Registration test—review of decision

Quall v Native Title Registrar [2003] FCA 145

Mansfield J, 7 March 2003

Issues

This case concerns a review of a decision by the Native Title Registrar's delegate that the claimant application concerned should not be accepted for registration. The grounds upon which review was sought were:

- since the majority of the requirements of the registration test were met, the delegate erred in refusing to accept the application;
- the delegate took irrelevant information into account;
- the delegate erred in finding that the claim group was not a properly constituted native title claim group and in finding that the claim overlapped another registered claim and that there were members common to each claim group for those applications; and
- the delegate was biased or acted in bad faith by considering the application with a closed mind, based on the delegate having had reference to evidence and findings in the Report and Recommendations of the Aboriginal Land Commissioner under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) called the Kenbi (Cox Peninsula) Land Claim No. 37 (the Land Claim report).

Background

In 1999, the applicant made a claimant application on behalf of himself and eight named individuals who were described as members of the Danggalaba clan. That application was registered but the decision to do so was set aside in earlier review proceedings determined by Justice O'Loughlin.

The applicant then amended the application and sought a determination of native title on behalf of four named families described as descendants of Kulumbiringin, claiming he had been authorised to bring the claim under the traditional and customary law of the Kulumbiringin. The amended application was referred to the Native Title Registrar for consideration but was not accepted for registration by one of the Registrar's delegates. The applicant, who was unrepresented, sought a review of that decision. The Registrar made a submitting appearance, as was appropriate. The Northern Territory was granted leave to appear as amicus curiae in the absence of any contradictor.

Jurisdiction

It was unclear whether review was sought under the provisions of the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) (AD(JR) Act), in which case it was strictly a review of the legality of the decision-making process, or under s. 190D(2) of the *Native Title Act 1993* (Cwlth) (NTA), which the Full Court in *Western Australia v Strickland* (2000) 99 FCR 33 found involves a hearing de novo. Justice Mansfield decided to consider the application as if it was brought under both. In any event,

nothing turned on this point as there was no information before the court that had not been before the delegate—at [10] to [13].

All conditions of the test must be met

The applicant's argument that the claim made in the application should have been registered because the majority of the requirements of the test were met 'must fail'. Subsection 190A(6) of the NTA requires that an application must not be registered unless all of the conditions in ss. 190B and 190C are met. As the Registrar has no discretion, compliance with a majority of the conditions does not suffice—at [17].

Regard to information not provided by the applicant

Mansfield J noted that s. 190A(3) provides (among other things) that the Registrar may have regard to such other information as he or she considers appropriate. Therefore, it was found that the delegate did not err in having regard to the information contained in the Land Claim Report. Further, the Register of Native Title Claims is a public register of considerable 'public significance':

> The functions and the powers of the Native Title Registrar in determining whether to accept an application for registration should not be circumscribed by, or confined to, some form of administrative inquiry in which reliance may be placed only on the information provided by the applicant. The public significance of the ... Register also indicates that the Registrar should be entitled to inform himself or herself of matters of significance, and ... to receive information from the relevant Commonwealth, State and Territory governments or land councils—at [22].

Was the native title group properly constituted?

Having determined that the application was brought on behalf of the Kulumbiringin as a discrete native title group and not as a sub-group of the Larrakia people, the delegate considered whether or not there was evidence to support the Kulumbiringin being an appropriate native title claim group when:

- it had earlier been claimed that the Danggalaba clan was the proper claim group; and
- the area covered by the application is subject to a claimant application brought on behalf of the Larrakia group and there was information before the delegate to suggest that the Kulumbiringin may be a clan that is actually part of the Larrakia group.

His Honour noted that the identification of the native title claim group 'goes to the heart' of a native title claim. Pursuant to s. 190C(2), on the basis of the application and such other relevant information, the delegate must determine whether the application has been made on behalf of a 'native title claim group' as defined in s. 61(1)—at [26].

Mansfield J cited with approval the observation of Justice O'Loughlin in *Risk v National Native Title Tribunal* [2000] FCA 1589 at [60]:

> A native title claim group is not established or recognised merely because a group of people (whatever number) call themselves a native title claim group ... . [T]he tasks of the delegate include the task of examining and deciding who, in accordance with traditional law and custom, comprised the native title group.

