

NATIONAL NATIVE TITLE TRIBUNAL

REGISTRATION TEST

REASONS FOR DECISION

DELEGATE: Mia Zlamal

Application Name: Combined Single Noongar Claim

Names of Applicant(s): Anthony Bennell, Alan Blurton, Alan Bolton, Martha Borinelli, Robert Bropho, Glen Colbung, Ken Colbung, Donald Collard, Clarrie Collard-Ugley, Albert Corunna, Shawn Councillor, Dallas Coyne, Dianna Coyne, Margaret Culbong, Edith De Giambattista, Rita Dempster, Aden Eades, Trevor Eades, Doolann-Leisha Eattes, Essard Flowers, Greg Garlett, John Garlett, Ted Hart, George Hayden, Reg Hayden, John Hayden, Val Headland, Eric Hayward, Jack Hill, Oswald Humphries, Robert Isaacs, Allan Jones, James Khan, Justin Kickett, Eric Krakouer, Barry McGuire, Wally McGuire, Winnie McHenry, Peter Michael, Theodore Michael, Samuel Miller, Diane Mippy, Fred Mogridge, Harry Narkle, Doug Nelson, Joe Northover, Clive Parfitt, John Pell, Kathleen Penny, Carol Petterson, Fred Pickett, Rosemary Pickett, Phillip Prosser, Robert Riley, Lomas Roberts, Bill Reidy, Mal Ryder, Ruby Ryder, Charlie Shaw, Iris Slater, Barbara Stamner-Corbett, Harry Thorne, Angus Wallam, Charmaine Walley, Joseph Walley, Richard Walley, Trevor Walley, William Warrell, William Webb, Beryl Weston, Bertram Williams, Gerald Williams, Richard Wilkes, Mervyn Winmar, Andrew Woodley, Humphrey Woods, Dianne Yappo, Reg Yarran, Saul Yarran, Myrtle Yarran

Region: South West, Western Australia

NNTT No.: WC03/6

Federal Court No.: W6006/03

Date Application Made: 10 September 2003

Application Amended: 9 October 2003

The delegate has considered the application against the conditions in s.190C(3) of the *Native Title Act* 1993 (Cwlth). This decision is in short form.

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

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

26 November 2004
Date of Decision

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

On 1 October 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This delegation has not been revoked as at this date.

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 November 2003

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 (Cth)* ('the Act') unless otherwise specified.

NOTE TO APPLICANTS:

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

In the following decision I have tested the application against only the conditions in s.190C(3). For the reasons outlined below under 'Brief History of the Application' I have determined that in the particular circumstances of this application it is unnecessary to provide an assessment against each of the conditions in section 190B and 190C of the Act.

Brief History of the Application

1. On 10 September 2003, the applicant's representative, South West Aboriginal Land & Sea Council ("SWALSC"), filed the Native Title determination application known as the Single Noongar Claim (W6006/03).

2. Prior to the filing of this application the Tribunal staff and a delegate of the Registrar provided assistance to SWALSC including by way of:
 - a. Preliminary assessment dated 17 April 2003 of a draft of the then proposed Single Noongar Claim in which s.190C(3) was identified as a condition which may prevent the application from being accepted for registration. It was noted in this assessment that this issue may be affected by ‘the sequence of proposed filing and strike out motions’;
 - b. Provision of some tenure information in relation to 20 applications in the South West;
 - c. Preliminary assessment dated 19 June 2003 of an amended draft of the Single Noongar Claim in which s.190C(3) was again identified as requiring close attention; and
 - d. Preliminary consideration of the application and requirements of some sections of the registration test, including s190C(3) in light of the Federal Court’s decision in *Colbung v The State of Western Australia* [2003] FCA 774 (29 July 2003).
3. Correspondence from SWALSC dated 27 June 2003 indicates that the intention at that time was that existing applications would be amended to combine with the Single Noongar application (I assume that existing applications refers to overlapping applications) and that Ballardong would be amended to remove any overlap with the Single Noongar Claim. It appears from this letter that SWALSC intended to address s.190C(3) issues by these actions.
4. Promotional material distributed by SWALSC prior to the filing of the Single Noongar Claim, and attached to the current application as Annexure ‘BS3’ to Attachment T (Affidavit of Dr Bruce Shaw sworn 1 August 2003), also evidences a clear intention by SWALSC that the six applications identified on the map in that material would be combined into a single Noongar Native Title determination application.
5. In the s.62(1)(a) affidavits that accompanied the original Single Noongar Claim, each of the applicants attests identically at para. 1(f) that:

‘The Application referred to as “SNC” enables the area claimed and other current applications to be combined into an Amended Southern Noongar claim to be known as “Single Noongar Claim (Area One)”’;

and at para. 2(b) that:

‘I believe that this and all applications on the National Native Title Register will be combined into the amended Southern Noongar application’.
6. On 9 October 2003 upon the motions of the applicants in the Combined Metropolitan Working Group and Single Noongar Claim applications, His

Honour Justice Wilcox ordered the amendment and combination of these applications. W6006/03 was identified as being the lead file. This combined application (the current application) is known as the Combined Single Noongar Claim.

