National Native Title Tribunal

REGISTRATION TEST
REASONS FOR DECISION

DELEGATE:	Danielle Malek

Application Name:	Wanjina/Wunggurr-Wilinggin # 2
Names of Applicants:	Paddy Neowarra, Paddy Wama, Scotty Martin, Jimmy Maline, Jack Dann, Jack Dale, Keith Nenowatt, Paul Chapman, Reggie Tataya, Donald Campbell, Pansy Nulgit, Betty Walker, Kathy Oreeri, Barney U
Region:	Kimberley
NNTT No.:	WC02/4
Date Application Made:	30 December 2002
Federal Court No.:	W6006/02

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

DECISION

The application is NOT ACCEPTED for registration pursuant to s.190A of the *Native Title Act* 1993 (Cwlth).

31st January 2003

Danielle Malek — Date of Decision

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

Brief History of the Application

This application was filed in the Federal Court, Western Australia District Registry on 30 December 2002 and referred by the Federal Court to the Registrar pursuant to s.63 of the *Native Title Act* 1993 ("the Act") on that date. The area claimed in this application falls entirely within the area claimed in WC99/11, an application which is currently part heard in determination proceedings. Applications WC99/11 and WC95/23 are being heard concurrently in these determination proceedings pursuant to an order of the Federal Court dated 17 December 1999. Final oral submissions in relation to these proceedings are listed for 3 February 2003.

By letter from the applicants' representative, the Kimberley Land Council ("KLC") dated 23 December 2002 I am advised that:

- The claimant group is the same as that in the part-heard proceedings WC99/11 and WC95/23;
- The authorised applicants for this application are identical to those in the part-heard proceedings with the exception of a deceased person [NAME OMITTED];
- The application is made solely for the purpose of seeking to satisfy the requirements of and then rely on the provisions of s.47A of the *Native Title Act* ('NTA') for Pentecost Downs, Durack River and a portion of Home Valley Pastoral Leases currently held by the Indigenous Land Corporation; and
- On 3 February 2003, the KLC will seek to have this application heard together with the part-heard proceedings.

The KLC also advises that it does not seek to have this application registered. Pursuant to s.190A(1) of the Act if the Registrar is given a copy of a claimant application under section 63, as is the case with this application, the Registrar must consider the claim made in the application.

Information considered when making the Decision

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

- The National Native Title Tribunal's registration test and legal files for this application and for application WC99/11 (another application made on behalf of this native title claim group and over part of which this application overlaps);
- The National Native Title Tribunal Geospatial Database;
- The Register of Native Title Claims;
- Schedule of Native Title Applications;
- The Native Title Register;
- Register of Indigenous Land Use Agreements.

Note: Information and materials provided in the mediation of any native title claims made on behalf of this native title group have not been considered in making this decision. 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* (Cth) unless otherwise specified.

A. Procedural Conditions

s.190C(2)

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

The Registrar must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.

Details required in section 61

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

Reasons relating to this sub-condition

In *Risk v NNTT* [2000] FCA 1589, O'Loughlin J commented that:

> "…when applying the registration test the Registrar must consider whether (on the basis of the application and other relevant information) the application has been made on behalf of a 'native title claim group'… An application which is not made on behalf of a native title claim group cannot validly proceed…" at paras [30] – [31].

O'Loughlin J went on to state that:

> "A native title claim group is not established or recognized merely because a group of people (of whatever number) call themselves a native title claim group. It is incumbent on the delegate to satisfy herself that the claimants truly constitute such a group… [T]he task of the delegate included the task of examining and deciding who, in accordance with traditional laws and customs, comprised the native title claim group" at [60].

The native title claim group is described in Schedule A of the application as being those Aboriginal people "who hold *in common* the body of traditional laws and customs derived from beliefs about Wanjina/Wunggurr" (my emphasis). Those people are defined as members of three descent groups, constituted by three (fairly extensive) lists of names of apical ancestors. I note that the names of five of the individuals listed as apical ancestors in the first descent group are repeated (Schedule A, para. (a)). This appears to be no more than an administrative error and does not signify the presence of five ancestors with identical names. A comparison of the claim group description in the current application with the claim group descriptions in other Wanjina application confirms this conclusion.

I note too that membership of the native title claim group includes those who are members by adoption.

The application is accompanied by affidavits from twelve of the fourteen named applicants. Affidavits from applicants [NAME OMITTED] and [NAME OMITTED] have not been filed in the Federal Court, although the Kimberley Land Council (hereafter KLC, legal representative for the applicants) supplied me directly with a facsimile copy of these affidavits. In their affidavits,

the applicants state that they are authorised to make the application and deal with matters which arise in relation to it pursuant to a process of decision making that the persons in the native title claim group have agreed to and adopted. There is nothing in the affidavits to indicate when or how this authority was given; nor does a consideration of the application as a whole provide details of the basis for authorisation. Schedule R of the application notes that the claim is certified and states that a copy of the certificate of the Representative Body accompanies the application. In fact, no such certification document accompanies the application. And while information contained in Schedule F (para. (a)(ii)) suggests that native title rights and interests are vested in members of the claim group by traditional law and custom on the basis of a number of different factors (including descent from ancestors connected to that area), it is difficult to ascertain whether the native title claim group includes all the persons who, according to traditional laws and customs, hold the common or group rights and interests in the area claimed.

A search of the Register and Schedule of Native Title Applications identified four previous native title applications made by Aboriginal people who hold in common the body of laws and customs derived from beliefs about Wanjina/Wunggurr. These are WC95/23 (Ngarinyin), WC99/7 (Dambimangari), WC99/11 (Wanjina/Wunggurr-Wilinggin) and WC99/35 (Uunguu). As noted earlier, the current application falls entirely within the external boundaries of WC99/11, an application which is presently being heard in trial proceedings with WC95/23. With the exception of WC99/7 and the apparent accidental repetition of the five names in the claim group description of WC02/4, the claim group descriptions in these applications are identical. The claim group description in WC99/7 consists of the descendants of a single descent group, identical to the last of the three descent groups listed in WC95/23, WC99/35, WC99/11 and WC02/4. It would appear then that the native title claim group in that application is a subset only of the larger claim group for the current application. At any rate, the claim group description in the present claim is identical with that used in three of the four previous native title applications, and is more inclusive than that used in WC99/7. Additionally, I note that I do not have any information before me which indicates that the group described in Schedule A does not include, or may not include, all the persons who hold native title in the area of the application.

