Registration test review — factual basis

Gudjala People # 2 v Native Title Registrar [2007] FCA 1167

Dowsett J, 7 August 2007

Issues

This case is about an application for review of a decision not to accept a claimant application for registration on the Register of Native Title Claims. The application for review was made under s. 190D(2) of the *Native Title Act 1993* (Cwlth) (NTA).

The main issues before the Federal Court were:

- whether a delegate of the Native Title Registrar had misled the applicant, denied the applicant procedural fairness or taken into account irrelevant material in making the registration test decision;
- whether the description of the native title claim group found in the application satisfied s. 190B(3);
- whether the application satisfied ss. 190B(5) to 190B(7).

The decision is important because it is the first case in which the court has considered in detail what is required to provide a sufficient factual basis for the purposes of s. 190B(5). The relevance of the decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*, summarised in *Native Title Hot Spots* Issue 3) to various conditions of the registration test is also considered for the first time.

Background

The Native Title Registrar must accept for registration the claim made in a claimant application if it satisfies all of the conditions found in ss. 190B and 190C. In any other case, the Registrar must not accept the claim for registration—see s. 190A(6).

The claimant application under consideration in this case was made on behalf of the Gudjala People in April 2006 (Gudjala People #2). In November 2006, a delegate of the Native Title Registrar decided it must not be accepted for registration because it did not meet the conditions found in ss. 190B(3), 190B(5), 190B(6) and 190B(7). In accordance with s. 190D(1), the applicant and the Federal Court were notified of this decision and the reasons for it. Subsequently, the applicant filed a claim registration review application pursuant to ss. 69(1) and 190D(2) (as it was then—now see s. 190F).

An earlier, related claimant application, known as the Gudjala 'core country' claim, was filed in 2005. The only significant difference between the two claims was that Gudjala People #2 covered some specific parcels that were, for reasons that are presently irrelevant, excluded from the core country claim. In March 2005, the core country claim was accepted for registration by the same delegate who considered, and rejected, Gudjala People #2.

Grounds for review

The grounds for review were that:

- the applicant relied to its detriment on misleading documents and information sent by the delegate;
- the material available to the delegate did not justify the application failing the test;
- the delegate took into account irrelevant material and failed to take into account relevant material;
- the decision involved an error of law;
- the applicant was deprived of procedural fairness in the decision-making process.

Nature of review

A claim registration review conducted pursuant to s. 190D(2):

- is not restricted to consideration and determination of a question of law but extends to determination of issues of fact and places the controversy constituted by the issues of fact and law before the court;
- it is not restricted to the material before the Registrar;
- empowers the court, if a ground of review is established, to make appropriate orders to do justice between parties in exercise of the original jurisdiction of the court—see the Full Court in *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 at [63] to [66].

As Justice Dowsett noted, given the nature of the review, the court must consider for itself the adequacy or otherwise of the information provided by the applicant against the conditions of the registration test, i.e. the court must form its own view—at [23] and [33].

The nature of the registration test and the Registrar's duty

Dowsett J noted that:

- while ss. 61, 61A and 62 'prescribe the content and form' of a 'valid' claimant application, compliance with those sections 'is not necessarily sufficient to secure registration of the claim';
- a claim may be accepted for registration 'only if' the Registrar is 'satisfied' as to all of the conditions prescribed by ss. 190B and 190C;
- under s. 190A(1), the Registrar has a statutory duty to consider, and decide, whether the claim made in the application under consideration meets the requirements of those provisions—at [2] and [11].

Delegate not bound by earlier decision

It was submitted that:

- the applicant in Gudjala People #2 was entitled to rely on the reasons given in relation to the core country claim when drafting the contents of application for Gudjala People #2 'for the purposes of passing the registration test'; and
- in circumstances where the same delegate considered both applications, that delegate became functus officio on making the first decision 'in respect of the second decision and it was not open to him to in effect reverse his own earlier decision'.

