National Native Title Tribunal

Registration test decision

Application name:	Mantjintjarra Ngalia Peoples
Name of applicant:	Phyllis Thomas, Nancy Gordon, Mindi Chapman, Morris Murphy, Dolly Walker, Kado Muir, Jane Beasley and Vanessa Thomas
State/territory/region:	Western Australia
NNTT file no.:	WC96/20
Federal Court of Australia file no.:	WAD6069/98
Date application made:	11 March 1996
Date application last amended:	13 October 1997
Name of delegate:	Liam Harding

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)(the Act).

For the reasons attached, I do not accept this claim for registration pursuant to s. 190A of the Act.

It is not possible to determine whether the claim satisfies all the conditions in s. 190B because of a failure to satisfy s. 190C.

Date of decision: 19 October 2007

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Liam Harding

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C and 190D of the ***Native Title Act 1993*** (Cwlth)[1]

[1] Instrument of delegation pursuant to s. 99 of the Act dated 27 September 2007

Reasons for decision

Table of contents

Introduction 4
The test 4
Information considered when making the decision 4
Application overview 5
Procedural fairness steps 6
Procedural and other conditions: s. 190C 7
Subsection 190C(2) Information etc. required by ss. 61 and 62 7
Delegate's comment 7
Native title claim group: s. 61(1) 7
Result 7
Name and address for service: s. 61(3) 8
Result 8
Native title claim group named/described: s. 61(4) 8
Result 8
Application in prescribed form: s. 61(5) 9
Result 9
Affidavits in prescribed form: s. 62(1)(a) 9
Result 10
Application contains details required by s. 62(2): s. 62(1)(b) 10
Delegate's comment 10
Result 10
Information about the boundaries of the area covered: s.62(2)(a) 10
Result 11
Map of boundaries of the area covered: s. 62(2)(b) 11
Result 11
Searches: s. 62(2)(c) 11
Result 11
Description of native title rights and interests: s. 62(2)(d) 12
Result 12
Description of factual basis: s. 62(2)(e) 12
Result 12
Activities: s. 62(2)(f) 12
Result 12
Other applications: s. 62(2)(g) 13
Result 13
Section 29 notices: s. 62(2)(h) 13

Result 13
Combined result for s. 62(2) 13
Combined result for s. 190C(2) 13
Subsection 190C(3) No common claimants in previous overlapping applications 13
Result 14
Subsection 190C(4) Authorisation/certification 14
Result 14
Reasons 15
Merit conditions: s. 190B 17
Subsection 190B(2) Identification of area subject to claimed native title 17
Result 17
Subsection 190B(3) Identification of the native title claim group 18
Result 18
Subsection 190B(4) Native title rights and interests identifiable 19
Result 19
Subsection 190B(5) Factual basis for claimed native title 20
Result 20
Subsection 190B(6) Prima facie case 20
Result 20
Subsection 190B(7) Traditional physical connection 21
Result 21
Subsection 190B(8) No failure to comply with s. 61A 21
Delegate's comments 22
No approved determination of native title: s. 61A(1) 22
Result 22
No previous exclusive possession acts: ss. 61A(2) and (4) 22
Result 22
No exclusive native title claimed where previous non-exclusive possession acts: ss. 61A(3) and (4) 23
Result 23
Combined result for s. 190B(8) 23
Subsection 190B(9) No extinguishment etc. of claimed native title 23
Delegate's comments 23
Result re s. 190B(9)(a) 24
Result re s. 190B(9)(b) 25
Result re s. 190B(9)(c) 25
Combined result for s. 190B(9) 25
Attachment A Summary of registration test result 26

Introduction

When this claim was first lodged with the Tribunal in 1996 it was brought by [name of Person A deleted] on behalf of others, and after some amendment became known, as it is today, as the Mantjintjarra Ngalia Peoples' claim; what was sought was recognition of native title over an area in the Goldfield's region of Western Australia.

Being a claim made before the commencement of the *Native Title Amendment Act 1998* (Cwlth) (1998 Amendment Act), neither the application form nor the information it contains is responsive to many of the requirements of the registration test, which was inserted into the *Native Title Act 199*3 (Cwlth) (the Act) by the 1998 Amendment Act.

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

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

The test

The registration test, found in ss. 190B and 190C of the Act, is a test to be applied to a native title claim to determine whether it should be entered on the Register of Native Title Claims. Registration means that certain procedural rights must be afforded to the registered native title claimants in relation to some future acts.

