



National
Native Title
Tribunal

Registration test decision

Application name: Wiluna #2

Name of applicant: Billy Patch, Tilly Stevens, Ken Clause, Benny Campbell,
Betty Anderson

State/territory/region: Western Australia

NNTT file no.: WC04/7

Federal Court of Australia file no.: WAD241/04

Date application made: 28 October 2004

Date application last amended: 6 April 2006

Name of delegate: Linda Blue

I have considered this claim for registration against each of the conditions contained in ss. 190B and 190C of the Native Title Act 1993 (Cwlth).

For the reasons attached, I do not accept this claim for registration pursuant to s. 190A of the Native Title Act 1993 (Cwlth). For the purposes of s. 190D(1B), my opinion is that the claim does not satisfy all of the conditions in s. 190B and s. 190C.

Date of decision: 20 August 2007

Linda Blue

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cwlth)

Reasons for decision

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Introduction

This document sets out my reasons for the decision to not accept the claimant application for registration.

Section 190A of the Native Title Act 1993 (Cwlth) (the Act) requires the Native Title Registrar to apply a 'test for registration' to all claimant applications given to him under ss. 63 or 64(4) by the Registrar of the Federal Court of Australia (the Court).

Delegation of the Registrar's powers

I have made this registration test decision as a delegate of the Native Title Registrar (the Registrar). The Registrar delegated his powers regarding the registration test and the maintenance of the Register of Native Title Claims under ss. 190, 190A, 190B, 190C and 190D of the Act to certain members of staff of the National Native Title Tribunal, including myself, on 30 July 2007. This delegation is in accordance with s. 99 of the Act. The delegation remains in effect at the date of this decision.

The test

In order for a claimant application to be placed on the Register of Native Title Claims, s. 190A(6) requires me to be satisfied that every condition set out in ss. 190B and 190C of the Act is met.

Section 190B sets out conditions that test the merit of the claim. Section 190C sets out conditions about procedural matters. The procedural conditions require a claimant application to contain certain specified information and documents. I consider the s. 190C requirements first, in order to assess whether the application contains the information and documents required before turning to questions regarding the merit of that material under s. 190B.

A summary of the result for each condition is provided at Attachment A.

Information considered when making the decision

Section 190A(3) directs me to have regard to certain information when testing an application for registration. I may also have regard to other information, as I consider appropriate.

I am guided by the case law relevant to the application of the registration test. In particular I am informed that some conditions of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider other relevant material.

Attachment B of these reasons lists all of the information and documents that I have considered in reaching my decision.

I have not considered any information provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice' (see s. 136A of the Act). Further, mediation is private as between the parties and is also generally confidential (see also ss. 136E and 136F).

Application overview

The Wiluna #2 application relates to an area of land in the central desert region of Western Australia. This application has already been tested for registration twice. The registration test was first applied to the application filed on 28 October 2004 and a decision that the application should not be registered was made. The application was amended by an order of the Federal Court on 6 April 2006 and so attracted the registration test again. The test was applied a second time on 6 July 2006 and it decided that the claim could not be accepted for registration.

The application has now attracted the registration test a third time. The test for registration on this occasion has been triggered by amendments made to the Act. Those amendments commenced on 15 April 2007. *The Native Title Amendment Act (2007)*, pursuant to s. 89(1) requires this application to be tested under s. 190A again because on 15 April 2007 the application was not on the Register of Native Title Claims but was first made between the date of commencement of the *Native Title Amendment Act (2007)* and the date of commencement of the *Native Title Amendment Act (1998)*.

In addition, the Wiluna #2 application is also affected by a s. 29 notice given on 25 April 2007. As a result, I am to use my best endeavours to apply the registration test by the end of four months from the date on the notice.

The applicant was invited, by letter dated 23 April 2007, to amend or add to the Wiluna #2 application because the claim was to be reconsidered for registration. On 22 June 2007, the applicant advised the Tribunal by email they had no intention of providing further information.

Procedural and other conditions: s. 190C

Section 190C(2)

Information etc. required by ss. 61 and 62

The Registrar/delegate 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.

