National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION

DELEGATE: Mia Zlamal

Application Name:	Single Noongar Claim (Area 2)
Names of Applicants:	Anthony Bennell, Alan Blurton, Alan Bolton, Martha Borinelli, Robert Bropho, Glen Colbung, Ken Colbung, Donald Collard, Clarrie Collard-Ugle, 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.:	WC03/7
Federal Court No.:	W6012/03
Date Application Made:	28 November 2003

The delegate has considered the application against the first condition in s.190C(2) of the *Native Title Act* 1993 (Cwlth). This Decision is in short form.

DECISION

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

17 September 2004
Date of Decision

Brief History of the Application

This application was filed in the Western Australian District Registry of the Federal Court on 28 November 2003.

A preliminary assessment of the application dated 29 January 2004 was provided to the applicants' legal representative, the South West Aboriginal Land and Sea Council ("SWALSC"). SWALSC was also provided at that time with a copy of information and submissions provided by the State of Western Australia in relation to the application. SWALSC was advised in the letter that accompanied the preliminary assessment that if the applicants intended to respond to the State's material or the preliminary assessment or provide further information or amend the application that they try to do this by 13 February 2004.

On 17 February 2004 SWALSC requested that they be allowed until 18 June 2004 to prepare any amendment or additional material. That request was not approved by the Tribunal. SWALSC was advised that as there was a section 29 notice overlapping the application with a closing date of 17 April 2004 the delegate would be applying the registration test to the application in accordance with his obligations under s.190A(2) with a likely decision date of 16 April 2004. On 12 March 2004 SWALSC requested a review of the decision not to allow the extension of the timeframe and on 25 March 2004 SWALSC was advised that the Registrar had decided that the Tribunal would not undertake such a review.

On 15 April 2004 SWALSC applied to the Federal Court for an order of review and stay of proceedings in relation to the application of the registration test to the Single Noongar Claim (Area 2), ("the proceedings"). The orders sought included that the decision to refuse an extension of the date for the application of the registration test be set aside; that the decision refusing to review the decision refusing an extension on the date for the application of the registration test be set aside; and the matter be remitted back to the Respondent for a decision to be made in accordance with the law. The applicants also requested by way of interlocutory relief a stay in the application of the registration test to the Single Noongar Claim (Area 2).

On 16 April 2004 consent orders were made in the proceedings. One of the orders agreed to was that the Native Title Registrar would not conclude his or her consideration pursuant to section 190A of the *Native Title Act 1993 (Cth)* prior to the Court's determination of the proceedings.

On 25 May 2004 SWALSC requested from the Tribunal assistance by way of the provision of a preliminary assessment on a draft amended application for the Single Noongar Claim (Area 2). SWALSC expected to be able to provide the materials for assessment in the week commencing 31 May 2004. This request was accepted on 28 May 2004.

On 22 June 2004 SWALSC provided a draft amended application for the Single Noongar Claim (Area 2). Accompanying that draft amended application were a response to the issues raised by the State Solicitor's Office for the State of Western Australia, submissions on some of the issues raised in the preliminary assessment of 29 January 2004 and an anthropological report. On 5 July 2004 SWALSC provided further material,

a table cross referencing conditions in the registration test with information in the draft amended application and accompanying material.

On 23 June 2004 SWALSC wrote to the Tribunal's legal representative for the proceedings suggesting that the proceedings be discontinued and requesting that the registration test not be applied sooner than required given the 19 September 2004 notification end date for another section 29 notice that overlapped the application. On 24 June 2004 the proceedings were discontinued by consent. On 13 July 2004 SWALSC was advised by the Tribunal that the registration test would be applied in the week of 13 September 2004.

SWALSC was provided with a preliminary assessment on the draft amended application on 27 July 2004.

On 6 August 2004, in a meeting with the Case Manager assisting me with the application of the registration test to the Single Noongar Claim (Area 2) and the State Manager for the Perth Registry of the Tribunal, SWALSC advised that the applicants would not be amending the Single Noongar Claim (Area 2). Accordingly the application I am considering pursuant to s.190A is that filed on 28 November 2003.

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; and
- Geospatial assessment and overlap analysis dated 24 December 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 "the application" are references to the Single Noongar Claim (Area 2) application as filed on 28 November 2003. All references to legislative sections refer to the *Native Title Act 1993* unless otherwise specified.

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

On 19 May 2004, Christopher Doepel, Native Title Registrar, delegated to members of the staff of the Tribunal including myself all of the powers given to the Registrar under sections 190, 190A, 190B, 190C and 190D of the *Native Title Act* 1993 (Cth).

This delegation has not been revoked as at this date.

NOTE TO APPLICANTS:

To be placed on the Register of Native Title Claims, the application must satisfy *all* the conditions in sections 190B and 190C of the *Native Title Act* 1993 (Cth).

