Registration test review – factual basis

Gudjala People #2 v Native Title Registrar [2008] FCAFC 157

French, Moore and Lindgren JJ, 27 August 2008

Issue
The main issue in these appeal proceedings was whether the primary judge's approach to assessing an anthropological report provided for the purposes of s. 190B(5) of the *Native Title Act 1993* (Cwlth) (NTA), a condition of the registration test dealing with the sufficiency of the factual basis provided to support the claim, was correct.

The Full Court allowed the appeal, finding that the primary judge's approach involved the application of a more onerous standard than s. 190B(5) required. The matter was remitted to the primary judge for reconsideration in accordance with the court's reasons for judgment.

Background
The claimant application under consideration in this case was made on behalf of the Gudjala People in April 2006 (Gudjala People #2). It covers an area in Queensland. In November 2006, a delegate of the Native Title Registrar decided it must not be accepted for registration because it did not meet various conditions of the registration test. (Pursuant to s. 190A(6), a claimant application must meet all of the conditions of the test if it is to be accepted for registration.) 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).

In August 2007, Justice Dowsett found that the application did not meet the conditions found in ss. 190B(5), 190B(6) and 190B(7) and so dismissed the application for review—see *Gudjala People # 2 v Native Title Registrar* [2007] FCA 1167, summarised in *Native Title Hot Spots* Issue 26.

In November 2007, an application for leave to appeal out of time against that judgment was filed on behalf of the Gudjala People. Leave to do so was granted unopposed at the commencement of the Full Court hearing in May 2008.

Statutory framework
Justices French, Moore and Lindgren set out the relevant provisions of the NTA. Two of those provisions are of particular importance in this case.

The first is s. 62(2)(e), which requires that a claimant application must contain 'a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist' and, in particular, that:

- the native title claim group have, and the predecessors of those persons had, an association with the area – s. 62(2)(e)(i); and

- there exist traditional laws and customs that give rise to the claimed native title – s. 62(2)(e)(ii); and
- the native title claim group have continued to hold the native title in accordance with those traditional laws and customs – s. 62(2)(e)(iii).

The second is s. 190B(5), which provides that the Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support that assertion. In particular, the Registrar must be satisfied that the factual basis is sufficient to support the assertions that:
- the native title claim group have, and the predecessors of those persons had, an association with the area – s. 190B(5)(a); and
- there exist 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 – s. 190B(5)(b); and
- the native title claim group have continued to hold the native title in accordance with those traditional laws and customs – s. 190B(5)(c).

Note that s. 190B(5)(b) includes a requirement that s. 62(2)(e)(ii) does not i.e. that there exist 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.

Native title rights and interests claimed

Where it could be recognised, the native title right to possession, occupation, use and enjoyment as against the whole world was claimed. Over the remainder of the area covered by the application, 11 specific rights were claimed on a non-exclusive basis, including rights of access, rights to camp, fish and hunt, rights to take and use the natural resources and rights in relation to cultural and spiritual matters.

Material going to factual basis

In this case, the following statement was made at Schedule F of the application form:

> The native title rights and interests claimed are those possessed under the traditional laws and customs of the Gudjala People which together form part of a body of customary law that is part of a broader system of Aboriginal culture. The broader system is a comprehensive body of law covering cultural values, norms of social behaviour and principles that comprise the land law component of that body of law that govern the landed interests of the claim group. The acquisition of land interests is by descent from ancestors and derived from fundamental rights of possession and ownership of land.

The 'examples' of 'facts giving rise to the assertion of native title' given at Schedule F were that members of the claim group continue to:
- have a close association, including a spiritual connection with the claim area according to their traditional laws and customs;
- pass on to their descendants the body of traditional laws and customs, rights to conduct activities under those traditional laws and customs and stories and beliefs concerning their traditional country, including the claim area;
- use the claim area for traditional hunting and fishing and for the gathering of traditional bush medicines and other materials;

- care for their traditional country, including the claim area, in accordance with traditional laws and customs passed down to them by their forebears and predecessors;
- exercise a body of traditional laws and customs which has been passed down to them from generation to generation by their forbears and predecessors, including traditional laws and customs dealing with caring for country, controlling access to country by members of the native title claim group, the holding of ceremonies on traditional country and the use of traditional country.

