Registration test — review of decision

Northern Territory v Doepel [2003] FCA 1384

Mansfield J, 28 November 2003

Issues

An application was made by the Northern Territory (the territory) under the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) to set aside a decision of the Native Title Registrar to include a claimant application on the Register of Native Title Claims. The territory contended the Registrar failed to comply with various requirements of ss. 190B and 190C of the *Native Title Act 1993* (Cwlth) (NTA) in accepting the claim for registration.

Background

The Killarney Application (D6028/02) was lodged with the Federal Court in September 2002 and accepted by the Registrar for registration under s. 190A of the NTA in October 2002. The territory sought judicial review of the decision to register the application.

The native title claim group was described in the application as comprising four groups, the Wardaman, Liyi, Yingawurnarri and Narrwan groups who were then said to be comprised by all persons descended from 31 specified apical ancestors.

The Registrar's general duties regarding registration

Justice Mansfield observed that these duties are defined by ss. 190A, 190B and 190C of the NTA:

> [The Registrar's] task is clearly not one of finding in all respects the real facts on the balance of probabilities, or on some other basis. Its role is not to supplant the role of the Court when adjudicating upon the application for determination of native title, or generally to undertake a preliminary hearing of the application—at [16].

His Honour briefly outlined the range of different tasks imposed upon the Registrar by ss. 190B and 190C, some requiring 'some measure of substantive (as distinct from procedural) quality control upon the application'. The requirements upon registration imposed by s. 190B should be read together—at [16] to [19] and [126].

A contention that the Registrar misunderstood his functions in that he assumed the claimants are 'entitled' to access procedural rights under the NTA upon demonstrating formal satisfaction of the requirements of the NTA and without (and in the absence of) logically probative evidence that those requirements are met, was rejected:

> I consider the Registrar's careful application of each of the requirements of ss 190B and 190C to the material before him indicates that he has understood properly the nature of the task imposed by the NT Act—at [30].

Details and information etc required by sections 61 and 62 — s. 190C(2)

Subsection 190C(2) requires that the Registrar must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.

In previous cases the Federal Court has held that the Registrar is required, as part of applying 190C(2), to be satisfied that the native title claim group is properly constituted as defined in s. 61(1)—see *Risk v Native Title Tribunal* [2000] FCA 1589 at [30] and *Quall v Native Title Registrar* [2003] FCA 145 (summarised in *Native Title Hot Spots* Issue 5) at [29] and [30]. In both decisions the court held that the Registrar is either entitled to, or is required to, have regard to material other than that in the application—*Risk* at [30] and *Quall* at [23] and [26]. This present decision, with respect, represents an appropriate retreat (to some extent) from those principles.

In this decision, his Honour, 'with the benefit of the helpful contentions of counsel in this matter', distinguished his finding in *Quall* that the Registrar is entitled to have regard to material extraneous to the application for the purposes of addressing the requirements of s. 190C(2). Thus, his Honour held that 'for the purposes of the requirements of s. 190C(2), the Registrar may not go beyond the information in the application itself'. Subsection 190C(2) directs attention to the contents of the application and the supporting affidavits—at [35] and [39].

It was in the context of disputing the Registrar's handling of s. 190C(2) and s. 190C(4) that the territory raised certain crucial issues.

Composite claim group argument

The Territory's attack upon the decision to register the application was in part because the Registrar accepted the claim for registration despite the appearance of what was described as 'a composite claim group' as a satisfactory description of the 'native title claim group' in s. 61(1) of the NTA. Because of its composite character, it was asserted that the claim group did not represent a single identifiable community living under its laws and customs and thus could not constitute a native title claim group as defined in s. 61. In support of its argument the territory referred to material not constituting part of the application supplied directly to the Registrar by the applicants.

His Honour rejected the territory's argument on the following grounds:

- the Registrar is not entitled to have regard to material other than the application in applying the condition in s. 190C(2); and
- s. 190C(2) does not require the Registrar to undertake some form of merit assessment of the material to determine whether he is satisfied that the native title claim group as described is in reality the correct native title claim group—at [37] and [39].

However, earlier in the decision, his Honour said that if the description of the native title claim group (in the application) were to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub–group of the native title claim group, then the relevant requirement of s. 190C(2) would not be met and

the Registrar should not accept the claim for registration—at [36].

Thus, the basis upon which claim group composition is to be considered under s. 190C(2) has been substantially narrowed from previous decisions and is limited to determining whether, on the face of the application, the claim group as described includes all the persons in the native title claim group as defined in s. 61.

