

Registration test review successful—date for registration

Wakaman People # 2 v Native Title Registrar [2006] FCA 1251

Kiefel J, 21 September 2006

Issue

The issue before the Federal Court was whether, in making an order that the Native Title Registrar include particulars of a claim in the Register of Native Title Claims (the register) following a successful review application under s. 190D of the *Native Title Act 1993* (Cwlth) (NTA), the court could order the Registrar to enter those particulars on the register as at the date of the incorrect decision to refuse to accept the claim for registration.

Background

This decision followed on from the decision in *Wakaman People #2 v Native Title Registrar* [2006] FCA 1198, summarised in *Native Title Hot Spots Issue 21*. The court adjourned the question of whether or not an order made following a s. 190D review could be retrospective to allow submissions to be made.

Construction of the NTA

Justice Kiefel referred to the provisions of the NTA concerning the maintenance of the Register of Native Title Claims (found in Part 7) and the Explanatory Memorandum to the Native Title Amendment Bill 1997, noting that none of them suggested that a date, other than the day upon which the Registrar actually entered the details in the register, was appropriate—at [8].

Kiefel J noted (among other things) that:

- registration of a claimant application confers a right to negotiate in relation to the doing of some future acts and, among others, notice must be given to a registered native title claimant of certain future acts, e.g. see s. 29;
- the effect of s. 28(1)(a) is that, if there is no registered native title claimant at the end of a period of four months following notification given under s. 29, then the future act to which the notice related can be validly done;
- if a native title claim group is unable to get its claim registered within that period, it generally loses the right to negotiate with the parties in relation to that future act;
- the importance of timely registration is recognised by provisions such as ss. 190A(2), which requires the Registrar to use best endeavours to consider a claimant application in the four month period if it is affected by a s. 29 notice—at [9].

From this, it was inferred that:

[T]he legislature was well aware of the problems which may arise for claimants if registration is delayed. There is no suggestion in the Act however that the potential for loss is to be remedied...It cannot be inferred from its recognition of the problem, and its limited response to it, that...the court was to provide a remedy—at [9].

Keifel J was of the view that retrospectively registering the claim would not give rise to any questions as to the validity of future acts:

It does not seem possible where the future act has been done and the requirements of the Act, in the circumstances then pertaining, complied with The requirement in s 25(2) is that negotiation be undertaken before the future act is done. There must necessarily be a registered claimant at that time for the provision to be operative. An order claiming registration to have occurred at an earlier date would therefore appear to be nugatory—at [10].

Decision

Her Honour declined to make orders back-dating registration of the claim to the date of the delegate's decision not to accept it.