Dismissal of application for review of registration test decision — insufficient factual basis

Gudjala People #2 v Native Title Registrar (2009) 182 FCR 63; [2009] FCA 1572

Dowsett J, 23 December 2009

Issue

On remittal from the Full Court, Justice Dowsett considered whether or not the claim made in the Gudjala People #2 claimant application satisfied the conditions of the registration test found in ss. 190B(5), 190B(6) and 190B(7) of the *Native Title Act 1993* (Cwlth) (the NTA). It was found that the claim did not meet these conditions, essentially because the factual basis provided was insufficient. Therefore, the application for review of the registration test decision was dismissed.

Background

Gudjala People #2 was made in 2006 over an area in central Queensland. In November 2006, a delegate of the Native Title Registrar decided the claim must not be accepted for registration because it did not meet all of the conditions of the registration test as required by s. 190A(6). Subsequently, the applicant filed a claim registration application pursuant to ss. 69(1) and 190D(2) (as it was then – now, see s. 190F) seeking review of the delegate's decision. In August 2007, Dowsett J found that the claim did not meet the conditions found in ss. 190B(5), 190B(6) and 190B(7) and so dismissed the application for review: *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala*), summarised in *Native Title Hot Spots* Issue 26.

In November 2007, an application for leave to appeal out of time was filed on behalf of the Gudjala People. Leave was granted in May 2008 when the matter was heard. The Full Court set aside Dowsett J's order dismissing the application for review and remitted it to his Honour for reconsideration: see *Gudjala People #2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala FC),* summarised in *Native Title Hot Spots* Issue 28. According to Dowsett J:

> It did not consider the correctness of my conclusions. Their Honours rather suggested ... that ... I may have approached the matter on the basis that the adequacy of the factual material should be evaluated as if it were evidence furnished in support of a claim. The Full Court also considered ... that I had not given appropriate weight to a report by Mr Hagen, an anthropologist—at [2].

The decision summarised here should be read in conjunction with the reasons of Dowsett J at first instance and those of the Full Court.

Statutory context important

One of the provisions relevant to this case was s. 62, the proper construction of which led his Honour to consider the purpose of a claimant application 'as contemplated' by the NTA. Determining the proper construction of the provisions which 'regulate the registration of claims made by application' (i.e. ss. 190A, 190B and 190C) involved 'consideration of the purpose of registration'.

Purpose of a claimant application

When considering the 'purpose' of a claimant application, Dowsett J noted that:

- the NTA 'prescribes a judicial procedure for determining whether an identified claim group holds native title rights and interests' and confers jurisdiction on the Federal Court to 'make determinations as to the existence of native title';
- section 60A 'regulates the making of applications ... for such determinations and other applications';
- Pt 3, Div 1 of the NTA 'sets out the process by which the jurisdiction of the Court is to be engaged for the purpose of deciding whether or not there should be a determination as to the existence of native title';
- pursuant to s. 62, which is found in Div 1, a claimant application must contain specified details—at [7].

One purpose the application serves is to assist people who become aware of it via notification under ss. 66 or 66A to decide whether or not to be joined as respondents:

> It ... [the application] ... must provide sufficient information to enable the notified persons, including members of the public, to determine whether or not they should enquire further—at [9].

In this case, the most relevant of the s. 62 requirements were:

- the identification of the particular rights and interests claimed as per s. 62(2)(d), which expressly forbids 'a general claim for unspecified native title rights and interests' and seems to suggest that 'some degree of specificity is required';
- the provision of 'a general description of the factual basis on which it is asserted that the claimed native title rights and interests exist' as per s. 62(2)(e), a provision that 'clearly distinguishes' between the 'claim' made in the application and the 'factual basis' of that claim—at [10].

Purpose of registration

His Honour noted that s. 190A requires the Registrar to 'consider "the claim made in the application" and not merely the application itself'—at [11].

As to the purpose of the registration test, Justice French's observation in *Strickland v Native Title Registrar* [1999] FCA 1089 at [9] was noted:

> [R]egistration ... constrains the ability of the State government to proceed to do a valid future act until, in the case of those acts to which Subdiv P applies, it has negotiated an agreement with the applicants or secured an arbitral determination that the act may be done.

So too was the explanation of the 'deficiency' to be remedied by the registration test given in the Explanatory Memorandum (EM) to the Native Title Amendment Bill 1997 (Cwlth), which was the decision in *Northern Territory v Lane (Native Title Registrar)* (1995) 59 FCR 332 which required applications to be registered upon receipt by the Registrar and so:

> [A]ll claims, regardless of their prospects of ultimate success, would initially attract the right to negotiate until such time as they underwent the acceptance test. That test could take some months to apply in any given case, so that a claim which ultimately failed the test could remain on the Register for some time before being removed—EM at [3.32].

