

REGISTRATION TEST

REASONS FOR DECISION

DELEGATE: Andrew Solomon

Application Name: Kurna Native Title Claim

Names of Applicants: Garth Agius, Vince Buckskin, Lynette Crocker, Phillip Davies, Cecil Graham, Carroll Karpany, Shirley Lampard, Marlene McArthur, Joseph Mitchell, Rodney O'Brien, Val Power, Glenice Sumner, Frank Wanganeen, Maureen Wanganeen, Georgina Williams, Timothy Williams

Region: South Australia

NNTT No.:SC00/01

Date Application Made: 25 October 2000

Federal Court No.:S6001/2000

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

DECISION

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

Andrew Solomon

22nd August 2001
Date of Decision

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

Brief History of the Application

On 25 October 2000 the application was filed in the South Australia Registry of the Federal Court of Australia and provided by the Court Registry to the National Native Title Tribunal, Adelaide Registry, on that same date.

Leave to amend the application was granted by the Federal Court on 10 August 2001. The Court made Orders in terms of paragraph 1 of the Notice of Motion filed on 3 July 2001 by Dwyer Durack, solicitors for the applicants, which stated: "This Application be amended in the terms of the attached Minute of Proposed Amended Native Title Determination Claimant Application (Form1)."

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

On 8 June 2001 Christopher Doepel, Native Title Registrar, delegated to members of the staff of the Tribunal including myself all of the powers given to the Registrar under sections 190, 190A, 190B, 190C and 190D of the Native Title Act 1993 (Cth).

The delegation of 8 June 2001 has not been revoked as at this date.

Information considered in making the decision

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

- Federal Court Application;
- The Registration Test File;
- Determination of Native Title Representative Bodies: their gazetted boundaries;
- The National Native Title Tribunal Geospatial Database;
- The Register of Native Title Claims;
- The National Native Title Register;
- ILUA Database;
- Correspondence from the Crown Solicitor for the State of South Australia dated 13 August 2001;
- Additional information from Dwyer Durack dated 30 October 2000 and 3 July 2001.

The State has been provided the opportunity to view documents submitted directly by the applicants for my consideration in the application of the registration test, in compliance with the decision in *State of Western Australia v Native Title Registrar & Ors [1999] FCA 1591 – 1594*. The State responded in correspondence dated 13 August 2001 that it does not wish to view the documents at this juncture.

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

A. Procedural Conditions

s.190C(2)

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.

On 12 April 2001 Keifel J handed down her decision *in State of Queensland v Hutchison [2001] FCA 416*. Among other things, her Honour refers to:

“.....the statutory obligation, on the part of the Registrar or delegate, to ensure that the application contains all of the information required by s 62. This is part of the registration test: s 190C(2).”

I refer to the individual reasons for decision in relation to sections 61 and 62 set out below. I find that the procedural requirements of sections 61 and 62 have been met and accordingly I find that the application meets the requirements of s.190C(2).

Details required in section 61

s.61(1) The native title claim group includes all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.

Reasons relating to this sub-condition

Schedule A of the application provides a description of the native title claim group. I do not have any other information that indicates that this group does not include, or may not include, all the persons who hold native title in the area of the application therefore I am satisfied that the group as described prima facie includes all the persons who, according to their traditional laws and customs, hold the communal native title that is claimed.

Result: Requirements met

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

Reasons relating to this sub-condition

Part B of the application has been completed and sets out details of the applicant's address for service.

Result: Requirements met

s.61(4) *Names the persons in the 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

An exhaustive list of names of the persons in the native title claim group has not been provided so the requirements of section 61(4)(a) are not met.

For the reasons set out in relation to section 190B(3)(b) I find that the persons in the native title claim group are described sufficiently clearly in Schedule A, so that it can be ascertained whether any particular person is one of those persons in accordance with section 61(4)(b).

Result: Requirements met

s.61(5) *Application is in the prescribed form, lodged with the Federal Court, contains prescribed information, and is accompanied by any prescribed documents*

Reasons relating to this sub-condition

The application meets the requirements of s.61(5)(a) in that it is in the form prescribed by Regulation 5(1)(a), Native Title (Federal Court) Regulations 1998. As required by s.61(5)(b), the application was filed in the Federal Court on 25 October 2000.

