Champion (No 2) v Western Australia [2011] FCA 345

McKerracher J, 12 April 2011

Issue

The issue was whether the Federal Court should, of its own motion, dismiss the Kalamaia claimant application pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA). The motion to dismiss was adjourned for eight months based on assurances that mediation conducted by the National Native Title Tribunal on the principle issue preventing registration was progressing well.

Background

In July 1999, March 2001, August 2007 and December 2009, the Native Title Registrar's delegate decided pursuant to s. 190A of the NTA that this application, in its original and then in its various amended forms, must not be accepted for registration because it did not satisfy all of the conditions of the registration test.

Operation of s. 190F(6)

Justice McKerracher cited *Strickland v Western Australia* [2010] FCA 272 (summarised in *Native Title Hot Spots* Issue 32) in explaining the court's discretionary power under s. 190F(6) to dismiss an unregistered claimant application. The principles set out in *George v Queensland* [2008] FCA 1518 (summarised in Native Title Hot Spots Issue 29) on the operation of s. 190F(6) were adopted. His Honour commented that:

- if the court considers the application has been, or is likely to be, amended in a way that would lead to it being registered once considered by the Registrar, it would be appropriate to await the outcome of the reapplication of the test before considering whether to dismiss the application;
- pursuant to s. 190F(6)(b), the court may also consider any 'other reason' why an application should not be dismissed;
- the Explanatory Memorandum to the Native Title Act Amendment Bill 2006 at [4.331] referred to what became s. 190F(6)(b) and stated it would 'ensure that applications are not dismissed where there is good reason for a claim remaining in the system, despite being unregistered'—at [9].

Submissions

The applicant submitted (among other things) that the application should not be dismissed because:

- the principal reason for failing the test (which largely related to common membership with an overlapping claim group) was the subject of mediation in Tribunal;
- there was a real chance this would result in the claim group being reconfigured in an amended application that would satisfy all the registration test conditions;
- the mediation process was 'any other reason' for not dismissing the application for the purposes of s. 190F(6)(b).

Decision

McKerracher J accepted that the Tribunal's mediation process, which the court was assured was progressing positively, provided 'any other reason' not to dismiss the application at this point. The motion for dismissal was adjourned for eight months—[17] to [18].