Finally, Dowsett J noted what was said by the Full Court in *Commonwealth of Australia v Clifton* (2007) 164 FCR 355 at [50]:

> The Attorney-General stated in the second reading speech [to the Native Title Amendment Bill 1997 (No. 2)] that one of the outcomes the Bill was designed to achieve was 'to put in place a registration test for claims which ensures that those negotiating with developers have a credible claim'. The Attorney-General also stressed that 'an effective registration test as the gateway to the statutory benefits which the act provides is essential' and that it was 'essential to the continuing acceptance of the right to negotiate process that only those with a credible native title claim should participate'.

After considering the purpose of registration, Dowsett J found that:

- the requirements of s. 62 'inform the process to be followed by the Registrar in performing the function prescribed' by s. 190A;
- the material available to the Registrar 'must constitute a factual basis, in general terms, for the claim that native title rights and interests exist'—see [16].

Traditional laws and customs

After noting that it was of particular importance in this case that ss. 62 and 190B(5) both refer to 'traditional laws' and 'traditional customs', his Honour set out s. 223(1), which provides that native title rights and interests claimed under the NTA must be possessed under 'traditional' laws and customs. The findings in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [45] to [47], [50] and [186] as to the meaning of that term in the context of s. 223(1) were also set out—see [19] to [21].

According to Dowsett J, in order to demonstrate 'traditional' laws and customs for the purposes of s. 223(1), one must demonstrate:

- a system of laws and customs which recognises that the relevant claim group has a connection with the land or waters in question;
- that such laws and customs 'have been passed down continuously through a society which existed prior to sovereignty and continues to exist';
- that current laws and customs 'have their roots' in the pre-sovereignty laws and customs—at [22].

Further, the claim in this case 'necessarily' involved the assertion that:
- the claim group holds native title rights and interests in connection with the claim area pursuant to laws and customs 'which they, as a group, recognize and observe'; and
- those laws and customs are traditional, 'being derived from the laws and customs of a pre-sovereignty society which has continued to exist, the claim group being its current manifestation'—at [24].

His Honour then linked this to s. 62(2)(e), which requires 'a general description of the factual basis upon which the applicant claims to satisfy these requirements' and to s. 190B(5), which requires that the Registrar 'be satisfied that such factual basis is sufficient to do so'—at [24].

It was also noted that:

> In describing the factual basis of a claim for rights and interests in land and waters, the applicant must take account of the specificity required by s 62(2)(d) [the description of the rights and interest claimed]. The general description required by s 62(2)(e) must be, one would expect, commensurate with the detail required by the former provision—at [28].

Drawing inferences as to pre-sovereignty society

It was accepted that the date for the assertion of British sovereignty was 1788 but that first contact was not until 1850-1860. Dowsett J was prepared to infer that 'circumstances as at the time of first European contact were probably the same as the circumstances in 1788'—at [26].

Before turning to the provisions of the registration test, his Honour considered the applicant's submission that:

> [I]t is not necessary to start by looking for something that one might regard as a pre-sovereignty "society". Rather, it is permissible to look for (factual assertions of) laws and customs ... and consider whether they can be laws and customs having a normative content which can define a relevant "society". Where the evidence is that such laws and customs have been handed down from generation to generation, inferences can be drawn to the effect that they form part of a normative system at the time of sovereignty.

His Honour was unsure how one would decide whether laws and customs have a "normative content which can define a relevant 'society'" as submitted by the applicant. In any case:

> The relevant enquiry is as to laws and customs acknowledged and observed by an existing claim group, laws and customs acknowledged and observed by a pre-sovereignty society and the connection between those societies and between the laws and customs, attributable to them—at [27].

It was also submitted that only a general description of the laws and customs presently acknowledged and observed and the process by which they had been handed down was required. In his Honour's view:

> In assessing the adequacy of a general description of the factual basis of the claim, one must be careful not to treat, as a description of that factual basis, a statement which is really only an alternative way of expressing the claim or some part thereof. In my view it would not be sufficient for an applicant to assert that the claim group's relevant laws and customs are traditional because they are derived from the laws and customs of a pre-sovereignty society, from which the claim group also claims to be descended, without any factual details concerning the pre-sovereignty society and its laws and customs relating to land and waters. Such an assertion would merely restate the claim—at [29].

His Honour noted that, as established in *Yorta Yorta*, a society and its laws and customs are inextricably linked. It is impossible to identify a system of laws and customs without identifying the society which recognises and adheres to those laws and customs: 'It would mean nothing to say that A had a legal interest in Blackacre unless one identified, or at least knew, the society which recognized that right'—at [36].

Dowsett J identified two approaches that may be useful in relation to drawing inferences in respect of a pre-sovereignty society.