The application is accompanied by affidavits by the applicants as prescribed by s.62(1)(a) and by a map as prescribed by s.62(2)(b).

I refer to my reasons for decision in relation to those sections of the Act.

I note that s.190C(2) only requires me to consider details, other information and documents required by s.61 and s.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)

s.62(1)(a) *Affidavits address matters required by s.62(1)(a)(i) – s.62(1)(a)(v)*

Reasons relating to this sub-condition

The application filed in the Federal Court was accompanied by affidavits from the named applicants. The affidavits identify the applicants by name and address (or the region they reside in). The affidavits were sworn/affirmed before a Justice of the Peace or a Commissioner of Supreme Court of South Australia for taking Affidavits, and are dated between 7 May 2001 and 11 July 2001.

The applicants depose in paragraphs (2) to (5) of the affidavits to the matters contained in s.62(1)(a)(i)-(iv) essentially using the words of the statute, and the requirements of these subparagraphs are therefore satisfied.

Section (1)(a)(v) requires that the affidavit states the basis on which the applicants are authorised as mentioned in subparagraph (iv). Section 251B states what it means for the applicants to be authorised by all the persons in the native title claim group. Essentially, authorisation is said to have occurred if it is (a) in accordance with a process of decision making under traditional laws and customs, or, where there is no such process, (b) in accordance with a process of decision making agreed to and adopted by the persons in the native title claim group.

The applicants state that they are authorised, pursuant to the process of decision making that the persons in the native title claim group have 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. There are no further details as to when this authorisation occurred.

Schedule R of the application states that the application has been certified by the Aboriginal Legal Rights Movement Inc being the representative Aboriginal/Torres Strait Islander body for the area covered by the application. A copy of the certificate of the Aboriginal Legal Rights Movement Inc is attached at Annexure "R" of the application and contains a statement regarding authorisation and the current application.

A further statement has been provided in Part A of the application under Authorisation. The application states that the applicants are entitled to make this application as people authorised by the native title claim group to make the native title determination application.

I am satisfied that the application is accompanied by affidavits that meet the procedural requirements of section 62(1)(a).

Result: Requirements met

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

Comment on details provided

The application contains some details relating to 'traditional physical connection' at Schedule G. Further details are provided in the form of affidavit material submitted directly to me on behalf of members of the native title claim group.

Result: Provided

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

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

Reasons relating to this sub-condition

For the reasons that led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the information and maps contained in the application and provided by the applicant are sufficient to enable the area covered by the application to be identified with reasonable certainty.

Result: Requirements met

s.62(2)(a)(ii) Information identifying any areas within those boundaries which are not covered by the application

Reasons relating to this sub-condition

For the reasons which lead to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the information provided by the applicant is sufficient to enable the area not covered by the application to be identified with reasonable certainty and meets the procedural requirements of s.62(2)(a)(ii).

Result: Requirements met

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

Reasons relating to this sub-condition

A map labelled Annexure "C" to the application clearly identifies the external boundaries of the application.

Result: Requirements met

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

Reasons relating to this sub-condition

Section 62(2)c) combined with section 62(1)(b) requires that the application contain details and results of all searches carried out to determine the existence of any non-native title rights and interests in relation to the land or waters in the area covered by the application.

Schedule D of the application states that the applicants are not aware of any searches that have been carried out to determine the existence of any non-native title rights and interests in relation to the land or waters in the area covered by the application.

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 under this condition I need only be informed of searches conducted by the applicant in order to be satisfied that the application complies with this condition. 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.

Result: Requirements met

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

Result: Requirements met

- s. 62(2)(e)** *The application contains a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that:*
- (i) the native title claim group have, and the predecessors of those persons had, an association with the area; and*
 - (ii) there exist traditional laws and customs that give rise to the claimed native title; and*
 - (iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.*

A general description of the factual basis upon which it is asserted that the native title rights and interests claimed exist is contained in Schedules F and G.

Schedule F of the application describes the area subject to claim as being possessed, occupied, used and enjoyed by the Kaurna people at the time and prior to the assertion of British sovereignty, and it describes the claim group and their ancestors as having continued to do so and having continued to have an association with the claim area since that time.

Schedule F of the application further provides a description of the native title claim group that is said to be in accordance with the traditional laws and customs of the Kaurna people.

