

National Native Title Tribunal

**REGISTRATION TEST
REASONS FOR DECISION COVER SHEET**

(Edited Website version)

DELEGATE: Russell Trott

Application Name: Widi Mob
Name of Applicant: Joan Martin
NNTT No: WC 97/72
Federal Court No: WG 6193/98
NNTT Region: South West - Pilbara
Date Application Made: 26 August 1997

I have considered the application against each of the conditions contained in s190B and 190C of the *Native Title Act 1993*.

DECISION:

The application is NOT ACCEPTED for registration pursuant to s190A of the *Native Title Act 1993*.

Written notice of the decision and the reasons for decision are to be provided to the applicant.

.....

Russell Trott

Delegate of the Registrar pursuant to
Sections 190, 190A, 190B, 190C, 190D
of the *Native Title Act 1993*

.....

Date of Decision

Brief History of the Application

The original application

The Widi Mob native title determination application was lodged with the National Native Title Tribunal on 26 August 1997 prior to the commencement of the *Native Title Amendment Act 1998* on 30 September 1998. The application was lodged by Joan Margaret Martin, Gregory Dennis Martin, Irwin Tasman Lewis and Gary Norman Lewis.

First Amendment by the Federal Court – 24 February 1999

On 5 February 1999 the applicant sought leave from the Federal Court to amend the application. On 24 February 1999 leave to amend was granted. On 5 March 1999 the Tribunal received a copy of the amended application from the Court. The amendments included the removal of all names from the applicant list except that of Joan Martin. The description of the claim group was also altered, increasing the number of claimants and making reference to their biological descendants.

On 4 May 1999 under s190A of the *Native Title Act 1993*, as amended (“the Act”) the delegate of the Registrar decided that the amended application did not meet the conditions for registration as specified in the Act. Following this decision on 15 June 1999 the Aboriginal Legal Service of W.A. (Inc.) filed an application for an order of review (W6013 of 1999, 10L) on behalf of the applicant. The review application is pending.

Second and Third Amendments by the Federal Court – 26 August 1999, 14 January 2000

On 22 July 1999 the applicant sought leave to further amend the application. On 26 August 1999 leave was granted. However there was an omission in the further amended application. This was noted in a Tribunal memorandum of 13 September 1999. The boundary description associated with Schedule C of the application was not included as an attachment to the application filed with the Court. This omission was brought to the attention of the applicant. Subsequently on 24 December 1999 the applicant again sought leave to further amend the application. On 14 January 2000 the Court ordered that the application be further amended. A copy of the application was given to the Native Title Registrar on 18 January 2000. Pursuant to s190A(1) of the Act, the application must be considered for registration.

Information considered when making the Decision

In determining this application I have considered and reviewed all of the information and documents from the following files, databases and other sources:

- ◆ The Registration Test File, Legal Services Files and Federal Court Application Files for claim Widi Mob WC 97/72
- ◆ Other tenure information acquired by the Tribunal in relation to the area covered by this application;
- ◆ Working files and related materials for native title applications that overlap the area of the application.
- ◆ The National Native Title Tribunal Geospatial Database;
- ◆ The Register of Native Title Claims;

- ◆ The Native Title Register;
- ◆ Determination of Representative ATSI Bodies: their gazetted boundaries.

Note:

1. Information and materials provided in the context of mediation have not been considered in making this decision due to the without prejudice nature of those conferences and the public interest in maintaining the inherently confidential nature of such conferences.
2. All references to legislative sections refer to the *Native Title Act 1993* unless otherwise specified.
3. All further references to 'the application', unless otherwise stated, are references to the application as amended on 14 January 2000 by leave of the Federal Court.

A. Procedural Conditions

190C2

Information, etc, required by section 61 and section 62:

The Registrar 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.

I set out as follows the reasoning in respect of each of the relevant sub-sections of sections 61 and 62 of the Act.

Reasons for Decision

Details required in section 61

61(3) Name and address for service of applicant(s)

Reasons relating to this sub-condition

The name of the applicant is given at page 1 of the application.

The address for service is given at Part B of the application.

Result: Requirements met

61(4) Name of persons in native title claim group or otherwise describes the persons so that it can be ascertained whether any particular person is one of those persons

Reasons relating to this sub-condition

Schedule A of the application states that

The claim is brought on behalf of [names deleted for privacy reasons] and their biological descendants.

Whilst an exhaustive list of names of the persons in the native title claim group has not been given pursuant to s61(4)(a), for the reasons which led to my conclusion (below), that the requirements for s190B(3) have been met, I am 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 one of the persons in the claim group, as is required by s61(4)(b).

Result: Requirements met

61(5) Application is in the prescribed form, lodged in the Federal Court, contains prescribed information, and accompanied by prescribed documents and fee

Reasons relating to this sub-condition

The application is in the form prescribed by Regulation 5(1)(a) of the *Native Title (Federal Court) Regulations 1998*. The application was filed in the Federal Court as required pursuant to s61(5)(b) of the Act.

The application meets the requirements of s61(5)(c) in that it contains all information as prescribed in s62. I refer to my reasons for decision in relation to those sections.

As required by s61(5)(d) the application is accompanied by an affidavit as prescribed by s62(1)(a) and a map as prescribed by s62(2)(b). I refer to my reasons in relation to s62(2)(b).

I note that s190C(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 Federal Court.

For the reasons outlined above, it is my view that the requirements of s61(5) have been met.

Result: Requirements met

Details required in section 62(1)

62(1)(a) Affidavits address matters required by s62(1)(a)(i) – s62(1)(a)(v)

Reasons relating to this sub-condition

The affidavit accompanying the application was affirmed by the applicant on 24 December 1999 before a competent witness.

I am satisfied that the affidavit satisfactorily addresses the matters required by s62(1)(a)(i)-(iv). I am not so satisfied in respect of s62(1)(a)(v). Section Paragraph (e) of the affidavit states:

I am so authorised by my descendants and the descendants of the named members of the native title claim group in accordance with a traditional custom acknowledged by the members of the native title claim group of younger generations respecting elder generations and elder generations having authority to make decisions and deal with matters relating to traditional interests in land and waters on their own behalf and on behalf of younger generations.

The basis of authorisation is set out at s251B of the Act. Section 251B(b) requires that the claim group is authorised “in accordance with a process of decision-making agreed to and adopted by the persons in the native title claim group”. The affidavit sets out the basis on which the applicant’s descendants and the descendants of the named members of the native title claim group authorised the applicant. It does not disclose the basis on which the applicant is authorised by the other named members of the native title claim group.

The requirements of s62(1)(a) are not met.

Result: Requirements not met

62(1)(c) Details of physical connection (information not mandatory)

Comment on details provided

The application contains some details relating to ‘traditional physical connection’ at Schedules F and G.

Result: Provided

Details required in section 62(2) by section 62(1)(b)

62(2)(a)(i) Information identifying the boundaries of the area covered

Reasons relating to this sub-condition

Schedules B and C of the application together with each relevant annexure contain information identifying the external boundaries of the area covered.

For the reasons which led to my conclusion that the requirements of s190B(2) have been met, I am satisfied that the information and maps provided by the applicant is sufficient to enable the area covered by the application to be identified with reasonable certainty.

Result: Requirements met

62(2)(a)(ii) Information identifying any areas within those boundaries which are not covered

Reasons relating to this sub-condition

Information identifying the 'internal boundaries' of the application is given at Schedule B of the application.

