NATIONAL NATIVE TITLE TRIBUNAL

REGISTRATION TEST

Reasons for Decision

DELEGATE: Brendon Moore

Application Name:	Pilki
Names of Applicant(s):	Geoffrey West, Victor Willis, Daniel (Stevie) Sinclair, Betty Kennedy
Region:	Central Desert NNTT No.: WC02/3
Date Application Made:	12 August 2002
Application Amended:	1 April 2004, by order of that date
Federal Court No.:	W6002/02

The application is **ACCEPTED** for registration pursuant to s.190A of the *Native Title Act* 1993 (C'th).

18th April 2005
Date of Decision

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

Brief History of the Application

On 12 August 2002 the Ngaanyatjarra Council ("NgC") filed an application in the Federal Court on behalf of the Pilki People. The application falls within the southern Central Desert region and covers an area of approximately 24398.94 sq km.

At the time it was filed, it fell within an area covered entirely by the Wongatha native title determination application (WC99/1). As Wongatha was in trial at the time Pilki was filed, the court ordered that a special notice of the application be given, in addition to the notification required under s.66 of the *Native Title Act 1993* (Cth) ("NTA").

The Wongatha application was amended on 20 October 2002, removing any overlap with the Pilki application. The registration test had not been applied to the Pilki application at that point and consequently, no notice pursuant to s.66 had been given by the Registrar. However, special notice had been given in accordance with the orders of Lindgren J on 19 August 2002.

The NgC provided a draft amended Form 1 (application) and sought assistance under s.78 NTA, by way of a preliminary assessment. Some provisional comments were made on the proposed amendment and these were provided to the NgLC in an email sent 19 December 2003.

Further information was sought by the NgLC and a full preliminary assessment was provided on 15 September 2004. Areas of potential deficiency for the purpose of registration were identified and in response, an extension of time was requested in order to incorporate some of the necessary changes.

A notice was subsequently published pursuant to s.29 NTA, which affected some of the area covered by the Pilki determination application. In response, a draft Form 1 (application) was provided to the Tribunal for preliminary assessment against the conditions of the registration test. The preliminary assessment was provided as an attachment to an email which was sent to Ms Sian Hanrahan of the NgLC on 24 March 2005.

The NgLC then filed the amended application with the court and the matter was heard on 24 March 2005. It was adjourned until 1 April 2005 on which date an order for amendment was made. Orders were also made referring it to the Tribunal for consideration against the conditions of the registration test. It is this application that was before the delegate for registration testing, although account was taken of other material as set out below.

Information considered when making the Decision

In determining this application I have considered and reviewed the application (including all attachments and accompanying documents) and all of the information and documents from the following files, databases and other sources:

- the National Native Title Tribunal's Registration Testing files and Legal Services files for this application
- the National Native Title Tribunal Geospatial Database

- the Register of Native Title Claims and Schedule of Native Title Applications
- the Native Title Register
- geospatial assessment and overlap analysis (dated 11 April 2005)
- portions of an anthropological report by Scott Cane dated 20 April 2002

Copies of the applicants' additional information have been provided to the State of Western Australia in the interests of procedural fairness, in line with the decision by Carr J in *State of Western Australia v Native Title Registrar & Ors [1999] FCA 1591 – 1594*.

Note: I have not considered any information and materials provided in the context of mediation of the native title claim group's native title applications. This is due to the 'without prejudice' nature of mediation communications and the public interest in maintaining the inherently confidential nature of the mediation process.

All references to legislative sections refer to the *Native Title Act 1993* unless otherwise specified.

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

On 22 November 2004, 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).

This delegation has not been revoked as at this date.

***

NOTE TO APPLICANT:

To be placed on the Register of Native Title Claims, the application must satisfy *all* the conditions in sections 190B and 190C of the *Native Title Act*.

S190B sets out the merit conditions of the registration test (see pages 16 - 48).

S190C sets out the procedural conditions of the registration test (see pages 4 - 15).

In the following decision, the Registrar's delegate tests the application against each of these conditions. The procedural conditions are considered first; then I shall consider the merit conditions.

Applications contains details set out in ss61 and 62: S190C(2)

S190C(2) first asks the Registrar's delegate to test the application against the registration test conditions at sections 61 and 62. If the application meets all these conditions, then it passes the registration test at s190C(2).

Native Title Claim Group: S61(1)

The application is made by a person or persons authorised by all of the persons (the **native title claim group***) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.*

Reasons relating to this sub-condition

In *Northern Territory of Australia v Doepel* [2003] FCA 1384 ("*Doepel*"), his Honour, Mansfield J stated that:

> *"In my judgment, s 190C(2) relevantly requires the Registrar to do no more than he did. That is to consider whether the application sets out the native title claim group in the terms required by s 61. That is one of the procedural requirements to be satisfied to secure registration: s 190A(6)(b). If the description of the native title claim group 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]*

His Honour went on to say that:

> *"My view that s 190C(2), relevantly to the present argument, does not involve the Registrar going beyond the application, and in particular 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, is fortified by s 190B(3). It imposes one of the merit requirements for accepting a claim for registration: s 190A(6)(a). Its focus also is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained. It, too, 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. Such issues may arise in other contexts, including perhaps at the hearing of the application, but I do not consider that they arise when the Registrar is faced with the task of considering whether to accept a claim for registration.": at [37]*

As a result it is my view that any application of the issues raised in *Risk* that may apply to this application may only be found by the Delegate in the application itself. The application I take to mean as including any affidavits or other material annexed to it but not material accompanying it. That is, it must form part of the application. To this end, I have not considered any material outside the application for the purposes of testing the application against the registration test condition at s61(1).

I note that there is no information on the face of the application which suggests to me that the application does not include all those individuals who, according to their traditional laws and customs hold the common or group rights comprising the particular native title claimed. That conclusion is supported by the Certification of the application by Ngaanyatjarra Council which forms part of the application, being Schedule R. They have acted for the claimants for some 8 years and state in the certificate that all reasonable efforts have been made to identify and describe the claim group.

I am consequently satisfied that the application meets the requirements of s.61(1).

Result: Requirements met

Name and address of service for applicants: S61(3)

An application must state the name and address for service of the person who is, or persons who are, the applicant.

Reasons relating to this sub-condition

The applicant's name and address for service is contained at Part B of the Form 1 application.

Result: Requirements met

Native Title Claim Group named/described sufficiently clearly: S61(4)

A native title determination application, or a compensation application, that persons in a native title claim group or a compensation claim group authorise

the applicant to make must name the persons or otherwise describes the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

Reasons relating to this sub-condition

For the reasons expressed at s190B(3), I am also satisfied that the application complies with this requirement.

Result: Requirements met

Application is in prescribed form: s61(5)

An Application must be in the prescribed form, and be filed in the Federal Court, and contain such information in relation to the matters sought to be determined as is prescribed, and be accompanied by any prescribed documents and any prescribed fee

Reasons relating to this sub-condition

The application is in the form prescribed by Regulation 5(1)(a) of the *Native Title (Federal Court) Regulations 1998*. The application was filed in the Federal Court on 8 March 2005, as required pursuant to s.61(5)(b) and contains such information as is required by s.61(5)(c). S.61(5)(d) requires that the application be accompanied by any prescribed documents, these being affidavits from each of the persons comprising the applicant as per s.62(1)(a) and a map as prescribed by s.62(1)(b). I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court.

Result: Requirements met

Application is accompanied by affidavits in prescribed form: S62(1)(a)

An application must be accompanied by an affidavit sworn by the applicant which addresses the matters required by s62(1)(a)(i) – s62(1)(a)(v)

Reasons relating to this sub-condition

The application is accompanied by affidavits from each of the persons comprising the applicant. I am satisfied that each of the affidavits addresses the information that is required by s.62(1)(a)(i)-(v).

Result: Requirements met

Application contains details set out in s62(2): S62(1)(b)

S62(1)(b) asks the Registrar to make sure that the application contains the information required in s62(2). Because of this, the Registrar's decision for this condition is set out under s62(2) below.

Details of physical connection s: 62(1)(c)

Details of traditional physical connection (information not mandatory) and prevention of access to lands and waters (where appropriate)

Reasons relating to this sub-condition

Schedule M provides details of physical connection. I note that this has been amended since the original application was filed and that details of the relevant amendments can be found at Schedule S.

Schedule M also references Attachments F and G, stating that these provide further information as to the traditional physical connection of members of the claim group. Reference is also made at Schedule M to the affidavits of **[Applicant 1], [Applicant 2], [Applicant 3] and [Applicant 4]**. These are the "long form" affidavits, as opposed to the affidavits required under s.62 NTA.

Reference is made in these affidavits of a period of time in which members of the claim group were not able to access the site owing to testing being undertaken by the Commonwealth government in Maralinga. Movement of people from the area was enforced, but the affidavits assert that claim members travelled back to the area frequently and returned more permanently once able.

Result: Provided

Information about the boundaries of the application area: S62(2)(a)

62(2)(a)(i) Information, whether by physical description or otherwise that enables the boundaries of the area covered by the application to be identified;

Reasons relating to this sub-condition

For the reasons that led to my conclusion that the requirements of s.190B(2) had been met, I am satisfied that the information contained in the application contains is sufficient to enable to area covered by the application to be identified.

Result: **Requirements met**

62(2)(a)(ii) Information, whether by physical description or otherwise that enables the boundaries of any areas within those boundaries that are not covered by the application to be identified.

Reasons relating to this sub-condition

For the reasons that led to my conclusion that the requirements of s.190B(2) had been met, I am satisfied that the information in the application is sufficient to enable the identification of any areas within the external boundaries of the claim area which are not covered by the application to be identified.

Result: **Requirements met**

Map of the application area: S62(2)(b)

The application contains a map showing the external boundaries of the area covered by the application

Reasons relating to this sub-condition

A map has been provided and appears at Schedule C, Attachment C. For the reasons that led to my conclusion that the conditions of s.190B(2) had been met, I am satisfied that the map provided shows the external boundaries of the application.

Result: **Requirements met**

Details and results of searches: S62(2)(c)

The application contains 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 and waters in the area covered by the application

Reasons relating to this sub-condition

Schedule D contains 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. The information is provided under the headings:

1. Historical Pastoral Leases
2. Current Reserves
3. Historical Mining Tenure

There is nothing before me or of which I am aware to suggest that the statements in the application are incorrect and I am satisfied that the applicant has provided details and results of all searches carried out to determine the existence of any non-native title rights and interests.

