National Native Title Tribunal

REGISTRATION TEST
REASONS FOR DECISION

DELEGATE:	Russell Trott

Application Name	Evelyn Gilla & Ors on Behalf of the Yugunga-Nya People (Yugunga Nya)
Names of Applicants	Evelyn Gilla, William Shay, Winifred Gentle and Rex Shay
Region	East Gascoyne Western Australia
Date Application Made	29 October 1999
NNTT Number	WC99/46
Federal Court Number	WG6132/98

DECISION – Yugunga Nya – WC99/46

The delegate has considered the application against each of the conditions contained in s190B and 190C of the *Native Title Act* 1993.

DECISION

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

…………………………………….

Date of Decision

Delegate of the Registrar pursuant to
sections.190, 190A, 190B, 190C, 190D

Brief History of the Application

The original application was lodged with the Federal Court in Perth on 29 October 1999.

This is a country claim lodged over an area west of Wiluna in Western Australia. The application encompasses within it five previously lodged polygon applications. Also filed in the Federal Court on 1 November 1999 were 'notices of motion' to combine those five previously lodged polygon applications and the newly lodged application into one inclusive application.

The motion to amend the application was heard on the 10 November 1999 by District Registrar Jan in the Federal Court in Perth. At the hearing, the newly lodged application was further amended and the Representative Body was instructed to lodge a re-amended application to the Federal Court in the form of a 'Minute of Proposed Amended Native Title Determination Claimant Application'. This re-amended application was lodged in the Federal Court on 9 December 1999.

At the hearing on 10 November 1999 District Registrar Jan ordered the newly lodged country application (WAG6036/99) be amended so that it is combined with the previously lodged polygon applications (WAG6132/98; WAG6222/98; WAG6268/98; WAG6269/98 & WAG6270/98). Registrar Jan ordered this amended and combined application (WAG6132/98 – the lead application) be known as 'Evelyn Gilla & Ors on behalf of the Yugunga-Nya People' and that the said six applications be continued in and under this title, and that the parties to the combined application be all the parties to the said six applications.

Information considered when making the Decision

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

- The National Native Title Tribunal's Working/Personnel Files, Legal Services Files, Party Files and Registration Testing Files for WC99/39; WC96/107; WC98/1; WC98/52; WC98/53 & WC98/54.
- Tenure information acquired by the Tribunal in relation to the area covered by this application.
- The National Native Title Tribunal's Working files and related materials for Native Title applications that overlap the area of this application (if applicable);
- The National Native Title Tribunal Geospatial Database;
- The Register of Native Title Claims and Schedule of Native Title Applications;
- The Native Title Register;
- Affidavits supplied by the applicants and their representatives;
- Submissions from the Western Australian State Government.

Under Schedule 5 of the Native Title Act I am able to consider all of this other information, when relevant [see specifically Part 4 – 11(8)].

Copies of affidavit and other material provided directly to the Tribunal by the applicants for my consideration in the application of the registration test were provided to the State as is required by *State of Western Australia v Native Title Registrar & Ors* [1999] FCA 1591 – 1594.

Note: 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.

All references to legislative sections refer to the Native Title Act 1993 unless otherwise specified.

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.

Details required in section 61

61(3) Name and address for service of applicants

Reasons relating to this sub-condition

The name of four applicants and address for service is detailed at Part A and B of the application.

Result: Requirements met

61(4) Name 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 describes the native title claim group as follows:

> *The native title claim group comprises those Aboriginal persons who are:*
> 1. *Evelyn Gilla, William Shay, Winifred Gentle and Rex Shay*
> 2. *The biological descendants of 'Wilba' (The Grandmother of Evelyn Gilla)*

As such 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 a member of the native title claim group.

Result: Requirements met

61(5) Application is in the prescribed form, lodged in the Federal Court, contain 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 s.61(5)(b) of the Act.

The application meets the requirements of s.61(5)(c) and contains all information prescribed in s.62. I refer to my reasons in relation to those sections. As required by s.61(5)(d) the application is accompanied by affidavits as prescribed by s.62(1)(a) and a map as prescribed by s.62(2)(b). I refer to my reasons in relation to those sections of the Act.

I note that s.190C2 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 s.61(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 application contains four affidavits. The applicants have each provided an affidavit in the prescribed form and have addressed the matters required by s62(1)(a)(i) – s62(1)(a)(v).

Result: Requirements met

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

The application contains some details relating to 'traditional physical connection' at Schedule F and Schedule 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

For the reasons which led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the information and maps provided by the applicant are 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 amended application in the following terms:

(1) The Applicant (sic) excludes 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, at the time of the Registrar's consideration:

- Category A past acts, as defined in NTA s.228 and s.229;
- Category A intermediate period acts as defined in NTA s.232A and s.232

(2) The applicants 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 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 23E in relation to the act.

(3) The Applicants exclude from the claim areas in relation to which native title rights and interest 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 exclude from the claim areas the tenures set out in Schedule B1.