As a result, given the consistency of the claim group description in the current application with previous claims and the absence of adverse information regarding the constitution of the native title claim group, I am satisfied that the application includes all those people who, according to traditional law and customs, hold the common or group rights and interests comprising the particular native title claimed.

Result: **Requirements met**

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

Reasons relating to this sub-condition

The applicants' names are detailed at Part A of the application. The details of address for service appear at Part B of the application.

Result: **Requirements met**

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

Reasons relating to this sub-condition

Schedule A of the application describes the native title claim group. For the reasons which led to my conclusion (below) that the requirements for s.190B(3) have been met, I am satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Result: **Requirements met**

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

Reasons relating to this sub-condition

s.61(5)(a)

The application is in the form prescribed by Regulation 5(1)(a) *Native Title (Federal Court) Regulations 1998*.

s.61(5)(b)

The application was filed in the Federal Court as required pursuant to s.61(5)(b).

s.61(5)(c)

The application meets the requirements of s.61(5)(c) and contains all information prescribed in s.62. I refer to my reasons in relation to s.62 below.

s.61(5)(d)

The application must be accompanied by the prescribed documents, being affidavits prescribed by s.62(1)(a) and a map as prescribed by s.62(1)(b). The application contains a map of the claim area at Attachment C.

Affidavits for twelve of the fourteen applicants accompany the application. Affidavits from two of the named applicants do not accompany the application. Although these two affidavits have since been provided to the Registrar, they have not been filed with the Federal Court, and cannot be considered to accompany the application as a prescribed document per s.61(5)(d).

See also my reasons for decision under s.62(1)(a) and (b) below.

Result: **Requirements not met**

Details required in section 62(1)

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

Reasons relating to this sub-condition

Pursuant to s.62(1)(a), a claimant application must be accompanied by an affidavit sworn by each of the applicants and which addresses the five criteria set out in subparas. (i) to (v) of that section. Affidavits sworn by twelve of the fourteen named applicants were filed with the application. Affidavits were not filed for [NAME OMITTED] or [NAME OMITTED]. On 23 January 2003 the Kimberley Land Council provided the Registrar with a copy of the sworn affidavits of [NAME OMITTED] and [NAME OMITTED]. However, as these affidavits have not been filed with the Federal Court, they cannot be considered to accompany the application as required by s. 61(5). To meet the formal requirements of s.61 and s.62, affidavits must be filed with the application; it is insufficient that such affidavits are provided directly to the Registrar (or his delegate) by way of additional information: *State of Queensland v Hutchison* (2001) 108 FCR 575. In light of this, I will only consider the affidavits of [NAMES OMITTED].

Each of these affidavits is two pages in length and is signed, dated, and competently witnessed on the second page. None of the affidavits is dated or numbered on the first page, but all affidavits (bar those of [NAME OMITTED], [NAME OMITTED] and [NAME OMITTED]) bear the initials of the deponent or the witness on the first page. Order 14 subrule 2(2C) of the *Federal Court Rules* requires that the full name of the deponent and the date on which the affidavit was sworn must appear on the first visible page of an affidavit. Order 14 subrule 6 requires that each page of an affidavit shall be signed by the deponent and by the person before whom it is sworn. However, Order 14 rule 5 of the Rules allows for the filing of affidavits which are irregular in form and provides that irregular affidavits may be 'used' in any proceedings notwithstanding any irregularity if the Court grants leave. For this reason, it is my view that the Registrar (or his delegate) can accept the affidavits notwithstanding their irregularities in form for the purposes of the registration test.

That said, I note that each of the twelve affidavits contains statements that satisfactorily address the matters required by s.62(1)(a)(i)-(iii) and (iv). In para. 4 of each affidavit, the applicants depose to being authorised to make and deal with matters arising in relation to the application. I note that the deponents do not state that they are authorised by *all* the persons in the native title claim group pursuant to the requirements of s.62(1)(a)(iv). In *Quall v Risk* [2001] FCA 378, O'Loughlin J noted that a literal reading of this section of the Act is problematic and that it could not mean that every individual in the native title claim group must authorise a claim. In *Risk v National Native Title Tribunal* [2000] FCA 1589, O'Loughlin had said that authorisation must come from all the persons who hold the common or group rights and interests in the area claimed according to traditional laws and custom, but this did not mean that the applicant had to be individually authorised to make the claim; rather authorisation must be in accordance with a process of decision-making recognised under the traditional laws and customs of the claimant group. In *Moran v Minister for Land and Water Conservation for NSW* [1999] FCA 1637 Wilcox J accepted that the requirement for authorisation by the claim group:

> "may be satisfied otherwise than by proving the making of individual decisions by all or most of the members of the group; it would be enough if there was a decision by a representative or other collective body, that exercises authority on behalf of the group under customary law" at [34].

On the basis of these judicial comments and the ability of applicants under s. 251B(b) of the Act to be authorised by way of an agreed and adopted decision making process, a process the applicants assert has given them the authority to make and deal with the application, I am satisfied that the twelve accompanying affidavits satisfactorily address the requirement of s.62(1)(a)(iv). The basis for this authorisation (pursuant to the requirements for s.61(1)(a)(v)) is said to be a decision "pursuant to the process of decision-making that the persons in the native title claim group have also agreed to and adopted" in relation to matters of this kind.

Nevertheless, as the application is not accompanied by affidavits from [NAME OMITTED] or [NAME OMITTED] which depose to the information set out in s.62(1)(a), I am not satisfied that the requirements of this section have been met.

Result: Requirements not met

s.62(1)(b) Contains the details specified in subsection (2)

See my reasons for decision under s.62(2)(a) – (h) below.

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

Comment on details provided

Schedule M contains a statement that at least one member of the claimant group has a traditional physical connection to the claim area. Schedule M does not contain any details of that traditional physical connection. The provision of this information is not mandatory.

Result: Not provided

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

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

Reasons relating to this sub-condition

For the reasons which led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the information and maps in the application are sufficient to enable the area covered by the application to be identified.

Result: Requirements met

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

Reasons relating to this sub-condition

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

Result: Requirements met

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

Reasons relating to this sub-condition

A map that shows the external boundaries of the claim area is found at Attachment C. For the reasons that led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the map contained in the application shows the external boundaries of the claim area.

