

National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION

DELEGATE: Mia Bailey

Application Name: Karnapyrri

Names of Applicant: Mr Nabaru (Billy) Landy and Ms Lynette Dunn

Region: Central Desert NNTT No.: WC06/3

Date Application Made: 22 March 2006 Federal Court No.: WAD77/06

The delegate has considered the application against the conditions contained in s.190C(3) and s.190C(4) of the *Native Title Act* 1993 (Cth). This decision is in short form.

DECISION

The application is **NOT ACCEPTED** for registration pursuant to s.190A of the *Native Title Act* 1993 (Cwlth).

Mia Bailey

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

Date of Decision:
20 June 2006

Brief History of the Application

The Karnapyrri native title determination application ('the application') is located approximately 70kms south of Telfer, in the Shire of East Pilbara, Western Australia. The application falls within the Pilbara native title representative body ('NTRB') area, for which Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation ('YMBBMAC') is the representative body. The applicants are represented by the Ngaanyatjarra Council, the representative body for the nearby Central Desert NTRB area.

The application was filed in the Federal Court on 22 March 2006. A copy was forwarded to the National Native Title Tribunal ('the Tribunal'), being received on 23 March 2006. The area covered by this application falls within the area of an existing native title determination application, Martu (WC96/78, WAD6110/98). My understanding is that the application has been primarily filed to utilise the provisions of s.47 of the Act.

On 30 May 2006 the Tribunal wrote to the Ngaanyatjarra Council noting that, based on a preliminary review of the application, the delegate was of the view that there may be significant compliance issues in relation to various conditions of the registration test. The letter queried whether, in the particular circumstances of this application, the Ngaanyatjarra Council required a detailed preliminary assessment and whether it intended to provide further information in support of the application.

In its response dated 1 June 2006, the Ngaanyatjarra Council confirmed that the primary purpose of the filing of this application is to utilise the provisions of s.47 of the Act and stated that they are aware that the application does not meet all the conditions of the registration test as it is overlapped by a registered claim with similar claim group membership. Ngaanyatjarra Council stated that, in the circumstances, it would not be providing any additional information for the purposes of the registration test and it had no objection to an abbreviated decision.

Given the Ngaanyatjarra Council's express acknowledgement of deficiencies with the application, its express intention not to remedy these and their clear communication that abbreviated reasons are acceptable in these circumstances, I do not intend to undertake an assessment of each condition of the registration test. Rather, I limit my consideration to the requirements of s.190C(3) and s.190C(4).

Information considered when making the Decision

In assessing this application I have considered and reviewed the documents listed below:

- This application as filed in the Federal Court on 22 March 2006.
- Prescribed affidavits of the Applicant pursuant to s.62(1)(a) filed in the Federal Court on 22 March 2006.
- Extracts from the Register of Native Title Claims and the National Native Title Register for the Martu People's native title determination application (WC96/78).
- The results of searches by the Tribunal's Geospatial & Mapping Unit of the Register of Native Title Claims, Federal Court Schedule of Native Title Applications, National Native Title Register and other databases in relation to the application area including Geospatial assessment dated 5 April 2006 (Geotrack 2006/0522).
- Email from the Ngaanyatjarra Council to the Tribunal dated 1 June 2006.

A copy of the application and all accompanying documents filed in the Federal Court was provided to the State and to YMBBMAC (as the representative body for the application area) and to the Ngaanyatjarra Council on 27 March 2006. No response has been received from the State or YMBBMAC.

Note: I have not considered any information and materials that may have been provided in the context of any mediation of the native title claim group's native title applications. This is due to the 'without prejudice' nature of mediation communications and the public interest in maintaining the inherently confidential nature of the mediation process.

All references to legislative sections refer to the *Native Title Act 1993* (Cth) ('the Act') unless otherwise specified.

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

On 31 May 2006, Christopher Doepel, the 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 Act.

This delegation has not been revoked as at this date.

NOTE TO APPLICANT:

To be placed on the Register of Native Title Claims, the application must satisfy *all* the conditions in sections 190B and 190C.

In the following decision I have tested the application only against the conditions in s.190C(3) and s.190C(4) of the Act. For the reasons outlined above, under 'Brief History of the Application', I consider that in the particular circumstances of this application it is unnecessary to provide an assessment against each of the conditions in sections 190B and 190C of the Act.

