

National Native Title Tribunal

REGISTRATION TEST
REASONS FOR DECISION

DELEGATE: Russell Trott

Application Name Hutt River
Glen Councillor and Others v the State of Western Australia
Names of Applicants Glenn Councillor, Vincent Councillor, Sandy Davies, Keith Councillor, Janet Kelly, Nyinngi Whitby and Iris Curley
Region Murchison region of Western Australia NNTT No WC00/1
Date Application Made 7 February 2000 Fed Court No W6001/00

DECISION – Hutt River WC00/1

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.

Written reasons are to be provided to the applicants.

.....

Russell Trott

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

7 July 2000

Date of Decision

National Native Title Tribunal

REGISTRATION TEST MINUTE

&

DELEGATE DECISION SUMMARY

TO DELEGATE	Russell Trott
FROM REGISTRATION TEST CASE MANAGER	Anita Field
DATE	5 July 2000

Application Name	Hutt River		
Name of Applicant(s)	Glenn Councillor, Vincent Councillor, Sandy Davies, Keith Councillor, Janet Kelly, Nyinngi Whitby and Iris Curley		
Region	Murchison region of Western Australia	NNTT Number	WC 00/1
Date Application Amended in the Federal Court	7 February 2000	Fed Court Number	W 6001/00

The Case Manager has considered the application against each Registration Test condition contained in s190B and s190C of the *Native Title Act 1993* and makes the following recommendations:

Procedural Conditions

Case Manager Recommendation				
190C2	Information etc required by section 61 and section 62	PASS		
s61(3)	Names of applicant(s) and address for service	<i>Requirements are met</i>		
s61(4)	Description of persons in native title claim group	<i>Requirements are met</i>		
s61(5)	Application in prescribed form, lodged in Federal Court, contains prescribed information and is accompanied by documents and any fees applicable¹	<i>Requirements are met</i>		
s62(1)(a)	Affidavit(s)	<i>Requirements are met</i>		

Details required in section 62(2)

62(2)(a)(i)	Information which identifies the boundaries of the area covered by the application	<i>Details provided</i>		
62(2)(a)(ii)	Information which identifies any areas within those boundaries that are not covered	<i>Details provided</i>		
62(2)(b)	A map showing the external boundaries of the area covered by the application	<i>Details provided</i>		
	Map(s) and textual or other information are consistent in their description of the area	<i>YES</i>		
62(2)(c)	IF there is information alerting the CM about searches to determine existence of any non- native title interests, are details provided?	<i>Details NOT provided</i>		
62(2)(d)	A description of the native title rights and interests claimed in relation to particular land or waters (and see below)	<i>Details provided</i>		
	Is the description more than a claim to all those native title rights and interests		<i>NO</i>	

¹ Note that in relation to pre 30.09.98 applications, the application does not need to be in the prescribed form as required by the amended *Act*. Note also that pre 30.09.98 applications are deemed to have been filed in the Federal Court.

Note that “prescribed information” is that which is required by s62(2) as set out in the text of this minute document.

	that have not been extinguished at law?			
62(2)(e)	A general description of the factual basis on which native title is asserted, in particular :			
62(2)(e)(i)	claim group have, and their predecessors had, an association with the area;	<i>Details provided</i>		
62(2)(e)(ii)	traditional laws and customs exist that give rise to the claimed native title;	<i>Details provided</i>		
62(2)(e)(iii)	claim group has continued to hold native title in accordance with laws and customs	<i>Details provided</i>		
62(2)(f)	IF there is information alerting the CM that activities are carried on, are details of those activities provided?	<i>Details provided</i>		

Case Manager Recommendation

<u>190C2</u>	<i>Information etc required by section 61 and section 62 (continued)</i>			
--------------	---	--	--	--

62(2)(g)	IF there is information alerting the CM that the applicant is aware of other applications to the High Court etc, are details provided?	<i>Details provided</i>		
62(2)(h)	IF there is information alerting the CM that the applicant is aware of any Future Act Notices over the area, are details provided?	<i>Details provided</i>		