Schedule G of the application provides a description of activities on the land and water within the area of the claim that have been carried out continuously by the native title claim group. Those activities include living on or moving freely about the land, using the resources of the land, conducting ceremonies on the land and passing on knowledge of the country and the traditional law and custom.

For the reasons detailed above I am satisfied that a general description of the factual basis, that specifically addresses each of the three particular requirements in (i), (ii) and (iii), does form part of the application itself.

I refer to my reasons at 190B(5) in respect of the sufficiency of the factual basis to support the assertion that the native title claim group have, and the predecessors of those people had, as association with the area under claim.

Result: **Requirements met**

- s.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

Schedule G of the application provides a list of activities that have been carried out continuously by members of the native title claim group on the land and waters within the area of the claim.

Result: **Requirements met**

- s.62(2)(g)** *Details of any other application 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 states:

“There are no other applications to the High Court, Federal Court or recognised State/Territory body that have been made in relation to the whole or a part of any area covered by this application that seek a determination of native title or compensation in relation to native title.”

Result: Requirements met

s.62(2)(h) *Details of any s.29 notices given pursuant to the amended Act (or notices given under a corresponding State/Territory law) in relation to the area, which the applicant is aware of*

Reasons relating to this sub-condition

Schedule I of the application states:

“The applicants are not aware of the details of any notices under section 29 of the Act, that have been given and that relate to the whole or a part of the area.”

Result: Requirements met

For the reasons outlined above, I consider that the application **passes** the conditions contained in s.190C(2).

s.190C(3)

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

If all three conditions nominated at section 190C(3) apply, I must consider whether any person included in the native title claim group was a member of the native title claim group(s) for any previous application(s).

Condition (a) of s.190C(3) is that the previous application covered the whole or a part of the area covered by the current application. A search of the Schedule of Native Title Applications, Register of Native Title Claims and Geospatial database confirm that there are no applications that overlap this current application.

Condition (b) of s.190C(3) is that an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made. This is not applicable in this application.

Condition (c) of s.190C(3) requires that potential previous application(s) must have been entered onto (or not removed from) the Register as a result of consideration under s.190A (the Registration Test.) This is not applicable in this application.

There is no application which meets the criterion in subsection 190C(3)(c), and as such, no further consideration of this section is required. I am satisfied the application passes the requirements of the section.

Result: Requirements met

s.190C(4)(a) or s.190C(4)(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:

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

Reasons for the Decision

The application is certified by the Aboriginal Legal Rights Movement Inc pursuant to section 203BE of the Act. The Certificate is supplied as Annexure “R” to the application.

The Aboriginal Legal Rights Movement Inc is the sole Aboriginal/Torres Strait Islander representative body that could certify the application under Section 203BE. I am satisfied that it is the proper body to provide the required certification.

The Certificate is dated 21 June 2001 and signed by Mr Neil Gillespie, Chief Executive Officer, who would have the proper authority to sign such a document.

Therefore, I am satisfied that the requirements of section 203BE(1)(a), 203BE(2)(a) and (b) and 203BE (4)(a) and (b) have been addressed.

Result: Requirements met

B. Merits Conditions

s.190B(2)

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 and waters.

Reasons for the Decision

Map and External Boundaries

A map showing the external boundaries of the area claimed is provided as Annexure "C" to the application. The map also has a locality diagram and clearly marked grid references.

In addition to the provision of a map defining the external boundaries of the claim, the applicants at Annexure "B" and Attachment "B" have provided a detailed written description of the external boundary, accompanied by a list of coordinates of 932 points defining the external boundary.

I am satisfied that the map that has been provided and the physical description of the external boundaries meets the requirements of s62 (2)(a)(i) and s62(2)(b).

I note that at Schedule B the applicants acknowledge the traditional affiliation of the Narungga people to the area located adjacent to the western side of the north-western boundary of the claim area between Pt Wakefield and Red Hill (Broughton), and the Ngadjuri people to the area located adjacent to the western side of the eastern boundary of the claim area between White Cliffs and the area of forest reserve to the east of Lyndoch. The applicants also state that the area will be protected by "this Application" and cared for by the Kurna people as custodians. Therefore, I am satisfied that the acknowledgment of the traditional interests of the Narungga and Ngadjuri peoples within the area subject to claim is not an impediment to registration of this application.

