

Registration test review

***Glasshouse Mountains Gubbi Gubbi People v Registrar* [2008] FCA 529 (2007 Amendment Act)**

Spender J, 21 April 2008

Issue

This case concerned an application for review under s. 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) (AD(JR) Act). The main issues were whether:

- the Native Title Registrar (the Registrar) breached the rules of procedural fairness in refusing to extend the time for making a registration test decision;
- Item 90 of Schedule 2 of the Native Title Amendment Act 2007 (Cwlth) (2007 Amendment Act) required the Registrar to apply the registration test to a claimant application that had been continuously registered since it was made in 1996 and had not been subjected to the test previously;
- having applied the registration test under Item 90 and decided the claim did not meet the conditions of the test, the Registrar was empowered to remove a claim from the Register of Native Title Claims (the Register) in the absence of any express power to do so.

The Federal Court concluded that none of the grounds raised had been made out and so dismissed the application. Of note is the court's finding that the Registrar is not obliged to advise an applicant of what amendments may be required to ensure compliance with the requirements of the registration test.

Background

The relevant claimant application was lodged by Eve Fesl and others on behalf of the Glasshouse Mountains Gubbi Gubbi People (the Gubbi Gubbi application) on 26 June 1996 under the original *Native Title Act 1993* (Cwlth) (NTA). Details of the application were entered on the Register when the application was received, as required by ss. 63, 66 and 190(1)(a) of the original NTA and in accordance with the decision in *Northern Territory v Lane* (1995) 59 FCR 332.

The registration test, found in ss. 190A to 190C, was inserted into the NTA when the relevant provisions of the *Native Title Amendment Act 1998* (Cwlth) (1998 Amendment Act) commenced on 30 September 1998. The Gubbi Gubbi application did not have to be tested at that time because Item 11 of Schedule 5 to the 1998 Amendment Act did not apply. Nor was there any other reason to apply the test to the claim made in that application prior to the commencement of the relevant provisions of the 2007 Amendment Act on 15 April 2007.

The Registrar wrote to the applicant on 24 April 2007 advising that Item 90 of Schedule 2 to the 2007 Amendment Act (the transitional provisions) applied to the Gubbi Gubbi application and it now had to be subjected to the registration test. On 14 May 2007, a further letter was sent on the Registrar's behalf which informed the applicant that:

- the test would be applied to the claim in September 2007;

- any amendments to the application should be made, and any additional materials should be provided, by 17 August 2007; and
- if nothing further was received, the Registrar's delegate would proceed to test the claim on the basis of the information currently available.

On 17 August 2007, the applicant sent an email stating that, while the claim group initially considered withdrawing the application, they now sought an extension of time to prepare the claim for the test. On 20 August 2007, the Registrar's delegate rejected the request for an extension of time for the making of the registration test decision but granted the applicant an extension until 24 August 2007 to provide any additional materials. The delegate pointed out there was no express statutory authority for delaying the application of the test and that requests for extensions were assessed on a case by case basis, taking into account all the relevant circumstances.

Nothing was received by 24 August 2007 and so the registration test was applied on 28 September 2007. The Registrar's delegate found that the claim made in the Gubbi Gubbi application did not meet all of the conditions of the test as required by s. 190A(6) and, as a consequence, it was removed from the Register. The applicant then sought review under the AD(JR) Act. The Commonwealth Attorney-General intervened in the proceedings pursuant to s. 18(1) of the AD(JR) Act.

Jurisdiction

His Honour Justice Spender was of the view that:

- the delegate's decision not to extend the time for the application of the test was neither required under the NTA nor 'a final determination of a substantive matter';
- therefore, it was not reviewable under s. 5 of the AD(JR) Act, although the delegate's conduct might have been reviewable under s. 6 of that Act;
- since the decision on registration was reviewable under s. 5 of the AD(JR) Act, which was 'sufficient for the present proceedings', there was no need to 'express a concluded view on the character' of the decision to refuse an extension of time—at [18].

The application for review was filed 10 days out of time but, because the delay was 'only very short and no prejudice is suggested to other interested parties', the court extended the time for making the review application—at [24].

Did the test have to be applied?

