ILUA registration – judicial review

Fesl v Delegate of the Native Title Registrar [2008] FCA 1469

Logan J, 1 October 2008

Issue

The main issues arising in this case, which deals with review of a decision to register an indigenous land use agreement (ILUA), were whether:

- it was part of the Native Title Registrar's function to make an assessment as to whether the Traveston Crossing Dam Agreement was an ILUA as defined in the *Native Title Act 1993* (Cwlth) (NTA);
- there was evidence before the Registrar's delegate to justify the decision to register the agreement;
- the delegate failed to take into account relevant considerations.

The court decided to dismiss the application for review.

Background

Queensland Water Infrastructure Pty Ltd (QWI) is responsible for the development of the proposed Traveston Crossing Dam in South East Queensland. It entered into negotiations for an ILUA with persons who claimed to hold native title to the project area. An agreement was entered into and an application to have it registered was made to the Registrar. On 14 April 2008, a delegate of the Registrar decided to register the agreement on the Registrar of Indigenous Land Use Agreements. Eve Fesl, Nurdon Serico and Tex Chapman (the applicants in this case) sought judicial review of the decision to register under the *Administrative Decisions (Judicial Review) Act 1977*.

Grounds of review

The applicants submitted that the delegate made errors of law or improperly exercised the power conferred upon her in finding that the agreement must be registered. The court categorised the grounds of review as being:

- 'no evidence' grounds;
- failure to take into account allegedly relevant considerations;
- whether the Traveston Crossing Dam Agreement may be characterised as an ILUA in the light of the Cultural Heritage Investigation Management Agreement (CHIMA) provisions of the agreement, the provisions of the *Aboriginal Cultural Heritage Act* 2003 (Qld) or otherwise.

Statutory scheme

His Honour Justice Logan made some preliminary observations about the ILUA provisions of the NTA, including that:

- an agreement which meets the requirements of ss. 24CB to 24CE of the NTA is an 'area agreement' ILUA;

- pursuant to s. 24CB, an area agreement must be about one or more of a number of specified matters about an area;
- subsection 24CD(1) provides that it is mandatory that all persons in the relevant 'native title group' be parties to an area agreement;
- a 'native title group' is an artificial statutory construct and, in accordance with s. 24CD(3)(a), the 'native title group' in this case consisted of the person or persons who *claim* to hold native title in relation to the land or waters of the relevant area;
- section 24CE provides that an area agreement may be made for such consideration or be subject to such conditions as the parties agree, provided they are lawful;
- the application for registration must include a statement to the effect that all reasonable efforts had been made (including by consulting all representative Aboriginal/Torres Strait Islander bodies for the area) to ensure that all persons who hold, or may hold, native title in relation to the agreement area have been identified and that all of the persons so identified have authorised the making of the agreement;
- when ss. 24CG(3)(b)(ii) and 251A are read together in the context of the NTA as a whole, authorisation of the making of an area agreement by a majority of those who comprise a 'native title group' is possible, i.e. the word 'all' in s. 24CG(3)(b)(ii) does not mean that 'a single dissentient or non-participant will invariably have an ability to veto the authorisation of an agreement';
- section 24CL obliges the Registrar to register an area agreement if two conditions are met, the first of which was not applicable in this case and the second of which goes to the Registrar's consideration of the authorisation requirements—at [17] to [20], [23], [25] to [26], [30] to [32].

Objects of the NTA and the ILUA provisions

According to the court:

> The statutory provision for the making of an area agreement in respect of an area even where there are no registered native title claimants or registered native title bodies corporate [as in this case] balances two of the main objects of the Native Title Act. Out of an abundance of caution and evidencing the recognition by the Parliament of the importance of native title, it liberalises membership of a "native title group" in those circumstances to the extent of permitting those who do nothing more than claim to hold native title in relation to an area to have an opportunity to be heard and to have an opportunity to participate in decision-making. In this fashion the provision can be seen as a benign endeavour, out of an abundance of caution, to preserve native title where it may exist, fulfilling the object in s 3(a) Native Title Act. At the same time, by permitting the making in such circumstances of a consensual agreement the effect of which may be to extinguish native title by a future act done under the authority of a registered agreement, the Native Title Act serves the object in s 3(b) by establishing a way in which a future dealing concerning native title may proceed—at [21].

Meaning of 'considers' and the role of the court on review

As was noted, the second condition for registration, found in s. 24CG(3)(b) is that:

> [T]he Registrar **considers** that the requirements in paragraph 24CG(3)(b) (in summary, relating to identifying native title holders and ensuring that they have authorised the making of the agreement) have been met (emphasis added).