The inclusiveness of the group

The territory also contended that the native title claim group, as described in the application, did not include all those persons or clan groups who may hold native title rights and interests in the claim area. It was asserted that this was evident from the information provided in support of the application.

Mansfield J observed the fact that the existence or potential existence of a competing native title claim group in respect of some or all of the claim area is not itself an impediment to acceptance of a claim for registration—at [43].

It is only if those other persons or clan groups are in fact members of the native title claim group, but have been excluded from it, that the application might not comply with s. 61. If they are members of a competing claim group, for example with a claim to an area which overlaps the claim area, s. 61(1) does not require them to be included as part of the native title claim group—at [46].

His Honour held that the Registrar's function was to address the application and the affidavits filed in support of it. The territory's contention was rejected on the basis that it did not assert the application does not contain the details about the native title claim group required by the table to s. 61(1) or was not accompanied by affidavits as to the nature of the native title claim group as required by s. 62(1)(a)(iv), and s. 62(1)(b) and (2)(e) of the NTA—at [44].

His Honour was of the view that if, in the alternative, the Registrar was required to consider all the material before him, that would raise questions about the nature of that undertaking. For example: What happens if the information is inconsistent; is a hearing required and if so how would it be conducted; would it require the Registrar to make findings of fact and would issues of procedural fairness arise etc? His Honour was of the opinion that there is no indication of a legislative intention that the Registrar should embark upon some general fact–finding exercise, balancing and weighing conflicting evidence, to determine whether to accept a claim for registration. The purpose of the 1998 amendments to Part 7 of the NTA was to impose a gateway to the statutory benefits which registration provides by identifying only those people with a credible native title claim. Such complexities reinforced his Honour's view that the Registrar's function under s. 190A is simply to determine whether the requirements of ss. 190B and 190C are satisfied according to their terms, rather than generally to consider the accuracy of the information in the application—at [47] and [50].

Comment

With respect, it is not unusual for administrative decision makers to have to deal with inconsistencies in information, afford procedural fairness to parties and make findings of fact in relation to particular issues. Where a decision maker is required to be 'satisfied' of a particular matter the necessary facts have to be established on the balance of probabilities. Each of the conditions in ss. 190B and 190C has to be examined to determine what is required of the Registrar. Subsection 190C(2) arguably requires no more than that the application and affidavits be complete. Thus, the view that the Registrar has to be satisfied that the native title claim group is properly constituted is not supported by the words of the subsection. Even the narrow view his Honour takes in relation to subgroups etc. (see [36]) is, with respect, not about whether the application contains 'all the details and other information' required by ss. 61 and 62. Subsection 190C(2) is not the place to test substantive compliance with s. 61.

The authorisation issue

The territory contended that, despite the application being certified by the representative body for the area, the Registrar had to satisfy himself that the requirements of s. 61(1) as to authorised applicants and also, therefore, s. 190C(2) were met. This appears to be an extension of O'Loughlin J's view in *Risk* that s. 190C(2) included consideration of substantive compliance with s. 61 (at least in relation to native title claim group composition).

Consistent with his opinion as to what s. 190C(2) requires, Mansfield J held that the Registrar is not required, when addressing that subsection, to consider whether as a fact the claimants are properly authorised by all the relevant members of the native title claim group. What was required by s. 190C(2) in relation to authorisation was that the application was accompanied by affidavits sworn by the applicant that the applicant was 'authorised by all the persons in the native title claim group' to make the application and to deal with matters concerning it and stating the basis for that authorisation—at [70], [73] and [77], referring to ss. 62(1)(a).

In relation to the affidavits accompanying the application, the territory contended that they did not comply with s. 172(2) of the *Evidence Act 1995* (Cwlth) (Evidence Act). His Honour declined to determine whether the Evidence Act applied to the registration test process although he was inclined to find that it had no application. The issue, rather, was whether the affidavits met the requirements of s. 62.

Mansfield J held, in the context of s. 190C(2), that the Registrar had not erred in this matter in being satisfied that the applicant's affidavits met the requirements—at [87] and [88].

His Honour did not think that the fact that one of the affidavits was dated some time before the application was filed and before the notifications given under s. 29 of the NTA (referred to in the application) changed the situation because exigencies of distance and access and the detailed requirements of s. 61 and s. 62 may mean that there is considerable delay between authorisation of the applicants and the filing of

the application. It was not necessarily the case that the applicants were unaware of the prospect of notices being given under s. 29 of the NTA—at [89].

Identity of claimed native title holders — s. 190C(4)

This application was certified by the relevant representative body. His Honour held that the matter raised by s. 190C(4)(a) may be met on the face of the application, perhaps supported by the Registrar's information about the relevant representative body. If s. 190C(4)(b) applies, s. 190C(5) imposes requirements which must appear from the application itself—at [16].