Item 90(1) of the transitional provisions sets out the circumstances in which Item 90 applies. It was not in dispute that the Gubbi Gubbi application satisfied all the elements of Item 90(1). Item 90(2) relevantly directs the Registrar to 'consider the claim under section 190A' and to use best endeavours to finish doing so by the end of 15 April 2008 or as soon as reasonable practicable thereafter. Subsection 190A(6) requires the Registrar to accept a claim for registration only if it meets all of the requirements of ss. 190B and 190C.

The applicant submitted (among other things) that:

- Item 90(2) required the Registrar to apply s. 190A only when the specific circumstances set out in s. 190A(1) arose i.e. when the Registrar received a copy of either a new, or an amended, claimant application from the Federal Court Registrar;

- as those circumstances did not apply to the Gubbi Gubbi application, the Registrar had no power to apply the test to it.

The Attorney-General argued (among other things) that Item 90(2):

- imposed a 'clear statutory duty' on the Registrar to consider claims that fell within Item 90(1), which was an extension of the scope of the operation of the duty found in s. 190A(1) of the NTA;
- expressly required the Registrar to consider a category or class of claim in addition to those that must be considered under s. 190A(1) i.e. the category or class of claim that fell within the scope of item 90(1).

His Honour accepted the Attorney-General's interpretation, finding that:

- the clear object of Item 90 was that certain registered claims that had not previously been examined against the criteria of the registration test must now be tested;
- Item 90(2) imposed upon the Registrar a requirement to examine any claim satisfying the conditions of Item 90(1) against the requirements of ss. 190, 190A, 190B and 190C of the NTA in order to decide whether that claim should be on the Register—at [32] and [34], referring to the Explanatory Memorandum to the 2007 Amendment Act.

Was the Registrar empowered to remove the claim from the Register?

The applicant submitted that:

- subsection 190(4) of the NTA comprehensively and exhaustively listed all of the Registrar's powers to deal with the Register;
- since none of the circumstances in s. 190(4) applied, the Registrar had no power to remove the entry in relation to the Gubbi Gubbi application from the Register.

The Attorney-General argued (among other things) that, while no express power existed to permit removal of the Gubbi Gubbi application from the Register, the 2007 Amendment Act had to be read to imply such a power.

His Honour held that:

- the NTA imposes particular duties on the Registrar to maintain the Register, keep it up to date and ensure that only claims that meet the requirements of the statute are entered on it;
- the Registrar was obliged to remove a claim from the Register if, after considering it under Item 90 of Schedule 2, the Registrar decided it did not meet the registration test criteria;
- although there was no express power to do so, the power existed by necessary implication—at [41] and [43].

Did the Registrar breach the rules of procedural fairness?

The applicant argued that the Registrar had breached the rules of procedural fairness by:

- requiring the applicant to prepare amendments in 'such a short time', especially as the claim had been registered for 11 years, when Item 90(2)(b) contemplated the Registrar taking up to a year to test claims;
- not informing the applicant of what they needed to do, or what amendments had to be made to the application, in circumstances where the Registrar was aware that the applicant was not legally represented.

Spender J held (among other things) that:

- the imposition of a nominal one year deadline within which the Registrar was to consider the relevant claims demonstrated that Item 90(2) was clearly aimed at having decisions made as quickly as the resources of the Tribunal, the applicant and relevant representative bodies would allow;
- it was in the interests of all parties that the intention of the legislature to be carried out soon as was reasonably practicable;
- the nominal one year time period was not relevant to any consideration of whether the applicant in this case had been given a reasonable opportunity to submit materials to the Registrar;
- it was not unreasonable for the Registrar to place the Gubbi Gubbi application among the first to be tested;
- there was no obligation on the Registrar to advise an applicant as to what amendments were required to be made to ensure compliance with the requirements of the registration test;
- the order sought by the applicant, namely that the Registrar re-consider the claim, subject to 'allowing the applicant not less than two months to make any amendments to the claim', was inconsistent with the applicant's submission that the three month period originally given by the Registrar constituted a breach of procedural fairness;
- it was not shown that, in this case, the Registrar's delegate 'unreasonably fettered or compromised' the right of the applicant to 'a fair hearing';
- the claim was one of the older claims that fell within Item 90 and had enjoyed the benefits of registration for many years 'without being subject to the requirements imposed on later claims seeking the same benefits';
- the applicant's failure to comply with the deadline set by the Registrar was not because that deadline was unreasonable but because the applicant did not perform the necessary tasks in the not unreasonable time given by the Registrar—at [64], [67] and [70] to [72].

Decision

The court ordered that the application for review be dismissed.