S62(1)(b)	<i>Details required in s62(2) above</i>	<i>Requirements are met</i>		
S62(1)(c)	<i>Details of physical connection</i>	<i>(not mandatory)</i>		

Decision of Delegate (whole of s190C2)		<i>PASS</i>		
---	--	--------------------	--	--

Case Manager Recommendation

190C3	<i>No previous overlapping native title claim group</i>	<i>PASS</i>		
--------------	--	--------------------	--	--

Decision of Delegate		<i>PASS</i>		
-----------------------------	--	--------------------	--	--

Case Manager Recommendation

Either

190C4(a)	<i>Application has been certified by relevant Representative Body</i>	PASS		
-----------------	---	-------------	--	--

Or

190C4(b)	<i>Applicant has been authorised by the native title claim group</i>	N/A		
-----------------	--	------------	--	--

<u>190C5</u>	<i>Statement about authorisation and grounds to consider provided</i>	N/A		
--------------	---	------------	--	--

Decision of Delegate		PASS		
-----------------------------	--	-------------	--	--

Merits Conditions

Case Manager Recommendation

190B2	<i>Identification of area subject to native title</i>	PASS		
--------------	---	-------------	--	--

Decision of Delegate		PASS		
-----------------------------	--	-------------	--	--

Case Manager Recommendation

190B3	<i>Identification of native title claim group</i>	PASS		
--------------	---	-------------	--	--

Decision of Delegate		PASS		
-----------------------------	--	-------------	--	--

Case Manager Recommendation

190B4	<i>Identification of claimed native title</i>	PASS		
--------------	---	-------------	--	--

Decision of Delegate		PASS		
-----------------------------	--	-------------	--	--

Case Manager Recommendation

190B5	<i>Factual basis for claimed native title</i>	<i>PASS</i>		
--------------	--	--------------------	--	--

Decision of Delegate	<i>PASS</i>	
-----------------------------	--------------------	--

Case Manager Recommendation

190B6	<i>Prima facie case</i>	<i>PASS</i>		
--------------	--------------------------------	--------------------	--	--

Decision of Delegate	<i>PASS</i>	
-----------------------------	--------------------	--

Case Manager Recommendation

190B7	Physical connection	<i>PASS</i>		
--------------	----------------------------	--------------------	--	--

Decision of Delegate	<i>PASS</i>	
-----------------------------	--------------------	--

Case Manager Recommendation

190B8	<i>No failure to comply with section 61A</i>	<i>PASS</i>		
--------------	---	--------------------	--	--

61A(1)	Approved determination of native title		<i>No</i>	
61A(2)	A previous exclusive possession act has been done in relation to the area		<i>No</i>	
61A(3)	A previous non-exclusive possession act has been done in relation to the area <u>and</u> a right of exclusive possession has been claimed		<i>No</i>	
61A(4)	The application states that section 47, 47A or 47B applies to it	<i>Yes</i>		

Decision of Delegate	<i>PASS</i>	
-----------------------------	--------------------	--

Case Manager Recommendation

190B9(a)	<i>Native title rights and interests claimed do not include ownership of minerals, petroleum or gas wholly owned by the Crown</i>	PASS		
-----------------	---	-------------	--	--

Decision of Delegate	PASS	
-----------------------------	-------------	--

Case Manager Recommendation

190B9(b)	<i>No claim to exclusive possession of waters in an offshore place</i>	PASS		
-----------------	--	-------------	--	--

Decision of Delegate	PASS	
-----------------------------	-------------	--

Case Manager Recommendation

190B9(c)	<i>No other extinguishment (except that to be disregarded under s47, s47A, or s47B)</i>	PASS		
-----------------	---	-------------	--	--

Decision of Delegate	PASS	
-----------------------------	-------------	--

Case Manager Combined Recommendation

1. That the application BE ACCEPTED for registration pursuant to s190A of the *Native Title Act 1993*.

CASE MANAGER

DATE

Decision of Delegate

Brief History of the Application

This application was filed in the Federal Court on 7 February 2000.

A section 29 notice affecting the area of the application was published on 8 March 2000. Accordingly, the application must be considered under 190A of the Native Title Act prior to the closing date of the notice, that is 10 July 2000.