Common claimants in overlapping claims: s.190C(3)

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 relating to this condition

The Geospatial overlap analysis of the application area dated 5 April 2006 indicates that there is one overlapping application in relation to the claim area as per the Register of Native Title Claims, being the Martu application (WC96/78, WAD6110/98). Martu, which was accepted for registration on 26 June 1996, was on the Register of Native Title Claims at the time that the current application was filed (22 March 2006).

In relation to the overlap with Martu the following applies:

- a) Martu (the previous application) covers the whole of the area covered by Karnapyrri (the current application). This overlap is confirmed by the Geospatial analysis dated 5 April 2006, Schedules H and O and Attachment R of the application and the Ngaanyatjarra Council's email dated 1 June 2006; and
- b) an entry relating to Martu (the previous application) was on the Register of Native Title Claims when Karnapyrri (the current application) was made. As noted above, Martu was entered on the Register on 26 June 1996; and

- c) the entry was made, or not removed, as a result of consideration of Martu (the previous application) under section 190A. Part of the Martu application was determined on 27 September 2002. The undetermined part of Martu remains on the Register of Native Title Claims.

As this application satisfies each of the three pre-conditions of s.190C(3), I must now consider whether any person included in the native title claim group for this application is also a member of the overlapping Martu application.

Schedules H and O of the application acknowledge that there is one overlapping application in relation to the whole of the claim area, Jeffrey James and Ors on behalf of the Martu People (WAG6110 of 1998).¹ Schedule O of the application states that:

All members of the native title claim group are members of a native title claim group for another application (Jeffrey James and Ors on behalf of the Martu People (WAG6110 of 1998)) that has been made in relation to the whole of the area covered by this application.

I also note the certificate dated 22 March 2006 from the Ngaanyatjarra Council at Attachment R to the application. The final paragraph of the certificate, in relation to the requirements of s.203BE(4)(c), states that:

As noted above under Schedules H and O, this application is wholly overlapped by the Martu (WAG 6110 of 1998) native title determination application. All members of this native title claim group are members of the native title claim group in the WAG 6110 of 1998 application. Accordingly, no attempt has been made to resolve the overlap given that they are the same people claiming the same land and waters.

I note, from the Register Extract for Martu, that the description of the native title claim group includes Mr Billy Landy, who is one of the applicants for the current application. Further, the native title claim group for the current application is described (in part), at Schedule A, as comprising “those people who hold in common the body of traditional laws and customs governing the area covered by the application *and who identify as Martu ...*” (my emphasis).

In light of all the above, I am of the view that persons included in the native title claim group for this application are also members of the overlapping Martu application.

Accordingly, I am not satisfied that the requirements of s.190C(3) are met.

¹ I note that this reference to the Federal Court number for the Martu People’s application is based on the old Federal Court numbering system. The current Federal Court number is WAD6110/98.

Result: Requirements not met

Application is authorised/certified: s.190C(4)

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

- (a) the application has been certified under paragraph 202(4)(d) by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part: or
- (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

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

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

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

Reasons relating to this condition

Schedule R(1) of the application indicates that the application is certified and refers to Attachment R. Attachment R is a copy of a certificate from the Ngaanyatjarra Council dated 22 March 2006. The certificate includes statements, as required by s.203BE(4)(a), that Ngaanyatjarra Council certifies that:

- all persons in the native title claim group have authorised the applicants to file this application and to deal with all matters arising in relation to the application; and
- all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

The certificate sets out brief reasons for the Ngaanyatjarra Council being of the above opinion, as required by s.203BE(4)(b). Further, the certificate briefly sets out what the Ngaanyatjarra Council has done to meet the requirement of s.203BE(3), as required by s.203BE(4)(c).

The Geospatial overlap analysis of the application area dated 5 April 2006 identifies YMBBMAC as the sole representative body for the area covered by the

application. Ngaanyatjarra Council is not identified as representative body for any part of the application area.

Section 190C(4)(a) requires that the Registrar (or his delegate) must be satisfied that the application has been certified under Part 11 by each representative body that could certify the application in performing its functions under that Part. Section 203BE(1)(a) provides that the certification functions of a representative body are “to certify, in writing, applications for determinations of native title *relating to areas of land or waters wholly or partly within the area for which the body is the representative body*” (my emphasis).

Given that the Ngaanyatjarra Council is not a representative body for any part of the application area, I am of the view that the certificate at Attachment R does not satisfy the requirements of s.190C(4)(a). In my view a certificate, meeting the requirements of s.203BE(4), from YMBBMAC, being the representative body for the entire application area, would be required to satisfy the requirements of s.190C(4)(a).