Internal Boundaries

At Schedule B, the applicants have provided information identifying the internal boundaries of the claimed area by way of a formula that excludes a variety of tenure classes from the claim area, being all areas within the claim area, excluding:

- (1) The applicants 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 any valid South Australian legislation to a similar effect, 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 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 South 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 interests 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 area any of the areas contained within the following descriptions or tenures, set out in Schedule B1.

Schedule B1

B1.1 Any land the subject of a grant of an estate in fee simple prior to October 1975, other than any fee simple land vested in the State of South Australia or the Commonwealth of Australia.

B1.2 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.

B1.3 An existing public road or street used by the public, or dedicated 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.

The description of areas excluded can be objectively applied to establish whether any particular area of land or waters within the external boundary of the application is within the claim area or not. This may require considerable research of tenure data held by the particular custodian of that data, but nevertheless it is reasonable to expect that the task can be done on the basis of the information provided by the applicant. I consider that the description provides a reasonable level of certainty.

I note that the applicant makes exceptions to the particular exclusions cited in the application by claiming the benefit of s47, s47A and s47 of the *Act* as they apply to any part of the area contained within the application. At Schedule L the applicant does not identify specific "parcels" of land where any of s47, s47A or s47B apply. Consistent with the reasoning set out above in respect of identifying areas excluded from the claim, I am of the view that identifying the areas so excepted from the exclusions in the manner done by the applicant does allow specific geographic location subject to tenure research.

Conclusion

I find that the description and map contained in the application is sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

Result: Requirements met

s.190B(3)

Identification of the native title claim group:

The Registrar must be satisfied that:

- (a) the persons in the native title claim group are named in the application; or***
- (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.***

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.

A list of names of all the persons in the native title claim group has not been provided in the application, so the requirements of section 190B(3)(a) are not met.

In the alternative, section 190B(3)(b) requires me to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group. It is my view that the section requires such a description to appear in the application itself.

Schedule A defines the claim group as comprising:

- Named apical ancestors, and
- Those related to the above by means of biological descent, and
- Persons of Aboriginal descent who are raised as children and part of the family of biological descendants and their descendants.

It is not necessary to ascertain now whether a particular individual is a member of the group. It is necessary only to be satisfied that, on the information provided, this can be ascertained. It does appear that further inquiry would have to be made in the case of any individual to determine both descent and non-descent based membership. This is a limited inquiry but one properly conducted by the Court hearing the application and not as part of an administrative decision under s.190A of the Act.

The key phrase is “can be ascertained”. It is not necessary, in considering this particular condition, for me to ascertain whether a particular individual is a member of the group. It is necessary only to be satisfied that, on the information provided, this can be ascertained.

I am satisfied that the 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 and therefore satisfies s.190B(3)(b).

Result: Requirements met

S.190B(4)

Identification of claimed native title:

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 s.190B(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.

These are:

- (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 the misuse of cultural knowledge of the common law holders associated with the area, and
- (k) the discharge of cultural, spiritual, traditional and customary rights, duties, obligations and responsibilities in relation to the area, and
- (l) the right to exercise and carry out economic activity in the area including hunting, and fishing and conducting other activities on the land, including the growing, production of and harvesting of natural resources.

The applicants continue in Schedule E, (i), (ii), (iii) (iv) and (v):

- (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 South Australia, they are not claimed by the applicants;
- (ii) To the extent that the native title rights and interests claimed 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 South 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 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 South 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 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; and
- (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 are readily identifiable. 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'.

Result: Requirements met

s.190B(5)

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

On 19 January 2001 French J handed down his decision (*Martin v Native Title Registrar [2001] FCA 16 (Martin)*). Amongst other things, his Honour considered this condition of the registration test in that case. I note, at the outset, his Honour's findings that,

“Provision of material disclosing a factual basis for the claimed native title rights and interests, for the purposes of registration, is ultimately the responsibility of the applicant. It is not a requirement that the Registrar or his delegate undertake a search for such material” - at [23].

As noted under my reasons in relation to s.190C(2) above, the application does provide a general description of the factual basis provided to support the assertion that the native title rights and interests claimed exist and also provides the factual basis to support the assertions as set out in s.190B(5)(a)-(c) as required by s.62(2)(e).