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 Legal Services File and Registration Testing File for WC00/1.
- The National Native Title Tribunal's Working files and related materials for Native title applications that overlap the area of this application;
- The National Native Title Tribunal Geospatial Database;
- The Register of Native Title Claims and Schedule of Native Title Applications;
- The Native Title Register;
- Determination of Representative ATSI Bodies: their gazetted boundaries;
- Affidavits supplied by the applicants and their representatives;

Copies of the affidavit and other material provided directly to the Tribunal by the applicants for my consideration in application of the registration test was provided to the State (*see State of Western Australia v Native Title Registrar & Ors* [1999] FCA 1591 – 1594). The State has indicated that it does not intend to provide any comments in response to the contents of this material.

Note:

1. Information and materials provided in the context of mediation have not been considered in making this decision due to the without prejudice nature of those conferences and the public interest in maintaining the inherently confidential nature of such conferences.
2. All references to legislative sections refer to the Native Title Act 1993 unless otherwise specified.

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

Details of the names of the applicants and address for service are as listed in 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 claim is brought on behalf of the biological descendants of John Councillor, Sarah Feast and Mary Jane Batt.

For the reasons given at 190B(3) (below), the application satisfies this condition.

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 s61(5)(b) of the Act.

The application meets the requirements of s61(5)(c) and contains all information prescribed in s62. I refer to my reasons in relation to those sections. As required by s61(5)(d) the application is accompanied by affidavits as prescribed by s62(1)(a) and a map as prescribed by s62(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 s61(5) have been met.

Result: Requirements met

Details required in section 62(1)

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

Reasons relating to this sub-condition

Affidavits, sworn by each of the seven applicants, accompany the application.

Six of the seven affidavits accompanied the application when it was filed in the Federal Court on 7 February 2000. The affidavit of Sandy Davies was filed subsequently, on 29 June 2000.

The affidavits are in identical terms and substantially address 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 does not contain details specific to s62(1)(c) - 'traditional physical connection' but this information is not mandatory.

Result: Requirements met

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

At Schedule B, the application states that the external boundaries of the claim area are set out in the map attached (Attachment C) and description in Attachment B. The map provided is not labelled as an Attachment, a technical description of the external boundary appears as Attachment A, and a general description is found at Attachment B to the application.

I am satisfied that the application contains information identifying the boundaries of the area covered.

For the reasons given at s190B(2), the application satisfies s62(2)(a)(i)

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 areas within the external boundary of the claim area that are not covered by the application is given at Schedule B and B1 of the application.

For the reasons given at s190B(2), I am satisfied that the application complies with s62(2)(ii)

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.

A map showing the external boundary of the application area accompanies the application

For the reasons given at s190B(2), I am satisfied that the map complies with the requirements of s62(2)(b).

Result: Requirements met

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

Reasons relating to this sub-condition

The requirements of s62(2)(c) can be read widely to include all searches conducted by any person or body. However, I am of the view that 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.

At Schedule D 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 and waters in the area covered by 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 s190B(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

A general description of the factual basis for the assertion that the claim group has and their predecessors had an association with the area is provided in the application at Schedule F.

The description satisfies s62(2)(e)(i).

Result: Requirements met

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

Reasons relating to this sub-condition

At Schedule F, the application contains a general description of the factual basis for the assertion that traditional laws and customs exist that give rise to the claimed native title.

The description complies with s62(2)(e)(ii).

Result: Requirements met

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

Reasons relating to this sub-condition

A general description of the factual basis for the assertion that the claim group have continued to hold native title in accordance with their traditional laws and customs is given at Schedule F of the application.

The description satisfies s62(2)(e)(iii).

Result: Requirements met

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

Reasons relating to this sub-condition

The application provides general details of the activities which the native title claim group carries out in relation to the area claimed at Schedule G. It is my view that this description of activities is sufficient to comply with the requirements of s62(2)(f).

Result: Requirements met

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

Reasons relating to this sub-condition

Schedule H of the application identifies one application (WC96/111) which has been made in relation to the whole or a part of any area covered by this application that seek a determination of native title.