In the following decision, I have tested the application against only the first of the conditions in section 190C(2), a procedural condition which requires me to be satisfied that the application has included in its description of the native title claim group all the persons who constitute that native title claim group. If I cannot be satisfied that there is a properly constituted claim group, it follows that the application cannot meet other conditions in sections 190B and 190C which refer to a 'native title claim group'.

Information has been provided to the applicants' representative in two preliminary assessments in relation to this condition of the registration test and its application to the Single Noongar Claim (Area 2). As a consequence of this communication with the applicants' representative and the follow-on effects of my decision below that the application does not meet the requirements of section 61(1), I have determined that it is unnecessary to provide an assessment against each of the conditions in sections 190B and 190C.

S190C: Procedural Conditions

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

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

Native Title Claim Group: S61(1)

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

Reasons relating to this sub-condition
At Schedule A of the application the native title claim group is described as follows:

> *"This application is made on behalf of all Noongar people who are described as:*
>
> *The descendants of the Noongar apical ancestors listed in Attachment A1;*
>
> *The members of the Noongar families whose surnames are listed in Attachment A2;*
>
> *The descendants, of the Noongar ancestors of families whose surnames are listed in Attachment A2;*
>
> *The members of the Noongar families whose surnames are listed in Attachment A3;*
>
> *The descendants, of the Noongar ancestors of families whose surnames are listed in Attachment A3; and*
>
> *All other Noongar people identifying and accepted in accordance with Noongar customs and traditions as understood by Noongar people and handed down by Noongar Elders;*
>
> *with the specific exclusion of the members of the Harris Family claim WC96/041 as listed in Attachment O at point a.*
>
> *Identification of a Noongar person is through biological descent from a Noongar person but can include people incorporated into the Noongar community through adoption, in accordance with Noongar custom and tradition.*

> *Identification of a Noongar family is through biological descent from a Noongar person but can include people incorporated into the Noongar community through adoption, marriage or de facto marriage and in accordance with Noongar custom and tradition."*

Attachment A1 lists 99 apical ancestors. Attachment A2 is a list of 240 family names and attachment A3 lists a further 683 family names.

Attachment O states that the Applicant and Claimants for the Harris Family native title determination application, WAG6085/98, ("the Harris Family application") are as follows:

> *"a.* ***WAG6085/98 (Harris)***
> ***Applicants:*** *[Name deleted]*
> ***Claimants:*** *[There follows a list of 18 names] and the biological descendents of their children."*

The Harris Family are a group of Noongar people who, on 3 April 1996, filed a native title determination application. That claim is on the Register of Native Title Claims. A review of the Harris Family application confirms that, other than typographical errors, the information in Attachment O reflects the applicant and claimant group description in that application.

I note that there are seven different family names referred to in the claimant group description for the Harris Family application. Three of these family names, Harris, Blurton and Maher, are included in Attachment A2 to the application. Ten of the nineteen named members of the Harris Family claim group have the family name Harris, three have the family name Blurton and one has the family name Maher.

Attachment R to the application includes a document entitled "Native Title Representative Body Certification". In that document there is a section entitled "statements relating to overlapping applications" in which it is stated as follows:

> *The South West Aboriginal Land and Sea Council has attended numerous meetings and mediation convened by the NNTT to attempt to resolve the overlaps and to include the Harris Family Claimant group into the Single Noongar Claim. The Applicants of that group have not agreed to combine or withdraw their application."*

Attachment R also includes affidavits from each of the eighty people who comprise the applicant sworn on various dates and the affidavit of Dr Bruce Shaw, an anthropologist, sworn on 28 August 2003.

The applicant's affidavits are virtually identical in wording, the only differences being in the names and addresses of the deponents and witnesses. These affidavits contain statements regarding the authorisation of the 'Single Noongar Claim' and purport to address the requirements of section 62(1)(a). Paragraph 1(e) in each of the applicant

affidavits states that "…the Single Noongar Claim will be brought in three parts." As I am aware of the existence of the Combined Single Noongar Claim (W6006/03) which abuts this application, it would seem that the Single Noongar Claim (Area 2) is one of the three parts referred to at paragraph 1(e) of the applicant affidavits.

Dr Shaw's affidavit contains his observations of the community meetings convened by SWALSC in relation to the Single Noongar Claim. Dr Shaw states at paragraph 3 of his affidavit that he has sworn the affidavit:

> *"in support of (a) the Applicant's Motion to amend this claim to reduce the current boundaries of the claim area, to replace the current Applicants with new Applicants and to make other consequential amendments; and (b) the Application for the proposed Single Noongar claim".*

Neither Dr Shaw's affidavit nor the application clarify Dr Shaw's statement at paragraph 3(a), however at paragraph 2(e) of each of the applicant's affidavits there is a statement that each of the people comprising the applicant were authorized through the process described in the affidavit of Dr Bruce Shaw sworn on 28 August 2003. That, combined with paragraph 1(e) in each of the applicant's affidavits, suggests that the people who comprise the applicant are of the view that the discussions in relation to the composition of the Single Noongar Claim at the meetings referred to in Dr Shaw's affidavit were in effect also discussions in relation to the composition of the Single Noongar Claim (Area 2). However I am of the view that the lack of specificity in relation to the Single Noongar Claim (Area 2) limits the value of Dr Shaw's affidavit.