His Honour looked at the meaning of the word 'considers' in this context, noting (among other things) that:

- as a matter of construction, the use of the verb 'considers' places s. 23CG(3)(b) within the category of laws the operation of which 'is made conditional upon the opinion or satisfaction as to certain matters of a designated authority or person';
- in relation to the judicial review of a 'satisfaction' based decision, it has been said that the authority must act in good faith, not merely arbitrarily or capriciously and that, where the matter is a one of opinion or policy or taste, it may be difficult to show error or that the decision could not reasonably have been reached;
- pursuant to s. 24CL(3), the delegate was required to made a value judgment on the basis of the evidence before her;
- it is not for the court on judicial review 'to decide on the merits of matters which were consigned by the Parliament to the Registrar...to "consider"'—at [33], [48] and [56].

Should the Registrar determine whether the agreement is an ILUA?

QWI had raised the question of whether or not it was part of the Registrar's function, when making a decision about registration pursuant to s. 24CJ, to make an assessment as to whether or not 'what was presented for registration was an ILUA'—at [35].

Logan J held that:

- an agreement will only be an ILUA if it meets the requirements of ss. 24CB to 24CE of the NTA;
- if it does not, the Registrar is both entitled and obliged not to register it on the Register, even if the conditions in s. 24CL were otherwise met;
- the extent to which the Registrar has cause in a given case to investigate whether an agreement presented for registration meets those requirements may depend upon whether, and to what extent, there is an assertion of non-compliance;
- however, the absence of any such assertion would not confer validity on an agreement which manifestly did not meet those requirements;
- the delegate was perfectly entitled, as a matter of good public administration, to reach a preliminary view about whether the agreement was an ILUA prior to giving notice of the application for registration;
- a decision to register an agreement that was not an ILUA would be 'no decision under s. 24CJ';
- the applicants were entitled to raise grounds going to whether the agreement was an ILUA—at [37], [39] and [41] to [42].

Lawfulness of CHIMA provisions

By the time the delegate came to make the registration decision (i.e. after the close of the notification period), she had received a submission that the CHIMA provisions of the agreement contravened the ACH Act and were conditions that were contrary to law and so in violation of the requirement in s. 24CE(1) . The delegate referred back

to the earlier finding that the agreement was an ILUA (the pre-notification assessment) and stated that, in making the registration decision, 'there is no scope for me to consider this point and I have no further comment in relation to this assertion'.

The court held that:

- while the delegate was entitled to make a pre-notification assessment of whether the agreement was an ILUA, this did not mean that whether the agreement was, in law, an ILUA is 'thereby quarantined from scrutiny upon an application for the judicial review of the registration decision';
- having made an initial (pre-notification) assessment, the delegate's reasons evidenced a rigidity of thinking, i.e. that what she had to consider was circumscribed by s. 24CL;
- if a condition of an agreement for which registration was sought was unlawful, a question arose as to whether that agreement was one which could be registered either at all or only if the offending condition were severable;
- while the delegate was not obliged to narrowly scrutinise the agreement looking for any condition which may be unlawful in the absence of the question having been raised, once it was raised, the delegate was in error in deciding that she could not deal with it when making the registration decision—at [85] and [88] to [89].

While this meant that one of the grounds of review was made out, the question of whether or not the delegate's decision ought to be set aside depended on whether or not the agreement contained terms and conditions that were unlawful—at [90].

Did agreement contravene the ACH Act?

Logan J went on to consider the provisions of the ACH Act and whether the ILUA was in contravention of that Act. His Honour considered that it was apparent that the Queensland State Parliament had decided to treat an ILUA under the NTA as an alternative way of meeting, in particular circumstances, the ACH Act's main purpose of providing effective recognition, protection and conservation of Aboriginal cultural heritage—at [100].

His Honour held that:

- the ACH Act was designed to complement the NTA;
- under the ACH Act, an agreement with an Aboriginal party was an *alternative* to an ILUA for the purposes of the ACH Act and so not every agreement must be with an Aboriginal party as defined in the ACH Act;
- the agreement was not one which was contrary to law;
- the fact that the delegate did not advert to the submission that the agreement was contrary to law was erroneous on her part but the submission itself was predicated upon an erroneous view as to the construction of the ACH Act;
- therefore, there was no basis for setting aside the decision to register the agreement—at [101] and [103].

Second condition for registration – no evidence grounds

The applicants for review submitted there was no evidence or material to justify the decision by the delegate that the second condition was met, i.e. that all persons who hold, or may hold, native title to the agreement area had authorised the making of the agreement.