In addition, the applicant had incorporated into the application both a report by Rod Hagen, an anthropologist, and the affidavit of a member of the claim group, William Santo.

Therefore, the materials provided in the application in this case as a 'general description' of the factual basis for the purposes of s. 62(2)(e) were the statements and information made in Schedule F, Mr Hagen's report and Mr Santo's affidavit evidence.

On several occasions, their Honours emphasised that the affidavits of those comprising the applicant filed for the purposes of s. 62(1)(a) (which the court referred to as the 'standard form verifying affidavits') all stated (as they were required to do) that the deponent believed that all the statements made in the application were true—at [23], [91], [92] and [96].

Anthropological report

Their Honours canvassed at some length the contents of this report, noting (among other things) that Mr Hagen:

- described himself as an anthropologist who had worked intermittently with members of the Gudjala group since June 2000 and on similar matters in other parts of Australia since October 1975;
- had been asked to comment on the factual basis for the asserted native title rights and interests claimed in the Gudjala application;
- had reviewed a wide range of materials relating to the area and spoken with both members of the native title claim group and 'many others in the general vicinity';
- explained the relationship of particular 'Gudjala families' with the four apical ancestors named in the application;
- said that the available materials supported the identification of the current claimants as members of the Gudjala group on the basis of descent from those apical ancestors, that contemporary members of the claim group continued to maintain an association with the Gudjala area and that this included maintenance of 'an unbroken chain of occupation of the overall claim area';
- said that documentary support for Gudjala interests in the claim area could be drawn from a number of earlier authors specified in the report and that, on the basis of available material, it could 'reasonably be concluded' that the lands subject to the claim 'traditionally belonged to the Gudjala';

- identified from earlier writing on Indigenous connections to land in north west Queensland four underlying principles of 'law' and that 'general government of the community' lay in the hands of 'an assembly of elders';
- found that establishment of 'ancestral connection' with an area 'to the satisfaction of the community' was of principal importance and those who now live in other areas, but possess an ancestral connection, are recognised by the Gudjala community while those arrived only in 'historical' times are generally not;
- opined that 'the framework of the law thus set out' provided a basis upon which it was possible for 'Indigenous people in the area to determine who belongs where, who has the right to make decisions concerning land related matters and who has a right to receive benefits flowing from activities on the land';
- stated that 'the indigenous community associated with the Gudjala area' had not 'abandoned the legal principles on which its system of land tenure was based and continues today to be guided by laws and customs which have their origins in pre-contact time'—at [24] to [41].

Mr Hagen's conclusions were that:

> The native title claim group have, and the predecessors of those persons had, an association with the area. The areas concerned are traditionally associated with the Gudjala peoples. The current claimants are members of this group by descent. Members of the group continue to reside within their traditional lands and to pursue other land based activity upon them.
>
> The native title claim group continues to acknowledge and observe traditional laws and customs pertaining to land in the area. Discussion of such laws and customs in the early literature pertaining to the area, and my own observations of their activity today, indicates a high degree of congruence between underlying legal principles followed then and now.
>
> The native title claim group's ongoing observance of traditional laws and customs is consistent with the maintenance of traditional rights and interests in the land subject to the claim.

Additional affidavit material in the application

Their Honours then set out the matters to which Mr Santos deposed, which included:

- his descent from one of the named apical ancestors and the life-long relationship of his grandfather with the claim area;
- how his father had lived in the area most of his life, with only a short period of absence that was brought about as a result of his removal from the area;
- how Mr Santos had lived in the area all his life and, as a child, been taught by his elders how to hunt and fish and how to behave so as not to disturb the spirits;
- that he taught Gudjala children about areas of importance and how to fish and worked to preserve and pass on the Gudjala language.

There was also an affidavit from Stella McLean, a member of the claim group, attesting to her connection to the claim area. This affidavit, along with the material provided at Schedule F and a general statement at Schedule M, was relied upon in relation to s. 190B(7), pursuant to which the Registrar must be satisfied that:

- at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or
- previously had, and would reasonably have been expected currently to have, such a connection but for things done (other than the creation of an interest in relation to land or waters) by the Crown, a statutory authority of the Crown, the holder of a lease over any of the land or waters or a person acting on behalf of such a lessee.