A search of the Tribunal's geospatial data reveals that as at 7 February 2000, the date when the application was filed, two applications – WC96/111 Nanda and WC96/93 Mullewa Wadjari - covered the whole or a part of any area covered by this application. The WC96/111 Nanda application was amended by order of the Federal Court on 18 February 2000 and no longer overlaps the area of the this application.

The Act requires only that those overlapping applications be listed *of which the applicant is aware of*. Whilst it would be reasonable to assume that the applicants would be aware of the existence of the Mullewa Wadjari application (WC96/93), it is also reasonable to assume that they have omitted to refer to this application at Schedule H in error. This issue was brought to the attention of the applicants' legal representative who advised the Tribunal by letter on 9 June 2000 that steps had been taken to correct the application with the Federal Court with respect to the omission of WC96/93 at Schedule H. In any event, for present purposes the omission is a minor technicality and of no real consequence.

Subject to the above undertaking given by the applicants' legal representative, I am satisfied that the application complies with the requirements of s62(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 states that "the Applicants are not aware of any section 29 notices since 30 September 1998 over the claim area".

A check of the geo-spatial database reveals that the application was not lodged in response to a section 29 notice.

Since filing, a section 29 affecting the area was issued on 8 March 2000.

For the purpose of s62(2)(h), the application passes this condition.

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 ss61&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 s190C3 (a) to (c) of the Act apply.

As noted above, a search of the Register of Native Title Claims as at 4 July 2000 reveals that there is one previous application which overlaps the current application. The previous application is WC96/93 (Mullewa Wadjari).

On 27 April 1999, WC96/93 (Mullewa Wadjari) was found to comply with the requirements for registration. The entry relating to WC96/93 (Mullewa Wadjari) was not removed from the Register as a result of consideration under s190A of the Act. This date is a date prior to the current application having been made.

The question of whether the current application has claimants in common with WC96/93 (Mullewa Wadjari) must therefore be considered. The description of the claimant group for the current application is set out at Schedule A of the application filed on 7 February 2000. Schedule A states, *“The claim is brought on behalf of the biological descendants of John Councillor, Sarah Feast and Mary Jane Batt”*. The register extract for the previous application (WC96/93 (Mullewa Wadjari)) lists the names of 68 people. The native title claimant group is described as “those people listed and their biological descendants.”

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 (WC96/93 (Mullewa Wadjari)) then the current application will not comply with the requirements of s190C3.

To clarify this matter, the applicant’s legal representative confirmed in a letter to the Tribunal dated 9 June 2000 that the native title claim group in this matter does not include any member of any overlapping native title claimant group.

The claim group for the current application comprises members of the claim groups for the adjacent non-overlapping claims WC96/111 Nanda and WC97/73 Naaguja. In both matters the question of common claim group members with respect to WC96/93 Mullewa Wadjari has arisen.

I note that in each of those matters the respective delegate has been satisfied that neither claim group shares common members with the overlapping WC96/93 (Mullewa Wadjari) claim group and I take this into account in reaching my decision.

On the basis of the above information I am satisfied that no member of the claimant group for the current application is a member of the claimant group for the previous application (WC96/93 (Mullewa Wadjari)).

I am satisfied on the basis of the above information that the application does not infringe 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

Accompanying the application filed in the Federal Court is a certificate issued by a Native Title Representative Body pursuant to s202(4)(d) of the Act. I note that this section has since been repealed and replaced. However at the time certification was made, the provision was operative. In my opinion the fact that the provision has since been repealed and replaced has no bearing on my decision as the decision to certify this application was exercised by the Representative Body under a provision that was operative at the time certification was made.

An inspection of the Native Title Representative Body gazetted boundaries establishes that the claim area is wholly within the Yamatji Land and Sea Council gazetted area.

Section 190C(4)(a) requires certification by each representative Aboriginal/Torres Strait Islander body that could certify the application. Section 190C(6) qualifies this requirement, stating that certification is not required by all representative bodies if the application has been certified by a body whose area includes all of the area of land or waters to which the application relates. As indicated above, the Yamatji Land and Sea Council is such a body.

