National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION

DELEGATE:	Kristy Eulenstein
Application Name:	**Nyiyaparli**
Names of Applicant(s):	**David Stock, Gordon Yuline, Raymond Drage, Brian Samson, Victor Parker and Richard Yuline**.
Region:	**Pilbara, Western Australia**
NNTT No.:	**WC05/06**
Federal Court No:	**WAD 6280/98**
Date Application (WAD6280/98) Made:	**25 September 1998**
Date (last) Amendment Filed:	**26 October 2005**

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

DECISION
The application is ACCEPTED for registration pursuant to s.190A of the *Native Title Act* 1993 (Cwth).

28 November 2005

Kristy Eulenstein
Delegate of the Registrar
Pursuant to Section 99 of the Native Title Act 1993 (Cwth)

Date of Decision

Brief History of the Application

The Nyiyaparli native title application (WAD6280/98) was provided to the National Native Title Tribunal (NNTT) on 25 September 1998, and deemed to be filed in the Federal Court on that date.

The area subject to the claim covers approximately 40,000 square kilometres and is located in the Pilbara region of Western Australia. The applicant is represented by the Yamatji Barna Barba Maaja Aboriginal Corporation (YBBMAC).

There have been a number of amendments to the application since September 1998. The first amendment to the application was filed in the Federal Court on 18 December 1998, this amendment added an applicant. A further amendment was filed on 29 January 1999, amending the application to combine WAG6280/98 with the following applications:

- WC96/95 (Federal Court No. WAG6121/98),
- WC97/49 (Federal Court No. WAG6177/98),
- WC97/51 (Federal Court No. WAG6179/98),
- WC97/92 (Federal Court No. WAG6209/98), and
- WC98/36 (Federal Court No. WAG6252/98).

This amended application, with WAG6280/98 the lead application, was referred from the Federal Court to the NNTT on 18 February 1999.

On 2 March 1999 the application was not accepted for registration pursuant to s190A of the *Native Title Act* 1993.

Subsequently an amended application was filed on 31 March 1999 and was accepted for registration pursuant to s.190A of the NTA.

It was amended on 21 December 2001, adding new applicants pursuant to an overlap agreement.

On 1 September 2005 an amendment to join the applications WAD6280/98 and WAD241/05 was filed in the Federal Court. On 30 September 2005 orders were made that the application be amended as sought, with WAD6280/98 being the lead application.

This matter, with the relevant NNTT Number of WC05/06 was allocated to a new Delegate in September 2005.

The latest amendment was filed in the Federal Court on 26 October 2005, and heard on 10 November 2005. The amendment included an alteration to the claim group description. This is the application which now falls to be tested and to which the delegate has regard.

Copies of additional information supplied by the applicant, such as affidavits and certification were provided to the State of Western Australia in the interests of procedural fairness, in line with the decision by Carr J in *State of Western Australia v Native Title Registrar & Ors* [1999] FCA 1591 – 1594. The State was invited to comment on the application and additional information, to be received by 22

November 2005. The State responded that it did not wish to provide any information for the delegate's consideration.

Information considered when making the Decision

In applying the registration test to this application the delegate has considered and reviewed the application, including all attachments and accompanying documents provided by the applicant, as listed in Attachment A to these reasons.

Note: The delegate has not considered any information or materials that may have been 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.

In this document:

- All references to legislative sections refer to the *Native Title Act 1993* ('the Act' or 'NTA') unless otherwise specified.
- All references to 'the application' or 'the current application' refer to the amended application WC05/06 filed on 26 October 2005 and amended by order of the Court on 10 November 2005, unless otherwise indicated.

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

On 22 September 2005, 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* (Cwth). 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 of the *Native Title Act*.

- Section 190B sets out the merit conditions of the registration test
- Section 190C sets out the procedural conditions of the registration test.

In the following decision, the Registrar's delegate tests the application against each of these conditions. The procedural conditions are considered first; then the merit conditions.

A. Procedural Conditions – Section 190C

Section 190C(2) of the Act requires the delegate to test the application against the registration test conditions at s.61 and s.62. If the application meets all these conditions, then it passes the registration test at s.190C(2).

Native title claim group: s.61(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

The delegate must 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 (see s. 190A(6)(b)). If the description of the native title claim group indicates that not all persons who according to traditional law hold the common rights, or that it was in fact a sub group of the native title group, then the requirements of s. 190C(2) would not be met and the claim could not be accepted for registration (*Northern Territory of Australia v Doepel* [2003] FCA 1384 at para 36).

This consideration does not involve the delegate going beyond the application, and in particular does not require her to undertake some form of merit assessment of the material to determine whether the native title claim group is in reality the correct native title claim group (*Northern Territory of Australia v Doepel* [2003] FCA 1384). The delegate has consequently confined her consideration of this sub-condition to the information in the application.

The current application is made on behalf of a group of people described as the Nyiyaparli people. Schedule A of the application refers to Attachment A of the application which contains the following description of the native title claim group:

> The persons on whose behalf the application is made are those persons who:
> (a) are the descendants of the Nyiyaparli apical ancestors listed below;
> (i) Mintaramunya
> (ii) Pitjirrpangu
> (iii) Yirkanpangu (Jesse)
> (iv) Kitjiempa (Molly)
> (v) Mapa (Rosie)
> (vi) Billy Martin Moses
>
> (b) the descendants of Bill Coffin who identify and are accepted as Nyiyaparli people through Nyiyaparli traditional law and custom; and

(c) the following Jigalong People who, according to traditional law and custom, have rights and interests within the Nyiyaparli native title claim:

(i) Clayton Michaels
(ii) Jason Michaels
(iii) Leona Hall
(iv) Cyril Bingi
(v) Ernest Robinson
(vi) Pincher Ruben
(vii) Muddi Muddi Grey
(viii) Tommy Arnott
(ix) Mack Gardiner
(x) Billy Atkins
(xi) Baker Lane
(xii) Darson Wumi
(xiii) Daisy Katabull
(xiv) Daisy Childs
(xv) Milly Kelly
(xvi) Mavis Arnott
(xvii) Brian Sampson
(xviii) Patricia Fry
(xix) Waka Taylor
(xx) Rowley Williams
(xxi) Frank French
(xxii) Daylight Robinson
(xxiii) Billy Cadigan
(xxiv) John Cadigan
(xxv) Tom B Watson
(xxvi) Woko Watson
(xxvii) Bundah Booth
(xxviii) Chicken Tango
(xxix) George Googai

It is the delegate's view that this description of the native title claim group is sufficiently comprehensive, and there is no indication from it that it excludes people who hold common or group rights and interests in the area covered by the application.

