National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION

DELEGATE:	Monica Khouri

Application Name:	Dalmore Downs	
Names of Applicants:	Angus Limmerick	
Region:	Northern Territory (North) NNTT No.:	DC01/30
	Federal Court No.:D6030/01	
Date Application Made:	8 May 2001	

The delegate has considered the application against each of the conditions contained in s.190B and s.190C of the *Native Title Act* 1993 (Cwlth).

DECISION

The application IS ACCEPTED for registration pursuant to s.190A of the *Native Title Act* 1993 (Cwlth).

Monica Khouri

Delegate of the Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D

7 June 2001
Date of Decision

Brief History of the Application

On 8 May 2001 the application was filed in the Northern Territory District Registry of the Federal Court of Australia ("the Court"). The application was made by Anges Limmerick on behalf of the Wakaya People (the applicants).

The application was filed in response to the following:

- Exploration Licences 9978 - notified on 7 February 2001;
- Exploration Licences 22939, 22971, 22972, 22973, 22974, 22975, 22976, 22977, 22978, 22979, 22980, 22981, 22982, 22983, 22809, 22551 and 22552 which have not been notified.

The Northern Territory Government was provided with a copy of the application on 9 May 2001 and were given until 19 May 2001 to respond. The Northern Territory Government 's submission was received on 17 May 2001.

A copy the Northern Territory Government's submission was faxed and mailed to the Northern Land Council for comment. To date no submission has been received from the NLC.

Delegation Pursuant to Section 99 of the Native Title Act 1993 (Cth)

On 6 March 2001 Christopher Doepel, Native Title Registrar, delegated to members of the staff of the Tribunal including myself all of the powers given to the Registrar under sections 190, 190A, 190B, 190C and 190D of the Native Title Act 1993 (Cth).

The delegation of 6 March 2001 has not been revoked as at this date.

Information considered when making the Decision

In considering this application I have considered and reviewed all of the information and documents from the following files, databases and other sources:

- Federal Court Application;
- Correspondence with Northern Land Council;
- The Registration Test File;
- Determination of Native Title Representative Bodies: their gazetted boundaries;
- The National Native Title Tribunal Geospatial Database;
- The Register of Native Title Claims;
- The National Native Title Register;
- ILUA Database;
- Correspondence from the NT Government, dated 17 May 2001 and 7 June 2001;
- Correspondence by E-Mail from the NLC dated 5 June 2001.

A. Procedural Conditions

s.190C(2)

Information, etc., required by section 61 and section 62:

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 a submission of 7 June 2001 the Solicitor for the northern Territory asserts that,

> "Section 190C(2) requires that the Registrar must be satisfied that *"the application contains all the details and other information"* etc. this requires a single self-contained application. The original application may be supplemented by additional information but it is not permissible to merely provide additional material to the Registrar or his delegate such as with this attachment or merely refer to material in the abstract (such as the purported incorporation of Wakaya/Alyawerre Land Claim report and uncited references to Memmott *et al*). These materials are not part of the application and the materials so provided cannot be relied upon for the purposes of applying the registration test."

Section 190C(2) provides that the Registrar must be satisfied that the application contains all details and other information required by sections 61 and 62.

Sections 62(1) and 62(2)(e) provide that the application must contain a *general description* of the factual basis on which it is asserted that the native title rights and inerests claimed exists and in particular that:

(i) the native title group have, and the predecessors of those persons had, an association with the area; and
(ii) there exist traditional laws and customs that give rise to the claimed native title; and
(iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Information of sufficiency to meet this requirement must be contained in the application itself.

In contrast to s62(2)(e) however, information provided in satisfaction of s190B(5) need not be all in the application but may be provided by way of additional information. Section 190A(3) provides that in the administration of the registration test the Registrar may have regard to "such information as he or she consider appropriate".

It should also be noted,
"Provision of material disclosing factual basis for the claimed native title rights and interests, for the purposes of registration is ultimately the responsibility of the applicant. It is not a requiremen5t that the Registrar or delegate undertake a search for such material"[1]

[1] French J *Martin v Native Title Registrar* [2001] FCA 16 para23.

By analogy, if applicants provide references where the relevance of those references to the requirements of the registration test is not clear, the delegate may find that those references, whether contained in the application or in additional material subsequently supplied by the applicants, may not be adequate to support the particular condition being considered. That is a risk borne by the applicants, but it does not prevent the delegate having regard to those references if the delegate so chooses.

I refer to the individual reasons for decision in relation to sections 61 and 62 set out below. I find that the procedural requirements of sections 61 and 62 have been met and accordingly I find that the application meets the requirements of s.190C(2).

Details required in section 61

s.61(1) The native title claim group includes all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.

Reasons relating to this sub-condition

Schedule A of the application provides a description of the native title claim group. I do not have any other information that indicates that this group does not include, or may not include, all the persons who hold native title in the area of the application. I am satisfied that the group described includes all the persons who, according to their traditional laws and customs hold communal native title that is claimed.

Result: Requirements met

s.61(3) Name and address for service of applicants

Reasons relating to this sub-condition

Part B of the application has been completed and sets out details of the applicant's address for service.

Result: Requirements met

s.61(4) Names the persons in the native title claim group or otherwise describes the persons so that it can be ascertained whether any particular person is one of those persons

Reasons relating to this sub-condition

An exhaustive list of names of the persons in the native title claim group has not been provided so the requirements of section 61(4)(a) are not met.

For the reasons set out in relation to section 190B(3)(b) I find that the persons in the native title claim group are described sufficiently clearly in Schedule A, so that it can be ascertained if any particular person is one of those persons in accordance with section 61(4)(b).

Result: Requirements met

s.61(5) ***Application is in the prescribed form, lodged with the Federal Court, contains prescribed information, and is accompanied by any prescribed documents***

Reasons relating to this sub-condition

The application meets the requirements of s.61(5)(a) in that it is in the form prescribed by Regulation 5(1)(a), Native Title (Federal Court) Regulations 1998. As required by s.61(5)(b), the application was filed in the Federal Court.

The application is accompanied by an affidavit by the applicant as prescribed by s.62(1)(a) and by a map as prescribed by s.62(2)(b).

I refer to my reasons for decision in relation to those sections of the Act.

I note that s.190C(2) only requires me to consider details, other information and documents required by s.61 and s.62. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court. For the reasons outlined above, it is my view that the requirements of s.61(5) have been met.