Schedule B1

B.1.1 Any former or current unqualified grant of an estate in fee simple and all other freehold land

.

B.1.2 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 Worker's 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 and "the land or waters on which a public work is constructed, established or situated" within the meaning given to that phrase by the Native Title Act 1993 (Cth) s251D.

B1.7 A public road.

(4) Paragraphs (1) to (3) above are 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 this application, particulars of which will be provided prior to the hearing but which include such areas as may be listed in Schedule L.

For the reasons given at s.190B(2) the application passes this condition. **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.

For the reasons which led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the map provided sufficiently identifies the external boundaries of the claim area.

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 requirements of s.62(2)(c) can be read widely to include all searches conducted by any person or body. However, I am of the view that I need only be informed of searches conducted by the applicants in order to be satisfied that the application complies with this condition. It would be unreasonably onerous to expect the applicants to have knowledge of, and obtain details about all searches carried out by every other person or body. A list of tenure compiled by the State of Western Australia is provided at Schedule D, Attachment D of the application.

Result: Requirements met

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

Reasons relating to this sub-condition

An adequate description of the native title rights and interests claimed by the applicant is contained in Schedule E of the application. I have outlined these rights and interests in my reasons for decision in respect of s.190B(4).

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

This information is contained at Schedule F of the application. For the reasons which led to my conclusion that the requirements of s.190B(5)(a) have been met, I am satisfied that there is sufficient factual basis to support the assertion that the native title claim group have, and the predecessors of those persons had, an association with the area.

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

This information is contained at Schedule F of the application. For the reasons which led to my conclusion that the requirements of s.190B(5)(b) have been met, I am satisfied that there is sufficient factual basis to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the native title rights and interests claimed.

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

This information is contained at Schedule F of the application. For the reasons which led to my conclusion that the requirements of s.190B(5)(c) have been met, I am satisfied that there is sufficient factual basis to support the assertion that the native title claim group have continued to hold the native title in accordance with their traditional laws and customs.

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. It is my view that this description of activities is sufficient to comply with the requirements of s.62(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 of the application lists the NNTT number for seven applications in relation to whole or part of the area covered by this application. A search of the Tribunal's geospatial data confirms that there are 'overlapping' applications. I am satisfied that the application complies with the requirements of s 62(2)(g).

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 lists one section 29 notice, issued post 30th September 1998 that relates to the whole or a part of the area, that the applicants are aware of.

Result: Requirements met

Reasons for the Decision

For the reasons identified above the application contains all details and other information, and is accompanied by the affidavits and other documents, required by ss.61&62.

I am satisfied that the application meets the requirements of this condition.

Aggregate Result: Requirements 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 the 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.

A search of the Register of Native Title Claims reveals that there are six overlapping native title applications on the Register. These are:

WC96/83 – Pandawn – lodged 3/7/96
WC98/11 – Baumgarten
WC99/05 – Koara – lodged 22/12/94
WC99/10 – Wutha – lodged 18/1/96
WC99/13 - Nganawongka/Wadjari & Ngarla
WC99/17 - Ngoonooru Wadjari

In three of these applications (WC98/11 Baumgarten, WC99/13 Nganawongka/Wadjari & Ngarla, WC99/17 Ngoonooru Wadjari) the area of overlap of the respective external boundaries is is less than 0.1 square kilometre, is insignificant or purely technical and may be disregarded.

Accordingly there are three overlapping native title applications on the Register of Native Title Claims, or not removed from the Register of Native Title Claims, as a result of consideration pursuant to s190A.

On 26 April 1999, WC96/83 (Pandawn) was found not to comply with the requirements of the registration test. As the entry relating to WC96/83 (Pandawn) was removed from the Register as a result of consideration under s190A of the Act the overlap with the current application is of no consequence.

On 23 March 1999, WC99/5 (Koara) was found to comply with the requirements for registration, following consideration under s190A. However, on 16 November 1999 Justice Carr of the Federal Court found that it should never have been placed on the register, see **Western Australia v Native Title Registrar [1999] FCA 1591 – 1594**. As the entry relating to WC99/05 (Koara) that was made as a result of consideration under s190A was subsequently removed from the Register I need not further consider the overlap with the current application.

The question of whether the current application has claimants in common with WC99/10 (Wutha) must therefore be considered. The description of the claimant group for this application is set out

at Schedule A of the application filed on 29 October 1999. Schedule A states "the native title claim group comprises those Aboriginal persons who are:
1. Evelyn Gilla, William Shay, Winifred Gentle and Rex Shay
2. The biological descendants of 'Wilba' (The grandmother of Evelyn Gilla).

The register extract for the overlapping application (WC99/10 (Wutha)) lists the names of two apical ancestors. The native title claimant group is described as "being those persons (including the applicants) who are: the biological descendants of Wunal aka Tommy (m) and Telpha Ashwin (f). It then lists a number of individuals and descedants who are specifically excluded from the claim.

