

National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION

DELEGATE: Tony Shelley

Application Name: Burramurra

Names of Applicants: Patrick Draper (on behalf of the Wakaya Kantupulangu, Wakaya (Draper) Bularnu Alyawarre and Indjilandji Dhidanu Groups) (the applicant)

Region: Northern Territory (North)

NNTT No: DC02/15

Federal Court No: D6016/2002

Date Application Made: 3 July 2002

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

DECISION

The application IS **ACCEPTED** for registration pursuant to s190A of the *Native Title Act* 1993 (Cth).

Tony Shelley

2 August 2002
Date of Decision

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

Brief History of the Application

On 3 July 2002 the application was filed in the Northern Territory District Registry of the Federal Court of Australia ("the Court"). The application was made by Patrick Draper (on behalf of the Wakaya Kantupulangu, Wakaya (Draper) Bularnu Alyawarre and Indjilandji Dhidanu Groups) ("the claimants").

The application was filed in response to a Notice under section 29 of the *Native Title Act 1993* (Commonwealth) dated 3 April and 29 May 2002 in relation to applications for exploration licences under the Mining Act (NT), numbered 23265, 23266, 23267, 23268 and 23269. The application does include other areas of land as hatched in Attachment A.

The Northern Territory Government was provided with a copy of the application on 5 July 2002 and was given until 15 July 2002 to respond. The first Northern Territory Government submission was received on 12 July 2002. This submission was forwarded to the NLC on 16 July 2002 requesting a response by 24 July 2002. Further information was received from the NLC on 23 July, 29 July and 30 July 2002. This information was forwarded to the NTG for a response.

The NTG made responses dated 25 July 2002 and 31 July 2002 respectively.

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

On 28 November, 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The delegation of 28 November, 2001 has not been revoked as at this date.

Information considered when 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;
- Correspondence with Northern Land Council;
- 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 NT Government, dated 12 July 2002 and 25 July 2002 and 31 July 2002.
- Correspondence from the NLC, received 23 July 2002, 29 July 2002, and 30 July 2002.

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.

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 provides a description of the native title claim group which is comprised by the Wakaya Kantupulangu, Wakaya (Draper) Bularnu Alyawarre and Indjilandji Dhidanu Groups Groups (here after referred to as "the claimants").

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.

Result: Requirements met

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

Reasons relating to this sub-condition

Supplied in Part B of the application.

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 if 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 3 July 2002.

The application is accompanied by an affidavit by the applicant 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.

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 an affidavit from the named applicant. The applicant is identified by name and address. The affidavit has been sworn before a Commissioner for Oaths.

The applicant deposes in paragraphs (1) to (4) of the affidavit to the matters contained in s.62(1)(a)(i)-(iv) essentially using the words of the statute, and the requirements of these sub-paragraphs are therefore satisfied.

Section (1)(a)(v) requires that the affidavit states the basis on which the applicant is 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.

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

The Northern Territory Government (NTG) in its correspondence of 12 July 2002, submit that there is no indication [on] the face of the affidavit of Tony Kenyon as to when and by what means authorisation referred to in paragraph 4 was granted and that this deficiency was not rectified by the certification contained in Schedule R. However, Tony Kenyon is not the applicant in regard to this native title matter, the applicant is Patrick Draper.

However, the applicant, Patrick Draper deposes in paragraph 4 of his affidavit that he is authorised, and in paragraph 5 states that he is authorised in accordance with decision

making processes under traditional laws acknowledged and customs observed, to make this application. There are no further details as to when this authorisation occurred.

Schedule R of the application provides details of Certification by the Northern Land Council and a number of statements are made regarding authorisation and the current application. Paragraph 6 of this Schedule asserts that the NLC have conducted meetings and held discussions with the claimants and that they are authorised to make the application on behalf of all other persons in the native title claim group. Whilst no details of these meetings are provided, I have no information before me to suggest that the certification was provided or obtained fraudulently and accept the statements contained within.