For the reasons which led to my conclusion that the requirements of s190B(2) have been met, I am satisfied that the information contained in the application and provided by the applicant is sufficient to enable any areas within the external boundaries of the claim area which are not covered by the application to be identified.

Result: Requirements met

62(2)(b) A map showing the external boundaries of the area covered by the application

Reasons relating to this sub-condition.

The application at Schedule C and Annexure to Schedule C includes a map showing the external boundaries of the area covered by the application

For the reasons which led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that there has been compliance with the procedural requirements of s62(2)(b).

Result: Requirements met

62(2)(c) Details/results of searches carried out to determine the existence of any non-native title rights and interests

Reasons relating to this sub-condition

The application at Schedule D and Annexure to Schedule D provides a list of searches dated 23 February 1999 carried out by the Land Claims Mapping Unit of the Department of Land Administration.

The requirements of s62(2)(c) can be read widely to include all searches conducted by any person or body. However I am of the view that, in order to be satisfied that the application complies with this condition, I need only be informed of searches conducted by the applicant and other searches of which the applicant is aware. It would be unreasonably onerous to expect the applicant to have knowledge of, and obtain details about, all searches carried out by every other person or body.

I am satisfied that there has been compliance with the procedural requirements of s62(2)(c).

Result: Requirements met

62(2)(d) Description of native title rights and interests claimed

Reasons relating to this sub-condition

This section requires a description of the native title rights and interests claimed in relation to particular land or waters.

A description of the native title rights and interests claimed is contained in Schedule E of the application:

The native title rights and interests claimed are the rights to the possession, occupation, use and enjoyment as against the whole world (subject to any native title rights which may be shared with any others who establish that they are native title holders) of the area, and any right or interest included within the same; subject to the following:

- i. To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants (sic).*
- ii. The claim does not include any offshore place.*
- iii. The applicants (sic) do not make a claim for native title rights or interests which confer possession, occupation, use or enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in section 23F of the NTA, was done in relation to an area and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in section 23I of the NTA in relation to the act.*
- iv. Paragraph (iii) above is subject to such of the provisions of sections 47, 47A and 47B of the Act as apply to any part of the area contained within the application, particulars of which will be provided prior to the hearing.*
- v. The said native title rights and interests are not claimed to the exclusion of any other rights and interests validly created by or pursuant to the common law, a law of the State or a law of the Commonwealth.*

The question of whether or not this description is sufficient to allow native title rights and interests described to be readily identified is addressed in my reasons for decision in relation to s190B(4).

For present purposes I am satisfied that there has been compliance with the procedural requirements of s62(2)(d).

Result: Requirements met

62(2)(e)(i) Factual basis – claim group has, and their predecessors had, and association with the area

Reasons relating to this sub-condition

Schedule F of the application provides a general description of the factual basis for the assertion that the claim group has, and their predecessors had, an association with the area.

I am satisfied that there has been compliance with the procedural requirements of s62(2)(e)(i).

Result: Requirements met

62(2)(e)(ii) Factual basis – traditional laws and customs exist that give rise to the claimed native title

Reasons relating to this sub-condition

A general description of the factual basis for the assertion that traditional laws and customs exist that give rise to the claimed native title is given at Schedule F of the application.

I am satisfied that there has been compliance with the procedural requirements of s62(2)(e)(ii).

Result: Requirements met

62(2)(e)(iii) Factual basis – claim group has continued to hold native title in accordance with traditional laws and customs

Reasons relating to this sub-condition

A general description of the factual basis on which it is asserted that the claim group has continued to hold native title in accordance with traditional laws and customs is given at Schedule F of the application.

I am satisfied that there has been compliance with the procedural requirements of s62(2)(e)(iii).

Result: Requirements met

62(2)(f) If native title claim group currently carry on any activities in relation to the area claimed, details of those activities

Reasons relating to this sub-condition

The application provides general details of the activities which the native title claim group carries out in relation to the area claimed at Schedule G of the application.

I am satisfied that there has been compliance with the procedural requirements of s62(2)(f).

Result: Requirements met

62(2)(g) Details of any other applications to the High Court, Federal Court or a recognised State/Territory body the applicant is aware of (and where the application seeks a determination of native title or compensation)

Reasons relating to this sub-condition

Schedule H and the annexure to Schedule H of the application contain details of other applications to the High Court, Federal Court or a recognised State/Territory body, in relation to the whole or a part of the area covered by the application.

There are differences between the information provided at Schedule H and that contained in the annexure to Schedule H. It appears that Schedule H has not been updated since the previous amendment made on 26 August 1999 whereas the information contained in the annexure to Schedule H is more recently derived.

The inclusion of the annexure supports a view that the applicant's intention was to update the previous information in order to comply with the requirements of this section. In order to resolve this ambiguity I have formed the view that the information in the annexure to Schedule H is intended to substitute for the information provided at Schedule H.

The annexure to Schedule H provides the following details:

Name	NNTT No.	Fed. Crt. No.
Tharlirrang Wadjari people	WC95/54	WAG6046/98
Widi Marra	WC96/67	WAG45/98
Pandawn Descendants (amended 22/12/99)	WC96/83	WAG43-45/98
Widi Marra 2	WC96/86	WAG44/98
Mullewa Wadjari Community	WC96/93	WAG6119/98
Badimia People	WC96/98	WAG6123/98
YUED	WC97/71	WAG6192/98
Ike Simpson	WC98/5	WAG6226/98
Ike Simpson	WC98/35	WAG6251/98

A search of the Tribunal's geospatial database verifies that the information in the annexure to Schedule H (identified above) is correct except that there is a substantial overlap (6582.862 sq.km) with the combined Wajarri Elders native title claim WC00/04. The original Wajarri Elders native title claim WC99/42 was lodged with the Federal Court on 21 December 1999. On 23 February 2000 WC99/42 was combined with WC98/5, WC98/35 and three other claims to form the combined Wajarri Elders native title claim WC00/04.

The motion to amend the Widi Mob native title claim was filed with the Federal Court on 24 December 1999. There can be little doubt that at the time of filing the applicant would not have been aware of the overlap with the Wajarri Elders native title claim WC99/42 lodged on 21 December 1999.

For the above reasons, I am satisfied that there has been compliance with the procedural requirements of s62(2)(f).

Result: Requirements met

62(2)(h) Details of any S29 Notices (or notices given under a corresponding State/Territory law) in relation to the area, and the applicant is aware of

Reasons relating to this sub-condition

The application at Schedule I and Annexure I lists all s29s issued over any part of the application area between 30 September 1998 and 13 December 1999. The information in Schedule I is sourced from the Tribunal's geospatial unit and is correct for this period.

I am satisfied that there has been compliance with the procedural requirements of s62(2)(g).

Result: Requirements met

Reasons for the Decision

For the reasons identified at section 62(1)(a) the application does not comply with section 190C(2).

Aggregate Result: Requirements not met

190C3

Common claimants in overlapping claims:

The Registrar must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:

- (a) **the previous application covered the whole or part of the area covered by the current application; and**
- (b) **an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made; and**
- (c) **the entry was made, or not removed, as a result of consideration of the previous application under section 190A.**

Reasons for Decision

For the application to comply with this requirement I must be satisfied that no person included in the native title claim group was a member of the native title claim group for any previous application if the circumstances set out in ss190C3 (a) to (c) of the Act apply.