This should be read in conjunction with his Honour's comments at [87] where he states that:

> [Had] the Registrar been required to address the condition in s. 190C(4)(b), the laconic nature of the affidavits may have been insufficient of themselves to satisfy the Registrar of that condition. Further material may have been needed by the Registrar.

The territory contended that the certificate of the representative body did no more than indicate to the Registrar whether to apply the requirements of ss. 190C(4)(a) or 190C(4)(b) in deciding whether to accept the application for registration. It was argued, amongst other things, that the certificate did not obviate the duty of the Registrar to be satisfied that the requirements of s. 61(1) as to authorisation of the applicant are met. This argument was rejected by the court in relation to s. 190C(2) (see above).

In relation to s. 190C(4)(a), the Registrar must be satisfied that the application has been certified under Part 11 by an appropriate representative body.

In his Honour's view the contrast between the requirements of ss. 190C(4)(a) and 190C(4)(b) is 'dramatic'. In the case of s. 190C(4)(b), the Registrar is required to be satisfied of the fact of authorisation by all members of the native title claim group. Subsection 190C(5) then imposes further specific requirements before the Registrar can attain the necessary satisfaction for the purposes of s. 190C(4)(b). The interactions of ss. 190C(4)(b) and 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s. 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given—at [78].

However, the Registrar was only required to consider s. 190C(4)(a). Paragraph 190C(4)(a) requires the Registrar to be satisfied that the application has been certified under s. 203BE of the NTA by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that part. A certificate from the appropriate body had been evidenced.

The contentions of the territory related to whether the Registrar needed to have both evidence of the content of the traditional decision–making process by which the authorisation was given, and evidence that the traditional decision–making process had in fact been invoked. The argument was based upon what was said to be required to establish authorisation under s. 251B(a) of the NTA, rather than upon the

terms of any particular subclause of ss. 190B or 190C. His Honour considered this imposed upon the Registrar a function beyond that required by s. 190C(4)(a)—at [62], and [63] and [81].

The court was satisfied that the Registrar did what was required under s. 190C(4)(a), namely to:

- identify the relevant native title representative body which may have needed access to material beyond that in the application; and
- be satisfied that the application had been certified by the representative body under s. 203BE—at [80].

In determining whether the certificate of the representative body was in accordance with s. 203BE, his Honour held that the Registrar correctly addressed the terms of the certificate and that it did enable the Registrar to be satisfied that it met the requirements of s. 203BE. Paragraph 190C(4)(a) does not require the Registrar to consider the correctness of the certification by the representative body, only its compliance with the requirements of s. 203BE—at [80] and [82].

Identification of area subject to native title — s. 190B(2)
It was noted that this is a requirement that does not appear to go beyond consideration of the terms of the application—at [16].

The territory contended that there was an 'absence of certainty' because the particular rights and interests claimed vary within the overall area subject of the application.

His Honour held that:

- it was open to regard the application as seeking a determination of the claimed native title rights and interests over all the claim area, so that, subject to ensuring the claim area was adequately and accurately described, the 'particular land and waters' over which the claims are made are identified with reasonable certainty;
- the focus is upon the information and map contained in the application, as required by s. 62(2)(a) and (b);
- it is whether that material enables, with reasonable certainty, the assessment of whether the native title rights and interests are claimed in relation to particular land or waters;
- the Registrar was held not to have erred in any reviewable way in relation to this condition—at [122].

Identification of native title claim groups — s. 190B(3)
It was noted that this is also a requirement that does not appear to go beyond consideration of the terms of the application—at [16].

Manfield J found that:

- the focus of s. 190B(3) is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the membership of the identified native title claim group can be ascertained;

- it does not require any examination of whether all the named or described persons do in fact qualify as members of the native title claim group—at [37].

Subsection 190B(3) has two alternatives, being either:
- the persons in the native title claim group are named in the application; or
- they are described sufficiently clearly so it can be ascertained whether any particular person is in that group.

His Honour was of the view that the focus of second, found in s. 190B(3)(b), is whether the application enables the reliable identification of persons in the native title claim group—at [51].

The approach taken by his Honour requires that the reference to 'native title claim group' in s. 190B(3) must be read down so that it is not referable to the definition in s. 61 but, rather, to the group defined in the application. Another reading of the subsection is that it is necessary to first determine who should be in the native title claim group ('all those persons who, according to their traditional laws and customs, hold the common or group rights comprising the particular native title claimed') before it is possible to decide whether they are named or described sufficiently clearly in the application. On this view, consideration of the constitution of the native title claim group would not be restricted to the application but would include all relevant material before the decision maker.