The NTG also submit that the applicant's affidavit is deficient as there is no indication on the face of the affidavit as to which claim the deponent refers. There is no requirement in s62 (1)(a) that the applicants indicate in an affidavit as to which claim the affidavit refers. I accept that as the affidavit is attached to and forms part of the Form 1 for this application, it in fact refers to this application.

The NTG also submit, that there is no indication that the deponent has read or been made aware of the contents of the claim. I note however, that the applicant has signed his affidavit before a Commissioner of Oaths attesting that all the statements made in the application are true.

The NTG further submits that the affidavit is also defective because "...a document referred to in an affidavit must be exhibited or annexed to the affidavit. A failure to do so is not a mere formal defect or irregularity (re *Abrahmson: Ex Parte Crisp and Gunn Ltd (1978) 22 ALR 749 per Neasey J at 752*"). Further on the submission states "It is not a response to this criticism to suggest that there is no explicit requirement in s62(1)(a) that an applicant exhibit or annex a claim or to suggest that the affidavit is sworn before a Commissioner of Oaths. The legislature has demanded that to gain registration an application must be accompanied by an affidavit deposing to specific matters. The judiciary has determined that for an affidavit to be effective in deposing to particular matters it must be (sic) satisfy particular requirements. The affidavit in question does not achieve the legislative purpose."

That case relates to requirements under the Bankruptcy Act 1966. The affidavit referred to can be relied upon by the Court at the hearing of a creditor's petition as to the required proof of the matters stated in that petition. Serious consequences for a debtor can flow from acceptance of the affidavit as proving the matters required under the Act, namely a declaration of bankruptcy. The requirements of this legislation are interpreted strictly.

The NTA is quite a different statutory scheme, and it has been held to be beneficial legislation. The registration test is applied administratively, at the start of a litigation process, to determine if there is sufficient information and factual detail in the application for the applicants to access procedural rights to which they are entitled under the Act.

I therefore disagree with the submissions of the NTG. The affidavit accompanies the application as required. It is in the correct form prescribed by the Federal Court. It addresses each of the matters required in s61(1)(a) of the NTA.

I am satisfied that the application is accompanied by one affidavit that meets 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

Schedule G provides details of activities carried out in the application area.

Schedule M provides details of traditional physical connection covered by the application.

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

Schedules B and C provide details of the area claimed. These schedules also refer to a map, which is provided as Attachment A.

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

Schedules B and C refer to a map contained in the application and labelled "Attachment A". The map 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

Schedule D of the application states that the applicants have not conducted any title searches of the area claimed.

Result: Requirements met

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

Reasons relating to this sub-condition

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

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 as required by s62(2)(e) is contained within Schedules E, F, G and M of the application and the applicant's affidavit.

I refer to my reasons at 190B(5).

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 a number of current activities.

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 meets this requirement.

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 states that the area claimed is subject to exploration licence applications 23265, 23266, 23267, 23268 and 23269, which are the subject of notices under s.29 of the *Mining Act (NT)* (the notification date being 3 April and 29 May 2002). A copy of the notices as published in the Northern Territory News is at attachment B.

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 and Register of Native Title Claims on 23 July 2002 and Geospatial's assessment dated 8 July 2002 confirm there are no applications which overlap this current application.

I therefore do not need to further consider conditions (b) and (c) of s.190C(3).

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 203BE 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 Northern Land Council pursuant to section 203BE of the Native Title Act. The Certificate is supplied as Schedule R in the application in which the requirements of section 203BE(1)(a), 203 BE(2)(a) and (b) and 203BE (4)(a) and (b) have been addressed.

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Data from the Tribunal's geospatial system indicates that there is an overlap of .512 sq km with the Central Land Council. However, the applicants have excluded any area that is not included in the area of responsibility of the Northern Land Council as a representative body.

