these circumstances, s. 190F(6) provides that the court may dismiss the application (on its own motion or on the application of a party) if:

- the court is satisfied the application 'has not been amended' since it was considered 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 court's opinion, there is no other reason why the application should not be dismissed.

As the court was considering doing so, pursuant to orders made in December 2008, submissions and evidence were filed in relation to s. 190F(6). However, the applicant subsequently filed the notice of motion seeking leave to amend by filing a Form 19. If leave was given to do so, the 'question of dismissal' under s. 190F(6) would 'fall away' because one of the conditions for the exercise of the power to dismiss is that 'the application in issue *has not* been amended' since the registration test decision. However, at the time the court was considering the application, it had not been amended and so s. 190F(6) still applied. McKerracher J took the view that there was no evidence before the court as to whether the proposed amendment was likely to lead to a different outcome.

**Decision**

His Honour gave leave for application to be amended pursuant to s. 64(1A) by the filing a Form 19.

**Comment**

As noted, the court took the view there was no evidence as to whether or not the application was 'likely to be amended in a way that would lead to a different outcome once considered by the Registrar'. However:

- evidence and submissions had been filed in relation to s. 190F(6);
- the court had been given a copy of the delegate's reasons for not accepting the claim for registration as required by s. 190D(1)(b);
- the court had before it the proposed amendments and so was aware that the only amendment proposed was one that would be to reduce the area claimed, i.e. in all other respects, the claim made in the application would be the same was that which was considered by the delegate.

In the circumstances of this case, it is not clear why the court took the view that it could not form an opinion as to whether or not the proposed amendment was likely to lead to a different conclusion. This approach also indicates that, if an application is about to be considered for dismissal under s. 190F(6), the applicant can deflect that possibility by simply exercising the right under s. 64(1A) to amend to reduce the application area.

In this case, the amendment was made via the filing of a Form 19, which indicates the court took the view that:

- O 13 r 8 of the FCR is not inconsistent with O78 r 7, because O78 r 3(2) provides that the other FCR apply 'so far as they are relevant and not inconsistent with' O78;
- the amendment to reduce the area covered by the application was 'not ... of such a nature as to render the document [i.e. application form] difficult or inconvenient to read' because it is only in these circumstances the O 13 r 8 applies.

Whether a Form 19 is used or the amendments are made in accordance with O 78 r 3, pursuant to s. 64(4) of the NTA, the Federal Court Registrar must give 'a copy of the amended application' to the Native Title Registrar, who requires it for notification purposes and in order to consider whether the registration test must be applied to the amended application—see ss. 66A and 190A(1) respectively.