

# Registration test decision

Application name: TARLPA  
Name of applicant: Les Tullock, Friday Jones, Elisabeth Wonyabong, Cyril Bingham  
State/territory/region: Western Australia  
NNTT file no.: WC 07/3  
Federal Court of Australia file no.: WAD248/07  
Date application made: 14/12/2007  
Date application last amended: 10/04/08

Name of delegate: Christopher Ripley Loorham

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 accept this claim for registration pursuant to s. 190A of the Native Title Act 1993 (Cwlth).

Date of decision: 30 April 2008

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C.R.Loorham

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 accept or not accept, as the case may be, the claimant application for registration.

Section 190A of the *Native Title Act 1993* (Cwlth) 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), with the exception of amended applications that satisfy ss. 190A(1A) or 190A(6A).

Subsection 190A(6) requires that I must be satisfied that *all* the conditions set out in ss. 190B and 190C of the Act are met, in order for me to accept a claim for registration.

**Note:** All references in these reasons to legislative sections refer to the Native Title Act 1993 (Cwlth) which I shall call 'the Act', as in force on 1 September 2007, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

## 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 27 September 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

Pursuant to s. 190A (6) of the Act I am required to be satisfied that the conditions of ss. 190B and 190C of the Act are met for a claimant application to be placed on the Register of Native Title Claims.

Section 190B sets out conditions that test particular merits of the claim for native title. Section 190C sets out conditions about 'procedural and other matters'. Included amongst the procedural conditions is a requirement that the application must contain certain specified information and documents. In my reasons below I consider the s. 190C requirements first, in order to assess whether the application contains the information and documents required by s. 190C before turning to questions regarding the merit of that material for the purposes of s. 190B.

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

## Application overview

This application was filed in the Western Australia Registry of the Court on 14 December 2007 in response to a notice given by the State of Western Australia (the State) pursuant to s. 29 of the Act. It covers an area of 2265.26 sq km east of Meekatharra and within the Shire of Wiluna. The application was amended in the Court on 3 April 2008 to include a claim to non-exclusive rights.

## **Information considered when making the decision**

Subsection 190A(3) directs me to have regard to certain information when testing an application for registration; there is certain information that I must have regard to, but I may have regard to other information, as I consider appropriate.

I am also guided by the case law (arising from judgments in the courts) relevant to the application of the registration test. Among issues covered by such case law is the issue 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 wider material.

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

I have not considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK, without the prior written consent of the person who provided the Tribunal with that information, either in relation to this claimant application or any other claimant application or any other type of application, as required of me under the Act.

I also have not considered any information that may have been 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).

## **Procedural fairness steps**

As a delegate of the Registrar and as a Commonwealth Officer, I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are fair, just and unbiased. Procedural fairness requires that a person who may be adversely affected by a decision be given the opportunity to put their views to the decision-maker before that decision is made. They should also be given the opportunity to comment on any material adverse to their interests that is before the decision-maker. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

An additional affidavit sworn on 31/10/07 and received by the Tribunal on 19/12/17 was provided to the State on 21/02/08. Comments were invited by 28/02/08. No comments have been received.

# Procedural and other conditions: s. 190C

## *Subsection 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 I come to a combined result for s. 190C(2) at page 14.

Section 190C(2) requires the Registrar to be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by ss. 61 and 62. If the application meets all these requirements, the condition in s. 190C(2) is met.

I note that in the case of *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16] Mansfield J stated that 'section 190C(2) is confined to ensuring the application, and accompanying affidavits or other materials, contains what is required by ss 61 and 62'.

His Honour also said at [39] in relation to the requirements of s. 190C(2): '...I hold the view that, for the purposes of the requirements of s 190C(2), the Registrar may not go beyond the information in the application itself.'

I am of the view that *Doepel* is authority for the proposition that when considering the application against the requirements in s. 190C(2), I am not (except in the limited instance which I explore below in my reasons under s. 61(1)) to undertake any qualitative or merit assessment of the prescribed information or documents, except in the sense of ensuring that what is found in or with the application are the details, information or documents prescribed by ss. 61 and 62.

### *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**

In deciding whether the application complies with s. 61(1) for the purposes of s. 190C(2), I am not required to go beyond the material contained in the application, nor am I entitled to inquire as to the merit of this group's claim over the area of the application (*Doepel*—at [37]). I must be satisfied

however that the description prima facie includes all the persons in the native title claim group. If the description of the native title claim group in the application indicates that not all persons in the group have been included, or that it is a sub-group of the native title claim group, then the relevant requirement is not met. *Doepel at 36*

The description of the persons in the native title claim group is set out in schedule A of the application, which I have extracted below in my reasons relating to s. 190B(3). In my view there is nothing in the description or elsewhere in the application to indicate that any persons have been excluded from the group or that it is a sub-group of the native title claim group.

I am also required to be satisfied that the persons who have made the application have been authorised by all the persons in the native title group. A certificate pursuant to section 203BE of the Act, signed by the Principal Solicitor and Chief Executive Officer of the Central Desert Native Title Services (CDNTS), is attached to the application at Attachment R. The certificate states that in the opinion of the representative body all reasonable efforts have been made to ensure that the application identifies all the persons in the native title group and that all persons in the group have authorised the named applicants to make the application in accordance with their traditional laws and customs.