Therefore I am satisfied the Northern Land Council 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 signed and dated 3 July 2002 by Norman Fry, CEO, Northern Land Council.

The representative body must not certify under this section, if it is of the opinion that proper authorisation has not occurred. The NLC have provided an opinion that proper authorisation has occurred. Therefore I am satisfied that the Northern Land Council has met its requirements under the Act, and that the applicant has authority to lodge this application and deal with matters arising in relation to it.

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 Boundary Description

A map is provided with the application and is identified as Attachment A. This map was produced by the Northern Land Council in June 2002.

Attachment A is the area subject to the claim. Schedule B describes the application area as all land and waters in the area symbolised on the map referred to in Schedule C including those areas subject to ELA's 23265, 23266, 23267, 23268 and 23269 and surrounded by ELA's 23265, 23266, 23269, Northern Territory portions 3771 and 4247 and native title determination application DC01/30 (D6030/01).

The Tribunal's Geospatial Unit have provided an assessment (dated 8 July 2002) of the map and the description and states the description and map are consistent and clearly identify the application area with reasonable certainty, and I accept that is the case.

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 ascertained 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.

Pursuant to the requirements of s.190B(3), the native title claim group is said to be comprised by the Wakaya Kantupulangu, Wakaya (Draper), Bularnu Alyawarre and

Indjilandji Dhidanu Groups and further that, in relation to the area claimed, are comprised by all persons descended from four apical persons. (Schedule A, 2). These apical ancestors are named in Schedule A, 2 and 3 and further details are provided in regard to their descendants. In each case particulars are provided in the application of the names of the apical ancestors and the names of their children.

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.

The NTG submits that the additional material supplied by the NLC makes it clear that the named groups are comprised of more than the four named apicals. However, the applicants have identified themselves by reference to four named apical ancestors, and no inherent uncertainty as to group membership flows from such a description.

I am satisfied that the description constitutes an objective means of verifying the identify 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

The application at Schedule E, (1) lists the native title rights and interests claimed.

These are:

- (a) to possess, occupy, use and enjoy the area claimed to the exclusion of all others;
- (b) to speak for and to make decisions about the use and enjoyment of the application area;
- (c) to reside upon and otherwise to have access to and within the application area;
- (d) to control the access of others to the application area;
- (e) to use and enjoy the resources of the application area;
- (f) to control the use and enjoyment of others of the resources of the application area;
- (g) to share, exchange and/or trade resources derived on and from the application area;
- (h) to maintain and protect places of importance under traditional laws, customs and practices in the application area;
- (i) to maintain, protect, prevent the misuse of and transmit to others their cultural knowledge, customs and practices associated with the application area; and
- (j) to determine and regulate membership of, and recruitment to, the landholding group.

The applicants includes some clarifying qualifications in Schedule E, (2), (3), (4) (5) and (6).

The native title rights and interests described are readily identifiable.

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

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, G and M.

Legal Framework

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

In regard to paragraph (a) of s190B(5) his Honour noted,

“...What he (the delegate) had to be satisfied of was that the factual basis on which it was asserted that the native title rights and interests claimed exist supported the proposition that the native title claim group and the predecessors of those persons had an association with the area “ - at [22].

His Honour imparts the same formulation of the question to the circumstances of paragraph b) - see [27].

In regard to paragraph c), his Honour noted that,

“...the delegate had to be satisfied that there was a factual basis supporting the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs. This is plainly a reference to the traditional laws and customs which answer the description set out in par (b) of s 190B(5). It followed from his conclusion in relation to that paragraph that he could not be so satisfied that there was a factual basis set out for the assertion referred to in par (c)...” - at [29]

French J also noted that the delegate was not limited to considering the statements in the application, but may go to additional material.