The interpretation given by his Honour, with respect, seems to be the preferable one, based on the context of the registration test and the focus of the subsection.

Identification of claimed native title — s. 190B(4)
Subsection 190B(4) requires the Registrar to be satisfied that the description in the application required by s. 62(2)(d) is sufficient to allow the claimed native title rights and interests to be readily identified. His Honour was of the view that this is a further requirement which does not appear to go beyond consideration of the terms of the application—at [16].

The test of the identifiability of the claimed native title rights and interests is that they are understandable and have meaning. The claims must be tested against the decision in *Western Australia v Ward* [2002] HCA 28 (*Ward*, summarised in *Native Title Hot Spots* Issue 1)—at [99] to [100] and [115].

The territory contended that the rights and interests accepted by the Registrar as being readily identifiable were contradictory when read with Schedule E pars 2, 3 and 4 of the application.

His Honour held that:
- in applying this condition of the test, it was a matter for the Registrar to exercise his judgment upon the expression of the native title rights and interests claimed;

- it was open to the Registrar to read the application as a whole so, properly understood, there was no inherent or explicit contradiction between parts of the application—at [123].

Mansfield J accepted the Registrar's findings that the rights and interests in subparagraphs 1(e) and (i) of Schedule E to the application were not readily identifiable as native title rights and interests. These claimed rights were respectively:

- to use and control the resources of the application area;
- to maintain, protect, prevent the misuse of and transmit to others their cultural knowledge, customs and practices associated with the application area, where the traditional laws acknowledged and customs observed have a connection with the application area—at [99]. The former was rejected by reason of *Wandarang People v Northern Territory* (2000) 104 FCR 380 at [124] and *Yarmirr v Northern Territory (No 2)* (1998) 82 FCR 533 at [158] and the latter by reason of the decision in *Ward* at [64].

Factual basis for claimed native title — s. 190B(5)

It was noted that this condition of the test clearly calls for consideration of material which may go beyond the terms of the application and, for that purpose, the information sources specified in s. 190A(3) may be relevant—at [16].

Mansfield J found that:

- subsection 190B(5) is carefully expressed;
- it requires the Registrar to determine whether the asserted facts can support the claimed conclusions, i.e. there must be probative material to support the asserted native title rights and interests;
- it does not itself require some weighing of that factual assertion, as that is the task that is required by s. 190B(6);
- the Registrar is required 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;
- the Registrar's 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—at [17], [103], [127] to [128].

  Subsection 190B(5) reflects the positive requirements of s. 62(2)(e), which dictates a required content of an application for determination of native title. His Honour held that the Registrar is not required to consider more than the three particular matters referred to in subparagraphs (a), (b) and (c) of s. 190B(5) —at [131] to [132].

  His Honour also held that it was not necessary for the relevant material, e.g. Land Claim Reports, to address specifically and separately each of the claimed native title rights and interests for the Registrar to have been able to be satisfied in terms of s. 190B(5). Mansfield J did not regard the necessity of the court to address each

claimed right or interest separately when deciding an application for native title as illuminating the task of the Registrar under s. 190B(5) —at [130] and [132].

Rights can be established prima facie — s. 190B(6)
It was noted that this condition also clearly calls for consideration of material which may go beyond the terms of the application and, for that purpose, the information sources specified in s. 190A(3) may be relevant—at [16].

In Mansfield J's view, it required the weighing of the factual basis on which it is asserted that the native title rights and interests are claimed and involved a more onerous test than s. 190B(5) —at [127] and [132].

The Registrar addressed each of those rights and interests which he considered were properly identified in turn and concluded that, on a prima facie basis, those rights could be established in relation to part or whole of the claim area. The territory's contentions concerning the application of s. 190B(6) divided into two groups.

The first was whether those rights and interests claimed in pars 1(a), (b), (d) and (f) of Schedule E could, prima facie, be established. Those claimed rights and interests read:

- to possess, occupy use and enjoy the area claimed to the exclusion of all others;
- to speak for and to make decisions about the use and enjoyment of the application area;
- to control the access of others to the application area;
- to control the use and enjoyment of others of the resources of the application area.

The territory contended that those rights relate to Crown land over which stock routes have been declared and gazetted. The Registrar regarded s. 47B as potentially applying to those parts of the claim area. The argument was that s. 47B cannot apply, even on a prima facie basis, to stock routes as they are declared under s. 96 of the *Crown Lands Act 1992* (NT).

