ILUA—review of decision to register an area agreement

Kemp v Native Title Registrar [2006] FCA 939

Branson J, 25 July 2006

Issue
The issue before the Federal Court in this case was whether the decision of a delegate of the Native Title Registrar to register an area agreement (a type of indigenous land use agreement) was correct. It arose in the context of an application under the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) (ADJR Act) for judicial review of the decision.

Background
In 1998, two claimant applications were made by Patricia Davis-Hurst on behalf of the Kattang People over an area known as Saltwater. After a contested hearing, Justice Branson joined Keith Kemp (the applicant in this case) as a respondent to those applications, on the basis that he was a descendant of the Pirripaayi people who were traditionally associated with the area concerned. No appeal was instituted in relation to that decision: see *Davis-Hurst v Minister for Land and Water Conservation (NSW)* [2003] FCA 541, summarised in *Native Title Hot Spots* Issue 6.

On 11 August 2005, the Minister for Lands for the State of New South Wales applied to the Native Title Registrar pursuant to s. 24CG of the *Native Title Act 1993* (Cwlth) (NTA) for the registration of an area agreement (the ILUA). Mr Kemp was not a party to the ILUA. The parties to these proceedings conceded, among other things, that:

- Mr Kemp was not a member of the native title claim group represented by Dr Davis-Hurst and so he would not enjoy any benefits or assume any obligations under the ILUA;
- registration of the ILUA would 'give substance' to a decision by the state of NSW that those Dr Davis-Hurst represented should be recognised as the holders of native title rights and interests;
- whether or not those whom Dr Davis-Hurst represented were the holders of native title rights and interests in the relevant area was in dispute before the court—at [8].

In December 2005, a delegate of the Registrar (the delegate) determined that:

- notwithstanding Mr Kemp's objection, the ILUA should be registered pursuant to s. 24CL(1) of the NTA;
- while Mr Kemp was a person who, prima facie, may hold native title in the area, his objection to the registration of the ILUA did not, in itself, result in the ILUA not being properly authorised—at [9].

Mr Kemp applied for judicial review of the delegate's decision, alleging an error of law and relying upon s. 5(1)(f) of the ADJR Act—at [10].

Statutory framework and relevant facts

The ILUA was an area agreement as defined in s. 24CA of the NTA. Therefore, all persons in the 'native title group', as defined in s. 24CD, must be parties to the agreement: s. 24CD(1) NTA. On the facts of this case, the 'native title group' consisted of all registered native title claimants in relation to the agreement area: s. 24CD(2). Dr Davis-Hurst was, therefore, part of the 'native title group' because she was a registered native title claimant. Mr Kemp was not. The critical issue was whether, nonetheless, the ILUA could be registered if Mr Kemp had not authorised its making—at [15].

Authorisation of ILUA by claimant group

The application for registration was accompanied by a statement as to the efforts made in relation to the authorisation of the ILUA. In the court's view:

- it was 'probably uncontentious' that the statements demonstrated that reasonable efforts were made to ensure that all members of the native title claim group represented by Dr Davis-Hurst were identified;
- however, it was 'not entirely clear' that those statements provided grounds on which the Registrar could have been satisfied that all reasonable efforts were made to ensure that 'all persons who hold or may hold native title' to the agreement area (as opposed to those who made up the native title claim group) were identified, e.g. the statement made no reference to the Pirripaayi people—at [18] and see s. 24CG(3)(b).

The application for registration was also accompanied by a statement recording that Mr Kemp had attended part of the meeting held for the purposes of authorising the ILUA and expressed his objection to the making of that agreement. The Registrar's delegate considered the application for registration and decided that notification of the application should be given. Within the three month notice period prescribed in s. 24CH, Mr Kemp wrote to the Registrar raising issues that went to the authorisation of the ILUA. The delegate decided (among other things) that, despite Mr Kemp's concerns, the 'second condition' for registration found in s. 24CL(3) (i.e. that the requirements of s. 24CG(3)(b), which relate to the identification of the native title holders and ensuring that they authorised the making of the agreement) had been met and the ILUA must be registered.

Grounds for review

Mr Kemp applied for judicial review of the delegate's decision to register the ILUA on the ground that it involved errors of law, namely that the delegate:

- misconstrued s. 251A; and
- found that the requirements of s. 24CG(3)(b) had been met, notwithstanding recognition of Mr Kemp as a person who may hold native title in relation to the area but who did not authorise the making of the agreement—at [34].