I have also had regard to each of the affidavits of Les Tullock, Elizabeth Wonyabong (sworn 20 November 2007) Friday Jones (sworn 26 November 2007) and Cyril Bingham (sworn 27 November 2007) attached to the application, which confirm that the traditional decision making process of the group was used to authorise the applicant to make the application on behalf of the whole 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**

The applicant is named and the address for service is given for the applicant's legal representative at Part B of the application.

### *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**

I find that the application describes the persons in the group as required by s.61(4)(b). The description and my reasons are detailed at page 16 under s. 190(3) below.

### *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**

s. 61(5)(a)

The application is in the form prescribed by Regulation 5(1)(a) of the Native Title (Federal Court) Regulations 1998.

s. 61(5)(b)

The application was filed in the W.A. District Registry of the Court on 14 December 2007, as required pursuant to s. 61(5)(b).

s. 61(5)(c)

The application contains all the information prescribed in s. 62, including a map as required by s. 62(2)(b). I refer to my reasons in relation to s.62 below.

s. 61(5)(d)

The application is accompanied by affidavits in relation to the requirements of s.62(1)(a) from each of the four persons jointly comprising the applicant.

I note that s. 190C(2) only requires me to consider details, other information and documents required by sections 61 and 62. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Court. For the reasons outlined above, it is my view that the requirements of s. 61(5) have been met.

### *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 approved determination of native title, 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) setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it.

## **Result**

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

## **Reasons**

Each of the four persons jointly comprising the applicant has sworn an affidavit to satisfy the requirements of s. 62(1)(a)(i)-(v). The contents of the affidavits filed 14/12/07 are identical and attest to the truth of the matters set out in s. 62(1)(a)(i) to (v). Paragraphs (g) and (h) of the affidavits sets out details of the process of decision making used to authorise the applicant as required by s. 62(1)(a)(v).

## *Application contains details required by s. 62(2): s. 62(1)(b)*

The application must contain the details specified in s.62(2).

## **Delegate's comment**

My decision regarding this requirement is the combined result I come to for s. 62(2) below. Subsection 62(2) contains 9 paragraphs (from (a) to (h)), and I address each of these sub-requirements in turn, as follows immediately here. My combined result for s. 62(2) is found at page 16, below and is one and the same as the result for s. 62(1)(b) here.

## **Result**

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

## *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**

At Attachment B of the application is a description of the external boundary and any areas within that boundary that are not covered by 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**

Attachment C contains a map showing the boundaries of the application.

### *Searches: s. 62(2)(c)*

The application must contain the details and results of all searches carried out by or on behalf of the native title claim group 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**

At Attachment D of the application it is stated that, other than as provided at Attachments H and I, the applicant has not carried out any searches to determine the existence of any non-native title rights and interests in relation to the land or waters in the area covered by the application. Attachment H deals with other applications and Attachment I provides a search of s. 29 Notices as at 7 September 2007.

### *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**

A description of the native title rights and interests claimed by the applicant is contained in Schedule E of the application. The description does not merely consist of a statement to the effect that the native title rights and interests are all the native title rights and interests that may exist, or that have not been extinguished at law. I have outlined these claimed rights and interests in my reasons for decision under s. 190B(4).

### *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**

Information relevant to this subsection is contained in Schedules F and G of the application. Schedule F describes in general terms the association of the group with the area through traditional practises and customs. An unbroken connection is traced through descent based links with the claim area. The factual basis which is described includes living in the immediate region of the claim area, knowledge of the traditional significance of the land and waters in the area, camping and regular journeys through the area, visits to sites of traditional significance and hunting and bush food gathering.

Traditional law (jukurrpa) and customs are described in general terms as governing behaviour of the group, including ceremonial activity, social organisation, foraging, preparation and distribution of food. Schedule F also describes particular traditional laws and custom as it relates to the rights and interests claimed and asserts, (in summary) that at all relevant times from the time of British sovereignty the rights and interests have been enjoyed by the group and their predecessors.

I am satisfied that the application describes a factual basis as required under s. 62(2)(e).

### *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**

Information relevant to this subsection is contained at schedule G of the application. The activities described include visiting sites for the purpose of instruction in traditional knowledge, camping and food collection. Death (if that be an activity) together with the complex observances associated with the place of death within the area of the application is described as an activity in relation to the land or waters. Site protection activity, road construction and the establishment of outstations are also described as current activities of the group in relation to the area claimed.

### *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**

Information relevant to this subsection is contained at schedule H of the application. One other unregistered application, WC95/82 Sir Samuel Number 2, is identified as being within the external boundary of this application.

### *Section 24MD(6B)(c) notices: s. 62(2)(ga)*

The application must contain details of any notification under s. 24MD(6B)(c) of which the applicant is aware, that have been given and that relate to the whole or part of the area covered by the application.

#### **Result**

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

#### **Reasons**

Information relevant to this subsection is contained in Schedule H, Attachment HA, which indicates that the applicant is not aware of any notifications under s. 24MD(6B)(c) of the Act that have been given in relation to the whole or part of the application area.

### *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**

Information relevant to this subsection is contained at Schedule H, Attachment H, and Attachment I, where the details of s. 29 notices which relate to the area of the application are listed.