7. The Combined Metropolitan Working Group application is a combination application. It was combined by order of the Court on 12 April 1999 and comprises six previously lodged applications, WC95/81 (WAG0142/98), WC97/26 (WAG6159/98), WC98/22 (WAG6239/98), WC96/53 (WAG0143/98), WC96/103 (WAG6128/98) and WC98/67 (WAG6283/98).
8. On 28 November 2003 SWALSC filed a series of motions for the amendment and combination of the following applications: Combined Single Noongar Claim (W6006/03), Southern Noongar (WAG6134/98), Wagyl Kaip (WAG6286/98), South West Boojarah (WAG6279/98), Gnaala Karla Boojah (WAG6274/98), Yued (WAG6192/98), and the Collard applications (WAG6091, 6102, 6142, 6171 and 6223 of 1998). Amended motions were filed on 27 February 2004.
9. On 5 May 2004 SWALSC filed an amendment to an existing motion in relation to the Ballardong application. This amended motion sought a proposed to change to the boundaries that would have removed its overlap with the Combined Single Noongar Claim.
10. On 15 June 2004 His Honour Justice French dismissed all of the above applications for amendment and combination save as to the removal of the names of deceased people from the applicant where relevant.
11. In meetings with representatives from SWALSC on 6 August and 20 September 2004, Tribunal staff members confirmed that because the amendment applications had not been successful the Combined Single Noongar application in its current form could not meet the requirements of s.190C(3). This was further confirmed in an email from the Tribunal to SWALSC dated 8 November 2004.
12. In the above meetings and in correspondence dated 1 October 2004 SWALSC was advised that a delegate might consider it appropriate in these circumstances to prepare an abbreviated registration test decision.
13. On 9 November 2004 SWALSC advised that it would prefer that a delegate prepare an abbreviated registration test decision.
14. Given that:
 - a. prior to the filing of the original Single Noongar Claim SWALSC was aware of the potential for difficulties in the application meeting the requirements of s.190C(3);
 - b. since filing the Single Noongar Claim SWALSC has clearly attempted to amend the overlapping applications in order to address the s.190C(3) difficulties; and

- c. SWALSC has advised that it does not object to an abbreviated registration test decision;

I do not intend to undertake an assessment of each condition of the registration test. Rather, I limit my considerations to the requirements of s.190C(3).

15. I will now consider the application.

ABBREVIATED CONSIDERATION

The following reasons have been edited to remove the names of individuals.

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:

(a) Does the previous application cover the whole or a part of the area covered by the current application?

A report from the Tribunal's Geospatial Unit dated 11 November 2003 reveals that, in addition to the overlap with Combined Metropolitan Working Group, Combined Single Noongar overlaps eleven other Native Title determination applications that are on the Register of Native Title Claims:

Tribunal Number	Federal Court Number	Name	Registered From	NTDA Area (sq km)	Overlap Area (sq km)	% NTDA Overlap
WC97/71	WG6192/98	Yued	22/08/1997	29253.1	26103.94	89.23
WC96/109	WG6134/98	Southern Noongar	18/11/1996	50296.29	50296.29	100.00
WC98/58	WG6274/98	Gnaala Karla Booja	17/09/1998	30424.53	30398.85	99.92
WC98/63	WG6279/98	South West Bojarah	29/09/1998	10072.09	9158.45	90.929
WC98/70	WG6286/98	Wagyl Kaip	29/09/1998	52246.9	52246.9	100.00
WC95/36	WG6032/98	Donald & Sylvia Collard	12/08/1995	9.947	9.94746	100.00
WC95/71	WG6053/98	Donald & Sylvia Collard	20/10/1995	27.756	27.7562	100.00
WC97/27	WG6160/98	Donald and Sylvia Collard	04/10/1997	756.547	756.547	100.00

WC97/56	WG6181/98	Ballardong People	10/07/1997	114488.16	62822.21	54.8722
WC97/85	WG6205/98	Donald & Sylvia Rachel Collard	09/10/1997	670.199	670.199	100.00
WC97/97	WG6214/98	Donald and Sylvia Collard	21/11/1997	289.072	286.61	99.1484

As the current application is a combination that includes WC99/6 Combined Metropolitan Working Group, I am disregarding that overlap for the purposes of s.190C(3).

Each of the above listed overlapping applications was made prior to 10 September 2003, being the date the current Combined Single Noongar application was made. The applicants have identified these and other non-registered overlapping applications at Attachment O of the current application.

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

Applying the principle established in *Western Australia v Strickland* [2000] FCA 652, the date the current application (Combined Single Noongar) was made is the date that the last of the underlying applications was made, ie. 10 September 2003. Each of the above listed applications was on the Register of Native Title Claims as at that date.

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

Of the eleven overlapping applications five have not been considered under section 190A. These are the Collard applications: WC95/36, WC95/71, WC97/27, WC97/56 and WC97/85. I do not therefore need to consider these applications any further.

The remaining six overlapping applications have all been considered under section 190A and as a result of that consideration, have been entered on, or not removed from, the Register of Native Title Claims.

(d) Are there common claimants between the current application and the application listed in paragraph (c)?

When taking into account the circumstances of this application as outlined under the heading 'Brief History of the Application', common claim group membership between the overlapping applications and Combined Single Noongar is inevitable.

Examples of overlapping claim group membership can be seen by comparing the list of people who comprise the applicant for the current application with applicants of the previous overlapping applications. Of the people who comprise the Combined Single Noongar applicant five are also part of the Southern Noongar applicant, four are part of the Wagyl Kaip applicant, five are part of the Yued applicant, six are part of the Ballardong applicant, five are part

of the South West Boojarah applicant and four are part of the Gnaala Karla Booja applicant.

A comparison of claim group descriptions also illustrates common claim group membership, for example one of the apical ancestors identified at Attachment A1 of the Combined Single Noongar Claim as one of that claim group's apical ancestors and is also listed as one of the apical ancestors in the Yued application. A second individual is also identified as an apical ancestor in both the Combined Single Noongar and Wagyl Kaip applications.

Result: Requirements not met

For the reasons outlined above I am of the view that Combined Single Noongar does not meet the requirements of s.190C(3). Accordingly, pursuant to s.190A(6) it must not be accepted for registration.

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