In order for a claimant application to be entered on the Register of Native Title Claims, s. 190A(6) requires that the Registrar must be satisfied that *all* the conditions set out in ss. 190B and 190C of the Act are met.

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.

The requirement that the Native Title Registrar (the Registrar) reconsider this application for registration pursuant to s. 190A of the Act was triggered by item 90 of Schedule 2 (the transitional provisions) of the *Native Title Amendment Act 2007*(Cwlth) (2007 Amendment Act).

Information considered when making the decision

Section 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.

However, given that the registration test has in this instance been triggered by item 90 of the transitional provisions of the 2007 Amendment Act, pursuant to sub-item 90(4)(c), I am required to apply the registration test under s. 190A as if the conditions in ss. 190B and 190C that require the application to be accompanied by certain information or other things, or to be certified or have

other things done, also allowed the information or other things to be provided, and the certification or other things to be done, by the applicant or another person after the application was made.

I have had regard to the contents of Registrar's file WC96/20 (also described as 2007/01317 Vol 01). Where I have had particular regard to documents within that file I have identified them in the text.

The applicant made a number of amendments to the original application and I have considered the changes made by these amendments in reaching my decision.

It is clear that the Mantjintjarra and Ngalia people contemplated bringing their application into a form that responded to the requirements of the registration test after the amendments to the Act in 1998. Under cover of letter dated 16 March 1999, a copy of a set of unsigned, proposed amendments to the application were provided to the Registrar. In the covering letter, the applicant's legal representative made it clear that proposed amendments were in draft form only and that it was anticipated some further changes would be made before the amendments were settled.

Whilst an application in the Federal Court, seeking leave to amend, was filed on 26 March 1999, from a notation made on the Registrar's file it appears that the applicant's legal representative later sought to discontinue the application for leave to amend but, in any event, the application for leave to amend was dismissed on 16 April 1999.

I have had regard to this material as required by sub-item 90(4)(a) of the transitional provisions of the 2007 Amendment Act, but as these were only a draft of proposed amendments to the application, never having been made, I have decided to treat the material as not generally relevant to my task.

In addition to the proposed amendments, the applicant provided additional sworn affidavits from three of the eight persons named as the applicant. I have considered the matters deposed to in those affidavits in making my decision.

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

Application overview

The application was lodged with the Tribunal on 11 March 1996 and, having been accepted for registration, details of the application were entered on the Register of Native Title Claims.

Since the time it was lodged with the Tribunal in 1996, there has been a succession of amendments made to the application, the last of which was made on 13 October 1997.

As a result of the commencement of the 1998 Amendment Act (item 11 of Part 2 of Schedule 5), the Registrar was required to consider the claim made in the application under s. 190A. On 23 April 1999, the Registrar's delegate decided it did not meet the conditions of ss. 190C(2) and 190C(4) and so the details of the claim were removed from the Register of Native Title Claims.

Because of the effect of item 90 of the transitional provisions to the 2007 Amendment Act, the Registrar is again required to apply the registration test to the claim.

I am aware that this claim was one of eight overlapping claimant applications which were before the Federal Court in *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9)* [2007] FCA 31 (*Wongatha*). In that case, the court considered the whole of the Wongatha (WAD6005 of 1998) and Cosmo Newberry (WAD144 0f 1998) applications and, to the extent that the area it covered overlapped the Wongatha claim area, the application I am considering, i.e. Mantjintjarra Ngalia People (WAD6069 of 1998).

Rather than making a determination under s. 225 of the Act the court, among other orders, made an order in respect to the Mantjintjarra and Ngalia peoples' application that:

> The application be dismissed to the extent that it relates to land or waters that are also the subject of proceeding WAD 6005 of 1998 (*Harrington Smith & Ors v State of Western Australia & Ors*).

Consequently, the claim which I must reconsider is that part of the Mantjintjarra and Ngalia people's application that was not dismissed by the court in *Wongatha*.

Procedural fairness steps

As both a delegate of the Registrar and a Commonwealth officer, when I make my decision about whether or not to accept this application for registration, I am bound by the principles of administrative law, including the rules of procedural fairness.