Result: Requirements met

Details required in section 62(1)

s.62(1)(a) ***Affidavits address matters required by s.62(1)(a)(i) – s.62(1)(a)(v)***

Reasons relating to this sub-condition

The application filed in the Federal Court was accompanied by an affidavit from the named applicant. The applicant is identified by name and address. The affidavit has been affirmed before John Gregory, Police Officer, Tennant Creek Police Station.

The applicant deposes in paragraphs (1) to (4) of the affidavit to the matters contained in s.62(1)(a)(i)-(iv) essentially using the words of the statute, and the requirements of these sub-paragraphs are therefore satisfied.

Section (1)(a)(v) requires that the affidavit states the basis on which the applicants are authorised as mentioned in subparagraph (iv). Section 251B states what it means for the applicants to be authorised by all the persons in the native title claim group. Essentially, authorisation is said to have occurred if it is (a) in accordance with a process of decision making under traditional laws and customs, or, where there is no such process, (b) in accordance with a process of decision making agreed to and adopted by the persons in the native title claim group.

The applicant states that he is authorised, in accordance with decision making processes under traditional laws acknowledged and customs observed, to make this application. There are no further details as to when authorisation occurred.

Schedule R of the application provides details of Certification by the Northern Land Council. A statement is provided regarding authorisation and the current application.

A further statement has been provided in Part A of the application under Authorisation. The application states that the applicant is entitled to make this application as the person authorised by the native title claim group to make the native title determination application.

I am satisfied that the application is accompanied by an affidavit that meets the procedural requirements of section 62(1)(a).

Result: Requirements met

s.62(1)(c) Details of traditional physical connection (information not mandatory)

Comment on details provided

Schedule G provides details of activities carried out in the application area.
Schedule M provides details of traditional physical connection covered by the application.

Result: Provided

Details required in section 62(2) by section 62(1)(b)

s.62(2)(a)(i) Information identifying the boundaries of the area covered

Reasons relating to this sub-condition

Schedules B and C refer to a map, which is provided as Attachment B.

The map was produced by the Northern Land Council in April 2001 and shows the external boundaries of the area covered by the application. The map also identifies surrounding Northern Territory portions.

Further the application at Schedule B describes the application area and includes exploration licence applications numbered 9978, 22939, 22971-22983 inclusive, 22809, 22551 and 22552.

Result: Requirements met

s.62(2)(a)(ii) ***Information identifying any areas within those boundaries which are not covered by the application***

Reasons relating to this sub-condition

For the reasons which lead to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the information provided by the applicant is sufficient to enable the area not covered by the application to be identified with reasonable certainty and meets the procedural requirements of s.62(2)(a)(ii).

Result: Requirements met

s.62(2)(b) ***A map showing the external boundaries of the area covered by the application***

Reasons relating to this sub-condition

Schedules B and C refer to a map contained in the application and labelled Attachment B. The map clearly identifies the external boundaries of the application.

Result: Requirements met

s.62(2)(c) ***Details/results of searches carried out by the applicant to determine the existence of any non-native title rights and interests***

Reasons relating to this sub-condition

Section 62(2)c) combined with section 62(1)(b) requires that the application contain details and results of all searches carried out to determine the existence of any non-native title rights and interests in relation to the land or waters in the area covered by the application.

Schedule D of the application states that the applicant has not conducted any title searches.

The requirements of s. 62(2)(c) can be read widely to include all searches conducted by any person or body. However, I am of the view that under this condition I need only be informed of searches conducted by the applicant in order to be satisfied that the application complies with this condition.

Result: Requirements met

s.62(2)(d) ***Description of native title rights and interests claimed***

Reasons relating to this sub-condition

A description of the native title rights and interests claimed by the applicant is contained in Schedule E of the application. I have outlined these rights and interests in my reasons for decision in respect of s.190B(4).

Result: Requirements met

s. 62(2)(e) ***The application contains a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that:***

(i) the native title claim group have, and the predecessors of those persons had, an association with the area; and

(ii) there exist traditional laws and customs that give rise to the claimed native title; and

(iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

A general description of the factual basis upon which it is asserted that the native title rights and interests claimed exist is contained in Schedules F, G and M. Specifically, the description does address each of the three particular requirements in (i), (ii) and (iii).

Result: Requirements met

s.62(2)(f) ***If native title claim group currently carry on any activities in relation to the area claimed, details of those activities***

Reasons relating to this sub-condition

Schedule G of the application provides a list of current activities of the native title claim group associated in some cases with the application area. Further particulars of current activities are provided at Schedule M by the applicants.

Result: Requirements met

s.62(2)(g) ***Details of any other application to the High Court, Federal Court or a recognised State/Territory body the applicant is aware of (and where the application seeks a determination of native title or compensation)***

Reasons relating to this sub-condition

Schedule H of the application states:

"The applicant is not aware that any other applications seeking a determination of native title, or a determination of compensation, have been made in relation to the whole or a part of the area covered by the application."

Result: Requirements met

s.62(2)(h) ***Details of any s.29 notices given pursuant to the amended Act (or notices given under a corresponding State/Territory law) in relation to the area, which the applicant is aware of***

Reasons relating to this sub-condition

Schedule I provides details of one S.29 Notice that has been advertised.

Result: Requirements met

For the reasons outlined above, I consider that the application **passes** the conditions contained in s.190C(2).

s.190C(3)

Common claimants in overlapping claims:

The Registrar must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:

(a) the previous application covered the whole or part of the area covered by the current application; and

(b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made: and

(c) the entry was made, or not removed, as a result of consideration of the previous application under section 190A.

Reasons for the Decision

If all three conditions nominated at section 190C(3) apply, I must consider whether any person included in the native title claim group was a member of the native title claim group(s) for any previous application(s).

Condition (a) of s.190C(3) is that the previous application covered the whole or a part of the area covered by the current application. A search of the Schedule of Native Title Applications, Register of Native Title Claims and Geospatial's assessment dated 16 May 2001 confirm there is one application (DC01/12) that overlaps this current application. The area of overlap is 0.274 and is known as Mt Drummond. However, at Schedule B the applicants have specifically excluded this from the claim area.

Condition (b) of s.190C(3) is that an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made. This is not applicable in this application.

Condition (c) of s.190C(3) requires that potential previous application(s) must have been entered onto (or not removed from) the Register as a result of consideration under s.190A (the Registration Test.) This is not applicable in this application.

Therefore there is no application which meets the criterion in subsection 190C(3)(c), and as such, no further consideration of this section is required. I am satisfied the application passes the requirements of the section.