### **Combined result for s. 62(2)**

The application meets the combined requirements of s. 62(2), because it meets each of the sub-requirements of ss. 62(2)(a) to (h) as set out above.

### **Combined result for s. 190C(2)**

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

## *Subsection 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 **satisfies** the condition of s. 190C(3).

### **Reasons**

A search of the Register of Native Title Claims and geospatial analysis (10/9/07) indicates there are no previous applications which cover the whole or part of the area covered by the current application.

## *Subsection 190C(4)*

### *Authorisation/certification*

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

- (a) the application has been certified under Part 11 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. 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition

of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

## **Result**

I must be satisfied that the requirements set out in either ss. 190C(4)(a) or (b) are met, in order for the condition of s. 190C(4) to be satisfied.

For the reasons set out below, I am satisfied that the requirements set out in s. 190C(4)(a) are met because the application has been certified by an Aboriginal Body with the authority to certify the application, pursuant to s. 203 FEA(1) of the Act.

## **Reasons**

The application is certified and therefore the requirements of s. 190C(4)(a) are applicable.

A certificate signed by the Chief Executive Officer and the Principal Legal Officer of CDNTS, being the sole representative body for the application area, (as confirmed by an overlap analysis undertaken by the Tribunal's geospatial services dated 10/9/07) is provided at Attachment R of the application.

I now consider whether the certificate satisfies the requirements of s. 203BE(4).

The certificate contains a statement pursuant to s. 203BE(4)(a) of the Act that CDNTS is of the opinion that the requirements of s. 203BE(2)(a) and (b) have been met, namely, that all persons in the native title claim group have authorised the named applicant to file and deal with the application, and that 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. The certificate also briefly sets out the reasons for this opinion (in accordance with s. 203BE(4)(b)) and the actions taken by CDNTS to facilitate the authorisation of the application.

I am satisfied that the certificate meets the requirements of s. 203BE(4).

# Merit conditions: s. 190B

## *Subsection 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.

### *Information regarding external and internal boundaries: s. 62(2)(a)*

The application must contain information, whether by physical description or otherwise, that enables identification of the boundaries of:

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

### *Map of external boundaries: 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 satisfies the condition of s. 190B(2).

#### **Reasons**

Both the map at Attachment C and description as contained in Attachment B of the application have been assessed by the Tribunal's geospatial services, which concluded in a memo dated 30/01/08 that the description and map are consistent and identify the application area with reasonable certainty. The map can be clearly read, contains geographic coordinates, orientation and a scale. The external boundary is described by reference to existing Native Title Determination Application boundaries and a pastoral lease boundary. Attachment B also describes areas excluded from the application within the external boundaries. I have had regard to this expert advice and agree with it. I am satisfied that the requirements of s. 190B(2) are met.

## *Subsection 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

At schedule A of the application the native title claim group is described as follows:

The native title claim group comprises those Aboriginal people who hold in common the body of traditional laws and customs governing the area covered by this application who:

(a) are all those persons descended from the following people: (six apical ancestors are then named); and

(b) in accordance with the traditional laws and customs governing the area covered by this application have authority to speak for the area covered by this application as custodians, specifically the following people: (nine people are named).

The list of nine persons named under par (b) of Schedule A is not exhaustive and as a consequence the requirements of s. 190B3(a) of the Act are not met.

In the alternative, s.190(3)(b) requires the Registrar to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is a member of the group.

Par (a) of Schedule A defines the group as persons descendent from six named ancestors. I have also received biographic information which identifies the named apical ancestors as real people. I am satisfied that the names and information provided for each apical ancestor are sufficient to identify the relevant person, and therefore it is possible with inquiry to ascertain whether a person is a descendent of one of those named.

I find that the persons in the Native Title Group have been named as required by s. 190B(3)(b)

## *Subsection 190B(4)*

### *Native title rights and interests identifiable*

The Registrar must be satisfied that the description contained in the application as required by s. 62(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

A description of the native title rights and interests claimed appears in Attachment E of the application. The rights claimed are divided into two sections; exclusive and non-exclusive rights and are described as follows:

1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s. 238 and/or ss.47,47A and 47B apply), the native title claim group claim the right to possess, occupy, use and enjoy the lands and waters of the area covered by the application to the exclusion of all others, pursuant to the traditional laws and customs of the claim group, including:

(a) the right to speak for the area covered by the application;

(b) the right to be asked permission to use the land and waters of the area covered by the application;

(c) the right to live on the area covered by the application;

- (d) the right to make decisions about the use, enjoyment and management of the land and waters of the area covered by the application;
- (e) the right to hunt and gather and to take water and other resources (including ochre) on the area covered by the application;
- (f) the right to control access to and activities conducted by others on the lands and waters of the area covered by the application;
- (g) the right to use and enjoy resources of the area covered by the application;
- (h) the right to maintain and protect areas of cultural significance to the native title claim group on the area covered by the application;
- (i) the right as against any other Aboriginal group or individual to be acknowledged as the traditional Aboriginal owners of the area covered by the application;
- (j) the right to trade in resources of the area covered by the application; and
- (k) the right to participate, engage in and conduct ceremonial activities on the area covered by the application.