The delegate reads the description as being all the descendants of the apical ancestors, all the descendants of Bill Coffin and all of the people listed.

Result: Requirement met

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

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

Reasons relating to this sub-condition
The delegate notes Part B of the application which provides details for filing and service, this procedural requirement is thus met.

Result: Requirement met

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

A native title determination application, or a compensation application, that persons in a native title claim group or a compensation claim group authorise the applicant to make must name the persons or otherwise

describes the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

Reasons relating to this sub-condition
Attachment A of the application contains the description of the native title claim group. In the delegate's view the description of the native title group is described sufficiently clearly so as to satisfy the procedural requirement set down in s.61(4) of the Act. It is noted that the merit aspect of this requirement is commented on in relation to s.190B(3) of the Act (see below for the delegate's comments in regard to this section).

Result: Requirement met

Application is in prescribed form: s.61(5)

An application must be in the prescribed form, be filed in the Federal Court, contain such information in relation to the matters sought to be determined as is prescribed, and be accompanied by any prescribed documents and any prescribed fee.

Reasons relating to this sub-condition
The application is in the form prescribed by Regulation 5(1)(a) of the *Native Title (Federal Court) Regulations 1998*. The amended application was filed in the Federal Court on 26 October 2005, as required pursuant to s.61(5)(b) and contains such information as is required by s.61(5)(c). Section 61(5)(d) states that the application be accompanied by any prescribed documents, these are set out in s.62 of the Act (see the delegate's comments under s.62 in regard to these documents).

The delegate is not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court.

The delegate is satisfied that the application is in the prescribed form so as to satisfy s.61(5) of the Act.

Result: Requirement met

Application is accompanied by affidavits in prescribed form: s.62(1)(a)

An application must be accompanied by an affidavit sworn by the applicant which addresses the matters required by s62(1)(a)(i) – s62(1)(a)(v).

Reasons relating to this sub-condition
Section 62(1)(a) of the Act requires an application be accompanied by an affidavit sworn by the applicant addressing certain matters. The delegate notes that affidavits from each of the persons comprising the applicant have been provided. Each affidavit is dated, signed and witnessed.

The affidavits were supplied with the amended application filed in the Federal Court on 1 September 2005, but not with the subsequent amendment application filed on 26 October 2005. The question is whether the affidavits required by s.62(1)(a) are to be submitted with each amendment to an application.

In *Drury v Western Australia* (2000) 97 FCR 169, French J considered the question of whether an amendment should be supported by fresh affidavits under s.62(1)(a). French J held that where a native title determination application has been filed in the Court and it is sought to file an amendment to that application, save in the case of an amendment seeking to replace an applicant, it is not necessary to file a verifying affidavit in support of the proposed amendment.

In considering whether there is a requirement to file fresh affidavits in this instance, the delegate notes that the amendment of this application filed in October 2005 was a recent amendment and since the application with the s.62(1)(a) affidavits was filed, in September 2005, there has been no change to the applicant for the application.

The delegate is therefore satisfied that the affidavits supplied with the amended application filed on 1 September 2005 are sufficient to satisfy this section of the test. In addition, the delegate is satisfied that these affidavits contain the information required under s.62(1)(a)(i) - (v).

Result: **Requirement met**

Application contains details set out in s.61(2): s.62(1)(b)

Section 62(1)(b) asks the Registrar to make sure that the application contains the information specified in s. 62(2). Because of this, the delegate's decision for this condition is set out under s. 62(2) below.

Details of physical connection: s.62(1)(c)

A claimant application may contain details of traditional physical connection and prevention of access to lands and waters (where appropriate).

Reasons relating to this sub-condition

This section provides that the application *may* contain details of traditional physical connection or any prevention of access, but does not necessarily require such information for an application to pass the registration test.

The delegate notes the current application, at Schedule M simply states;

> At least one member of the claim group has a traditional connection to the claim area.

Affidavits provided by members of the claim group contain information regarding traditional physical connection to the area covered by the application.

The delegate is of the view that the procedural requirement is met by the applicant.

Result: **Provided**

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

s. 62(2)(a)(i) - Information, whether by physical description or otherwise that enables the boundaries of the area covered by the application to be identified;
s. 62(2)(a)(ii) - Information identifying any areas within those boundaries which are not covered by the application.

Reasons relating to this sub-condition
The delegate notes Attachments B and C to the application, which provides information about the boundaries to the application area.

The delegate is of the view that this information satisfies this procedural requirement.

Result: **Provided**

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

The application contains a map showing the external boundaries of the area covered by the application.

Reasons relating to this sub-condition
A map that shows the external boundaries of the area covered by the application is found at Attachment C to the application. The delegate is satisfied that the map contained in the application shows the external boundaries of the area covered by the application, sufficient to satisfy this requirement.

Result: **Provided**

Details and results of searches: s.62(2)(c)

The application contains 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.

Reasons relating to this sub-condition
Schedule D and Attachment D of the application provides details of searches carried out in relation to the application area by the applicant. The delegate is of the view that Attachment D is sufficient to satisfy this procedural requirement.

Result: **Provided**

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

The application contains 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.

Reasons relating to this sub-condition
A description of the claimed native title rights and interests is contained in Schedule E. The description does not merely consist of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law. Therefore the delegate is satisfied in respect of the procedural requirement at s.62(2)(d) of the Act. For further discussion of these rights and interests in respect of the merit requirements, see below in relation to sections 190B(4), (5) and (6) of the Act.

Result: **Provided**

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

The application contains 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.*

Reasons relating to this sub-condition
Schedule F of the application includes a general description of the factual basis upon which it is asserted that the claimed native title rights and interests exist. It addresses each of the particular requirements in s.62(2)(e)(i)(ii) and (iii). The delegate is therefore satisfied that this procedural requirement is met.

Result: **Provided**

Activities carried out in application area: s.62(2)(f)

If the native title claim group currently carry on any activities in relation to the area claimed, the application contains details of those activities.

Reasons relating to this sub-condition
Schedule G of the application contains a general description of the activities that are carried out by members of the native title claim group in relation to the land and waters. The delegate takes this to mean the land and waters of the application area.

The delegate is satisfied that the description is sufficient for this procedural condition.

Result: Provided

Details of other applications: s.62(2)(g)

The application contains 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 a determination of compensation in relation to native title.

Reasons relating to this sub-condition
Schedule H of the application states that the applicant is aware of 2 other applications to the High Court, Federal Court, or a recognised State/Territory body, that seek a determination of Native Title or compensation in relation to native title, for the whole or part of the area covered by the application. These are:

- Njamal (Federal Court No. WAD6028 of 1998)
- Birriliburu (Federal Court No. WAD6284 of 1998)

As noted in Schedule B and Schedule H, the application specifically excludes any area of overlap between the Birriliburu application and the current application. Taking this into account, the Tribunal's Geospatial and Mapping Unit provided an assessment, dated 22 November 2005 (GeoTrack 2005/2720) of the application area. The assessment confirms, that once the Birriliburu application is excluded, there are 2 applications that overlap this current application,

- Nyiyaparli, and
- Njamal.