Primary judge's analysis of the requirements of s. 190B(5)

After setting out a summary of the delegate's findings, the court turned to Dowsett J's reasons for judgment. After noting that his Honour (unlike the delegate) was satisfied that the claim group description was sufficient for the purposes of s. 190B(3), their Honours set out Dowsett J's analysis of the requirements of s. 190B(5) which was, in brief, that:

- the delegate must 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;
- this meant that the 'alleged facts' must support the claim that the identified claim group (and not another) held the identified rights and interests (and not some other rights and interests);
- in relation to s. 190B(5)(a), there 'must be evidence that there is an association between the whole group and the area' and evidence of such an association between the predecessors of the whole group and the area over the period since sovereignty;
- in relation to s. 190B(5)(b), traditional laws and customs must, in order to answer that description, be sourced in a pre-sovereignty society and have been observed since that time by a continuing society, referring to *Members of the Yorta Yorta Aboriginal Community v Victoria* 214 CLR 422 (*Yorta Yorta*), but that this did not require that the apical ancestors themselves comprised a society;
- the task under s. 190B(5)(b) in this case was the identification of a society of people living according to identifiable laws and customs having a normative content at the existence in 1850-1860, the time of first European contact;
- those laws and customs must establish normal standards of conduct or, perhaps be prescriptive of such standards;
- while it was not necessary to show that the apical ancestors were members of the society and were used only to define the claim group, a link would have to be identified between the apical ancestors and any society existing at sovereignty, even if it arose at a later stage;
- satisfying s. 190B(5)(c) would rest on the demonstration of the existence, at the time of sovereignty, of a society observing laws and customs from which current traditional laws and customs were derived—at [68] to [72] and [77].

Primary judge on the evidence for s. 190B(5)

The court noted that Dowsett J was of the view that s. 190B(5)(a) was not met because:

- the affidavit evidence of Mr Santos and Ms McLean did not show an association between the predecessors of the whole group and the area over the period since sovereignty;
- Mr Hagen's evidence provided opinions and conclusions rather than any alleged factual basis for those opinions and conclusions or for the claim;
- the application did not demonstrate the relevant association.

As to the reasons for finding that s. 190B(5)(b) was not met, the court noted Dowsett J's findings that:

- there was no evidence of any known connection between the three relevant apical ancestors, save for their presence in a relatively large area;
- none lived in isolation, each had parents and, apparently, children so it might be inferred they had siblings and other members of extended families;
- two of them apparently lived on stations but there was no evidence of the relationship between station owners and Indigenous employees, on the one hand, and any pre-existing indigenous society on the other;
- there was no factual basis for inferring that there was a society defined by its acknowledgement and observation of laws and customs;
- there was only scant evidence of contact in modern times amongst the family groups identified by Mr Hagen;
- on the material available to the court, no factual basis could be found that was supportive of an inference that there was, in 1850-1860, an indigenous society in the area, observing identifiable laws and customs;
- while it was not necessary to consider it, the evidence concerning the broader question whether there are laws and customs acknowledged and observed by the claim group currently that have their origins at, or before, European occupation was scant;
- while some of Mr Santo's evidence might be said to describe laws and customs of a normative character, and to assert rights and interests in land, none of it identified traditional laws and customs derived from a pre-sovereignty society supporting or justifying the claim group's claims;
- it was impossible to understand why descendants of the identified apical ancestors had rights and interests in the land whereas others did not;
- there was no clear basis for Mr Hagen's opinion that it could reasonably be concluded that the claim area belonged to the Gudjala people;
- Mr Hagen offered no real basis for inferring that the Indigenous community associated with the Gudjala area had '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 he might have described the society having apparently traditional laws and customs, there was no basis for inferring that they originated in any pre-sovereignty society;
- some or all of the traditional laws and customs may have been handed down through two or more generations but it was impossible to say any more than that;
- the two 'real deficiencies' in the application were that 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 shown for inferring 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.