In this case, the delegate decided that the native title claim group was not properly constituted as required under s. 61(1) because not all of the people who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed were included. This conclusion was based on the following:

- some of the offspring of the four named elders of the claim group were not included in the 27 people said to comprise the Kulumbiringin group and, according to the Land Claim report, one of the three apical ancestors named in the application had eight children, seven of whom had descendants. Only four of those descendants were referred to in the application. The only explanation given for the absence of these people was that some had 'opted out' of the claim;
- apart from this, the persons comprising the Kulumbiringin appeared to be those previously identified by the applicant during the Land Claim hearings as Danggalaba people—at [27] to [29].

It followed from this that the application did not comply with s. 61(4), which requires all persons in the native title claim group to be named or otherwise described sufficiently clearly so that it can be ascertained whether any particular person is one of those persons. Therefore, the delegate concluded that the application did not comply with the provisions of s. 190C(2) of the NTA—at [29].

Mansfield J found that:

- the process of reasoning of the delegate was not 'attended by any demonstrated factual misconception or any error of law' and that the determination of the facts was not 'shown to be erroneous';
- the delegate had identified the appropriate issues, asked the right question and addressed it;
- the delegate was entitled to come to the conclusion that she reached and it was not appropriate for the court to go beyond that conclusion;
- if the application for review was made under the AD(JR) Act, then it was not a function of the court to re-address the issues of fact and, if brought under s. 190D(2), then this was not a case in which it was appropriate for the court to substitute its own findings for those of the delegate;
- the conclusion of the delegate should stand—at [30] to [32].

Overlapping claim

It was held that the delegate correctly concluded that the application did not comply with s. 190C(3), which 'precludes the registration of an overlapping claim where there are members of the claimant group common to a prior registered claim and the one being tested'—at [34].

Authorisation

The court agreed with the delegate's conclusion that, as the claim group was not properly constituted, she could not be satisfied that the applicant was authorised to make the application and, therefore, failed to satisfy the provision of s. 190C(4)(b). His Honour noted that:

> Section 251B makes it clear that authorisation must be given by all the persons in the native title claim group ... . It followed, from the delegate's view that the claim group was not properly ... constituted, that the applicant was not authorised on behalf of all the native title claim group—at [35].

Factual basis for claimed native title and other conclusions

As the delegate was not satisfied that the application was made by a properly constituted native title claim group, she concluded that:

- the requirement for a sufficient factual basis to support the assertion that the claimed native title rights and interests exist under s. 190B(5) could not be satisfied;
- *prima facie*, the rights and interests claimed could not be established as required under s. 190B(6); and
- the requirement to show that there is or was a traditional physical connection under s. 190B(7) could not be met.

His Honour was of the view that these conclusions should not be disturbed—at [36] to [37].

Allegation of bias and acting in bad faith

As a claim of bias or lack of good faith is a serious allegation, it should not be made without proper foundation. The applicant must show that:

> [A] suspicion may be reasonably engendered in the minds of those who came before the Registrar or in the minds of the public that the Registrar or his delegates may not bring to the resolution of the questions arising before them fair and unprejudiced minds—at [39].

After considering the evidence, the court found there was no basis to the claim, with his Honour commenting that:

- the delegate was entitled to and did have regard to an extensive range of material;
- the applicant was given an opportunity to respond to the adverse information provided by the Northern Territory and the Northern Land Council;
- the fact that the delegate or the Registrar had previously considered and rejected applications brought by the same applicant did not mean that the delegate could not bring to the making of the decision an unbiased mind;
- the delegate acted appropriately in addressing the differences between the present application and the earlier applications and exploring the significance of those differences.
- the delegate was also entitled to have regard to both other applications in the area and the land claim report;
- the delegate's reasons reflected a 'careful and considered approach to the fulfilment of her task' and so did not give rise to conclusions of bias, either actual or apprehended. Nor did they indicate that the delegate approached her task in bad faith or with a view to achieving an end outside the purpose for which the decision-making power was conferred—at [39] to [41].

Decision

The application was dismissed with no order as to costs.