It is the delegate's view that the applicant supplied sufficient information to satisfy this procedural requirement.

Result: Provided

Details of s.29 notices: s.62(2)(h)

The application contains details of any notices under section 29 (or under a corresponding provision of a law of a State or Territory) of which the applicant is aware, that have been given and that relate to the whole or a part of the area.

Reasons relating to this sub-condition
Schedule I of the application refers to Attachment I of the application, which contains a list of notices issued under s.29 of the Act (or under a corresponding provision of a law of the State or Territory) which the applicant is aware of in relation to the whole or part of the application area. Attachment I states that it is current as at 25 July 2005.

The delegate notes GeoTrack 2005/2720 identified 688 s.29 or equivalent notices that fall within the external boundary of the application as at 22 November 2005. There are some active matters within the area. The Registrar is required to use best endeavour to consider a claimant application within four months after the notification day specified in a s.29 notice.

The delegate is of the view that s.62(2)(h) and s.190A(2) of the Act make it reasonably clear that the purpose of the provision is to ensure the Registrar is made aware of an application affected by a relevant notice and, therefore, expedite the registration test of the application as required under s.190A(2).

The delegate is of the view that the applicant has provided sufficient information in this section to alert the delegate to the fact that the application may be s.29 affected.

Result: **Requirement met**

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 for the Decision
Under section 190C(3) of the Act the 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) 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.

The policy underlying the subsection is to give priority to an earlier claim which is also registered first in time, therefore even where there are claim group members in common, only a previous registered claim will keep the second off the Register.

It is up to the applicant to satisfy the delegate that if there are previous overlapping claims which were on the Register before this current application was made; there are no common members of the claim groups.

Obviously the delegate need not consider s.190C(3) unless there is an application which overlaps the area of the Nyiyaparli application. The GeoTrack 2005/2720 assessment lists the applications which appear on the Register of Native Title Claims and fall within the external boundary of the application area of WC05/06. Three applications overlap the current application area:

- Njamal application,
- Nyiyaparli application, and
- Birriliburu application.

The Njamal application (WAD6028/98) is the only application relevant to this section, after removing the Nyiyaparli application (as it is a pre-combination of the current application) and the Birriliburu application (as it is specifically excluded from the current claim area).

The delegate has compared the claim group descriptions of each application. The Njamal claim group is described by providing a list of names. It is not apparent when comparing this with the Nyiyaparli claim group, that there are any common members between these claims.
Schedule O to the application states;

> There are no details of the membership of the Applicant, or any other member of the native title claim group, in a native claim group for any other application that has been made in relation to the whole or part of the area covered by this Application.

The delegate notes that the applicant list the Njamal application at Schedule H of the application, and therefore concludes that the Schedule O statement is made in light of the knowledge of the Njamal application. Further on this point, it seems apparent to the delegate that the applicant has had knowledge and consideration of the overlap with the Njamal application, for a significant amount of time, given that it was identified in earlier amendments of this application (Schedule O and H of the amended application filed in the Federal Court in March 1999, in the delegate's view thoroughly addressed this issue).

The delegate is satisfied that the claim group descriptions of the Njamal and Nyiyaparli do not reveal common claimants in these overlapping claims.

In conclusion, the delegate relies on the applicants statements at Schedule O and H in this case to be satisfied that there are no common claim group members.

Result: **Requirement met**

Application is authorised/certified: s.190C(4)

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

(a) the application has been certified under paragraph 203BE by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part: or

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

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

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

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

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

Reasons for the Decision

Under this section, the delegate is only required to be satisfied that one of the two conditions of s.190C(4) is met.

At Schedule R of the application the applicant states that the application has been certified under s. 203BE of the Act by the Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (YMBBMAC) and Ngaanyatjarra Land Council (NLC).

Section 190C(4)(a) requires that the application be certified by each Aboriginal or Torres Strait Islander body that could certify the application. In this instance, the YMBBMAC and the Ngaanyatjarra Council Aboriginal Corporation (NCAC) are the only representative Aboriginal/Torres Strait Islander Bodies that cover this area, the delegate notes GeoTrack 2005/2720. The delegate's understanding is that NLC and NCAC are one in the same, and will refer to the Council as NCAC.

By letter dated 20 September from the applicant's representative, the certificates from both YMBBMAC and NCAC were received.

As required by s. 203BE(4)(a) the certificates contain statements to the effect that YMBBMAC and NCAC are of the opinion that:

(a) all the persons in the native title group have authorised the applicant to make the application and deal with matters arising in relation to it; and

(b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

As required by s. 203BE(4)(b) the Certificates set out briefly the reasons for being of that opinion.

Both representative bodies have provided opinions that proper authorisation has occurred and has given brief reasons for being of that opinion. Having considered these documents the delegate is satisfied that this requirement under the Act is satisfied.

Result: **Requirement met**

B. Merit Conditions – Section 190B

Identification of area subject to native title: s.190B(2)

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

Reasons for the Decision

Schedule C refers to Attachment C of the application. Attachment C is a colour print of a map titled "Nyiyaparli Native Title Application" prepared by the Department of Land Information, Land Claims Mapping Unit on 15 June 2005 and includes:

- The application area depicted by a bold cyan boundary and hachuring;
- Cadastral background colour coded by tenure;
- Scalebar, coordinate grid and locality map;
- Notes relating to the source, currency and datum of data used to prepare the map.

Schedule B of the application refers to Attachment B of the application for a description of the external boundary of the application. Attachment B describes the external boundary using geographic coordinates in decimal degrees referenced to the Geocentric Datum of Australia 1994 (GDA94) and reference to topographic features.

It is noted that at Schedule B the application area specifically excludes any area of minor overlap between the Birriliburu Native Title Determination Application (WAD6284/98) and this application.

An assessment by GeoTrack 2005/2720 of the boundary description and map concludes that the description and the map are consistent and identify the area with reasonable certainty. The delegate accepts this assessment.

The internal boundaries of the current application are described at Schedule B of the application as follows:

1) Subject to 4), the Applicant excludes from the Application area any areas that are covered by any of the following acts as these are defined in either the Act as amended (where the act in question is attributable to the Commonwealth), or *Titles (Validation) and Native Title (Effect of Past Acts) Acts 1995* (WA), as amended, (where the act in question is attributable to the State of Western Australia) at the time of the Registrar's consideration:
   (a) Category A past acts;
   (b) Category A intermediate period acts;
   (c) Category B past acts that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests.