Delegate's comment

I address each of the requirements under ss. 61 and 62 in turn and come to a combined result for s. 190C(2) at page 11. The objective of s. 190C(2) is to ensure that the application contains all of the material and is accompanied by any document required under ss. 61 and 62 of the Act. If the required material is provided in the prescribed manner, s. 190C(2) will be met. It is necessary then to address each of the requirements under ss. 61 and 62 in turn.

Native title claim group: s. 61(1)

The application must be 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.

Result

The application **meets** the requirement under s. 61(1).

Reasons

This procedural condition is satisfied unless the description of the native title claim group in the application indicates that not all persons in the native title group were included, or that it was in fact a subgroup of the native title group. Schedule A of the application names all of the persons in the native title group. There is nothing on the face of Schedule A or elsewhere in the application that suggests not all persons in the claim group are included or that those named are in fact a subgroup of the native title claim group.

Name and address for service: s. 61(3)

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

Result

The application **meets** the requirement under s. 61(3).

Reasons

Those persons who comprise the applicant are named at the commencement of the application and an address for service is provided with the application at Part B.

Native title claim group named/described: s. 61(4)

The application must:

- (a) name the persons in the native title claim group, or
- (b) otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

Result

The application **meets** the requirement under s. 61(4).

Reasons

Attachment A of the application comprises a list of names. It is asserted that the people named are the persons in the native title claim group. This condition is met.

Application in prescribed form: s. 61(5)

The application must:

- (a) be in the prescribed form,
- (b) be filed in the Federal Court,
- (c) contain such information in relation to the matters sought to be determined as is prescribed, and
- (d) be accompanied by any prescribed documents and any prescribed fee.

Result

The application **meets** the requirement under s. 61(5).

Reasons

The application is in the prescribed form, thereby satisfying s. 61(5)(a) and s. 61(5)(b). For the reasons outlined under s. 190C(2), I am satisfied that the application contains the information prescribed by ss. 61 and 62, thereby also satisfying s. 61(5)(c). I am satisfied that the application meets the requirement of s. 61(5)(d) and refer to my reasons under s. 62(1)(a).

Affidavits in prescribed form: s. 62(1)(a)

The application must be accompanied by an affidavit sworn by the applicant that:

- (i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
- (ii) the applicant believes that none of the area covered by the application is also covered by an entry in the National Native Title Register, and
- (iii) the applicant believes all of the statements made in the application are true, and
- (iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and

(v) stating the basis on which the applicant is authorised as mentioned in subparagraph (iv).

Result

The application **meets** the requirement under s. 62(1)(a).

Reasons

Those persons who comprise the applicant have sworn and properly deposed affidavits that meet all of the requirements set out from s. 62(1)(a)(i) to (v). Those affidavits are included with the application.

Information about the boundaries of the area: s.62(2)(a)

The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:

- (i) the area covered by the application, and
- (ii) any areas within those boundaries that are not covered by the application.

Result

The application **meets** the requirement under s. 62(2)(a).

Reasons

Attachment B of the application is a boundary description that consists of coordinates and directions. Also forming part of Attachment B is a description of those areas within the identified boundary that do not form part of the application.

Map of external boundaries of the area: s. 62(2)(b)

The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

Result

The application **meets** the requirement under s. 62(2)(b).

Reasons

A map of the area claimed forms part of the application and is at Attachment C.

Searches: s. 62(2)(c)

The application must contain the details and results of all searches carried out to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application.

Result

The application **meets** the requirement under s. 62(2)(c).

Reasons

Schedule D of the application refers me to a map at Attachment C, and asserts the map identifies any non-native title rights and interests in relation to the area covered, as at 1 June 2004. The map itself includes a legend that lists forms of leases, reserves, unallocated Crown land, freehold land, identified on the map. The map also identifies the claim area. For the purposes of this section, the description is sufficient.

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

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

Result

The application **meets** the requirement under s. 62(2)(d).

Reasons

The application refers me to Attachment E, containing a description of native title rights and interests. The description states that it relates to land and waters and is more than a mere statement that native title rights and interests, in the applicant's opinion, exist. The description includes a list of activities— examples of ways the asserted rights and interests are observed. I am satisfied that the description meets the expectations of this section of the Act.

Description of factual basis: s. 62(2)(e)

The application must contain a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist, and in particular that:

- (i) the native title claim group have, and the predecessors of those persons had, an association with the area, and
- (ii) there exist traditional laws and customs that give rise to the claimed native title, and
- (iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Result

The application **meets** the requirements under s. 62(2)(e).