His Honour found that these arguments were 'misconceived' because:

- the delegate could not have considered the application 'at all' if functus officio;
- in fact, 'there was a statutory duty to do so' and the applicant's submissions failed to take account of that duty;
- the delegate 'was obliged to act in accordance with law, not in accordance with his own previous decision' and there could be 'no question' of delegate being bound to follow his own earlier decision if he considered that it incorrectly applied the NTA;
- in any case, the question was whether or not the delegate was correct in his view of Gudjala People #2 and so the decision concerning the core country claim was irrelevant to the court's task—at [8] and [11], referring to *Attorney-General (New South Wales) v Quin* (1989) 170 CLR 1.

Procedural fairness

The allegation of a denial of procedural fairness took two forms:

- an allegation that errors in the decision denied the applicant an opportunity to have the application assessed according to the appropriate criteria;
- the fact that the core country claim satisfied the same delegate with respect to the same group, for the same country, with the same traditional laws and customs and represented by the same individuals 'contributed' to the unfairness of the decision not to register Gudjala People #2 'without reference to a cogent or relevant reason for a changed opinion and on erroneous bases'.

Dowsett J dismissed the first allegation because it confused procedural fairness with errors in the decision-making process, when errors alone will not usually amount to a denial of procedural fairness—at [13].

The second 'superficially more substantial argument' led the court to consider the duty conferred upon the delegate. Pursuant to s. 190A(5A):

> Before the Registrar [or delegate] has decided whether or not to accept the claim for registration, he or she may notify the applicant that the application may be amended under the Federal Court Rules.

His Honour found there was 'nothing' in the second allegation because (among other things):

- the decision to 'accept or reject an application is a purely administrative function' that depended upon whether or not the application under consideration satisfied 'the prescribed criteria';
- nothing in the NTA suggested that the delegate was to receive submissions about any proposed decision and, if anything, s. 190A(5A) suggested the contrary;
- no special requirements of procedural fairness arose simply because the same delegate considered both applications;
- the applicant was obliged to satisfy the delegate that the requirements of the test were met and could not rely upon 'past practices';
- the applicant was given a preliminary assessment that warned of possible inadequacies in relation to all of the conditions of the test it ultimately failed to

meet, with the exception of s. 190B(6), and could 'hardly complain that other identified inadequacies led to a failure to satisfy the requirements of' s. 190B(6);
- it was made clear in the preliminary assessment that it was for the applicant to get independent legal advice and provide sufficient information to pass the test;
- exercising the discretion available under s. 190A(5A) to advise of possible 'shortcomings' and give the applicant an opportunity to amend before the registration test decision was made was desirable but 'not necessary'—at [15] to [21].

Irrelevant material

The allegation that the delegate took into account irrelevant material by having regard to documents relating to other applications was dismissed largely because the delegate did not treat that material as 'generally relevant to his task' and made 'very limited' use of it. However, after referring to s. 190A(3), which provides that the delegate 'may have regard to such other information as he or she considers appropriate', Dowsett J commented that:

> [I]t would be ... undesirable that the ... delegate take into account information derived from other applications without affording the applicant an opportunity to comment upon it—at [23].

Error of law and other grounds

The allegations as to errors of law and the other grounds raised in the review application were dealt by his Honour in the examination of the delegate's reasons summarised below.

Relevance of *Yorta Yorta* to the registration test

The delegate had referred to the decision in *Yorta Yorta* concerning the meaning of 'traditional' in s. 223(1) when considering ss. 190B(5) and 190B(7) of the test. Paragraphs (b) and (c) of the former refer to 'traditional laws' and 'traditional customs'. Subsection 190B(7) refers to a 'traditional' physical connection. His Honour summarised the major findings in *Yorta Yorta* before going on to consider the claim against ss. 190B(3) and 190B(5) to 190B(7)—at [26].

Native title claim group description—s. 190B(3)

The relevant provision here was s.190B(3)(b), which requires the Registrar must be satisfied that the persons in the native title claim group are described in the application sufficiently clearly so that it can be ascertained whether any particular person is in that group. This part of the test responds to a similar requirement found in s. 61(4).

The description of the native title claim group in Gudjala People #2 was:

> The criteria for membership of the Gudjala native title claim group is in accordance with traditional laws acknowledged and customs observed by the Gudjala people who are traditionally connected to the area described in Schedule B...through:
> 1) physical, spiritual and religious association; and
> 2) genealogical descent; and
> 3) processes of succession; and

> 4) who have communal native title in the application area from which rights and interests derive.
>
> The Gudjala native title claim group is comprised of all persons descended from the following [four named apical] ancestors.

