National Native Title Tribunal

Registration test decision

Application name:	Karnapyrri
Name of applicant:	Mr Nabaru (Billy) Landy and Ms Lynette Dunn
State/territory/region:	Western Australia
NNTT file no.:	WC06/3
Federal Court of Australia file no.:	WAD77/06
Date application made:	22 March 2006

Name of delegate: Georgy Mayo

I have considered this claim for registration against each of the conditions contained in ss. 190B and 190C of the *Native Title Act 1993* (Cwlth).

For the reasons attached, I do not accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

For the purposes of s. 190D, my opinion is that the claim does not satisfy all of the conditions in s. 190B.

Date of decision: 31 January 2008

_____

Georgy Mayo

Delegate of the Native Title Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D of the ***Native Title Act 1993*** (Cwlth)

Reasons for decision

Table of contents

Introduction

This document sets out my reasons for the decision not to accept the Karnapyrri claimant application (WAD77/06) for registration.

Section 190A of the *Native Title Act 1993* (Cwlth) (the Act) requires the Native Title Registrar (the Registrar) to apply a 'test for registration' to the claims made in all claimant applications given to him or her under ss. 63 or 64(4) by the Registrar of the Federal Court of Australia (the Court), with the exception of certain amended applications specified under s. 190A.

I note that the test in this particular instance is triggered by the transitional provisions of the *Native Title Amendment Act 2007* (Cwlth) (the Amendment Act) which commenced operation on 15 April 2007 (see item 90). Further amendments were made to the Act by the *Native Title Amendment (Technical Amendments) Act 2007* (the Technical Amendment Act) which commenced operation on 1 September 2007, some of which are relevant to the application of the registration test.

Note: All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cwlth), as in force on 1 September 2007, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

Delegation of the Registrar's powers

I have made this registration test decision as a delegate of the Registrar who delegated his powers regarding the registration test and the maintenance of the Register of Native Title Claims under ss. 190, 190A, 190B, 190C and 190D of the Act to certain members of staff of the National Native Title Tribunal, including myself, on 27 September 2007. This delegation is in accordance with s. 99 of the Act. The delegation remains in effect at the date of this decision.

The test

In order for a claimant application to be placed on the Register of Native Title Claims, s. 190A(6) requires that I must be satisfied that *all* the conditions set out in ss. 190B and 190C of the Act are met.

Section 190B sets out conditions that test particular merits of the claim for native title. Section 190C sets out conditions about 'procedural and other matters'. Included amongst the procedural conditions is a requirement that the application must contain certain specified information and documents. In my reasons below I consider the s. 190C requirements first, in order to assess whether the application contains the information and documents required by s. 190C *before* turning to questions regarding the merit of that material for the purposes of s. 190B.

A summary of the result for each condition is provided at Attachment A.

Application overview

The Karnapyrri native title determination application WC06/3 ('the application') was filed in the Federal Court on 22 March 2006. A copy was provided to the Registrar on 23 March 2006.

The application area is located in Western Australia and is almost completely surrounded by the Rudall River National Park. 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 Central Desert Native Title Services Ltd, a native title service provider under s203FE(1). The applicants were previously represented by Ngaanyatjarra Council, the previous native title representative body for the area.

The area covered by this application falls within the area of an existing native title determination application, Martu (WC96/78, WAD6110/98). The application was previously considered for registration on 20 June 2006. The delegate's decision was not to accept the application for registration as the application did not satisfy s. 190C(3) as there were common claimants in an overlapping application (Martu) and the application was not properly authorised/certified as required under s. 190C(4). The delegate noted in her reasons that the applicants representative then, the Ngaanyatjarra Council, had advised the Registrar on 1 June 2006 that the application was filed primarily to utilise the provisions of s.47 of the Act and they were aware that the application did not did satisfy s. 190C(3) due to the overlap with Martu.

Given the Ngaanyatjarra Council's advice that it did not intend to remedy the deficiencies with the application and nor did it object to abbreviated reasons for decision, the delegate confined her consideration of the application to the requirements of s. 190C(3) and s. 190C(4).