In some cases, it will be possible to identify a group's continuous post-sovereignty history in such detail that it can be inferred that it must have existed at sovereignty 'simply because it clearly existed shortly thereafter and has continued since'. In those circumstances, it would also be possible to infer that 'the assertion of sovereignty had not significantly affected its laws and customs, so that the laws and customs shortly after sovereignty were probably much the same as the pre-sovereignty laws and customs', i.e. the 'necessary link' between the pre-contact society and its laws and customs and the claim group and its laws and customs 'may be inferred primarily from continuity', without necessarily having to closely examine each society and its laws and customs because 'the evidence of actual events will demonstrate continuity'—at [30] and [32].

If the history of the claim group was not sufficiently well known to allow this approach to be taken, there may be information relating to the circumstances before or shortly after first contact to support an inference that the claim group 'is a modern manifestation

of a pre-sovereignty society and that its laws and customs have been derived from that earlier society' even if there was no recorded history of the society and the way in which it has continued since the 'earlier "snapshot" of the society'. However, at some point, there would still need to be a comparison of the earlier and later societies and their laws and customs—at [31] and [32].

According to Dowsett J, there was no clear distinction between these two approaches and many cases would involve elements of both. However:

> [I]t must be kept in mind that it is necessary to demonstrate both a pre-sovereignty society having laws and customs, from which the laws and customs of the claim group are derived, and continuity of the pre-sovereignty society, including its laws and customs. Clear evidence of the existence of such a society and acknowledgement and observance of its laws and customs shortly after first European contact, and continuity thereafter, may satisfy both requirements, the first, by available inference and the second, directly. Clear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity. However when the evidence as to both aspects is weak, the combined effect may, in some respects, be further to undermine, rather than to strengthen, the claim—at [33].

It was noted that this was not the 'problem' addressed in these proceedings, which was the 'adequacy ... of the factual basis advanced as underlying the applicant's claim' for the purposes of s. 190B(5). However, the applicant relied to some extent upon inferences and so these remarks 'may have some relevance'—at [34].

Applicant's case

The applicant's case was summarised by his Honour as follows:

> [T]he applicant's claim as to the traditional nature of the claim group's laws and customs is primarily that they are presently acknowledged and observed, coupled with assertions that they have been passed down from generation to generation by the claim group, and that the claim area was, prior to first European contact, that of the Gudjala people, a description which the claim group also applies to itself. Some evidence from Mr Hagen generally supports these assertions. He also says something about the named apical ancestors and a little about Aboriginal laws and customs. ... There is a substantial amount of evidence in the affidavits and the report concerning current laws and customs which, it is asserted, are "traditional", but little of it relates to rights and interests in land and waters—at [41].

An annexure to the application set out the parts of the material that apparently addressed the three matters found in s. 190B(5). While this related to 'the alleged existence of the claimed native title rights', there was 'no mention of the concept of a pre-sovereignty society having laws and customs concerning such rights and interests'. This was consistent with the applicant's submission that the applicant 'need only

demonstrate a "normative system at the time of sovereignty" without reference to the society to which it relates'—at [43].

Insufficient factual basis for pre-sovereignty society

Putting to one side Rod Hagen's anthropological report, his Honour concluded none of the applicant's material offered a sufficient factual basis for the existence of a pre-sovereignty society or its laws or customs, save for some implied or actual assertions by several of the claimants in affidavit evidence that such laws and customs were the same as present laws and customs—at [44] to [52].

The applicant asserted that the people occupying the claim area at or about the time of sovereignty described themselves as Gudjala people. The claim group identified itself using the same name. Laws and customs were also described as being 'Gudjala' and, in so far as it referred to the claim group, 'Gudjala' meant members of the claim group, i.e. descendants of apical ancestors. However, in this case:

> [N]o attempt has been made to identify the meaning of the word [Gudjala] when applied to those persons who occupied the claim area at the time of first European contact. Nor, apart from Mr Hagen's affidavit, has anything been said about the laws and customs of that pre-sovereignty society, other than that they must have been the same as existing laws and custom. In my view, to assert that current laws and customs are "traditional" is not to provide a factual basis for that assertion, even in a general way. Similarly, to assert that they have been handed down from generation to generation is to do no more than re-state the claim that they are traditional—at [53].

One other aspect was noteworthy:

> There is a degree of emphasis, ... , upon the dates of birth of the apical ancestors. In fact, it is not clear that any of them was born prior to first European contact. That would not necessarily matter if it were alleged that they were born into a society which had existed prior to such contact, or that they subsequently became members of such a society in accordance with its laws and customs. However that subject is simply not addressed. ... . [T]he assertion that those who occupied the area prior to European contact were described as Gudjala says nothing about that society, or about its laws and customs. To infer that such a statement is part of the factual basis of the applicant's claim would be to confuse the claim with its factual basis—at [55].

