Registration test review — authorisation

Wiri People v Native Title Registrar [2008] FCA 574

Collier J, 29 April 2008.

Issue
In this review of a registration test decision, the main issue before the Federal Court was whether the claimant application referred to here as Wiri People #2 application met the authorisation condition found in s. 190C(4)(b) of the *Native Title Act 1993* (Cwlth) (NTA).

Background
The original Wiri People # 2 application covered an area in central Queensland and was first entered on the Register of Native Title Claims (the register) in April 1998. In 1999 and 2000, it was amended to decrease the area it covered. Both amended applications passed the registration test found in s. 190A to 190C of the NTA and so the application remained on the register.

In November 2006, the application was again amended, this time to increase the application area back to almost the area covered by the original Wiri People # 2 application, change the description of the native title claim group and replace the applicant. The expansion of the application area resulted in an overlap with the area covered by a claimant application referred to here as the Wiri Core Country Claim, which had been certified by the Central Queensland Land Council (the CQLC) under ss. 190C(4)(a) and 203BE of the NTA. The Wiri People #2 application was not certified by the CQLC.

Delegate's decision
The Native Title Registrar's delegate found that the Wiri People #2 application did not satisfy the requirements of s. 190C(4)(b) (i.e. that the applicant was authorised to make the application and deal with matter arising in relation to it by all the persons in the native title claim group), essentially because:

- the evidence relating to the proper composition of the claim group was 'conflicting and contentious';
- the delegate could not be satisfied that the group described in the application was the whole of the native title claim group.

In making this finding, the delegate referred to *Risk v National Native Title Tribunal* [2000] FCA 1589 at [60] (*Risk*).

The applicant sought review of the delegate's decision under s. 190D(2) of the NTA.

Applicant's submissions
The applicant submitted (among other things) that the delegate:

- had misconstrued *Risk* by erroneously considering she was required to make a factual determination as to the 'correct' description of the native title claim group;
- had failed to appreciate that an assessment of the composition of the claim group is a function of the duty found in s. 190C(2), not s. 190C(4)(b);

- did not limit her assessment under s. 190C(4)(b) to the description of the claim group as it appeared in the application and accompanying material; and
- having been satisfied that s. 190C(2) was met, should have confined her inquiries in relation to s. 190C(4)(b) to whether the claimant group, as described in application, had authorised the making of the application.

Registrar's submissions

The Registrar submitted (among other things) that:

- paragraph 190C(4)(b) required the delegate to be satisfied that the applicant was authorised to make the application by all the other persons in the 'native title claim group', which involved consideration of the composition of that group;
- the delegate's role went beyond merely accepting the correctness of an applicant's assertion that the persons who, according to their traditional laws and customs, hold communal rights and interests comprising the particular native title claimed are confined to those named or described in the application.

Reasoning

Justice Collier rejected the submission that the delegate had misconstrued the principles in *Risk*, essentially because:

- it was open to the delegate to take into account the existence the Wiri Core Country Claim, an overlapping and competing application, which contained a broader native title claim group description and which had been certified the CQLC;
- it was clear from the delegate's reasons that she had carefully avoided both adjudicating between the two claim group descriptions and making a factual determination as to the 'correct' description—at [24] to [25].

As to the applicant's second submission, the court found that an assessment of the composition of the claim group was a function of the delegate's duty under s. 190C(4)(b) not s. 190C(2) because:

- clause 29.24 of the Explanatory Memorandum to the Native Title Amendment Bill 1997 stated that s. 190C(4): '[R]elates to the identity of the claimants and is designed to ascertain whether they are the appropriate persons';
- the applicant misrepresented the plain meaning of s. 190C(4)(b) by giving it a more restricted meaning;
- the applicant's argument confused the terms of ss. 190C(2) and 190C(4)(b) - while there was an obvious intersection between those two provisions, the matters of which the delegate must be satisfied are different;
- under s. 190C(2), the delegate must be satisfied that the application contains the information required by ss. 61 and 62 whereas under s. 190C(4), the delegate must be satisfied as to the identity of the claimed native title holders, including the applicant—at [26] to [29].

As to the applicant's third submission, Collier J held that:

- paragraph 190C(4)(b) does not confine the delegate to the information in the application or statements in the affidavit;
- the existence and nature of the information in the Wiri Core Country Claim was available and relevant to the delegate's consideration of whether the applicant in the Wiri People #2 application was authorised to make the application on behalf of all the other persons in the native title claim group;

- while the delegate was not required to look beyond the terms of the application for the purposes of s. 190C(2), it did not necessarily follow that the same principle applies to s. 190C(4)(b)—at [23], [25], [28] and [31].

The applicant's fourth submission was also rejected i.e. once the delegate was satisfied of those matters under s. 190C(2), in the case of an uncertified application, the requirements of s. 190C(4)(b) are not met simply if the delegate is satisfied that the claim group as described in the application authorised the making of the application—at [27], [29] and [33], referring to *Northern Territory v Doepel* (2003) 133 FCR 112; [2003] FCA 1384, *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 and *Wakaman People No 2 v Native Title Registrar* (2006) 155 FCR 107; [2006] FCA 1198.

Her Honour concluded that:

- the delegate had not misconstrued the decision in *Risk*;
- the delegate's approach to the different requirements of ss. 190C(2) and 190C(4)(b), and her conclusion that the claim made in the application did not meet the condition found in s. 190C(4)(b) in relation to authorisation, were correct—at [32] and [36].

Decision

Collier J was of the view that the applicant had not made out any ground of review and so dismissed the application—at [22] and [37] to [40].