Result: Requirements met

s.190C(4)(a) or s.190C(4)(b)

Certification and authorisation:

The Registrar must be satisfied that either of the following is the case:

(a) the application has been certified under paragraph 202(4)(d) by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part: or

(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

Note: s.190C(5) – Evidence of authorisation:

If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:

(a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and

(b) briefly set out the grounds on which the Registrar should consider that it has been met.

Reasons for the Decision

The application is certified by the Northern Land Council pursuant to section 203BE of the Act. The Certificate is supplied as Schedule R in the application in which the requirements of section 203BE(1)(a), 203 BE(2)(a) and (b) and 203BE (4)(a) and (b) have been addressed.

The Tribunal's Geospatial assessment confirms that there is an overlap with an area covered by another representative body, namely the Central Land Council. The area of overlap is 0.023 square kilometres. The Geospatial Unit have advised that due to different data being used in mapping, some discrepancies may and do occur. However, they further advise that this small overlap could be a technical overlap.

The applicants also state in Schedule B that any area covered by the CLC is excluded from the application.

Therefore I am satisfied that the Northern Land Council is the sole Aboriginal/Torres Strait Islander representative body that could certify the application under Section 203BE.

The Certificate is signed and dated by Norman Fry, Chief Executive Officer, of the Northern Land Council.

Result: Requirements met

B. Merits Conditions

s.190B(2)

Description of the areas claimed:

The Registrar must be satisfied that the information and map contained in the application as required by paragraphs 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land and waters.

Reasons for the Decision

Map and External Boundary Description

A map showing the external boundaries of the area claimed has been produced by the Northern Land Council and is included as Attachment B to the application. The map shows geographic coordinates.

The description in Schedule B provides a further description of the area covered as in the locality of Dalmore Downs in the Northern Territory. The area claimed is all land and waters within the area as symbolised on the map referred to in Schedule C and "hatched" in Attachment B. The land and waters are subject to eighteen separate applications for an exploration licence under the *Mining Act (NT).* At this time, notice under section 29 of the Act has only been issued for one of the applications.

The Tribunal's Geospatial Unit have provided an assessment of the map and the description. It states that the description and the map are generally consistent, identifying the application area with "reasonable certainty".

The assessment also notes that "the map includes a grid no datum has been cited. This is problematic as a result of the introduction of a new datum (GDA94) last year. The Exploration Licence data portrayed on the map has been incorrectly generated with reference to the graticular grid based on AGD66 instead of GDA94. Thus resulting in a positional variation of the exploration licence boundaries from that intended".

Internal Boundaries

The applicant provides details in Schedule B.

Subject to Schedule L of this application, any area in relation to which a previous exclusive possession act under section 23B of the NTA has been done, is excluded from this application.

Excluding that area as covered by the *Neade v The Territory of Australia* (as filed 15 February 2001) (D6012/01) (DC01/12) ("Mt Drummond").

Excluding that area as covered by the Central Land Council Region.

The applicants also acknowledge that in Schedule E(2)(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".*

Schedule E(3) states: *"Subject to Schedule L, this application does not claim that the native title rights and interests confer possession, occupation, use and enjoyment to the exclusion of all others in relation to any area regarding which a previous non-exclusive possession act under s 23F of the NTA has been done".*

Whether the exclusions identified by this formula are sufficient to meet the conditions of s.190B(8) and (9) is not considered here. I refer to my reasons for decision in relation to those sections.

Conclusion

I find that the description and map contained in the application are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

Result: Requirements met

s.190B(3)

Identification of the native title claim group:

The Registrar must be satisfied that:
(a) the persons in the native title claim group are named in the application; or
(b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Reasons for the Decision

To meet this condition, the description of the claim group must be sufficiently clear so that it can be ascertained whether any particular person is a member of the native title claim group.

A list of names of all the persons in the native title claim group has not been provided in the application, so the requirements of section 190B(3)(a) are not met.

In the alternative, section 190B(3)(b) requires me to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group. It is my view that the section requires such a description to appear in the application itself.

Pursuant to the requirements of s.190B(3), the native title claim group is said to be comprised by the Wakaya People and further that, in relation to the area claimed, are comprised by all persons descended from six (6) named apical ancestors (Schedule A, 2). Further details are provided in the application in Schedule A, 4, regarding descendants from these named apical ancestors.

It is my view that the applicant has provided a formula whereby membership of the native title claim group might be established. I am satisfied that the persons in the group are defined sufficiently clearly so that it can be ascertained whether any particular person is in that group.

The key phrase is “can be ascertained”. It is not necessary to ascertain now whether a particular individual is a member of the group. It is necessary only to be satisfied that, on the information provided, this can be ascertained. This is a limited inquiry but one properly conducted by the Court hearing the application and not as part of an administrative decision under the s.190A of the Act.

I am satisfied that the description constitutes an objective means of verifying the identify of members of the native title claim group such that it can be clearly ascertained whether any particular person is in the group and therefore satisfies s.190B(3)(b).

Result: Requirements met

s.190B(4)

Identification of claimed native title:

The Registrar must be satisfied that the description contained in the application as required by paragraph 62(2)(d) is sufficient to allow the native title rights and interests claimed to the readily identified.

Reasons for the Decision

This condition requires me to be satisfied that the native title rights and interests claimed can be readily identified. It is insufficient to merely state that these native title rights and interests are 'all native title interests that may exist, or that have not been extinguished at law'. To meet the requirements of s.190B(4), I need only be satisfied that at least one of the rights and interests sought is sufficiently described for it to be readily identified.

The application at Schedule E, (1) lists the native title rights and interests claimed.

These are:

(a) to possess, occupy, use and enjoy the application area to the exclusion of all others;
(b) to speak for and to make decisions about the use and enjoyment of the application area;
(c) to reside upon and otherwise to have access to and within the application area;
(d) to control the access of others to the application area;
(e) to use and enjoy the resources of the application area;
(f) to control the use and enjoyment of others of the resources of the application area;
(g) to share, exchange and/or trade resources derived on and from the application area;
(h) to maintain and protect places of importance under traditional laws, customs and practices in the application area;
(i) to maintain, protect, prevent the misuse of and transmit to others their cultural knowledge, customs and practices associated with the application area; and
(j) to determine and regulate membership of, and recruitment to, the landholding group.

The applicants continue in Schedule E, (2), (3), (4) (5) and (6):

"The claimants acknowledge that:
(2) (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.

(3) Subject to Schedule L, this application does not claim that the native title rights and interests confer possession, occupation, use and enjoyment to the exclusion of all others in relation to any area regarding which a previous non-exclusive possession act under s.23F of the NTA has been done.