In particular, it was submitted that there was no evidence from which the delegate could reasonably be satisfied that:

- the Gubbi Gubbi People and the Kabi Kabi People were part of the same wider group;
- the Gubbi Gubbi People did not adhere to a mandatory traditional decision making process;
- there was no mandatory traditional decision making process applicable;
- the Gubbi Gubbi People withdrew from the agreement making process.

Logan J held that, on the evidence, it was open to the delegate to conclude that:

- the Kabi Kabi and Gubbi Gubbi and other variant spellings were ways of naming one broader group of related persons who, together, assert native title interests in relation to the project area;
- the Kabi Kabi people did not have a traditional decision-making process that dealt with the making of ILUAs—at [54] to [56].

On authorisation, it was submitted that s. 251A was premised on the existence of a single community or other group and that the section could not apply if the community or group were not established on the evidence.

Logan J considered the authorities for authorisation under s. 251B, which deals with the authorisation of claimant applications. It was noted (among other things) that:

- in cases where there is no relevant traditional decision-making process, s. 251B did not mandate any particular decision-making process, i.e. all that is required is that it is agreed to and adopted by the persons in the native title claim group or compensation group;
- 'agreed to and adopted by' in s. 251B(b) imports giving a reasonable opportunity to participate in the adoption of the process and the making of decisions pursuant to that process to those who can be located and who are capable of doing so;
- section 251A 'plays an identical role' in relation to authorisation by the 'native title group' to the role s. 251B plays in relation to 'native title claim group' authorising the making of a claimant application—at [71] to [72].

Logan J was of the view that:

> [E]ach of the propositions which I have distilled from cases concerning s 251B has like application, *mutatis mutandis*, to the meaning and effect of s 251A and in relation to the impact of that section on "authorisation" for the purposes of s 24CG(3)(b)(ii)...In turn that means that the Delegate was entitled to conclude that the "second condition" for which s 24CL of the Native Title Act provides was satisfied—at [72].

In this case, it was found that:

- the process which led up to the so-called 'authorisation meeting' of 11 August 2007 was lawful, as was the process of decision-making at that meeting;
- the non-participation or, as the case may be, dissent of the applicant did not affect the validity of the authorisation decision which was made in respect of the making of the agreement;
- there was evidence before the delegate by reference to which she was entitled to conclude that the authorisation decision had been duly made and that each person who comprised the applicants in this matter had been given a reasonable opportunity to participate in the adoption of a decision-making process and in the decision-making process itself;
- the delegate was therefore entitled to conclude that the second condition found in s. 24CL was satisfied—at [74].

Relevant considerations for the second condition

The applicants argued that the delegate failed to take into account the following 'relevant considerations':

- membership of the Gubbi Gubbi People was based on matrilineal descent from the two apical ancestors whereas membership of the Kabi Kabi People was based on cognatic descent from a number of additional apical ancestors;
- Gubbi Gubbi People have a mandatory traditional decision-making process in relation to matters affecting land;
- the fact that the Gubbi Gubbi People disputed the decision making process adopted at the authorisation meeting and did not authorise the making of the ILUA;
- the evidence showed that the Gubbi Gubbi People were not afforded the opportunity to separately consider the terms of the ILUA.

Logan J was of the view that:

- section 24CL 'makes provision for registration of an agreement only if particular conditions are satisfied, and forbids registration if they are not';
- therefore, the s. 24CL conditions are 'relevant considerations' and, so far as the second condition is concerned, what is made 'relevant' is that the Registrar considers that the requirements of s 24CG(3)(b) are met;
- in considering that question, it is s 24CG(4) which supplies the matters that are 'relevant' and whether, 'in fact', the requirements of s 24CG(3)(b) are met is *not* a 'relevant consideration';
- because the s. 24CL conditions are imposed only in respect of an ILUA as defined in ss. 24CB to 24CE and because the Registrar is only empowered under s 24CJ to register such an agreement, 'it necessarily follows that whether the application concerns such an "agreement" is also a "relevant consideration"'—at [77] to [78].

His Honour concluded that:

- the delegate's reasons indicated that she did consider that the agreement had been authorised and that, in making her decision, she took that fact (i.e. her opinion that this requirement had been met) into account;
- the delegate did, therefore, take into account a relevant consideration;

- further, the delegate was entitled to reach the conclusion that that there was but one clan or tribal group;
- the applicants for review had an opportunity to participate in the decision-making process and it was entirely up to them to decide the extent to which they would participate;
- there was no obligation on the part of the delegate in the circumstances to afford what the applicants for review termed 'the Gubbi Gubbi people' a separate opportunity to consider whether or not to authorise the making of the agreement—at [79] to [80].

Decision

The application to review the decision of the Registrar's delegate to register the agreement as an ILUA was dismissed.