Result: Requirements met

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

Reasons relating to this sub-condition

No details/results of searches are contained in the application. At Schedule D, the applicants state:

> "that complete tenure history searches of the areas covered by the application have been undertaken by the State of Western Australia, tendered by the State of Western Australia in and received in evidence in, Federal Court proceeding WAG6016 of 1996 and WAG6015 of 1999 as part of the tenure history material marked Exhibit U in the proceeding."

From documents contained in the legal files for WC99/11 and as noted in my consideration of s.190B(2), I am aware that this information was to have been provided to the Applicants in the course of the trial proceedings for WC99/11 and WC95/23 in October 2000. It is not clear from the material when this information was provided to the Applicants although it would appear from the document entitled "First Respondents Statement of Issues, Facts and Contentions Regarding Extinguishment", provided to the Tribunal on 30 January 2001 in relation to the WC99/11 and WC95/23 trial proceedings that the State filed its tenure documents in the Federal Court on 17 November 2000. As final oral submissions for these proceedings are scheduled to commence on 3 February 2003 it is not unreasonable to assume that the applicants had a copy of or access to the complete tenure history searches referred to in Schedule D at the time this application was made. There is nothing in the application to explain why this information does not accompany the application; nor does the application contain "details and results" of the searches undertaken by the State Government and provided to the applicants. The Applicants have provided as part of Attachment C a copy of three land tenure maps showing each of the pastoral leases that comprise the area claimed in the application, but these maps do not provide details and results of the complete tenure history searches described in the application. This issue was raised with the applicants in a preliminary assessment of the application dated 22 January 2003, and the applicants advised that the provision of material satisfying the requirements of this section must form part of the application and cannot be provided by way of further information. The KLC has since indicated that the applicants do not intend to amend the application (e-mail to case manager dated 23 January 2003), but seek instead to have the current application joined with those proceedings currently before the Court in the matters of WC99/11 and WC95/23.

Consequently, I am of the view that requirements of disclosure in s.62(2)(c) are not met.

Result: Requirements not met

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

Reasons relating to this sub-condition

A description of the claimed native title rights and interests is contained in Schedule E. The description does not merely consist of a statement to the effect that the native title rights and interests are all the native title rights and interests that may exist, or that have not been extinguished at law. For the reasons given in my conclusion that the applicants have met the requirements of s.190B(4), I am also satisfied that the requirements of this section are met.

Result: Requirements met

s.62(2)(e) 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 their predecessors had, an association with the area;

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

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

Reasons relating to this sub-condition

The decision in *Queensland v Hutchison* [2001] FCA 416 at [25] is authority for the proposition that only material that is part of the application can be relied on in support of this requirement. A general description of the factual basis on which it is asserted that the native title claim group has, and their predecessors had, an association with the area is contained in Schedules F and G. The requirement of this sub-condition will not be met by a mere recitation of the provision of the Act. However, when assessing an application against the procedural requirements of the registration test I am of the view that French J's comments in *WA v Strickland* (2000) 99 FCR 33 are particularly relevant, namely that the registration test is administrative in character and that the adequacy of information provided in the application should be determined accordingly [52]. Moreover, as his Honour observed in *Strickland*, and as the Court has previously noted, the provisions of the Act should be construed beneficially: [55].

I have taken these comments into account when reaching my conclusions on whether the applicants have met the requirements of these sub-conditions.

s.62(2)(e)(i)

In Schedule F of the application the applicants state that the native title claim group and their ancestors at and since the time of British sovereignty have possessed, occupied, used and enjoyed the claim area. At Schedule G, the applicants state that members of the native title claim group have continuously carried out activities on the land and waters within the claim area and have possessed, occupied, used and enjoyed the area including by way of living and building structures and establishing and maintaining communities. The applicants describe a number of activities carried out by members of the native title claim group on the area claimed, including camping, hunting, gathering and fishing, taking and using resources of the area, conducting and taking part

in ceremonies, visiting and protecting sites and passing on knowledge of the country and of the traditional law and custom.

I am satisfied that the information contained in Schedules F and G together provides a general description of the factual basis on which the native title claim group have, and their predecessors had, an association with the area.

s.62(2)(e)(ii)

In Schedule F of the application the applicants state that the claimants' possession, occupation, use and enjoyment of the claim area is and has been pursuant to and under the traditional laws and customs of the claim group, and is comprised of rights and interests in the land and waters which the traditional laws and customs vest in members of the native title claim group on the basis of:

- descent from ancestors connected to that area;
- conception in the area;
- birth in the area;
- traditional religious affiliations to and knowledge of and responsibility for the area;
- traditional knowledge of the geography of the area;
- traditional knowledge of the resources of the area;
- knowledge of traditional ceremonies of the area.

On the basis of these traditional laws and customs, the native title claim group claims a continuing connection with the land and waters of the subject area. Furthermore, at Schedule G, the applicants state that members of the native title claim group have continuously carried out a range of activities, including passing on the knowledge of the country and of the traditional law and custom in accordance with custom and tradition.

I am of the view that Schedules F and G of the application provide a general description of the factual basis on which traditional laws and customs exist that give rise to the claimed native title.

s.62(2)(e)(iii)

The material in Schedules F and G of the application already referred to above supports the assertion that the native title claim group has continued to hold the native title in accordance with traditional laws and customs. Refer to my reasons under s.62(2)(e)(ii) above.

Conclusion

A general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and for the particular assertions in sub-paragraphs (i), (ii) and (iii) is found in Schedules F and G of the application. As a result, I am satisfied that the requirements of s.62(2)(e) are met.

Result: Requirements met

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

Reasons relating to this sub-condition

Details of activities carried on by the native title claim group are contained in the application at Schedule G.

Result: **Requirements met**

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

Reasons relating to this sub-condition

At Schedule H, the applicants state that they are aware of an application to the Federal Court that has been made in relation to the whole of area covered by this application and that seeks a determination of native title or compensation in relation to native title. The applicants identify that application as being WAG6015 of 1999. An expert geospatial assessment prepared by the Tribunal's Geospatial Unit (dated 20 January 2003) confirms that one claimant application falls within the external boundary of this application and identifies that application as being W6015/99 Wanjina/Wunggurr-Wilinggin (i.e., the same application as that identified by the applicants).