2) Subject to 4), the Applicant excludes from the Application area any areas in relation to which:
   (a) a "previous exclusive possession act", as defined in s. 23B of the Act was done and the act was an act attributable to the Commonwealth; or
   (b) a "relevant act" as that term is defined in s. 12I of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) was done and the act is attributable to State of Western Australia; or
   (c) a previous exclusive possession act under s. 23 B(7) of the Act was done in relation to the area and the act was attributable to the State of Western Australia.

3) Subject to 4), the Applicant also excludes from the Application area areas in relation to which native title rights and interests have otherwise been wholly extinguished.
4) The Application area includes any area in relation to which the non-extinguishment principle (as defined in s. 238 of the Act) applies, including any area to which ss 47, 47A and 47B of the Act apply, particulars of which will be provided prior the hearing but which include such areas as may be listed in Schedule L.

The acceptability of the use of class or formula exclusions as appear here will depend on the state of knowledge of the claimants of the tenure in the claim area at the date the application is made (*Daniels v State of Western Australia* [1999] FCA 686). In *Dieri v State of South Australia* [2000] FCA 1327 the Court said that if tenure information might reasonably have been used to exclude areas from an application then reliance cannot be placed on class or formula exclusions.

Schedule D to the application states the searches that the applicant is aware of that have been carried out to determine the existence of any non-native title rights and interests in relation to the application area are listed at Attachment D. The information contained in this Attachment identifies areas as Pastoral Leases, Special Leases, and unallocated Crown Land.

In relation to the question of class exclusions, note the comments of Nicholson J in *Daniels* at [38]:

> The Act recognises the need to provide certainty for people with interests as to whether it is subject of a claim. The class formula approach proposed by the applicants to the definition of exclusion does, if otherwise appropriate, give certainty for respondent interest holders in that they know their interest is subject to claim unless specifically excluded. The determination of whether particular interests meet the definition referred to in that section will often have to await the determination of the application.

Having regard to the information contained in the application, the delegate is satisfied that the class exclusion clauses used by the applicant amount to information that enables the internal boundaries of the application area to be identified with reasonable certainty.

In conclusion the delegate is satisfied that the requirements of s.190B(2) are met in relation to the area covered by the application. It follows that she is also satisfied that the physical description of the area covered by the application meets the requirements of s.62(2)(a)(i) and that the map shows the boundaries of the claim area in compliance with the requirements of s.62(2)(c).

Result: **Requirement met**

Identification of the native title claim group: s.190B(3)

The Registrar must be satisfied that:

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

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

Reasons for the Decision

Under this section, the delegate is only required to be satisfied that one of the requirements in s.190B(3) is met. That is, either the persons in the native title claim group must be named in the application (s.190B(3)(a)) or the persons in that group must be described sufficiently clearly so that it can be ascertained whether any particular person is in that group (s.190B(3)(b)).

The description is not a complete list of names of the claim group members which means that it does not satisfy s.190B(3)(a). The claim group description must therefore satisfy s.190B(3)(b).

To satisfy s.190B(3)(b) the claim group must be described so that individuals can be readily identified objectively. The delegate does not assess the 'correctness' of the claim group. In *State of Western Australia v Native Title Registrar* [1999] FCA 1591-1594 Carr J said that:

> It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently….The Act is clearly remedial in character and should be construed beneficially.

The current application is made on behalf of a group of people described as the Nyiyaparli people. Schedule A of the application refers to Attachment A which contains the following description of the native title claim group:

> The persons on whose behalf the application is made are those persons who:
>
> (a) are the descendants of the Nyiyaparli apical ancestors listed below;
>
> | | | | |
> |---|---|---|---|
> | (i) | Mintaramunya | (iv) | Kitjiempa (Molly) |
> | (ii) | Pitjirrpangu | (v) | Mapa (Rosie) |
> | (iii) | Yirkanpangu (Jesse) | (vi) | Billy Martin Moses |
>
> (b) the descendants of Bill Coffin who identify and are accepted as Nyiyaparli people through Nyiyaparli traditional law and custom; and
>
> (c) the following Jigalong People who, according to traditional law and custom, have rights and interests within the Nyiyaparli native title claim:
>
> | | | | |
> |---|---|---|---|
> | (i) | Clayton Michaels | (xi) | Baker Lane |
> | (ii) | Jason Michaels | (xii) | Darson Wumi |
> | (iii) | Leona Hall | (xiii) | Daisy Katabull |
> | (iv) | Cyril Bingi | (xiv) | Daisy Childs |
> | (v) | Ernest Robinson | (xv) | Milly Kelly |
> | (vi) | Pincher Ruben | (xvi) | Mavis Arnott |
> | (vii) | Muddi Muddi Grey | (xvii) | Brian Sampson |
> | (viii) | Tommy Arnott | (xviii) | Patricia Fry |
> | (ix) | Mack Gardiner | (xix) | Waka Taylor |
> | (x) | Billy Atkins | (xx) | Rowley Williams |

(xxi) Frank French
(xxii) Daylight Robinson
(xxiii) Billy Cadigan
(xxiv) John Cadigan
(xxv) Tom B Watson
(xxvi) Woko Watson
(xxvii) Bundah Booth
(xxviii) Chicken Tango
(xxix) George Googai

As noted previously, the delegate reads the description as being all the descendants of the apical ancestors, all the descendants of Bill Coffin and all of the listed individuals.

The delegate is of the opinion that some factual inquiry may be required to identify members of the native title claim group in this matter, that is, to identify who are the descendants of the named ancestors or Bill Coffin. However, the delegate is of the view that this inquiry is not onerous or unreasonable, and therefore that identification of members by reference to descendants of apical ancestors is capable of satisfying the requirements of s.190B(3) in this instance.

In this instance, the delegate is satisfied that the description as provided at Attachment A of the application is sufficiently clear to satisfy the requirement of s.190B(3)(b).

Result: Requirement met.

Native title rights and interests are readily identifiable: s.190B(4)

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

Reasons for the Decision
Section 190B(4) is the imposed registration condition by reference to s.62(2)(d) of the Act, it requires the delegate to be satisfied that the description of the native title rights and interests contained in the application is sufficient to allow the rights and interests to be readily identified. Only information contained within the application may be considered for the purposes of this section (*Queensland v Hutchison* (2001) 108 FCR 575).

The delegate is of the view that for a description to be sufficient to allow the claimed native title rights and interests to be readily identified it must describe what is claimed in a clear and easily understood manner. Any assessment of whether the rights can be prima facie established as native title rights and interests will be discussed in relation to the requirement under s.190B(6) of the Act. At this stage the delegate is focussing only on whether the rights and interests as claimed are *identifiable*.