The delegate considered that the paragraph identifying the claim group by reference to named apical ancestors would, of itself, be sufficient to satisfy s. 190B(3). However, the additional paragraph, which asserted membership was in accordance with traditional laws and customs etc., suggested to the delegate that membership of the claim group was not solely dependent upon descent from the named ancestors but the relevant laws and customs were not identified. This led the delegate to decide the description in the application was not sufficiently clear for the purposes of s. 190B(3)(b).

In relation to the submissions of the applicants, it was found that:

- as required, the delegate addressed only the content of the application in considering s. 190(3)(b);
- there was no error involved in the delegate accepting that the application complied with s. 61(4) for the purposes of 'procedural' condition found in s. 190C(2) but deciding that it did not meet the 'merit' condition found in s. 190B(3) because the NTA draws a distinction between ss. 190B(3) and 190C(2) as they apply to s. 61(4);
- in order to be entitled to registration, the application must 'comply with the quite precise test prescribed' in s. 190B(3)(b)—at [30] to [32].

However, given the nature of the review, it was also necessary for the court to form its own view as to whether there was compliance with s. 190B(3)(b). While this was a question that was 'not without difficulty' in this case, it was found that the 'better' view was that the application satisfied that condition of the test—at [33].

This was because the canons of statutory construction required the two parts of the claim group description to be read:

> [A]s part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open. The preferable construction ... is that all members of the claim group are descendants of the four apical ancestors. ... Although I would not encourage a repetition of this approach ... it sufficiently identifies the members of the claim group by reference to apical ancestors—at [34].

His Honour did note that:

> It is curious that laws and customs concerning physical, spiritual and religious association, genealogical descent and processes of succession should lead to the outcome that the only people who have 'communal native title' in the area are the descendants of four apical ancestors. One would have thought it more likely than not that some such descendants ... would fail in connection with physical, spiritual and religious association and/or processes of succession. As the laws and customs in question are not identified, this curiosity cannot be resolved. However subs 190B(3) requires only that the members

> of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification—at [33], emphasis in original.

Factual basis for claimed native title—s. 190B(5)

Subsection 190B(5) requires the Registrar to be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

- that the native title claim group have, and the predecessors of those persons had, an association with the area; and
- that there exists traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests; and
- that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The court noted that the reference in s. 190B(5) to the factual basis upon which it is asserted that the claimed native title rights and interests exist was:

> [C]learly a reference to the existence of rights vested in the claim group. Thus it was necessary that the Delegate be satisfied that there was an alleged factual basis sufficient to support the assertion that the claim group was entitled to the claimed Native Title rights and interests. In other words, it was necessary that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)—at [39].

Identification of claim group is a necessary aspect in identifying the factual basis

Dowsett J emphasised that there was a relationship between the claim group description and the requirements of s. 190B(5):

> [T]he absence of any description of the basis upon which the apical ancestors were selected re-emerges in considering this aspect of the case. There may be many ways in which to describe a claim group, any one of which may be sufficient to satisfy the requirements of subs 190B(3). However that task is undertaken, it will eventually be necessary to address the relationship which all members claim to have in common in connection with the relevant land ... .
>
> Identification of the claim group, the claimed rights and interests and the relationship between the two are not totally independent processes. The identified rights and interests must belong to the identified claim group. Subsection 190B(5) requires a description of the alleged factual basis which demonstrates that relationship. The applicant may not have been obliged to identify the relationship between the claim group and the relevant land and waters in describing the claim group for the purposes of subs 190B(3), but that step had to be undertaken for the purposes of subs 190B(5)—at [40] and [41].

After noting the material relied upon by the delegate, including affidavits from two members of the claim group and an anthropologist's report, his Honour went on to examine the evidence under each of paragraphs (a) to (b) of s. 190B(5).

Association with the area—s. 190B(5)(a)

The factual basis provided must support the assertion 'that the native title claim group have, and the predecessors of those persons had, an association with the area'.

