Judicial review — ILUA registration decision

Murray v Registrar [2002] FCA 1598

Marshall J, 20 December 2002

Issues

This decision deals with an application under s. 5 of the *Administrative Decisions Judicial Review Act 1977* (Cwlth) (AD(JR) Act) seeking judicial review of a decision to register an indigenous land use agreement (ILUA) made by one of the Native Title Registrar's delegates. This is the first time a delegate's decision to register an ILUA has been challenged. As at 17 February 2003, 67 ILUAs had been registered.

Background

The parties to this area agreement (as defined in ss. 24CA to 24CE of the *Native Title Act 1993* (Cwlth) (NTA) were Ms Carolyn Briggs on behalf of the Boonerwung People and Blairgowrie Safe Boat Harbour Ltd (the Blairgowrie). The agreement deals with the building of a safe harbour on Crown land and waters in Victoria over which there was no native title claim. Under the agreement (amongst other things), consent was given for the doing of any future acts that might be, or have been, involved in the construction of the harbour.

Certified and uncertified area agreements

The making of an area agreement must be authorised in accordance with s. 251A of the NTA. The application for registration of the agreement must either include a statement addressing compliance with s. 251A or have been certified by all the representative Aboriginal/Torres Strait Islander bodies for the agreement area - see s. 24CG.

Uncertified area agreement

In this case, the application for registration was not certified. Therefore, there had to be a statement in the application for registration to the effect that:

- all reasonable efforts have been made to ensure that all persons who hold or may hold native title in relation to the agreement area have been identified— s.24CG(3)(b)(i).
- all persons so identified have authorised the making of the agreement – s. 24CG(3)(b)(ii) and s. 251A; and
- all representative bodies for agreement area have been consulted as part of the process of identifying those persons—s. 24CG(3)(b)(i).

The grounds on which the Registrar should be satisfied that these requirements have been met must also be set out briefly—s. 24CG(3)(b).

Native title group must be a party

Subsection 24CD(1) provides that all persons in the 'native title group' must be a party to the agreement. The 'native title group' in this case was to consist of 'one or more' of the following:

- person who claims to hold native title in relation to the area;
- representaive body for that area—s. 24CD(3).

Notice of application for registration
Following the delegate's decision that the area agreement complied with the requirements of ss. 24CB to 24CE (see s. 24CA), notice was given to (among others) Mirimbiak National Aboriginal Corporation, the representative Aboriginal/Torres Strait Islander body (representative body) for the area concerned, as required under s. 24CH(1)(a)(iii).

Conditions for registration
At the close of the notice period, the delegate had to consider whether the two conditions for registration of an uncertified area agreement were met. The first condition was met i.e. no native title claim had been filed over the agreement area within the notice period—see ss. 24CL(1) and 24CL(2) of the NTA.

The second condition is that the delegate considers that the requirements found in s. 24CG(3)(b) (relating to the authorisation of the agreement) 'have been met'—s. 24CL(3). (The requirements of s. 24CG(3)(b) are referred to below as the identification and authorisation process.)

In considering this matter, the delegate must take into account:
- the statements made in the application for registration; and
- any information given to the delegate by any representative body or by any other body or person – ss. 24CL(4)(a) and 24CL(b). Any other matter or thing may also be taken into account, but it need not be—s. 24CL(4).

If both of these conditions are met, then the agreement must be registered. However, if they are not, then the delegate *must not* register the agreement—s. 24CL(1).

Challenge to authorisation and party status
During the notice period, the principal legal officer of Mirimbiak, who was acting for a group of Aboriginal people living in Tasmania (the Tasmanian group), gave the delegate information relevant to the second condition. The thrust of the submission was that the Tasmanian group should have been:
- consulted about the agreement and authorised it; and
- parties to it because they were part of the 'native title group'.

Procedural fairness
Mirimbiak sought copies of the agreement and provided some genealogical material in relation to the Tasmanian group to the delegate on a confidential basis. The delegate was not prepared to release a copy of the ILUA both because it was not relevant to the second condition for registration and on confidentiality grounds.

The delegate suggested a process for dealing with the issues raised by Mirimbiak, which included Mirimbiak making submissions as to why the ILUA should not be registered and Ms Briggs being granted a right of reply. Mirimbiak and its clients

were provided with the material that went to the identification and authorisation process on a confidential basis. Similarly, the genealogies and other information from Mirimbiak were provided to Ms Briggs on a confidential basis. A letter was also sent to Ms Briggs outlining in some detail the matters that needed to be addressed to assist the delegate in deciding whether or not the second condition for registration had been met. The procedure adopted and some of this correspondence is set out in detail at [13] to [31] of the reasons for judgment.

Delegate's decision
As required by s. 24CL(4), the delegate considered the issues raised and provided further information and assistance. At the end of the process, she decided that the second condition was met and registered the agreement—see at [31]. The application for judicial review was then filed.