Schedule E of the application describes the claimed native title rights and interests. The claimed rights and interests are subject to a number of qualifications also set out in Schedule E. The applicant has differentiated the application area into Areas 'A', 'B' and 'C'. In summary, the applicant is claiming exclusive possession, occupation use and enjoyment in relation to Area A, and non-exclusive rights and interests in relation to all other areas. In respect of Area B, which is defined in the

application as land and waters which are a 'nature reserve' or 'wildlife sanctuary' the native title rights and interests claimed exclude hunting, fishing and the taking of fauna.

The applicant has listed the claimed rights and interests as activities, as required by *Attorney General for the Northern Territory v Ward* [2003] FCAFC 283 in respect of non-exclusive rights. The applicant has listed 34 rights, all of which are sufficiently clear to be understood. The delegate is satisfied that the requirements of this section have been met.

Result: Requirements met.

Factual basis for claimed native title: s.190B(5)

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

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

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

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

Reasons for the Decision

Under s.190B(5) of the Act the delegate must be satisfied that there is sufficient factual basis to support the existence of the claimed native title rights and interests.

The delegate is not limited to consideration of statements contained in the Form 1 application but may refer to additional material supplied to the delegate, however the delegate will not look beyond the material provided to her and will not investigate issues of credit of the supplied material. For support of this position, note the consideration of French J in *Martin v Native Title Registrar* [2001] FCA 16 at [23]:

> Provision of material disclosing a factual basis for the claimed native title rights and interests, for the purposes of registration, is ultimately the responsibility of the applicant. It is not a requirement that the Registrar or his delegate undertake a search for such material.

The delegate notes that the test in section 190A involves an administrative decision – it is not a trial or hearing of a determination of native title pursuant to s.225, and therefore it is not appropriate to apply the standards of proof that would be required at such a trial or hearing. It is not the task of the delegate to make findings about whether or not the claimed native title rights and interests *exist*. It is not the role of the delegate to reach definitive conclusions about complex anthropological issues pertaining to applicant's relationship with country subject to native title claimant applications. That is a judicial enquiry.

What the delegate must do is consider whether the factual basis provided by the applicant is sufficient to support the assertion that claimed native title rights and interests exist. In particular this material must support the assertions noted in s.190B(5)(a), (b) and (c).

The applicant provided material in support of s.190B(5) at Schedules F and G. Schedule F contains a general description of the factual basis on which it is asserted that the three criteria identified at s. 190B(5)(a)-(c) are met. Schedule G provides brief details of activities currently being carried out within the area claimed. The veracity of the statements in these Schedules is attested to by each of the persons named as the applicant in their affidavits required by s. 62(1)(a) accompanying the application.

In addition, affidavits by members of the claim group were provided as additional information in support of this and other conditions of the registration test. These affidavits are very comprehensive and have been considered by the delegate.

s.190B(5)(a) that the native title claim group have, and the predecessors of those persons had, an association with the area;

This encompasses both past and current association with the area. For this requirement to be met, the association with the area must be, and was communal, that is shared by a number of members of the native title claim group.

Schedule G of the application provides a summary of the activities the native title claim group currently carries out in the claim area. In the delegate's view these activities are indicative of the native title claim group's association with the claimed area. This association is supported by the affidavits provided as additional material, including:

- Affidavit of [*name withheld*], sworn 18 April 2002 in which he states that he was born and brought up in Nyiyaparli country and lived most of his life in that area. When he talks of [*specific area within claim*] and [*specific area within claim*] he states, '…both of these stations are in country traditionally owned and occupied by the Nyiyaparli people. Nyiyaparli people have always lived in their country.'
- Affidavit of [*name withheld*], sworn 28 January 1999 in which he says that 'Until the Europeans came, we buried our dead according to custom in our own land…'

It is noted that Attachment F to the amended application filed in March of 1999 provides a more detailed information than the current Schedule F, dealing with each of the s.190B(5) requirements. In respect of s.190B(5)(a) the Attachment states that:

> From time immemorial, the ancestors of the Nyiyaparli People…having entered upon the area of the land and waters traditionally known as Nyiyaparli Country, which is the subject of this application, remained thereon… were without dispute and disruption connected to and in association with the land and waters stated, by traditional laws, customs and beliefs.

The delegate accepts that the claim group is, and has been associated with the area.

s.190B(5)(b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests;

The interpretation of the term 'traditional' by the High Court majority in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 must be considered by the delegate here.

In brief, the majority held that only laws and customs that have their origins before the assertion of British sovereignty are capable of being considered 'traditional' for the purposes of s.223. This normative system must have continued to function uninterrupted from the time of acquisition of sovereignty to the time when the native title group sought determination of native title. Their Honours noted, however, that this does not mean that some change or adaptation of the laws and customs of a native title claim group would be fatal to a native title claim; rather that an assessment would need to be made to decide what significance (if any) should be attached to the fact that traditional law and custom had altered.

Information at Schedules F and G of the application and in the affidavits provide a factual basis to support the existence of laws and customs observed by the native title claim group that give rise to a claim for native title rights and interests in the area. It is noted that the majority of the material talks of the claimed rights and interests in the current tense, however the delegate is of the view that the material does provide enough material to support the factual basis for traditional basis to these activities.

In particular the delegate notes that the statements in para (iv) of Schedule F. The affidavits supplied also make reference to activities carried out by the claim group with some reference to a traditional law or custom as its base, for example:

- [*Name withheld*], in his affidavit sworn in April 2002 makes reference to the importance of [*particular* activity] to pass on Law and culture. He also talks about 'my old people told me that if you go into someone elses country then you must follow the leader of the country.' [*Name withheld*] also talks about having responsibility for an area of country, and how it is people gain such responsibility, he says that 'it has always been this way'.
- [*Name withheld*], in his affidavit sworn in April 2002 talks about skin groups and how he was taught the skin groups and the rules for each group. [*Name withheld*] states that there are certain people he can not talk to as 'the law says I can't do this…'
- [*Name withheld*], in his affidavit of March 1999 states that the rights and interests claimed in relation to the claim area '…is defined by our traditional boundaries identified by the natural environment of hills, waterholes, springs, ranges and rivers. Our tribal group is controlled, managed, organised and united through Aboriginal Law, skin grouping and kinship systems which provide the basis of our social structure…our language is unique to our land…our traditional beliefs are based on the dreaming with our totems, ritual and ceremony sites, history and myths, songs and stories that are passed down from generation to generation…'

Also of particular assistance is the table of rights and interests provided on 20 September 2005 and labelled 'Attachment F' which provides the traditional law and custom which give rise to each of the claimed rights. While the delegate does not propose to quote at length from this document, she does take into account the information contained therein, and accepts that information.