Unless I am satisfied that no member of the claimant group for the current application was a member of the claimant group for the previous application (WC99/10 (Wutha)) then the current application will not comply with the requirements of s190C3.

When this issue was raised with the Yamatji Land and Sea Council, the Council provided the Tribunal with a letter from Allister Hill who is an anthropologist engaged by the Council. In his letter Mr Hill states, amongst other things, as follows:

> *I have responsibility for anthropological research within the Yagunga Nya native title claim area. The Yagunga Nya claim group consists of a combination of cognatic descent groups formed from the apical ancestors: Walaba, Dolly Ward and Maggie, also know as Wilky, Wheelbarrow. The descent group include the adopted and social children of the descendants of those ancestors.*
> *I have been provided with a copy of the register extract from the WC99/10 Wutha claim, listing apical ancestors of the applicants describing the Wutha claim group as the biological descendants of those ancestors, but excluding certain named individuals and their descendants.*
> *From my genealogical research with the Yagunga Nya claim group, I have no reason to believe that the persons making up the Wutha group, nor any of their descendants, are descendants of the apical ancestor used to define the Yagunga Nya claim group.*

On the basis of the above information I am satisfied that no member of the claimant group for this application was a member of the claimant group for the previous application (WC99/10 (Wutha)).

I am satisfied on the basis of the above information that the application does not offend the provisions of s190C(3).

Result: Requirements met

190C4(a) or 190C4(b)g

Certification and authorisation:

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

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

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 the Decision

s.190C (4) requires that I be satisfied of either paragraph (a) or (b).

In this instance, the Applicants have elected to have their application authorised in accordance with s.190C (4)(b). I do not therefore need to consider s.190C (4)(a).

S. 190C(4)(b) requires that the Registrar be satisfied that :

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.

Schedule R of the application states that:

The Applicants are members of the native title claim group and are authorised to make the application and to deal with matters arising in relation to it by all other persons in the native title claim group pursuant to a process of decision making that:

(1) under the traditional laws and customs of the persons in the native title claim group, must be complied with in relation to authorising things of that kind; and

(2) the persons in the native title claim group have also agreed to and adopted in relation to authorising the making of the application and dealing with matters and in relation to doing things of that kind.

Each of the four named applicants in this matter has affirmed an affidavit stating in identical terms that:

5 I am authorised by all the persons in the native title claim group to make the application and deal with matters arising in relation to the application pursuant to a process of decision making that:

(1) under the traditional laws and customs of the persons in the native title claim group, must be complied with in relation to authorising things of that kind; and

(2) the persons in the native title claim group have also agreed to and adopted in relation to authorising the making of the application and dealing with matters and in relation to doing things of that kind.

These statements set out the process of decision making that, under traditional laws and customs of the group must be complied with in relation to making decisions of this kind, as required by S251B.

Under S190C (5) the applicant is also required to briefly set out the grounds on which the Registrar should consider that S190C (4)(b) has been met. I refer to my reasons in that section below.

The application meets the condition contained in S190C(4)

190C5	***Evidence of authorisation:*** ***If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:*** ***(a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and*** ***(b) briefly sets out the grounds on which the Registrar should consider that it has been met.***

Reasons for the Decision

Under S190C (5) the applicants are also required to briefly set out the grounds on which the Registrar or delegate should consider that S190C (4)(b) has been met.

In addition to the s62 affidavits that accompanied the application, the Principal Legal Officer of the Yamatji Land and Sea Council, David Ritter, provided the Tribunal with an affidavit, sworn 12 June 2000. In the affidavit, Mr Ritter states that:

2. It is my understanding that the applicants for the Yugunga Nya native title claim Rex Shay, William Shay, Winifred Gentle and Evelyn Gilla ['the applicants'] are members of the Yugunga Nya native title claim group and are authorised to make the application and deal with the matters arising in relation to it by all the other persons in native title claim group in accordance with s190C(4)(b) of the (Commonwealth) Native Title Act.
3. I have been advised by officers of the Yamatji Land and Sea Council who have direct conduct of the matter, namely anthropologist Allister Hill and Legal Officer Martin Dore, that the applicants were selected by the Yugunga Nya people in accordance with traditional law and custom.
4. The officers of the Yamatji Land and Sea Council mentioned in paragraph 3 have conducted numerous meetings of Aboriginal people from across the claim area the subject of the present application and have observed how decisions are made by Yugunga Nya people.
5. I have been advised that the authority to make decisions in relation to the Yugunga Nya claim vests in the Elders of the Yugunga Nya people, and that these Elders have authority to speak for and make decisions on behalf of the group.
6. I have been advised that each of the applicants are either Elders themselves or are authorised by Elders to speak for and make decisions on behalf of the Yugunga-Nya people.