2. Over areas where a claim to exclusive possession cannot be recognised, the native title claim group claim the following rights and interests:

- (a) the right to access the area covered by the application;
- (b) the right to camp on the application area;
- (c) the right to erect shelters on the area covered by the application;
- (d) the right to live on the area covered by the application;
- (e) the right to move about the area of the applications;
- (f) the right to hold meetings on the area covered by the application;
- (g) the right to hunt and gather on the area covered by the application;
- (h) the right to have access to and use the natural water resources of the area covered by the application;
- (i) the right to gather and use the natural products of the area covered by the application;
- (j) the right to conduct ceremony on the area covered by the application;
- (k) the right to participate in cultural activities on the area covered by the application;
- (l) the right to maintain and protect places of importance under traditional laws customs and practices in the area covered by the application;
- (m) the right to conduct burials on the area covered by the application;
- (n) the right to speak for and make non-exclusive decisions about the area covered by the application;
- (o) the right to speak authoritatively about the area covered by the application among other Aboriginal People or Torres Strait Islanders in accordance with traditional laws and customs;
- (p) the right to control access to and use of area covered by the application by other Aboriginal People or Torres Strait Islanders who seek access to or use of the lands and waters in accordance with traditional laws and customs;
- (q) the right to determine and regulate membership of and recruitment to the native title group;
- (r) the right to transmit the cultural heritage of the native title group including knowledge of particular sites.

3. The native title rights are subject to:

- (a) the valid laws of the State of Western Australia and the Commonwealth of Australia;
- (b) the rights (past and present) conferred upon persons pursuant to the laws of the Commonwealth and the laws of the State of Western Australia.

The question I need to consider under this section is whether the rights claimed can be readily identified. This will involve two considerations, firstly are the rights claimed clear and understandable and secondly are they capable of recognition as native title rights.

The rights claimed must be rights in land or waters to be recognised as native title rights as defined under s. 223(1) of the Act. In *Doepel Mansfield J* said the following in relation to s. 190B(4):  
In my judgment, the Registrar is not shown to have erred in any reviewable way in addressing the condition imposed by s 190B(4). ... He reached the required satisfaction that ... the claimed native title rights and interests did meet the requirements of being understandable as native title rights and interests and of having meaning – at [123].

It has further been held that the rights claimed must be specified exhaustively and not described in inclusive terms to meet the requirements of s. 225(b). see *Attorney-General of the Northern Territory v Ward* [2003] FCAFC [18-21]

For the sake of convenience I have examined the recognition of the rights claimed as native title rights under 190B(6) below, as apart of my consideration of whether at least some of the rights and interests claimed can be prima facie established. I now turn to consider the question of whether the rights claimed are understandable.

The current application in Attachment E firstly sets out a claim for exclusive possession over land where that may be recognised in the following terms.

**The right to possess, occupy, use and enjoy the lands and waters of the area covered by the application to the exclusion of all others, pursuant to the traditional laws and customs of the claim group.**

This description of the right of exclusive possession has been recognised as a native title right, it is readily identifiable and has been supported by the legal authorities *Ward*

I also need to consider the eleven instances (a) to (k) which are subsumed under the right of exclusive possession. Each of the particular rights identified is described in relation to the area of the land covered by the application and their meaning is clear. I have considered each of these rights and find that each is readily understandable. These rights will be considered further under 190B (6) below when I consider whether there is a prima facie basis for the rights.

Where exclusive possession may not be established I am satisfied that the non-exclusive rights (a) to (r) are described sufficiently to allow them to be identified as native title rights. These rights are considered further when I consider whether there is a prima facie basis for the rights under s. 190B(5) above.

## *Subsection 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.

## Combined Results

I consider each of the three assertions set out in the three paragraphs of s. 190B(5) in turn and come to combined result for s. 190B(5) at page 21 below.

For the application to meet this merit condition, I must be satisfied that a factual basis is provided to support the assertion that the claimed native title rights and interests exist and to support the particular assertions in paragraphs (a) to (c) of s. 190B(5). My role is not to test whether the asserted facts are proved but rather to determine whether the asserted facts, if they be true support the existence of the claimed rights and interests (*Doepel* at [17]).

In considering this condition, I must also bear in mind the definition of the terms ‘native title’ and ‘native title rights and interests’ in s. 223, where the terms are defined as

the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Straight Islanders; and

the Aboriginal peoples or Torres Straight Islanders, by those laws and customs, have connection with the land or waters; and

the rights and interests are recognised by the common law of Australia.

The word ‘traditional’ in the context of the phrase ‘traditional laws and customs’ was considered in the decision of the High Court in *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; (2002) 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*). In particular I refer to *Yorta Yorta* at [46] and [47] where the court considers whether the laws and customs are derived from a normative system that existed before British sovereignty and has continued to exist.

In particular I am required by this decision of the High Court to consider, how as a result of the acknowledgement and observance of traditional laws and customs, there could be said to be a factual basis for the assertion that the group in this application are in possession of native title rights and interests.

The recent decision in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala*)—at [40] and [41] also points to the need for the factual basis to describe the relationship between all members of the claim group with the land claimed and the relationship between the group and the claimed native title rights and interests. In relation to the application of s. 190B(5) Dowsett J said:

Thus it was necessary that the Delegate be satisfied that there was an alleged factual basis sufficient to support the assertion that the claim group was entitled to the claimed Native Title rights and interest. In other words, it was necessary that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)—at [39].