The affidavit evidence of the two claimants identified their relationship to the apical ancestors and set out the association each claimant had with the claim area and the association of their parents and grandparents. His Honour was somewhat critical of the anthropologist's report in relation to this issue, noting that:

- in much of the report, it was unclear whether the writer was expressing opinions or stating facts;
- some parts of the report seemed to refer to views and opinions concerning Aboriginal culture and norms generally, rather than to those relevant to Gudjala People #2;
- a statement in the report that 'documentary and oral historical material obtained in the course of my work make it clear that this family has maintained a presence in the claim area at all times since non-indigenous occupation' was, at best, merely a summary of relevant facts not otherwise identified—at [46] to [47].

Dowsett J noted the delegate's comment that, in the absence of any evidence as to the size of the claim group or as to the number of predecessors over the years since the days of the apical ancestors, it was impossible to assess the group's association with the claim area or that of their predecessors—at [51].

His Honour went on to say that:

> Even if it be accepted that all members of the claim group are descended from people who had an association with the claim area at the time of European settlement, that says nothing about the history of such association since that time. Some members of the claim group and their predecessors may be, or may have been, so associated, but that does not lead to the conclusion that the claim group as a whole, and their predecessors, were similarly associated—at [51].

It was found that the application did not demonstrate the required association because:

- while the affidavit evidence of the two claimants may have demonstrated that they, and their families, presently have an association with the claim area, and that their predecessors have had such association since European settlement, it did not demonstrate that the claim group as a whole presently has such association;
- while this did not mean all members must have such association at all times, there must be evidence that there is an association between the whole claim group and the area claimed;
- similarly, there must be evidence of such an association between the predecessors of the whole group and the area over the period since sovereignty;
- the affidavit evidence did not 'go so far' and the anthropologist's report provided opinions and conclusions rather than any alleged factual basis for such opinions and conclusions or for the claim—at [52].

Traditional laws and customs—s. 190B(5)(b)

The requirement here is that the factual basis is sufficient to support the assertion 'that there exists traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests'.

It was found that, in order to satisfy s. 190B(5)(b):

- that factual basis must be capable of demonstrating that there are traditional laws and traditional customs acknowledged or observed by the native title claim group and giving rise to the group's claim to native title rights and interests;
- in accordance with *Yorta Yorta*, the requirement in s. 190B(5)(b) that the laws and customs be 'traditional' means that 'they must have their source in a pre-sovereignty society and have been observed since that time by a continuing society';
- the task at 190B(5)(b) is to identify the existence, at least at the time of European occupation, of 'a society of people, living according to identifiable laws and customs, having a normative content';
- such laws and customs must 'establish normal standards of conduct or, perhaps, be prescriptive of such standards';
- there can be no relevant traditional laws and customs unless there was, at sovereignty, a society 'defined by recognition of laws and customs from which such traditional laws and customs are derived';
- the 'starting point' for 190B(5)(b) must be identification of an Indigenous society at the time of sovereignty or, at least, at the time of European occupation (1850 to 1860 in this case);
- while the apical ancestors used to define the claim group need not be shown to be, in and of themselves, such a society, at some point the applicant must 'explain the link between the claim group and the claim area', which would 'certainly involve the identification of some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage';
- the Gudjala People #2 claim should be understood as relating to the core country claim and so the relevant society should be sought in the larger area covered by that application—at [62] to [67].

After considering the evidence, Dowsett J found that:

> [T]here is no evidence of any known connection between the...apical ancestors, save for their presence in this relatively large area. [Two of them]... seem to have lived on stations. There is no evidence as to the relationship between station owners and indigenous employees on the one hand, and any pre-existing indigenous society on the other. One is inclined to infer that, in 1850-1860, there were groups of indigenous people in the area, but there is no evidence concerning them. There is certainly no factual basis for inferring that there was a society defined by its acknowledgement and observation of laws and customs—at [68].

Further, the evidence of contact in 'modern times' amongst the family or clan groups identified in the anthropologist's report as members of the claim group was 'scant'—at [69].

Therefore, s. 190B(5)(b) was not satisfied because:

> On the material presently available, I find no factual basis supportive of an inference that there was, in 1850-1860, an indigenous society in the area, observing identifiable laws and customs. For the purposes of subs 190B(5), it is not necessary to go further—at [70].