Result: **Requirements met**

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

Reasons relating to this sub-condition

The applicants refer in Schedule I to six notices issued pursuant to section 29 of the *Native Title Act* 1993. The Geospatial assessment prepared by the Tribunal's Geospatial Unit dated 20 January 2003 identifies 26 section 29 or equivalent notices that fall within the external boundaries of this application. The six notices identified by applicants do not appear in the list of notices identified by the Tribunal's Geospatial Unit. Further investigation of this discrepancy suggests that two of the notices, E04/1119 and E80/2410 relate to the claim area of both WC99/11 and WC95/23; in any case, that none of the six notices listed in Schedule I do, in fact, overlap with the subject area of the current application. That said, as there is no information before me to indicate that the applicants were aware of the details of the 26 s.29 notices when the application was made, I am satisfied that the application meets this condition of the registration test.

Result: **Requirements met**

Reasons for Decision under s. 190C(2):

For the reasons identified above, I am not satisfied that the application meets the requirements of this condition.

Aggregate Result: **Requirements not met**

s.190C(3)

Common claimants in overlapping claims:

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

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

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

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

Reasons for the Decision

This application was filed in the Federal Court on 30 December 2002. For the purposes of s.190C(3)(b), the application is taken to have been "made" on that date.

A search of the Tribunal's Geospatial Database and Register of Native Title Claims reveals that there is one previous application that covers the whole of the claim area, WAG6015 of 1999 Wanjina/Wunggurr-Wilinggin. This was confirmed by an expert geospatial assessment prepared by the Tribunal's Geospatial Unit dated 20 January 2003. The Register of Native Title Claims indicates that this previous overlapping application was made on 10 June 1999 and was entered on the Register of Native Title Claims on 9 July 1999 following consideration of the application under section 190A of the *Native Title Act* 1993. As indicated by the discussion under my reasons for decision for s.61(1), the claim group descriptions for these two applications, apart from some minor discrepancies, are identical. As a result, I am not satisfied that there are no persons included in the native title claim group for the current application who are members of the native title claim group for the previous application. It follows that I am not satisfied that the conditions of s.190C(3) are met.

Result: Requirements not met

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

Certification and authorisation:

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

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

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

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

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

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

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

Reasons for the Decision

Information contained at Schedule R of the application indicates that the application has been certified by a Representative Body, and that the certificate of the Representative Body would be provided to the Registrar at a later date. This certificate has not been provided to the Registrar; an e-mail from the Kimberley Land Council (dated 22 January 2003) indicated that the KLC would not be providing any further information with respect to the registration testing of the current application. That being so, the application cannot be regarded as certified and, I must consider whether I am satisfied that the application is one which is properly authorised (s.190C(4)(b)). Proper authorisation of a claimant application is a fundamental requirement of the Act,[1] and all claimant applications, whether they purport to satisfy s.190C(4)(a) or s.190C(4)(b) of the Act must be properly authorised.

Section 190C(4)(b) requires the Registrar (or his delegate) to be satisfied that:

(i) the applicant is a member of the native title claim group;

(ii) the applicant is authorised to make the application and deal with matters arising in relation to it by all other persons in the claim group.

(i) the applicant is a member of the native title claim group

A fundamental difficulty with the current application is the absence of supporting factual material in or accompanying the application. Legal representatives for the applicants (KLC) have indicated, as explained previously, that they intend to have the application heard together with other proceedings on foot, and do not seek to have the application registered (letter to Tribunal dated 23 December 2002). To this end, the KLC has indicated that no further material will be provided to the Registrar pursuant to s.190A(3) of the *NTA*.

The applicants do not depose to be members of the native title claim group in their affidavits; nor are there statements elsewhere in the application to this effect.

A review of materials on related Tribunal files revealed copies of the following documents: 'Statement of [NAME OMITTED], 'Statement of [NAME OMITTED]' and 'Statement of [NAME OMITTED]'. A letter from the KLC on the same file accompanies these statements and indicates that they are copies of witness statements provided to the Federal Court for trial proceedings in relation to WC95/23 and WC99/11 (previous applications filed by the claimant group). The documents were provided to the Registrar on 16 November 2000. They are undated, and unsigned, and there is nothing on the face of the documents or elsewhere to indicate to me the particular circumstances in which these documents were provided to the Registrar. Although s190A(3) enables the Registrar to have regard to such other information as he or she considers appropriate, given the obvious limitations of the documents, I am of the view that the 'witness

[1] *Strickland (on behalf of the Maduwongga People) v Native Title Registrar* (1999) 168 ALR 242; *Moran v Minister for Land and Water Conservation for the State of NSW* [1999] FCA 1637, per Wilcox J; *Ward v Native Title Registrar* [1999] FCA 1732, per Carr J; *Western Australia v Strickland* (2000) 99 FCR 33; *Risk v NNTT* [2000] FCA 1589.

statements' have limited evidentiary weight in the current matter. At any rate, while the statements support the idea that [NAME OMITTED], [NAME OMITTED] and [NAME OMITTED] are members of the Wanjina/Wunggurr-Wilinggin native title claim group, they do not confirm whether or not other applicants in the current application are members of the native title claim group; nor do the statements provide information which would enable me to be satisfied that the application is properly authorised.

In addition to the statements mentioned above I note that material in the Registration Test file for WC99/11 indicates that affidavits sworn by applicants [NAME OMITTED], [NAME OMITTED], [NAME OMITTED] and [NAME OMITTED] were provided to the Registrar for the purposes of the consideration of the registration test against that application. Unsworn copies of these affidavits were also provided to the Registrar, but these documents are clearly marked by way of the covering letter as 'confidential' and unable to be considered for any other purpose. It is likely that some or all of the sworn affidavits would have contained information relevant to this section of the registration test. However, these affidavits appear to be no longer in the possession of the Registrar. It is probable that, like their unsworn copies, they were provided to the Registrar in confidence for the purposes of the registration test and that following the application of that test the affidavits were returned to the applicants or destroyed.

On the basis of the material I have before me I am not satisfied that the fourteen applicants are members of the native title claim group.

(ii) the applicant is authorised to make the application and deal with matters arising in relation to it by all other persons in the claim group.

Section 190C(5) further requires that the Registrar cannot be satisfied that the condition in subsection (4) has been met unless the application includes a statement to the effect that the requirements in s. 190C(4)(b) are met; and briefly sets out the grounds on which the Registrar should consider that the requirements of s. 190C(4)(b) are met.

At s.251B, the Act recognises that the applicants may be authorised using a decision-making process that is either:

(a) under traditional laws and customs of the group; or

(b) agreed to and adopted by the native title claim group.