Further, sub-item 90(4)(c) of the 2007 Amendment Act requires that the Registrar advise the applicant that the application was being reconsidered and give the applicant a reasonable opportunity to provide further information or other things, or to have any things done, in relation to the application. In accordance with this requirement, a number of letters were sent to the applicant, the particulars being:

- Letter of 23 April 2007 advising that application was being reconsidered and that new material could be provided
- Letter of 15 May 2007 setting timetables for provision of material and testing; and
- Letter of 14 September 2007 setting a revised date for testing.

No response was received to any of these letters.

Please note: All references to legislative sections refer to the *Native Title Act 1993* (Cwlth), unless otherwise specified. The description of each condition of the registration test that appears prior to the delegate's result and reasons is in many instances a paraphrasing of the relevant legislative section in the Act. Please refer to the Act for the exact wording of each condition. For ease of reading, sections, subsections and paragraphs are denoted with 's.' in headings and elsewhere.

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 13.

Subsection 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.

Sub-item 90(4) of the transitional provisions to the 2007 Amendment Act says that I must have regard to any information provided by the applicant after the application was made and must apply s. 190A as if the conditions in ss. 190B and 190C requiring that the application contain or be accompanied by certain information or other things or be certified or have other things done in relation to it, also allowed the information or other things to be provided or to be done by the applicant or another persons after the application is made.

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).

In light of the requirements of s. 190C(2) outlined above, I must be satisfied that the application before me contains all the information required by s. 61(1). Section 61(1) appears in the Act as a table and sets out the types of applications that may be made to the Federal Court under Division 1 of the Act and the persons who may make each of those applications.

In *Northern Territory of Australia v Doepel* [2003] FCA 1384 (*Doepel*) His Honour, Mansfield J, provided some guidance on the task I must undertake to determine whether the requirement in s. 61(1), as imposed by s. 190C(2), is met. At paragraph [36] His Honour states:

> In my judgment, s 190C(2) relevantly requires the Registrar to do no more than he did. That is to consider whether the application sets out the native title claim group in the terms required by s 61. That is one of the procedural requirements to be satisfied to secure registration: s 190A(6)(b). If the description of the native title claim group were to indicate that not all the

> persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirement of s 190C(2) would not be met and the Registrar should not accept the claim for registration.

This analysis of the task however presupposes that the application describes a 'native title claim group' – a legal concept which was only introduced when the 1998 Amendment Act commenced. Despite the fact that this application was made in 1996, and prior to the introduction of s. 61(1), I accept that the application and the additional material to which I have had regard is, in this respect, sufficiently responsive to the requirement of the Act to enable me to properly test whether this requirement is met. I note that in A5 of the application there is a description of persons on whose behalf the application is brought and in the affidavits of [name of Person D deleted], [name of Person C deleted] and [name of Person A deleted] (all of which are dated 13 January 1999) each deposes to having been appointed to speak on behalf of the 'claim group'.

Having considered the description of the claim group I believe that there is nothing on the face of that description, or elsewhere in the application, to indicate that not all persons in the native title claim group are included in the description or that it is in fact a sub-group of the native title claim group for the area of the application.

Accordingly, I am satisfied that the description of the persons in the claim group meets the requirement in s. 61(1), as imposed by s. 190C(2).

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).

This information is provided at A3 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).

The information contained under A5 and at Attachment A of the application does not name the persons in the native title claim group but a description of the native title claim group has been provided in accordance with s. 61(4)(b) that is sufficient for the purposes of s. 190C(2). A qualitative assessment of the sufficiency of the description provided is found in my reasons under s. 190B(3).

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 **does not meet** the requirement under s. 61(5).

The application was made in 1996 in what was, at that time, the relevant form prescribed by the National Native Title Regulations 1993. In my opinion, this is sufficient for the purposes of s. 61(5). I do not think that, in the circumstances, the application must be in the form now prescribed by the Native Title Federal Court Regs 1998. It take this view because Item 6, Part 3 of Schedule 5 to the 1998 Amendment Act provides that this application is 'taken to have been made to the Federal Court', i.e. the application 'is to be treated as if it were made to the Federal Court under the relevant provisions of the new Act': sub-item 36(a) of Part 9 of Schedule 5 of the 1998 Amendment Act. Sub-item 90(4) of Part 4 of Schedule 5 of the 2007 Amendment Act provides further support, in that it cannot have been intended that the application would be refused registration merely because it was not in the form prescribed by the new Act. Otherwise, there would be no point in allowing the applicant to 'top up' the application in the manner provided for by sub-item 90(4).