Result: Requirements met

Description of native title rights and interests: S62(2)(d)

The application contains a description of native title rights and interests claimed in relation to particular lands and waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and are all native title rights and interests that may exist, or that have not been extinguished, at law.

Reasons relating to this sub-condition

A description of the native title rights and interests claimed is provided at Schedule E, Attachment E. This does not consist merely of a statement to the effect that native title rights and interests that may exist or that have been extinguished at law.

My reasons under s.190B(4) provide further information on this point.

For the reasons set out here and at s.190B(4), I am satisfied that this condition of the registration test has been met.

Result: Requirements met

Description of factual basis: S62(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.

Reasons relating to this sub-condition

The application contains a general description of the factual basis upon which it is asserted that rights and interests claimed exist. This information can be found at Schedule F, Attachment F and is supported by material found in the affidavits of each of the persons comprising the applicant. An anthropological report provided by Dr Scott Cane in support of the application provides further information.

The information contained at Attachment F, in the affidavits and in the anthropological report addresses each of the requirements in s.62(2)(d)(i), (ii) and (iii).

See also my reasons for s.190B(5).

Result: Requirements met

Activities carried out in application area: S62(2)(f)

If native title claim group currently carry on any activities in relation to the area claimed, the application contains details of those activities

Reasons relating to this sub-condition

Schedule G, Attachment G asserts that the native title claim group carry on, and their predecessors carried on, activities so as to fully exercise the rights and interests referred to in Schedule E of the application. The application refers specifically to those 'activities' set out under the "activity based rights" at Schedule E. Further information on these activity based rights is set out in Attachment G.

The activities set out in Attachment G include, but are not limited to:

- Hunting and gathering;
- Visiting sites;
- Cleaning soaks;
- Visiting country;
- Ceremonial activities;
- Burning of country;
- Economic activity centred on kangaroo, emus, and turkey; and
- Teaching of children on country.

Further information can also be found in the affidavits of each of the persons named as the applicant.

I am satisfied that the information contained in the Schedules, Attachments and affidavits mentioned above are sufficient to satisfy this condition of the registration test.

Result: Requirements met

Details of other applications: S62(2)(g)

The application contains details of any other applications to the High Court, Federal Court or a recognised State/Territory body of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application and that seek a determination of native title or a determination of compensation in relation to native title;

Reasons relating to this sub-condition

Schedule H contains a statement that no other applications that seek a determination of native title or a determination of compensation for native title have been made in relation to any or all of the area covered by this application.

An assessment provided by the Tribunal's Geospatial Unit on 11 April 2005 indicates that no claimant application as per the Schedule of Applications falls within the boundary of this application.

See also my reasons at s.190C(3) for further information.

Result: Requirements met

Details of s29 notices: S62(2)(h)

The application contains details of any notices under section 29 (or under a corresponding provision of a law of a State or Territory) of which the applicant is aware, that have been given and that relate to the whole or a part of the area

Reasons relating to this sub-condition

Details of three s.29 notices are given. They are:

- E69/1438 dated 16.6.1999
- E69/1874 dated 7.5.2003
- App 2/04-5 EP dated 15.12.2004

The assessment by the Tribunal's Geospatial unit confirms that there are no other notices

Result: **Requirements met**

Combined decision for s190C(2)

For the reasons identified above the application contains all details and other information, and is accompanied by the documents, required by ss.61 & 62.

Result: **Requirements met**

Common claimants in overlapping claims: S190C(3)

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 relating to this condition

There are three subsections of this section of the Act, each of which is listed above and each of which must be satisfied before the Registrar or his delegate is required to consider whether there may be common membership with an overlapping application. In *State of Western Australia v Strickland* Justices Beaumont, Wilcox and Lee wrote:

> "The form of subsection 190C(3) is awkward…However, it is tolerably clear that the requirement expressed in the opening clause of the subsection arises only if the conditions specified in para(a), para(b) and para(c) are satisfied."[1]

This is supported by the Explanatory Memorandum to the Act which states that "the purpose of the (new) registration test is to ensure that only claims which have merit are registered on the "Register of Native Title Claims" (Ch29.2) The Memorandum goes on to say:

> *"No previous overlapping claim groups*
>
> 29.25 The Registrar must be satisfied that no member of the claim group for the application or amended application is a member of the claim

[1] *Western Australia v Strickland* [2000] FCA 652 at [9]

group for a registered claim which was made before the claim under consideration, which **is** overlapped by the claim under consideration and which itself has passed the registration test. (subs.190C(3))" (emphasis added)

At the time the Pilki application was filed, it was overlapped entirely by the Wongatha application (WG6005/98). The boundaries of the Wongatha application have since been amended, removing any overlap with the Pilki application. The registration test is yet to be applied to the amended Wongatha application and as a result, the details of the Wongatha application prior to its amendment remain on the Register of Native Title Claims (the Register). Thus a record of the overlap continues to exist on the Register, even though the relevant current amended application filed in Wongatha no longer makes any claim to that country.

Bearing in mind the principle that courts should give effect to the intention of Parliament in statutory interpretation and therefore can have regard to the general purpose and intention of the Act to determine its meaning and construction,[2] and that s.15AA of the *Interpretation Act* 1901 (Cth) provides that:

Regard to be had to purpose or object of Act

(1) In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

Regard can be had to extrinsic material such as the Explanatory Memorandum, Second Reading speeches or notes in the Act etc that do not form part of the NTA but aid in interpretation.[3]

On this basis, I am of the view that it is open to me to read the word 'covered' subsection 190C(3) in the present tense, (i.e. "the previous application covers"). The amendment to the Wongatha application has removed any overlap with this application, which is consistent with the intention of this section as set out in the Explanatory Memorandum. Reading the section in the present tense, I am satisfied that the previous application (Wongatha) does not cover the Pilki application and that the requirements of this section have been met.

Alternatively, if I am wrong in that interpretation, I must look to see whether there is any evidence or reason to believe that there may be claimants in common between to two claims. The Wongatha claimants are described, broadly speaking, by their descent from a list of apical ancestors, together with any persons adopted in. The Pilki claimants are similarly described by descent from known persons, although in this case those ancestors are described by their place of living and their spiritual or ritual knowledge rather than by name. The application does, however, provide the names of some of the descendant

---

[2] *Mills v Meeking* (1990) 91 ALR 16

[3] See ss.15AB and 13 of the *Acts Interpretation Act 1901* (Cth)

families. I am unable to find any names in common between the two applications and have no other reason to believe that there may be.

The applicants also assert at Schedule O that there are no members in common in overlapping claims. That assertion is of course verified by the affidavits of the applicants, and I accept it.

As a result I am satisfied that no person included in the native title claim group for the application (the current application) is a member of the native title claim group for any previous application.

Result: Requirements met

Application is authorised/certified: s190C(4)

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 relating to this condition

At Schedule R, Attachment R, a copy of the certificate provided by the Ngaanyatjarra Council appears.

Under the heading “Statement of opinion pursuant to section 203BE(4)(a)”, the Ngaanyatjarra Council provides a statement that they believe the persons named as the applicant have been authorised by all members of the claim group and that all reasonable efforts have been made to ensure that all persons in the native title claim group have been described or otherwise identified in the application. These statements are sufficient to satisfy the requirement of s.203BE(4)(a).

Under the heading “Reasons for statement of opinion pursuant to section 203BE(4)(b)”, the Ngaanyatjarra Council provides three paragraphs to describe why they are of the opinion that the requirements of s.203BE(2)(a) and (b) have been met. These reasons include staff observations and familiarity with the decision-making process of the native title claim group, including the decision-

making process that related to authorisation, and the efforts of the consultant Anthropologist who prepared an expert report for the group having made all reasonable efforts to identify the members of the group through various means. I am satisfied that this condition of the registration test has been met.

Result: Requirements met

Identification of area subject to native title: S190B(2)

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 or waters.

Reasons relating to this condition

Schedule B refers to Attachment B, which describes the area as a series of geographic coordinates referenced to the AGD 84 Datum.

Schedule C refers to Attachment C, which is an A3 sized map titled "Pilki Native Title Claim W6002/02 (WC02/003)" produced by the Land Claims Mapping Unit, 05/02/2003. The map includes:

- The application area depicted with a bold dark outline and hachuring;
- Cadastre boundaries and tenure classification;
- Scale bar, north point, coordinate grid, tenure legend and locality map; and
- Notes the datum, source and currency of data used to produce the maps

The assessment prepared by the Tribunal's Geospatial Unit dated 11 April 2005 concluded that the written description and map were consistent with each other and clearly identify the application area with reasonable certainty.

For the reasons discussed above, I am satisfied that the requirements of s.190B(2) are met in relation to the area covered by the application. It follows that I am also satisfied that the physical description of the area covered by the application meets the requirements of s.62(2)(a)(i) and that the map shows that the boundaries of the claim area in compliance with the requirements of s.62(2)(c).

Areas within the external boundaries that are not covered by the application

The internal boundaries are described at Schedule B, Attachment B to the application. At point 2 of Attachment B, information is provided identifying the internal boundaries of the claimed area by way of a formula that excludes a variety of tenure classes from within the claim area.