What I must determine here is whether or not this factual basis is sufficient to support these assertions. In *Martin*, French J noted that the delegate was not limited to considering the statements in the application but may refer to additional material under this condition. In *Queensland v Hutchison [FCA] 416*, Keifel J (commenting on that finding) said, *obiter*, that reference may be had to additional evidence if:

“such evidence goes beyond what was required to be set out in the application...Section 190B(5) may require more than [s 62(2)(e)], for the Registrar [or his delegate] is required to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to suggest a wider consideration, of the evidence itself, and not of some summary of it.” At [25].

The Supplementary Explanatory Memorandum to the *Native Title Amendment Bill 1997 [No. 2]* states that s 190B(5) was “designed to ensure that only credible, well research [sic] claims which are likely to be established can be registered.” – at p 35].

The applicant lists at Schedule E a description of native title rights and interests claimed in relation to the area subject to the application, including activities in exercise of those rights and interests. The applicant also provides material in support of s190B(5) at Schedules F and G.

Schedule F contains a general description of the rights and interests claimed and describes, in particular, the factual basis on which it is asserted that the three criteria identified at s 190B5(a)–(c) are met. Schedule G provides details of traditional usage asserted by the claimants.

It is apparent in these schedules that the applicant has made a series of assertions in relation to the existence of the claimed native title rights and interests, including statements which related to the three particular matters referred to in s 190B(5). What I must determine here is whether or not the applicants have also provided a factual basis which is sufficient to support the assertions made in the application.

There are three criteria to consider in determining over all whether or not I am satisfied that there is a sufficient factual basis to support the applicants' assertion about the existence of the native title rights and interests listed at Schedule E of this application.

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

In considering this condition, I have had regard to the affidavits of [name deleted], [name deleted] and [name deleted], three members of the native title claim group. On the basis of their affidavits it is clear that these people have an association with the claim area and are descended from people who also had an association with the claim area:

- [name deleted], paras 1, 3, 6, 7, 12, 18, 21-24, 26, 29, 30,
- [name deleted], paras 1-6, 9-14,
- [name deleted], paras 1-5, 11-22.

(b) that there exist traditional laws acknowledged 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 claim to native title rights and interests.

I have had regard to the affidavits of [name deleted], [name deleted] and [name deleted], three members of the native title claim group. On the basis of their affidavits, and Schedule G of the application, it is clear that there exist traditional laws and customs observed by the native title claim group that give rise to the claim to native title rights and interests:

- [name deleted], paras 1-3, 6, 8, 10-27, 29, 30,
- [name deleted], paras 1-6, 8-14,
- [name deleted], paras 1-23.

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

Under this criterion, I must be satisfied that the native title claim group has continued to hold native title in accordance with their traditional laws and customs.

For the reasons set out in 190B(5)(b) and having regard to the same affidavit material, and Schedule G of the application, I am satisfied that there is a factual basis for the claim group continuing to hold native title in accordance with those traditional laws and customs.

Conclusion

I am satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertions described for each of the criteria set out in s.190B(5).

Result: Requirements Met

s.190B(6)

Prima facie case:

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

Reasons for the Decision

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

'Native title rights and interests' are defined at s.223 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 the rights and interests to have a connection with the relevant land and waters; and
- these rights and interests to be recognised under the common law of Australia.

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 appears at first sight without investigation." [Citing the Oxford English Dictionary (2nd ed 1989)]."

In the *State of Western Australia v Ward* [2000] FCA 191 (Ward's case), handed down on 3 March 2000, the majority of the full Federal Court held that some of the native rights and interests which had previously been accepted following Lee J's first instance decision may not be recognisable at common law (and therefore in a determination under s.225). The majority held that the common law does not protect purely religious or spiritual relationships with land. It was held that rights and interests which involve physical presence on the land and activities on the land associated with traditional social and cultural practices are recognised and protected by the common law: see [104] of Ward's case. In finalising the determination the Court confirmed these findings. (See *State of Western Australia v Ward* [2000] FCA 611 dated 11 May 2000.)

Following Ward's case, the rights which can be made out, prima facie, appear to be only those which can be characterised as having an aspect involving physical use and enjoyment of the land claimed. I have considered this aspect of the judgement in relation to the rights and interests claimed as set out below.