The application was made to the Registrar on 11 March 1996 but, as noted, is 'taken to have been filed in the Federal Court' and thus satisfies s. 61(5)(b): see item 6 of the transitional provisions to the 1998 Amendment Act.

In the light of my reasons set out below in relation to ss. 61 and 62, I am of the view that the application does not 'contain such information in relation to the matters sought to be determined as is prescribed' by the Act and does not, therefore, satisfy the condition in s. 61(5)(c).

The application is accompanied by an affidavit from each of the applicants as prescribed by s. 62(1)(a)(although the affidavits themselves do not satisfy all of the requirements of s. 62(1)(a)(i)-(v)) and therefore s. 61(5)(d) is satisfied.

I am not required under s. 190C(2) to consider whether the prescribed fee was paid.

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

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

(i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and

(ii) the applicant believes that none of the area covered by the application is also covered by an entry in the National Native Title Register, and

(iii) the applicant believes all of the statements made in the application are true, and

(iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and

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

Result

The application **does not meet** the requirement under s. 62(1)(a).

Pursuant to s. 190C(2), I must be satisfied (among other things) that the application is accompanied by any affidavit or other document, required by ss. 61 and 62. In accordance with sub-item 90(4)(b), the applicant was given the opportunity to 'top up' their application to meet these requirements in the terms of the Act as it currently stands but did not do so.

Paragraph 62(1)(a) provides that a claimant application must be accompanied by an affidavit sworn by the applicant in the terms required under s. 62(1)(a)(i) to (v). If (as in this case) more than one person comprises the applicant (see s. 62(2)(d)), then I accept that those persons may make an affidavit deposing to the prescribed matters either jointly or individually.

The application before me is made by eight persons. Therefore, the application must be accompanied by an affidavit or affidavits from all those persons in the terms required bys. 62(1)(a).

Affidavits from the eight persons who jointly comprise the applicant accompany the application. All of those affidavits address the matters set out in s. 62(1)(a) (i) – (iii). There are further affidavits of [name of Person A deleted], [name of Person D deleted] and [name of Person C deleted], provided to the Registrar after the application was made, that contain statements that appear to be aimed at providing the information sought in s. 62(1)(a)(iv) to (v) in relation to authorisation.

However, the absence of affidavits containing all of the information required by s. 62(1)(a) (i) – (v) from each of eight persons who jointly comprise the applicant means that the requirement under this section has not been met.

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 eight 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 13 below and is one and the same as the result for s. 62(1)(b) here.

Result

The application **does not meet** the requirement under s. 62(1)(b).

Information about the boundaries of the area covered: 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).

There is a map and other information contained in the application, which appear to provide information about the boundaries and the area covered by the application.

Map of boundaries of the area covered: 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).

A map has been provided with the application which appears to show the boundaries of the area mentioned in s. 62(2)(a)(i).

Searches: s. 62(2)(c)

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

Result

The application **does not meet** the requirement under s. 62(2)(c).

I understand the requirement under s. 62(2) to mean that the application must contain details of all searches carried out by or on behalf of the applicant to determine the matters the section refers to.

A8 of the Form 1 required an applicant to provide 'details of any searches conducted with public bodies and authorities and of official title registers in relation to the area covered by the application and the results obtained'. The applicant's response was 'not yet completed'.

Had the applicant intended to convey that searches had not been carried out this could have been achieved by unequivocally stating this. Instead, by using the words 'not yet completed' it is open to me to conclude that the process of undertaking *all searches the applicant intends to perform* is not yet completed but that some searches have been completed.

On the basis of the information in section A6 of the application, where what appear to be non-native title interests in relation to the area covered by the application are set out, it appears to be the case that some searches have been undertaken.

On the basis of the information before me and as a result of the applicant's ambiguous response to A8 of the Form 1, I am not satisfied that the requirement under s. 62(2)(c) is met.

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).

In the application there is what appears to be a description of the rights claimed.

The description of the rights claimed meets the requirement under s. 62(2)(d) as it 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.

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).

The application itself does not provide a general description of the factual basis of the kind referred to in this section. However, the applicant has provided three affidavits that might be considered to contain information which would satisfy the requirements under this section and I note that I am able to consider this material pursuant to item 90(4) of the transitional provisions to the 2007 Amendment Act.

However, I have not undertaken any qualitative assessment of this additional material when considering the requirements under s. 62(2)(e) and for the purposes of s. 190C(2); that task is to be undertaken when the conditions of s. 190B(5) are applied to the application.