Areas that are excluded from the claim area are set out in paragraph 17 (a)-(g) of the Schedule as follows:

Subject to 3 below, the areas of land and waters within the boundary that are not covered by the application are:

(a) any area that is or was subject to any of the following acts as these are defined in either the *Native Title Act 1993*, as amended (where the act is [sic] question is attributable to the Commonwealth), or the *Titles (Validation) and Native Title Act (Effect of Past Acts) Act 1995*(WA), as amended, (where the act in question is attributable to the State of Western Australia) at the time of the Registrar's consideration:
    (i) Category A Past Acts;
    (ii) Category A intermediate period acts;
    (iii) Category B past acts that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights and interests;
(b) any area in relation to which a 'relevant act' as the term is defined in section 12I of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) was done and the act is attributable to the State of Western Australia;
(c) any area in relation to which a previous exclusive possession act under s.12J of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995*(WA) was done and that act is attributable to the State of Western Australia;
(d) any area in relation to which a previous exclusive possession act as defined by section 23B (including section 23B(7)) of the *Native Title Act 1993* was done in relation to the area and the act was attributable to the Commonwealth);
(e) any areas where native title rights and interests have otherwise been wholly extinguished; and
(f) specifically, any areas where there has been:
    (i) any unqualified grant of estate in fee simple;
    (ii) a lease which is currently in force, in respect of an area not exceeding 5000 square metres, upon which a dwelling house, residence, building or work is constructed, and which comprises:
        (A) a lease of a worker's dwelling under the *Worker's Homes Act 1911-1928*;
        (B) 999 year lease under the Land Act 1898 (WA);
        (C) a lease of a town lot or suburban lot pursuant to section 117 of the *Land Act 1933* (WA);
        (D) a special lease under section 177 of the *Land Act 1933*(WA); or
        (E) any reserves vested pursuant to section 33 of the *Land Act 1933* (WA) that are not for the benefit of Aboriginal people,

    (iii) a conditional purchase lease currently in force in the Agricultural Areas of the South West Division under regulations 46 and 47 of the Land Regulations 1887 which includes a condition that the lessee reside on the area of the lease and upon which a residence has been constructed;

(iv) a conditional purchase lease of cultivable land currently in force under Part V, Division (1) of the Land Act 1933 (WA) in respect of which habitual residence by the lessee is a statutory condition in accordance with the Division and upon which a residence has been constructed;

(v) a perpetual lease currently in force under the War Service Land Settlement Scheme Act 1954;

(vi) a public work as defined in section 253 of the Native Title Act 1993; or

(vii) an existing dedicated public road; and

(g) notwithstanding anything contained elsewhere in this application (including attachments to it), any areas not covered by the original application.

The acceptability of the use of class or formula exclusions as appear here will depend on the state of knowledge of the claimants of the tenure in the claim area at the date the application is made. (*Daniels v State of Western Australia* [1999] FCA 686 ("*Daniels"*)) In *Dieri v State of South Australia* [2000] FCA 1327 the Court said that if tenure information might reasonably have been used to exclude areas from an application then reliance cannot be placed on class or formula exclusions.

Schedule D to the application contains a list of the results to a search conducted by the applicant to determine the existence of any non-native title rights and interests.

In relation to the question of class exclusions I note the following comments of Nicholson J in *Daniels*:

> *"The Act recognises the need to provide certainty for people with interests as to whether it is subject of a claim. The class formula approach proposed by the applicants to the definition of exclusion does, if otherwise appropriate, give certainty for respondent interest holders in that they know their interest is subject to claim unless specifically excluded. The determination of whether particular interests meet the definition referred to in that section will often have to await the determination of the application." [38]*

In S*trickland*, French J noted that:

> *"the Act is to be construed in a way that renders it workable in the advancement of its main objects…The requirements of the registration test are stringent. It is not necessary to elevate them to the impossible…"* [55]

Having regard to the information contained in the application, I am satisfied that the class exclusion clauses used by the applicant at Schedule E amount to information that enables the internal boundaries of the application area to be identified with reasonable certainty.

Result: Requirements met

Identification of the native title claim group: S190B(3)

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 relating to this condition

For the application to meet this condition of the registration test, I must be satisfied that either the conditions at s.190B(3)(a) or (b) are met. It is noteworthy that the requirement of this section that the description be sufficient to allow the identification of 'any particular person' is more stringent than what is required for a determination under s.225, which relevantly says:

> *'A determination of native title is a determination whether or not native title exists in relation to a particular area (the determination area) of land or waters and, if it does exist, a determination of:*
>
> > *(a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and'*

This reality (albeit in relation to an application to amend the claimed list of rights and interests) was adverted to in *Daniel v State of Western Australia [2003] FCA 666* by Nicholson J in his reasons for determination, at [69]

> *"…. It is clear that s 225(b) of the NTA requires the Court to make a determination in rem as to `the nature and extent of the native title rights and interests in relation to the determination area': s 225(b). I agree with the submission for the first respondents that this requires the Court to find make such a determination on the evidence ultimately unconfined by the formulation of the claim. In that context, to insist on formal amendment in the particular circumstances would be inappropriate'*

The application does not name all of the persons in the native title claim group. Consequently, the requirements of s.190B(3)(a) are not met. I must then turn to section 190B(3)(b). The Courts have provided guidance on this examination and how it is to be discharged.

French J in *Strickland v Native Title Registrar [1999] FCA 1530* said at par 44 in that case, an application for review of the Registrar's decision:

> *"It is also necessary to bear in mind the administrative character of the registration test and the time constraints under which it is to be applied. A significant margin of appreciation must be allowed for the experience and detailed administrative knowledge of the Registrar and his delegates in making the largely evaluative judgments on whether applications*

comply with the statutory conditions of registration. Their reasons are not to be scrutinised finally and minutely with an eye keenly attuned to error - Collector of Customs v Pozzolanic Enterprises Pty Ltd *(1993) 43 FCR 280 at 287."*

To meet the requirements of s190B(3)(b), the persons in the group must be described sufficiently clearly, so that it can be ascertained whether any particular person is a member of the native title claim group. It is not necessary to actually identify each and every member of the claim group. Rather, the test is whether the group is described sufficiently clearly so that it could be ascertained whether any particular person is in the group i.e. by a set of rules or principles.

I note also the comments by Mansfield J in *Northern Territory v Doepel* [2003] FCA 1384 that where an application clearly falls, as this one does, within s.190B(3)(b), the focus of the Registrar is "whether the application enables the reliable identification of persons in the native title claim group" – at [51]. Mansfield J said::

"Section 190B . . . has requirements which do not appear to go beyond consideration of the terms of the application: subs 190B(2), (3) and (4)." [16]

"Its focus 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." [37]

and at 51

51 …The focus of s 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group. Section 190B(3) has two alternatives. Either the persons in the native title claim group are named in the application: subs (3)(a). Or they are described sufficiently clearly so it can be ascertained whether any particular person is in that group: subs (3)(b). Although subs (3)(b) does not expressly refer to the application itself, as a matter of construction, particularly having regard to subs (3)(a), it is intended to do so

One of the factors which the delegate might consider and which perhaps falls under French J's categorization of the test as 'largely evaluative' in assessing whether there has been compliance with elements of the test, is the nature of the society of the native title claim group. It is trite but evident that in claim groups around Australia differing levels of traditional law, custom and practice continue to exist from group to group. As each case is of course decided on its facts, the extent of those variations might not always be apparent or noted in reasons for decisions. Whether there exists a 'normative society' is an enquiry to be made on the facts. As a result, evidence might be more readily accepted from a society in which the claim group still lives on country (as here) and where there is deep adherence to traditional laws and customs, especially at a ritual level than for, say, a society which has been more damaged by white

sovereignty or dispossession and which has perhaps lost more of its traditional knowledge. It will be easier to find the elements of that normative society (as described in *Yorta Yorta)* in the former circumstances.

These considerations are relevant in the present application. Although *Doepel* may seem to suggest in the passage from [16] above that no regard may be had to anything beyond the application itself, I am of the view that the comments in [37] and [51] indicate that the thrust of His Honour's decision is to reinforce the principle that what must be looked at is whether the description 'in the application' is sufficient, rather than whether it is correct. I do not read those passages as meaning that I may never have regard to other material where it is relevant.

The description of the claim group at Schedule A is as follows

1. *The Native title Claim group are the people known generally as the people from the Pilki area, being the area covered by this application and depicted in the map at Attachment C*
2. *The native title claim group comprises those people:*
   - *(a) Who are*
     - *(i)Descended from ancestors born in the area covered by the application; and*
     - *(ii) In respect of whom that claim is recognised by the native title claim group according to its traditional decision-making processes; or*
   - *(b) who are adopted, or are descended from persons adopted by members of the native title claim group under traditional laws and customs and accepted by members of the native title claim group:.*

At Attachment A is further information on the laws and customs relating to adoption.

Attachment F, the 'general description of the native title rights and interests claimed' under s 62, contains considerable and valuable further information about the claim group and its composition, showing details of how ritual and knowledge of the Tjukurrpa and of country are essential elements of membership. That Schedule, in setting out details of the laws and customs giving rise to native title also provides further clarification about the membership of the claim group.

The ancestors from whom the present members are descended are not named in the application. Their 'qualifications' are described at Attachment A. They are said to have been "The sole occupants…[and] were people who were born in and lost their umbilical cords within the area, lived a nomadic life and knew its Tjukurrpa. They were all ngura tjantu or ngura walytja – land owners or, more correctly, a 'relation' (walytja) to the land."

The 'long form' affidavits by **[Applicant 1], [Applicant 2]** and **[Applicant 3]** also depose to their membership according to the rules.

Finally, I have been provided with portions of an anthropological report prepared by Scott Cane (also provided to the State) . This raises the question of

whether I may have regard to it for the purposes of considering s190B(3) in the light of the remarks in *Doepel*. I have come to the conclusion that I should do so, as I do not read the passages above from *Doepel* as prohibiting that. It would seem unlikely that His Honour could have intended in his reasons to hold that the report could not be considered at all when I am considering not whether the assertions about membership are true but whether they are sufficient to allow an identification, especially when I am able to consider the report when considering other sections and thus know its contents. That report, by giving further information about the group, reinforces my view that the group is a strong one with clear knowledge of who is and who may be a member and the principles underlying that knowledge.

In that conclusion I am reinforced by *Kanak's* case; The Act is clearly remedial in character and should be construed beneficially: *Kanak v National Native Title Tribunal (1995) 61 FCR 103 at 124*

It is apparent that the claim group is a small one, and that it lives in country much of which is still Crown land. The group is a part of the wider Spinifex culture and senior members of the Spinifex people are ritually involved with the land, having some contingent or associated rights there.