Certification by the Yamatji Land and Sea Council

There appears to be no legally required format for certification of a claimant application other than it must be in writing (s202(4)(d)) and that it must contain the information required under s.202(7).

Compliance with s.202(7)

Section 202(7) of the Act sets out the statements to be included in certification of an application for determination of native title in the following terms:

A certification of an application for a determination of native title by a representative body must:

- a) include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (5)(a) and (b) have been met; and*
- b) Briefly set out the body's reasons for being of that opinion; and*
- c) Where applicable, briefly set out what the representative body has done to meet the requirements of subsection (c)*

The certification of the Hutt River Native Title Claim is signed by Clinton Wolf, Executive Director of Yamatji Land and Sea Council, and dated 8 February 2000.

In my view the certificate accompanying the application complies with s202(7).

Conclusion

As a result of the above considerations, I am satisfied that the application has been certified by the Yamatji Land and Sea Council pursuant to s.202(4)(d) and in accordance with s207(7).

This certification satisfies the requirements of s190C(4)(a) of the Act.

Result: Requirements 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

Schedule B of the application refers to a map provided at Attachment C. Although, the A3 size map of the claim area that accompanies the application is not labelled Attachment C, I will consider this map in my assessment of 190B2.

The map supplied shows the external boundary of the native title application. The map was produced by the Geospatial and Mapping Branch of the National Native Title Tribunal under s78 of the Native Title Act. The map was produced on 13/10/1999 and the sub-title of the map, "Proposed Hutt River Application", reflects this production date. The map accompanying the application, notwithstanding the sub-title, is the map that depicts the external boundary of the Hutt River application as filed in the Federal Court on 7 February 2000.

The borders of the map display lines of longitude and latitude to enable the position of sites or localities within them to be identified. The map shows a scale allowing distances and areas to be ascertained and identifies the 12 Nautical Mile Limit that the western boundary of the application tracks. A locality diagram, which indicates generally the position of the claim within Western Australia, forms part of the map provided. 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.

External Boundary

A written description and technical description of the external boundary of the claim are found in the application at Attachment B and Attachment A respectively.

The Tribunal's Geospatial Unit provided assistance in the preparation of the written and technical descriptions. As a result the description of the external boundary is confirmed to be internally consistent, fully encloses the claim area and does not discernibly contradict the map accompanying the application.

Internal Boundaries

Areas excluded from the application are described at Schedule B and B1 of the application. These areas excluded from the application, set out below, are areas within the (external) boundary which are not covered by the application, that is, the internal boundary description.

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

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 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.232B.*

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 the 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 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:

- B1.1 An unqualified grant of an estate in fee simple currently in force.
 - B1.2 Any former unqualified grant of an estate in fee simple which has been validly granted and any other freehold land which has been validly granted.
 - B1.3 A Lease which is currently in force, in respect of an area not exceeding 5,000 square metres; upon which a dwelling house, residence, building or work is constructed; and which comprises:
 - 1) a Lease of a Worker's Dwelling under the Workers' Homes Act 1911-1928;
 - 2) a 999 Year Lease under the Land Act 1898;
 - 3) a Lease of a Town Lot or Suburban Lot pursuant to the Land Act 1933 (WA), s.117; or
 - 4) a Special Lease under s.117 of the Land Act 1933 (WA).
 - B1.4 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.
 - B1.5 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.
 - B1.6 A Perpetual Lease currently in force under the War Service Land Settlement Scheme Act 1954.
 - B1.7 A Permanent public work and "the land and 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) s.251D.
 - B1.8 An existing public road or street used by the public, or dedicated road.
4. Paragraph(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.

I read the reference to the "Titles Validation Act 1994 as amended" in the above description as referring to the Titles Validation Act 1995, as amended.

The applicants have not identified, parcel by parcel, the areas of land and waters that are excluded from the claim area. In my view, they are not required to do so in order to satisfy the requirements of s62(2)(a)(ii) and s190B(2). The applicants have detailed a series of land tenure types specifically and by reference to relevant legislative provisions that are excluded from the area of the application. Such class exclusions amount to information that enables the internal boundaries of the application area to be adequately identified. This may require considerable research of tenure data held by the State of Western Australia but nevertheless it is reasonable to expect that the task can be accomplished on the basis of the information provided by the applicants.