His Honour went on to distinguish between the requirement to demonstrate a factual basis for the claimed native title and the expert opinion of the anthropologist in the case. His Honour drew a clear distinction between opinion and fact in relation to evidence given for the purpose of satisfying s.190B(5)(a) to (c).

While my role is not to assess the truth of facts upon which the claimed native title rights and interests rest, the claimed rights need to be based on factual evidence and not merely an unsupported opinion of an expert (*Gudjala*—at [46], [68] and [81]).

In the current application I have before me an outline of the factual basis for the assertions contained in s. 190B(5)(a), (b) and (c) at Attachment F to the application. I also have first hand evidence in the form of an affidavit (dated 31/10/17) sworn by the traditional leaders of the group, who are also the applicant in the claim. The affidavit jointly sworn by [names deleted] provides facts upon which the group's traditional association and continuing connection with the area of the application is based. This material is evidence of a 'normative system' in the sense discussed by the High Court in *Yorta Yorta*; with traditional laws and customs binding the whole group to each other and to the area of the application.

I have reviewed this material under each of the three assertions set out in the three paragraphs of s. 190B(5) in turn and come to combined result for s. 190B(5) at page 22, below.

### **Result re s. 190B(5)(a)**

I am **satisfied** the factual basis provided is sufficient to support the assertion that the native title group and their predecessors had an association with the area.

Information relevant to this sub section has been provided in Attachment F to the application and in the affidavit of the applicant jointly sworn 31 October 2007.

### **Reasons re s. 190B(5)(a)**

Attachment F to the application contains detailed evidence of the group's association with the area of the application. The association is described in a number of ways:

Through descent from ancestors who enjoyed traditional ownership of the area, par; 1.1.

Living in the vicinity of the area, par; 1.3.

Knowledge of the Aboriginal lore associated with the area; par 1.4.

Traditional activities which continue to be conducted in the area; par 1.5, 1.6.

The information contained in the affidavit dated 31/10/07 jointly sworn by the applicants goes beyond the assertions and generalities of professional experts and represents direct first hand evidence from the group's leaders of their acknowledgement and observation of traditional laws and customs including social structure, ancient belief systems and activities, through which the group has associated with the area of the application for, it seems as long as anyone can tell. While the material does not specify a particular date or year, I am prepared to draw the inference that this group and its predecessors' connection with the area of the application precedes 1829, the date of British Sovereignty over Western Australia.

I have based the inference of a factual basis for the continued association of the group and its predecessors with the area of the application on the following material:

The veracity of the material contained in the application , particularly schedule F at par. 4 and the affidavit dated 31/10/07 which describes ancient belief systems and social structures whose origins precede European settlement.

The very limited extent of European settlement in this desert area to this day, which lies between the Gibson Desert to the north and the Great Victoria Desert to the south-east.

I have also referred to the publicly available anthropological study by Daisy Bates (1914) "Social organizations of some Western Australian tribes" Report of the Australian and New Zealand Association for the Advancement of Science 14: 387-400. Dame Daisy describes the social organisation of the Aboriginal people of the Lake Way district, the area of this application.

Based on the material provided in the application and corroborated and enhanced by the material considered above, I find that there is a factual basis to support the group's association and their predecessors association with the area.

### **Result re s. 190B(5)(b)**

I am **satisfied** that the factual basis provided is sufficient to support the assertion 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.

### **Reasons re s. 190B(5)(b)**

Information relevant to this assertion is contained in Attachment F and in the affidavit dated 31/10/07.

Attachment F of the Application contains a descriptive outline of the group's traditional laws and customs, including:

The nature of the laws and customs being based on the group's relationship and knowledge of the claim area, (par;2.1,2.2).

The universal nature of the laws and customs is outlined as embracing nearly all activity of the group and representing emulation their ancestral beings, (par; 2.3-2.7).

Social organisation including group decision making, rules for marriage and mortuary rights are governed by traditional laws and customs, (par 2.8-2.9).

The affidavit, dated 31/10/07 corroborates the description of the traditional laws and customs contained in the application. Both documents describe a rich and complex system of land based law and custom which govern the lives of members of the group. I find that there is a sufficient factual basis to support the assertion that there exist traditional laws and customs acknowledged and observed by the group, which gives rise to the claimed rights and interests in land.

### **Result re s. 190B(5)(c)**

Consistent with my reasons set out under s. 190B(5) (a) and (b), I am satisfied that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(c), that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

### **Reasons re s. 190B(5)(c)**

The material provides the factual basis for the group continuing to hold native title by describing in detail the continued relevance of the traditional laws and customs to the lives of members of the group today. In summary this includes the continued association with the area through, economic activity and continued veneration of the land through ceremony, story and song, and through site visitation. The teaching and receiving of knowledge is apparent and central to members of the group continuing to hold native title.

### **Combined result for s. 190B(5)**

The application **satisfies the requirement** as the factual basis provided is **sufficient** to support each of the particularised assertions in s. 190B(5), as set out in my reasons above.

## *Subsection 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 satisfies the condition of s. 190B(6). The claimed native title rights and interests that I consider can be prima facie established are identified in my reasons below.