Reasons

Schedule F is the part of the application relevant to this condition. There is also additional, relevant information at Schedule G. It is my view that a general description of the factual basis for the assertions required by s. 62(2)(e) is provided.

Activities: s. 62(2)(f)

If the native title claim group currently carries out any activities in relation to the area claimed, the application must contain details of those activities.

Result

The application **meets** the requirement under s. 62(2)(f).

Reasons

Schedule G of the application includes a list of activities that the applicant asserts have been and are currently carried out on the claim area. I am satisfied that the description is sufficient.

Other applications: s. 62(2)(g)

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

Result

The application **meets** the requirement under s. 62(2)(g).

Reasons

Schedule H refers to Federal Court application WAD 6164/98 as being an application made 'in relation to the whole of the area covered by the application and that seeks a determination of native title'. That application number is quoted on a registration test decision, dated 24 September 1999 and pertains to the Wiluna application. The Wiluna application appears on the Register of Native Title Claims, however with the application number WAD 6164/98. I am satisfied that both numbers refer to the same application and so find this condition is met.

Section 29 notices: s. 62(2)(h)

The application must contain details of any notices given under s. 29 (or under a corresponding provision of a law of a state or territory) of which the applicant is aware that relate to the whole or a part of the area covered by the application.

Result

The application **meets** the requirement under s. 62(2)(h).

Reasons

Attachment I of the application comprises a list of s. 29 notices of which the applicant, as at 26 October 2004, states they are aware. For this reason I am of the view s. 62(2)(h) is met.

Combined result for s. 62(2)

The application **meets** the combined requirements of s. 62(2), because it meets each of the subrequirements of ss. 62(2)(a) to (h) as set out above. See also the result for s. 62(1)(b) above.

Combined result for s. 190C(2)

The application **satisfies** the condition of s. 190C(2), because it does contain all of the details and other information and documents required by ss. 61 and 62, as set out in the reasons above.

Section 190C(3)

No common claimants in previous overlapping applications

The Registrar/delegate 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) 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 the previous application being considered for registration under s. 190A.

Result

The application **does not satisfy** the condition of s. 190C(3).

Reasons

For the application to meet this condition, I must be satisfied that no member of the native title claim group is also a member of another application affected by the provisions of s. 190C(3). The Full Court in *State of Western Australia v Strickland* (2000) 99 FCR 33, is authority on whether an application meets this condition.

In accordance with *Strickland*, the first thing to do is 'identify any previous application covering the whole, or part, of the area covered by the current application' [17]. I have identified one other overlapping application that covers at least part of the area currently claimed. An expert geospatial assessment dated 3 May 2006, identified that overlap as a previous application that entirely overlaps the current application and so the condition in s. 190C(3)(a) is met.

Second, *Strickland* provides the delegate 'would then have to determine whether there was an entry relating to the claim in the previous application which was on the register, when the current application was made' [17]. *Strickland* is authority that the words 'when the current application was made' means the date it was filed in the Federal Court [35]. A search of the Register of Native Title claims reveals the earlier application was entered on 24 September 1999 and was therefore on the register when the current application was made, thus meeting the condition in s. 190C(3)(b).

Third, *Strickland* is authority that I would 'also have to ascertain whether that previous application had been considered under s. 190A and whether as a result of that consideration, the relevant entry was either made, or if pre-existing, was not removed, pursuant to that consideration' [17].

Strickland is also authority that the date on which I must consider whether the entry was made or not removed is the date of my decision. As noted above, the first application which was entered on the Register of Native Title Claims on 24 September 1999, upon being considered under s. 190A of the Act, continues to be registered.

Satisfied then that the current application is an overlapping and previous application pursuant to s. 190C(3), the next question to ask is, are any persons common to both claim groups? I am satisfied that there are a significant number of members common to both groups. Identifying the degree of commonality between groups is relatively easy as both applications name the persons who are members of their respective native title claim groups. Many of the names that appeared on the first application also appear here. I note that Schedule O of the current application contains the following statement:

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 find that the current application cannot satisfy the condition in s. 190C(3) because it has members in common with another application (WAD6164/98), , entirely overlaps the claim area identified in and the first application was on the Register of Native Title Claims when the current application was made and continues to be on the register as a result of being tested under s. 190A.