In *Risk v Native Title Tribunal* [2000] FCA 1589, O'Loughlin J held that a delegate applying s190C(2) of the registration test must consider whether the people identified as the native title claim group are the people who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title that is claimed in their application (i.e. are they a properly constituted native title group?) His Honour held that, when it is apparent to the delegate that the group bringing the application are only part of a larger group who hold common or group rights, it is impossible to accept the application for registration.

O'Loughlin J noted in *Risk:*

> *'By operation of subs 190C(2) the Registrar must be satisfied in relation to all the requirements contained in s61. It follows 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'.*
>
> *The [Native Title] Act now ensures that applications can only be lodged on behalf of properly constituted groups – not individuals or small sub-groups. This approach is consistent with the principle that native title is communally held… Subsection 61(1) imposes requirements not only in relation to the question of*

> *authorisation, but also in relation to the anterior question of whether 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"*… [30] – [31].

Most recently the role of the delegate in applying s.61(1) of the registration test was discussed by his Honour Mansfield J in *Northern Territory v Doepel* [2003] FCA 1384. His Honour stated that:

> *"In my judgment, s190C(2) relevantly requires the Registrar to do no more than he did. That is to consider whether the application sets out the native title claim group in the terms required by s.61. That is one of the procedural requirements to be satisfied to secure registration: s.190A(6)(b). If the description of the native title claim group were to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirement of s.190C(2) would not be met and the Registrar should not accept the claim for registration": at [36]*

His Honour went on to say that:

> *"My view that s190C(2), relevantly to the present argument, does not involve the Registrar going beyond the application, and in particular does not require the Registrar to undertake some form of merit assessment of the material to determine whether he is satisfied that the native title claim group as described is in reality the correct native title claim group, is fortified by s.190B(3). It imposes one of the merit requirements for accepting a claim for registration: s.190A(6)(a). Its focus also is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained. It, too, does not require any examination of whether all the named or described persons do in fact qualify as members of the native title claim group. Such issues may arise in other context, including perhaps at the hearing of the application, but I do not consider that they arise when the Registrar is faced with the task of considering whether to accept a claim for registration.": at [37]*

It appears clear to me from the large number of apical ancestors listed at Attachment A1 and the extensive lists at Attachments A2 and A3 of Noongar family names, that the claim group for this application is not a sub-group of the kind dealt with in *Risk*. Notwithstanding this difference, both *Risk* and *Doepel* make it clear that in order for an application to meet the requirements of s.61(1), I must be satisfied that the claim group is properly constituted.

In light of the extensive nature of the claim group description in the application, its use of family names as a tool in identifying membership of the claim group and the crossover between the family names identified in Attachments A2 and A3 and those of the majority of the named members of the Harris Family claim group, the express exclusion of the

members of the Harris Family claim group from the application raises the question as to whether in fact all the persons in the native title claim group have been included.

It would be reasonable in the circumstances as described above to expect an explanation as to why, despite having family names in common, the members of the Harris Family native title claim group are not members of the Single Noongar Claim (Area 2) native title claim group. There is no such explanation in the application. If this issue was discussed at the meetings referred to in Dr Shaw's affidavit, as might be expected given the view of the applicant that this constituted the authorisation process, it is not mentioned in that affidavit or in any of the applicant's affidavits in Attachment R of the application.

To compound this difficulty there is the statement in Attachment R which effectively says that attempts have been made to include the members of the Harris Family in the Single Noongar Claim (Area 2). To my mind this statement in Attachment R is, without further explanation, inconsistent with the exclusion of the members of the Harris Family claim group at Schedule A. It indicates that at least at some point in time the members of the Harris Family claim group were considered as belonging to the Single Noongar Claim (Area 2) claim group and ways were sought to make that possible. There is no explanation in the application, including the attachments, as to why this view changed. I simply have before me the two inconsistent statements.

Although I am not required to undertake a merit assessment of the native title claim group described in the application, I am nevertheless required to be satisfied that, based on the information contained in the application, the native title claim group is properly constituted. On account of the unexplained inconsistencies in the application with respect to the members of the Harris Family claim group, I cannot be satisfied that the claim group description for the Single Noongar Claim (Area 2) includes <u>all</u> the persons "who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.".

This in turn means that the application cannot pass other conditions of the registration test that refer to a 'native title claim group'. Without a 'native title claim group' of the kind described at s.61(1) it is not possible for the application to satisfy the conditions at ss190B(5), 190B(6) and 190B(7). In *Risk*, O'Loughlin J stated that an application which is not made on behalf of a properly constituted native title claim group cannot proceed (at para. 30). The Court's interpretation of s.61(1) means that material provided by the applicant for these other conditions of the registration test cannot be considered as providing a factual basis or establishing the rights and interests of a valid claim group. As such this decision is in short form.

Result: Requirements not met

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