### **Reasons**

The claimed rights and interests in Attachment E of the application are set out above in my reasons relating to s. 190B(4). They are set out in two sections, the first section being exclusive and the second section non-exclusive rights. Eleven rights are claimed where a right to exclusive possession can be recognised. In the second section a further eighteen rights are claimed where exclusive possession cannot be recognised.

Each of the first set of rights are qualified by the following statement;

“The native title rights are subject to:

- (a) the valid laws of the State of Western Australia and the Commonwealth of Australia;
- (b) the rights (past or present) conferred upon persons pursuant to the laws of the Commonwealth and the laws of the State of Western Australia.

I will firstly consider the rights that are claimed where exclusive possession can be established:

The primary right claimed is the right to exclusive possession, which is expressed as in the following terms;

The right to possess, occupy, use and enjoy the lands and waters of the area covered by the application to the exclusion of all others, pursuant to the traditional laws and customs of the claim group.

Evidence provided which supports this right is to be found in the attachment F of the application and in the affidavit dated (30/11/07). The instances of exclusive possession are discussed below under the particular instance identified.

**(a) the right to speak for the area covered by the application:**

I am satisfied that this right can be prima facie established.

Evidence provided which supports this right is to be found attachment F of the application and in the affidavit dated (30/10/07). The right to “speak for country” appears to be peculiar to native title and has been considered by the courts. It has been recognised in relation to areas of exclusive native title rights and interests in *Neowarra v State of Western Australia* [2003] FCA 275 & 494, where it was found to be equivalent to the right of ownership. This finding was based on the evidence received by Sundberg J in that case. The right to “speak for country” appears to be based on traditional knowledge of the jukurrpa, a term, common to western desert Aboriginal languages, [with spelling variations]. The concept was discussed in *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31; “The evidence shows that the subject matter of ownership was areas defined by Dreaming (Tjukurrpa) sites and tracks, and that it was the connection of the individual to an area so defined that made the individual an ‘owner’ of that area.”

It may therefore be concluded that the right to speak for country is based on ownership, (in traditional Aboriginal terms) and transcribed into western desert Aboriginal context by the concept of Jukurrpa. Having regard to the material provided in the application and particularly in the affidavit dated (31/10/07). I am satisfied that the right to speak for country can be established on a prima facie basis.

**(b) the right to be asked permission to use the land and waters of the area covered by the application:**

I am satisfied that this right can be prima facie established.

A factual basis for the assertion of this right is provided in the affidavit, (dated 31/10/07). At par.7 it is demonstrated that the right to be asked permission by somebody wishing to use the area of the application is a traditional right which continues to be recognised by the group.

**(c) the right to live on the area covered by the application:**

I am satisfied that this right can be prima facie established.

A factual basis for the assertion of this right is provided in the affidavit, dated (31/10/07). The affidavit demonstrates that the group continues to occupy the area of the application for various purposes associated with their traditional rights and responsibilities. This includes, visiting sites and teaching children (par 4.1, 4.2), hunting and food gathering (par 4.3), and funerals (par 6.1).

A broader outline of the group’s occupation of the area is provided in schedule F of the application which describes, inter alia, camping, travelling, hunting, performing rituals and collection of bush food.



The right has been recognised as a native title right, for example, see Determination in *Wandarang, Alawa, Mara & Ngalakan Peoples v Northern Territory* [2004] FCA 187 [para 3(c)], where it is expressed as a right to reside.

**(d) the right to make decisions about the use, enjoyment and management, of the land and waters of the area covered by the application:**

I am satisfied that this right can be prima facie established.

Given that the right may only be exercised where exclusive possession is established and given that it is expressed as subject to the law I am satisfied that this right may be established on a prima facie basis. Prima facie support for this right is found in the affidavit, dated (31/11/07). Ref. par 7.

**(e) the right to hunt and gather and to take water and other resources (including ochre) on the land and waters of the area covered by the application:**

I am satisfied that this right can be prima facie established.

A factual basis is provided in the affidavit dated (31/10/07) (par 4) and in attachment G.

The right to take water may be recognised as a non exclusive right, for example, see *Rubibi Community v WA* [2005] FCA 1716 [para 7].

The other rights in this group have been recognised as a native title right for personal, communal or traditional purposes by all the judicial authorities.

**(f) the right to control access to and activities conducted by others on the lands and waters of the area covered by the application:**

I am satisfied that this right can be prima facie established.

This is similar to the right to control use (d) considered above. Given that the right may only be exercised where exclusive possession is established and given that it is expressed as subject to the law I am satisfied that this right may can be prima facie established basis. Prima facie support for this right is also found in the affidavit, dated (31/10/07). Ref. par 7.

**(g) the right to use and enjoy resources of the area covered by the application:**

I am satisfied that this right can be prima facie established.

A factual basis is provided for this right in the affidavit of the applicants (31/10/07) at para 4.2, 4.3, 4.4 and 7.1.

This right to use and enjoy resources is recognised as a native title right, for example, see Determination in *Wandarang, Alawa, Mara & Ngalakan Peoples v Northern Territory* [2004] FCAFC 187 [para 3(d)].

**(h) the right to maintain and protect areas of cultural significance to the native title claim group on the area covered by the application:**

I am satisfied that this right can be prima facie established.

A factual basis is provided for this right in the affidavit dated (31/10/07) at para 3.1, 3.2, and 3.3 and in attachment G, Para 8 and 9.

