Registration test decision review - authorisation

Evans v Native Title Registrar [2004] FCA 1070

Nicholson J, 19 August 2004

Issue
The key issue in this case was whether the Native Title Registrar gave proper consideration to the issue of authorisation under one or other of the limbs of s. 251B of the *Native Title Act 1993* (Cwlth) (NTA) when deciding not to register a claimant application.

Background
This case relates to an application under s. 190D(2) seeking review of a decision under s. 190A not to accept a claimant application made on behalf by the Koara people for registration. The application was a combination of six applications. In March 1999, the combined application was accepted for registration. However, that decision was set aside and the application remitted to the Registrar: see *Western Australia v Native Title Registrar* [1999] FCA 1594.

In reconsidering the application, the Registrar's delegate raised issues relating to the satisfaction of various conditions of the registration test with the applicant's representative, the Goldfields Land Council. Between November 2001 and the making of the decision in August 2003, the delegate provided feedback, requested further information and gave several opportunities for either further information to be provided to satisfy the delegate that, in particular, the application was properly authorised or for the application to be further amended—at [10] to [15].

The evidence regarding authorisation
The application had not been certified by the relevant representative body pursuant to s. 190C(4)(a) and, therefore, it fell to be considered under s. 190C(4)(b). Subsection 190C(4)(b) requires the Registrar to be satisfied that the applicant has been authorised by the native title claim group to make the application and deal with matters arising in relation to it. Subsection 190C(5) states that the Registrar cannot be so satisfied unless the application includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met and 'briefly' sets out the grounds on which the Registrar should consider that this is so. 'Authorisation' is defined in s. 251B.

The applicant provided what the delegate described as four versions of the claim to authority, contained in various affidavits and the application itself:

- the first appeared to describe a process pursuant to s. 251B(a), as it made reference to the authorisation being in 'accordance with its laws and customs';

- the second appeared to conflate ss. 251B(a) and 251B(b), those provisions being phrased in the alternative;
- the third appeared to refer to a traditional process; and
- the fourth process was said to have been arrived at in accordance with 'standard protocols and procedures about these types of matters' but there was no explanation of what those standard protocols and procedures might be—at [26] to [27].

There was also an affidavit referring to a quite different process from that previously used, although it was asserted that it was in accordance with the 'traditional laws and customs'. Because the material was vague as to what had actually happened and whether the 'usual procedures' had, in fact, been followed, the delegate sought further information from the applicant but the reply did not assist in providing the necessary explanation—at [28] to [30].

The delegate concluded that the application, although generally otherwise sound, was not properly authorised in accordance with the NTA, noting that the effect of s. 251B was to provide alternative modes of authorisation. He said the effect of s. 251B(a) was that, where there was a process of decision-making under the traditional laws and customs that must be followed, the applicant was required to be authorised according to that process. It was only in the event 'there is no such process' that the alternative method of authorisation under s. 251B(b) becomes applicable—at [18] and [32].

Approach to review under s. 190D(2)

Justice RD Nicholson noted that:

- review under s. 190D is not restricted to consideration and determination of a question of law. Rather, it enlivens the court's jurisdiction in respect of the whole of the matter and all the issues of fact and law raised by the parties are before the court;
- the review may require redetermination of factual issues according to the material then available and it is not restricted to the material before the Registrar. As a consequence, the court may take into account events that have occurred since the decision under review was made;
- this is in contrast to a review under the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth), in which only the legality of the decision-making process is reviewed and the court cannot freshly determine issues of fact or substitute its view for that of the decision-maker—at [35] to [37], referring to *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 and *Northern Territory v Doepel* (2003) 203 ALR 385; [2003] FCA 1384.

The court also noted that:

> [A] significant margin of appreciation should be allowed for the experience and detailed administrative knowledge of the Registrar and his delegates in making largely evaluative judgments on whether applications comply with the statutory conditions of registration—at [38], citing *Strickland v Native Title Registrar* (1999) 168 ALR 242; [1999] FCA 1530 at [44].

The authorisation issue

On the issue of authorisation, Nicholson J held that:

- section 251B provides alternative methods of authorisation and it is not possible to conflate the two methods;
- the delegate had not misconstrued the information before him by wrongly regarding it as not clear on which of the methods of authorisation was being addressed;
- this was a case where there was 'genuine inconsistency in the information provided';
- the inconsistency was 'patent' it was the delegate's reasons and the evidence clearly described differing methods of authorisation;
- a later affidavit introduced as evidence before the court, which explained traditional methods of decision-making and proceedings at a meeting of the Koara claimants in March 2002, was considered inconsistent with earlier evidence, and no explanation for those inconsistencies was provided- at [7], [52] to [60] and [71].

Delegate's requests for further details

Additional material supporting the authorisation had been sought by the delegate. The request for further information included a list of matters to be addressed. The list was drawn from the judgment in *Ward v Northern Territory* [2002] FCA 171 at [24], a decision on authorisation for the purposes of an application to replace the applicant under s. 66B. The applicant submitted that:

- the use of the word 'briefly' in s. 190C(5)(b) indicated that the delegate was not required or empowered to request a detailed explanation of the process by which authorisation was obtained; and
- the delegate's request for extensive and detailed information concerning the process of authorisation showed that he essentially misunderstood how he should approach the question of authorisation.

His Honour found that the delegate had made no error in making this request because the materials before the delegate were contradictory as to which process of authorisation had been adopted and, as the response to the delegate's first request for additional information did not bring clarification, there was a proper foundation for the request for further explanation:

> In those circumstances, it could not rightly be said that the range of issues upon which additional information was sought was inappropriate. The issues were ones that had been identified judicially as relevant to an issue of authorisation. The word 'briefly' in s 190C(5)(b) is to be understood in the particular circumstances and as taking its colour from those circumstances. It was necessary, in the context of conflicting accounts in the evidence, that the statement should place before the delegate information on which the delegate could consider that the authorisation test had been met. The items suggested for explanation were all relevant to that end—at [41] to [43].

No need for adverse submissions

An argument that the delegate misconstrued his role by (among other things) raising questions about issues that were not the subject of any adverse submission was rejected because:

- under s. 190A(6), the Registrar has no discretion i.e. claims for registration that satisfy all the conditions in ss. 190B and 190C must be accepted and those that do not must not be accepted;
- it is immaterial whether or not there was any adverse submission—the Registrar's administrative function is to reach satisfaction on the matters put at issue by ss. 190B and 190C;
- the delegate was not under any administrative obligation to accept the material placed before him by the applicant, particularly where that material was the source of contradiction and inconsistency—at [46] to [47].

Decision

Nicholson J dismissed the application for review.