In the twelve affidavits which accompany the application, the applicants depose that they are authorised to make the application and to deal with matters arising in relation to it. The method used to secure this authorisation is said to be a process of decision-making that the native title claim group has agreed to and adopted in relation to doing things of this kind.

In *Strickland*, French J held the insertion of the word 'briefly' in s. 190C(5)(b) suggested that the legislature was not concerned to require any detailed explanation of the process by which authorisation was obtained but the sufficiency of the statement is primarily a matter for the Registrar. In determining whether or not the evidence of authorisation is sufficient, the Registrar is not confined to considering the information in the application and any accompanying affidavit. His Honour emphasised that the authorisation question is a matter of considerable importance and mere formulaic statements would be insufficient. This aspect of the decision by French J was upheld by the Full Federal Court in *Western Australia v Strickland* (2000) 99 FCR 33.

The application does not contain a statement that the requirements in s. 190C(4)(b) are met. The applicants have not provided any detail of the process of authorisation, how that process of

decision-making was agreed upon by the members of the claimant group or any information that might form the factual basis supporting the assertion that this process has been followed. As I have noted previously, the applicants were provided with an opportunity to provide additional material in support of this and other conditions of the registration test, but indicated that no further information would be provided.

Consequently, I am not satisfied that the application is properly authorised.

Result: Requirements not met

B. Merits Conditions

s.190B(2)

Description of the areas claimed:

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

Reasons for the Decision

Written Description and Map of External Boundaries

Attachment B contains a written description of the external boundary of the claim area. This area is further defined in Attachment B by a series of geographic co-ordinates.

A map of the claim area, prepared by the Land Claims Mapping Unit of the Western Australian State Government's Department of Land Administration ("LCMU") and dated 6 August 2001, is contained in Attachment C. The area covered by the application is hachured on the map. The map includes background land tenure and cadastre, scale bar, north point, coordinate grid tenure legend, a locality map and GDA94 datum reference. Accompanying the application and referenced in Schedule L are three maps also produced by LCMU and dated 28 April 2000. Two of these maps depict pastoral leases that comprise the claim area of this application, 3114/648 Durack River and 3114/918 Pentecost Downs. The maps are also identified by area number. Schedule L refers to Areas 14, 26 and 76. Area 14 is noted on one of the maps as being pastoral lease 3114/918 Pentecost Downs. Area 26 is noted on the map as being pastoral lease 3114/648 Durack River. The third map that is referenced in Schedule L is noted as being Area 76 but the third map provided with the application is noted as being in relation to Area 16 and providing an outline of pastoral lease 3114/1180. As Home Valley is pastoral lease 3114/962 it seems likely that the map for Area 16 has been provided in error and should be a map for Area 76. These maps are additional to Attachment C and do not impact on the assessment of the written description and map of the external boundaries.

The expert assessment prepared by the Tribunal's Geospatial Unit dated 20 January 2003 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 external boundaries of the claim area. It follows that I am also satisfied that the physical description of the external boundaries meets the requirements of s.62(2)(a)(i) and that

the map shows the boundaries of the claim area in compliance with the requirements of s.62(2)(c).

Internal Boundaries

The internal boundaries are described in Schedule B to the application. Schedule B provides information identifying the internal boundaries of the claimed area by way of a formula that excludes a variety of tenure classes from the claim area.

Areas that are excluded from the claim area are set out in paragraphs (a) and (b) of that Schedule as follows: "

(a) The Applicants exclude from the claim any areas covered by valid acts which occurred on or before 23 December 1996 comprising such acts within the *Native Title Act* 1993, as amended, or *Titles Validation Act* 1994, as amended, at the time of the Registrar's consideration:

(i) Category A past acts as defined in NTA s.228 and s.229;

(ii) Category A intermediate acts as defined in NTA s.232A and s.232B

(b) The Applicants exclude from the claim area any areas in which a previous exclusive possession act, as defined in section 23B of the NTA, was done in relation to an area, and, either the act was attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in section 23E in relation to the act.

(c) The Applicants exclude from the claim areas in relation to which native title rights and interests have otherwise been extinguished.

To avoid any uncertainty the Applicants particularly exclude all:

(i) acts for a public work

(ii) dedicated roads

(iii) grants of unqualified freehold."

I also note that while the applicants have excluded some particular classes of areas where native title has been extinguished, they have not excluded others, for example reserves vested under s.33 of the *Land Act* 1933 (WA), other than Aboriginal reserves. I am of the view that this omission is rectified by the general exclusion clause at (c) of Schedule B which states that the Applicants exclude from the claim areas in relation to which native title rights and interests have otherwise been extinguished.

The applicants have chosen to define the internal boundaries of their claim by what are known as class or formula exclusions. *Daniels v Western Australia* [1999] FCA 686 (*"Daniels"*) is authority for the proposition that the acceptability of class or formula exclusions will depend upon the state of knowledge of the claimants of the tenure in the claim area at the date the application is made. In *Dieri v 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.

At Schedule D of the application, the applicants state that complete tenure history searches of the areas covered by the application have been undertaken by the State of Western Australia, tendered by the State of Western Australia in and received in evidence in Federal Court proceeding WAG6016 of 1996 and WAG6015 of 1999 as part of the tenure history material marked as Exhibit U in the proceeding. This application falls entirely within the claim area of WAG6015 of 1999. Trial proceedings in WAG6016 of 1996 and WAG6015 of 1999 are well advanced and closing submissions scheduled to commence on 3 February 2003. I am aware that Federal Court orders dated 16 February 2000 required the following action with respect to tenure information:

- The State of Western Australia was to file and serve an index of current and historical land and mining tenure documentation upon which it intends to rely on the Applicants on or before 13 October 2000, and serve on the Applicants a copy of those documents (Order 3);
- The applicants were to have served on the respondents a notice in respect of each index of tenure documents served upon them setting out which of the documents could be tendered and admitted as proof of its contents and which of the documents would be objected and the ground of objection in each case on or before 19 January 2001 (Order 5).