The right to maintain and protect sites has been recognised as a native title right, for example, see Determination in *Wandarang, Alawa, Mara & Ngalakan Peoples v Northern Territory* [2004] FCAFC 187 [para 3(e)].

**(i) the right as against any other Aboriginal group or individual to be acknowledged as the traditional Aboriginal owners of the area covered by the application:**

I am **not** satisfied that this is a right that can be prima facie established.

This right is similar to the right to speak for country which is recognised as a native title right. It implies ownership of the traditional knowledge of the area.

The concept of “Traditional Aboriginal Ownership” as a legal concept originates in the *Aboriginal Land Rights (Northern Territory) Act 1976* and has come to be used in a more generic, non legal sense outside the Northern Territory.

Many Aboriginal groups have come to refer to themselves as traditional aboriginal owners of various parts of the country and have received acknowledgement from the broader community as such. Outside the *Aboriginal Land Rights (Northern Territory) Act 1976*, however, traditional ownership is not a legal concept which is recognised as such. This group may well be entitled to call themselves traditional owners of the area however I do not accept that this is a right which can be (or needs to be) recognised as a native title right.

**(j) the right to trade in resources of the area covered by the application:**

I have not been provided with any evidence in support of this right. Accordingly I can **not** be satisfied that this is a right which can be prima facie established.

The affidavit dated (31/11/07) and the information provided in attachment G of the application presents a strong impression of a vibrant society governed by a living structure of mutual responsibility with a close relationship to the area of the application. The dominant theme of the affidavit in particular is one of strong intergenerational responsibilities. I can however find no factual basis for the right to trade in the information provided.

**(k) the right to participate, engage in and conduct ceremonial activities and other cultural activities on the area covered by the application:**

This is a right which can be prima facie established.

A factual basis is provided for this right in the affidavit, dated (31/10/07) at para 4.1 and in attachment G at para 3, 4, 6, and 7.

The right to engage in cultural activities has been recognised as a native title right in a number of determinations; for example, *Attorney General of the Northern Territory v Ward* [2003] FCAFC, para 5(c) and para 9.2(h) of Determination.

I now turn to the second set of rights which are claimed over areas where exclusive possession cannot be established. Generally these rights are non controversial and are not disputed by the State of Western Australia who has elected not to comment on the affidavit, dated (31/10/07). I have examined each of these rights and have found that fifteen of the rights may be established as non exclusive native title rights on a prima facie basis. However the rights at paragraphs (o), (p) and (r) should not be registered for the reasons set out below.

The following rights are capable of being established on a prima facie basis and supported by the information in the application and the affidavit, dated (31/10/07).

- (a) the right to access the area covered by the application;**
- (b) the right to camp on the application area;**
- (c) the right to erect shelters on the area covered by the application;**
- (d) the right to live on the area covered by the application;**
- (e) the right to move about the area covered by the application;**
- (f) the right to hold meetings on the area covered by the application;**
- (g) the right to hunt and gather on the area covered by the application;**
- (h) the right to have access to and use the natural water resources of the area covered by the application;**
- (i) the right to gather and use the natural products of the area covered by the application (including food, medical plants, timber, stone, ochre, and resin) according to traditional laws and customs;**
- (j) the right to conduct ceremony on the area covered by the application;**
- (k) the right to participate in cultural activities on the area covered by the application;**
- (l) the right to maintain and protect places of importance under traditional laws, customs and practices in the area covered by the application;**
- (m) the right to conduct burials on the area covered by the application;**

In relation to the non-exclusive rights claimed, I have found that the following rights **should not** be registered:

- (n) the right to speak for and make non exclusive decisions about the area covered by the application.

The right to 'speak for' the area is discussed above and relates to the assertion of traditional aboriginal concept of ownership. The right to make "non exclusive decisions" derives its meaning from this context. In my view it can only mean the right to make decisions relating to the non exclusive native title rights that may be recognised.

In the unreported decision of *Neowarra v State of Western Australia* [2003] FCA 1402 Sundberg J was of the view that the 'right to speak for country involves a claim to ownership' and could only be

recognised in relation to areas where exclusive possession could be established. I note also the unreported decision of French J in *Sampi v State of Western Australia* [2005] FCA 777 where his Honour stated:

The right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation – at [1072].

I am of the view that the ‘right to speak for’ the application area cannot be prima facie established in relation to those areas where exclusive possession cannot be recognised. I note that this right is expressed as a composite right, namely the right to ‘speak for **and** make non-exclusive decisions about the application area’ (my emphasis). I am therefore of the view that if one part of the right cannot be established, the overall right cannot be established. Further, I am of the view that the ‘right to make non-exclusive decisions about the application area’ is not sufficiently clear in its scope and meaning.

This right **should not** be registered.

**(o) the right to speak authoritatively about the area covered by the application among other Aboriginal People or Torres Strait Islanders in accordance with traditional laws and customs.**

In my view this right should not be registered as it is doubtful whether this claimed right can be characterised as a right in relation to land and waters as required by s. 223. In any event, I refer to my comments above in relation to right 2(p) as also being relevant in relation to this right. I am of the view that this claimed right implies a claim to ownership and as such can only be recognized in relation to those areas where exclusive possession can be recognized. In my view, the restriction of this right to other Aboriginal People does not assist.

