Registration test review—Town of Bachelor No 2

Hazelbane v Doepel [2008] FCA 290

Mansfield J, 7 March 2008

Issue

This case deals with an application under the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) (AD(JR) Act) for review of a decision by the Native Title Registrar (the Registrar) to accept a claimant application for registration pursuant to s. 190A of *the Native Title Act 1993* (Cwlth) (NTA). The critical issues were whether:

- the applicant to a registered overlapping claimant application was a person aggrieved by the decision of the Registrar and, therefore, had standing to bring an application for review under s. 5 of the AD(JR) Act;
- the Registrar was required to afford procedural fairness to the applicant to a registered overlapping application and if so, whether it had been afforded;
- section 53A of the *Federal Court of Australia Act 1976* (Cwlth)(FCA) prohibited the Registrar from considering material which was produced for the purposes of mediation in the Federal Court; and
- the Registrar erred in law by asking the wrong question in addressing the procedural requirements of ss.190C(2) and 190C(4) of the NTA.

It was decided that the Registrar's decision should be set aside, firstly because (in the particular circumstances of this case) the Registrar had failed to provide procedural fairness to the applicant on the overlapping registered application and, secondly, because the Registrar's finding that the application satisfied s. 190C(4)(b) of the NTA was wrong.

The decision is significant because it indicates that, absent the particular circumstances of this case, the Registrar is not required to afford procedural fairness to the applicant on an overlapping registered claim when making a registration test decision on any 'competing' overlapping claim.

Background

The Registrar accepted an application for registration under s. 190A of the NTA. It was made by three people over an area of land in the Town of Batchelor in the Northern Territory. The court called those making the application the Batchelor No 2 applicant and their application the Batchelor No 2 application. The applicant to a previously registered claimant application (Bachelor No 1 application) over the same area, referred to as the Town of Batchelor No 1 applicant, sought review under the AD(JR) Act of the Registrar's decision to register the Batchelor No 2 application. The Northern Land Council (NLC), the recognised representative body under the NTA for the area concerned, had certified the Town of Batchelor No 1 application pursuant to s. 203BE of the NTA but had not certified the Town of Batchelor No 2 application—at [12].

Standing

Those who constituted the Town of Batchelor No 1 applicant (see s. 61(2)(d) of the NTA) submitted that:

- they were aggrieved by the decision of the Registrar because it resulted in two groups of people having the same procedural rights under the NTA's future act regime in respect of the same claim area;
- success in their AD(JR) Act application would result in a benefit to them, or relieve them of a detriment, to an extent greater than ordinary members of the public.

Justice Mansfield considered that the procedural rights which the Town of Batchelor No 1 applicant obtained from registration were not diminished by the fact of the registration of the Town of Batchelor No 2 application. However, his Honour held that:

- the enjoyment of those procedural rights would be diminished because the persons who were required to afford them to the Town of Batchelor No 1 applicant would also have afford them to the Town of Batchelor No 2 applicant;
- therefore, in a practical sense and to 'put it somewhat crudely, the potential fruits of the negotiations would probably be shared rather than doubled';
- on that basis, the Town of Batchelor No 1 applicant's interests were adversely affected by the Registrar's decision to a greater extent than ordinary members of the public;
- therefore, the Town of Batchelor No 1 applicant had standing under s. 5 of the AD(JR) Act to make an application for review of the Registrar's decision to register the Town of Batchelor No 2 application—at [20] to [22].

Procedural fairness

Those who constituted the Town of Batchelor No 1 applicant contended that:

- the Registrar was obliged to extend procedural fairness to them;
- this included affording them an opportunity to make written submissions and present material on whether that application should be accepted for registration;
- the Registrar had failed to afford that opportunity—at [23] and [25].

The court accepted that, had this opportunity been afforded, the Town of Batchelor No 1 applicant would have (either directly or through the NLC) provided anthropological and other material to the Registrar which may have influenced the Registrar's decision—at [24].

Mansfield J considered the extent to which an entitlement to procedural fairness may have been excluded by the express terms of the NTA or any necessary implication and concluded that:

- section 66 of the NTA proceeds on the basis that a decision to accept a native title claim for registration under s. 190A not only may, but must, be made before a competing registered native title claimant in respect of the same area is notified of the competing claim because of the interaction between ss. 66(3) and 66(6)(a);
- paragraph 66(6)(a) makes it plain that, in the normal course, a competing registered native title claimant is not entitled to be given the opportunity to be heard when the Registrar is considering whether to accept a claimant application over the same area for registration—at [25] to [26], referring to *Kioa v West* (1985) 159 CLR 550.

However, Mansfield J considered that a 'combination of particular circumstances' meant this case did not follow the 'normal course' but, rather, gave rise to a legitimate expectation on the part of the Town of Batchelor No 1 applicant, and an obligation on the part of the Registrar, that the NLC and its solicitors would be given:

- notification that the Registrar was considering whether to accept the Town of Batchelor No 2 application for registration; and
- a time within which to make submissions and provide additional information to the Registrar—at [28].