(4) All rights and interests listed in paragraph 1 exist (and existed) throughout the whole of the area claimed.

(5) The native title rights and interests are held communally by the claimants, albeit that:

(a) the capacity of individuals to exercise these rights and interests will vary according to a variety of circumstances, for example age, gender, and physical and mental capacity;

(b) by traditional laws and customs, responsibility for the area claimed is exercised by different individuals in different ways.

(6) The activities referred to in schedule G are enjoyed by the claimants, and derive from their native title and are consistent with their native title rights and interests."

In my view the native title rights and interests described are readily identifiable. The description is more than a statement that native title rights and interests are 'all native title interests that may exists, or that have not been extinguished at law'.

Result: Requirements met

s.190B(5)

Sufficient factual basis:

The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

(a) that the native title claim group have, and the predecessors of those persons had, an association with the area;

(b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests;

(c) that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.

Reasons for the Decision

On 19 January 2001 French J handed down his decision *(Martin v Native Title Registrar [2001] FCA 16 (Martin)*. Amongst other things, his Honour considered this condition of the registration test in that case. I note, at the outset, his Honour's findings that,

> *"Provision of material disclosing a factual basis for the claimed native title rights and interests, for the purposes of registration, is ultimately the responsibility of the applicant. It is not a requirement that the Registrar or his delegate undertake a search for such material"* - at [23].

As noted under my reasons in relation to s.190C(2) above, the application does provide a general description of the factual basis provided to support the assertion that the native title rights and interests claimed exist and also provides the factual basis to support the assertions as set out in s.190B(5)(a)-(c) as required by s.62(2)(e).

What I must determine here is whether or not this factual basis is sufficient to support these assertions. In *Martin*, French J noted that the delegate was not limited to considering the statements in the application but may refer to additional material under this condition. In *Queensland v Hutchison* [FCA] 416, Keifel J (commenting on that finding) said, *obiter*, that reference may be had to additional evidence if:

> "*such evidence goes beyond what was required to be set out in the application…Section 190B(5) may require more than [s 62(2)(e)], for the Registrar [or his delegate] is required to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to suggest a wider consideration, of the evidence itself, and not of some summary of it."* At [25].

The Supplementary Explanatory Memorandum to the *Native Title Amendment Bill 1997 [No. 2]* states that s 190B(5) was "designed to ensure that only credible, well research [sic] claims which are likely to be established can be registered." – at p 35].

The applicants list at Schedule E a description of native title rights and interests claimed in relation to the area subject to the application, including activities in exercise of those rights and interests. The applicants also provide material in support of s190B(5) at Schedules F, G and M. Schedule A the applicants state that ...."*Members of the*

Wakaya People were successful claimants in the Wakaya-Alyawerre Land Claim under the Aboriginal Land Rights (Northern Territory) Act 1976. The land subject to this claim is in proximity to the area subject to the land claim".

Schedule F contains a general description of the rights and interests claimed, and, describes, in particular, the factual basis on which it is asserted that the three criteria identified at s 190B5(a)–(c) are met. Schedule G provides details of traditional usage asserted of Wakaya country, including in some cases the area claimed. Schedule M provides details of the traditional physical connection the claimants assert they have maintained with the application area.

It is apparent that in these schedules that the applicants have made a series of assertions in relation to the existence of the claimed native title rights and interests, including statements which related to the three particular matters referred to in s190B(5). What I must determine here is whether or not the applicants have also provided a factual basis which is sufficient to support the assertions made in the application.

The Northern Land Council provided additional material to the Tribunal on 5 June 2001. This additional material was entitled "Additional Information" and included excerpts from the *Land Rights* Act Wakaya/Alyawarre Land Claim Report.

The additional information states, in part:

> "*The information contained in the reports, being a claim to land in the general vicinity of the area claimed in the native title application."*
>
> *"…..the Wakaya Aboriginal Land Trust adjoins the southern boundary of Dalmore Downs Pastoral Station. The land subject to this claim is located on that pastoral lease and as such, is reasonably proximate to the area subject to this claim."*

On 7June 2001 the Solicitor for the Northern Territory provided a submission responding to the applicants' 5 June 2001 additional material. The submission notes that the applicants are required to supply a basis on which it is asserted that the claimed rights exist, not mere assertions that a factual basis exists.

The submission states that the tests to be applied under the *Aboriginal Land Rights (Northern Territory)* Act 1976 are conceptually different from the requirements of the Native Title Act.

The Solicitor for the Northern Territory further asserts that the following support the view that the additional information is insufficient:

(i) Section 190C(2) requires that "the Registrar must be satisfied that the application contains all the details and information " etc. This requires a single, self-contained application. The original application may be supplemented by additional material to the Registrar or his delegate such as with this attachment or merely refer to material in the abstract (such as the purported incorporation of Wakaya/Alyawerre Land claim Report and uncited references to Memmott Iet al). These materials are not part of the application and the materials so provided cannot be relied upon for the purposes of applying the registration test.

(ii) The authorship/provenance of the attached five page document is unstated and is expressed in terms which are part contentions/opinions and part assertions of fact. The delegate may be reluctant, in such circumstances, to place reliance upon it.

(iii) In attempting to translocate the ALRA details to this application the document says: *"The land subject to this claim is located on that pastoral lease and as such, is reasonably proximate to the area subject to this claim."* Yet the previous paragraph appears to state that it is in "the general vicinity". It says: *The information contained in the reports, being a claim to land in the general vicinity of the area claimed in the native title application, [sic].* Reference is made to the map which has no scale and no markings to indicate the claimed area.

I have considered this information.

It is already noted under my reasons in relation to s.190C(2) above that the application does provide a general description of the factual basis provided to support the assertion that the native title rights and interests claimed exist as required by s.62(2)(e).

In contrast to s62(2)(e) however, information provided in satisfaction of s190B(5) need not be all in the application but may be provided by way of additional information. Section 190A(3) provides that in the administration of the registration test the Registrar may have regard to "such information as he or she consider appropriate".

In considering 190B(5) I have had regard to information contained in the application (specifically schedules A, F, G and M), the additional information provided by the NLC 5 June 2001, and I have viewed the Wakaya/Alyawerre Land Claim Report.

Before dealing with each particular aspect of this condition it is necessary to clarify that it is not the role of the Delegate to reach definitive conclusions about complex anthropological issues pertaining to applicants' relationships with the country subject to native title claimant applications. What I must do is consider whether the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion that the native title claim group have, and the predecessors of those persons had, an association with the area.