Mansfield J observed that the extent or ambit of s. 47B(1)(b)(ii) had not been fully explored in decisions to date. His Honour did not consider it was incumbent upon the Registrar, in such circumstances, to resolve such a question. If on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis—at [135].

His Honour contrasted the approaches taken by Nicholson J in *Daniel v Western Australia* [2003] FCA 666 (summarised in *Native Title Hot Spots* Issue 6) at [967] to [968] with the application of s. 47B by Olney J in *Hayes v Northern Territory* (1999) 97 FCR 32; [1999] FCA 1248 as illustrating that this is not a settled area of law. Mansfield J indicated that he did not regard s. 47B(1)(b)(ii) as so clearly applying to the instruments by which the stock routes were established as to demonstrate legal error on the part of the Registrar in accepting, notwithstanding the stock routes, that prima facie the rights and interests claimed in par 1(a), (b), (d) and (f) of Sch E to the application can be made out—at [135].

In relation to the second group, while accepting those native title rights and interests claimed in pars 1(c), (e), (h) and (j) of Sch E as being, on present authority, capable of being established prima facie, the territory contended the Registrar erred in law in considering that those claimed rights and interests prima facie can be established because par 1 of Schedule E is expressed as being subject to pars 2 and 3 of Schedule E but the qualifications do not appear in the Register itself. The particular interests read:

- to reside upon and otherwise to have access to and within the application area;
- to use and control the resources of the application area;
- to maintain and protect places of importance under traditional laws, customs and practices within the application area;
- to determine and regulate membership of, and recruitment to, the landholding group—at [95].

The qualifications read:

> The claimants acknowledge that:
>
> (a) their native title rights and interests are subject to all valid and current laws of the Commonwealth and the Northern Territory; and,
>
> (b) the exercise of their native title rights and interests might be regulated, controlled, curtailed, restricted, suspended or postponed by reason of the existence of valid concurrent rights and interests in others by or under such laws; and,
>
> (c) their native title rights and interests might have been partially extinguished by relevant valid laws of the Commonwealth, South Australia, and the Northern Territory.
>
> Subject to Schedule L, this application does not claim that the native title rights and interests confer:
>
> (a) possession, occupation, use and enjoyment to the exclusion of all others;
>
> (f) [sic]the right to control the access of others to the application area; or
>
> (g) [sic]the right to control the use and enjoyment of others of the resources of the application area:
>
> in relation to any area regarding which a previous non—exclusive possession act under s. 23F of the NTA has been done.

His Honour considered it unclear whether the description of the native title rights and interests in the claim area which the Registrar, in applying s. 190B(6), considered prima facie could be established should be qualified in some way when recorded on the Native Title Register and, in any case, did not demonstrate that the Registrar erred in his consideration of s. 190B(6)—at [136] to [173].

In respect of right (f), the Registrar concluded that it should be limited to natural resources only. However, the Register did not reflect that conclusion. Mansfield J was of the view that the absence of such limitation on the Register was 'an inadvertent error' which can be addressed administratively—at [143].

In relation to s. 190B(6), which requires the Registrar to consider whether 'prima

facie, at least some of the native title rights and interests claimed in the application can be established', his Honour observed:

> [I]ndeed it may be that the Registrar, upon being satisfied that some of the native title rights and interests claimed can, *prima facie*, be established, might not apply that evidentiary test to each of the claimed native title rights and interests—at [16].

This is a curious observation, since (as the note to s. 190B(6) explains) only those rights and interests for which a prima facie case is established can form the basis for the 'right to negotiate' process. Paragraph 186(1)(g) likewise takes an inclusive approach to the native title rights and interests to be included on the Register. Indeed his Honour, when later discussing the application of s. 190B(6), seems to adopt that interpretation—at [126].

Note also s. 190(3A), which allows for further information to be provided to the Registrar in support of registration of rights and interests asserted in the application but not originally considered by the Registrar to be prima facie established.

Subsection 190B(8) and ss. 190B(9)(a) and (c)

The territory contended that the Registrar's conclusions about the conditions imposed by these provisions were erroneous in law, in substance because the Registrar is said to have 'in effect' amended the application by amending the native title rights and interests claimed so as to enable a finding to be made that, prima facie, they are capable of being established and do not contravene those provisions.

His Honour held that it is necessary that the Registrar should interpret the application, having regard to the entirety of its contents, in order that the prohibitions contained in s. 190B(8) and s. 190B(9) could be addressed—at [138] to [139].

Decision

As none of the grounds of review was found to be made out, the application to set aside the decision of the Registrar to register the Killarney application was dismissed. The decision of his Honour is on appeal on all grounds.