In *De Rose v State of South Australia* [2002] FCA 1342 O'Loughlin J considered a description similar to the present one, albeit in obiter. Whilst the requirements of s190B(3) are a requirement of registration and not determination this consideration is worth quoting. Omitting some portions for the sake of brevity, His Honour said this:

> *926 In their principal submissions, the claimants identified the native title claim group in the following terms:*
>
> > *"The application is made by the named individuals on their own behalf and on behalf of other individuals who fulfil the criteria of nguraritja according to traditional law and custom."*
>
> *Therefore, to identify who is a member of the native title claim group that seeks a determination of native title over the claim area, it is necessary to examine the rules that govern the right to be called Nguraritja for the claim area. In Attachment E to their final submissions, the claimants ….. identified the four major reasons by which Aboriginal people could be Nguraritja under traditional laws and customs. The individual might have been born on the claim area or, even though not born there, he or she might have had a long-term physical association with the claim area. Then again, he or she may have had an ancestral association with the claim area. Finally, the person might have geographical and religious knowledge of the claim area to such a degree that the person will qualify as Nguraritja. I find that, for an Aboriginal person to be Nguraritja under traditional laws and customs as described by the claimants, the person must satisfy at least one of the four criteria listed above. But there is one further factor that is an essential criterion to being Nguraritja: the individual must be acknowledged as Nguraritja for his or her land by the other Nguraritja. I am satisfied that these*

> *factors are the major criteria by which people may be Nguraritja for De Rose Hill….*
>
> *927 Some other methods were put forward by the different witnesses…..*
>
> *928 By an application of the above criteria it is possible, in my view, to conclude who is, and who is not Nguraritja for the claim area. It is not necessary that every single applicant be personally named, although they do need to be identified by a set of appropriate criteria: see Risk v National Native Title Tribunal [2000] FCA 1589 at [43]; Ngalakan People v Northern Territory of Australia [2001] FCA 654 at [53]; Russell v Bissett-Ridgeway [2001] FCA 848 at [18-19]…. . In the circumstances, I am satisfied that the applicants have adequately established a method by which the members of the potential native title claim group may be identified.*

With respect, I share His Honour's assessment. The 'rules' are set out in the description. The claim group here seems to me to be a tight-knit group, many of them leading very 'traditional' lives and part of a community in which initiation, 'skin' and ritual play a significant role. I am satisfied that there can be little doubt as to who comprise the claim group.

In order to satisfy the requirement of the Act at s.190B(3) it must be shown that a claim group member, however the group chooses to recognise one, can be ascertained to be a member. That is what recognition by the group as a whole achieves. A person cannot simply 'choose' to be a member without recognition by the group. The nett effect is that by whatever means a member is recognised by the group, a notional person enquiring as to whether an individual is a member of the claim group may be given a definitive answer. That recognition is predicated on a strong set of beliefs held by all the group. Where the conditions for membership are complex and ultimately, to some extent at least, subjective (in that acceptance or recognition could be so described), the assessment by the group as to who is a member must be the ultimate test; an assessment only the group could make ,

I have formed the view that the description here is sufficient to allow a person to be identified

Result: Requirements met

Native title rights and interests are readily identifiable: S190B(4)

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 relating to this condition

The description of the rights and interests claimed is contained at Schedule E which refers to Attachment E. The first two paragraphs at Attachment E draw a distinction between those areas in which a claim to exclusive possession is made out and those areas where a claim to exclusive possession is not made out. Specifically, the Attachment states:

1. In areas, within the area covered by the application, where a claim to exclusive possession is made out, the nature and extent of the native title rights and interests is the **exclusive native title** or, alternatively, comprise the **exclusive rights**, the **non-exclusive rights** and the **activity based rights**, and in either case includes the **rights of related Aboriginal persons.**

2. In areas, within the area covered by the application, where a claim to exclusive possession is not made out, the native title rights and interests are the **activity based rights**, the **non-exclusive rights** and the **qualified exclusive rights**, and include the **rights of related Aboriginal persons**.

Several words and phrases appearing in Attachment E are defined as follows:

"activity based rights" means the native title rights to carry on each of the following classes of activity:
- (a) hunting;
- (b) gathering;
- (c) taking;
- (d) camping;
- (e) a cultural or spiritual activity; and
- (f) a teaching activity.

"exclusive native title" means native title rights that confer possession, occupation, use and enjoyment of the land and waters to the exclusion of all others;

"exclusive rights" means native title rights that have stipulated for unqualified control of access to, or use of, land and waters and includes the rights to:
- (a) speak for the land and waters;
- (b) make decisions about the use and enjoyment of the land and waters;
- (c) control the access to, and activities conducted by others on, the land and waters;
- (d) control the use and enjoyment of others of the land and waters;
- (e) control access of others to the resources of the land and waters;
- (f) control the use and enjoyment of others of the resources of land and waters; and
- (g) maintain and protect places and objects of significance on the land and waters.

"native title rights" means the native title rights and interests claimed by the native title claim group in relation to an area of land and waters;

"non-exclusive rights" means native title rights that do not stipulate for control of access to, or use of, land and waters and includes the activity based rights and the rights to:

(a) occupy, use and enjoy the land and waters;
(b) remain on the land and waters;
(c) take and use the resources of the land and waters;
(d) live on the land and waters;
(e) erect permanent structures on the land and waters;
(f) be acknowledged as the traditional Aboriginal owner of the land;
(g) share or exchange or trade resources of the land and waters;
(h) maintain and protect places of and objects of significance on the land and waters (except as against others); and
(i) be consulted about any activity that may impact upon a place of significance to the native title claim group.

"qualified exclusive rights" means native title rights to:

(i) the access to the land and waters by any person pursuant to another interest; or
(ii) the exercise by any by any person of a right in relation to the land and waters accorded by a law of the Commonwealth or Western Australia; or, in the alternative to (a) and (b);
(iii) Aboriginal people who are subject to or who acknowledge the traditional laws and customs of the native title claim group,

and includes each of the exclusive rights as so qualified.

"related Aboriginal person" means a person who is not a member of the native title claim group but who, in accordance with traditional laws acknowledged and traditional customs observed by the native title claim group, is recognised by the members of the native title claim group as a person born on lands immediately adjacent to the area covered by the application and who is senior in knowledge and understanding of the Tjukurrpa (Dreamings) for the area covered by the application.

"resources" does not include minerals or petroleum wholly owned by the Crown;

"rights of related Aboriginal persons" means native title rights and interests exercisable by a related Aboriginal person, subject to the rights and interests of the native title claim group, and include the activity based rights and the rights to:

(a) occupy, use and enjoy the land and waters;
(b) maintain and protect places and objects of significance on the land and waters (except as against others); and
(c) be consulted about any activity that may impact upon a place of significance to the native title claim group.

The requirements of the Act

Section 190B(4) requires the Registrar or his delegate to be satisfied that the description contained in the application of the claimed native title rights and interests is sufficient to allow the rights and interests to be readily identified. For the purposes of this condition, only the description contained in the application can be considered.[4]

Section 62(2)(d) requires that the application contain a "description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests) but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished at law." This terminology suggests that parliament intended to screen out applications which describe native title rights and interests in a manner which is vague, or unclear.

Of note is the use of the terms "native title" and "native title rights and interests", thus excluding any rights and interests that are claimed but are not native title rights and interests as defined by s.223 of the *Native Title Act 1993* (Cth).

Section 223(1) reads as follows:

> "The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land and waters; and
> (c) the rights and interests are recognised by the common law of Australia."

On the basis of the above requirements, I am of the view that for a description to be sufficient to allow the claimed rights and interests to be readily identifiable it must describe what is claimed in a clear and easily understood manner and in such a way so that what is claimed is quickly and easily recognised as a native title rights and interest as that phrase is defined in s.223. Rights which the Courts have said are not native title rights will not be able to be readily identified.

Are the rights and interests claimed readily identifiable?

The application makes the following claims to rights and interests. It is necessary to set them out in full because of a numbering difficulty.

There appears to be a numbering error in the paragraphs: after paragraphs 1, 2 and 3 there is another numbered 2 and thereafter none of the paragraphs is

[4] *Queensland v Hutchison* (2001) 108 FCR 575

numbered. I have added numbering to the paragraphs below in order to make these reasons easier to follow. My numbers are those in bold type in square brackets, so that the second number 2 has become **[4]** and so on.

> I. In areas, within the area covered by the application, where a claim to exclusive possession is made out, the nature and extent of the native title rights and interests is the exclusive native title or, alternatively, comprise the exclusive rights, the non-exclusive rights and the activity based rights, and in either case includes the rights of related Aboriginal persons.
>
> 2. In areas, within the area covered by the application, where a claim to exclusive possession is not made out, the native title rights and interests are the activity based rights, the non-exclusive rights and the qualified exclusive rights, and include the rights of related Aboriginal persons.
>
> 3. In this attachment, every described or listed native title right includes each of the more particular rights that together comprise the described or listed right; for example the listed activity based right to carry on the activity of hunting includes the several rights:
>
> (a) to carry on each activity involved in the activity of hunting; for example entering, remaining on and moving about the lands and waters, gathering materials used in hunting (for example, material used in the construction of hunting equipment such as spears) and cooking the product of the hunt and using or discarding the remains; and
>
> (b) to hunt each particular species of edible fauna and each individual member of that species in relation to each part of the land and waters.
>
> **[4]** 2 In this attachment, the following words and phrases have the following meanings:
>
> **[5] "activity based rights** " means the native title rights to carry on each of the following classes of activity:
>
> (a) hunting;
> (b) gathering;
> (c) taking;
> (d) camping;
> (e) a cultural or spiritual activity; and
> (g) a teaching activity .
>
> **[6] "exclusive native title"** means native title rights that confer possession, occupation, use and enjoyment of the land and waters to the exclusion of all others.
>
> **[7] "exclusive rights**" means native title rights that stipulate for unqualified control of access to, or use of, land and waters and includes the rights to:
>
> (a) speak for the land and waters;
> (b) make decisions about the use and enjoyment of the land and waters;

(c) control the access to, and activities conducted by others on, the land and waters;
(d) control the use and enjoyment of others of the land and waters;
(e) control access of others to the resources of the land and waters;
(f) control the use and enjoyment of others of the resources of land and waters; and
(g) maintain and protect places and objects of significance on the land and waters.

[8] "native title rights" means the native title rights and interests claimed by the native title claim group in relation to an area of land and waters;

[9] "non-exclusive rights" means native title rights that do not stipulate for control of access to, or use of, land and waters and includes the activity based rights and the rights to:

(a) occupy, use and enjoy the land and waters;
(b) remain on the land and waters;
(c) take and use the resources of the land and waters;
(d) live on the land and waters;
(e) erect permanent structures on the land and waters;
(f) be acknowledged as the traditional Aboriginal owners of the land and waters;
(g) share or exchange or trade resources of the land and waters;
(h) maintain and protect places and objects of significance on the land and waters (except as against others); and
(i) be consulted about any activity that may impact upon a place of significance to the native title claim group.