The operation of s190C3 was considered in *Western Australia v Strickland* [2000] FCA 652. It was held that an application lodged prior to 30 September 1998 is to be regarded as having been made on the date it was lodged with the National Native Title Tribunal. The Widi Mob claim WC97/72 was lodged with the NNTT on 26 August 1997 and this is the relevant date when considering the application for the purposes of s190C(b). At that time there were 7 previous overlapping claims (WC95/54, WC96/67, WC96/83, WC96/86, WC96/93, WC96/98 and WC97/71).

A search of the Schedule of Native Title Applications and Register of Native Title Claims reveals that there are presently 8 applications covering the whole or part of the area covered by the current application. Three of these are “previous applications” within the meaning of the Act in which entries on the Register have been made, or not removed, following consideration under s190A. These applications are:

NNTT_No	NNTT Name	Area of overlap WC97/72	Date entry made after consideration under s190A
WC96/93	Mullewa Wadjari	18227.394 sq.km	28 April 1999
WC96/98	Badimia People	14413.663 sq.km	12 June 1999
WC97/71	Yued	31.688 sq.km	21 July 1999

I must therefore consider the question of whether I can be satisfied that no person included in the current application (WC97/72 Widi Mob) was a claimant in common with any of the 3 claims listed above.

The description of the claimant group for the Widi Mob claim is set out at Schedule A which defines the claim group as follows:

The claim is brought on behalf of [names deleted for privacy reasons] and their biological descendants.

1. Mullewa Wadjari claimant group

A search of the Register of Native Title Claims reveals that the claimant description for the Mullewa Wadjari claim lists 68 living persons. Comparing the claimant descriptions of the Mullewa Wadjari and Widi Mob claims reveals that there are no claimants in common.

2. Badimia claimant group

A search of the Register of Native Title Claims reveals that the claimant description for the Badimia claim is as follows:

The claim is brought on behalf of those people descended from and including Dorothy Bandy, Gloria Fogarty, Clara George, Ollie George, Percy George, Olive Gibson, Irene Harris, Albert Little, Hazel Little, Richard Little, Frank Walsh (jnr), Frank Walsh (snr), Des Thompson, John Ashwin, Des Little, Georgina Lawson, Wilma Lawson, Nancy Wallam.

Comparing the claimant descriptions of the Badimia and Widi Mob claims reveals that there are no claimants in common.

3. Yued claimant group

A search of the Register of Native Title Claims reveals that the claimant description for the Yued claim is an apical ancestral model with additions including one named individual. The description is as follows:

*1. The biological descendants of the unions between:-
Sarah Bundaran of Wyenning + white settlerwhite settler John Ryder
Mary Ellen/Helen Tainan + Patrick Yappo
William 'Bill' Warel + Delores 'Olly' Nettle
Johnny Pickett + Joanna Indich*

2. Those persons adopted by the individuals named in 1. Above and those persons adopted by the biological descendants of the unions between the individuals named in 1. above.

3. Those persons who are the biological descendants of the adopted persons included in 2. Above.

4. Arnold Franks

Comparing this description (apical ancestry type) with that of the Widi Mob claim does not reveal whether or not there are claimants in common. There is nothing before me however to indicate that there are claimants in common. None of the surnames mentioned in the Yued claim description gives rise to an inference that there are claimants in common. I take into account the fact that the area of overlap between the two claims is particularly small (31.688 sq.km). In my opinion this fact supports a reasonable inference that there are no claimants in common. In the absence of anything to suggest the contrary, I am satisfied there are no claimants in common between the Yued claim and the Widi Mob claim.

I am satisfied that the application does not infringe s190C(3).

Result: Requirements met

190C4(a) or 190C4(b)

Certification and authorisation:

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

(a) the application has been certified under paragraph 202(4)(d) by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part; or

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

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

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

includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and briefly set out the grounds on which the Registrar should consider that it has been met.

Reasons for Decision

This condition requires me to be satisfied that the application is certified pursuant to s190C4(a) or authorised pursuant to s190C4(b) of the Act.

The relevant representative Aboriginal/Torres Strait Islander body that could certify the application has not done so. I must therefore consider whether the application has been authorised pursuant to s190C4(b).

Information Considered

In applying this condition I have had regard to the application as amended in the Federal Court on 14 January 2000 together with additional information provided by the applicants directly to the Tribunal. The information I have considered includes information previously considered and additional information provided by the applicants since 4 May 1999 when the delegate of the Registrar made his decision under s190A.

In the previous decision the delegate of the Registrar considered the following information:

- Statement by [Name deleted for privacy reasons] (undated) supplied to the Tribunal by facsimile 9 March 1999.
- Statement by [Name deleted for privacy reasons] dated 5 March 1999.
- Statement by [Name deleted for privacy reasons] dated 4 March 1999.
- Statement by [Name deleted for privacy reasons] dated 4 March 1999.
- Statement by [Name deleted for privacy reasons] dated 5 March 1999.
- Statement by [Name deleted for privacy reasons] dated 5 March 1999.
- Statement by [Name deleted for privacy reasons] dated 5 March 1999.
- Statement by [Name deleted for privacy reasons] dated 5 March 1999.
- Statement by [Name deleted for privacy reasons] dated 5 March 1999.
- Statement by [Name deleted for privacy reasons] dated 4 March 1999.
- Statement (partly illegible) by [Name deleted for privacy reasons] dated 4 March 1999.
- Statement (partly illegible) by [Name deleted for privacy reasons] dated 4 March 1999.
- Statement (partly illegible) by [Name deleted for privacy reasons] dated 5 March 1999.
- Statement by [Name deleted for privacy reasons] dated 9 March 1999.
- Chart showing the inter-relationship of the members of the native title claim group.

On 31 August 1999 the following was submitted on behalf of the Applicant:

- Affidavit of [Name deleted for privacy reasons] sworn 20 July 1999 including as annexure “A” statements from :
 - [Name deleted for privacy reasons];
 - [Name deleted for privacy reasons];
 - [Name deleted for privacy reasons].

Schedule A of the application, as amended on 14 January 2000, states that:

The claim is brought on behalf of Norman Charles Harris, Ann Caroline Harman (nee Harris), Myrtle Daphne Mullaley (nee Harris), Kevin Phillips, Barry Phillips, William Lewis, Irwin Lewis, Joan Margaret Martin (nee Lewis), Shirley Elizabeth Lowden, Gloria May Lewis, Richard Douglas Lewis, Gary Norman Lewis, Eunice Atkins, Gordon Phillips, Aggie Phillips, Lorraine Phillips, Shirley Woods (Phillips), Darryl Woods (Phillips), Frank Woods (Phillips), Helen (Ellen) Woods (Phillips), David Woods (Phillips), and James (Jimmy) Woods (Phillips), and their biological descendants.

