

Registration test decision—s. 190D review

Wakaman People # 2 v Native Title Registrar [2006] FCA 1198

Kiefel J, 5 September 2006

Issue

The issue before the Federal Court in this review, conducted pursuant to s. 190D of the *Native Title Act 1993* (NTA), was whether the Native Title Registrar erred in refusing to accept the Wakaman People #2 claimant application for registration. The main question was whether the delegate could 'look behind' the certificate provided under s. 203BE by the Northern Queensland Land Council (the representative body) in relation to the authorisation of the application.

Background

The Wakaman People #2 application was refused registration on 18 April 2005. This was because the delegate was not satisfied that the application met the requirements of ss. 190C(4)(b) and 190C(5) relating to authorisation or s. 190B(3) relating to the description of the claim group. The application was subsequently amended to change the description of the native title claim group. The amended application was certified by the North Queensland Land Council for the purposes of s. 190C(4)(a). The Registrar's delegate subsequently informed the applicant that the description of the native title claim group in the amended application would not satisfy s. 190B(3). The applicant responded by further amending the description of the claim group. The further amended application was accompanied by a copy of the same certificate from the NQLC as was provided with the previous amended application.

The Registrar's delegate refused to accept the further amended application for registration, concluding that, due to the further amendment, the native title claim group had changed significantly after the issuing of the certificate and, therefore, the certificate could not be relied upon for the purposes of s. 190C(4)(a) and s. 190C(4)(b) and (5) were not satisfied either. The applicant then sought judicial review of that decision under s. 190D of the NTA.

Grounds for review

The applicant submitted that:

- the delegate had neither the duty nor the power to go behind the certification provided; and
- the delegate was in error in finding that the native title claim group described in the application was a wider, and significantly different, group from that referred to in the previous application, which had been the subject of the certification.

Review not restricted to questions of law

Justice Kiefel considered the nature of a review under s. 190D and concluded that:

- it placed the controversy constituted by the issues of fact and law before the court; and

- if a ground of review was established, appropriate orders might be made to do justice as between parties (i.e. it is essentially a hearing de novo)—at [29], referring to *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652.

Certification

Her Honour held that:

- a consideration of aspects of the authorisation process was not to be undertaken by the Registrar where the application in question had been certified in accordance with s. 203BE;
- certification meant that the function of considering the question of authorisation had been carried out by the representative body and there was no basic function for the Registrar to carry out;
- it was, therefore, not open for the delegate to conclude that the certification provided earlier could not relate to the subsequent application;
- as the conditions set out in ss. 190B and 190C were met, the registration test was satisfied and the Registrar was obliged to accept the claim for registration;
- it was not necessary to consider whether the delegate was correct in finding that the native title claim group described in the amended application differed from that found in the further amended application—at [30] to [35], following *Northern Territory v Doepel* (2003) 133 FCR 112; [2003] FCA 1384, summarised in *Native Title Hot Spots Issue 8*.

Claim group description and self-identification

On the last point noted above, it was argued that the claim group could be seen to be different, and larger, following the removal from the description in the further amended application of a requirement that a person identify as one of the Wakaman People before they could be said to be a member of the claim group. Her Honour noted that:

- the registration test is concerned with the clarity of the description of persons making up a claim group so that it may be determined whether a person is a member of it;
- a requirement of self-identification would not appear to meet such an objective and might be thought to provide grounds for refusal of registration;
- at a practical level it cannot be known whether descendants will or will not identify with the group;
- a conclusion that a group described as descendants, regardless of their opinion as to membership, will be larger is merely conjecture—at [37] to [38].

Decision

The delegate's decision was set aside. The court proposed making orders requiring the Registrar to accept the application for registration and include the details of the claim in the Register of Native Title Claims but sought further submissions as to when the latter order should take effect: see *Wakaman People 2 v Native Title Registrar* [2006] FCA 1251, summarised in *Native Title Hot Spots Issue 21*.