In (*Martin*) French J found that the factual basis provided by the applicant to support the assertion that the claimed native title rights and interests exist was,

"...diffuse and general, and would be unlikely, in the ordinary course, to satisfy the Registrar or his delegate that it supported the assertions set out in s 190B(5)". At [23]

Reproduced immediately below is the extract of Schedule F in the amended Martin application:

"Schedule F [see Act, s 62]

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

- 1. the native title claim group and their ancestors have, since the assertion of British sovereignty, possessed, occupied, used and enjoyed the claim area; and*
- 2. such possession, occupation, use and enjoyment has been pursuant to and possessed under the laws and customs of the claim group, including traditional laws and customs that rights and interests in land and waters vest in members of the native title claim group on the basis of:*
 - a. descent from ancestors connected to the area*
 - b. conception in the area*
 - c. birth in the area*
 - d. traditional religious knowledge of the area*
 - e. traditional knowledge of the geography of the area*
 - f. traditional knowledge of the resources of the area*
 - g. knowledge of traditional ceremonies of the area*
- (iii) such traditional law and custom has been passed by traditional teaching, through the generations preceding the present generations to the present generations of persons comprising the native title claim Group;*
- (iv) the native title claim group continues to acknowledge and observe those traditional laws and customs;*
- (v) the native title claim group by those laws and customs have a connection with the land in respect of which the claim is made;*
- (vi) the rights and interests are capable of being recognised by the common law of Australia."*

In *WA v Strickland* (2000) 99 FCR 33 at [89] the Full Federal Court held (unanimously) that the Registrar was right to be satisfied with the general description required under s.62(2)(e). Schedule F in the *Strickland* application was identical to Schedule F in *Martin* set out above.

However, in *Strickland* the delegate also relied upon an anthropological report provided by the applicants in support of the factual basis required by 190B5.

On 12 April 2001 Keifel J handed down her decision in *State of Queensland v Hutchison [2001] FCA 416*. Among other things, her Honour noted that s 62(2)(e) does not entirely correspond with s 190B(5),

“It requires that a “*general description*” of the factual basis for the assertions of the existence of native title rights and interests be provided in the application. Section 190B(5) may require more, for the Registrar is required to be satisfied that the factual basis asserted is sufficient to support the assertion.”

It appears clear that a description in Schedule F of the *Martin/Strickland* nature will be sufficient for s62(2)(e), but too general for s190B5. In *Martin* it appears that the factual assertions in Schedule F was all there was. In *Strickland* additional information was relied upon to meet the additional requirements of s190B5, because Schedule F was in identical to the ‘general and diffuse’ form used in *Martin*.

There is no doubt that sufficiency of factual basis must exist on material in front of the delegate, and that it can be wholly contained in information set out in the application alone, or alternatively it can be information set out in the application supplemented by additional material.

Information Supplied in this application

In the application now to be considered, there is a considerable amount of additional factual information supplied in the native title application compared to that description supplied in Schedule F in *Martin* or *Strickland*.

Relevant information is supplied at Schedule A, paragraphs 1 (a) and (b), Schedule E paragraphs 1 to 6, Schedule F paragraphs 1 to 12, Schedule G paragraphs 1 (a) to (q), Schedule M paragraphs 1 and 2. I need not recite those parts of the application here.

Also, the affidavits signed by Patrick Draper affirms that all of the statements made in the application are true.

In addition to the information supplied in the application and accompanying affidavits, there is a significant body of information contained in the correspondence from the NLC received 23 July, 29 July, and 30 July 2002.

The differences between *Martin/Strickland* and this application

What is readily apparent is the difference in the contents of Schedule F between this application and that which was provided in either *Martin* or *Strickland*. The differences that I note are that in the *Martin/Strickland* applications there is reference to only effectively four points of factual basis in support of the three required general points in 190B5 (apart from the general factual statements), being:

- (a) descent from ancestors connected to the area
- (b) conception in the area
- (c) birth in the area
- (d) traditional knowledge (religious, of geography, of resources, of ceremony)

In this application, in addition to the general statements of fact that go no further than restating the three general statements of 190B5 (a-c), there are a considerable number of specific facts relied upon by the applicants in order to provide particulars of fact going to those three general propositions, being:

- (a) reference to sites of significance on their country;
- (b) material evidence of connection being archaeological, artefact fragments, rock art, and evidence of occupancy of sites;
- (c) a common kinship system (with detail of it set out in Schedule F para 10 a-j above);
- (d) the observation of common laws relating to land tenure (with details set out at Schedule F para 11 a-d above);
- (e) factual detail of traditional usage set out in a considerable degree of specificity at Schedule G para a-q above;
- (f) a number of factual examples of traditional physical connection in Schedule M.

The current application also states that the general and specific assertions of fact apply to the area of the claim at Schedules A, E, F, G, and M.

On 22 July 2002 the applicants' representative provided additional material in the form of references to and copies of, extracts from the Wakaya/Alyawarre Land Claim in which further details of Wakaya Kantupulangu, Wakaya (Draper), Bularnu Alyawarre and Indjilandji Dhidanu Groups were provided.

"On 8 May 1990 the Commissioner, Justice Olney published his findings regarding the Wakaya/Alyawarra Land Claim. He found that several local descent groups of the Wakaya country language affiliation were traditional Aboriginal owners to country in the general vicinity of the area subject to this native title application. Other local descent groups of the Alyawarra country language affiliation were also found to be traditional Aboriginal owners of country in the general vicinity of the area subject to this native title application.

I have considered the information provided by the applicants together with a map of the area subject to this Land Claim. I confirm that the area of the Wakaya/Alyawarra Land Claim is to the west of this current application before me.

I have considered the references provided to me in the Additional Information together with the Wakaya/Alyawarra Land Claim, although I cannot locate direct connection with the claimants of this Land Claim with apical ancestors or descendants as listed in this application. (It is also noted that this Land Claim application was lodged by the Central Land Council and not the Northern Land Council.)

The NLC state in their additional information that there was considerable movement of Wakaya people in the region of the land claim. Soudan Station (in the current native title application area) became a regional centre for ceremonial life in the 1920s and 1930s. There were both Alyaware and Wakaya people there as well as others and Wakaya ceremony was conducted there. As noted above, it is stated that both the Wakaya and Alyawarra country language affiliation were found to be traditional Aboriginal owners of country in the general vicinity of the area subject to this native title application.

The NTG has made detailed criticism of aspects of the additional material in its submissions. The NTG also concedes at page 6 of its submission dated 31 July 2002 that part of the additional information supplied by the NLC (in particular the study) provides some information that locates some of the groups traditional country within the claim area. The NTG submits that all of the parts of the additional material should be considered with

equal weight, and it has drawn my attention to a number of specific instances that, in its submission, the additional material is unhelpful to the applicants or is unclear or raises additional questions about the composition of the applicants groups.

However, those detailed matters are ones, in my view, that will ultimately need to be tested at a later stage in the proceedings either during discussions during mediation based upon further expert examination and assessment, or ultimately at trial through cross examination. It is beyond my role as an administrative decision maker applying this test at the beginning of a litigation process to be able to determine those complex matters that may involve difficult issues of fact and law. I am required at this point to assess whether the application and the additional material supplied contains sufficient factual basis to support the general assertions in 190B(5) (a) – (c).

Findings on sufficiency of fact

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

In summary, the application asserts:

- a) association since time immemorial (Schedule F(2)).
- b) that the connection of the members of the native title claim group and the predecessors of those persons with the application area is based on a system of traditional laws and customs, including common kinship system, observance of common laws relating to land tenure and traditional usage of land and waters.
- c) that the traditional connection of the claimants with the claim area and native title rights and interests, were inherited from the ancestors of the native title claim group in accordance with traditional laws and customs.
- d) the applicants state that material evidence of physical connections by the ancestors of the claimants exists in their country, and is illustrated by the presence of archaeological evidence of both pre-contact and post-contact Aboriginal habitation.
- e) That the claimants have maintained a traditional physical connection with the application area and describe how they have entered and travelled across the land and waters covered by the application, resided on the land and used the resources of the land and waters.