Thus, the claimant group now consists of 25 named claimants and their descendants. In Schedule R of the application it is stated that:

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

The grounds upon which the Registrar of Native Title should consider that statement is correct are:

1. *The Applicant was so authorised in accordance with a tradition and custom comprising -*

(a) a traditional custom of elders being respected by younger generations;

(b) a traditional custom of elder generations having authority to make decisions and act in protection of the interests of younger generations; and

(c) a traditional custom of decision-making by agreement among the members of the eldest generation; and

2. *Following a number of family meetings and personal communications, by which such agreement was reached, the Applicant was authorised by her siblings, her cousins, their descendants and her descendants, who comprise the native title claim group, to make this application and deal with the matters arising in relation to it.*

In the affidavit accompanying the application, the applicant has deposed that:

- (d) I am 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*
- (e) I am so authorised by my descendants and the descendants of the named members of the native title claim group in accordance with a traditional custom acknowledged by the members of the native title claim group of younger generations respecting elder generations and elder generations having authority to make decisions and deal with matters relating to traditional interests in land and waters on their own behalf and on behalf of younger generations.*

I have identified in my reasons under s61(1)(a) that there is a deficiency in this affidavit with respect to s61(1)(a)(v). However I am satisfied, for the purposes of the present condition, that the applicant believes the statements contained in the affidavit to be so.

The previous decision and developments since then

In deciding not to accept the claim for registration, the delegate reasoned that the applicant had not been able to show to his satisfaction a traditional procedure or mechanism by which those claimants who had not made statements authorising the applicant might otherwise have authorised

the applicant. The delegate was satisfied (from the additional information provided at that time) that 23 of the 32 named members of the native title claim group had, either directly or through a representative, authorised the applicant. This finding was made in the absence of particulars and evidence of direct authorisation from named members of the claimant group.

Since that decision was made the application has been further amended. Schedule R has been added; Schedule A (description of the claimant group) has been amended to omit certain persons previously named as members of the claim group; and additional information provided, as identified above. I note in passing that all of the persons now omitted from the description of the claimant group are persons, in respect of whom, the previous delegate decided he was not satisfied how it had been shown that they authorised the applicant.

Also since that time, there have been several decisions of the Federal Court concerning authorisation of native title claims. In *Moran v Minister for Land and Water Conservation for the State of New South Wales* [1999] FCA 1637, Wilcox J. stated, [at p.18]

The obtaining of proper authorisation of a claimant application is a fundamental requirement of the Native Title Act. It is important that those who come to the Court asserting a native title right; with all this involves in terms of effort and expense to other parties and the Court itself, should be properly authorised to make the claim. As I have explained, this does not necessarily mean the applicant must be individually authorised by each member of the claimant group. It will be enough that the applicant has been authorised to make the claim in accordance with a process of decision-making recognised under the traditional laws and customs of the claimant group. It meritorious cases, that is unlikely to be an onerous requirement.

In *Strickland v Native Title Registrar*, French J. stated that authorisation,

is a matter of considerable importance and fundamental to the legitimacy of native title determination applications. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title. It is not a condition to be met by formulaic statements in or in support of applications.

Does the application comply with s190C(4)?

Section 251B of the Act envisages that there is a "process of decision-making" which has to be gone through in order to authorise the making of the claim on behalf of a claimant group. I am of the opinion that the wording of s251B provides that the process can be either in accordance with traditional law and customs or, agreed to in a contemporary manner by the group, or both.

Schedule R states that authorisation is based on a process of decision-making under 'traditional customs'. I interpret this to mean that authorisation is based on a process of decision-making under the traditional laws and customs of the native title claim group. Section 251B of the Act provides that where such a process is adopted, the persons in the native title claim group must authorise the applicant in accordance with that process.

Schedule R outlines the grounds on which the Native Title Registrar should consider the applicant to be authorised but does not give particulars. Whilst I am not entitled to (and do not) question the contentions made in Schedule R the absence of any particulars does not assist in my assessment of whether the application complies with s190C(4)(b). There are statements that the applicant was authorised under 'traditional customs' but beyond these assertions there is no factual material supplied to support the assertions nor are there any specific details outlining the process of decision-making gone through in order to authorise the making of the claim on behalf of all members of the claimant group. There are also no details of when the members of the claim group met or otherwise communicated their agreement to authorise the applicant.

The statements in Schedule R and the affidavit accompanying the application are that the applicant bases her authorisation on the respect shown by younger generations to elder generations under traditional custom to use their authority to make decisions on behalf of the group. However, in my opinion, without further information, this is insufficient to satisfy me that all the other persons in the native title claim group authorised the applicant.

Notwithstanding the above comments, there exist signed statements by members of the native title claim group, some of whom are named members and some of whom are the biological descendants of named members, which in my opinion demonstrate support for the application.

In the previous decision, the delegate expressed opinion that although the wording of these statements is somewhat ambiguous and in some cases non-legible, he was nevertheless satisfied that 13 members of the claim group authorised the applicant to 'make the application and to deal with matters arising in relation to it'. I am of the same opinion.

I am therefore satisfied that 12 of the named claimants [Names deleted for privacy reasons] have expressly authorised the applicant. I am also satisfied that a descendant of one of the named claimants ([Name deleted for privacy reasons]) has expressly authorised the applicant.

Two of these statements (those of [Name deleted for privacy reasons] and [Name deleted for privacy reasons]) purport to be made on behalf of other members of the claimant group as specified in each statement. In the previous decision, the delegate was of the opinion that the statements of [Name deleted for privacy reasons] and [Name deleted for privacy reasons] as representatives of other members of the claimant group were acceptable to show that the other members of the claimant group, as specified, authorised the applicant. In light of the decisions of the Federal Court referred to above I respectfully disagree. I do not regard the statements of [Name deleted for privacy reasons] and [Name deleted for privacy reasons] as sufficient for the purpose of showing that those other specified members of the claimant group have authorised the applicant. There is nothing in the documents to indicate that the other specified members of the claimant group have authorised [Name deleted for privacy reasons] and [Name deleted for privacy reasons] to represent them. In my view the statements are insufficient to satisfy me pursuant to s190C(4)(b).

The statements by [Names deleted for privacy reasons] dated 4 May 1999 included within Annexure "A" to the affidavit of [Name deleted for privacy reasons] affirmed on 20 July 1999 all state that they "authorise [Name deleted for privacy reasons] and other descendants of [Name deleted for privacy reasons] and [Name deleted for privacy reasons] of Irwin and Morawa districts to make Native Title claim on my behalf" (emphasis added). I do not consider on the basis of these statements that [Name deleted for privacy reasons] or [Name deleted for privacy reasons] or [Name deleted for privacy reasons] authorise the applicant on her own to make the application and to deal with matters arising in relation to it. In my view the statements are insufficient to satisfy me pursuant to s190C(4)(b).

It is not clear from the claim group description how many descendants of the named claimants there are. I regard this as relevant to my decision as to whether or not I am satisfied that the applicant is authorised by all the members of the native title claim group, particularly as there are no details relating to the nature of the decision-making process.

Summary of findings

- The applicant is a member of the claimant group;
- The claimant group consists of the 25 named persons and their descendants;
- 12 named members of the claimant group have expressly authorised the applicant.

In the absence of any information describing a process by which the applicant was authorised by the remaining members of the native title claim group, I am not satisfied that the requirements of s190C(4)(b) are met.

Result: Requirements not met

Evidence of authorisation:

190C5

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

- (a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and***
- (b) briefly sets out the grounds on which the Registrar should consider that it has been met.***

Reasons for Decision

This procedural condition requires either of the matters referred to in s190C(4) to be satisfied. As the application has not been certified I cannot be satisfied that the application meets the condition in s190C(4)(b) unless the application complies with s190C(5)(a) and (b).

The affidavit accompanying the application includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met. This in my view, complies with s190C5(a).