At paragraph 4 of Schedule B the applicants seek the protection of ss47, 47A and 47B of the Act as apply to any part of the area contained within the application. Details of what areas are subject to this legislative protection are not provided. At Schedule L it is stated that the applicants do not have details of:

- a) Any area for which a pastoral lease is held by or on behalf of the members of the native title claim group; and
- b) Any area leased, held or reserved for the benefit of Aboriginal peoples or Torres Strait Islanders that is occupied by or on behalf of the members of the native title claim group; and
- c) Any vacant crown land occupied by members of the native title claim group; and

- d) Any areas mentioned in paragraph (a), (b) or (c) over which the extinguishment of native title is required by section 47, 47A or 47B of the Act to be disregarded.

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

The statements at Schedule B, Schedule E (iv) and Schedule L read together allows it to be shown objectively, upon the provision of further particulars, whether applicants may have the benefit of these provisions.

Both the applicants and the State of Western Australia were invited to make submissions on the effect of the majority decision in *Western Australia v Ward* [2000] FCA 191 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.

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.

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 claim is brought on behalf of the biological descendants of John Councillor, Sarah Feast and Mary Jane Batt”.

It is inferred from this statement that the native title claim group comprises the biological descendants of the three named apical ancestors.

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

I am satisfied that the said 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.

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 amended application at Schedule E lists the native title rights and interests 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 the resources of the area,*
- (f) *the right to control the use and enjoyment of others of the 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;*

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 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 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.231 of the NTA in relation to the act.

- (iv) Paragraph (iii) above is subject to such of the provisions of sections 47, 47A and 47B of the Act as apply to any part of the area contained within the application, particulars of which will be provided prior to the hearing.*
- (v) The said native title rights and interests are not claimed to the exclusion of any other rights and interests validly created by, or pursuant to, the common law, the law of the State or a law of the Commonwealth.*

In my view the native title rights and interests described at schedule E are readily identifiable.

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 too be readily identified in compliance with s190B(4).

Result: Requirements met

190B5

Sufficient factual basis:

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

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

Reasons for 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 amended application is sufficient to support that assertion.

In reaching this decision I must be satisfied that the factual basis supports the 3 criteria identified at s190B5 (a) – (c).

Information Provided

Also submitted by the applicants for my consideration is:

- An affidavit by [name deleted for privacy reasons], sworn 27 June 2000.
- An affidavit by [name deleted for privacy reasons], sworn 27 June 2000.
- An affidavit by [name deleted for privacy reasons], sworn 27 June 2000
- An affidavit by [name and occupation deleted for privacy reasons], sworn 28 June 2000.

I am of the view, given the beneficial nature of the Act, 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 conditions, this is adequate.

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 (collectively, communally or individually) have (that is currently have) an association with the area (under claim);and
- the predecessors in title or antecedents 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 at schedule E of the amended application.

In addition, as native title rights and interests 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 at schedule B of the amended application. I must therefore be satisfied that the members of the native title claim group are and that their predecessors were, broadly associated with the particular land and waters

claimed. I note in this case that the external boundary of the claim encloses an area of 5,893 square kilometres, comprising both land, waters and sea.

Schedule F of the amended application asserts at paragraph (1) that “the native title claim group and their ancestors have, since the assertion of British sovereignty possessed occupied, used and enjoyed the claim area and had an association with it”. The truthfulness of this assertion is deposed in the accompanying affidavits of each applicant.

The Hutt River claim covers an area that includes part of the traditional country of Nanda and Naaguja peoples. Members of these groups have come together to form the Hutt River native title claim. [Sentence deleted for privacy reasons] the Hutt River claim covers an area that has cultural importance to the members of the claim group (reference deleted for privacy reasons, para c). According to [name deleted for privacy reasons], Northampton is regarded as the hometown for a large number of Nanda and Naaguja people (reference deleted for privacy reasons, para e).