Grounds for review
The decision to register the agreement was challenged on the bases that:
- not all of the 'native title group' were parties to the agreement—ss. 24CD(1) and 24CD(3);
- the native title representative body for the agreement area had not been notified that the ILUA was to be made, as required under s. 24CD(7);
- there was a reasonable apprehension that the delegate was biased; and
- the delegate had made several errors of law.

No requirement to provide copy of agreement
Justice Marshall found that:
- that the delegate had provided cogent reasons as to why the ILUA should not be made public;
- in any event, the failure to provide the ILUA does not bear upon the decision to register;
- the delegate was not obliged to show the ILUA to the party challenging its registration;
- no material disadvantage flowed from the late provision of the agreement—at [68] and [77].

It was noted that s. 24CH(2), which sets out the matters to be included in the notice of the application to register, does not refer to the ILUA itself.

Meaning of 'native title group'
Mirimbiak submitted that the agreement should not have been registered as it did not comply with the requirement under s. 24CD(1) that all persons in the native title group must be parties to the agreement because:
- the Tasmanian group were people that claim to hold native title in that area;
- the definition of 'all' persons should be read strictly with s. 24CD(3) i.e. the native title group should consist of 'any person who claims to hold native title' in relation to the agreement area.

The delegate was satisfied that the requirement in s. 24CD(1) that 'all persons in the native title group...must be parties' had been met because one of the parties to the agreement claimed to hold native title. This was based on the delegate's interpretation of the relevant definition of 'native title claim group' found in s. 24CD(3) i.e. that group 'consists of *one or more* of the following':

- any person who claims to hold native title in relation to the agreement area;
- any representative body for the area.

His Honour agreed with submissions made on behalf of Ms Briggs that:

- the purpose of the ILUA provisions is to promote agreements; and
- subsection 24CD(3) should be read so as to enable 'any one person who claims to hold native title to begin ... and carry forward the process of negotiating an ILUA'—at [44] and [48].

The implication in the judgment is that requirements of s. 23CD have to be read in conjunction with the requirement that anyone proposing to make an area agreement must:

- use all reasonable efforts to identify all those persons who hold or may hold native title to the agreement; and
- get the authority of those persons to make the agreement: s. 24CG(3) and s. 251A.

It is pursuant to that authority that the 'native title group' can then enter into the agreement and seek to have it registered, the effect of which will be (among other things) that the native title holders for the agreement area, who have authorised the making of the agreement, are bound by it 'in the same way' as the 'native title group' that is a party to the agreement: see s. 24EA(1)(b). At [46], Marshall J also referred to the Explanatory Memorandum to the Native Title Amendment Bill 1997 where what became s. 24CD(3) is discussed in the following terms:

> If [as in this case] there are not any registered native title claimants or registered native title bodies corporate in relation to land or waters in the area, the native title group [for an area agreement] is *any* person who claims to hold native title in relation to the land or waters covered by the agreement *and/or* any representative ... body for the area—at [7.14] and [7.15] of the EM, emphasis added.

His Honour concluded that, in these circumstances, s. 23CD(1) was satisfied provided at least one person claiming to hold native title (in this case, Ms Briggs) was a party to the area agreement. That conclusion was 'fortified' by the potential difficulties that may be placed in the path of registering these agreements if the alternative view was taken (i.e. that every person identified as a person who holds or 'may' hold native title in the agreement area must be a party to the agreement)—at [48] to [49].

No representative body at the relevant time

Subsection 24CD(7) requires that if none of the representative bodies for the agreement area is a party, then the native title group must inform at least one of those bodies of its intention to enter the agreement. The application for registration must be accompanied by a written statement that this has been done: see the Native

Title (Indigenous Land Use Agreements) Regulations 1999. It was submitted that no such notice was given. The application for registration stated that Mirimbiak had been told of the intention to enter the agreement at a meeting in April 2000. The agreement was entered into in September 2000.

Mirimbiak is now a recognised representative body but this was not the case in September 2000. At that time, Mirimbiak was funded under s. 203FE to perform the functions of such a body. It was held that this did not convert it into a recognised representative body at the relevant time. Nor were there any other recognised representative bodies for the agreement area at that time. Therefore, s. 24CD(7) was not relevant to the delegate's decision as to whether or not the agreement was an area agreement as defined in s. 24CA. In these circumstances, the question of whether or not, as a matter of fact, Mirimbiak was informed in April 2000 did not need to be determined—at [53] and [55].

Marshall J also said that, if he was wrong about that point, then there was nothing in the NTA to indicate that a failure to comply with s. 24CD(7) should lead to the 'invalidity of the agreement'—at [54], referring to *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [93].

With respect, compliance with s. 24CD(7) does not go to the validity of the agreement. Rather, it is one of the requirements that must be met before the agreement can be said to be an indigenous land use agreement: see s. 24CA.