[10] "qualified exclusive rights" means native title rights to:
(a) control access to the land and waters, except in relation to:

(i) the access to the land and waters by any person pursuant to another interest; or
(ii) the exercise by any person of a right in relation to the land and waters accorded by a law of the Commonwealth or Western Australia; or, in the alternative to (a) and (b);
(iii) Aboriginal people who are subject to or who acknowledge the traditional laws and customs of the native title claim group;

(b) control use of the land and waters and their resources, except in relation to:

(i) the use of the land and waters and their resources by any person pursuant to another interest; or
(ii) the exercise by any person of a right in relation to the land and waters accorded by a law of the Commonwealth or Western Australia; or, in the alternative to (a) and (b);
(iii) Aboriginal people who are subject to or who acknowledge the traditional laws and customs of the native title claim group,
and includes each of the exclusive rights as so qualified.

[11] "related Aboriginal person " means a person who is not a member of the native title claim group but who, in accordance with traditional laws acknowledged and traditional customs observed by the native title claim group, is recognised by the members of the native title claim group as a person born on lands immediately adjacent to the area covered by the application and who is senior in knowledge and understanding of the Tjukurrpa (Dreamings) for the area covered by the application.

[12] "resources" does not include minerals or petroleum wholly owned by the Crown;

[13] "rights of related Aboriginal persons" means native title rights and interests exercisable by a related Aboriginal person, subject to the rights and interests of the native title claim group, and include the activity based rights and the rights to:
(a) occupy, use and enjoy the land and waters;
(b) maintain and protect places and objects of significance on the land and waters (except as against others); and
(c) be consulted about any activity that may impact upon a place of significance to the native title claim group.

Where exclusive possession may be found; "exclusive native title" and "exclusive rights"

Paragraphs 1 and 2 make a claim to exclusive possession, firstly as 'exclusive native title' which is then defined in para**. [6]** as the right to 'possess, occupy use and enjoy to the exclusion of all others' and is secondly claimed in the alternative as 'the exclusive rights, the non-exclusive rights and the activity based rights', which are set out in paras**.[7], [9]** and **[5]** respectively.,.

The phrase 'possess, occupy, use and enjoy' is conventionally described as the broadest expression of the rights attached at common law to absolute ownership – fee simple. In native title jurisprudence it is the expression of the totality of rights held by the claim group where there has been no extinguishment.

The High Court in Ward at [52] said of it '*It is necessary to recognise that the holder of a right, as against the whole world, to possession of land, may control access to it by others and, in general, decide how the land will be used.* Whether the claim be phrased as 'possess, occupy use and enjoy' or as the sum of all the rights (the whole of the 'bundle of rights') enumerated here (the alternative claim) is, at the prima facie level of the registration test, of little moment. I am of the view that where exclusive possession may be shown the holders may 'decide how the land will be used' and will have all the rights in land which might flow from that. I accept that as a matter of logic, the holder of absolute rights will also hold lesser rights of the same type.

The interpretation clause is also applicable to the "exclusive rights", however to my mind native title rights that stipulate for unqualified control of access to, or use of land and waters must amount to exclusive possession. Even though the definition of "exclusive rights" contains an illustrative rather than exhaustive list of rights, as they arise from a right of exclusive possession the nature and extent of the rights claimed is clear enough for the purposes of s190B(4).

I am satisfied that the applicant's description of the rights and interests claimed where native title is wholly established is sufficiently clear to enable what is being claimed to be readily identified.

Where native title is partially recognizable; "non-exclusive rights", "qualified exclusive rights" and "rights of related Aboriginal persons"

The claim for rights where exclusive possession may not be established is:

> '2. In areas, within the area covered by the application, where a claim to exclusive possession is not made out, the native title rights and interests are the activity based rights, the non-exclusive rights and the qualified exclusive rights, and include the rights of related Aboriginal persons'

Paragraph **[3]** in effect defines the stated rights as including all subsidiary rights necessary to give effect to the larger right. I accept that .

In relation to the whole of the claim area, including areas where the applicant is of the view that native title may not be wholly recognized, the applicant is claiming non-exclusive rights and interests, variously named. The Courts have considered how such rights and interests should be formulated. In *Attorney General v Ward* the Full Federal Court held that because of the requirments of s.225 of the Act, in relation to the proposed wording of the non-exclusive rights in the determination, there must be a specification of the content of the nature and extent of the relevant rights and interests; that the statement of rights and interests in a determination must exhaustively indicate the determined incidents of the right to use and enjoy. In particular the Court said at [21]:

> *'A statement about the right to 'occupy, use and enjoy' (or merely 'use and enjoy') in accordance with traditional laws and customs conveys no information as to the nature and extent of the relevant rights and interests. It is equivalent to a statement that the holders of the traditional rights and interests are entitled to exercise their traditional rights and interests. Something more is obviously required. There must be a specification of the content of the relevant rights and interests. That is why the parties included sub-clauses (a) to (e). It is to those sub-clauses that a reader may look in considering the effect of the determination. They must exhaustively indicate the determined incidents of the right to use and enjoy.'*

This is consistent with the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ in the High Court's decision in *Western Australia v Ward* [2002] HCA 28 in which their Honours said at [51]:

> *'Where, as was the case here in relation to some parts of the claim area, native title rights and interests that are found to exist do not amount to a right, as against the whole world, to possession, occupation, use and enjoyment of land or waters, it will seldom be appropriate, or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms.'*

It seems to me that the rights and interests as described in Attachment E do not all meet these requirements.

"The activity based rights"

Schedule E 3 says:

> *"In this Attachment, every described or listed native title right includes each of the more particular rights that together comprise the described or listed right; for example the listed activity based right to carry on the activity of hunting includes the several rights:"*

Thus in attachment E **[4],** the 'activity based right' to hunt must in fact be read not simply as 'hunting', but rather as 'hunting and carrying on each activity involved in the activity of hunting including entering, remaining on and moving about the land and water, gathering materials used in hunting and cooking the product of the hunt and using or discarding the remains and hunting each particular species of edible fauna and each individual member of that species in relation to each part of the land and waters.'

This may at first glance seem problematic. The Registrar is not able to 'unbundle' rights expressed thus into their component parts for the purposes of the test, as to do so would amount to a de facto amendment of the application. Thus, each right must be considered by me in its entirety as it is expressed, raising the questions of whether a right apparently so complex is readily identifiable (and if it is, whether at s190B(6) the applicants could show prima facie evidence of each component of the entire right).

I have concluded that the better view of the way in which the rights have been drafted is to consider each one in its 'primary' form – 'hunting' for example -- and then to look at the implications of the definition clause which appears to add further rights. It seems to me that, looked at it in that way, there is no added complexity, but rather a better or more detailed defining of the nature and extent of the primary right, but not any addition to it. That is to say, behind a plain and identifiable right such as 'hunting' there are in fact a number of necessary other activities implied by the right without which the 'primary' right could not exist. A claimant obviously could not go hunting without being on the land, without carrying or making weapons, or without moving about, and it is these underlying assumptions that are described in paragraph 3.

In support of that interpretation is the fact that the Act at s.223(2) does not expand on each of the rights to hunt, fish and gather but is content to express them that way alone. Further, determinations in the Federal Court do not elaborate on these simple expressions of what is in fact a complex series of activities described by a single word

On this analysis rights (a), (b), (c), (d) and (g), are readily identifiable, noting that there is no'(f)' There is nothing in the application or the supporting material that indicates that this is a right or interest that in and of itself relates to land and waters, either by giving rise to connection to land or waters or being directly related to the right to control access to land or waters, nor for that matter is there any indication of its nature and extent (*Daniel v State of Western Australia*

[2003] FCA 666 at [300], [301], [311], [322], Western Australia v Ward [2002] HCA 28 at [57] – [61]. It is therefore not readily identifiable as a native title right or interest.

I also do not think that right at (e) is readily identifiable, because it simply does not give any indication of what is to be 'taken', nor is (h): it requires the reader to make judgements about what might be 'reasonably associated' with those activities. This is sufficiently vague that I do not think they are identifiable. That does not mean that such rights might not be found in a determination, of course.

"Non-exclusive rights" "

"Non-exclusive rights" are defined as "native title rights that do not stipulate for control of access to, or use of land and waters and includes the activity based rights and the rights to: [(a) – (i)]. I read this to mean, in effect, that the rights asserted over lands and waters where exclusive possession (or s47) cannot be established are comprised by an exhaustive list of all the 'activity based rights' together with all these named 'non-exclusive rights'.

They are:

(a) occupy, use and enjoy land and waters;

For the reasons I have given above I do not think that (a) is readily identifiable, as it is contrary to the remarks in *Ward* previously discussed as to the need for its nature and extent to be made clear.

(b) remain on land and waters;

(c) take and use the resources of land and waters

These two rights are readily identifiable and may be established subject to the requirements of s190B(6)

(d) live on the land and waters;

(e) erect permanent structures on the land and waters;

I am of the view that these two rights are more in the nature of exclusive rights, as both would in some circumstances be inconsistent with prior rights. There is a tension between the right as stated and the heading, in that the heading describes the right as falling into a class where no control of access or use is stipulated. It is, however, the permanent and fixed nature of the rights, together with the element of control (or the restrictions necessarily placed on a prior right-holder's ability to exercise those rights) implied by the two activities which lead to my conclusion. It can be difficult to form a concluded view without knowledge of the nature and extent of the competing prior interests, but at the prima facie level at which s.190 operates I think that the better view is that these are not readily identifiable as non-exclusive rights.

(f) be acknowledged as the traditional Aboriginal owners of the land and waters;

In *Daniel v State of Western Australia* this right was held to be 'a matter of law falling to be decided under s.223 and s.225 of the NTA'. Accordingly it is not recognisable as a native title right.

(g) share or exchange or trade resources of the land and waters;

Whilst there is some debate about the position of the Full Bench in *Yarmirr*, I am of the view that, at best, this can only be an exclusive right and cannot be established over non-exclusive land. In any event the broadness of the right as drafted would, in any event, make it not readily identifiable.

