Thomas v Western Australia [2011] FCA 346

McKerracher J, 12 April 2011

Issue

The issue in this case was whether the Federal Court should, of its own motion, dismiss the Mantjintjarra Ngalia claimant application pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA). It was decided the application should not be dismissed because there was a real chance of it being amended in such a way as to lead to it being registered.

Background

The application concerned was made in March 1996. It was not amended to comply with the registration test criteria introduced into the NTA by the 1998 amendments. On 23 April 1999, 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 conditions, in particular ss. 190C(2) and 190C(4). In 2007, part of the original application was dismissed by Justice Lindgren in *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31 (*Wongatha*, summarised in *Native Title Hot Spots* Issue 24).

When the *Native Title Amendment Act 2007* (Cwlth) commenced, the remainder of the application had to be retested. The original application overlapped with the former Wongatha application. No amendments were made between 1998 to 2007 because of the operation of s. 190C(3), which prevents registration of overlapping applications where there are common claimants.

In February 2008, after the dismissal of the Wongatha application in *Wongatha*, the remainder of the Mantjintjarra Ngalia application was amended to reduce the area it covered. In September 2009, the Registrar's delegate decided the amended application must not be accepted for registration because it did not satisfy all of the conditions of the test. The court then considered whether the application should be dismissed pursuant to s 190F(6). The applicant resisted dismissal, submitting details of a legal and research strategy being undertaken by the Goldfields Land and Sea Council (GLSC) in relation to the application. The GLSC advised the court it had instructions to assist the Mantjintjarra Ngalia people to file a new application and, subject to certain conditions acceptable to the current claimants, leave to discontinue this application would then be sought.

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). The principles set out in *George v Queensland* [2008] FCA 1518 (summarised in *Native Title Hot Spots* Issue 29) on the proper application of s. 190F(6) were adopted. His Honour accepted that, in this case, there had been 'some steps toward genuine advancement of the claim' and that 'much of the previous delay was beyond the control of the applicant'. Since there was now 'a positive plan and strategy', the court also accepted that there was' a real chance the shortcomings identified in the past' could be overcome, leading to registration—at [15].

Decision

The application was not dismissed because the court found there was a real chance that the application could be amended in such a way as to lead to a different registration test outcome—[15] and [18].