(a) the native title claim group have, and the predecessors of those persons had, an association with the area

This criterion requires me to be satisfied that the factual basis on which this is asserted is sufficient to support the assertion.

The application asserts association since time immemorial, including at the time when sovereignty was asserted by the Crown of the United Kingdom and at the time of contact with non-Aboriginal people (Schedule F(2)).

Schedule F(3), states that the traditional connection of the native title claim group with the application area, and native title rights and interests, were inherited from the ancestors of the native title claim group in accordance with traditional laws and customs.

At Schedule F(8) the applicants summarise that there is material evidence of physical connections by the ancestors of the claimants in Wakaya country, and is illustrated by the presence of archaeological evidence of both pre-contact and post-contact Aboriginal habitation. It is asserted that this evidence includes artefact fragments, rock art and traditional occupancy sites. I again note that Keifel J in *Queensland v Hutchison* [FCA] FCA 416, states *…Section 190B(5) may require more than [s 62(2)(e)], for the Registrar [or his delegate] is required to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to suggest a wider consideration, of the evidence itself, and not of some summary of it."* At [25].

Schedule G provides details of traditional usage asserted of Wakaya country, including in some cases the area claimed. It is not clear from the information provided which of these activities apply to the area claimed.

Schedule M states that the claimants have maintained a traditional physical connection with the application area and gives examples of the asserted use of the land and waters covered by the application.

The Wakaya/Alyawarre Report identifies areas and sites associated with the various claimant groups. The Wakaya were identified as belonging to six separate estate groups. Those estate groups correspond with five of the six groups identified in Schedule A of the native title application. The "Physical Features" associated with the different estate groups include Dalmore Downs, Soudan Station and the headwaters of the Rankin River and Lorne. These areas fall within the area the subject of the native title application.

The Purrukwarra estate "comprises the descendants of three deceased siblings, namely Avon Willy, his brother Old Leo and their sister Rosuie Pilkalaab." These siblings were the children of Paralangi, a named apical ancestor in the native title application. The report also states that "The late Avon Willy is generally recognised as having been "the boss" for Purrukwarra", and further, the report identifies .

The Arrawajin estate, which takes in the upper portion of the Frew River (south of Dalmore Downs) is said to be related to a group "whose traditional country extends some distance north from the claim area." The claimant group for the estate is said to comprise "the descendants of four siblings of whom only two, Lame Tommy and his sister Blanche, had children." Lame Tommy, his sister Blanche and his two siblings are identified as descendants of an apical ancestor (an unnamed Aboriginal man) in the native title application.

Angus Limmerick, named applicant in the native title application, is identified in the report as one of the people found to be the traditional owners of part of the claim area. The northern part of the claim area is immediately adjacent to the southern boundary of Dalmore Downs Station.

While I can find no specific reference in the report to that southern portion of Burramurra that falls within the native title application I am satisfied that it is "reasonably proximate"

to those areas that are subject to claim and are discussed in the report. Further, it is reasonable to infer from the report that there appears to be some degree of linkage between Wakaya People's interests in the general region, and, by extension, to the area subject to this application.

Justice Olney makes the following important observation in the Wakaya/Alyawarre Report:

> "It is always a difficult matter to assign boundaries to Aboriginal estates. Often the task is simplified if the estate clearly extends beyond the limits of the claim area and this is the case with several of the boundaries in the present claim."

For the reasons set out above I do not agree with the view of the Solicitor for the Northern Territory as described at point (iii) of the Territory's 5 June 2001 submission. Those issues may properly be subject to further inquiry during mediation of this application or through litigation, but for the purposes of this administrative decision the additional information provided by the applicants is adequate to satisfy the condition

Accordingly, I accept that additional information provided by the applicants does provide a sufficient factual basis to support the assertion that the native title claim group has, and the predecessors of those persons had, an association with the area subject to this application.

(b) that there exist traditional laws acknowledged and traditional customs observed by the native title claim group that give rise to the claim to native title rights and interests.

Schedule F (5) and (6) asserts the traditional ownership of the claimed area by the Wakaya People.

Schedule F(9), asserts that the claimants observe common traditional laws and customs that include a common kinship system, observance of common laws relating to land tenure, and traditional usage of land and waters. Further details are provided at F(10) and (11).

Details of the activities asserted to be associated with the traditional usage of, in some cases, the area claimed are provided in Schedule G(1) (a)-(q). It is not clear from this information which of these activities apply to the area claimed.

Each of the six estates identified in the Wakaya/Alyawarre Report that use Wakaya as the "Country Language" are also designated as areas having certain "Dominant Dreaming" including goanna, black-headed python, western brown snake, rayerrpe (black headed python), yam, dingo (dog), sugarbag, (possibly rain to the north-east of country but outside of the claim area) and emu. Avon Willy is referred to in the report as "a well known rainmaker".

The report talks about Soudan Station becoming a regional centre for ceremonial life in the 1920's and 1930s:

> "There were both Alyawarre and Wakaya people there as well as others. Some of the Alyawarre learnt Wakaya business during this period at Soudan and a number of Alyawarre were initiated there."

The report also goes into some detail about the belief systems of the Alyawarre and Wakaya, and how those beliefs relate to important sites. In some cases the dominant site will lend its name to that of the "country":

> "The land tenure system of the Alyawarre and Wakaya is based upon a set of cosmological and cosmogenic beliefs. They, like other Aboriginal groups, believe in an ancient formative period inhabited by superhuman beings, whose heroic travels and deeds shaped the universe, generated human life, and established the natural, moral, religious and social orders.. the Wakaya call it wakuna.
>
> These ancestors, known as yiwukina (dream hero) jumped up from the ground and returned to the ground upon death. Most Alyawarre and Wakaya mythology deals with the travels of the yiwukina which can be divided into three categories. In the first category are yiwukina who travelled through the environment along a particular route. ….. The second category contains yiwukina who rose up at a place and, although travelling out regularly into the surrounding environment, always returned to the original site. The last category contains dream heroes who rose up at a place and remained at that place. The dream heroes named and created sites in the environment.
>
> The sites created by the dream heroes are the constituent elements of the "countries" into which the claimants divide the claim area…..All countries are named. In some cases a dominant site lends its name to that of the country, for example, Tijampara, Purrukwarra. "

Finally, the Wakaya/Alyawarre Report describes how each group has the right to forage over any land that it has primary spiritual responsibility for.

In my view, given the relative proximity of the land involved in the Land Rights Act matter, and the land subject to this native title claimant application, it is reasonable to infer that there is some degree of linkage between Wakaya people's interests in the general region, and, by extension, to the area subject to this application.