Schedule R of the application and the affidavit accompanying the application briefly set out the grounds on which the Registrar should consider that it has been met. This in my view complies with s190C5(b).

For the reasons identified at s190C(4) I am not satisfied that it has been demonstrated that the applicant is authorised according to the requirements of that section. Were the application to comply with s190C(4) however I would be satisfied that the formal requirements set out in s190C(5) are met.

B. Merits Conditions

190B2

Description of the areas claimed:

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

Reasons for Decision

Map and External Boundary Description

Map

A map, produced by the Land Claims Mapping Unit, WALIS, 4 December 1998 is supplied with the application and included as Attachment "C".

The map supplied shows the external boundaries of the areas claimed. All the line work on the map is finely drawn and easy to follow.

The map displays a list of co-ordinates to enable the position of sites or localities within them to be identified. In addition, it shows a scale allowing distances and areas to be ascertained. The map also shows the location of a pastoral lease in relation to the claim area.

The map meets the requirements of s62(2)(b) as the boundaries of the areas covered by the application can be identified.

External Boundary

A technical description identifying the external boundary of the claim is supplied with the application.

Based on advice received from the Tribunal's Geospatial Services, I am satisfied that the technical description of the external boundaries coincides with the map provided.

I am satisfied that the physical description of the external boundaries meets the requirements of s.62(2)(a)(i).

Internal Boundary Description

Information identifying the 'internal boundaries' of the application is given at Schedule B of the application in the following terms:

- 1 *The applicants (sic) exclude from the claim any areas covered by valid acts on or before 23 December 1996 comprising such of the following as are included as extinguishing acts within the Native Title Act 1993, as amended, or Titles Validation Act 1994, as amended by Titles Validation Amendment Act 1998 :*
 - *Category A past acts, as defined in NTA s228 and s229;*
 - *Category A intermediate period acts, as defined in NTA s232A and s232B.*
- 2 *The applicants (sic) exclude from the claim any areas in relation to which a previous exclusive possession act, as defined in section 23B of the NTA, was done in relation to the area, and either the act was an act attributable to the Commonwealth, or the act was an act attributable to the State of Western Australia and the Titles Validation Amendment Act 1998 has made provision as mentioned in section 23E of the NTA in relation to the act.*
- 3 *The Applicants (sic) exclude from the claim areas in relation to which native title rights and interest (sic) have otherwise been extinguished, including areas subject to:*
 - (a) *an act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or*

- (b) *actual use made by the holder of a tenure other than native title which is permanently inconsistent with the continued existence of native title.*

To avoid any uncertainty, the applicants (sic) exclude from the claim area the tenures set out in Schedule B1.

SCHEDULE B1

- B1.1 An unqualified grant of an estate in fee simple.*
- B1.2 A lease which is currently in force, in respect of an area not exceeding 5,000 square metres; upon which a dwelling, house, residence, building or work is constructed; and which comprises:*
- 1. a lease of a worker's dwelling under the Workers' Homes Act 1911-1928;*
 - 2. a 999 year lease under the Land Act 1898;*
 - 3. a lease of a Town Lot or Suburban Lot pursuant to the Land Act 1933 (WA), s.117; or*
 - 4. a special lease under s.117 of the Land Act 1933 (WA).*
- B1.3 A Conditional Purchase Lease currently in force in the agricultural areas of the South West Division under clauses 46 and 47 of the Land Regulations 1887, which includes a condition that the lessee reside on the area of the lease and upon which a residence has been constructed.*
- B1.4 A Conditional Purchase lease of cultivable land currently in force under Part V, Division 1 of the Land Act 1933 (WA) in respect of which habitual residence by the lessee is a statutory condition in accordance with the Division and upon which a residence has been constructed.*
- B1.5 A Perpetual Lease currently in force under the War Service Land Settlement Scheme Act 1954.*
- B1.6 A permanent public work.*
- B1.7 A public road or street.*

Paragraphs (1) to (3) above are subject to such of the provisions of sections 47, 47A and 47B of the NTA as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing

These excluded areas form the areas within the (external) boundary which are not covered by the application, that is, the internal boundary description. I interpret the reference to the Titles Validation Amendment Act 1998 as referring to the Titles (Validation) and Native Title (Effect of Past Acts) Act 1995, as amended.

Findings

I must be satisfied that the information required by paragraph 62(2)(a) is sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land and waters.

The description of areas excluded from the claim area refers to land where an act of a State or Commonwealth government has created an interest. The excluded areas of land can be readily identified through searches of relevant Government registers and are therefore described with reasonable certainty.

Exclusive possession acts attributable to the Commonwealth can be readily identified through searches of the relevant register and are therefore described with reasonable certainty. Exclusive possession acts attributable to the State of Western Australia under legislation of the type described in s.23E are likewise readily identified by reference to that legislation and thereafter searches of the relevant registers.

The excluded areas of land can be readily identified through searches of relevant Government registers and are therefore described with reasonable certainty. The description in paragraph 3(b)

read together with Schedule B1 is sufficient for me to be satisfied that the areas excluded from the application are identified with reasonably certainty.

Both the applicant and the State of Western Australia were invited to make submissions on the effect of the majority decision in *Ward* in respect of the current application. No submission was received from the applicants. Comments were received from the State by way of a general response. The State commented that paragraph 3(a) and (b) of Schedule B constitutes reference to a test formulated by Lee J at first instance which the majority in the Full Court appeal decision (*Western Australia v Ward* [2000] FCA 191) found to be inconsistent with the development of Australian jurisprudence.

I note that leave to amend the application in the above terms was granted before the decision of the Full Court in *Ward* was handed down. The reference in paragraph 3 to the test formulated by Lee J reflects the applicant's awareness of the prevailing state of the law at the time that leave to amend the application was sought. Notwithstanding this, the wording of paragraph 3 makes it plain that the applicant excludes from the claim area any areas in relation to which native title rights and interests have otherwise been extinguished. The description of areas excluded from the claim area is expressed as "including" the areas subject to what is set out in 3(a) and 3(b). As such the listed information in 3(a) and (b) is clearly not intended to be exhaustive. Although not expressly stated it follows that the applicant excludes, for example, any areas covered by pastoral leases or portions thereof that are enclosed or improved where such enclosure or improvement extinguishes native title. Similarly, although again not expressly stated, it follows that the applicant excludes any areas covered by mining or general purpose leases where such leases extinguish native title.

The applicant relies on the provisions of sections 47,47A and 47B of the Act as apply to any part of the area in relation to which a previous non-exclusive possession act as defined by section 23F of the NTA was done in relation to the area contained within the application.

The qualifications to the native title rights and interests claimed at Schedule E invoke the provisions of sections 47, 47A and 47B of the NTA as apply to any part of the area contained within the application. The rights and interests claimed are not claimed exclusively in respect of any areas in relation to which a previous non-exclusive possession act as defined by section 23F of the NTA was done in relation to the area. Paragraph (iii) of Schedule E is also subject to such of the provisions of sections 47,47A and 47B of the Act as apply to any part of the area contained within the application.

These statements read together allow it to be shown objectively, upon the provision of further particulars, whether applicants may have the benefit of these provisions.

Conclusion

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

Result: Requirements met

190B3

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.**

Reasons for Decision

Schedule A of the application relies on a description other than naming all the persons in the claim group. The application does not satisfy s190B3(a). Consequently, the applicants must rely on satisfying s190B3(b).

I must therefore 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.