Having considered all the information provided, the delegate accepts, at the prima facie level, that the claim group's activities are pursuant to the normative rules as required. The delegate notes that while some activities have adapted with time (see affidavit of [*name withheld*] of August 2005 paragraph 4) they are still based on the traditional law and custom of the Nyiyaparli people.

s.190B(5)(c) that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.

Under this requirement, the delegate must be satisfied that the claim group continues to hold native title in accordance with their traditional laws and customs.

For the reasons set out in s.190B(5)(b) and having regard to the same material the delegate is satisfied that there is sufficient factual basis to support the assertion as required.

Result: Requirement met

Native title rights and interests claimed established prima facie: s.190B(6)

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

Reasons for the Decision

Only one of the claimed native title rights or interests needs to be prima facie established for the claim to be registered (subject to all other requirements being met). However those that cannot be prima facie established will not be entered on the Register.

Rights and interests that cannot be readily identified, as required by s.190B(4) cannot be prima facie established under s.190B(6). In addition, the delegate's view is that claimed rights and interests which do not have a factual support as required by s.190B(5) will not satisfy s.190B(6).

In respect of s.190B(6) the delegate considers whether the claimed rights and interests can be prima facie established *as* native title rights and interests, that is whether the claimed rights are recognisable as native title rights. Native title rights and interests which are not recognisable are those that;

- are not within the definition of native title rights and interests as found in s.223 of the Act, or
- are inconsistent with common law, or
- have been extinguished (the delegate will have regard to s.47, s.47A and s.47B areas).

The delegate is of the view that each right must be considered individually and that each must have a sufficient prima facie basis.

Schedule E of the application lists 34 separate rights and interests which are claimed in relation to the application area. Not all the rights are claimed in relation to all of the application area, a distinction is made between rights claimed in relation to land where exclusive possession is claimed (Area A as defined in the application) and rights claimed in relation to where exclusive possession is not claimed (such as Area C in the application). The rights claimed in relation to nature reserves and wildlife sanctuaries (Area B as defined in the application) are further refined.

Rights claimed in Area A only

The applicant has listed 8 rights which are claimed in respect of Area A only. These are claimed as exclusive possession rights.

(1) The right to possess, occupy, use and enjoy the area as against the whole world;
(2) A right to occupy the area;
(3) A right to use the area;
(4) A right to enjoy the area;
(5) A right to make decisions about the use of the area by persons who are not members of the Aboriginal society to which the native title claim group belong;
(6) A right to control access of others to the area;
(7) A right to control access of others to the area except such person as may be exercising a right accorded by the common law, statute law of the Commonwealth or the State of Western Australia or a lawful grant by the British sovereign or its successor; and
(8) A right to control the taking, use and enjoyment by others of the resources of the area.

Subject to the satisfaction of other requirements, the majority of the High Court in *Western Australia v Ward* (2002) 191 ALR 1 indicated that a claim to exclusive possession, occupation, use and enjoyment of lands and waters can, prima facie, be established. However, the Court indicated that such a claim may only be able to be prima facie established in relation to some parts of a claim area, such as those areas where there has been no previous extinguishment of native title, or where extinguishment is to be disregarded (for example, where the applicant claims the benefit of ss.47, 47A or 47B). This is recognised by the applicant in this application, as demonstrated by the exclusions listed in Schedule E of the application.

The rights and interests claimed in (1) to (8) above can be seen as an integral part of the right of exclusive possession which is claimed over Area A.

The affidavit support for these rights are referred to in the Table provided by the applicant on 20 September 2005, namely:

- Affidavit of [*name withheld*] dated 18 April 2002, para 8, 9, 10, 11, 16, 17, 18, 21.
- Affidavit of [*name withheld*] dated 18 April 2002, para 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22.
- Affidavit of [*name withheld*] dated 9 August 2005, para 2.

Having considered these rights in relation to s.190(4) and s.190(5) and having considered the affidavits in support, the delegate is satisfied there is sufficient information in the application and in the additional material to support the prima facie establishment of the rights claimed at (1) through to (8) in respect of Area A.

Established - claimed rights (1) through (8) in Area A.

Rights claimed in Area A and C

(9) A right to hunt in the area;
(10) A right to fish in the area;
(11) A right to take fauna; and
(12) A right to take traditional resources, other than minerals and petroleum from the area.

The rights claimed at (9) to (12) are rights which can be established in areas where there is exclusive possession, and areas where there is non-exclusive possession.

The affidavit support for these rights are referred to in the Table provided by the applicant on 20 September 2005, namely:

- Affidavit of [*name withheld*] dated 18 April 2002, para 12.
- Affidavit of [*name withheld*] dated 18 April 2002, para 6, 7, 23, 24, 25, 27, 28.
- Affidavit of [*name withheld*] dated 9 August 2005, para 3.
- Affidavit of [*name withheld*] dated 9 August 2005, para 1.

Therefore, based on the information provided to the delegate, she is satisfied there is sufficient information to support the prima facie establishment of the rights claimed at paras (9) through to (12) above in respect of Areas A and C.

Established - claimed rights (9) through (12) in Areas A and C.

Rights claimed in Area A, B and C

(13) A right to be present on or within the area;
(14) A right to make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;
(15) A right to invite and permit others to have access to and participate in or carry out activities in the area;
(16) A right of access to the area;
(17) A right to live within the area;
(18) A right to erect shelters upon or within the area;
(19) A right to camp upon or within the area;
(20) A right to move about the area;
(21) A right to engage in cultural activities within the area;
(22) A right to conduct and participate in ceremonies and meetings within the area;
(23) A right to visit, care for and maintain places of importance and protect them from physical harm;
(24) A right to take flora (including timber);
(25) A right to take soil;
(26) A right to take sand;
(27) A right to take stone and/or flint;
(28) A right to take clay;
(29) A right to take gravel;
(30) A right to take ochre;
(31) A right to take water;
(32) A right to manufacture traditional items from the resources of the area;
(33) A right to trade in the resources of the area; and
(34) A right to maintain, conserve and protect significant places and objects located within the area.

Where there is a claim to control access to and use of an area, *Ward* decision states that where there is not exclusive possession it is generally doubted that there is any right to control access to land or make binding decisions about its use.

The rights claimed at (13), (16), (18) - (22) and (24) - (31) are rights which can be established in both areas of exclusive and non-exclusive possession, as there is no intention to control access or use by others.