This process clearly involved detailed consideration of the current and historical tenure of the application area for WC99/11, over part of which this application in its entirety sits. It would appear from the document entitled "First Respondents Statement of Issues, Facts and Contentions Regarding Extinguishment", provided to the Tribunal on 30 January 2001 in relation to the WC99/11 and WC95/23 trial proceedings that the State filed its tenure documents in the Federal Court on 17 November 2000. These tenure documents are stated to comprise 11 volumes. Although there is nothing which expressly states it in the material before me, it would seem that the applicants have had in their possession detailed land tenure information or access to such information for a period of approximately two years. Given that the application area is defined relatively simply as the entirety of two pastoral leases and a portion of a third lease, and that the applicants have had access to tenure data for some time, it is certainly arguable that the applicants might reasonably have been expected to use this information to particularise areas excluded from the application.

It is not clear, however, that the applicants have agreed that any of the documents provided by the State could be tendered and admitted as proof of its contents, or that there may not yet be questions about the validity of grants of tenure as indicated by the documents. This then raises the question as to whether it is reasonable to require the applicants to particularise areas excluded from the application on the basis of tenure submissions in the "First Respondents Statement of Issues, Facts and Contentions Regarding Extinguishment".

In relation to this question 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 *Strickland*, 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].

In light of the above comments, I am satisfied that the class exclusion clauses used by the applicants at Schedule B amount to information that enables the internal boundaries of the application area to be identified with reasonable certainty.

The requirements of s.62(2)(a), s.62(2)(b) and s.190B(2) are met.

Result: Requirements met

s.190B(3)

Identification of the native title claim group:

The Registrar must be satisfied that:

(a) the persons in the native title claim group are named in the application; or

(b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Reasons for the Decision

An exhaustive list of names of the persons in the native title claim group has not been provided. The requirements of s.190B(3)(a) are therefore not met. It is therefore necessary to consider if the application meets the requirements of s.190B(3)(b). In order to meet this condition of the registration test, the description of the group must be sufficiently clear so that it can be ascertained whether any particular person is a member of the native title claim group.

Schedule A provides that the persons in the native title claim group are descendants of a list of named ancestors. These ancestors have been divided into three groups. Two of these groups name individuals who are included in the native title claim group by way of adoption.

In *State of Western Australia v Native Title Registrar* [1999] FCA 1591-1594, Carr J said that "[i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently….The Act is clearly remedial in character and should be construed beneficially." I note that a description of the native title claim group in terms of named apical ancestors and their descendants is acceptable under s.190B(3)(b), even though these descendants are not always named, and some factual inquiry would need to be made in these instances to determine if any one person is a member of the group. I note too that membership of the native title claim group includes those who are members by adoption. Although the application does not contain an account of the processes of adoption used by the group, it names those individuals who are considered to be members of the native title claim group. These adoptions do not, in my view, widen the claim group beyond those individuals descended from named apical ancestors, I am satisfied that it is capable of certain application. In *Ward v Native Title Registrar* [1999] FCA 1732, Carr J remarked [at 67] that: "It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently."

I am satisfied that the descendants of the named ancestors could be identified with minimal inquiry, and as such, ascertained as part of the native title claim group. By referencing the identification of members of the native title claim group as descendants of named ancestors, it is possible to objectively verify the identity of members of the native title claim group such that it can be clearly ascertained whether any particular person is in the group.

The requirements of s.190B(3)(b) are satisfied.

Result: Requirements met

s.190B(4)

Identification of claimed native title:

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

Reasons for the Decision:

Rights and interests claimed

At Schedule E of the application the applicants claim the right at paragraphs 1 (a) and (b) to "the possession, occupation, use and enjoyment to the exclusion of all others (subject to any native title rights and interests which may be shared with any others who establish that they are native title holders) of the claim area; and in the alternative against the whole world, the right to enter, remain on use and enjoy the claim area for all purposes deemed relevant by the native title claim group."

Further to these general rights the applicants claim particular rights, some of which might be thought to derive from the core right of possession, use, enjoyment, and occupation of the land and waters of the claim area, but which are expressed as independent rights and interests. These rights are listed in paragraph 1(c) of Schedule E as a set of twenty-two itemised rights and interests (marked para. (i)-(xxii)) as follows:

(i) rights and interests to possess, occupy, use and enjoy the claim area;

(ii) the right to assert valid proprietary claims over and speak authoritatively for, on behalf of and about, the claim area;

(iii) the right to make decisions about the use and enjoyment of the claim area;

(iv) the right of access to the claim area;

(v) the right to control the access of others to the claim area;

(vi) the right to use and enjoy the resources of the claim area;

(vii) the right to control the use and enjoyment of others of resources of the claim area;

(viii) the right to trade in resources of the claim area;

(ix) the right to receive a portion of the benefit of any resources taken by others from the claim area;

(x) the right to maintain and protect places of importance under traditional laws, customs and practices in the claim area.

(xi) The right to maintain, protect and prevent the misuse of cultural knowledge of the native title claim group in relation to the land and waters of the claim area;

(xii) The right to uphold and enforce the traditional laws and customs of the *Wanjina-Wunggurr* community in relation to the land and waters of the claim area;

(xiii) As between members of the *Wanjina-Wunggurr* community and as against other Aboriginal people the right to resolve disputes concerning the claim area;

(xiv) The right to recognise or determine as between members of the *Wanjina-Wunggurr* community what is the form of connection or relationship of a particular member of the *Wanjina-Wunggurr* community to particular parts of the claim area and what are the particular rights and interests that arise from that particular form of connection or relationship;

(xv) As against the whole world, the right of possession of painted images on rock surfaces within the claim area, in particular in relation to but not limited to painted images known as or referred to by the claimants as *Wanjina* images and *Gwion* images and images associated with those images, and in the alternative rights of access to, rights to make decisions in relation to, rights to paint, freshen and repaint, those painted images.

(xvi) As against the whole world, the right to enter, remain on and use the land or waters adjacent to such images for the purpose of or incidental to the rights set out in paragraph (xiv) above;

(xvii) The right to belong to or be from the claim area;

(xviii) The right to speak for the claim area;

(xix) The right to represent the *Wanjina* in relation to the land and waters of the claim area;

(xx) The right to look after the land and waters of the claim area;

(xxi) The right to inherit the native title rights and interests in the land and waters of the claim area;

(xxii) The right to engage in the activities set out in Schedule G.

At Schedule L, the applicants claim the benefit of s.47 and 47A in relation to the land and waters covered by pastoral leases 3114/918 Pentecost Downs, 3114/648 Durack River and so much of pastoral lease 3114/962 Home Valley as lies within the external boundaries of the claims made in the native title determination claimants applications the subject of Federal Court proceeding WAG6016 of 1996 and WAG6015 of 1999.