Findings

1. the persons in the native title claim group are the 25 people listed at schedule A and their biological descendants.
2. As Schedule A relies on a description other than naming the persons in the claim group, the application does not satisfy s.190B(3)(a). Consequently, the applicants must rely on satisfying s.190B(3)(b).
3. In my view the description at Schedule A provides an objectively verifiable mechanism for ascertaining whether any particular person is in the claim group.
4. I am therefore 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 description satisfies the requirements of s.190B(3)(b).

Result: Requirements met

190B4

Identification of the native title rights and interests:

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

Reasons for Decision

This condition requires me to be satisfied that the native title rights and interests claimed can be readily identified. It is insufficient to merely state that these native title rights and interests are 'all native title interests that may exist, or that have not been extinguished at law'. To meet the requirements of s190B (4), I need only be satisfied that at least one of the rights and interests sought is sufficiently described for it to be readily identified.

The application at Schedule E lists the native title rights and interests claimed with qualifications. :

The native title rights and interests claimed are the rights to the possession, use, occupation and enjoyment as against the whole world (subject to any native title rights and interests which may be shared with any others who establish that they are native title holders) of the area, and any right or interest included within the same; subject to the following:

- i. To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants (sic).*
- ii. The claim area does not include any offshore place.*
- iii. The applicants do not (sic) make a claim to native title rights and interests which confer possession, occupation, use and enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in section 23F of the NTA, was done in relation to an area, and either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and law of that State has made provision as mentioned in section 23I in relation to the act;*
- iv. Paragraph (iii) above is subject to such provisions of section 47,47A and 48B of the Act as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing;*
- v. The said native title rights and interests are not claimed to the exclusion of any other rights or interests validly created by or pursuant to the common law, the law of the State or a law of the Commonwealth.*

In my view the native title rights and interests described at schedule E are readily identifiable and the description is more than a statement that native title rights and interests are 'all native title interests that may exist, or that have not been extinguished at law'.

I am satisfied that the description in Schedule E allows the native title rights and interests claimed to be readily identified in compliance with s190B(4).

Result: Requirements met

190B5

Sufficient factual basis:

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

- (a) that the native title claim group have, and the predecessors of those persons had, an association with the area;**
- (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests;**
- (c) that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.**

Reasons for Decision

This condition requires me to be satisfied that the factual basis on which it is asserted that there exist native title rights and interests described at schedule E of the application is sufficient to support that assertion. In reaching this decision I must be satisfied that the factual basis supports the 3 criteria identified at s190B5 (a) – (c).

Information considered

- Original Application lodged 26 August 1997
- Determinations and Objector Contentions for matters WO97/368 and WO97/446
- Genealogical chart
- Letter from [Name deleted for privacy reasons] dated 24 February 1999 including attachments: 4 statements from members of claimant group; [Names deleted for privacy reasons] (14 pages)
- submission from [Name deleted for privacy reasons] in a letter dated 24 February 1999. In this letter [Name deleted for privacy reasons] outlined [pronoun deleted for privacy reasons] interpretation of this section in the following terms:

Section 190B(5) requires that the assertion of a claim to native title rights and interests be supported by fact. Section 190B(5) particularises in subparagraphs (a) (b) and (c) what is required in order for an assertion to be made out that native title rights and interests exist. Section 190B(5) does not require anything more than an assertion of the facts upon which the native title rights and interests are based. Such an assertion of those facts is to be found in paragraph 4 of the Registration Statement and Schedule F of the Amended Application. Section 190 B(5) does not require evidence supporting or “stories” illustrating the assertion or statement of the facts, deposed to on affidavit in each case which are set out therein.

The facts deposed to include:

- Occupation of the claim area since British sovereignty.
- Customs of title vesting by descent, birth, traditional knowledge, etc.
- Traditional inter-generational teaching.
- Continuing observance of traditional laws and customs.

The correctness of this interpretation of s190B(5), is confirmed by the mirror provision in section 62 (2) (e) which more explicitly requires “a general description of the factual basis” of the assertion of the existence of native title rights and interests. The Parliament did not intend by these provisions to require the provision of evidence confirming the facts stated.

Additional Information provided since 4 May 1999

Since the delegate made that decision the applicant has provided the following additional information:

- Letter from [Name deleted for privacy reasons], a member of claimant group to [Name deleted for privacy reasons] of FAU received 11/6/99 (4 pages);
- Affidavit of applicant sworn 20/7/99 received 6/9/99 including as annexure “A” statements from
 - [Name deleted for privacy reasons]
 - [Name deleted for privacy reasons]
 - [Name deleted for privacy reasons].
- letter from [Name deleted for privacy reasons] dated 29/8/99 with attached unsworn draft affidavit for [Name deleted for privacy reasons].

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

This sub-section requires me to be satisfied that:

- the members of the native title claim group have an association with the area; *and*
- the predecessors in title or antecedents of the members of the native title claim group had an association with the area.

The word ‘association’ is not defined in the Act. In my view, the nature of the association to be demonstrated by the applicants is governed by the nature of the native title rights and interests claimed. In this case the applicants claim the rights and interests identified at schedule E of the application.

As native title rights and interests are defined as being related to land and waters (s223 of the Act), in my view the information about the association of members of the native title claim group must relate to the area of land and waters where the particular native title rights and interests are claimed. In this case the extent of land and waters claimed is identified at schedule B of the amended application. I must therefore be satisfied that the members of the native title claim group are and that their predecessors were, broadly associated with the particular land and waters claimed. I note in this case that the external boundary of the claim encloses an area of 52,948 square kilometres.

The previous delegate concluded from the information provided that all of the named claimants could claim descent from [Name deleted for privacy reasons] who was known to be from the area at the time of European settlement.

As to whether the members of the native title claim group have an association with the area, the previous delegate found that:

- Overwhelmingly the places mentioned in the statements are those surrounding the towns of Morawa, Koolanooka and Perenjori.
- No evidence is provided of association with the coastal areas claimed around Dongara, particularly relevant as the original claim was expanded to include this area. The very limited anthropological references likewise do not refer this area.
- Additionally, no information is provided regarding association with broadly the northern and eastern part of the claim.

I agree with the findings of the previous delegate in relation to this sub-section based on the information before him at that time. Additional material has since been supplied to the Tribunal.

In an affidavit affirmed 20 July 1999 [reference to author deleted for privacy reasons] states:

My Grandfather, [Name deleted for privacy reasons] was buried in Mingenew. I am informed by my parents that his predecessors were buried at Battersby, about 20 km south of Mullewa, and that other known burial places of his predecessors were at burial grounds south of Dongara, at Koolanooka Hills (on Karara Station), at Barnong Station and at Bunnawarra Station.

My family have not frequented the Dongara area since a large number of our relations died at Tobraddin Station near Dongara during my mother's time.

In his signed statement of 4 May 1999 [Name deleted for privacy reasons] asserts:

I have collected traditional food and bush medicine since knowing that I have had descendant connections through my grandparents [Name deleted for privacy reasons] and [Name deleted for privacy reasons] and other family members [Name deleted for privacy reasons] etc also my father [Name deleted for privacy reasons] born 1911 whom is the first son of [Name deleted for privacy reasons] and my Grandmother [Name deleted for privacy reasons].