(h) maintain and protect places and objects of significance on the land and waters (except against others);

The right (h) in form appears problematic but is modified by the words in brackets. The phrase 'maintain and protect' has been held to imply a level of control inconsistent with non-exclusive possession, but the express exclusion of 'against others' seems to me to allow it to be read as being directed at something more in the nature of maintenance and protection against the elements rather than against the holder of other inconsistent rights and interests. Accordingly it is readily identifiable.

(i) be consulted about any activity that may impact upon a place of significance to the native title claim group.

I find that this right is not sufficiently described as to make it readily identifiable. Its use of the words 'consulted', 'activity', 'impact' and 'significance' render it vague, or, to be more precise, lacking in definition of its nature and extent.

"Qualified exclusive rights"

I have difficulty with the "qualified exclusive rights", claimed in relation to areas where native title is partially recognised. These rights are:

[10] "qualified exclusive rights" means native title rights to:

(a) control access to the land and waters, except in relation to:

(i) the access to the land and waters by any person pursuant to another interest; or

(ii) the exercise by any person of a right in relation to the land and waters accorded by a law of the Commonwealth or Western Australia; or, in the alternative to (a) and (b);

(iii) Aboriginal people who are subject to or who acknowledge the traditional laws and customs of the native title claim group;

(b) control use of the land and waters and their resources, except in relation to:

(i) the use of the land and waters and their resources by any person pursuant to another interest; or

(ii) the exercise by any person of a right in relation to the land and waters accorded by a law of the Commonwealth or Western Australia; or, in the alternative to (a) and (b);

(iii) Aboriginal people who are subject to or who acknowledge the traditional laws and customs of the native title claim group,

and includes each of the exclusive rights as so qualified.

In this analysis it is to be remembered that the result of the application of the registration test is to have rights entered on the Register. The legislature saw fit to require that those rights be 'readily identifiable', presumably so that a person consulting the Register would be able to understand what was there. I do not think that these rights, expressed as they are, can be said to fit that description.

Not the least problem is that the rights are described as 'qualified exclusive' and it is hard not to see this as an oxymoron: rights are either those of exclusive possession, or they are not. Because these rights are not absolute, they must presumably be non-exclusive, but are named otherwise.

The first problem is that the "rights that stipulate for control of access to or use of land and waters" or, at (b) "land and waters and resources" are not specified, again contra *Attorney General v Ward,* which is shown by the use of the word 'includes'. The further difficulty I have with these rights is that they do not appear to be sufficiently clearly defined so as to enable ready identification of what it is the claimants say these rights are and in relation to whom they apply. It might be a way of expressing the application of various exclusive rights and interests (those relating to controlling access to, or use of land and waters) insofar as they can only be upheld or enforced as between members of the native title claim group in areas where exclusive possession cannot be established. This might be consistent with laws and customs such as those noted in Scott Cane's report or the long form affidavits to the effect that access to some places, sites and areas is restricted on the basis of gender, age and ritual knowledge. It might also be an attempt to tie rights to uphold and enforce traditional laws and customs amongst the claim group to land and waters. These types of rights were not recognised in *Neowarra v State of Western Australia* [2003] FCA 1402 on the basis that they do not relate to land or waters. It might also be consistent with the Full Federal Court's discussion in *Ward* at [17] in relation to a "surviving right to make decisions, pursuant to Aboriginal laws and custom, about the use and enjoyment of the land by Aboriginal people" in areas where a right to absolute control of access has been extinguished. Although why then would the rights *not* be in relation to Aboriginal people who are subject to or who acknowledge the traditional laws and customs of the native title claim group? It is also unclear whether paragraph (c), "Aboriginal people who are subject to or who acknowledge the traditional laws and customs of the native title claim group", refers to *all* Aboriginal people who are subject to or who acknowledge the traditional laws and customs of the native title claim group or only those Aboriginal people who are not members of the native title claim group but who are subject to the Pilki traditional laws and customs. I assume that the intended construction of this would be that it refers to Aboriginal people who are not members of the claim group as any other construction seems additionally nonsensical.

In conclusion, there is too much uncertainty surrounding the construction and application of the "qualified exclusive rights" for me to find that they are readily identifiable. As I have noted elsewhere, these confusions may very well be clarified by the evidence in the hearings or may even have been drafted to conform to rights asserted in evidence, but that is not before me.

Insofar as the "rights of related Aboriginal persons" are concerned, I have concluded in applying s.190B(3), that the preferable construction of the apparent claim for rights and interests on behalf of "related Aboriginal persons" is that it is an attempt on the part of the drafter to acknowledge the existence of shared or overlapping rights held by claimants in other matters. As I am of the view that the claimants did not intend to actually claim these rights and interests they are not readily identifiable as such for the purposes of s.190B(4).

For the above reasons I am satisfied that the ‘exclusive rights’ and some of the ‘activity based rights’ and ‘non-exclusive’ rights are readily identifiable, but that some rights and interests claimed where native title is otherwise partially recognisable are not readily identifiable as native title rights and interests. This does not mean that these rights and interests do not exist, only that on the relevant information before me in this administrative decision making process, the written description of them doesn’t enable them to be clearly and easily understood. The provisions of s190(3)(a) are always available.

As the description of the rights and interests claimed where native title is wholly recognizable (‘exclusive rights’) and the activity/non exclusive rights are sufficiently clear to enable what is being claimed to be readily identified, the application meets the requirements of this section.

Result: Requirements met

Factual basis for claimed native title: S190B(5)

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 relating to this condition

Section 190B(5) requires that the Registrar (or his delegate) must be satisfied that the factual basis provided in support of the assertion that the claimed native title rights and interests exist is sufficient to support that assertion. In particular, the factual basis must be sufficient to support the assertions set out in subparagraphs (a), (b) and (c).

To satisfy the requirements of s.190B(5), the Registrar (or his delegate) is not limited to consideration of statements contained in the application (as for s.62(2)(e)) but may refer to additional material supplied to the Registrar under this condition: *Martin v Native Title Registrar* [2001] FCA 16. Regard will be had to the application as a whole; subject to s.190A(3), regard will also be had to relevant information that is not contained in the application. The provision of material disclosing a factual basis for the claimed native title rights and interests is the responsibility of the applicant. It is not a requirement that the Registrar (or his delegate) undertake a search for this material: *Martin v Native Title Registrar* per French J at [23].

In *Queensland v Hutchinson* (2001) 108 FCR 575, Kiefel J said that "[s]ection 190B(5) may require more than [s.62(2)(e)], for the Registrar is required to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to assert a wider consideration of the evidence itself, and not of some summary of it."

For each native title right or interest claimed, there should be some factual material that demonstrates the existence of the traditional law and custom of the native title claim group that gives rise to the right or interest.[5]

In *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (the *Yorta Yorta* decision), the majority of the High Court noted that the word 'traditional' refers to a means of transmission of law or custom, and conveys an understanding of the age of traditions. Their Honours said that 'traditional' laws and customs are those normative rules which existed or were "rooted in pre-sovereignty traditional laws and customs": at [46], [79]. This normative system must have continued to function uninterrupted from the time of acquisition of sovereignty to the time when the native title group sought determination of native title. This is because s.223(1)(a) speaks of rights and interests as being 'possessed' under traditional laws and customs, and this assumes a continued "vitality" of the traditional normative system. Any interruption of that system which results in a cessation of the normative system would be fatal to

[5] See *Ward* at [382].

claims to native title rights and interests because the laws and customs which give rise to the rights and interests would have ceased to exist and could not be effectively reconstituted even by a revitalisation of the normative system. Their Honours noted, however, that this does not mean that some change or adaptation of the laws and customs of a native title claim group would be fatal to a native title claim; rather that an assessment would need to be made to decide what significance (if any) should be attached to the fact that traditional law and custom had altered. In short, the question would be whether the law and custom was 'traditional' or whether it could "no longer be said that the rights and interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified" - at [82] and [83].

I find these statements in the *Yorta Yorta* decision of assistance in interpreting the terms "traditional laws", "traditional customs" and "native title rights and interests", as found in s.190B(5). However, I am also mindful that the "test" in section 190A involves an administrative decision – it is not a trial or hearing of a determination of native title pursuant to s.225, and it is therefore not appropriate to apply the standards of proof that would be required at such a trial or hearing.

In *Northern Territory of Australia v Doepel [2003] FCA 1384* the Court considered the Registrar's role

> *125 One of those contentions can be briefly dealt with. There is nothing in s 190B(5) or in s 190B generally which indicates that the assertions in the application itself may not be considered by the Registrar in addressing the condition imposed by s 190B(5). In both WA v Strickland at 54-55 [88 - 89] citing with approval Strickland v NTR at 261, and Martin at [23] - [26], the Court was prepared to consider the material included in the application as material relevant to the satisfaction of the condition imposed by s 190B(5). The Registrar then, in fact, looked at the extensive material available beyond the application to address the condition....*
>
> *127 On the other hand, s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s 190B(6)....*
>
> *128...... All it requires is that the Registrar be satisfied that there be a proper factual basis on which it was asserted that the claimed native title rights and interests exist.*

I believe that in respect of this condition I must consider whether the factual basis provided by the applicant is sufficient to support the assertion that claimed native title rights and interests exist. In particular this material must support the assertions noted in s.190B(5) (a), (b) and (c). I have formed the view that the information referred to above provides sufficient probative detail to address each element of this condition. I will now deal in turn with each of these elements.

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

There is ample evidence of the association of the claim group and its predecessors with the area. There is little evidence of occupation prior to a

period some three or four generations ago (as best I understand) but given that the claim group holds a large number of tjukurrpa for the area and that the country is relatively remote and harsh, I accept that on the balance of probabilities the claim group is descendant from those who occupied the area at sovereignty.