Given that I am not satisfied that the requirements of s.190C(4)(a) are met, I will proceed to consider whether I am satisfied that the application meets the requirements of s.190C(4)(b). Authorisation is defined in s.251B and provides, in summary, that where there is a process of decision making under traditional law and custom for authorising things of this kind then that process must be complied with (s.251B(a)). Where there is no such process, the native title claim group may authorise the applicant in accordance with a process of decision making agreed to and adopted by the group (s. 251B(b)).

It is clear as a matter of law that the requirement that the applicant be authorised by all the persons in the native title claim group does not necessarily mean that each and every member of the claim group must authorise the applicant². The Act simply requires all those persons who need to authorise an applicant according to traditional law and custom, or an agreed and adopted process, do so. There may well be individual members of the claim group who for one reason or another are incapable of authorising an applicant, for example because they are of unsound mind, ill, or unable to be located, or are disinclined to do so for whatever reason.

There are two limbs to s.190C(4)(b) compliance. Firstly, the Registrar must be satisfied that the applicant is a member of the native title claim group. Under the second limb the Registrar must be satisfied that the applicant is authorised by all

² *Moran v Minister for Land and Water Conservation for the State of NSW* [1999] FCA 1637, per Wilcox J. Refer also *O’Loughlin J, Quall v Risk* [2001] FCA 378 at [33-34].

the other persons in the native title claim group to make the application and deal with matters arising in relation to it. In accordance with s.190C(5) the Registrar cannot be satisfied of compliance with s.190C (4)(b) unless the application:

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

Part A(2) of the application states:

Nabaru (Billy) Landy and Lynette Dunn are entitled to make this application as persons authorized by all the persons (“the native title claim group”) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.

Nabaru (Billy) Landy and Lynette Dunn are members of the native title claim group.

The s.62(1)(a) affidavits of Nabaru (Billy) Landy (dated 5 August 2004) and Lynette Dunn (dated 4 August 2004) , accompanying the application, include the following statements:

I am authorized by all the persons in the native title claim group to make this application and to deal with all matters arising in relation to it.

The basis for my belief that I am authorized is that, pursuant to the traditional laws and customs of the native title claim group, a process of decision-making, that must be complied with authorizing matters of this kind, has occurred and been complied with.

1st limb – the applicant is a member of the native title claim group

This statement is made at Part A(2) of the application and in the s.62(1)(a) affidavits of the applicants.

I am satisfied that the first limb of the authorisation condition is met.

2nd limb – the applicant is authorised to make the application and to deal with matters arising in relation to it

This statement is included in the s.62(1)(a) affidavits of the applicant, as extracted above. I am satisfied that the application includes a statement to the effect that the second limb of the authorisation condition is met, as required by s.190C(5)(a).

I am also satisfied that the application briefly sets out the grounds on which the Registrar should consider that the second limb of the authorisation condition has

been met, as required by s.190C(5)(b). I am of the view that this requirement is satisfied by information provided in the certificate at Attachment R.

I will now proceed to consider whether I am satisfied that the second limb of the authorisation condition has been met. In doing so, I note that I am not confined to the information provided in the application and accompanying affidavits (*Western Australia v Strickland* [2000] FCA 652 at [28] and [78]).

The only information I have before me in relation to the authorization of the applicant is a brief statement in the s.62(1)(a) affidavits of the applicants (extracted above) and the statements in the certificate at Attachment R. The certificate includes the following statements:

The Ngaanyatjarra Council has provided legal and anthropological services to the native title claim group over a period of some years...

Staff members of the Ngaanyatjarra Council have attended many meetings with the claimants and have observed a process of decision making and taken instructions that emanate from that process.

The native title claim group has a decision making process in accordance with their traditional laws and customs that has been observed at meetings where this application has been discussed.

I do not have any information before me as to when and how the applicants were authorized to make the application and deal with all matters arising in relation to it. For example, if this took place at a meeting or series of meetings, what was the date of these meetings, how were the meetings notified to all other persons in the native title claim group, who attended the meeting, etc.? Further, I have not been provided with any details of the nature of the traditional decision making process that is said to have been used to authorize the applicants.

Based on the information before me, I am not able to be satisfied that the requirements of the second limb of s.190C(4)(b), namely that the applicant is authorised to make the application and deal with all matters arising in relation to it, by all the persons in the native title claim group, have been met.

In conclusion, I am not satisfied that the requirements of s.190C(4) are met.

Result: Requirements not met