Accordingly, I am satisfied that the factual basis on which it is asserted that there exist traditional laws acknowledged, and traditional customs observed, by the native title claim group exists, and that it gives rise to the claim to native title rights and interests is sufficient to support that assertion.

(c) that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.

Assertions of the continued observation of traditional laws and customs from which the native title rights and interests claimed are said to derive is provided as follows :

- Processes for transmission of rights and interests (succession) (Schedule A (1)(a)), and Schedule G.

- Continued observance of a common kinship system by the claimants, and outlined in Schedule F, (10) and includes; recognition of common ancestors, recognition of group and individual responsibilities towards land and waters; and participation in and responsibility for ceremony.

- A description of common laws relating to land tenure (Schedule F (11)); and activities in furtherance of the above rights and interests (Schedule G).

While Schedule G provides details of the activities asserted to be associated with the traditional usage of, in some cases, the area claimed, it is not clear from the information provided which of these activities apply to the area claimed.

I am of the view that the material contained in the application and references in the Wakaya/Alyawarre Report to the descendants of the named apical ancestors, and the likely link between Wakaya people's interests in the general region, and, by extension, to the area subject to this application, provides a sufficient factual basis to support the assertion that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.

Conclusion

I am satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertions described for each of the criteria set out in s.190B(5).

Result: Requirements Met

s.190B(6)

Prima facie case:

The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.

Reasons for the Decision

Under s190B(6) I must consider that, prima facie, at least some of the native rights and interests claimed can be established.

'Native title rights and interests' are defined at s.223 of the Act. This definition specifically attaches native title rights and interests to land and water, and in summary requires:

- the rights and interests to be linked to traditional laws and customs;
- those claiming the rights and interests to have a connection with the relevant land and waters; and
- these rights and interests to be recognised under the common law of Australia.

Under s.190B(6) I must consider that, prima facie, at least some of the rights and interests claimed can be established. The term *prima facie* was considered in *North Ganalanja Aboriginal Corporation v Qld* 185 CLR 595 by their Honours Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, who noted:

"The phrase can have various shades of meaning in particular statutory contexts but the ordinary meaning of the phrase 'prima facie' is: "At first sight, on the face of it; as appears at first sight without investigation." [Citing the Oxford English Dictionary (2nd ed 1989)]".

In the *State of Western Australia v Ward* [2000] FCA 191 (Ward's case), handed down on 3 March 2000, the majority of the full Federal Court held that some of the native rights and interests which had previously been accepted following Lee J's first instance decision may not be recognisable at common law (and therefore in a determination under s.225). The majority held that the common law does not protect purely religious or spiritual relationships with land. It was held that rights and interests which involve physical presence on the land and activities on the land associated with traditional social and cultural practices are recognised and protected by the common law: see [104] of Ward's case. In finalising the determination the Court confirmed these findings. (See *State of Western Australia v Ward* [2000] FCA 611 dated 11 May 2000.)

Following Ward's case, the rights which can be made out, prima facie, appear to be only those which can be characterised as having an aspect involving physical use and enjoyment of the land claimed. I have considered this aspect of the judgement in relation to the rights and interests claimed as set out below.

The applicants state in Schedule E that the native title rights and interests claimed are subject to Schedule L applying.

I note that in Schedule E (2) and (3) of the application, the applicant provides the following statements:

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.

Subject to Schedule L of the application, the applicants do not claim that native title rights and interests confer possession, occupation, use and enjoyment to the exclusion of all others on any area in relation to which a previous non-exclusive possession act under s.23F of the Act has been done.

I am satisfied that these statements qualify all the rights and interests claimed.

(a) The right to possess, occupy, use and enjoy the area claimed to the exclusion of all others;

The applicant provides specific examples of cultural activities involving possession, occupation, use and enjoyment of the claim area and land and waters proximate to the application area by the applicant and members of the claim group. The applicant states that, since time immemorial and in accordance with traditional laws and customs, the application area has been regarded as belonging to the Wakaya People. Details of communal or group activities carried out currently in the area are provided in Schedules G and M of the application.

Although the applicant claims these rights to the exclusion of all others, the claim is subject to the general statements provided in Schedule E noted above and Schedule J. I am satisfied the statements are qualifications to the rights claimed and are sufficient to show, prima facie, that these rights are not asserted exclusively where such a claim cannot be established.

Further, s 47B has been asserted in relation to the claim area. If that section does apply, all prior extinguishment must be disregarded and rights in the terms claimed may be found to exist: see, for example, Ward's case at para [663] in relation to areas to which s 47A (which also provides that prior extinguishment must be disregarded in certain circumstances) was applied by the majority.

On the face of it, there is nothing to indicate that s 47B is not attracted – as noted above, the Crown in right of the Northern Territory has not provided any information which would indicate that s 47B(1)(b) is attracted to the area concerned. If it were to apply, then it is arguable that the same could be said in relation to areas subject to s 47B as was said in Ward's case in relation to s 47A.

However, it is not necessary for me to be satisfied that this section is attracted since I have nothing before me to indicate that this right may have been extinguished by a prior inconsistent grant. Further, the right is claimed subject to the qualifications set out in Schedules E and J.

For the reasons given above, I am satisfied that this right is prima facie capable of being established.

(b) To speak for and to make decisions about the use and enjoyment of the application area;

The applicant provides examples about decisions related to the use and enjoyment of the area claimed and also of land waters proximate to the application area. Some of the activities listed in Schedule G which provide support for the rights claimed appear to be of a kind which the majority in Ward's case rejected. However, on the face of it, some of the activities described in paragraphs (a) to (d), (f) to (k) and (n) and (o) could be characterised as activities which involve physical presence on the land or activities on the land associated with traditional social and cultural practices. In the draft determination in Ward's case, the majority found that a non-exclusive right to make decisions about the use and enjoyment of the land was recognisable at common law over areas where native title was found to exist but to which s 47 and 47A did not apply.

Prima facie this right is not claimed to the exclusion of all others. See also the statements made in Schedules E and J. As previously noted, s 47B has been asserted in relation to the claim area (refer to comments above).

I am therefore satisfied that this right is, prima facie, capable of being established.

(c) To reside upon and otherwise to have access to and within the application area;

The applicant provides examples about residency and access of the area claimed and also of land proximate to the application area in accordance with traditional laws and customs. For example, Schedule G refers to accessing, travelling and residing on the land and includes building and using shelters on the land, and also refers to accessing the land for particular purposes. Clearly, these can be characterised both as activities which involve physical presence on the land and activities on the land associated with traditional social and cultural practices.

