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

Sambo v Western Australia [2009] FCA 940

McKerracher J, 24 August 2009

Issue

The Federal Court considered whether it should dismiss a claimant application ostensibly brought on behalf of the Central West Goldfields People pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA). The application was not dismissed because the court was satisfied there was a reasonable possibility that it would be amended in the near future in such a way as to be accepted for registration.

Background

In May 2009, the applicant filed submissions on behalf of the all persons, bar two, who constituted the applicant. One respondent filed submissions in reply. The application had been accepted for registration under s. 190A in October 1999 but was not accepted when re-tested in September 2006 and again in September 2008. Subsection 190F(5) provides that s. 190F(6) applies if:

- the Registrar does not accept the claim for registration because it does not satisfy all the merit conditions of the registration test found in s. 190B or 'it was so procedurally defective as to render it impossible' to determine whether the claim satisfies those conditions (as in this case); and
- the court is satisfied that all avenues for reconsideration or review of the registration test decision have been exhausted.

In this case, s. 190F(5) was satisfied. Therefore, the court was empowered to dismiss the application if the court:

- was satisfied that it had not been amended since consideration by the Registrar and was not likely to be amended in a way that would lead to a different outcome once considered by the Registrar; and
- was of the opinion that there was no other reason why the application should not be dismissed.

In resisting dismissal, the applicant's solicitor submitted (among other things) that: the claim had been in deadlock for some years because of disagreements about the handling of future act matters and the strength of the connection of some members of the native title claim group;

- the relevant representative body, Goldfields Land and Sea Council, had ceased to act for (or fund) the claim, which had led to a difficulty in obtaining legal representation;

- the claimants had entered into numerous heritage and land use agreements, particularly with mining companies, and had been involved in proceedings in the Supreme Court of Western Australia as to funds accruing and related disputes;
- these disputes were the primary reason why no active steps had been taken in relation to the application;
- that said, as considerable resources had been put into the preparation of the claim, including the filing of several expert reports, there was weight behind the notion it was deserving of further attention by the court and the respondents.

According to the applicant, attempts were being made to fund a claim group meeting in order to change the composition of the applicant and resolve issues such as the membership of the claim group. It was submitted that if this was done the claim was likely to be re-registered and that the applicant would take all necessary steps to achieve this in a timely manner.

Reasoning

Justice McKerracher:

- repeated his analysis of the terms of s. 190F(6) and the relevant provisions of the Explanatory Memorandum to the *Native Title Amendment Bill 2006*, as outlined in *Champion v Western Australia* [2009] FCA 941 (summarised in Native Title Hot Spots Issue 31); and
- respectfully adopted the analysis in *George v Queensland* [2008] FCA 1518 (summarised in Native Title Hot Spots Issue 29) regarding the proper application of s 190F(6)—at [2] to [9].

His Honour concluded that, while it was difficult to be satisfied that the outcome of the proposed claim group meeting would be the making of an amended application that was capable of being registered pursuant to s. 190A:

> [T]he extensive submissions filed and the assurances given by the solicitors for the applicant, at least, lead to an inference that there is a reasonable and imminent possibility of that event occurring—at [20].

Decision

In the circumstances of this case, the court was not prepared to dismiss the application of its own motion—at [21].