Section 190C(4)

Authorisation/certification

Under s. 190C(4) the Registrar/delegate must be satisfied either that:

- (a) the application has been certified under s. 203BE, or under the former s. 202(4)(d), by each representative Aboriginal/Torres Strait Islander body that could certify the application, 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.

Under s. 203BE(4), certification of a claimant application by a representative body must:

- (a) include a statement to the effect that the representative body is of the opinion that the requirements of ss. 203BE(2)(a) and (b) have been met (regarding the representative body being of the opinion that the applicant is authorised and that all reasonable efforts have been made to ensure the application describes or otherwise identifies all the persons in the native title claim group), and
- (b) briefly set out the body's reasons for being of that opinion, and
- (c) where applicable, briefly set out what the representative body has done to meet the requirements of s. 203BE(3)(regarding overlapping applications).

Under s. 190C(5), if the application has not been certified, the application must:

- (a) include a statement to the effect that the requirement in s. 190C(4)(b) above has been met (see s. 251B, which defines the word 'authorise'), and
- (b) briefly set out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

Result and Reasons

I must be satisfied that the circumstances described by either ss. 190C(4)(a) or (b) are the case, in order for the condition of s. 190C(4) to be satisfied.

I am satisfied that the circumstances described by s. 190C(4)(a) are met because the application has been certified by the relevant native title representative body.

Forming part of the application at Attachment R is a certification document that complies in full with s. 203BE(4).

Merit conditions: s. 190B

Section 190B(2)

Identification of area subject to native title

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

Result for s. 190B(2)

The application **satisfies** the condition of s. 190B(2).

Reasons

Before I consider whether s. 190B(2) is met, I note this application meets what's required by ss. 62(2)(a) and (b). I must be satisfied that the map, at Attachment C, allows for the identification of the location of the area claimed with reasonable certainty. In order to come to a view as to the certainty of the claim's external boundary and the identification of any areas within that boundary that are not the subject of the native title claim, I rely on an expert geospatial assessment, dated 3 May 2006.

In relation to the external boundary, the expert geospatial assessment states that the map at Attachment C includes:

- the application area depicted by a bold outline and cross hatching and legend for reference;
- lots described in the description are clearly labelled;
- cadastral boundaries and land tenure;
- scalebar, coordinate extents, legend and locality map; and,

- notes relating to the source of data used to prepare the map.

In addition to providing a map identifying the claim area, Attachment B comprises a boundary description referencing Department of Land Information Deposited Plans and coordinate points. Notes are included relating to the source and currency of information used to prepare the description. Attachment B also describes the areas within the external boundary not covered by the application and lists a number of general exclusions. The geospatial assessment considers that the external boundary can be identified with certainty.

In relation to the use of a generic description to identify areas within the external boundary that are not covered by the application, I note the proceedings are at an early stage and that there is no information before me that suggests the applicant could have provided something more than the generic statement at Attachment B. The geospatial assessment considers the application area is identified with certainty. To conclude, I am satisfied that the information required by s. 62(2)(a) is sufficient for it to be said with reasonable certainty whether the native title rights and interests are claimed in relation to particular areas of the land or waters and the requirements of s. 190B(2) are met.

Section 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.

Result

The application **satisfies** the condition of s. 190B(3).

Reasons

The current application, at Attachment A, provides a list of names under the heading 'Wiluna #2, Members of the Native Title Claim Group'. Because the application names the persons in the native title claim group I am satisfied that s. 190B(3)(a) is met.

Section 190B(4)

Native title rights and interests identifiable

The Registrar must be satisfied that the description contained in the application as required by s. 61(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.

Result

The application **satisfies** the condition of s. 190B(4).

Reasons

If I am to be satisfied that this condition is met, the description of the native title rights and interests claimed at Schedule F of the application, ought to fit within the definition of native title rights and interests at s. 223 of the Act, and in addition be 'readily identifiable'. With regard to the term 'readily identifiable' I am assisted by the court in *Northern Territory of Australia v Doepel* [2003] FCR 112, which considers 'readily identifiable' to beg the questions 'are they understandable' and 'do they have meaning'? I will not consider whether the asserted rights are recognisable native title rights that could be, prima facie, established. That is a question posed at s. 190B(6).