At paragraph 2 of Schedule E, the applicants state that the claims made in paragraph 1 of this Schedule are subject to the following:

(a) to the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the Applicants;

(b) to the extent that the native title rights and interests claimed relate to waters in an offshore place, those rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under international law in relation to the whole or any part of the offshore place;

(c) except to the extent that the provisions of section 47, 47A or 47B of the NTA apply to a part of the area contained within this application the Applicants do not make a claim to native title rights and interests which confer possession, occupation, use and enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in section 23F of the NTA, was done in relation to an area, and, either the act was attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision for that act as described in section 23E NTA 1993.

(d) Such of the provisions of section 47, 47A and 47B of the Act as apply to any part of the area contained within this application, particulars of which include such areas as may be listed in Schedule L.

(e) except to the extent that the provisions of section 47, 47A or 47B of the NTA apply to a part of the area contained within this application the said native title rights and interests are not claimed to the exclusion of any other rights or interests validly created by or pursuant to the common law, a law of the State or a law of the Commonwealth.

I understand these statements to mean that where the applicants claim the benefit of ss.47, 47A or 47B, the rights and interests in Schedule E are claimed exclusively; in all other areas, the rights and interests in Schedule E are claimed non-exclusively (i.e., subject to other interests). As I have noted in the brief history of this application the applicants make this application solely for the purpose of seeking to have the application heard together with other proceedings on foot. It is not the intention of the applicants that the application is registered (letter to Tribunal, dated 23 December 2002).

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 the condition, then, only the description contained in the application can be considered.[2]

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.

Furthermore, the phrases 'native title' and 'native title rights and interests' are used to exclude 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:

[2] *Queensland v Hutchinson* (2001) 108 FCR 575.

(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 or waters; and

(c) the rights and interests are recognised by the common law of Australia'.

Some interests which may be claimed in an application may not be native title rights and interests and are not 'readily identifiable' for the purposes of s.190B(4). These are rights and interests which the courts have found to fall outside the scope of s.223. Rights which are not readily identifiable include the rights to control the use of cultural knowledge that goes beyond the right to control access to lands and waters,[3] rights to minerals and petroleum under relevant State legislation,[4] an exclusive right to fish offshore or in tidal waters, and any native title right to exclusive possession offshore or in tidal waters.[5]

I have considered the description of native title rights and interests in the present application in light of previous judicial findings. In *Ward*, the High Court confirmed that a right to protect and prevent the misuse of cultural knowledge does not amount to a right in the land or waters and is not therefore a right or interest which is readily identifiable: [64]. Their Honours considered that "recognition" of such a right went beyond denial or control of access to land and would involve, for instance, the restraint of visual or auditory reproductions of what was to be found, or what was to take place there. They stated:

> "However, it is apparent that what is asserted goes beyond [a right to control access] to something approaching an incorporeal right akin to a new species of intellectual property…[t]he 'recognition' of this right would extend beyond denial or right of access to land held under native title…It is here that the second and fatal difficulty appears" at [59].

In the current application the applicants claim the right at paragraph 1(c)(xi) 'to maintain, protect, prevent the misuse of cultural knowledge of the native title claim group in relation to the land and waters of the claim area'. The phrasing of the right at (xi) is similar to that of the right disallowed by *Ward*, with the addition of the phrase ' in relation to the land and waters of the claim area'. In my view the addition of this phrase does not address the difficulty referred to by their Honours; what is asserted may still go beyond a right to control access to land and waters. As a result, I am of the opinion that the right claimed at (xi) is not readily identifiable for the purposes of s.190B(4).

At paragraph 1(c)(xv) the applicants claim, *inter alia*, the right as against the whole world, to "possession of painted images on rock surfaces within the claim area", (as per the right at (xv)). I am of the view that insofar as the right relates to the possession of painted images, it cannot be distinguished from that right disallowed by *Ward*, and is not 'readily identifiable.' I note that the remaining claim in para. (xv) seeks "in the alternative rights of access to, rights to control the access of others to, rights to make decisions in relation to, and rights to paint, freshen and repaint, those painted images". This right is concerned intimately with issues of controlling access to and use of the rock surfaces and to that extent is not an incorporeal right but a right in relation to lands

[3] *Western Australia v Ward* (2002) 191 ALR 1, para [59]
[4] *Western Australia v Ward*, paras [383] and [384]; *Wik v Queensland* (1996) 63 FCR 450 at 501-504; 134 ALR 637 at 686-688.
[5] *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 144-145.

and waters within the meaning of s223(1)(c). It is therefore a right which is 'readily identifiable 'as a native title right and interest for the purposes of s.190B(4).

I am satisfied that the remaining rights and interests claimed in Schedule E are readily identifiable for the purposes of s.190B(4).

Result: Requirements met

s.190B(5)

Sufficient factual basis:

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

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

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

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

Reasons for the Decision

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).

In a preliminary assessment of the current application (dated 22 January 2002), the applicants were informed that although there was some information in Schedules F and G which supported the assertions set out in s.190B(5), this information was limited and insufficient to provide a factual basis to support the assertions there that the native title rights and interests claimed exist. The KLC subsequently informed the Tribunal that no further information would be provided to the Registrar in satisfaction of this or other conditions of the registration test, and that the applicants were not seeking registration of the claim.

For satisfaction 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 [23]. Regard will be had to the application as a whole; and, subject to s.190A(3), regard will also be had to relevant information that is not contained in the application. I have noted earlier in my reasons for decision that I have reviewed other files held by the Registrar relevant to the current application, and that the Registrar is in receipt of the following documents: 'Statement of [NAME OMITTED]', 'Statement of [NAME OMITTED]' and 'Statement of [NAME OMITTED]'. A letter from the KLC on that same file accompanies these statements and indicates that they are copies of witness statements provided to the Federal Court for trial proceedings in relation to WC95/23 and WC99/11 (previous applications filed by the claimant group), provided to the

Registrar on 16 November 2000. They are undated, and unsigned, and there is nothing on the face of the documents or elsewhere to indicate to me the particular circumstances in which these documents were provided to the Registrar. Affidavits sworn by applicants [NAME OMITTED], [NAME OMITTED], [NAME OMITTED] and [NAME OMITTED] were provided to the Registrar for the purposes of the consideration of the registration test against WC99/11; and unsworn copies of these affidavits were provided to the Registrar (these documents are clearly marked as confidential and not to be considered for any purpose other than in relation to the registration of that claim). The 'witness statements' and affidavits contain detailed information which would go to support the assertions in s.190B(5) that the native title rights and interests claimed exist. However, for the reasons set out earlier in relation to the requirements of s.190C(4), I am of the view that these 'witness statements' and related materials have limited evidentiary weight in the current matter. Ordinarily, it would be Tribunal practice to make enquiries of the applicant as to the circumstances which surround the witness statements and whether the applicants consented to use confidential affidavits provided for another purpose for the satisfaction of the registration test conditions for the current matter. However, as the applicant has indicated that no further information will be provided to the Tribunal in relation to this matter and as the application is unable to be registered for failure to satisfy other conditions of the test (for example, under s.190C(3)), I am of the view that it is not appropriate to have recourse to this material in my consideration of s.190B(5).

