

National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION

DELEGATE: Mia Bailey

Application Name: Wiluna #2

Names of Applicant: Billy Patch, Tilly Stevens, Ken Clause, Benny Campbell
and Betty Anderson

Region: Central Desert NNTT No.: WC04/7

Date Application Made: 28 October 2004 Federal Court No.: WAD241/04

The delegate has considered the application against the condition contained in s.190C(3) of the *Native Title Act* 1993 (Cth). 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 Bailey

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

Date of Decision:
6 July 2006

Brief History of the Application

The Wiluna #2 native title determination application ('the application') is located in the Shire of Wiluna, Western Australia and falls within the Ngaanyatjarra Council Aboriginal Corporation native title representative body area.

The original Wiluna #2 application was filed in the Federal Court on 28 October 2004. As a delegate of the Native Title Registrar I considered the application against the condition in s.190C(3) of the registration test and decided on 5 May 2005 that as the application did not satisfy the requirements of s.190C(3) it could not be accepted for registration. Prior to making that decision, a preliminary assessment had been provided to the applicant's representative, the Ngaanyatjarra Council, identifying s.190C(3) as being a condition which was likely to prevent registration.

The amended Wiluna #2 application was filed in the Federal Court on 24 March 2006 and leave to amend was granted by District Registrar Jan on 6 April 2006. A copy of the amended application was received by the National Native Title Tribunal ('Tribunal') on 11 April 2006. The amendments to the application consist of:

- Amendment to Attachment B (claim area description) to correct a Lot number that was incorrectly described and describe and additional Lot number;
- Amendment to Attachment C (map of the claim area) to correct the above misdescription of Lots; and
- Amend the details of the solicitor for the Applicants.

On 26 June 2006 the Tribunal wrote to the Ngaanyatjarra Council noting that, based on a preliminary review of the application, the delegate was of the view that, as with the original Wiluna #2 application, s.190C(3) appeared to be a condition that was likely to prevent registration. Ngaanyatjarra Council were referred to the delegate's reasons for decision in relation to the original application. The letter queried whether, in the particular circumstances of this application, the Ngaanyatjarra Council intended to provide further information in support of the application and whether it had any objection to an abbreviated application of the registration test.

In its response dated 28 June 2006, the Ngaanyatjarra Council confirmed that it would not be providing any further information in support of the application and it had no objection to an abbreviated decision.

Given the Ngaanyatjarra Council's acknowledgement of deficiencies with the application, its express intention not to remedy these and their clear communication that abbreviated reasons are acceptable in these circumstances, I do not intend to undertake an assessment of each condition of the registration test. Rather, I limit my consideration to the requirements of s.190C(3).

Information considered when making the Decision

In assessing this application I have considered and reviewed the documents listed below:

- The amended application as filed in the Federal Court on 24 March 2006.
- The original application as filed in the Federal Court on 28 October 2004.
- Prescribed affidavits of the Applicant pursuant to s.62(1)(a) filed in the Federal Court on 28 October 2004.
- Notice of Motion to amend the application including Orders 1-4 made on 6 April 2006 by Deputy District Registrar Jan.
- Affidavit of Malcolm O'Dell, Principal Legal Officer, Ngaanyatjarra Council, dated 24 March 2006 in support of the Notice of Motion to amend the application, including Annexure marked MOD1, being the Proposed Amended Application.
- Extract from the Register of Native Title Claims for the Wiluna native title determination application (WC99/24).
- The results of searches by the Tribunal's Geospatial & Mapping Unit of the Register of Native Title Claims, Federal Court Schedule of Native Title Applications, National Native Title Register and other databases in relation to the application area including Geospatial assessment dated 3 May 2006 (Geotrack 2006/0694).
- Email from the Ngaanyatjarra Council to the Tribunal dated 28 June 2006.

A copy of the application and all accompanying documents filed in the Federal Court was provided to the State on 11 April 2006. No response has been received from the State.

Note: I have not considered any information and materials that may have been provided in the context of any 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.

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

On 31 May 2006, Christopher Doepel, the 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 Act.

This delegation has not been revoked as at this date.

NOTE TO APPLICANT:

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

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

Common claimants in overlapping claims: s.190C(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

Schedule H of the application states that there is one application to the Federal Court – WAG 6164 of 1998 (Wiluna) – that has been made in relation to the whole of the area covered by the application. The Geospatial overlap analysis of the application area dated 3 May 2006 confirms that there is one overlapping application in relation to the claim area as per the Register of Native Title Claims and Schedule of Applications – Federal Court, being the Wiluna application (WC99/24, WAD6164/98). The Wiluna application was accepted for registration

on 24 September 1999. The Wiluna application was therefore on the Register prior to date that the current application was made, being 28 October 2004.

I will now consider each of the conditions of s.190C(3):

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

As noted above, the overlap between Wiluna (the previous application) and the current application is acknowledged in Schedule H of the application and confirmed by the Geospatial assessment dated 3 May 2006.

(b) Was an entry relating to the claim made 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 was 'made' is 28 October 2004, being the date that the original application was filed in the Federal Court. The previous application (Wiluna) was entered on the Register of Native Title Claims on 24 September 1999 and was therefore on the Register at the time that the current application was made.

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

The Wiluna application was entered on the Register following consideration of the application pursuant to s.190A on 24 September 1999 and has not been removed since that date.

(d) Are there common claimants between the previous application and this application?

As this application satisfies each of the three pre-conditions of s.190C(3), I must now consider whether any person included in the native title claim group for this application is also a member of the overlapping Wiluna application.

Schedule O of the application states that:

All members of the native title claim group are members of a native title claim group for another application WAG6164 of 1998 that has been made in relation to the whole of the area covered by this application.

I also note the certificate dated 24 March 2006 from the Ngaanyatjarra Council at Attachment R to the application. The final paragraph of the certificate, in relation to the requirements of s.203BE(4)(c), states that:

As noted above under Schedules H and O, this application is wholly overlapped by the WAG 6164 of 1998 native title determination application.

All members of this native title claim group are members of the native title claim group in the WAG 6164 of 1998 application. Accordingly, no attempt has been made to resolve the overlap given that they are the same people claiming the same land and waters.

I also note that Billy Patch is one of the persons jointly comprising the applicant on both Wiluna and the current application.

Common claimants are also evident when comparing membership of the respective claim groups, each of which is described by way of an exhaustive list of names. All except three of the names appearing in the Wiluna #2 application also appear as claimants in the Wiluna application.

In light of the above, I am of the view that persons included in the native title claim group for this application are also members of the previous overlapping application (Wiluna).

Accordingly, I am not satisfied that the requirements of s.190C(3) are met.

Result: Requirements not met

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