Schedule E of the application refers me to Attachment E which is a document with the title 'Wiluna #2 Native Title Claim, Native Title Rights and Interests'. It is a two page document consisting of a long list of asserted rights. All of the rights and interests asserted relate to the land and waters of the claim area. The majority of asserted rights pertain to fishing, hunting and gathering, which are readily identifiable pursuant to s. 232(2) of the Act. The remaining rights relate to the following:

- access and residence on the claim area. This includes the asserted right to control and regulate access to the claim area;
- the use and enjoyment of the claim area;
- protection of knowledge of traditional law and custom;
- cultural and ceremonial observance;
- bestowing native title rights and interests.

It is my view that the native title rights and interests described are within the parameters of s. 223 of the Act. It is also my view that the description is clear and understandable and accordingly, meets the requirements of this condition.

Section 190B(5)

Factual basis for claimed native title

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

Result for s. 190B(5)

The application **does not satisfy** the condition of s. 190B(5) because the factual basis provided is **not sufficient** to support each of the particularised assertions in s. 190B(5).

Reasons re s. 190B(5)

Schedule F of the application provides a general description of the factual basis on which it is asserted that the claimed native title rights and interests exist and for the particular assertions in subsections (a) to (c). Further information in relation to the asserted factual basis is found in Schedule G, which includes a list of some activities the applicant asserts are 'continually and from time to time' carried out on the land. Schedule M contains some brief information asserting that many members of the native title claim group live permanently in communities located near to the area covered by the application.

Apart from the information in Schedules F, G and M, there is no other information provided by the applicant that seeks to support the assertions made at Schedules F, G and M. I have not been directed to any other material by the applicant that could serve to support the assertions made at Schedules F, G and M. I cannot form a view in relation to ss. 190B(5)(a), (b), or (c) for that reason. It follows then that the application must fail all of the conditions within s. 190B(5).

Section 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.

Result

The application **does not satisfy** the condition of s. 190B(6). I consider that none of the claimed native title rights and interests can, prima facie, be established.

Reasons

It is due to an absence of material that the claim must also fail in relation to this condition. Apart from the general descriptions provided at Schedules F and G and M of the application, there is no other material before me relevant to this condition. I am unable then to form a prima facie view as to whether at least some of the claimed native title rights and interests claimed by the Wiluna #2 application can be established.

Section 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 be expected to currently 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.

Result

The application **does not satisfy** the condition of s. 190B(7).

Reasons

The application asserts the type of connection to land and waters required by s. 190B(7). Schedule F relevantly states:

(i) the native title claim group and their ancestors have, since the assertion of British sovereignty possessed occupied used and enjoyed the claim area;
such possession occupation use and enjoyment has been pursuant to and possessed under the traditional laws and customs of the claim group including traditional laws and customs of rights and interests in land and water vesting in members of the native title claim group on the basis of:

- (a) descent from ancestors;
- (b) conception in the area;
- (c) birth in the area;
- (d) traditional religious knowledge of the area;
- (e) traditional knowledge of the resources of the area; and
- (f) knowledge of traditional ceremonies of the area

...

(v) the native title claim group by those laws and customs have a connection with the land in respect of which the claim is made.

Schedule G of the application asserts the existence of a traditional connection between the Wiluna #2 claim group and the claim area stating:

Members of the native title claim group have continuously and from time (sic) carried out activities on the land and waters within the area of the claim in particular they have possessed, occupied, used and enjoyed the area. Details of activities currently carried out are such as flowing from the conduct of their daily lives on the land and pursuant to their spiritual connection with the land being such aspects of living as create the identity of the claim group as a group of separate and distinct people.

Finally, Schedule M of the application states:

Many members of the native title claim group live permanently in communities located near to the area covered by the application. Many members of the native title claim group regularly hunt in, travel through, camp and live on, the area covered by the application.

Each and every one of the above assertions I can certainly accept, as assertions. Those statements do not, however, demonstrate that at least one member of the native title claim group, in fact, currently has or previously had a traditional physical connection with part of the land or waters covered by the application. Without some material before me that demonstrates even the possibility that at least one member of the claim group has the kind of connection to the land and

waters covered in the application spoken of in *Yorta Yorta* (supra), I am prevented from reaching any concluded view in relation to s. 190B(7). It follows then that this condition cannot be met.