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).

I am of the view that the requirement under s. 62(2)(f) only necessitates the applicant providing these details in circumstances where the native title claim group assert that they currently carry

out activities in relation to the area. As the application is silent on this matter I accept that this requirement is met.

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).

There is nothing before me which indicates that the applicant was aware of any such applications at the time this application was made.

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).

There is nothing before me which indicates that the applicant was aware of any such notices.

Combined result for s. 62(2)

The application **does not meet** the combined requirements of s. 62(2), because it does not meet each and every one of the sub-requirements of ss. 62(2)(a) to (h), as set out above. See also the result for s. 62(1)(b) above.

Combined result for s. 190C(2)

The application **does not satisfy** the condition of s. 190C(2), because it **does not** contain 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).

The Tribunal's Geospatial Services conducted an overlap analysis on 17 September 2007. The analysis identified that there are three applications as per the Register of Native Title Claims that fall within the external boundary of the Mantjintjarra and Ngalia people's application. Each of these applications was accepted for registration after the Mantjintjarra and Ngalia people's application was originally made on 11 March 1996. Consequently, I am therefore satisfied that there are no previous overlapping applications which were registered as a result of being considered for registration under s. 190A of the Act. I am therefore not required to proceed to consider the issue of whether there are common claimants and I am satisfied that the condition of s. 190C(3) is met.

Subsection 190C(4) Authorisation/certification

Under s. 190C(4) the Registrar/delegate must be satisfied either that:
(a) the application has been certified under s. 203BE, or under the former s. 202(4)(d), by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

Under s. 203BE(4), certification of a claimant application by a representative body must:
(a) include a statement to the effect that the representative body is of the opinion that the requirements of ss. 203BE(2)(a) and (b) have been met (regarding the representative body being of the opinion that the applicant is authorised and that all reasonable efforts have been made to ensure the application describes or otherwise identifies all the persons in the native title claim group), and
(b) briefly set out the body's reasons for being of that opinion, and
(c) where applicable, briefly set out what the representative body has done to meet the requirements of s. 203BE(3)(regarding overlapping applications).

Under s. 190C(5), if the application has not been certified, the application must:
(a) include a statement to the effect that the requirement in s. 190C(4)(b) above has been met (see s. 251B, which defines the word 'authorise'), and
(b) briefly set out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

Result

The application **does not satisfy** the condition of s. 190C(4) and the condition of s. 190C(5).

Reasons

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

It is clear that there is no information suggesting that the application has been certified and, accordingly, s. 190C(4)(a) is not applicable. Therefore, I must be satisfied that the application meets the requirements of s. 190C(4)(b).

The Act at s.190C(5) sets out a threshold test for compliance with s. 190C(4)(b) – the Registrar must be satisfied that the application:

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

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

Does the application comply with the requirements of s. 190C(5)? The application itself does not. The Mantjintjarra Ngalia peoples' claim was lodged in 1996, prior to the insertion of the requirement for authorisation by the 1998 Amendment Act. The claim was not subsequently amended to address the question of authorisation. It follows that there is no information in the application, in the form it took from the last amendments to it in 1997, which relates to the issue of authorisation.

Does then any of the additional material provided by the applicant (to which I may have regard pursuant to item 90(4)(b) of the transitional provisions to the 2007 Amendment Act) assist the claim in this regard?

On 16 March 1996, the applicant's legal representative forwarded to the Registrar copies of affidavit's sworn on 13 January 1999 from three of eight persons who jointly comprise the applicant. The affidavits for the most part relate to matters not apparently relevant to the issue of authorisation of the applicant. However, there is one paragraph touching on the issue of authorisation in each of the affidavits that warrants consideration. There is a near identical statement in each of the three affidavits and that statement, as it appears in both [name of Person D deleted] and [name of Person A deleted] affidavits, reads:

> I am an applicant on this claim. I am authorised as an applicant as a meeting was held by the claim group today. Those in attendance at the meeting agreed that they have authority as elders under traditional law and customs to appoint me to speak on behalf of the claim group together with others who were nominated as applicants. I believe that I have the necessary authority to speak on behalf of my people.