The Hagen Report

His Honour referred to those aspects of Mr Hagen's report that dealt with the apical ancestors of the claim group and noted that:

> Ms Hann, Ms Thomson and Ms Anning [the three apical ancestors] may all have been associated with Bluff Downs station. However one must look at the circumstances of such association. Ms Thomson took refuge there from violence which was occurring elsewhere and subsequently worked there. The nature of Ms Hann's association with Bluff Downs, and that of Ms Anning, are not stated. If Aboriginal people seeking refuge and/or work assembled on a cattle station, presumably established and managed by Europeans, the group of itself, and without more, could not constitute a pre-sovereignty

> society. It would be a society formed after first European contact. Ms McLean associates Ms Hann with Maryvale station, not Bluff Downs. She went there to work, tried to leave to join her people, but was returned to Maryvale. As I have said, none of this suggests membership of an identifiable pre-sovereignty society at Maryvale.
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> In so analysing the evidence, I do not mean to impose a particular burden upon the applicant. I am rather analysing various, largely disconnected, and very general, assertions with a view to identifying available inferences as to the existence of a pre-sovereignty society relevant to the present claim group. Many of the assertions may, in isolation, suggest that a particular inference is available, but such inference may not be available when the whole of the applicant's assertions are taken into account—at [62] to [63].

Dowsett J accepted that, in certain circumstances, Mr Hagen's professional opinion may be, in itself, a fact and so may be part of the factual basis advanced for the purposes of 190B(5). It was also accepted that, in some circumstances, it may be appropriate for certain expert opinions to be expressed without stating the factual basis which underlies them. However, in this case:

> [N]o attempt has been made to identify a pre-sovereignty society, the laws and customs which such a society may have acknowledged and observed in connection with rights and interests in land and waters, any connection between the apical ancestors and such society, or any connection between pre-sovereignty and current laws and customs of the relevant kind. The question is whether the applicant has stated the factual basis of its claim to the extent required by the Act. If it offers no explanation as to how the claim group's laws and customs can be sourced to those of a society existing prior to first European contact, then that obligation has not been discharged. In the present context, I cannot see that Mr Hagen, any more than the applicant or its deponents, can simply re-state the claim so that such re-statement becomes the factual basis of the claim—at [77].

Decision

The application for review was dismissed. His Honour found that the factual basis provided was sufficient to support the assertion that the native title claim group have, and the predecessors of those persons had, an association with the claim area as required by s. 190B(5)(a). Dowsett J was also satisfied that there was 'a demonstrated factual basis' to support the assertion that the laws and customs acknowledged and observed by the claim group 'give rise to the native title rights and interests claimed'. However, his Honour did not accept that there was 'a factual basis for the assertion that those laws and customs are traditional'. Therefore, s. 190B(5)(b) was not satisfied. Given that finding, it followed that s. 190B(5)(c) was not satisfied because it requires that the factual basis be sufficient to support the assertion that the native title claim group have 'continued to hold native title in accordance with traditional laws and customs'. It also followed that s. 190B(6) was not met. This requires the Registrar to 'consider that, prima facie, at least some of the native title rights and interest can be established'—at [79] to [84].

Subsection 190B(7) relates to the demonstration of a 'traditional physical connection'. According to the court:

> It seems likely that such connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs. For the reasons which I have given, the requirements of that subsection are not satisfied—at [84].

Relevance to the Registrar's practice

This case does not impact in any significant way on the Registrar's current practice with respect to the application of the registration test. However, it does draw attention to the fundamental problem Dowsett J faced, which was the distinction between using *assertions* to support assertions as opposed to providing a *factual basis* to support the requisite assertions for the purposes of s. 190B(5). His Honour concluded that the applicants had merely re-stated their claim without having provided a sufficient factual basis to support the assertions in ss. 190B(5)(b) and (c).

One final point should be made. In 'Registration of claimant applications following *Gudjala People #2 v Native Title Registrar*' (2010) 9 Native Title News 121, Justin Edwards implies that a significant rise in the number of claims failing the registration test in 2007-2008 can be attributed to Dowsett J's decision at first instance and that a subsequent the increase in acceptance can be attributed the Full Court's decision. Both of these propositions are erroneous. An analysis conducted by the Registrar in September 2008 demonstrates that the rise in the number of failures in the period concerned was attributable to amendments made to the NTA in 2007 that required the re-testing of relatively large a number of unregistered claims (i.e. claims that had already failed the test). Despite being offered the opportunity to amend or provide additional information to meet the conditions of the test, the applicant often chose not to do so and, following re-consideration by the Registrar's delegate, the claim was again unable to be accepted for registration.