The affidavit support for these rights are referred to in the Table provided by the applicant on 20 September 2005, namely:

- Affidavit of [*name withheld*] dated 18 April 2002, para 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 21.
- Affidavit of [*name withheld*] dated 18 April 2002, para 4, 6, 8, 9, 10, 11, 12, 14, 15, 16, 18, 23, 24, 25, 26, 27.
- Affidavit of [*name withheld*] dated 9 August 2005, para 1, 2, 4.
- Affidavit of [*name withheld*] Stock dated 9 August 2005, para 1, 2, 3.

The remaining rights, (14), (15), (17), (23), (32), (33) and (34) are discussed below.

(14) A right to make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;

The right at (14) intends to limit the use of the area, and therefore under *Ward* may not be able to be established in areas where there is non-exclusive possession. In this instance, the right may be established in Area A as defined by the application, but not B or C.

The question is whether there is any impact or difference if the right is limited to the 'members of the Aboriginal society to which the native title group belong' as it is here. This issue was discussed in two recent Federal Court cases *Gawirrin Gumana v Northern Territory (No 2)* [2005] FCA 1425 and *Northern Territory v Alyawarr* [2005] FCAFC 135.

In *Alyawarr* the Full Court of the Federal Court discussed the right to make decisions about use & enjoyment by Aboriginal people. The Court at [151] said that such a right was:

> …not without difficulty. There is a risk that it may be seen as creating a criterion for exclusion based in part upon Aboriginality. In any event it does not appear in this case that there are persons other than the native title holders who are bound by their traditional laws and customs. The position would be different were the native title holders a subset of a wider society incorporating other groups bound by the same traditional laws and customs…To the extent that the native title holders could collectively exclude particular members from particular areas, such as women from law grounds, that is a matter best left to the intramural workings of the traditional laws and customs. It is not a matter requiring determination as a distinct native title right.

In *Gawirrin* the court stated that such a right in that case was to remain only on the basis that it is expressed to refer to those aboriginal people who recognise themselves as governed by those laws, it cannot operate more extensively.

In the delegate's view the right as claimed at (14) can therefore be established in both exclusive and non-exclusive areas. The affidavit support for this right is referred to in the Table provided by the applicant on 20 September 2005, namely:

- Affidavit of [*name withheld*] Gordon Yuline dated 18 April 2002, para 8, 16, 17.
- Affidavit of [*name withheld*] dated 18 April 2002, para 10, 11, 12, 14, 18.

- Affidavit of [*name withheld*] dated 9 August 2005, para 2.

This right is therefore prima facie established in Areas A, B and C as defined in the application.

(15) A right to invite and permit others to have access to and participate in or carry out activities in the area;

The native title right claimed at (15) is an interest that can be seen as an integral part of the right of exclusive possession in respect of Area A, as noted in *Alyawarr* the right to control access cannot be sustained where there is no right to exclusive occupation against the whole world. The right of exclusion is an exclusive right and such can not be established where there is non-exclusive possession, such as Areas B and C. The right at (15) is not limited to members of the Aboriginal society to which the native title claim group belongs as the right at (14) above is.

The delegate is therefore not satisfied that the right at (15) can be prima facie established in Areas B and C.

The affidavit support for this right is referred to in the Table provided by the applicant on 20 September 2005, namely:

- Affidavit of [*name withheld*] dated 18 April 2002, para 8, 16, 17, 18.
- Affidavit of [*name withheld*] dated 18 April 2002, para 8, 10, 11, 12, 13, 19, 20, 21, 22.

(17) A right to live within the area;

The applicant claims the right to live within the area. While *Ward* did not preclude the recognition of native title rights to reside upon a claim area despite the absence of exclusive possession in that case, the question which arises here is whether the right to live on the land necessarily amounts to a right to control access to and use of the claim area. To the extent that it would do so, such a right is not prima facie capable of being established over areas for which a claim to exclusive possession could not be sustained that is, Areas B and C in this application.

The Northern Territory in *Alyawarr* argued that the right to live and erect structures in that claim embraced a right to live permanently on the area. The Full Court held that the right to live on the land does not necessarily involve permanent settlement at a particular place. The Court considered the interaction of the right with the pastoral lease rights on the land, holding that there were not inconsistent. Therefore, it would seem that such a right could be established in areas of non-exclusive possession.

The delegate notes that there is nothing in the description of this right which conveys an intention or capacity on the part of the members of the native title claim group to control access to or use of the area as an integral part of this right. Rather, rights to control access to, or use of the application area are claimed separately.

It follows that the delegate is satisfied that the right claimed above are capable of being prima facie established in Areas A, B and C as defined in the application. The affidavit support for this right is referred to in the Table provided by the applicant on 20 September 2005, namely:

- Affidavit of [*name withheld*] dated 18 April 2002, para 8, 9, 10, 11.
- Affidavit of [*name withheld*] dated 18 April 2002, para 4, 6, 9, 10, 11, 16, 18.
- Affidavit of [*name withheld*] dated 9 August 2005, para 2.

(23) A right to visit, care for and maintain places of importance and protect them from physical harm;
(34) A right to maintain, conserve and protect significant places and objects located within the area.

The delegate notes recent Federal Court cases with similar claimed rights, where it was discussed whether the term 'protect' necessarily involved an intention to exclude or control access.

In *Gawirrin* the Court said that the right to protect sites included the right to exclude others from those sites. The Full Court in *Alyawarr* (at [140]) found that the notion of protection of sites may involve physical activities on the site to prevent its destruction, but need not be read as implying a general right to control access.

These two cases appear to be at odds with each other. It is noted that the Court in *Gawirrin* were happy to delete the word 'protect' from the claimed right to 'protect and maintain' to allow the right to be determined.

The delegate is of the view that the rights as expressed in this application do not convey an intention to control access to the areas as an integral part of these two rights. As noted, rights to control access to, or use of the application area are claimed separately. Therefore the rights (23) and (34) can exist in areas of exclusive and non-exclusive possession.

The affidavit support for these rights are referred to in the Table provided by the applicant on 20 September 2005, namely:

- Affidavit of [*name withheld*] dated 18 April 2002, para 8, 9, 11, 16, 17, 18, 19.
- Affidavit of [*name withheld*] dated 18 April 2002, para 11, 12, 13, 18, 19, 20, 21.
- Affidavit of [*name withheld*] dated 9 August 2005, para 1.
- Affidavit of [*name withheld*] dated 9 August 2005, para 1.

(32) A right to manufacture traditional items from the resources of the area;

The question which arises in respect of this claimed right is whether it is a right in relation to land or waters, as required under s.223 of the Act.

In *Neowarra v WA* [2003] FCA 1402 at [509] the Court rejected a submission that this was not a right or activity in relation to land or waters but rather a right in respect of chattels, that is something that has been severed from the land or taken from the waters. The right however was limited to the manufacture of traditional items such as spears and boomerangs.