[Name deleted for privacy reasons] asserts in his signed statement of 4 May 1999:

I am well aware of the surrounding countryside as I have been within the vicinity of that part of the tribal country along with other family members on a spiritual and physical basis gathering bush food and bush medicine for a number of years.

[Name deleted for privacy reasons] asserts in his signed statement of 4 May 1999

I am the family of this area. I have collected traditional food and medicine in this area all my life.

Schedule F of the application states at paragraph (1) that “the native title claim group and their ancestors have, since the assertion of British sovereignty, possessed, occupied, used and enjoyed the claim area or otherwise had an association with it”. Schedule G states that “members of the native title claim have continuously carried out activities on the land and waters within the area of the claim”. The truthfulness of these assertions is deposed in the affidavit accompanying the application.

The external area of the claim is extensive. The applicant has stated that the lack of evidence supporting the claim to the coastal area surrounding Dongara is a result of the deaths of a large number of her ancestors at Tobraddin Station. The implications being that the claim members avoid this area for traditional or customary reasons. The issue of the claimants' association with the northern and eastern outlying areas of the claim, eg Tallering, Gullewa, Warriedar, Rothsay and Mt Gibson remains unaddressed.

An unsworn statement submitted by the applicant's [Occupation details and name deleted for privacy reasons] for [Name deleted for privacy reasons], the [pronoun deleted for privacy reasons] of the named claim member [Name deleted for privacy reasons] mentions [Name deleted for privacy reasons] travels to such outlying areas of the claim as Rothsay and Kirkalocka Station. Without sworn testimony, however, this statement carries little weight.

There seems to be no doubt that the claimants have a connection with part of the area under the claim. As was noted by the previous delegate, this association is characterised in the statements of the current members of the claim group as “concentrated around the centre of this claim” and “overwhelmingly the places mentioned in the statements are those surrounding the towns of Morawa, Kooloona and Perenjori.”

Conclusion

In my opinion the additional information is insufficient and does not redress the concerns of the previous delegate with which I agree. After considering all of the information before me I am of the opinion that the members of the claimant group have not established to my satisfaction that they have an association with the entire area claimed. The application does not comply with the requirements of this sub-section.

Result: Requirements not met

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

This sub-section requires me to be satisfied that:

- traditional laws and customs exist;
- that those laws and customs are respectively acknowledged and observed by the native title claim group; and
- that those laws and customs give rise to the native title rights and interests claimed.

In the previous decision the delegate was not satisfied that the applicant had provided information demonstrating the existence of laws and customs acknowledged and observed by a community of people which gives rise to the native title rights and interests in the area claimed by the claim group.

The previous delegate found that:

- while information had been provided about a community from which the claimant group and their predecessors derive their rights and interests (the Widi People) - there was little information about the relationship of the claim group and the predecessors of the claim group to the Widi People.
- the applicant had not detailed how the traditional laws acknowledged by, and traditional customs observed by, the Widi Mob give rise to the native title rights and interests claimed.
- It was unclear, from the information provided, whether the laws and customs referred to relate to the land and waters where native title rights and interests are claimed.

Schedule F of the application now states:

The native title rights and interests are those of and flowing from the right to possession, occupation, use and enjoyment and of the land pursuant to the traditional laws and customs of the claim group based upon the following facts:

1. the native title claim group and their ancestors have, since the assertion of British sovereignty, possessed, occupied, used and enjoyed the claim area or otherwise had an association with the claim area; and

2. such possession, occupation, use and enjoyment has been pursuant to and possessed under the laws and customs of the claim group, including traditional laws and customs that rights and interests in land and waters vest in members of the native title claim group on the basis of:

- a. descent from ancestors connected to the area*
- b. conception in the area*
- c. birth in the area*
- d. traditional religious knowledge of the area*

- e. traditional knowledge of the geography of the area*
- f. traditional knowledge of the resources of the area*
- g. knowledge of traditional ceremonies of the area*

(iii) such traditional law and custom has been passed by traditional teaching, through the generations preceding the present generations to the present generations of persons comprising the native title claim Group;

(iv) the native title claim group continues to acknowledge and observe those traditional laws and customs;

(v) the native title claim group by those laws and customs have a connection or association with the land and waters in respect of which the claim is made and have continued to hold the native title to that area in accordance with those traditional laws and customs;

The truthfulness of these assertions is deposed in the affidavit accompanying the application.

The Statement of Reasons and Decision by Kim Wilson in WO97/368 quotes an affidavit of [Name deleted for privacy reasons] that contains relevant statements, including:

- 1. I was born in the heart of Widi country which my Ancestors frequented for centuries. My mother was born on the [Name of place deleted for privacy reasons]. Her family and grandparents before her were born into the Widi mob and within the boundaries of the Widi peoples' traditional land.*
- 2. I was informed by my Ancestors that their nomadic lifestyle took them across country to visit other small groups in the area and they became familiar with neighbouring relatives.*
- 3. The older lawmen of the Widi mob had to make regular trips to keep check on sacred sites and update ancient paintings. These paintings recorded our being and stories familiar to the Widi people.*
- 4. My family and I have painted these stories.*
- 5. Many tribal gatherings were held on the Widi territory where songs familiar to the mob were sung and young people were initiated all through the area.*
- 6. Tallerang Peaks, which is part of the Widi peoples' area, has a long history with our people. Many, many Aborigines became lawman (stet) from here.*
- 7. Many Aboriginal babies were born in a special cave at Tallerang and it was always a tribal camping and meeting ground for surrounding mobs where all the important Elders and Special People met from all over the Gascoyne/Murchison area. These meetings took place in turn in different places but Widi mob also had their own meetings.*
- 8. Brandy Hill was another such area as well as Gullewa, Warridar and Rothsay.*
- 9. Mt Gibson was another place of significance and most of all Koolanooka Hills extending to what we now know as Blue Hills.*
- 10. My [noun deleted to protect privacy], [Name deleted for privacy reasons] is familiar with the sacred sites of the Widi mob. While working in the [Occupation details deleted for privacy reasons] s/he was able to list these sites of significance with the Aboriginal Affairs Department of Western Australia ("AAD"), therefore recording our history. While AAD do have records of sites it also acknowledges that it may not have recorded all of those sites.*
- 11. It is our belief that the only sacred site is one that no-one knows about, this explains why a work programme clearance procedure for any mining companies is essential.*

12. *I, and other members of the Widi people use Aboriginal law as a guideline for our daily lives. We follow a traditional lifestyle and have maintained contact with the land. With my sisters and brothers, I am a custodian of the [Name of place deleted for privacy reasons]. The laws and culture of the Widi people include traditional stories and beliefs concerning the land, which are handed down by the custodians to my descendants. I express those stories through paintings and craft in the traditional style. I believe these ties with the Widi people are never-ending and will always be followed.*
14. *The country of the Widi people is home to me and ownership was handed down to all Widi people and their descendants.*
15. *I am a direct descendant of [Name deleted for privacy reasons] and [Name deleted for privacy reasons] (my Great Grandparents), who are buried in the [Name of place deleted for privacy reasons]. My Grandparents are [Name deleted for privacy reasons] and [Name deleted for privacy reasons].*
16. *My Ancestors and direct relatives and I were born and raised in the [Name deleted for privacy reasons]. We lived in camps in the bush, living basically on traditional food only for many years before World War II.*
17. *The [Name deleted for privacy reasons] family has a long history with the Morawa District and surrounding areas.*
18. *The rights I have inherited from my Ancestors include -
the right to live and enter upon the land; and
the right to collect food, timber, stone, ochres, resin or grasses and bush medicines within the Widi area.*
19. *I also have the right to practice Aboriginal law and ceremonies and bury my deceased relatives.*
20. *It follows that I have -
the right to negotiate in relation to any further developments, ie, mining or agricultural etc., which may take place on and affect our traditional land, and the right to negotiate before the commencement of infrastructure developments or such other expansions upon our Ancestral lands.*
21. *I ask, as a custodian of my traditional lands, that no-one should be permitted to remove any stones etc., attached to sacred sites relevant to customs of the Widi mob without my permission.”*