[name of Person C deleted] affidavit only differs in respect of this statement by the omission of the reference to elders having authority under traditional law and customs to appoint him to speak on behalf of the group. Of course, if the omission of these words was deliberate it may give a different view of who apparently authorised the applicant. I am not able to conclude whether this omission was accidental or deliberate but as I do not consider it to be the only problem with regards to the issue of authorisation I will not make any findings on the basis of the apparent inconsistency.

I have considered the additional material and I am not satisfied that 'threshold' conditions of s. 190C(5) are satisfied. The affidavits from each of [name of Person D deleted] , [name of Person A deleted] and [name of Person C deleted] refer to them having been appointed 'to speak on behalf

of the claim group together with others who were nominated as applicants' but they do not indicate how many other persons were nominated, nor provide names for those other persons. I am not prepared to assume that the nominees are the same persons as those whose names appear in the application as jointly comprising the applicant. Further, the deponents do not specifically state they are members of the claim group and I am not prepared to assume this to be case.

I also note that five of the eight persons who are listed in the application as persons who jointly comprise the applicant have not provided any evidence that they are members of the native title claim group and that they are authorised to make the application and to deal with matters arising in relation to it.

For the reasons set out above I am not satisfied the requirement in s. 190C (5) has been met.

Although it is not necessary in these circumstances to proceed to consider the substantive issue of whether the applicant has in fact been authorised in accordance with s. 251B I have briefly set out the reasons why I am not satisfied that this is the case.

Chiefly, there is a significant lack of information as to how authorisation could be said to have occurred. It is not readily apparent whether there exists a process of decision-making under traditional law and custom for authorising things of this kind or whether the claim group agreed to and adopted a decision-making process in the absence of a mandated traditional process.

It appears to be the case (relying upon the affidavits of [name of Person D deleted] and [name of Person A deleted] that elders have, or have been given, the authority to appoint people to speak on behalf of the claim group. In *Moran v Minister for Land and Water Conservation for NSW* [1999] FCA 1637, His Honour Justice Wilcox recognised that a traditional decision making processes may exist under which a 'council of elders' or some other group has the requisite authority. However, in a case where the authority purportedly given was challenged, Wilcox J found that a person who wishes to rely on a decision by such a representative or other collective body would need to show:

- that such a body exists under customary law recognised by the members of the group
- the nature and extent of that body's authority to make decisions binding the members of the group
- and that the body had given its authority as required under the Act – see [34].

The Mantjintjarra and Ngalia people's application lacks sufficient information concerning both the existence of a council of elders or other representative body and the membership or powers of such a group.

I am also concerned that, given my findings at s. 190B(3) concerning the description of the membership of the group, I am unable to determine who would be the members who need to authorise. I believe that these are critical failings for the application.

To conclude, for the reasons set out above, I am not satisfied that the circumstances described by either ss. 190C(4)(a) or (b) are the case in this application and therefore the condition of s. 190C(4) as a whole is not met.

Merit conditions: s. 190B

Subsection 190B(2)
Identification of area subject to claimed native title

Under s. 190B(2) 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.

Under 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.

Under 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 **does not satisfy** the condition of s. 190B (2).

Subsection 190B(2) requires that the information in the application, describing the areas covered by the application, is sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters. The information required to be contained in the application is that described in ss. 62(2)(a) and (b) as set out above.

At A6 the application area is described as including:

> Vacant Crown Land; Aboriginal Reserves: 25058 (Mulga Queen), 25059 (Mulga Queen), 25060 (Mulga Queen), and 32421 (Mt Gerard); Pastoral Leases: Lake Wells, Erliston, Bandya, Nambi, Melrose, and Banjawarn Station, and a portion of Wonganno Station; Conservation and Land Management Reserves: Mungkili Claypan Nature Reserve, and De La Poer Nature Reserve, and a portion of proposed Lake Throssell Nature Reserve; Darlot Stock Route.

There is a note to A6 which states that 'The area under claim does not include any land or waters affected by a Category A Past Act (as defined in section 229 of the Native Title Act 1993)'.

There is also a note to A9 which states that: 'The above native title rights and interests are not claimed with respect to any area of current and former freehold land.

There is a monochrome A4 copy of a map attached to the application that includes the application area depicted by a bold line and generalised land tenure information.

The Tribunal's Geospatial Services assessed the map and written description and concluded in its assessment dated 17 September 2007 that, 'the description and map are inconsistent and do not identify the application area with reasonable certainty'.

