Registration test review—Butchulla

Doolan v Native Title Registrar [2007] FCA 192

Spender J, 23 February 2007

Issue

In this review of a registration test decision, the main issue before the Federal Court was whether the term 'the applicant' in s. 61 of the *Native Title Act 1993* (Cwlth) (NTA) meant 'all of the persons authorised by the native title claim group and no fewer' or 'all of the persons authorised by the native title claim group who, at any particular time, were willing and able to act'.

Background

The Butchulla Land and Sea claimant application was filed in January 2006. This was preceded by the members of the native title claim group holding an authorisation meeting in April 2005. At that meeting, the native title claim group authorised 18 people to comprise the applicant. In November 2005, two of the 18 people who were authorised to be 'the applicant' withdrew. When the application was made in January 2006, the applicant was comprised of the remaining 16 persons.

In May 2006, the Gurang Land Council (the representative body for the area and the applicant's legal representative) was advised that the Native Title Registrar's delegate had decided not to accept the claim made in the application for registration —see ss. 99 and 190A(6). Among other things, the delegate considered that the claim group had authorised 18 persons to comprise 'the applicant' and make the application and so was not satisfied that the native title claim group authorised the 16 persons to do so for the purposes of s. 190C(4)(b). The delegate also found that the application did not meet the conditions of s. 190B(5) and, as a result of that decision (and without considering each of them), it followed that the conditions found in ss. 190B(6) and (7) were not met.

A claim registration application was subsequently made pursuant to s. 69(1) seeking review under s. 190D(2) of the delegate's decision. On review, it was contended (among other things) that:

- the delegate had erred in law by concluding that the application did not meet the authorisation requirements found in s. 190C(4)(b); and
- properly construed, s. 61(2) meant that 'the applicant' was constituted by either the group of persons authorised at the meeting or so many of them as were able and willing to constitute the applicant.

The Commonwealth intervened pursuant to s. 84A(1), agreeing that the delegate had been wrong in relation to ss. 190B(5), (6) and (7) but contending that the delegate was correct to find that the application did not meet the requirements of s. 190C(4)(b).

Nature of s. 190D review
A review by the court under s. 190D(2) is not restricted to consideration and determination of a question of law but extends to determinations of issues of fact. The court has power under s. 190D(3) to make appropriate orders to do justice between the parties —see [42] to [47] for a discussion of the relevant cases.

Meaning of 'the applicant'
Justice Spender considered that the authorisation of a number of persons as the 'applicant' was not an appointment of each of them 'jointly and severally' and that s. 61(2)(c) contemplated 'an authorisation of persons to act collectively, rather than each of them personally'—at [56].

His Honour held that:
- in providing for the authorisation of a group of people to act collectively, in a representative capacity, as the applicant, there was an implication that the 'vicissitudes that accompany joint action' was recognised;
- the appointment at a meeting of a native title claim group of a group of persons to jointly be the applicant was an authorisation of those persons, or so many of them as were willing and able to discharge their representative function, to act as the applicant;
- there was no requirement that there be an express qualification as to that effect;
- the 'applicant' in s. 61(1) was a reference to each of the persons who comprised 'the applicant' for the purposes of s. 61(2)—at [57], [59], [67] and [73].

Therefore, the delegate's decision on s. 190C(4)(b) was found to be wrong.

Directing the Registrar to accept and register the claim
An order directing the Registrar to accept the application for registration on the Register of Native Title Claims (the Register) was sought. The Commonwealth submitted that the appropriate form of relief was an order requiring the Registrar to consider the application according to law. As noted earlier, the delegate did not consider the rights and interests claimed for the purposes of s. 190B(6). His Honour found that, as a result, the delegate did not properly apply s. 190B(6)—at [84].

Spender J considered there was evidence before the court demonstrating that a number of the 'low-level' rights claimed in the application could, prima facie, be established for the purposes of s. 190B(6). Therefore, the court concluded it was appropriate to order both that the application be registered and that the Register entry record those claimed rights—at [83] to [88].

Decision
The court ordered that the decision of the delegate be set aside and the Registrar accept the claim for registration. The Registrar was ordered to enter the following rights in the Register of Native Title Claims:
- the right to hunt and fish on the land and waters;
- the right to access and move about on the land and waters;
- the right to camp on the land; and

- the right to gather and use natural products on the land.

The Registrar was also ordered to consider what (if any) of the other claimed rights and interests should be included in the Register pursuant to s. 190B(6), having regard to the entire application and other material in support of it.

Comment

In the two previous s. 190D(2) proceedings where the Registrar was ordered to accept the relevant claim for registration, the application had failed only one condition of the registration test. Therefore, once the court was satisfied that the Registrar 's decision on that condition was wrong, 'there were no other grounds upon which' a refusal to register 'could be maintained' and an order that the claim be registered was manifestly appropriate—see *Strickland v Native Title Registrar* (1999) 168 ALR 242; [1999] FCA 1530 at [62] and *Wakaman People 2 v Native Title Registrar* (2006) 155 FCR 107; [2006] FCA 1198, summarised in *Native Title Hot Spots* Issue 21.

However, s. 190(6A) *requires* the Registrar to *refuse* registration if not satisfied that *all* the conditions of ss. 190B and 190C are met. Therefore, the court should not direct the Registrar to register a claim unless the court is satisfied that all of the conditions on which the Registrar found the application failed are, in fact, met. Otherwise, remittal to the Registrar for reconsideration in accordance with the law is the appropriate course. In this case, while his Honour did make a finding that s. 190B(6) was met, it appears he did not do so in relation to either ss. 190B(5) or (7).

Costs

The applicant sought an order as to costs (initially on an indemnity basis) against the Registrar on the basis that the Registrar had 'unreasonably' maintained a position by allowing the authorisation point to 'remain contested'. His Honour noted that:

- section 85A applies to s. 190D(2) proceedings;
- the Registrar submitted to the court's jurisdiction, save as to costs, which was an appropriate course to take—at [91] and [94].

Spender J found that:

- the Registrar had not 'unreasonably' maintained his position; and
- it would not have been appropriate for the Registrar to consider the revocation or variation of the registration test decision because, in the circumstances, the Registrar had no power to do so—at [95] to [96].

This was because his Honour was of the view that:

> The power given to the Registrar to make a decision as to registration is not one which can be exercised from time to time ... . Once exercised, it is spent. Even if I be wrong in that conclusion, this is not a case where the Registrar ought properly to have resiled from the registration decision ... . The fact that the Attorney-General has sought to argue [the authorisation point] ... powerfully underlines the lack of imperative necessity to resile from the registration decision, and, if there was power to resile, it was not unreasonable not to resile—at [99].