The applicants state in Schedule E that the native title rights and interests claimed are 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 South Australia, they are not claimed by the applicants;
- (ii) To the extent that the native title rights and interests claimed 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 South 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 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 South 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 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; and
- (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.

I am satisfied that these statements qualify all the rights and interests claimed.

In considering 190B(6) I have had particular regard to the affidavits of **[name deleted]**, **[name deleted]** and **[name deleted]**, three members of the native title claim group.

Those affidavits provide sufficient material and information to satisfy me on a prima facie basis that most of the native title rights and interests claimed by the applicants at Schedule E of the application can be established.

The 3 deponents of the affidavits have provided me with specific evidence addressing each of those rights and interests, as follows:

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

The affidavits provide evidence of members of the native title claim group exercising these rights, some of which is detailed below.

- **[name deleted]**, paras 1, 6, 7, 11-14, 22-24, 26, 29, 30,
- **[name deleted]**, paras 1-3, 5, 6, 9-14,
- **[name deleted]**, paras 1, 2, 4, 5, 11-23.

Therefore, I am satisfied that this right is prima facie capable of being established.

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

The affidavits provide evidence of members of the native title claim group exercising this right, some of which is detailed below.

- [name deleted], paras 12,
- [name deleted], paras 19, 20, 23.

Therefore, I am satisfied that this right is prima facie capable of being established.

(c) the right of access to the area;

The affidavits provide evidence of members of the native title claim group exercising this right, some of which is detailed below.

- [name deleted], paras 1, 6, 7, 12, 18, 21-24, 26, 29, 30,
- [name deleted], paras 1-3, 5, 6, 9-14,
- [name deleted], paras 1, 2, 4, 5, 11-23.

Therefore, I am satisfied that this right is prima facie capable of being established.

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

The affidavits provide evidence of members of the native title claim group asserting this right, some of which is detailed below.

- [name deleted], paras 26, 27,
- [name deleted], paras 12,
- [name deleted], paras 18-20, 23.

I note that, in Ward's case, this right formed part of Justice Lee's determination but not that of the majority. However, there was no discussion as to why this right was not included in the draft determination. The application of s 47A 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 a freehold title which would include the right to control the access of others to the area (subject to the laws of Australia): see para [207] of the decision.

Prima facie this right is not claimed to the exclusion of all others. See also the statements made in Schedule E.

Therefore, I am satisfied that this right is prima facie capable of being established.

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

The affidavits provide evidence of members of the native title claim group exercising this right, some of which is detailed below.

- [name deleted], paras 11-14, 22, 30,
- [name deleted], paras 3, 6, 10,
- [name deleted], paras 11-15.

Therefore, I am satisfied that this right is prima facie capable of being established.

(f) the right to control the use and enjoyment of others of resources of the area;

The affidavits provide evidence of members of the native title claim group asserting this right, some of which is detailed below.

- **[name deleted]**, paras 21, 27,
- **[name deleted]**, paras 12,
- **[name deleted]**, paras 18-20, 23.

I note that although this right formed part of Justice Lee's determination, the majority in Ward's case did not include it in their draft determination. There was no discussion as to why this was so. As noted above, the application of s 47A 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 a freehold title which would include the right to control the use and enjoyment of others of the resources of the application area, subject to the laws of Australia: see para [207] of the decision.

See also the statements made in Schedule E.

Therefore, I am satisfied that this right is prima facie capable of being established.

(g) the right to trade in resources of the area;

The affidavits provide evidence of members of the native title claim group exercising this right, some of which is detailed below.

- **[name deleted]**, paras 18, 23.

Therefore, I am satisfied that this right is prima facie capable of being established.

(h) the right to receive a portion of any resources taken by others from the area;

Prima facie, this right and interest cannot be established on the material currently before me.

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

The affidavits provide evidence of members of the native title claim group exercising these rights, some of which is detailed below.

- **[name deleted]**, paras 21, 22,
- **[name deleted]**, paras 20, 23.

Therefore, I am satisfied that this right is prima facie capable of being established.

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

Notwithstanding the assertions in the application and the ample evidence to be found in the affidavit material of the claim group exercising this right, the majority in Ward's case held that the right to maintain, protect, prevent the misuse of and transmit to others their cultural knowledge, customs and practices associated with the application is not a native title right and interest which can be recognised in a determination of native title: see [666].