The application has not been amended since the last registration test decision was made in June 2006.

Information considered when making the decision

Subsection 190A(3) directs me to have regard to certain information when testing an application for registration; there is certain information that I *must* have regard to, but I *may* have regard to other information, as I consider appropriate.

I am also guided by the case law (arising from judgments in the courts) relevant to the application of the registration test. Among issues covered by such case law is the issue that some conditions of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider wider material.

However, as the registration test has in this instance been triggered by item 90 of the transitional provisions of the Amendment Act, I must also comply with item 90. This requires me to apply the registration test under s. 190A as if the conditions in ss. 190B and 190C that require the application to be accompanied by certain information or other things, or to be certified or have other things done, also allowed the information or other things to be provided, and the certification or other things to be done, by the applicant or another person *after* the application *was made*.

Attachment B of these reasons lists all of the information and documents that I have considered in reaching my decision.

I have *not* considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK of the Act.

I also have *not* considered any information that may have been provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice' (see s. 136A of the Act). Further, mediation is usually private as between the parties and may be subject to non-disclosure directions by the presiding member (see also ss. 136E and 136F).

Procedural fairness steps

As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are made in a fair, just and unbiased way. Procedural fairness requires that a person who may be adversely affected by a decision be given the opportunity to put their views to the decision-maker before that decision is made. They should also be given the opportunity to comment on any material adverse to their interests that is before the decision-maker. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

The applicant was advised by letter dated 23 April 2007 that the Registrar was reconsidering the claim pursuant to item 90 of the transitional provisions and was offered an opportunity to provide any further information or other things, or to have other things done in relation to the application, before the registration test was applied. The applicant was also advised by letter on 15 May 2007 and again on 15 October 2007 that the decision would be made on 19 December 2007 and was requested to file any amendments or provide any additional material for the delegate's consideration no later than 7 November 2007. The applicant did not respond to these communications, and no further information or other things relevant to the conditions of the registration test have been provided or done by the applicant. The applicant was also provided with the previous registration test decision made on 20 June 2006 which identified deficiencies in the application at that time.

Although I have considered the reasons for decision by the first delegate dated 20 June 2006 I have made my decision in relation to those conditions, and all other conditions, independently. The principles of administrative decision-making require that the delegate make an independent, unbiased decision based upon all relevant material before him/her.

Procedural and other matters: s. 190C

Subsection 190C(2)
Information etc. required by ss. 61 and 62

> The Registrar/delegate 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.

Delegate's comment

I address each of the requirements under ss. 61 and 62 in turn and I come to a combined result for s. 190C(2) at page 14 below.

I note that I am considering this claim against the requirements of s. 62 as it stood prior to the commencement of the *Native Title Amendment (Technical Amendments) Act 2007* on 1 September 2007. This legislation made some minor technical amendments to s. 62 which only apply to claims made from the date of commencement of the act on 1 September 2007 onwards, and the claim before me is not such a claim.

In *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*), His Honour Justice Mansfield at [16] stated that 'section 190C(2) is confined to ensuring the application, and accompanying affidavits or other materials, contains what is required by ss 61 and 62' and that for the purposes of the requirements of s. 190C(2), the Registrar may not go beyond the information in the application itself' – at [39].

Doepel is authority for the proposition that when considering the application against the requirements in s. 190C(2), I am not (except in the limited instance which I explore below in my reasons under s. 61(1)) to undertake any qualitative or merit assessment of the information or documents, except in the sense of ensuring that what is found in, or with, the application are the details, information or documents prescribed by ss. 61 and 62.

Native title claim group: s. 61(1)

> The application must be made by a person or persons authorised by all of 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, provided the person or persons are also included in the native title claim group.

Result

The application meets the requirement under s. 61(1).

Reasons

To meet the requirements of s. 190C(2) the application must, among other things, set out the native title claim group in the terms required by s. 61(1). If the description of the native title claim group in the application indicates that not all persons in the native title group were included, or that it was in fact a subgroup of the native title group, then the requirements of s. 190C(2) would not be met and the claim could not be accepted for registration: *Doepel* at [36].