Prima facie this right is not claimed to the exclusion of all others. See also the statements made in Schedules E and J. As previously noted, s 47B has been asserted in relation to the claim area (refer to comments above).

I am satisfied that this right is prima facie capable of being established.

(d) To control the access of others to the application area;

The applicant provides examples about controlling the access of others to the application area and land and waters proximate to the application area. In Schedule G, paragraphs (l), and (m) respectively mention regulating access to parts of the land according to gender, age, and ritual experience and restricting the access of outsiders to the land and waters. All these could be characterised as activities which involve physical presence on the land or activities on the land associated with traditional social and cultural practices.

I note that, in Ward's case, this right formed part of Justice Lee's determination but not that of the majority. However, there was no discussion as to why this right was not included in the draft determination. As noted above, the application of s 47A in that case resulted in the applicants having the right of use, occupation, possession and enjoyment as against the whole world. The majority found this would give rise to rights similar to those available under a freehold title which would include the right to control the access of others to the area (subject to the laws of Australia): see para [207] of the decision.

Prima facie this right is not claimed to the exclusion of all others. See also the statements made in Schedules E and J. As previously noted, s 47B has been asserted in relation to the claim area (refer to comments above).

I am satisfied that this right is prima facie capable of being established.

(e) To use and enjoy the resources of the application area

The applicant provides examples at Schedules G and M about the use, enjoyment and management of resources to the application area and land and waters proximate to the application area. Information is provided in Schedule G1(b) about hunting and gathering on the land and waters; (d) using waters from the land, (f) collecting materials including timber, stones, minerals, ochre, resin, grass and shell.

In *State of Western Australia v Ward*, the majority of the Full Court said that all minerals and petroleum are the property of the Crown and that any native title to minerals and petroleum was extinguished (relevantly) by the *Minerals (Acquisition) Ordinance Act* (NT) and the *Petroleum Act 1984 (NT).* (This case is currently on appeal to the High Court.) In *Yarmirr v Northern Territory* (1998) 82 FCR 533 at 601, it was found that native title to minerals, petroleum or gas has been extinguished in the Northern Territory.

However, in Ward's case, a claim to use and enjoy the "traditional resources" of the land was recognised in the draft determination and, specifically, a claim to ochre was acceptable: see [524] to [544].

I am satisfied that some of the resources particularised in the application, namely food resources and water, timber, stones, ochre, resin, grass and shell, fall within the scope of "traditional resources" . Although the claimants claim minerals as a natural resource, I do not think it satisfies the Ward's case and can be considered a "traditional resource."

Further confirmation of this is included in *Hayes v Northern Territory* (1999) 97 FCR 32, when Olney J found that there was no evidence of traditional laws and customs relating to the extraction or use of minerals.

I note that the claimants exclude claiming ownership of minerals, petroleum or gas wholly owned by the Crown.

Prima facie this right is not claimed to the exclusion of all others. See also the statements made in Schedules E and J. As previously noted, s 47B has been asserted in relation to the claim area (refer to comments above).

I am therefore satisfied that the right to claim resources, including food, water, timber, stones, ochre, resin, grass and shell fall within the scope of traditional resources, but minerals does not. Therefore this right is prima facie capable of being established in respect of traditional resources, and not including minerals.

(f) To control the use and enjoyment of others of the resources of the application area;

The applicant provides examples about the use and enjoyment of others of the resources of the application area and land and waters proximate to the application area. The claim group make a claim in paragraph 1(m) of Schedule G which states that they restrict the access of outsiders to the land and waters and 1(n) responsibility for caring for the land and waters in accordance with spiritual, economic and social obligations. These activities could be characterised as activities which involve physical presence on the land or activities on the land associated with traditional social and cultural practices. On the face of it, access to and responsibility for the land and waters would include *traditional resources* e.g. timber, stones, ochre, resin, grass and shell, food and fish of the area. This would provide, prima facie, evidence for the rights claimed.

However, I note that although this right formed part of Justice Lee's determination, the majority in Ward's case did not include it in their draft determination. There was no discussion as to why this was so. As noted above, the application of s 47A in that case resulted in the applicants having the right of use, occupation, possession and enjoyment as against the whole world. The majority found this would give rise to rights similar to those available under a freehold title which would include the right to control the use and enjoyment of others of the resources of the application area, subject to the laws of Australia: see para [207] of the decision.

See also the statements made in Schedules E and J. As previously noted, s 47B has been asserted in relation to the claim area (refer to comments above).

Therefore, I am satisfied that this right is prima facie capable of being established.

(g) To share, exchange and/or trade resources derived on and from the application area.

Prima facie, I am not satisfied that there is sufficient information provided in regard to this right to make it capable to being established. Schedule G(1) (e) merely recites, as an activity, the right claimed. No further information was provided to support this right.

(h) To maintain and protect places of importance under traditional laws, customs and practices in the application area;

The applicants provide information about the maintenance and protection of places of importance of the application area and land and waters proximate to the application area. Schedule G lists the following which support this right; 1(k) conducting ceremonies on the land; 1(l) observance of laws and sanctions restricting access to areas of the land and waters according to divisions of gender, age, and ritual experience; 1(n) responsibility for caring for the land and waters in accordance with spiritual, economic and social obligations; and 1(q) maintaining traditional knowledge of

the land and waters and passing that knowledge on to younger generations. These activities could be characterised as activities which involve physical presence on the land or activities on the land associated with traditional social and cultural practices.

The right is claimed subject to the qualifications set out in Schedules E and J. As previously noted, s 47B has been asserted in relation to the claim area (refer to comments above).

I am satisfied that this right is prima facie capable of being established.

(i) to maintain, protect, prevent the misuse of and transmit to others their cultural knowledge, customs and practices associated with the application area.

Notwithstanding the assertions in the application, the majority in Ward's case held that the right to maintain, protect, prevent the misuse of and transmit to others their cultural knowledge, customs and practices associated with the application is not a native title right and interest which can be recognised in a determination of native title: see [666]. Therefore, I am not satisfied that this right is prima facie capable of being established.

(j) To determine and regulate membership of, and recruitment to, the landholding group.

The application provides information on the traditional laws and customs governing membership of, and recruitment to, the native title claim group and describes the differing roles and responsibilities of members recruited to the group. However, it does not appear to satisfy the criterion set out in Ward's case mentioned above as, prima facie, it does not seem to describe activities which involve physical presence on the land or activities on the land associated with traditional social and cultural practices. It may be possible to characterise this right as involving such activities but there is nothing before me to support such a characterisation. Therefore, I am not satisfied that this right is prima facie capable of being established.