The assessment notes that what is described in the application is only those parcels that are included in the area and that, whilst this is suitable for the south-west portion of the application

area, the same cannot be said for the northern and eastern boundaries. The northern and eastern boundaries are predominantly within vacant Crown land and are not clearly defined by the description as they do not follow cadastral boundaries and no other boundary description is given.

I accept that the lack of sufficient information would render the description incapable of allowing the proper identification of the particular land and waters where native title rights and interests are asserted. For these reasons, I am not satisfied that the information and map contained in the application 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.

In conclusion, I consider that the application does not satisfy the condition of s. 190B(2) as a whole.

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 **does not satisfy** the condition of s. 190B(3).

Subsection 190B(3) sets out two ways in which a claim group may be described for the purposes of registration. It is set out above.

As the application does not name all of the native title claim group members individually s. 190B(3)(a) is not applicable.

My consideration must then turn to whether the description in the application meets the requirement in s. 190B(3)(b). This provision requires me 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 in that group.

The application is expressed to be brought 'on behalf of the Mantjintjarra and Ngalia peoples including [name of Person A deleted] and family, [name of Person E deleted] and family, [name of Person F deleted] dec) and family, [name deleted] family, [name of Person D deleted] and family, [name of Person G deleted] and family, [name of Person H deleted] and family, [name deleted] family, [name of Person I deleted], [name of Person J deleted] and [name of Person K deleted] and [name of Person L deleted] and [name of Person M deleted] and family, [name of Person N deleted] and family, [name deleted], [name of Person B deleted] and family, [name of Person O deleted], [name of Person P deleted],[name deleted] family, [name of Person Q deleted](dec) and family, [name deleted] family, [name deleted]family.'

The use of the word 'including' indicates to me that this is not an exhaustive list of individuals and families that comprise the Mantjintjarra and Ngalia people and therefore, from the information before me there is no way of knowing what further individuals or families might be included. Nor does the use of the word 'family' assist the description in meeting the requirements of the section as no definition of what may be encompassed by the notion of family is provided. A similar kind

of description of a native title claim group was discussed in *Colbung v The State of Western Australia* [2003] FCA 774 and was found to be inadequate. Finn J stated:

> The description of the persons on whose behalf the application is made is clearly inadequate. The description "the Isaacs family" is itself difficult enough in the absence of explanation. The word "family" as applied to people can be used in a variety of senses. The Oxford English Dictionary (2nd ed), for example, includes the following amongst possible meanings of "family":
>
> > 3.a. *The group of persons consisting of the parents and their children, whether actually living together or not; in wider sense, the unity formed by those who are nearly connected by blood or affinity.*
> > 4.a. *Those descended or claiming descent from a common ancestor: a house, kindred, lineage.*
>
> Alternatively the term as used in the application may have its own dictionary or conventional meaning. There is no evidence to suggest this is the case, but the additional description of the claim group "and other related people etc" suggests this might be so—[38] to [39].

I am of the view that the description can not satisfy the requirements of s. 190B(3)(b) because it is not sufficiently clear as to allow the identity of persons in the native title claim group to be determined. Accordingly, I am not satisfied that the condition of s. 190B(3) has been met.

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).

Subsection 190B(4) requires the Registrar or his 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. For this purpose 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, I am focussing only on whether the rights and interests as they appear in the application are identifiable.

At A9 of the Form 1, under the heading 'Native Title Interests' the following words appear:

> Occupation, use and enjoyment of the claim area.
>
> Save and except for the areas of former pastoral lease and current pastoral lease, in respect of which the claimed native title rights and interests are limited to those rights and interests which are consistent with the reservations contained in statutes.
>
> In relation to any other lease hold interest (not including mining leases) within the claim area granted prior to 1st Jan 1994 the native title rights and interest claimed by the applications are

limited to those which are consistent with such leasehold interests and or any reservations contained in such lease hold interest.

NOTE: The above native title rights and interests are not claimed with respect to any area of current and former freehold land.

Although a right thus expressed may, after *Attorney-General of the Northern Territory v Ward* (2003) 134 FCR 16; [2003] FCAFC 283 (see [16]—[23]), have difficulty in being established prima facie, the claimed right satisfies this section.

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.

Result

I am **not satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(a)to (c).