Evidence for this may be found at:

Attachments F and G generally
Scott Cane Report at pages 47-49, 67-69 and particularly 76-77
[Applicant 1] affidavit at paras2, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16,
[Applicant 2] affidavit at paras 2, 3, 4, 5, 6, 10, 12, 13-23
[Applicant 3] at paras 3, 4, 5, 10, 1115
Schedule M

(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;

The claim group is a strong one learning, holding and exercising law, ritual and knowledge of country. Men are being made and there is a comprehensive set of laws and customs relating to the use and occupation of land – both how it is to be used as well as by whom and in what circumstances. These traditional laws and customs form (or perhaps show) the presence of a normative society as discussed in *Yorta Yorta.* Evidence for these propositions may be found at:

Attachments F and G generally
Scott Cane Report at pages 47-49, 67-69 and particularly 76-77
[Applicant 1] affidavit at paras2, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16,
[Applicant 2] at paras 2, 3, 4, 5, 6, 10, 12, 13-23
{Applicant 3] at paras 3, 4, 5, 10, 1115
Schedule M

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

Attachment F contains information as to claimants continued connection to country through activities learned from parents and grandparents, as well as the neighbouring Spinifex people. Continued observance of traditional law and custom and demonstrable knowledge and use of country are cited as further evidence of the group having held native title in accordance with traditional law and custom.

Attachment G includes details of activities carried out by the group and the affidavits provided by each of the persons comprising the applicant provide further material relevant to this point. The affidavits contain information relevant to this point. Specifically this information can be found at:

Affidavit of **[Applicant 1]**, sworn 7 December 2004, at paragraphs 6, 9, 11, 12, 13, 14, 15, 16, 17;
Affidavit of **[Applicant 3]**, sworn 18 November 2002, at paragraphs 8, 9, 10, 13, 14 and 15;

Affidavit of **[Applicant 2]**, sworn 7 December 2004, paragraph 7, 8, 9, 10, 11, 14, 16, 17, 18, 19, 23

Other paragraphs throughout the affidavit material provide context and support for the continued existence and observance of a traditional law and custom, giving rise to the rights and interests claimed.

On balance, I am satisfied that there is a sufficient factual basis to support the rights and interests claimed. Specifically, I am satisfied that:

(a) the native title claim group has, and predecessors of these people had, an association with the area;
(b) traditional laws acknowledged by, and traditional customs observed by, the Pilki People give rise to the rights and interests claimed; and
(c) the Pilki People continue to hold native title in accordance with these traditional laws and custom.

Result: Requirements met

Native title rights and interests claimed established prima facie: S190B(6)

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 relating to this condition

Where rights and interests are not readily identifiable, it follows that they cannot be prima facie established. Therefore, it is only necessary for me to consider those rights found to be readily identifiable in my reasons at s.190B(4). These rights and interests are:

- exclusive rights, meaning native title rights and interests that confer possession, occupation, use and enjoyment of the land and waters to the exclusion of all others;
- the 'Activity based" rights (a) to (g) and
- the 'Non-exclusive' rights at (b), (c), and (h).

I must now look to see whether there is evidence capable of establishing them at a prima facie level.

The term *"prima facie"* was considered on *North Ganalanja Aboriginal Corporation v Qld* 185 CLR 595 by their Honours Brennan CJ, Dawson, Toohey, Gaudron, 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 it appears at first sight without investigation." [citing Oxford English Dictionary (2nd ed 1989].

And at [35]:

> "However, the notion of a good prima facie claim which, in effect, is the concern of s.63(1)(b) and, if it is still in issue, of s.63(3)(a) of the Act, is satisfied if the claimant can point to material which, if accepted, will result in the claim's success."

This test was recently considered and approved in *Northern Territory v Doepel* [2003] FCA 1384, see at paras 134-135. Briefly, the Court concluded that although the above case was decided before the 1998 amendments of the Act there is no reason to consider the ordinary usage of 'prima facie' there adopted is no longer appropriate, see paragraphs 134-5.

I have adopted the ordinary meaning referred to by their Honours in considering this application, in deciding which native title rights and interests claimed can be established on a prima facie basis.

Exclusive Rights

This right is defined as the "native title rights that stipulate for unqualified control of access to, or use of, land and waters and includes the rights to:

(a) speak for land and waters;
(b) make decisions about the use and enjoyment of the land and waters;
(c) control access to, and activities conducted by others on, the land and waters;
(d) control the use and enjoyment of others of the land and waters;
(e) control access of others to the resources of the land and waters;
(f) control the use and enjoyment of others of the resources of land and waters; and
(g) maintain and protect places and objects of significance on the lands and waters"

Following *Attorney General of the Northern Territory v Ward* [2003] FCAFC 283 9 ("*Ward"*), a claim to exclusive possession, occupation, use and enjoyment of the land and waters can only be sustained in where there has been no extinguishment of native title. The nature of the claim does allow such exclusive possession should it be established.

Evidence that establishes these rights and interests at a prima facie level can be found generally at Schedule F, Attachment F, Schedule G, Attachment G and specifically in the affidavits of:

[Applicant 1], sworn 7 December 2004, at paragraphs 12, 14, 15, 16, 17, 18, 20;
[Applicant 3] sworn on 18 November 2002, at paragraphs 14, 15;
[Applicant 2], sworn on 7 December 2004, at paragraphs 18, 21, 23, 24, 26

Further information is contained in the report of Dr Scott Cane at pages 48 and 49.

I am satisfied that on the basis of the information provided there is sufficient information to support the prima facie establishment of this right.

Result: Established

Non-exclusive rights and interests
(b) Remain on land and waters
Evidence to support the prima facie establishment of this right can be found at Schedule F, Attachment F, Schedule G, Attachment G and in the affidavits of:

[Applicant 1], sworn 7 December 2004, at paragraphs 8, 9, 12, 15
[Applicant 3], sworn 18 November 2002, at paragraphs5, 6, 7, 11, 13
[Applicant 2], sworn on 7 December 2004, at paragraphs14, 17, 21, 22,

Information is also contained in Dr Scott Cane's report at pages 55 and 56.

I am satisfied that on the basis of the information provided there is sufficient information to support the prima facie establishment of this right.

Result: Established

(c) take and use the resources of land and waters
Evidence to support the prima facie establishment of this right can be found at Schedule F, Attachment F, Schedule G, Attachment G.

Affidavits of:

[Applicant 1], sworn 7 December 2004, at paragraphs 8, 11, 14, 15.
[Applicant 3], sworn 18 November 2002, at paragraphs 10, 11, 14;
[Applicant 2], sworn 7 December 2004, at paragraphs 7, 20, 21, 22, 22.

I am satisfied that on the basis of the information provided there is sufficient information to support the prima facie establishment of this right.

Result: Established

(h) maintain and protect places and objects of significance on the land and waters (except as against others)
Evidence to support the prima facie establishment of this right can be found at Schedule F, Attachment F, Schedule G, Attachment G and in the affidavits of:

[Applicant 1], sworn 7 December 2004, at paragraphs 12, 14, 16, 17, 18;
[Applicant 3], sworn 18 November 2002, at paragraphs 8, 14
[Applicant 2], sworn 7 December 2004, at paragraphs18, 21, 23, 24.

Further evidence can be found in the report of anthropologist Dr Scott Cane at pages 48, 49, 53.

I am satisfied that on the basis of the information provided, there is sufficient information to support the prima facie establishment of this right.

Result: Established

Non-Exclusive Rights termed "Activity based rights" in the Form 1 (application)

(a) Hunting
Prima facie evidence of the establishment of this right can be found at Schedule F, Attachment F, Schedule G, Attachment G and the in the affidavits of:

[Applicant 1], sworn 7 December 2004, at paragraphs 8, 11, 14, 15, 16

[Applicant 3], sworn 18 November 2002, at paragraphs 10, 14;
[Applicant 2], sworn 7 December 2004, at paragraphs 5, 7, 14, 20, 22, 23, 26.

I am satisfied that on the basis of the information provided, this right has been prima facie established.

Result: Established

(d) Gathering
Evidence for the prima facie establishment of this right can be found at Schedule F, Attachment F, Schedule G, Attachment G, and in the affidavits of:
[Applicant 3], sworn 18 November 2002, at paragraph 11
[Applicant 2], sworn 7 December 2004, at paragraphs 7, 20.

I am satisfied that there is sufficient information in these documents to establish the right to gather.

Result: Established.

(f) A cultural or spiritual activity
Information to support the prima facie establishment of the right to carry out a cultural or spiritual activity can be found at Schedule F, Attachment F, Schedule G, Attachment G, and also in the affidavits of:
[Applicant 1], sworn 7 December 2004, at paragraphs 6, 10, 13, 18
[Applicant 3], sworn 18 November 2002, at paragraphs 6, 13,
[Applicant 2], sworn 7 December 2004, at paragraphs 8, 9, 10, 17, 18, 19.

Further information can be found in the report of Dr Scott Cane at pages 47 48, 49, 53.

I am satisfied on the basis of this information that this right can be prima facie established.

Result: Established

(h) a teaching activity
Evidence to support the prima facie establishment of the right to carry out a teaching activity can be found at Schedule F, Attachment F, under the headings "traditional laws and customs giving rise to the claim to native title rights and interests" and "continued native title". Information is also contained at Schedule G, Attachment G, and in the affidavits of:
[Applicant 1], sworn 7 December 2004, at paragraphs 2, 9, 11, 12, 15;
[Applicant 2], sworn 7 December 2004, at paragraphs, 2, 7, 10, 16, 18, 21.

Further information evidencing this right can be found in the report of Anthropologist Dr Scott Cane at pages 47 and 48.

On the basis of this information, I am satisfied that this right can be prima facie established.

Result: Established

Result: Requirements met

Traditional physical connection: S190B(7)

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 relating to this condition

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

While the term 'traditional physical connection' is not defined in the Act, I am interpreting it to mean that physical connection should be in accordance with the particular traditional laws and customs relevant to the claim group. The explanatory memorandum to the *Native Title Act* 1993 explains that this "connection must amount to more than a transitory access or intermittent non-native title access." (para29.19 of the 1997 EM on page 304)

Schedule M of the application states that the claimants live in the Tjuntjuntjara community 10km from the claim area, which allows "them to maintain their traditional physical connection to their country." This Schedule also refers to a traditional physical connection arising out of the conduct of activities described in Schedule G, (see reasons at ss.190B(4) for further information) of the application and refers to the affidavits provided by each of the persons comprising the applicant for further information as to these peoples' physical connection.

[Applicant 1] states in his affidavit that he is a member of the Pilki group of people. He includes details of prior connection to the claim area which relates to his parents' connection, and his early visits to the claim area. The affidavit includes material that indicates his family moved away from the claim area during the Maralinga testing period, but continued to visit the area despite living at some distance.