Section 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.

Delegate's comments

Section 61A contains four subsections. The first of these, s. 61A(1), stands alone. However, ss. 61A(2) and (3) are each limited by the application of s. 61(4). Therefore, I consider s. 61A(1) first, then s. 61A(2) together with (4), and then s. 61A(3) also together with s. 61A(4). I come to a combined result at page 20.

No approved determination of native title: s. 61A(1)

A native title determination application must not be made in relation to an area for which there is an approved determination of native title.

Result

The application **meets** the requirement under s. 61A(1).

Reasons

The expert geospatial report states that as at 3 May 2006, no determinations of native title fall within the external boundary of this amended application. An online request for an overlap analysis in relation to the current application, conducted on 10 August 2007, revealed that as at that date, there were had been no approved determination of native title in relation to the claim area.

No Previous Exclusive Possession Acts (PEPAs): ss. 61A(2) and (4)

Under s. 61A(2), the application must not cover any area in relation to which

- (a) a previous exclusive possession act (see s. 23B) was done, and
- (b) either:
 - (i) the act was an act attributable to the Commonwealth, or
 - (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act.

Under s. 61A(4), s. 61A(2) does not apply if:

- (a) the only previous exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
- (b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

Result

The application **meets** the requirement under s. 61A(2), as limited by s. 61A(4).

Reasons

Attachment B of the application, at part B 1.(c) and (d) contains the following statement:

- (c) any area in relation to which a previous exclusive possession act, under section 12J of the Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA), was done and that act is attributable to the State of Western Australia;
- (d) any area in relation to which a previous exclusive possession act, as defined by section 23B (including section 23B(7)) of the Native Title Act 1993 (Cth), was done in relation to the area and that act was attributable to the Commonwealth;

Attachment B of the application, at part C, relevantly contains the following statement:

...the applicant seeks to have section 47B apply to the entire area within the external boundary of the application described in Part A above and shows on the map provided at Attachment C.

I note that seeking to claim s. 47B does not offend s. 61A(2) and so I am satisfied that the required consideration under s. 61A(2) has been addressed by the applicant.

No exclusive native title claimed where Previous Non-Exclusive Possession Acts (PNEPAs): ss. 61A(3) and (4)

Under s. 61A(3), the application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where:

- (a) a previous non-exclusive possession act (see s. 23F) was done, and
- (b) either:
 - (i) the act was an act attributable to the Commonwealth, or
 - (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act.

Under s. 61A(4), s. 61A(3) does not apply if:

- (a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
- (b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

Result

The application **meets** the requirement under s. 61A(3), as limited by s. 61A(4).

Reasons

At Schedule L of the application it is asserted that the whole of the application area is vacant Crown land in respect of which s. 47B is said to apply and so prior extinguishment is to be disregarded. I am satisfied that 61A(3) is met, because the whole area is asserted to be Crown land and when read with the limiting provisions in s. 61A(4) I note that this condition is met.

Combined result for s. 190B(8)

The application **satisfies** the condition of s. 190B(8), because it **meets** the requirements of s. 61A, as set out in the reasons above.

Section 190B(9)

No extinguishment etc. of claimed native title

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

- (a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
- (b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
- (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 ss. 47, 47A or 47B.

Delegate's comments

I consider each subcondition under s. 190B(9) in turn and I come to a combined result at page 28.

Result re s. 190B(9)(a)

The application **satisfies** the subcondition of s. 190B(9)(a).

Reasons re s. 190B(9)(a)

Schedule Q of the application contains the following statement:

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

I am satisfied then, that this condition is met.

Result re s. 190B(9)(b)

The application **satisfies** the subcondition of s. 190B(9)(b).

Reasons re s. 190B(9)(b)

This applications makes no claim in relation to offshore waters. This condition is met.

Result re s. 190B(9)(c)

The application **satisfies** the subcondition of s. 190B(9)(c).

Reasons re s. 190B(9)(c)

Attachment B of the application, at part C, contains the following statement:

...the applicant seeks to have section 47B apply to the entire area within the external boundary of the application described in Part A above and shows on the map provided at Attachment C.

The application states at para 1(e) of Attachment B that the application does not cover any area in respect of which native title rights and interests have otherwise been extinguished. There is no information before me that indicates the claimed native title rights and interests are otherwise extinguished. I am satisfied therefore that the requirements of this section are met.