In her affidavit sworn on 20 July 1999 [Name deleted for privacy reasons] states:

During my lifetime, within the claim area, I have been taught to eat porcupine, beet honey, kangaroo, emu, natural gum, bungarra, various native birds, cogalas (wild pears, yams, quandongs and berries and have been on expeditions within the claim area to track and hunt and collect foods when they were in season. I have been taught by mother how to skin, cook and eat a kangaroo in a way her ancestors did it. I have also watched my mother grind grain with a grinding stone in the manner her ancestors taught her.

In the same affidavit [Name deleted for privacy reasons] states:

My [noun's deleted to protect privacy], [Name deleted for privacy reasons]...and his sons remain law men with a traditional connection to their father's country in the area of this claim.

[Name deleted for privacy reasons] asserts in his signed statement of 4 May 1999:

My three [noun deleted for privacy reasons] who have also followed the physical and spiritual connection to these lands and have completed tribal ceremonies and are lore men.

Conclusion

The information refers to traditional knowledge and activities of persons within the native title claim group. There are references to the observation of traditional laws by members of the native title claim group and this suggests that the laws and customs as described are acknowledged and observed the members of the claim group. This is supported by Schedule R which states that traditional customs do exist. After reviewing all of the material, on balance, I am satisfied that the laws and customs described in the material are capable of giving rise to the native title rights and interests claimed.

Result: Requirements met

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

This sub-section requires that the native title claim group have continued to hold native title in accordance with their traditional laws and customs. I have already referred to information relevant to this sub-section in the two earlier sub-sections. I will not repeat that information here except to note that Schedule F of the application relevantly states:

(iii) such traditional law and custom has been passed by traditional teaching, through the generations preceding the present generations to the present generations of persons comprising the native title claim Group;

(iv) the native title claim group continues to acknowledge and observe those traditional laws and customs;

(v) the native title claim group by those laws and customs have a connection or association with the land and waters in respect of which the claim is made and have continued to hold the native title to that area in accordance with those traditional laws and customs.

The truthfulness of these assertions is deposed in the affidavit accompanying the application.

Conclusion

In my opinion the statements of [Name's deleted for privacy reasons] and the affidavits of [Name deleted for privacy reasons] indicate that the native title claim group would appear to have continued to hold the native title in accordance with those traditional laws and customs.

Result: Requirements met

Conclusion for s190B(5)

In order that the requirements of s190B(5) are met I must be satisfied that each condition at s190B(5)(a)-(c) is met.

While I am satisfied the conditions of 190B(5)(b) and (c) are met I am not satisfied in respect of s190B(5)(a). Members of the native title claim group have not established to my satisfaction the factual basis on which it is asserted that the native title rights and interests claimed exist in relation to s190B(5)(a).

Aggregate Result: Requirements not met

190B6

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.

Reasons for Decision

Under s190B(6) I must consider that, prima facie, at least some of the native title rights and interests claimed can be established.

“Native title rights and interests” are defined at s233 of the Act. This definition specifically attaches native title rights and interests to land and water, and in summary requires:

- the rights and interests to be linked to traditional laws and customs;
- those claiming rights and interests to have a connection with the relevant land and waters; and
- those rights and interests to be recognised under the common law of Australia.

It is necessary to have regard to both what rights and interests may be claimed at law and what rights and interests prima facie can be established. The term prima facie was considered in *North Ganalanja Aboriginal Corporation v Qld* 185 CLR 595 by their Honours Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, who noted: “The phrase can have various shades of meaning in particular statutory contexts but the ordinary meaning of the phrase “prima facie” is: “At first sight, on the face of it; as appears at first sight without investigation.” [Citing the Oxford English Dictionary (2nd ed 1989)]. I have adopted the ordinary meaning referred to by their Honours when considering this application.

Conclusion

For the reasons given at s190B(5) I am not satisfied of the factual basis on which members of the native title claim group assert a connection with all of the relevant land and waters within the area claimed. Specifically, the northern and eastern outlying areas of the claim, eg Tallering, Gullewa, Warriedar, Rothsay and Mt Gibson. In the absence of such connection, native title rights and interests as defined in the Act, prima facie, cannot be made out.

The application does not comply with this condition.

Result: Requirements not met

190B7

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 have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to 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 holder of a lease.***

Reasons for Decision

This section requires me to be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.

Traditional physical connection is not defined in the Native Title Act. I am interpreting this phrase to mean that physical connection should be in accordance with the particular traditional laws and customs relevant to the claim group

For the reasons given at s190B(5), I am satisfied that there exist traditional laws acknowledged by and customs observed by the claim group sufficient to support traditional physical connection.

Result: Requirements met

190B8

No failure to comply with s61A:

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that, because of s61A (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.

Reasons for Decision

s61A(1) – Native Title Determination

A search of the Native Title Register conducted on 22 June 2000 reveals that there is no approved determination of native title in relation to the area claimed in this application

S61A(2) – Previous Exclusive Possession Acts

In Schedule B of the application, certain tenures are excluded from the claim area. For reasons provided above at s190B(2) these exclusions are sufficiently clear to provide reasonable certainty about all the tenure excluded and this includes previous exclusive possession acts.

S61A(3) – Previous Non-Exclusive Possession Acts

The applicants are not seeking exclusive possession over areas the subject of previous non-exclusive possession acts.

S61A(4) – s47, 47A, 47B

The applicant claims the benefit of ss.47, 47A and 47B. I am required to ascertain whether this is an application that should not have been made because of the provisions of s61A. In my opinion, the applicants' express statements with respect to the provisions of that section are sufficient to meet the requirements of s 190B(8). Subsection 61A(4) of the Act provides that an application may be made in these terms. Whether or not the applicants have provided sufficient information to bring any area of land and waters covered by the application within the ambit of sections 47, 47A and 47B is a matter to be settled in another forum.

Conclusion

For the reasons identified above the application and accompanying documents do not disclose and it is not otherwise apparent that because of section 61A the application should not have been made.

Result: Requirements met

190B9 (a)

Ownership of minerals, petroleum or gas wholly owned by the Crown:

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

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

Reasons for Decision

Schedule E (i) in the application makes the statement that:

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

I am satisfied that this statement ensures that the application complies with the requirements of s.190B(9)(a).

Result: Requirements met

190B9 (b)

Exclusive possession of an offshore place:

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

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

Reasons for Decision

There is no offshore place included within the application.

I am satisfied that this application complies with the requirements of s.190B(9)(b).

Result: Requirements met

190B9 (c)

Other extinguishment:

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

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

Reasons for Decision

The application does not disclose, and I am not otherwise aware of, any area where an extinguishing act has occurred and yet the application seeks native title rights and interests over such an area. I am satisfied that the requirements of this section have been met.

Result: Requirements met

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