I note that Mr Ritter's affidavit confirms that the Council employee with the day to day conduct of the application is Mr Martin Dore. Ordinarily it might be expected that the applicants themselves, or Mr Dore, might have provided material concerning the grounds on which the Registrar might consider the requirement in s190C4 to be satisfied. Most of the statements made in Mr Ritter's affidavit are made in reliance on information provided to him by other Land Council officers, including Mr Dore. In fact it is only the statement in para 3 of Mr Ritter's affidavit that is made without such a qualification. Mr Ritter is however the Principal Legal Officer of the Council and whilst he might be expected to be familiar with the details of the application, he cannot be expected to have first hand knowledge of every matter in which the Council is involved. In my view it would be preferable for information concerning s190C4 to have been provided by the applicants themselves or Mr Dore, but there is no reason to doubt the accuracy of the statements Mr Ritter has made nor is there any basis to question Mr Ritter's

ability to make such statements.

In this particular instance it is clear from the information provided that the basis for authorisation of the applicants is the respect shown to the Elders under traditional custom to use their authority to make decisions on behalf of the group. Whilst no specific details are provided it is also clear that numerous meetings of Aboriginal people from across the claim have been conducted at which decisions have been made concerning the application, including authorisation of the applicants. I also note that Mr Ritter's affidavit states that *each of the applicants are either Elders themselves or are authorised by Elders to speak for and make decisions on behalf of the Yugunga-Nya people*. In my view the provision of this information by Mr Ritter supports the above conclusions and removes any doubt about whether the applicants have anything sufficient to support their claim to be authorised within the meaning of s251B.

In reaching this view I am mindful of the basis on which the Registrar or his delegate ought to be satisfied in relation to s190C(5)(b). In *State of Western Australia v Strickland* [2000] FCA 652 a Full Court of the Federal Court upheld the approach taken by French J in *Strickland v Native Title Registrar* (1999) 168 ALR 242 in which His Honour stated (at 259):

> *The insertion of the word 'briefly' at the beginning of s190C(5)(b) suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained. The sufficiency of the grounds upon which the registrar should consider that the requirement has been met is primarily a matter for the registrar.*

I am satisfied that the requirements of this section have been 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 the Decision

Map and External Boundary Description

Map

The application states at schedule C that a map showing the external boundaries of the area covered by the application is attached (Attachment "C").

The map at Attachment C is produced by the Department of Land Administration, Land Claims Mapping Unit and shows the land areas claimed in the application. In addition, it shows a scale allowing distances and areas to be ascertained and identifies pastoral leases and other tenure. All the line work on the map is finely drawn and easy to follow.

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

Additional information identifying the external boundary of the claim is supplied at Attachment B of the amended application.

Internal Boundary Description

The areas excluded from the application are described in the following terms:

1. The Applicant excludes 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 NTA, as amended, or Titles Validation Act 1994, as amended, at the time of the Registrar's consideration:
- 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 Applicant excludes from the claim any area in relation to which a previous exclusive possession act, as defined in section 23B of the NTA, was done in relation to an area, and, either the act was 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 23E in relation to the act.

3. The Applicant excludes from the claim areas in relation to which native title rights and interest 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 Applicant excludes from the claim area any of the areas contained within the following descriptions or tenures which have been validly granted, set out in Schedule B1.

B1.1 Any former or current unqualified grant of an estate in fee simple and all other freehold land.

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 Workers 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), s177; or
(4) a Special Lease under s117 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 and "the land or waters on which a public work is constructed, established or situated" within the meaning given to that phrase by the Native Title Act 1993 (Cth) s251D.

B1.7 A public road.

(4) Paragraphs (1) to (3) above are 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 this application, particulars of which will be provided prior to the hearing but which include such areas as may be listed in Schedule L.

In determining whether this information complies with the requirements of 190B(2) in relation to s62(2)(a)(ii), that is, whether I am satisfied that this information is sufficient for it to be said with reasonable certainty whether native title rights or interests are claimed in relation to particular areas of land or waters within the external boundaries of the area claimed, I have considered the following:

1. I must be "satisfied" on the balance of probabilities. Blount Inc v Registrar of Trade Marks [1988] AIPC 37,241 (Federal Court)

2. The provisions of s109 of the Native Title Act require the Tribunal to be fair, just economical, informal, and prompt; and it is appropriate that I perform my obligations in a similar manner. Northern Territory v Lane (1995) 59 FCR 332 at 336 D-E

3. As a general principle, the provisions relating to compliance with s 190A should be read beneficially. Kanak v NNTT (1995) 61 FCR 103 Lockhart, Lee and Sackville JJ at 124-125

4. The provisions of Schedule 5 Part 4 of the Native Title Act which require the Registrar, in some cases, to use best endeavours to finish considering a claim for registration by the end of 4 months after a notice is given under s29. The Wajarri Elders Claim is such a case, as section 29 notices were issued over parts of the claim area on 9 February 2000, triggering the 4 month time frame in which to consider the claim for registration.

In addition, I have turned my mind to some of the practical realities associated with tenure information and to what is reasonable in that context, including:

- the volume of tenure information associated with the claim area, which is large.
- the length of time needed to obtain and check all the relevant tenure, given the four month time frame.
- the cost to applicants of obtaining such tenure information
- the inherent uncertainty in the reliability of tenure without full inquiry into the validity of grants and full details of all historical tenure.
- The fact that full details of all historical tenure are not easily obtainable.