The court noted Dowsett J took the view that the application did not meet the test at s. 190B(5)(c) because the applicant was unable to demonstrate the existence, at the time of sovereignty, of a society observing laws and customs from which current traditional laws and customs were derived.

Dowsett J's view that, since s. 190B(5) was not met, it followed that the requirements of s. 190B(6) had not been satisfied was also noted. As to s. 190B(7), it was noted that his Honour:

- took the reference to 'traditional physical connection' as denoting that the relevant connection was in accordance with laws and customs of the group having their origin in pre-contact society, referring to *Yorta Yorta*;
- found that, as there was no basis for inferring there was a society of the relevant kind as at the date of European settlement, the application did not satisfy s. 190B(7).

Grounds of appeal

The grounds of appeal were, in summary, that Dowsett J:

- failed to find that the factual assertions in the materials provided to the delegate, if proven, would be sufficient for a court to draw such inferences as would be necessary for it to find that s. 190B(5) was met;
- applied the wrong tests in relation to the requirements of s 190B(5) by:
    - imposing a burden of proof not required or intended by s 190B(5);
    - requiring that the factual basis on which it is asserted that the native title rights and interests claimed exist must 'lead to' certain conclusions, as distinct from must be 'sufficient to support' the assertions identified in s 190B(5);
    - disregarding Mr Hagen's assertions because they comprised opinions and conclusions rather than, or without demonstrating, an alleged factual basis for such opinions and conclusions;
    - failing to have regard to the fact that a court can, and will often need to, draw inferences, without 'hard evidence', in relation to facts and circumstances at about and prior to European settlement;
- erred in his consideration of ss. 190B(6) and 190B(7) because of the errors made in relation to consideration of s. 190B(5).

The Registrar's function

Their Honours endorsed the views of Justice Mansfield in *Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16] as to the Registrar's 'general functions' under s. 190A, including that:

- in considering ss. 190B(2), 190B(3) and 190B(4), the Registrar may not go beyond what is contained in the application;
- however, ss. 190B(5), 190B(6) and 190B(7) 'clearly' call for consideration of material that may go beyond the terms of the application.

Their Honours agreed with, and adopted, what was said in *Doepel* at [17] as to the 'characterisation of the criterion set out' in s. 190B(5):

> S[ubs]ection 190B(5) is carefully expressed. It requires the Registrar to consider whether the "factual basis on which it is asserted" that the claimed native title rights and interests exist "is sufficient to support the assertion". That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; *but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests*. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts (their Honours' emphasis).

The court also referred to *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [22], where French J said, in relation to s. 190B(5)(a), that:

> What …[the delegate] had to be satisfied of was that the factual basis on which it was asserted that the native title rights and interests claimed exist supported the proposition that the native title claim group and the predecessors of those persons had an association with the area.

The distinction Mansfield J made in *Doepel* at [18] between the Registrar's task under s. 190B(5) and that imposed by s. 190B(7) was also noted with approval. Mansfield J found that:

- subsection 190B(7) required the Registrar 'to be satisfied of a particular fact or particular facts' and, therefore, 'required the presentation of evidentiary material';
- however, the focus of the Registrar's task was not the same as that of the court when hearing and determining the application;
- the focus of the Registrar's task was upon the relationship of at least one member of the claim group with some part of the claim area, which required 'some measure of substantive (as distinct from procedural) quality control upon the application if it was to be accepted for registration'.

Doepel and *Martin* were said to:

> [S]ufficiently describe the law applicable to the function of the Registrar or his delegate in the present case and the principles which inform the Court's approach to review of the Registrar's or delegate's decision—at [85].

Nature of the review

After noting that the function undertaken by Dowsett J was 'a review of the Registrar's decision not to accept the claim' pursuant to s. 190D(2) (now s. 190F), the court endorsed the view that:

- the right of review places 'the controversy constituted by the issues of fact and law raised between the parties' before the court;
- upon a ground of review being established, appropriate orders may be made to do justice between the parties in the court's discretion in the exercise of its original jurisdiction;
- the review may require redetermination of factual issues according to the material then available and so is not restricted to the material before the Registrar;

- at the time of review, the court may take into account events that have occurred since the decision under review was made by the Registrar—see [86] to [89], referring to *Western Australia v Strickland* (2000) 99 FCR 33 at [63] and *Wakaman People No 2 v Native Title Registrar* (2006) 155 FCR 107 at [29].