Combined result for s. 190B(9)

The application **satisfies** the condition of s. 190B(9), because it **meets** all of the three sub-conditions, as set out in the reasons above.

Attachment A

Summary of registration test result where application not accepted for registration

| | |
|--------------------------------------|----------------|
| Application name: | Wiluna #2 |
| NNTT file no.: | WC04/7 |
| Federal Court of Australia file no.: | WAD241/04 |
| Date of registration test decision: | 20 August 2007 |

| Test condition (see ss.190B and C of the Native Title Act 1993) | Sub-condition/requirement | Result |
|---|---------------------------|-------------------------|
| s. 190C(2) | | Combined result: met |
| | re s. 61(1) | met |
| | re s. 61(2) | met |
| | re s. 61(3) | met |
| | re s. 61(4) | met |
| | re s. 61(5) | met |
| | re s. 62(1)(a) | met |
| | re s. 62(1)(b) | met |
| | re s. 62(2)(a) | met |
| | re s. 62(2)(b) | met |
| | re s. 62(2)(c) | met |
| | re s. 62(2)(d) | met |

| | | |
|------------|-----------------------|-----------------------------|
| | re s. 62(2)(e) | met |
| | re s. 62(2)(f) | met |
| | re s. 62(2)(g) | met |
| | re s. 62(2)(h) | met |
| s. 190C(3) | | Not met |
| s. 190C(4) | | met |
| s. 190B(2) | | Combined result: met |
| | re s. 62(2)(a) | met |
| | re s. 62(2)(b) | met |
| s. 190B(3) | | met |
| s. 190B(4) | | met |
| s. 190B(5) | | Combined result: Not met |
| | re s. 190B(5)(a) | Not met |
| | re s. 190B(5)(b) | Not met |
| | re s. 190B(5)(c) | Not met |
| s. 190B(6) | | Not met |
| s. 190B(7) | | Not met |
| s. 190B(8) | | Combined result: met |
| | re s. 61A(1) | met |
| | re ss. 61A(2) and (4) | met |
| | re ss. 61A(3) and (4) | met |
| s. 190B(9) | | Combined result: |

| | | |
|--|------------------|-----|
| | | met |
| | re s. 190B(9)(a) | met |
| | re s. 190B(9)(b) | met |
| | re s. 190B(9)(c) | met |

Attachment B

Documents and information considered

The following lists all documents and other information that were considered by the delegate in coming to his/her decision about whether or not to accept the application for registration.

| Document Date | Document Name | Document Description |
|----------------------------|--|---|
| 23/04/07 | Letter | From National Native Title Tribunal to Applicant regarding re-testing of application. |
| 22/06/07 | Email | From Malcolm O'Dell to Gerry Putland (case manager) confirming the applicant will not provide further information regarding the re-application of the registration test. |
| 06/07/04 | Affidavit | Tilly Stevens |
| 06/07/04 | Affidavit | Ken Clause |
| 06/07/04 | Affidavit | Benny Campbell |
| 09/08/07 | Affidavit | Billy Patch |
| 06/07/04 | Affidavit | Betty Anderson |
| 06/04/06 | Order | Federal Court Order allowing amended application |
| 06/04/06 | Form 1 | WAD241/2004 – Amended application |
| 06/07/07 | Overlap Analysis | Application WC/07 |
| 03/05/07 | Geospatial Assessment and Overlap Analysis | Analysis conducted in relation to WC/07 application, as amended on 06/04/06. |
| 09/07/07 | Email | From Gerry Putland (Case Manager) to Linda Blue (Delegate) advising that the Geospatial Unit considers an overlap identified with tribunal application WC98/68 is a technical overlap only. |
| Last updated 19/10/2006 | Application information and extract from the | Register Extract of application WAD6164/98 (Wiluna). First entered on the Register on 24/09/99. |

| | | |
|----------|--|---|
| | Register of Native Title Claims | |
| 24/09/99 | Reasons for Registration Test Decision | <p>Application Name: Wiluna</p> <p>Federal Court Application Numbers: WAD6164/98, WAD6227/98, WAD6164/98</p> <p>Tribunal Application Numbers: WC97/32, WC98/7, WC99/24.</p> <p>Decision: Accepted</p> |