Both the applicants 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 found to be inconsistent with the development of Australian jurisprudence.

The applicants have detailed a series of land tenure types that are excluded from the area of the application. These are outlined above. The description of areas excluded from the claim area at Schedule B paragraphs (1), and (3)(a) refer to land where an act of a State or Commonwealth governments has created interests. The description of areas excluded from the claim at schedule B paragraph 2 refers to the areas in relation to which a previous exclusive possession act, as defined in s23B of the NTA 1993, 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 a law of that State has made provision for that act as described in s23E NTA. 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 s23E are likewise readily identified by reference to that legislation and therefore searches of the relevant registers.
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 applicants' 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 applicants exclude 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 applicants exclude, 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 applicants exclude any areas covered by mining or general purpose leases where such leases extinguish native title. Paragraph (3)(b) of Schedule B excludes areas of land where actual use by the holder of a tenure is permanently inconsistent with continued existence of native title. Schedule B1 provides examples of these types of tenures that are excluded from the application.

This is sufficient for me to be satisfied that the areas excluded from the application, are identified with reasonably certainty. I also consider that excluded areas of land can be readily identified through searches of relevant Government registers.

Paragraph (4) of Schedule B states that the exclusions are subject to the provisions of section 47, 47A and 47B. Particulars allowing the claiming of the benefit of these sections are not provided. I consider that the description provided allows it to be shown objectively, upon the provision of such particulars, whether applicants may have benefit of these provisions and that this is all that is required by this section.

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 the Decision

To meet this condition, the description of the claim group must be sufficiently clear so that it can be said with reasonable certainty whether any particular person is a member of the native title claim group.

An exhaustive list of the persons in the native title claim group has not been provided. Accordingly, the requirements of s190B(3)(a) have not been met.

In the alternative, s190B(3)(b) requires the Registrar to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Schedule A of the application states that the native title claim group is those Aboriginal persons who are:

“1. Evelyn Gilla, William Shay, Winifred Gentle and Rex Shay
2. The biological descendants of ‘Wilba’ (The Grandmother of Evelyn Gilla)”

It is my opinion that the biological descendants of the persons named could be readily identified with appropriate inquiry.

I am satisfied that the above-stated description constitutes an objective means of verifying the identity of members of the native title claim group such that it can be clearly ascertained whether any particular person is in the group or not.

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 the 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 describes the native title rights and interest claimed as follows:

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 and interests which may be shared with any others who establish that they are native title holders) of the area, and in particular comprise:

(a) rights to possess, occupy, use and enjoy the area;
(b) the right to make decisions about the use and enjoyment of the area;
(c) the right of access to the area;
(d) the right to control the access of others to the area;
(e) the right to use and enjoy resources of the area;
(f) the right to control the use and enjoyment of others of resources of the area;
(g) the right to trade in resources of the area;
(h) the right to receive a portion of any resources taken by others from the area;
(i) the right to maintain and protect places of importance under traditional laws, customs and practices in the area; and
(j) the right to maintain, protect and prevent misuse of cultural knowledge of the common law holders associated with the area.

Subject to:
(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 applicant.
(ii) The claim area does not include any offshore place.
(iii) The applicant does not make claim to native title rights and interest which confer possession, occupation, use and enjoyment to the exclusion of all others in respect of any areas in relation to which 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 in relation to the act;
(iv) Paragraph (iii) above is subject to such of the provisions of section 47, 47A and 47B 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, a 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. Also, the qualifications listed at items i, ii, iii and v are clear in their scope and intention, reciting general limitations to the operation of the listed rights and interests, where relevant.

In addition, the qualification in item iv, the saving of exclusive possession rights and interests in areas of previous non- exclusive possession acts where the acts are in favour of native title claimants, is capable of qualifying item iii, and consequently of providing clearly identifiable specific rights and interests.

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 s.190B(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 the 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 s.190B5 (a) – (c).

Information considered:

Submitted by the applicants for my consideration is:

- Affidavit of Evelyn Gilla (applicant) sworn 12 April 2000

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

This criteria requires me to be satisfied that:

The members of the native title claim group have an association with the area (under claim) and the predecessors of the members of the native title claim group had an association with the area (under claim).

The word 'association' is not defined in the Act. In my view, the nature of the association required 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 as schedule E of the native title claimant application.

In addition, as any native title rights and interest are defined as being related to land and waters (s.223 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 as schedule B of the application. I must therefore be satisfied that the members of the native title claim group are, and 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 30,334.525 square kilometres.

Schedule F of the application asserts that the native title claim group and their ancestors have, since the assertion of British sovereignty possessed, occupied, used and enjoyed the claim area.

At point (5) of Schedule F it is asserted that the claim group have a connection with the land in respect of which this claim is made. The truthfulness of these assertions is deposed in the accompanying affidavits of each applicant.