The 'combination of particular circumstances' giving rise to the legitimate expectation were that:
- the NLC had certified the Town of Batchelor No 1 application;
- both the NLC and the Town of Batchelor No 1 applicant had the same solicitors;
- the Town of Batchelor No 1 applicant was aware that the Town of Batchelor No 2 application had been made, probably because the Registrar gave the NLC a copy of it and the accompanying material as required by s. 66(2A);
- the solicitors for the NLC and the Town of Batchelor No 1 applicant had indicated a desire to make submissions to the Registrar on whether the Town of Batchelor No 2 application should be accepted for registration;
- this was acknowledged in an email exchange between the solicitors for the NLC and the Town of Batchelor No 1 applicant and the Registrar's staff;
- in that email exchange, the Registrar's staff indicated that any submissions should be delayed until after proposed amendments to the Town of Batchelor No 2 application were made and that the NLC would be notified of the time within which it was to do so;
- the Registrar gave the NLC notice that the Town of Batchelor No 2 application had been amended and was to be tested but did not give notice as to when any submissions and additional information were to be provided by the NLC and so made the registration decision without affording that opportunity—at [27].

While the communication between the Town of Batchelor No 1 applicant, the NLC and the Registrar's staff referred only to a submission from the NLC, Mansfield J held that there was such a 'coincidence of interest' between the Town of Batchelor No 1 applicant and the NLC (which was apparent to the Registrar because the Town of Batchelor No 1 application had been certified by the NLC) that the opportunity to make a submission and to present additional information was an entitlement to procedural fairness that 'covered' both the NLC and the Town of Batchelor No 1 applicant—at [28].

The court held that the Registrar's decision should be set aside because the nature of any submission and any additional information which may have been provided had an opportunity to do so been afforded might have affected that decision—at [29] to [31].

Use of mediation information

The Town of Batchelor No 1 applicant contended that the Registrar, in considering the Town of Batchelor No 2 application against the condition found in s. 190B(5) of the NTA, could not have regard to material which was prepared for the purposes of mediation in the court in relation to the Batchelor No 1 claim. This submission was based on s. 53B of the FCA, which provides that evidence of anything said, or of any admission made, at a conference conducted by a mediator in the course of mediating anything referred under s. 53A is not admissible:
- in any court (whether exercising federal jurisdiction or not); or
- in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence. (Compare s. 136A(4) of the NTA.)

Mansfield J held that:

- the Town of Batchelor No 2 applicant was entitled to provide material to the Registrar in addition to that in the Town of Batchelor No 2 application for the purposes of satisfying the requirements of s. 190B(5) of the NTA;
- section 53B (although his Honour refers to s. 53A) of the FCA did not prevent a party producing in evidence the same material as that presented at mediation (provided, of course, it is relevant);
- the Registrar simply recorded that he understood the material to have been prepared for the purposes of mediation and did not receive material as to what was said at the mediation, 'or of anything there said';
- had the Registrar actually received information that the material was presented at the mediation, then s. 53B may have been infringed but, because there was no apparent reliance by upon the fact of it having been presented to the mediation, it would have been 'an error without consequence';
- the material was apparently 'of a factual and conclusory nature and was equally eligible to be presented to the Registrar as to a mediator'—at [38].

Authorisation

The final contention was that the Registrar fell into error by identifying the wrong issue, and asking the wrong question, in addressing the requirements of ss. 190C(2) and 190C(4). In considering this point, the court focussed on s. 190C(4)(b), which provides that the Registrar must be satisfied that those who constitute the Town of Batchelor No 2 applicant are members of the native title claim group and are authorised to make the application and deal with matters arising in relation to it by all the persons in the native title claim group.

The court concluded that the Registrar's decision to overlook the shortcomings in the attachments to the Town of Batchelor No 2 application, because they were not professionally prepared, was understandable. However, the substance of the material had to be adequate to satisfy the requirements of s. 190C(4)(b) and his Honour was of the view that the material did not have that quality. So, for that reason also, the decision of the Registrar to accept the Town of Batchelor No 2 application for registration under s. 190A was set aside—at [42] to [52].

Decision

The court made orders:

- setting aside the Registrar's decision to accept the Town of Batchelor No 2 application for registration; and
- granting the Town of Batchelor No 2 applicant leave to apply in the event that the applicant wished to have the Town of Batchelor No 2 application referred for reconsideration by the Registrar. On this point, see *Hazelbane v Doepel* [2008] FCA 291, summarised in *Native Title Hot Spots* Issue 27, where his Honour made an order striking out the Town of Batchelor No 2 application but ordered it not be sealed for 14 days and 'lie in the registry' until then or until further order.