Subsection 190B(5) refers in (a) to (c) to the 'native title claim group'. In my reasons at s. 190B(3), I came to the conclusion that the description is not sufficiently clear as to allow the identity of persons in the native title claim group to be determined. As a consequence of the failure to adequately describe the group, it is not possible to know how large the membership of the group is or who its members are. The assertion being made that the native title rights and interests claimed exist is being made by the applicant on behalf of the native title claim group. As I am of the view that the native title claim group is not adequately identified in the application, it follows that I cannot be satisfied that the requirements of s. 190B(5)(a) to (c) are met.

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

I note the decision in *Quall v Native Title Registrar* (2003) 126 FCR 512; [2003] FCA 145 (*Quall*) at [36] to [37], where Mansfield J found that:

> The [Delegate of the] Registrar was…not satisfied that the requirements of s. 190B(5) were met...
>
> [T]he delegate's decision turned in this regard on her approach to s 61 and the identification of the native title claim group for the purposes of s. 190B(3). For the same reasons, the delegate found that the requirements of ss. 190B(6) and 190B(7) were not met. As I have concluded that the delegate's decision as to the requirements of s. 61 and s. 190B(3) should not be disturbed, her conclusion as to those further provisions should also remain undisturbed.

As I have found that the requirements of s. 190B(5)(a) to (c) have not been met, it follows that I do not consider that at least some of the native title rights and interests can, prima facie, be established under s. 190B(6).

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

Under s. 190B(7)(a), I 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.

As I am of the view that the native title claim group is not adequately identified in the application, it follows that I cannot be satisfied that the requirement of s. 190B(7) is met: *Quall* at [36] to [37].

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 23.

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).

A search of the National Native Title Register indicates that there are no approved determinations made in relation to the area.

No previous exclusive possession acts: 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 **does not meet** the requirement under s. 61A(2), as limited by s. 61A(4).

This condition is to ensure that native title determination applications are not made over areas covered by prohibited grants or tenures (e.g. freehold and certain leases) called 'previous exclusive possession acts', a definition for which is provided in s. 23B— see s. 61A(2). The application area, as described in A6, excludes 'any land or waters affected by a Category A Past Act (as defined in section 229 of the Native Title Act 1993'. And at A9 the application provides: 'NOTE: The above native title rights and interests are not claimed with respect to any area of current and former freehold land'. However, there is no express statement that the application does not cover land or waters that are covered by 'previous exclusive possession acts' as that term is defined in the Act.

Accordingly, I am of the view that the requirements of this subsection are not met.

No exclusive native title claimed where previous non-exclusive possession acts: 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).

Whilst there is no statement in the application that no claim is made over areas subject to any 'previous non-exclusive possession acts' as defined in s. 23F, the claimed native title rights and interests do not appear to include a claim to possession, occupation, use and enjoyment to the exclusion of all others. Accordingly, I am satisfied that the requirements of this subsection are met.

Combined result for s. 190B(8)

The application **does not satisfy** the condition of s. 190B(8), because it **does not meet** all 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 subcondition under s. 190B(9) in turn and I come to a combined result at page 24.

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

The application and accompanying documents do not disclose, nor am I otherwise aware that the applicant claims ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory. Accordingly, I am satisfied that the application complies with s. 190B(9)(a).

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

A search of the Tribunal's geospatial mapping of the application area reveals that it does not extend to any offshore place. Accordingly, I am satisfied that the application complies with s. 190B(9)(b).

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

I am not otherwise aware that the native title rights and interests claimed have otherwise been extinguished. Accordingly, the application satisfies the subcondition of s. 190B(9)(c).

The application and accompanying documents do not disclose, and I am not otherwise aware, that the native title rights and interests claimed have otherwise been extinguished.

Combined result for s. 190B(9)

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

[End of reasons]

Attachment A
Summary of registration test result

Application name:	Mantjintjarra Ngalia Peoples
NNTT file no.:	WC96/20
Federal Court of Australia file no.:	WAD6069/98
Date of registration test decision:	19 October 2007

Test condition (see ss.190B and C of the Native Title Act 1993)	Sub-condition/requirement	Result
s. 190C(2)		Combined result: Not met
	re s. 61(1)	Met
	re s. 61(3)	Met
	re s. 61(4)	Met
	re s. 61(5)	Not met
	re s. 62(1)(a)	Not met
	re s. 62(1)(b)	Not met
	re s. 62(2)(a)	Met
	re s. 62(2)(b)	Met
	re s. 62(2)(c)	Not met
	re s. 62(2)(d)	Met
	re s. 62(2)(e)	Met
	re s. 62(2)(f)	Met

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

[End of document}