Further information provided in the affidavit of one of the elder members of the native title claim group link members of the claim group to a number of places within the claim area, from Cue to Mooloogool Station. The affidavit refers to numerous stations and sites throughout the claim area. The evidence provided for association is particularly strong for the central portion of the claim area.

Based on this information, I am satisfied that current members of the claim group have, and the predecessors of these people had, an association with the area.

190 B(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 subsection 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.

I have considered filed relating to overlapping claims WC96/83, WC99/05, WC99/10. I am satisfied that there is no relevant information that would aid consideration of this condition within the WC96/83 application.

Overlapping claim WC99/5 – Koara has previously been considered for registration under s.190A of the Native Title Act and was accepted for registration on 23 March 1999, however a judgement by Justice Carr deemed that this application should never have been placed on the native title register of claims. WC99/5 overlaps this current application by 83.463 square kilometres. The applicants in WC99/5 appear to identify with a system of traditional laws and customs which give rise to their particular native title rights and interests that are different to those identified in this application.

In my view, the identification by the applicants in WC99/5 of a different system of laws and customs over part of the current application is not, in this particular situation, adverse to the applicants in this application. I have based my view on the following:

The relatively small size of the overlap

The native title rights and interests identified at Schedule E of this application are specifically made subject to the rights and interests of others who may hold native title.

Overlapping claim 99/10 – Wutha has also previously been considered for registration under s.190A of the Native Title Act and was accepted for registration on 15 June 1999. WC99/10 overlaps this current application by 7973.484 square kilometres. Once again, the applicants of WC99/10 appear to identify with a system of traditional laws and customs which give rise to their rights and interests that are different to those identified in this application.

I have not identified laws and customs that could be adverse to this particular application. Schedule E points out that the rights and interests are subject to others who may hold native title.

The application at schedule F asserts that the native title rights and interests claimed by the applicants are pursuant to the traditional laws and customs of the claim group. The traditional laws and customs which give rise to rights and interests in land and waters are vested in members of the native title claimant group on the basis of:

Descent from ancestors connected to the area

Traditional religious knowledge of the area

Traditional knowledge of the geography of the area

Traditional knowledge of the resources of the area

Knowledge of traditional ceremonies of the area

To be satisfied that those laws and customs are respectively acknowledged and observed by the native title claim group, I have examined the affidavit provided by one of the members of the claim group in the terms above. Information about descent, knowledge (religious, geographical, of resources and there use) and activities, which can be linked to each of the above criteria are provided in the affidavit. In my view, such examples substantiate the assertion of the factual basis that traditional laws and customs are observed by the group.

Furthermore, it is stated at Schedule F that such traditional law and custom has been passed by traditional teaching, through generations preceding the present generations to the generations of persons comprising the native title claim group.

The information provided supports the notion that there exists a body of traditional laws acknowledged by, and traditional customs observed by the native title claim group and that these laws and customs give rise to the claimed native title rights and interests.

I am satisfied that this criterion is met.

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

This criteria requires me to be satisfied that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

The assertions at schedule F together with consideration of the affidavit supports the notion that the native title claim group continues to hold native title in accordance with traditional laws and customs. Furthermore, the assertion that the claim group continues to hold native title in accordance with traditional law and custom is deposed in the affidavits accompanying the application.

I am satisfied this criterion is met.

Summary

In summary, each applicant has sworn to the truth of the statements contained in the application, which contain certain assertions attesting to the factual basis on which their claim is made.

Supporting information provided in the affidavit of Ms Evelyn Gilla gives clear examples of the claim groups association with the claim area and a life governed by traditional laws and custom which in turn gives rise to the native title rights and interests claimed.

Statements are made and information is provided connecting members of the claim group and their predecessors to the area of the claim and their adherence to traditional laws and customs.

There is evidence of hunting, gathering for food and medicinal purposes, camping and visiting and protecting sites (in accord with traditional laws and customs taught by their predecessors). There is evidence that members of the claim group continue to hold traditional knowledge associated with the religious and economic significance of the country. There is evidence that the laws and customs practiced by the claim group give rise to the native title rights and interests claimed.

Conclusion

There is evidence to support the factual basis in each of the three criteria identified at s190B5 (a) – (c). This evidence in turn is sufficient for me to be satisfied that the factual basis on which the assertion of the existence of the native title rights and interests claimed is sufficient to support the assertion.

Aggregate Result: Requirements 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 the Decision

Under s190B6 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 s.233 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.

The definition is closely aligned with all the issues I have already considered under s190B5. I will draw on the conclusions I made under that section in my consideration of s190B6.

Under s.190B(6) I must consider that, prima facie, at least some of the rights and interests claimed 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 it appears at first sight without investigation." [citing Oxford English Dictionary (2nd ed) 1989]."

I have adopted the ordinary meaning referred to by their Honours in considering this application and deciding which native title rights and interests claimed can prima facie be established.