Correct approach to s. 190B(5)

In considering whether or not Dowsett J's approach was correct, the court thought a consideration of 'the interaction between' ss. 62 and 190A was a 'convenient' place to start, with their Honours noting that:

- section 62 'prescribes what an applicant must do to commence an application';
- section 190A 'establishes a statutory regime under which the Registrar…assesses the application to determine whether it should be accepted'—at [90].

The court was of the view that:

- it was 'tolerably clear' that what the Registrar's assessment entailed was 'informed by what is required of an applicant to commence an application';
- an application and accompanying affidavit which, in combination, addressed 'fully and comprehensively all the matters specified' in s. 62 might contain enough information to satisfy the Registrar about 'all matters referred to' in s. 190B—at [90].

This suggested to their Honours that:

> [T]he quality and nature of the information necessary to satisfy the Registrar will be of the same *general* quality and nature as the information required to be included in the application and accompanying affidavit [pursuant to s. 62]—at [90], emphasis added.

However, as the court pointed out:

> Of course, if an applicant fails to *fully and comprehensively* furnish the information required by s 62 then there is a risk that the Registrar will not accept the claim although that risk is ameliorated [in relation to ss. 190B(5) to 190B(7)] by the power of the Registrar to consider information additional to that contained in the application, including documents (other than the application) provided by an applicant: see s 190A(3)(a)—at [90], emphasis added.

Their Honours noted (among other things) that:

> There is an obvious link between the requirement that the evidence of the applicant [i.e. the affidavit required by s. 62(1)] include a statement that the applicant believes that all the statements in the application are true and the requirement that the application contain the details specified in s 62(2) together with the identification of the details in that subsection—at [91].

What was of 'central importance' in this case was the details specified in s. 62(2)(e) i.e. 'details that constitute a general description of the factual basis on which it is asserted that the native title rights and interests claimed existed and, in particular, the matters referred to in ss 62(2)(e) (i), (ii) and (iii)', which are 'are in aid of the description, with some particularity, required by s 62(2)(d) of the asserted native title rights and interests'—at [92].

In their Honours' view:

- the fact that the detail specified by s. 62(2)(e) is described as 'a general description of the factual basis' is an 'important indicator of the nature and quality of the information required' by s. 62;
- an applicant is only required to give a general description of the factual basis of the claim and provide evidence in the s. 62(1)(a) affidavit that the applicant believes the statements in that general description are true;
- the applicant is not required to provide anything more than a general description of the factual basis on which the application is based and, in particular, is not required to 'provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim';
- nor is the applicant required to 'provide evidence that proves directly or by inference the facts necessary to establish the claim'—at [92].

However, the court did point out that:

> [T]he general description [for the purposes of s. 62] must be in sufficient detail to *enable a genuine assessment of the application by the Registrar* under s 190A and related sections, *and* be *something more than assertions at a high level of generality*—at [92], emphasis added.

The specifics of this case

Some of Dowsett J's observations were said to suggest he thought the material before the Registrar should be 'evaluated as if it was evidence furnished in support of the claim'. If, 'in truth', this was the approach adopted, then the court was of the view that 'it involved error' on Dowsett J's behalf—at [93]

However, this was *not* the reason for the court's conclusion that the appeal should be allowed. The reason for allowing the appeal was that Dowsett J 'was critical of, and in many respects did not accept, the opinions expressed by Mr Hagen' e.g. Dowsett J said Mr Hagen's 'evidence provides opinions and conclusions rather than any alleged factual basis for such opinions and conclusions or for the claim'—at [93].

Their Honours were of the view that:

> Mr Hagen's report contained much material which, *if accepted as a recitation of facts*, went *a considerable way* towards establishing the factual basis asserted by the applicant in relation to the various matters referred to in s 190B(5)—at [94], emphasis added.