Authorisation and s. 251A

In a letter to the delegate seeking information on the authorisation process, the solicitor acting for Dr Davis-Hurst 'confirmed' that:

> [T]here was no traditional decision-making process and ... the Applicants had agreed and adopted a decision-making process of authorising through the decision of the majority. This majority decision-making process was used to authorise the ILUA, unanimous consent was not required to authorise the ILUA—at [35] to [36].

Acting on this information, the delegate was satisfied that all those persons identified as potential native title holders for the area, including Mr Kemp, had authorised the making of the ILUA by a majority decision. However, in the court's view:

> It seems likely that the ... [delegate] overlooked the fact that the ... response [from Dr Davis-Hurst's solicitor] identified the decision-making process adopted by *'the Applicants'*. In the context of the response, the reference to *'the Applicants'* is to be understood as a reference to the claimant group represented by Dr Davis-Hurst. It is accepted on all sides that Mr Kemp is not a member of that group—at [38].

The court noted it was 'plain' that s. 251A is concerned with 'how a single community or other group ... may authorise the making of an indigenous land use agreement'—at [40].

Her Honour went on to find that:

> Section 251A is not intended to provide, and does not provide, a means whereby a single authorising decision can be obtained which is binding on two or more groups where their respective claims to hold native title in an area are in conflict. This can be seen from the reference in paragraph (a) to a process of decision-making that, under the traditional laws and customs of the persons who hold or may hold ... native title, must be complied with in relation to authorising things of that kind. It is hard to imagine any such process of decision-making where the respective claims of two groups to hold the native title are in conflict; it would require traditional laws and customs in relation to jointly authorising things binding on the members of both groups—at [41].

The delegate erred, it was held, in concluding that Mr Kemp was bound by that majority decision of the native title claim group represented by Dr Davis Hurst; and that therefore, the requirements of s. 24CG(3)(b) were met—at [43].

Was authorisation by Mr Kemp required?

It was argued that Mr Kemp's authorisation was not required because s. 24CL required that all reasonable efforts had been made to ensure that all of the persons described in s. 24CG(3)(b)(i) had been identified and did not require that all persons so described had in fact been identified. The court accepted this interpretation and noted that the delegate also understood the provision in this way. However, as the delegate regarded Mr Kemp as a person identified by the efforts of Dr Davis-Hurst, it was held that the ILUA could not be registered unless Mr Kemp had authorised its making—at [46].

The court noted that the intended meaning of the words ' all persons who hold or may hold native title in relation to land or waters in the area covered by the

agreement' found in s. 24CG(3)(b)(i) presented 'a much more difficult issue of statutory construction'—at [47].

The majority decision of the High Court decision in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 was noted. Her Honour then set out the two competing views as to the meaning of the words in s. 24CG(3)(b)(i), i.e. it should be:

- construed literally so that, for example, where two competing groups each claimed to hold the common or group rights which constitute the native title in the area, the words were capable of including the persons in both groups (the first view); or
- understood to refer to all persons who, according to the traditional laws and customs of the registered native title claimants, hold the common or group rights in the area (the second view)—at [49].

Her Honour confessed 'to having found this issue difficult to resolve' and accepted that the second view would result in a logically coherent scheme for the registration of area agreements. However, the court preferred the first view – i.e. a literal construction of s. 24CG(3)(b)(i) – because it did not:

> [R]esult in an absurd or otherwise plainly unlikely outcome. In the absence of a compelling case to do so, I am reluctant to depart from the literal meaning of the words which the legislative [sic] has chosen because a departure from that meaning could, in this and other cases, result in the loss of rights which an individual might otherwise enjoy—at [58] and see [61].

If Mr Kemp's claim to be a person who holds, or may hold, native title 'was merely colourable', her Honour was of the view that it would have been open to the Registrar 's delegate to conclude that it was without substance and, therefore, that his authority was unnecessary. However, as Mr Kemp had successfully applied to be joined as a party to proceedings to oppose the claim, her Honour was of the view that the appropriate forum for the resolution of that dispute was the court—at [59].

Decision

As the delegate erred in concluding that the requirements of s. 24CG(3)(b) had been met, her Honour set aside the delegate's decision and remitted the application to the Registrar to be determined according to law—at [62] to [63].