Detailed affidavits provided by the claim group members refer to their connection to places with the claim area, from Binnu at the northern boundary of the application, to a place near Nabawa in the south of the claim area. The affidavits contain a number of references to Northampton, Lynton Station and Bowes River. The affidavits refer to the significance of these places not only to themselves, but to their families.

The claim group members mention their association with a number of places along the coast, particularly Horrocks reef, and Hutt Lagoon, near Port Gregory. Apart from the inference that can be made from statements as to the importance of fishing within traditional custom, there is a lack of direct references to the claim group’s association with the sea portion of the claim, to 12 Nautical Miles.

The places referred to in the affidavits of the claim group members are portrayed as significant to the current generation because those places were significant to their predecessors. Places such as Bowes River and Lynton Station were places where the predecessors of now elderly people were born or worked. [Name deleted for privacy reasons] refers to a site near Northampton which used to be the old Aboriginal Reserve, where families of the claim group would camp [sentence deleted for privacy reasons]. Other places are significant because of stories associated with the site which were told by the “old people”.

The claim group’s association with the area, and the association of their predecessors is supported by the information provided in [reference deleted for privacy reasons].

I am satisfied that the evidence provided is sufficient 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

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

This subsection requires me to be satisfied that:

- (a) traditional laws and customs exist;
- (b) those laws and customs are respectively acknowledged and observed by the native title claim group; and
- (c) those laws and customs give rise to the claim to native title rights and interests.

The amended application at Schedule F asserts that the native title rights and interests claimed by the applicants “are those of and flowing from the right to possession, occupation and use and enjoyment of the land pursuant to the traditional laws and customs of the claim group”. At Schedule F the applicants also assert that “such traditional law has been passed by traditional teaching, through the generations preceding the present generations to the present generations of the persons comprising the native title claim group”. The truthfulness of these assertions is deposed in the accompanying affidavits of each applicant.

Affidavits sworn by [names deleted for privacy reasons] and provided by way of further information allude to the traditional laws and customs held by the claim group. Details of traditional stories of the spirit world, customs of avoidance of places and certain foods, and practical knowledge of the country are some of the examples that point to the existence of traditional laws and customs of the claim group.

[Names deleted for privacy reasons] refer to teaching their children about the traditional stories and how to find bush food. [Name deleted for privacy reasons] states that the knowledge of message sticks is passed onto Elders (reference deleted for privacy reasons, para 21), and [name deleted for privacy reasons] has “told [[pronoun deleted for privacy reasons] children] about the importance of keeping our Aboriginal traditions”(reference deleted for privacy reasons, para 8). Such information lends weight to the notion that traditional laws and customs are acknowledged and observed by the claim group.

That those laws and customs give rise to the claim to native title rights and interests is demonstrated by the practical examples provided in the further affidavits as to the way rights and interests are exercised by members of the claim group in accordance with traditional law and customs.

This information detailed above is corroborated by the affidavit of [name deleted for privacy reasons].

I am satisfied that the requirements of s190B5(b) are met.

Result: Requirements met

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

This subsection requires that the native title claim group continues to hold native title in accordance with their traditional laws and customs. I have already referred to information relevant to this subsection in the two earlier subsections. I will not repeat that information here.

At Schedule F paragraph 4, the applicants assert that the native title claim group continues to acknowledge and observe the traditional laws and customs and that “such law and custom has been passed by traditional teaching through the generations... to the present generation of persons comprising the native title claim group”(paragraph 3).

These statements are supported by the further information provided in affidavits sworn by members of the claim group. As such, both the assertions at Schedule F and the affidavits provided as further information support the notion that the native title claim group continues to hold native title in accordance with traditional laws and customs.

I am satisfied this condition is met.

Result: Requirements met

Conclusion

There is evidence to support the factual basis in each of the 3 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 this requirement I must consider that, prima facie, at least some of the native title rights and interests claimed can be established. For the reasons given below, I am of the view that some but not all of the rights and interests claimed can be established.

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

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 s190B(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 [name deleted for privacy reasons], sworn 27 June 2000.
- An affidavit by [name deleted for privacy reasons], sworn 27 June 2000.