This right **should not** be registered.

**(p) the right to control access to and use of area covered by the application by other Aboriginal People or Torres Strait Islanders who seek access to or use of the lands in accordance with traditional laws and customs;**

The right to control access to the area implies a degree of ownership that is inconsistent with a claim to non-exclusive possession. Although this right is phrased only in relation to other Aboriginal People I am of the view that it still implies a claim to ownership of the area and a right to make decisions about the use of and access to the land by others and that is not able to be sustained in relation to areas where exclusive possession cannot be established.

As such I find that this right is not capable of being prima facie established in relation to those areas where a claim to exclusive possession cannot be sustained.

This right **should not** be registered.

**(q) the right to determine and regulate membership of and recruitment to the native title claim group;**

The description of a native title claim group is regulated under the Native Title Act 1993, s.190B(3). In *Daniel v Western Australia* [1999] FCA 686 at [303] the court held that a similarly phrased right, being a right to identify and acknowledge members of the native title claim group, was not a right that gives rise to a connection to land or waters as required by s. 223. As such I am of the view that this right is not capable of being prima facie established for the purpose of s. 190B(6).

This right **should not** be registered.

(r) the right to transmit the cultural heritage of the native title claim group including knowledge of particular sites.

It would appear that the right asserted at (r) encompasses transmission of the cultural heritage of the group in general and as such goes beyond the ambit of a native title right to land. In my view such a right approaches the new form of intellectual property as discussed in *Western Australia v Ward* (2002) 213 CLR 1. I am of the view that this right is not capable of being prima facie established as a 'native title right or interest'.

This right **should not** be registered.

## *Subsection 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 **satisfies** the condition of s. 190B(7).

### **Reasons**

Evidence provided which supports this right is to be found in attachment F of the application and in the affidavit dated (31/10/07). This evidence is discussed above, under s.190B(5) and s.190B(6).

## *Subsection 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 29.

### *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**

A search of the Tribunal's Register confirms that there is no determination of native title over the area of the current application.

### *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

In Attachment B of the application areas of previous exclusive possession acts are excluded from the claim.

### *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 attachment E of the application the native title rights and interests claimed by the group are described:

1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s.238 and/or ss.47,47A and 47B apply), the native title claim group claim the right to possess, occupy, use and enjoy the lands and waters of the area covered by the application to the exclusion of all others, pursuant to the traditional laws and customs of the claim group, including: (eleven claimed rights are then listed a-k).
2. Over areas where a claim to exclusive possession cannot be recognised, the native title claim group claim the following rights and interests: (eighteen rights are then listed a-r)

As the application does not claim exclusive possession over areas where exclusive possession cannot be established, I find that the requirement of this section 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.

## *Subsection 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 sub condition under s. 190B(9) in turn and I come to a combined result at page 31 below.

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

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

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

At schedule Q the application states that the applicants make no claim to any minerals, petroleum, or gas wholly owned by the Crown in right of the Commonwealth or State of Western Australia.

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

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

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

No part of this application is over any area offshore, see Schedule P

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

The application satisfies condition of s. 190B(9)(c).

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

The application does not claim exclusive possession over areas where native title has been extinguished.

#### **Combined result for s. 190B(9)**

The application satisfies the condition of s. 190B(9).

[End of reasons]



# Attachment A

## Summary of registration test result

|                                      |                  |
|--------------------------------------|------------------|
| Application name:                    | TALPA            |
| NNTT file no.:                       | WC 07/3          |
| Federal Court of Australia file no.: | WAD248/07        |
| Date of registration test decision:  | 29 February 2007 |

| Test condition<br>(see ss.190B and C of the<br>Native Title Act 1993) | Subcondition/requirement | Result                  |
|---|--------------------------|-------------------------|
| s. 190C(2)  |                          | Combined result:<br>met |
|   | re s. 61(1)              | 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)(ga)          | met                     |
|   | re s. 62(2)(h)           | met                     |
| s. 190C(3)  |                          | met                     |
| s. 190C(4)  |                          | met                     |

|            |                       |                         |
|------------|-----------------------|-------------------------|
| s. 190B(2) |                       | met                     |
| s. 190B(3) |                       | met                     |
| s. 190B(4) |                       | met                     |
| s. 190B(5) |                       | Combined result:<br>met |
|            | re s. 190B(5)(a)      | met                     |
|            | re s. 190B(5)(b)      | met                     |
|            | re s. 190B(5)(c)      | met                     |
| s. 190B(6) |                       | met                     |
| s. 190B(7) |                       | met                     |
| s. 190B(8) |                       | Combined result:<br>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:<br>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.

Native Title Determination Application filed in the W.A. District Registry of the Federal Court 14 December 2007, WAD 248/2007 with Attachments, supporting Affidavit of applicants sworn 27 November 2007 and Federal Court certificate of compliance by Malcolm O'Dell dated 13 December 2007.

Affidavit jointly sworn 31 October 2007 by **[names deleted]**.

Geospatial overlap analysis prepared by the Geospatial Unit of the Tribunal 10 September 2007 and geospatial assessment of 30/01/08

Tenure analysis WAD 248/07 as per Schedule of Applications (28/02/2008). Non Freehold Tenure as at December 2007.