Summary

In summary I am satisfied that the rights and interests listed at (a), (b), (c), (d), (e) (but only traditional resources and not minerals), (f), and (h) are capable of being established, however, I am not satisfied in respect of the rights and interests listed at (g), (i) and (j).

Result: Requirements met

s.190B(7)

Traditional physical connection:

The Registrar must be satisfied that at least one member of the native title claim group:

(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or

(b) previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:

(i) the Crown in any capacity; or

(ii) a statutory authority of the Crown in any capacity; or

(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

Reasons for the Decision

This section requires that I am satisfied that at least one member of the native title claim group currently has, or previously had, a traditional physical connection with any part of the land covered by the application.

Traditional physical connection is not defined in the Native Title Act. I am interpreting this phrase to mean that physical connection should be in accordance with the particular traditional laws and customs relevant to the claim group.

This condition does not require me to consider the sufficiency of the factual basis on which traditional physical connection is established. I have had regard to statements contained in the application including Schedules E, F, G and M, and am satisfied that the applicants have provided a general description of their traditional physical connection. The applicants depose that the statements are true, and Schedule M, in particular, details that traditional physical connection to the land or waters covered by the application by any member of the native title claim group thus:

"1. The claimants have maintained a traditional physical connection with the land or waters covered by the application. The claimants reside on Wakaya country and there are many examples of such physical connections, both in respect of Wakaya country generally, and in the vicinity of the area claimed.

2. Examples include as follows.
The claimants use the land and waters covered by the application, including:
(a) entering and travelling across the area claimed;
(b) hunting, fishing and collecting resources from the area claimed;
(c) camping on the area claimed;
(d) visiting sites of significance on the area claimed."

In the absence of any more specific information establishing a traditional physical connection to the claim area by any other member of the claim group, it is to the named applicant and his affidavit that I turn to establish whether the requirements of this condition are met.

On the basis of the combined description of activities in the named schedules and the depositions of the applicant, I am satisfied that at least one member of the claim group currently has a traditional physical connection with the application area. The application meets the requirements of S.190B(7).

Result: Requirements met

s.190B(8)

No failure to comply with s.61A:

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s.61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Reasons for the Decision

S61A(1) – Native Title Determinations

A search of the National Native Title Register shows no approved determinations of native title for the application area claimed in this application.

S61A(2) - Previous exclusive possession acts

Previous exclusive possession acts under s.23B have been excluded from the area of the application by virtue of Schedule B(b), and the application complies with s.61A(2).

S61A(3) - Previous non-exclusive possession acts

The applicant states in Schedule E (3) that subject to Schedule L they do not claim that native title rights and interests confer possession, occupation, use and enjoyment to the exclusion of all others on any area in relation to which a previous non-exclusive possession act under s.23F of the Act has been done.

The application therefore complies with s.61A(3).

S61A(4) - s.47, 47A 47B

The applicant states in Schedule L:

“Pursuant to s 47B of the Act, extinguishment is to be disregarded in relation to vacant Crown land.”

Conclusion

I am required to ascertain whether this is an application that should not have been made because of the provisions of s61A. There is nothing before me to indicate that this application could not be made. I am satisfied the applicants’ statements with respect to the provisions of that section are sufficient to meet the requirements of s 190B(8).

Result: Requirements met

s.190B(9)(a)

Ownership of minerals, petroleum or gas wholly owned by the Crown:

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:

(a) to the extent that the native title rights and interests claimed consist or include ownership of minerals, petroleum or gas – the Crown in the right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas;

Reasons for the Decision

Schedule Q of the application states that:

"The claimants do not claim ownership of minerals, petroleum or gas wholly owned by the Crown. The claimants assert that the Crown does not wholly own minerals, petroleum or gas in the area subject to the application".

Correspondence was received from the Solicitor for the Northern Territory on 17 May 2001 in regard to this section of the Act. The NT Government state...."It is our submission that to the extent that this application and accompanying documents disclose, or makes you aware, that it is a claim to ownership of minerals, petroleum, or gas, it fails the requirements set out in paragraph 190B(9)(a) NTA."

The Northern Land Council was given a copy of the submission for comment. To date no comments have been received from the NLC.

In *State of Western Australia v Ward*, the majority of the Full Court said that all minerals and petroleum are the property of the Crown and that any native title to minerals and petroleum was extinguished (relevantly) by the *Minerals (Acquisition) Ordinance Act* (NT) and the *Petroleum Act 1984 (NT).* (This case is currently on appeal to the High Court.) In *Yarmirr v Northern Territory* (1998) 82 FCR 533 at 601, it was found that native title to minerals, petroleum or gas has been extinguished in the Northern Territory.

Although the claimants assert that the Crown does not wholly own minerals, petroleum or gas in the area subject to the application, they do not claim ownership of minerals, petroleum or gas.

Also in their application 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."

The claimants also provide a general exclusion clause in Schedule J.

Notwithstanding the comments from the NT Solicitor, I am satisfied that this exclusion clause provides sufficient clarity to ensure that the application complies with the requirements of s.190B(9)(a).

Result: Requirements met

s.190B(9)(b)

Exclusive possession of an offshore place:

The application and accompanying documents must not disclose, and the Registrar must not be otherwise aware, that:

(b) to the extent that the native title rights and interests claimed relate to waters in an offshore place – those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place;

Reasons for the Decision

The area claimed does not include any offshore area. It is therefore not necessary for me to consider this section further as it is not relevant.

Result: Requirements met

s.190B(9)(c)

Other extinguishment:

The application and accompanying documents must not disclose, and the Registrar must not be otherwise aware, that:

(c) in any case – the native title rights and interests claimed have otherwise been extinguished (except to the extent that the extinguishment is required to be disregarded under subsection 47(2), 47A(2) or 47B(2).

Reasons for the Decision

Under the requirements of this section, I must consider whether there are any native title rights and interests claimed by the applicant that have been otherwise extinguished.

In addition to the areas excluded from the claim area as considered in s.190B(8), I have listed, in my reasons for decision in relation to s.190B(4), the qualifications to the native title rights and interests claimed at Schedule E of the application.

The application does not disclose, and I am not otherwise aware of, any additional extinguishment of native title rights and interests in the area claimed.

The application meets the requirements of s.190B(9)c.

Result: Requirements met