- An affidavit by [name deleted for privacy reasons], sworn 27 June 2000
- An affidavit by [name and occupation] deleted for privacy reasons], sworn 28 June 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 ten 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. One example of the right to make decisions about the use and enjoyment of the area is provided in [name deleted for privacy reasons] statement that, “As an Elder, I feel that I should be consulted before activities take place in my country” (reference deleted for privacy reasons, para 41). In my opinion the information provided is capable of interpretation as an example of the continued exercise of a traditional right to make decisions about traditional country.

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 activities carried out by members of the native title claim group on the land and waters within the area of the claim. Examples include access to the area to camp, to live and build structures, to hunt, gather and fish, to trade and conduct ceremony, to visit sites, etc. Some of the statements in Schedule G, specifically the right of access, is supported by the substance of the further affidavits provided by the [names deleted for privacy purposes]. 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 611, 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 (see *State of Western Australia v Ward* [2000] FCA 191). 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.

A number of important places to which access was restricted to certain members of the claim group area mentioned in the affidavit of [name deleted for privacy reasons] (para 25, 34). 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 any such limitation expressed as applying to the current application 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 further affidavits provided by the three claim group members cite numerous examples of claim group members using and enjoying what may be categorised as “traditional” resources of the area (see [references deleted for privacy purposes]). 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. 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.

Further, the right claimed is expressed in broader terms than the law may provide for. In *State of Western Australia v Ward* [2000] FCA 191 the majority recognised a non-exclusive right to use traditional resources. That is not the right claimed in the current application.

For these reasons 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 611, 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.

In [pronoun deleted for privacy purposes] further affidavit, [name deleted for privacy reasons] states that, “if people take things from the country, they should share some of what they have taken”(para 40). 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;

At Schedule G of the amended application and paragraph 38 of [name deleted for privacy reasons] affidavit mention is made of the right to trade in what may be categorised as “traditional” resources of the area. 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. 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.

The right claimed is expressed in broader terms than the law may provide for. In *State of Western Australia v Ward* [2000] FCA 191 the majority recognised a non-exclusive right to trade in traditional resources. That right is clearly less than what is claimed in the current application

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. In my opinion I am bound to follow the finding by Olney J and I 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 amended application and the affidavit of [name deleted for privacy purposes] (para 41) 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 included "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 recognising the existence of native title.

This right differs somewhat from that claimed in the present case. In my view I am bound to follow the majority decision in *State of Western Australia v Ward* [2000] FCA 611. The right being claimed in the current application is expressed in identical terms to that considered by their Honours and 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 and I am **not** satisfied that this right can be prima facie established.

Conclusion

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.231 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 addition to the amended application, I also considered the affidavits sworn by [names deleted for privacy purposes], each sworn on 27 June 2000 (detailed in my reasons under 190B5 & 6 above).

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

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

I am further satisfied based on the information supplied and identified previously that [names deleted for privacy purposes], referred to above, currently have a traditional physical connection with the land or waters covered by the application.

The application passes this condition.

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

s61A(1) – Native Title Determination

A search of the Native Title Register on 5 July 2000 reveals that there is no approved determination of native title in relation to the area claimed in this application

S61A(2) – Previous Exclusive Possession Acts

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

S61A(3) – Previous Non-Exclusive Possession Acts

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

S61A(4) – s47, 47A, 47B

The applicants have sought to invoke the provisions of ss47, 47A or 47B of the NTA as apply to any area within the application. The details of any areas to which the provisions may apply have not been provided in the application.

Conclusion

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

Result: Requirements met

190B9 (a)

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

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

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

Reasons for the Decision

Native title rights and interests are described at Schedule E of the amended application.

None of the native title rights described in Schedule E specifically claim ownership of resources including minerals, petroleum or gas.

In any event, paragraph (i) of schedule E in the amended application makes the statement that:

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

Consequently, the application and accompanying documents do not disclose, and I am not otherwise aware that the applicant claims ownership of minerals, petroleum or gas that is wholly owned by the Crown.

The application passes this condition.

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

The amended application qualifies the native title rights identified at Schedule E by making them subject to paragraph (ii) which states:

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 Western Australia or accorded under international law in relation to the whole or any part of the offshore place.

The application passes this condition.

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

End of Document