That said, the only material I have before me which addresses the requirements of s.190B(5) is contained in Schedules F and G of the application. The information contained in Schedule F is brief and while it amounts to more than a mere repetition of the assertions in s.62(2)(e) and s.190B(5), it does not satisfactorily disclose a factual basis for the claimed native title rights and interests. Schedule G contains a list of activities on the lands and waters of the claim area which the applicants assert the native title claim group has carried out in furtherance of their claimed right to possess, occupy, use and enjoy the area.

However, for the reasons discussed above, I am not satisfied that the information in the application provides a factual basis sufficient to support the existence of the native title rights and interests listed at Schedule E of the application so as to comply with the requirements of s.190B(5)(a), (b) and (c).

Result: **Requirements not met**

s.190B(6)

Prima facie case:

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

Reasons for the Decision

Under s.190B(6) I must consider that, *prima facie*, at least some of the native title rights and interests claimed by the native title group can be established. The Registrar takes the view that this requires only one right or interest to be registered.

I have noted already the description of native title rights and interests claimed by the applicants under my reasons for decision for s.190B(4) of the registration test, and I determined that two native title rights claimed at Schedule E were not readily identifiable for the purposes of the *NTA*

(namely, the right claimed at paragraph. (xi) and part of the right claimed at para. (xv)). Under my reasons for decision under s190B(5), I have further found that there is insufficient material in the application or accompanying material which provides a factual basis to support the claimed native title rights and interests. As a result, it is my view that the rights and interests claimed in Schedule E are not be capable of being established *prima facie* pursuant to s.190B(6).

None of the rights and interests can be established *prima facie* pursuant to s.190B(6).

Result: Requirements not met

s.190B(7)

Traditional physical connection:

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

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

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

(i) the Crown in any capacity; or

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

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

Reasons for the Decision

Under s.190B(7)(a), I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.

At Schedule M, the applicants assert that "[a]t least one member of the claimant group has a traditional physical connection to the claim area." However, no information is provided which would identify the member or members of the native title claim group who has the traditional physical connection, nor is the application accompanied by an affidavit which supports this assertion.

At Schedule G the applicants state that members of the claim group have continuously camped, visited and protected sites, hunted, gathered, fished and moved freely about and had access to the claim area in accordance with custom and tradition. This statement suggests an on-going traditional connection of at least one member of the native title claim group to the claim area. However Schedule G does not reference these activities to individual members of the claim group except in this broad sense. I note again (as previously) that the witness statements referred to earlier seem to contain detailed information which could go to satisfy the requirements of traditional physical connection set out in s.190B(7). However, for the reasons earlier stated, I am of the opinion that these statements are of little evidentiary weight in the current matter.

As a result, I am not satisfied on the basis of the material before me that any member of the claim group has the requisite traditional physical connection with the claimed area.

Result: Requirements not met

s.190B(8)

No failure to comply with s.61A:

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

Reasons for the Decision

For the reasons that follow, I have concluded that there has been compliance with s.61A.

S61A(1)- Native Title Determination

A search of the National Native Title Register has revealed that there is no determination of native title in relation to any part of the claim area.

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

I am satisfied that the claim area does not cover any areas covered by previous exclusive possession acts as defined s. 23B (see statement to this effect at paragraph (b) of Schedule B).

S.61A(3) – Previous Non-Exclusive Possession Acts ("PNEPAs")

At Schedule E, paragraph 2(c) the applicants state that they do not make a claim to native title rights and interests which confers possession, occupation, use and enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive act, as defined in section 23F of the NTA, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision for that act as described in section 23E NTA 1993.

S.61A(4) – s47, 47A, 47B

At Schedule L, the applicants claim the benefit of s.47 and 47A in relation to those Pastoral Leases known as Pentecost Downs and Durack River (and held by the Indigenous Land Corporation) and so much of the Home Valley pastoral lease as lies within the external boundaries of the claims made in the native title determination claimant applications subject to Federal Court proceedings : WAG6016/1996 and WAG60154/1999. It is my understanding that the ILC is a corporation that purchases land for indigenous communities whose members are recognised as having traditional connection to that country. Title and control of the land purchased by the ILC is held initially by the ILC and then transferred to the community.

I note that s47A requires that when the application is made, one or more members of the native title claim group occupy the area. There is no information in Schedule L which asserts such an occupation although there is some information in Schedule G which suggests that members of the native title claim group camp, live on, hunt, fish and move freely about the lands and waters of

the claim area. Twelve of the applicants swear to the truth of this statement in their s.62 affidavits.

Conclusion

For the reasons identified above the application and accompanying documents do not disclose, and it is not otherwise apparent, that because of Section 61A the application should not have been made.

Result: Requirements met

s.190B(9)(a)

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

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

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

Reasons for the Decision

Paragraph 2 of Schedule E of the application states that 'to the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the Applicant".

Result: Requirements met

s.190B(9)(b)

Exclusive possession of an offshore place:

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

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

Reasons for the Decision

The claim area does not include any offshore places. Nevertheless, to the extent that the native title rights and interests claimed would relate to waters in an off-shore place, the applicants state at para. 2(b) of Schedule E, that these rights and interests are not claimed to the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under international law in relation to the whole or any part of the offshore place.

Result: Requirements met

s.190B(9)(c)

Other extinguishment:

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

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

Reasons for the Decision

The application does not disclose, and I am not otherwise aware that the native title rights and interests claimed have otherwise been extinguished. At paragraph (c) of Schedule B of the application, the applicants exclude from the claim areas 'in relation to which native title rights and interest have otherwise been extinguished'.

Result: Requirements met

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