Therefore, in applying this interpretation I am not satisfied that this right is prima facie capable of being established.

(k) the discharge of cultural, spiritual, traditional and customary rights, duties, obligations and responsibilities in relation to the area;

The affidavits provide evidence of members of the native title claim group exercising these rights, some of which is detailed below.

- [name deleted], paras 12, 21-23, 29, 30,
- [name deleted], paras 3, 6, 10-12,
- [name deleted], paras 11, 12, 14-20, 22, 23.

Therefore, I am satisfied that this right is prima facie capable of being established.

(l) the right to exercise and carry out economic activity in the area including hunting, and fishing and conducting other activities on the land, including the growing, production of and harvesting of natural resources.

The affidavits provide evidence of members of the native title claim group exercising some of these rights, some of which is detailed below.

- [name deleted], paras 12,
- [name deleted], paras 6, 10,
- [name deleted], paras 11.

Therefore, I am satisfied that this right is prima facie capable of being established.

Summary

In summary I am satisfied that the rights and interests listed at (a), (b), (c), (d), (e), (f), (g), (i), (k) and (l) are capable of being established, however, I am not satisfied in respect of the rights and interests listed at (h) and (j).

Result: Requirements Met

s.190B(7)

Traditional physical connection:

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

- (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or***
- (b) previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:***
 - (i) the Crown in any capacity; or***
 - (ii) a statutory authority of the Crown in any capacity; or***
 - (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.***

Reasons for the Decision

This section requires that I am 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 covered by the application.

The confidential affidavit material provided by the applicants satisfies me that a number of members of the native title claim group currently have and have had a traditional physical connection to parts of the claim area. I refer specifically to:

- **[name deleted]**, paras 1, 6, 7, 12, 14, 21-24, 26, 29, 30
- **[name deleted]**, paras 1, 5, 6, 9-11
- **[name deleted]**, paras 1, 4, 5, 11, 12, 14-18

Result: Requirements met

s.190B(8)

No failure to comply with s.61A:

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s.61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Reasons for the Decision

For the reasons that follow I have concluded that there has been compliance with s61A.

S61A(1) – Native Title Determinations

A search of the National Native Title Register shows no approved determinations of native title for the application area claimed in this application.

S61A(2) - Previous exclusive possession acts

The applicants state in Schedule B(2) that they 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 South Australia and a law of that State has made provision as mentioned in section 23E in relation to the act.

S61A(3) - Previous non-exclusive possession acts

The applicants state in Schedule E (iii) that they do not 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 South Australia and a law of that State has made provision as mentioned in section 23I in relation to the act;

S61A(4) - s.47, 47A 47B

The applicants have not provided any information in regard to this in their application.

Conclusion

I am required to ascertain whether this is an application that should not have been made because of the provisions of s61A. There is nothing before me to indicate that this application could not be made. I am satisfied the applicants' statements with respect to the provisions of that section are sufficient to meet the requirements of s 190B(8).

Result: Requirements met

s.190B(9)(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 the right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas;***

Reasons for the Decision

At Schedule E of the application the applicants have asserted a right to natural resources – including the right to use and enjoy the resources of the area and the right to control the use and enjoyment of others of resources of the area.

However, the applicants also state at Schedule E(i) 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 South Australia, then they are not claimed.

Result: Requirements met

s.190B(9)(b)

Exclusive possession of an offshore place:

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

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

Reasons for the Decision

The claim area extends approximately 810 metres west of the mean high water mark in the Gulf St Vincent (Annexure “B”).

At Schedule E(ii) of the application the applicants state the following:

To the extent that the native title rights and interests claimed 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 South Australia or accorded under international law in relation to the whole or any part of the offshore place.

Result: Requirements met

s.190B(9)(c)

Other extinguishment:

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

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

Reasons for the Decision

Under the requirements of this section, I must consider whether there are any native title rights and interests claimed by the applicant that have been otherwise extinguished.

In addition to the areas excluded from the claim area as considered in s.190B(8), I have listed, in my reasons for decision in relation to s.190B(4), the qualifications to the native title rights and interests claimed at Schedule E of the application.

The application does not disclose, and I am not otherwise aware of, any additional extinguishment of native title rights and interests in the area claimed.

The application meets the requirements of s.190B(9)c.

Result: Requirements met