No error of law

The court found that there was nothing before the court to show that the delegate had:

- taken irrelevant considerations into account; or
- failed to take relevant considerations into account—at [82] to [86].

The submission that the delegate made an error of law by relying upon the opinion of Ms Briggs as to whether or not the Tasmanian group were 'persons claiming to hold native title' was also rejected. Marshall J noted that the delegate decided that, by the date on which the agreement was signed, Ms Briggs and her group had come to the view that the Tasmanian group were not people who 'may hold native title' in relation to the agreement area. This led them to conclude that the authority of the Tasmanian group was not required. In all the circumstances, the delegate found that it was reasonable for them to hold that view. His Honour found that the submissions made on behalf of Ms Briggs, which his Honour accepted and which included the following, 'comprehensively' answered the submission:

> [The delegate] independently made this crucial finding herself ... . That finding does not...depend on any view as to the proper interpretation of [s.] 24CG(3(b). It is simply a finding of fact regarding the reasonableness of the steps taken and the view formed by [Ms Briggs and those she represents]—at [76].

His Honour held that the delegate had reached a considered view and that this matter was dealt with 'comprehensively' in her reasons for the decision—at [72].

The delegate did not rely upon the 'subjective and unsupported statements' of Ms Briggs:

> [The delegate] was entitled to act upon information provided to her and [to] either accept or reject it as appropriate whilst exercising her discretion in a proper way and/or making appropriate findings of jurisdictional fact—at [73].

Further, it was found that the delegate's view that 'all persons who may hold native title' in s. 23CG(3)(b)(i) was a reference to people 'who at least are able to make out a prima facie case that they hold native title, within the meaning of s. 223' of the NTA demonstrated no error of law. This was not a misstatement of the test. Rather, it was an observation that 'a person should not necessarily be regarded as someone who may hold native title simply because they say they do'—at [75].

The submission that the delegate incorrectly applied s. 24CG(3)(b) by inquiring into the events that happened after the agreement was made was also rejected—at [76].

Role of the delegate

It was submitted that the delegate had purported to exercise judicial power in the process of making her decision. The basis for the allegation was that, in finding that s. 24GC(3)(b) was met, the delegate formed the view that the Tasmanian group were not people who may hold native title, which is a matter reserved for the Federal Court.

His Honour found that, in making the decision, the delegate:

> [D]etermined facts and applied concepts, as defined in the Act, and came to a certain view. In doing so ... [she] did not exercise judicial power. Her decision in no sense involved a binding consideration of the legal rights and obligations of the Tasmanian group—at [95].

Therefore, it was found that the registration of an ILUA does not involve the exercise of judicial power. It does not involve determining the pre-existing rights or obligations arising from the operation of the law on past events. Rather, upon registration, an ILUA creates new rights and obligations—at [100].

It was noted that, when making the decision, the Registrar's delegate may have to assess factual and legal matters but this does not necessarily involve any exercise of judicial power. The Registrar exercises administrative power and has an administrative function—at [100].

Apprehension of bias not shown

It was alleged that the proactive approach by the delegate in specifying the matters to be addressed by Ms Briggs in relation to the identification and authorisation process constituted a reasonable apprehension of bias. The allegation was that 'a reasonable bystander would have entertained a reasonable fear that [the delegate] was incapable of bringing an unprejudiced mind to the decision'. (Reliance was also placed upon some internal correspondence that did not involve the delegate. This

was found to have no relevance to the question of reasonable apprehension of bias)—see at [56] and [65].

Marshall J found that:

- the reasonable person should be one who is reasonably informed;
- a reasonably informed person would realise that the delegate was entitled to request further information when an application for registration of an ILUA is made if she was not satisfied with the material provided;
- the delegate is an administrator, not a judge in a court and the processes adopted by a delegate will, therefore, be less formal. (His Honour actually refers to the Tribunal but, in this context, it is the Registrar – and the Registrar's delegates – who must make the decision and not the Tribunal. See s. 253 for a definition of each); and
- in these circumstances, the delegate was entitled to be more interventionist (noting that s. 24CI and s. 24CF empower the Tribunal to assist with certain aspects of the ILUA process if it is requested to do so)—at [67].

In coming to this view it was also noted that the reasons for decision to register the ILUA were 'long and deliberative and carefully set out the grounds upon which the delegate acted to register the ILUA'—at [69].

Conclusion

The application for review was dismissed and orders made for the filing of submissions as to costs.

Appeal

This decision is now subject to an appeal brought by Ms Murray against his Honour's findings in relation to the proper construction of s. 24CD(1) i.e. in circumstances where there are no registered native title claimants and no registered native title bodies corporate for the agreement area, this section is satisfied if at least one person claiming to hold native title is a party to the agreement.