The additional material provided by the NLC notes the following:

“Members of the native title claim group were involved in the Wakaya/Alyawarra Land Claim, made under the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act).”

By reference to the material contained within the application and the Land Claim Report, I conclude that the factual basis provided is sufficient to support the assertions made and is therefore sufficient for me to be satisfied that this condition is met.

(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.

Schedule F (5) and (6) contains assertions describing details of the traditional ownership of the claimed area by the Wakaya Kantupulangu, Wakaya (Draper), Bularnu Alyawarre and Indjilandji Dhidanu Groups Groups:

Further assertions relating to details of traditional laws and customs are provided in this schedule under (9) and include; common kinship system, observance of common laws relating to land tenure, and traditional usage of land and waters.

Assertions of the activities associated with the observation, maintenance and passing on of a body of traditional law and customs are also provided in Schedule G(1) (a)-(q) and Schedule M.

By reference to the information contained within the application and the Land Claim Report, I conclude that the factual basis provided is sufficient to support the assertions made and is therefore sufficient for me to be satisfied that this condition is met.

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

Assertions of the continued observation of traditional laws and customs from which the native title rights and interests claimed are said to derive is provided as follows:

- Processes for transmission of rights and interests (succession) (Schedule A (1)(a)(iii), and Schedules F and G.
- Continued observance of a common kinship system by the claimants, and outlined in Schedule F, (10) and includes; recognition of common ancestors, recognition of group and individual responsibilities towards land and waters; and participation in and responsibility for ceremony.
- A description of common laws relating to land tenure (Schedule F (11); and activities in furtherance of the above rights and interests (Schedule G and M).

By reference to the information contained within the application and the Land Claim Report, I conclude that the factual basis provided is sufficient to support the assertions made and is therefore sufficient for me to be satisfied that this condition is met.

The NTG also submits that in an assessment of 190B(5) the delegate must

- (a) firstly determine whether there is a sufficient factual basis to satisfy the particular matters set out in clauses (a), (b) and (c), and
- (b) secondly determine there is a sufficient factual basis to support the assertion of each of the rights and interests claimed in Schedule E to the application.

The NLC submission dated 29 July 2002 takes issue with this NTG proposition and submits there is nothing in ss190B(5) which requires that there be a sufficient factual basis to support the assertion of each of the rights and interests claimed in Schedule E, and that the requirements of ss190B(5) and ss190B(6) are separate elements of the registration test.

I agree with the NLC submission. I am of the view that an examination of the requirements of 190B(5) and 190B(6) are quite separate. I can see no reason to incorporate considerations of the latter into a consideration of the requirements of the former.

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.

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: see [104] of Ward's case.

This is relevant to whether the right claimed at Schedule E paragraph (l) is capable of registration at law.

Subsequently, a Determination made by Mr Justice Merkel on 29 May 2001, in *Rubibi Community & Anor v The State of Western Australia & Ors* [2001] FC 607 (29 May 2001). On the evidence of that case it was found that such a right and interest was capable of being made out and recognised at common law.

The applicants state in Schedule E that the native title rights and interests claimed are subject to Schedule L applying.

I note that in Schedule E (2) and (3) of the application, the applicant provides the following statements:

The applicants acknowledge that:

- (a) their native title rights and interests are subject to all valid and current laws of the Commonwealth and the Northern Territory; and
- (b) the exercise of their native title rights and interests might be regulated, controlled, curtailed, restricted, suspended or postponed by reason of the existence of valid concurrent rights and interests in others by or under such laws.

Subject to Schedule L of the application, the applicants do not claim that native title rights and interests confer possession, occupation, use and enjoyment to the exclusion of all others on any area in relation to which a previous non-exclusive possession act under s.23F of the Act has been done.