Native title rights and interests are defined at s.223 of the Native Title Act. This definition attaches native title rights and interests to land and water and requires:

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

I have already outlined at s.190B(5) that I am satisfied that the members of the native title claim group have an association with the relevant land and waters and continue to adhere to traditional laws and customs that support the factual basis for the native title rights and interests claimed. I refer to my reasons in relation to that section.

In *Western Australia v Ward* [2000] FCA 191, Beaumont and von Doussa JJ, by majority, held that some of the rights and interests included in the determination of native title made by Lee J at first instance are incapable of being recognised at common law. Their Honours held that rights and interests that involve a physical presence on the land or that are associated with traditional, social and cultural practices are capable of recognition under common law but that those involving religious or spiritual relationships with land are not. See *Ward* at [104]. However their Honours also found that where s47 and 47A applied, the applicants in Ward were entitled to possession, occupation, use and enjoyment of the area concerned as against the whole world.

The native title rights and interests claimed are those set out in at Schedule E of the amended application. I note that the native title rights and interests claimed at Schedule E are claimed *subject to any native title rights and interests which may be shared with any others who establish that they are native title holders*. The claim to exclusive possession is further qualified in terms of the five paragraphs set out in Schedule E which state that the claimed native title rights and interests are subject to other validly granted rights and interests.

The information, in addition to that within the amended application that I have considered in relation to this section is:

- An affidavit by Ms Evelyn Gilla, sworn 12 April 2000.

In some instances, I will only refer to one of the relevant paragraph or page number of the document containing information that I considered pertinent to establishing the prima facie claim. I will not detail information in these reasons or detail every document containing information with information about the specific condition.

The rights and interests claimed by the native title claim group are set forth in Schedule E of the application. There is one principal native title right and interest expressed, being:

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 and interests which may be shared with any others who establish that they are native title holders) of the area.

The ten other rights and interests sought flow from this principal right. As a consequence, the information provided to establish the secondary rights of itself also supports the principal right and interest.

The ten subordinate rights and interests sought, together with my reasons, follow:

(a) rights to possess, occupy, use and enjoy the area;

In *State of Western Australia v Ward* [2000] FCA 611, this right formed part of the determination made by the their Honours. The information provided supports this general principal right and interest. I note that the rights are not claimed to the exclusion of all others.

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

(b) the right to make decisions about the use and enjoyment of the area;

In *State of Western Australia v Ward* [2000] FCA 611, this right formed part of the determination made by their Honours. Evelyn Gilla points out in her affidavit (12-04-00) at paragraph's 42 and 43 that "The claim areas are in are in my family's traditional country. People need to ask us before they make decisions that will affect the country…People let us know about things that affect our area."

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

(c) the right of access to the area;

In *State of Western Australia v Ward* [2000] FCA 611, this right formed part of the determination made by their Honours. Schedule G of the amended application gives examples of the Yugunga Nya's people's right of access to the area, to camp, to live and build structures, and to move freely about. This is supported by the information about camping on country provided in the affidavits of Ms Evelyn Gilla. I further note that this right is not claimed to the exclusion of all others.

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

(d) the right to control the access of others to the area;

In *State of Western Australia v Ward* [2000] FCA 191, the majority declined to include this right in any determination of native title in relation to areas where native title was found to have been partially extinguished. There was no discussion as to why the right was not included in the draft determination. The application of s47A in that case resulted in the applicants having the right of use, occupation, possession and enjoyment as against the whole world. The majority found this would give rise to rights similar to those available under freehold title, including the right to control the access of others to areas where s47A applies. See para [207] of the decision.

Evelyn Gilla provides examples of ritual sites where access was controlled and restricted to certain persons (para 36). The right is claimed subject to the qualifications set out in Schedule E.

However in my opinion this does not limit the right to areas in which s47A (or indeed s47B) may apply.

In the absence of such limitation I am not satisfied that this right can be prima facie established.

(e) the right to use and enjoy the resources of the area;

The absence of the word 'traditional' in the present case implies that the applicants are claiming a larger right – to use and enjoy both traditional and non-traditional resources in the area. The further affidavit provided by Ms Gilla cites numerous examples of Yugunga Nya People using and enjoying what may be categorised as "traditional" resources of the area (see para 14,31 & 33). There is no evidence before me to support the right of the claim group to use and enjoy other than traditional resources of the area.

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

(f) the right to control the use and enjoyment of others of resources of the area;
In *State of Western Australia v Ward* [2000] FCA 191, the majority declined to include this right in the determination of native title in relation to areas where native title was found to have been partially extinguished. As noted above there was no discussion as to why the right was not included in the draft determination.

The right claimed is supported by Evelyn Gilla's affidavit at para 26. The right is claimed subject to the qualifications set out in Schedule E. However in my opinion this does not limit the right to areas in which s47A (or indeed s47B) may apply (see above).

In the absence of such limitation I am not satisfied that this right can be prima facie established.

(g) the right to trade in resources of the area;
In *State of Western Australia v Ward* [2000] FCA 191, the majority declined to include the right to trade in the resources of the claim area in the determination of native title. This raises the question of whether this right is recognisable under the common law.