While it was not necessary to do so, his Honour did go on to say that there was also 'scant' evidence concerning the 'broader question' of whether there were 'traditional' laws and customs currently acknowledged and observed by the claim group. That evidence consisted what was said in the affidavits of two claimants, in particular those of William Santos, and the anthropologist's report—at [70] to [77].

Dowsett J noted (among other things) that:

> Much of it may well have been handed down to ... [Mr Santos] as oral tradition, but there is nothing in the affidavit material which would link those laws and traditions [i.e. as described by Mr Santos] to any particular time in the period since 1850-1860 or, in particular, to that period. A certain amount of Mr Santo's evidence might be said to describe laws and customs which are normative in nature. Although some of it asserts rights and interests in land, none of it identifies traditional laws and customs derived from a pre-sovereignty society, which support or justify the claim group's claims. It is impossible to understand why descendants of the identified apical ancestors have rights and interests in the land whereas others have not—at [78].

As to the anthropologist's report, his Honour noted that:

- the basis for the opinion that 'it may reasonably be concluded that the claimed area belongs to the Gudjala People' was by no means clear;
- much of the discussion of traditional laws and customs in the report referred to writings concerning north-west Queensland generally;
- there was no 'real' basis given in the report for the inference that the Indigenous community 'associated with the Gudjala area have clearly not abandoned the legal principles on which their system of land tenure is based and continue to today to be guided by laws and customs which have their origin in pre-contact time';
- while the report may have described a society having apparently traditional laws and customs, there was no basis for inferring that those laws and customs originated in any pre-sovereignty society;
- while an inference that some or all of those laws and customs had been handed down through two or more generations may have been open, it was 'impossible to say any more than that'—at [79] to [81].

The court concluded that the 'real deficiencies' in the application were 'twofold':

- it failed to explain how, by reference to traditional law and customs presently acknowledged and observed, the claim group was limited to descendants of the identified apical ancestors; and

- no basis was given to support an inference that there was, at and prior to 1850-1860, a society which had a system of laws and customs from which relevant existing laws and customs were derived and traditionally passed on to the existing claim group—at [81].

Claim group continued to hold the native title—s. 190B(5)(c)
The requirement here was that there must be a sufficient factual basis to support the assertion that 'the native title claim group have continued to hold the native title in accordance with those traditional laws and customs'.

Dowsett J found that the application did not satisfy s. 190B(5)(c) because it:

> [I]mplied a continuity of such tenure going back to sovereignty, or at least European occupation as a basis for inferring the position prior to that date and at the time of sovereignty. The difficulty is the inability to demonstrate the existence, at that time, of a society observing laws and customs from which current traditional laws and customs were derived. This difficulty led the Delegate to conclude that this requirement has not been satisfied. I agree—at [82].

Some native title rights and interests can be established prima facie—s. 190B(6)
Subsection 190B(6) provides that the Registrar must consider, prima facie, that 'at least some of the native title rights and interests claimed in the application can be established'.

In considering this requirement, his Honour referred to the definition of 'native title or native title rights and interests' in s. 223(1) and the findings in *Yorta Yorta* at [86] that:

- 'native title rights and interests' are rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the peoples in question; and
- 'traditional' refers to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty.

It was found that, for the reasons given earlier in relation to traditional law and traditional custom in this case, s. 190B(6) was not satisfied—at [87].

Traditional physical connection—s. 190B(7)
This condition of the test requires the Registrar to be satisfied that at least one member of the native title claim group has, or had, a 'traditional' physical connection with any part of the application area. Dowsett J decided that the application did not meet the condition found in s. 190B(7) because there was 'no basis for inferring that there was a society of the relevant kind, having a normative system of laws and customs, as at the date of European settlement'—at [89].

Decision
The application for review was dismissed because the court found that the conditions in ss. 190B(3) and 190B(5) to 190B(7) were not met.

Comment

This court's findings will have a significant impact upon the application of various conditions of the registration test, particularly s. 190B(5). The Registrar is in the process of providing information on the application of the test in the light of his Honour's findings direct to applicants, Representative Aboriginal/Torres Strait Islander bodies and native title service providers. In the meantime, if readers have any queries in relation to a particular matter, please contact the Senior Delegate—Communications, freecall 1800 640 501.