The applicants are not claiming exclusive rights to the area of claim as per the statements provided in Schedule E and stated above. I am satisfied the statements provided are sufficient to qualify the rights and interests claimed.

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

(a) The right to possess, occupy, use and enjoy the application area to the exclusion of all others;

The applicants provide specific examples of cultural activities involving possession, occupation, use and enjoyment of the claim area and land and waters proximate to the application area by the applicants and members of the claim group. The applicants state that, since time immemorial and in accordance with traditional laws and customs, the application area has been regarded as belonging to the native title claim group. Details of communal or group activities carried out currently in the area are provided in Schedule G of the application.

Further, s47 B has been asserted in relation to the claim area. If that section does apply, all prior extinguishment must be disregarded and rights in the terms claimed may be found to exist: See, for example, Ward's case at para [663] in relation to the areas to which s.47A (which also provides that prior extinguishment must be disregarded in certain circumstances) was applied by the majority.

However, it is not necessary for me to be satisfied that this section is attracted since I have nothing before me to indicate that this right may have been extinguished by a prior inconsistent grant. Further, the right is claimed subject to the qualifications set out in Schedules E, J and Q.

In my findings in relation to 190B(5) I have previously referred to the specific facts set out in the application upon which the applicant relies, and I need not repeat them all here.

For the reasons given above, I am satisfied that this right is prima facie capable of being established.

In summary I am satisfied that the rights listed at (b), (c), (d), (e), (f), (g), (h), (i) and (j) are rights and interests that are derived from (a), and I do not make separate findings in respect of each.

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.

I have had regard to the statements contained in the application including Schedules G and M and am satisfied that the applicant has provided a general description of the traditional physical connection. The applicant deposes that the statements are true and Schedule M, in particular, details traditional physical connection to the land or waters covered by the application by any member of the native title claim group.

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

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

Previous exclusive possession acts under s.23B have been excluded from the area of the application by virtue of Schedule B(b), and the application complies with s.61A(2).

S61A(3) - Previous non-exclusive possession acts

The applicants state in Schedule E (3) that subject to Schedule L they do not claim that native title rights and interests confer possession, occupation, use and enjoyment to the exclusion of all others on any area in relation to which a previous non-exclusive possession act under s.23F of the Act has been done.

The application therefore complies with s.61A(3).

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

Schedule L the applicants state:

1. The claimants occupied the area claimed when the application was made.

- Pursuant to s.47B of the Act, extinguishment is to be disregarded in relation to vacant Crown land.

Conclusion

I am satisfied the application is 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:

- 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

Schedule Q of the application states that:

“The claimants do not claim ownership of minerals, petroleum or gas wholly owned by the Crown. The claimants assert that the Crown does not wholly own minerals, petroleum or gas in the area subject to the application”.

In *State of Western Australia v Ward*, the majority of the Full Court said that all minerals and petroleum are the property of the Crown and that any native title to minerals and petroleum was extinguished (relevantly) by the *Minerals (Acquisition) Ordinance Act (NT)* and the *Petroleum Act 1984 (NT)*. (This case is currently on appeal to the High Court.) In *Yarmirr v Northern Territory* (1998) 82 FCR 533 at 601, it was found that native title to minerals, petroleum or gas has been extinguished in the Northern Territory.

Also in their application the claimants acknowledge that:

- “a) their native title rights and interests are subject to all valid and current laws of the Commonwealth and the Northern Territory; and
- b) the exercise of their native title rights and interests might be regulated, controlled, curtailed, restricted, suspended or postponed by reason of the existence of valid concurrent rights and interests in others by or under such laws.”

The claimants also provide a general exclusion clause in Schedule J.

I am satisfied that this exclusion clause provides sufficient clarity to ensure that the application complies with the requirements of s.190B(9)(a).

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

Not applicable

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

In addition to the areas excluded from the claim area as considered in s.190B(8), I have referred to 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

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