His affidavit contains statements that his family moved back into closer proximity to the claim area and that he raised his own family in towns close by. Further material in the affidavit states that **[Applicant 1]**:

- travels regularly in the claim area;
- hunts in the area in accordance with traditional law and custom (as taught by senior men with the requisite knowledge of traditional practice);
- looking after country, including burning areas and cleaning rockholes, according to traditional law and custom.

I am satisfied that the information contained Schedule M and the affidavit of **[Applicant 1]** is sufficient to demonstrate continued physical connection with the claim area that is not transient and non-native title in nature. I am also satisfied that such physical connection has been in accordance with traditional law and custom.

I am satisfied that the requirements of this section have been satisfied.

Result: **Requirements met**

No failure to comply with s61A: S190B(8)

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.

S61A contains four sub-conditions. Because s190B(8) asks the Registrar to test the application against s61A, the decision below considers the application against each of these four sub-conditions.

S61A(1)- Native Title Determination

Reasons relating to this sub-condition

A search of the Native Title Register conducted on 13 April 2005 reveals that there area no approved determinations of native title in relation to the area claimed in this application.

Result: **Requirements met**

S61A(2)- Previous Exclusive Possession Acts (PEPAs)

Reasons relating to this sub-condition

Schedule B of the application refers to Attachment B, which provides detail of tenures that are excluded from the claim area. For reasons as set out in s.190B(2) these exclusions are sufficiently clear to provide reasonable certainty about all the tenure excluded and include all previous exclusive possession acts.

Result: **Requirements met**

S61A(3) – Previous Non-Exclusive Possession Acts (PNEPAs)

Reasons relating to this sub-condition

The applicant is not seeking exclusive possession over areas the subject of previous non-exclusive possession acts.

Result: **Requirements met**

S61A(4) – Areas to which sections 47, 47A or 47B may apply

Reasons relating to this sub-condition

The applicant seeks to invoke the provisions of s.47B of the Act over specific areas as set out in Schedules B and L. Schedule B of the application refers to Attachment B, where the applicant states:

> "For the purposes of the application of sections 61A(4) and 47B of the Act, the application covers the entirety of the vacant Crown land, as identified in the map at Attachment C, which is subject to section 47B."

Schedule L of the application refers to this area, noting that it is occupied by members of the claim group and that "it is an area over which native title is required by section 47B of the Act to be disregarded, it being an area that, when the application was made, was vacant Crown land and occupied by one or more members of the native title claim group,

Result: Requirements met

No claim to ownership of Crown minerals, gas or petroleum: S190B(9)(a)

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 relating to this sub-condition

This section requires that the application must not disclose, and I must not otherwise be aware, that there is any native title right or interest claimed in this amended application which either consists of or includes a claim to ownership over minerals, petroleum or gas wholly owned by the Crown in right of the Commonwealth, a State or Territory.

Schedule Q of the application includes the statement,

> "The applicants make no claim to any mineral, petroleum or gas wholly owned by the Crown in right of the Commonwealth or State of Western Australia."

Schedule E refers to Attachment E, which includes a definitions section. In this attachment, "resources" is defined as not including minerals or petroleum wholly owned by the Crown.

I am of the view that these statements are sufficient to satisfy the requirements of s.190B(9)(a).

Result: Requirements met

No exclusive claim to offshore places: S190B(9)(b)

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 relating to this sub-condition

This section requires that the application must not disclose and I must not otherwise be aware, that if any native title right or interest claimed in this amended application which relates to waters on an offshore place, that those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place.

This application covers no offshore place – see Schedule P.

Result: Requirements met

Native title not otherwise extinguished: S190B(9)(c)

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 relating to this sub-condition

The application and accompanying documents do not disclose, and it is not readily apparent, that the native title rights and interests claimed have not been extinguished by any mechanism, including:

- a break in traditional physical connection;
- non-existence of an identifiable native title claim group;
- by the non-existence of a system of traditional laws and customs linking the group to the area;
- an entry on the Register of Indigenous Land Use Agreements;
- Legislative extinguishment.

In addition, at Schedule B, Attachment B, paragraph 2(e) of the application, the applicant excludes any areas where native title rights and interests have otherwise been wholly extinguished. I am satisfied that because native title

rights and interests must relate to land and waters (s.223 of the Act), the exclusion of particular land and waters is an exclusion of native title rights and interests over those lands and waters.

I am satisfied that the application meets the requirements of this condition.

Result: Requirements met

[End of document]

ATTACHMENT A

The following is to be entered as contents of the Register of Native Title Claims pursuant to S186

S186 (1)

(a) whether the application was filed in the Federal Court or lodged with a recognised State/Territory body

Federal Court

(b) if the application was lodged with a recognised State/Territory body – the name of that body

n/a

(c) the date on which the application was filed or lodged

Date Application Made:12 August 2002
Application Amended:1 April 2004, by order of that date

(d) the date on which the claim is entered on the Register

18 April 2005

(e) the name and address for service of the applicant/s

Applicant/s:

Geoffrey West, Victor Willis, Daniel (Stevie) Sinclair, Betty Kennedy

Address for service:

Ngaantyatjarra Council (Aboriginal Corporation)

Level 2, 8 Victoria Avenue

Perth WA 6000

(f) the area of land or waters covered by the claim

1. Subject to 2 below, all those lands commencing at a point with co-ordinates Latitude 28.000000 South, Longitude 125.690000 East and proceeding east to coordinate Latitude 28.000000 South, Longitude 127.000000 East, thence south to coordinate Latitude 29.720478 South, Longitude 127.000000 East. Then westerly to a point at the intersection of a line joining coordinates Latitude 29.720478 South, Longitude 127.000000 East and Latitude 29.719333 South, Longitude 125.417833 East and Latitude 30.000000 South, Longitude 125.690000 East and Latitude

28.000000 South, Longitude 125.690000 East. Finally returning north to the commencement point.

2. Subject to 3 below, the areas of land and waters within the boundary that are not covered by the application are:

(a) any area that is or was subject to any of the following acts as these are defined in either the *Native Title Act 1993*, as amended (where the act is [sic] question is attributable to the Commonwealth), or the *Titles (Validation) and Native Title Act (Effect of Past Acts) Act 1995*(WA), as amended, where the act in question is attributable to the State of Western Australia) at the time of the Registrar's consideration:
   (i) Category A Past Acts;
   (ii) Category A intermediate period acts;
   (iii) Category B past acts that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights and interests;
   (iv) Category B intermediate period acts that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests;

(b) any area in relation to which a 'relevant act' as the term is defined in section 12I of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) was done and the act is attributable to the State of Western Australia;

(c) any area in relation to which a previous exclusive possession act under section 12J of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995*(WA) was done and that act is attributable to the State of Western Australia;

(d) any area in relation to which a previous exclusive possession act as defined by section 23B (including section 23B(7)) of the *Native Title Act 1993* was done in relation to the area and the act was attributable to the Commonwealth);

(e) any areas where native title rights and interests have otherwise been wholly extinguished; and

(f) specifically, any areas where there has been:
   a. any unqualified grant of estate in fee simple;
   b. a lease which is currently in force, in respect of an area not exceeding 5000 square metres, upon which a dwelling house, residence, building or work is constructed, and which comprises:
      i. a lease of a worker's dwelling under the *Worker's Homes Act 1911-1928*;
      ii. 999 year lease under the Land Act 1898 (WA);
      iii. a lease of a town lot or suburban lot pursuant to section 117 of the *Land Act 1933* (WA);
      iv. a special lease under section 177 of the *Land Act 1933*(WA); or
      v. any reserves vested pursuant to section 33 of the *Land Act 1933* (WA) that are not for the benefit of Aboriginal people,

c. a conditional purchase lease currently in force in the Agricultural Areas of the South West Division under regulations 46 and 47 of the Land Regulations 1887 which includes a condition that the lessee reside on the area of the lease and upon which a residence has been constructed;
d. a conditional purchase lease of cultivable land currently in force under Part V, Division (1) of the Land Act 1933 (WA) in respect of which habitual residence by the lessee is a statutory condition in accordance with the Division and upon which a residence has been constructed;
e. a perpetual lease currently in force under the War Service Land Settlement Scheme Act 1954;
f. a public work as defined in section 253 of the Native Title Act 1993; or
g. an existing dedicated public road; and

(g) notwithstanding anything contained elsewhere in this application (including attachments to it), any areas not covered by the original application.

3. the application covers the entirety of the vacant Crown land, as identified on the map attached at Annexure c which is subject to s.47

(h) a description of the persons who it is claimed hold the native title

1. The native title claim group are the people known generally as the people from the Pilki area, being the area covered by this application and depicted in the map at Attachment C

2. The native title claim group comprises those people:

(a)who are:
(i) descended from ancestors born in the area covered by the application; and
(ii) in respect of whom that claim is recognised by the native title claim group according to its traditional decision-making processes; or
(b) who are adopted, or are descended from persons adopted, by members of the native title claim group under traditional laws and customs and accepted by members of the native title claim group.

(i) a description of the native title rights and interests in the claim that the Registrar in applying the subsection 190B(6); considered, prima facie, could be established.

A Over land and waters where exclusive possession may be found or s.47 applies:

(a) speak for the land and waters;

(b) make decisions about the use and enjoyment of the land and waters;

(c) control the access to, and activities conducted by others on, the land and waters;

(d) control the use and enjoyment of others of the land and waters;

(e) control access of others to the resources of land and waters;

(f) control the use and enjoyment of others of the resources of land and waters; and

(g) maintain and protect places and objects of significance on the land and waters.

B. Over lands and waters where non-exclusive possession may be found:

(b) remain on the land and waters;

(c) take and use the resources of land and waters
(h) maintain and protect places and objects of significance on the land and waters (except as against others);

and the following:

(a) Hunting

(d) Gathering

(f) A cultural or spiritual activity

(h) A teaching activity

The rights and interests at Schedule E are further qualified as follows:

- The applicant claims the benefit of ss.47, 47A and 47B of the *Native Title Act* in relation to parts of the claim area (see Schedule B, Attachment D and Schedule L).
- The applicant does not claim any minerals, petroleum or gas wholly owned by the Crown (Schedule Q).
- The applicant does not claim exclusive possession over any offshore place (Schedule P);

S186 (2)

The Registrar may include in the Register such other details about the claim as the Registrar thinks appropriate.

Map annexed at Schedule C, Annexure C.