The right, as expressed in this application limits the manufacture to traditional items. Therefore, the delegate is satisfied that the right may exist in all areas of the application area. The affidavit support for this right is referred to in the Table provided by the applicant on 20 September 2005, namely:

- Affidavit of [*name withheld*] dated 18 April 2002, para 15.
- Affidavit of [*name withheld*] dated 18 April 2002, para 27, 28.
- Affidavit of [*name withheld*] dated 9 August 2005, para 4.

(33) A right to trade in the resources of the area; and

Similar to the right to manufacture, the question which arises in respect of this claimed right to trade in the resources of the area is whether it is a right in relation to land or waters, as required under s.223 of the Act.

The Full Court in *Alyawarr* considered the right to trade and said at [153]:

> The right to trade is a right relating to the use of the resources of the land. It defines a purpose for which those resources can be taken and applied. It is difficult to see on what basis it would not be a right in relation to the land.

The Court also considered the case of *Commonwealth v Yarmirr* (2001) 201 CLR 1 which at first instance referred to evidence related to trade by way of exchange, between indigenous groups of items including spearheads, stone axes, bailer shells, cabbage palm baskets and turtle shells. The *Alyawarr* Full Court said (at [155]) of the *Yarmirr* decision:

> Olney J's observation does not involve the proposition that trade in the resources of the land can never be a 'right' in relation to the land. There the evidence was of an activity. It did not amount to evidence of the exercise of a right……. *Yarmirr* cannot be taken as authority for the proposition that there cannot be a right to trade in the resources of the land as a right in relation to the land.

Having come to this conclusion however, the Full Court in *Alyawarr* was of the opinion that in the matter before them, there had been insufficient evidence before the Court at first instance for the right to survive on appeal. The finding by the Court was that the word 'trade' should be omitted from the lower Court's formulation, leaving as the right:

> the right to share or exchange subsistence and other traditional resources obtained on or from the land and waters.

By taking that view, the delegate believes that the Court has implicitly accepted that the right to trade is capable of being established (where satisfactorily evidenced) over land where exclusive possession is not available. The delegate therefore assesses that the right at (33) can be made out in Areas A, B and C as defined in the application.

The delegate takes the view that in defining 'resources' as claimed in the right, they are the 'traditional resources', this is also supported by the affidavit material.

The affidavit support for this right is referred to in the Table provided by the applicant on 20 September 2005, namely:

- Affidavit of [*name withheld*] dated 18 April 2002, para 20.
- Affidavit of [*name withheld*] dated 18 April 2002, para 28.

Established - claimed rights (13) through (34) in Area A.
- claimed rights (13), (14) and (16) through (34) in Areas B and C.

Having considered each right separately, the delegate is of the view that the application meets the requirements of s.190B(6).

Result: Requirement met

Traditional physical connection: S. 190B(7)

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

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

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

(i) the Crown in any capacity; or

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

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

Reasons for the Decision

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

Traditional physical connection is not defined in the Act. The delegate interprets this phrase to mean that physical connection should be in accordance with the particular traditional laws and customs relevant to the claim group. The Explanatory Memorandum to the *Native Title Act* 1993 explains that this "connection must amount to more that a transitory access or intermittent non-native title access" (paragraph 29.19 of the 1997 EM, page 304).

The delegate has regard to the affidavits from members of the claim group that have been provided. In particular the affidavit of [*name withheld*], sworn in April 2002, in which he describes his membership of the claim group and states that he 'was born bush way' on Nyiyaparli country and has lived most of his life on Nyiyaparli country. [*Name withheld*] also provides information that he continues to spend time in the claim area carrying out activities and rituals under traditional law and custom.

The delegate is satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with part of the land or waters covered by the application.

Result: Requirement met

No failure to comply with s. 61A: s.190B(8)

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.

Section 61A contains four conditions. Because s.190B(8) asks the Registrar to test the application against s.61A, the decision below considers the application against each of these four conditions.

Reasons for the Decision
For the reasons that follow the delegate has concluded that there has been compliance with s.61A.

Native Title Determination – s.61A(1)

A search of the National Native Title Register has revealed that there is no determination of native title in relation to any part of the claim area. This is confirmed by GeoTrack 2005/2720.

Previous Exclusive Possession Acts – s.61A(2)

Schedule B excludes from the application any area in relation to which a previous exclusive possession act, as defined in s.23B of the Act was done.

Previous Non-Exclusive Possession Acts – s.61A(3)

The applicant is not seeking exclusive possession over areas the subject of previous non-exclusive possession acts. The delegate notes Schedule E, paragraph 4.

s.47, 47A, 47B Areas – s.61A(4)

Schedule B, paragraph 4 of the application states:

> The Application area includes any area in relation to which the non-extinguishment principle (as defined in s. 238 of the Act) applies, including any area to which ss. 47, 47A and 47B of the Act apply, particulars of which will be provided prior to the hearing but which include such areas as may be listed in Schedule L.

Schedule L of the application provides the following details:

> (1) Walagunya Pastoral lease 3114/1103 is a pastoral lease held by or on behalf of members of the native title claim group;
> (2) Reserve 42835 and reserve P41265 are reserved for the benefit of Aboriginal peoples and occupied by or on behalf of the members of the native title claim group;
> (3) All vacant crown land is occupied by the members of the native title claim group;
>
> All members mentioned in paragraph (1), (2) or (3) attract the protection of sections 47, 47A or 47B of the Act and hence prior extinguishment is to be disregarded.

The delegate is of the opinion that this requirement is met.

Result: **Requirement met**

No claim to ownership of Crown minerals, gas or petroleum: S. 190B(9)(a)

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

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

Reasons for the Decision

Schedule Q to the application includes the statement:

> To the extent that any minerals, petroleum or gas are within the area of the claim are wholly owned by the Crown in right of the Commonwealth or the State of Western Australia, they are not claimed by the native title claim group.

The delegate is satisfied that the requirement of this section of the registration test is met.

Result: **Requirement met**

No exclusive claim to offshore places: s.190B(9)(b)

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

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

Reasons for the Decision

The application contains no Schedule P but the delegate notes the area described at Schedule B, Attachment B and depicted in the map at Attachment C, which all confirm that no offshore place is covered by the application.

Result: **Requirement met**

Native title not otherwise extinguished: s.190B(9)(c)

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

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

Reasons for the Decision

Schedule B to the application excludes from the application area any area in relation to which native title rights and interests have otherwise been wholly extinguished.

The delegate is satisfied that the application meets the requirements of this condition.

Result: Requirement met

End of Document