The court noted two recent decisions on the role of anthropological reports in native title proceedings. In those cases, it was found (among other things) that, where a question of admissibility arises on a trial of the application:

- there is no requirement that the facts upon which the expert's opinion has been formed be supported by admissible evidence;
- subject to some exceptions, hearsay material on which an expert's opinion is based will qualify for admission as relevant to the basis upon which the expert holds the opinion and, if it so qualifies, it can then be used as proof of the fact intended to be asserted;
- it is well established that, as a basis for their opinions, experts are entitled to rely upon reputable articles, publications and material produced by others in the area

in which they have expertise and they may not only base their opinions on such sources but also give evidence of fact which is based upon them;
- the weight to be accorded to such evidence is a matter for the court;
- direct evidence of an anthropologist's observations is admissible in the ordinary course—at [94] to [95], referring to the Full Court in *Bodney v Bennell* (2008) 167 FCR 84 at [88] to [94] and Lindgren J in *Alphapharm Pty Ltd v H Lundbeck A/S* [2008] FCA 559.

Mr Hagen's report 'did not fall for consideration by reference to questions of admissibility that would arise on a trial of the application'—at [95].

However, the reference to the case law on admissibility at trial appears to have been made in order to reinforce, and perhaps expand on, was said in *Doepel* i.e. in the context of assessing an application against the registration test, the matters covered in such reports can, and should, be treated as a 'recitation of the facts', with the relevant task then being to ensure that those facts are sufficient to support the three assertions found in ss. 190B(5)(a) to 190B(5)(c).

The court was of the view that Dowsett J's 'general approach' to Mr Hagen's evidence 'affected his approach in assessing the matters required to be considered' by s. 190B(5) giving, as an example, Dowsett J's comment that, on the material available, he could 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'—at [96].

In their Honours' opinion:

> Mr Hagen's report, *which formed part of the application* (and in respect of which there were affidavits from members of the claim group saying the *statements in the application were true*), contained several statements which, together, would have provided material upon which a decision maker could be satisfied that there was, in 1850-1860, an indigenous society in the claim area observing identifiable laws and customs—at [96], emphasis added.

It was accepted that the report did not deal 'in direct and unequivocal terms' with that question and others that s. 190B 'requires must be addressed'. However:

> [I]t is not true that his report provides *no* factual basis in the way described by his Honour. Had his Honour given appropriate weight to Mr Hagen's report, that report together with other material could well have sustained a conclusion that the application should be accepted—at [95], emphasis added.

Decision

The court decided to allow the appeal and set aside Dowsett J's orders. Remittal of the matter to Dowsett J for further consideration of the review application was the preferred course because:

- Dowsett J was not engaged in a judicial review limited to error of law or process but, rather, a review that required consideration of the material before the Registrar and any other material that might be placed before him;

- therefore, remittal back to the Registrar (the order the appellants sought) was not appropriate—at [97] to [98].

Their Honours went on to note that:

> This does not prevent his Honour, in the exercise of his discretion under s 23 of the Federal Court Act, from remitting the matter to the Registrar with directions if he thinks it appropriate. Alternatively, his Honour may decide to direct the Registrar to register the claim. Alternatively, his Honour might come to the conclusion, on all of the materials that were before him or are to be before him, that the claim should not be accepted and so dismiss the review application—at [98].

Comment

Given the facts of this case, it is not clear what will be sufficient in each case. Their Honours did not appear to disagree with Dowsett J's analysis as to what the material provided as the factual basis to support the three assertions found in s. 190B(5) must address. Indeed, at [96], the court endorsed the view that one of the 'questions' that 'must be addressed' under s. 190B was whether the Registrar could be satisfied, upon the material provided, that there was, at first contact, an Indigenous society in the claim area observing identifiable laws and customs.

Further, it seems that while only a general description of the factual basis supporting the three particular assertions need be provided, the court envisioned that it would 'fully and comprehensively' address the matters raised by s. 62(2)(e) and opined that 'assertions at a high level of generality' that do not provide 'sufficient detail to enable a genuine assessment of the application by the Registrar ' would not suffice. Again, this is not an easy standard to apply. For example, in this case, had Mr Hagen's report not been included as part of the application, would what was contained at Schedule F of the application (set out above) have been sufficient?