The absence of the word 'traditional' in the present case implies that the applicants are claiming a larger right – to trade in both traditional and non-traditional resources of the area. At Schedule G of the application and paragraph 13 of Evelyn Gilla's affidavit, mention is made of the right to trade in what may be categorised as "traditional" resources of the area. However there is no further evidence before me to support, prima facie, the right of the claim group to use and enjoy other than traditional resources of the area.

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

(h) the right to receive a portion of any resources taken by others from the area;
I note that in *Yarmirr v Northern Territory* [1998] 82 FCR 533 Olney J found that this right was not a right that could form part of a determination of native title. In *Ward v State of Western Australia [*1998]159 ALR 483 Lee J differed from Olney J with respect to this finding. However, Lee J.'s determination was overturned by a majority of the Full Court in *State of Western Australia v Ward* [2000] FCA 191. I therefore follow the finding by Olney J and conclude that this right is not recognised under the common law of Australia.

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

(i) the right to maintain and protect places of importance under traditional laws, customs and practices in the area; and

In *State of Western Australia v Ward* [2000] FCA 611, this right formed part of the determination made by their Honours. Schedule G of the application and the affidavit of Evelyn Gilla (para 42) refer to and support the exercise of this right.

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

(j) the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area.

I note that in *State of Western Australia v Ward* [2000] FCA 191 it was found that this right was not "a right in relation to land of the kind that can be the subject of a determination of native title" at para [666]. I further note the submission by the State of Western Australia on 14 April 2000 that "such a right cannot therefore be included on the Register of Native Title Claims and should be excluded from any application in which it is included in Schedule E".

In *Hayes v Northern Territory of Australia* [2000] FCA 671,Olney J held "the right to manage the spiritual forces and to safeguard the cultural knowledge associated with the land and waters of their respective estates within the determination area" in the formal determination made.

This right differs slightly from that claimed in the present case. Therefore in my view I am bound to follow the majority decision in *State of Western Australia v Ward* [2000] FCA 191, as the right being claimed is expressed precisely as a right which was found not to be a right that can be the subject of a determination of native title. I therefore conclude that this right it is not recognised under the common law of Australia.

I am <u>not</u> satisfied that this right can be prima facie established.

<u>Conclusion</u>

I am satisfied the rights and interests claimed above at (a) (b) (c) and (i) are, prima facie, capable of being made out, subject to the following qualifications as set out in Schedule E of the amended application:

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.*

ii. *To the extent that the native title rights and interests claimed may relate to waters in an offshore place, those rights and interests are not to the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under international law in relation to the whole or any part of the offshore place.*

iii. *The applicants do not make a claim for native title rights or 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 s.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 s.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 native title 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, the law of the State or a law of the Commonwealth.*

I am not so satisfied with respect to the rights and interests claimed above at (d) (e) (f) (g) (h) and (j) but note that s190(3A)(c) allows the applicants the opportunity to provide the Registrar with

further information relating to any native title rights and interests that were claimed in the application but whose details were not included in the Register.

Result:Requirements met in part as outlined above.

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 the 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.

As discussed more fully in my reasons for 190B5 above, I am of the view that so long as there is a sufficient factual basis drawn from either the broader traditional area or the defined areas that supports the relevant condition, this is adequate.

In the sworn affidavit of Evelyn Gilla, she talks about her connection to Yugunga Nya country, including being born on the claim area, living there, hunting, being taught and speaking the language, place names and other traditional Yugunga Nya customs. Ms Gilla talks of visiting the claim area and taking her children and grandchildren on country to learn about traditional stories and significant sites on Yugunga Nya country.

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 the Decision

<u>s61A(1) – Native Title Determination</u>

A search of the Native Title Register conducted on 08 June 2000, reveals that there are no approved determinations of native title in relation to the area claimed in this application.

<u>S61A(2) – Previous Exclusive Possession Acts</u>

In Schedule B of the application, certain tenures are excluded from the claim area. For reasons provided above at s190B2 these exclusions are sufficiently clear to provide reasonable certainty about all the tenure excluded and include all previous exclusive possession acts.

<u>S61A(3) – Previous Non-Exclusive Possession Acts</u>

The applicants are not seeking exclusive possession over areas the subject of previous non-exclusive possession acts, as discussed in my reasons provided above at s190B4.

S61A(4) – s47, 47A, 47B

The application does not state that any of these sections apply to it.

I am required to ascertain whether this is an application that should not have been made because of the provisions of s61A. In the absence of a statement specified in s61A(4)(b), it is not necessary to consider this section further..

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 Common-wealth, a State or Territory wholly owns the minerals, petroleum or gas;

Reasons for the Decision

Schedule E 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 applicant.

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 the Decision

It is apparent from the boundary and map material that the claim area is located inland of the coast. Schedule E, point (ii) notes that the "*claim area does not include any offshore place*".

I am satisfied that the 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 the 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