This consideration does not involve me going beyond the information contained in the application and prescribed accompanying affidavits. In particular it does not require me to undertake some form of merit assessment of the material to determine whether I am satisfied that the native title claim group is in reality the correct native title claim group: *Doepel* at [37].

I have, therefore, confined my considerations to the information contained in the application itself. The description of the persons in the native title claim group is contained in schedule A of the application. There is nothing on the face of the application which suggests that not all persons in the native title claim group have been included, or that it is in fact a subgroup of the native title claim group. Therefore I am satisfied this requirement has been met.

Name and address for service: s. 61(3)

> The application must state the name and address for service of the person who is, or persons who are, the applicant.

Result

The application meets the requirement under s. 61(3).

Reasons

These details are found in Part B (filing and service) of the application.

Native title claim group named/described: s. 61(4)

> The application must:
> (a) name the persons in the native title claim group, or
> (b) otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

Result

The application **meets** the requirement under s. 61(4).

Reasons

The application does not name the persons in the native title claim group but does contain a description of the persons as set out in schedule A. In my view the description of the native title claim group is sufficiently clear so as to comply with the procedural requirement in s. 61(4) of the Act. Whether there is a sufficiently clear description so that it can be ascertained whether any particular person is a person in the native title claim group is to be decided by me under the corresponding merit condition in s. 190B(3): see *Gudjala #2 v Native Title Registrar* [2007] FCA 1167 at [31] (*Gudjala*).

Application in prescribed form: s. 61(5)

The application must:

(a) be in the prescribed form,
(b) be filed in the Federal Court,
(c) contain such information in relation to the matters sought to be determined as is prescribed, and
(d) be accompanied by any prescribed documents and any prescribed fee.

Result

The application meets the requirement under s. 61(5).

Reasons

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 Court as required by s. 61(5)(b) and contains such information as is required by s. 61(5)(c). The application also complies with s. 61(5)(d) which requires the application to be accompanied by any prescribed documents (which I read as being the applicant affidavit/s prescribed by s. 62(1)(a)). I am therefore satisfied that the application is in the prescribed form so as to meet the requirements of s. 61(5) of the Act.

Affidavits in prescribed form: s. 62(1)(a)

The application must be accompanied by an affidavit sworn by the applicant that:

(i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
(ii) the applicant believes that none of the area covered by the application is also covered by an entry in the National Native Title Register, and
(iii) the applicant believes all of the statements made in the application are true, and
(iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and
(v) stating the basis on which the applicant is authorised as mentioned in (iv).

Result

The application meets the requirement under s. 62(1)(a).

Reasons

The application is accompanied by an affidavit from each of the two persons who jointly comprise the applicant:

- Lynette Dianne Dunn, made 4 September 2004
- Nabaru (Billy) Landy, made 5 September 2004

The affidavits appear to have been competently made and witnessed and contain the statements required by s. 62(1)(a)(i) to (v). For these reasons I am satisfied that the requirements of this section are met.

Application contains details required by s. 62(2): s. 62(1)(b)

The application must contain the details specified in s.62(2).

Delegate's comment

My decision regarding this requirement is the combined result I come to for s. 62(2) below. Subsection 62(2) contains 8 paragraphs (from (a) to (h)), and I address each of these subrequirements in turn, as follows immediately here. My combined result for s. 62(2) is found at page 14 below and is the same as the result for s. 62(1)(b) here.

Result

The application meets the requirement under s. 62(1)(b).

Information about the boundaries of the area: s. 62(2)(a)

The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:

(i) the area covered by the application, and

(ii) any areas within those boundaries that are not covered by the application.

Result

The application meets the requirement under s. 62(2)(a).

Reasons

A written description of the area covered and not covered by the application is found in attachment B.

Map of external boundaries of the area: s. 62(2)(b)

The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

Result

The application meets the requirement under s. 62(2)(b).

Reasons

A map showing the boundaries of the area covered by the application prepared by the Western Australian Department of Land Information dated 26 May 2004 is found in attachment C.

Searches: s. 62(2)(c)

> The application must contain the details and results of all searches carried out to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application.

Result

The application meets the requirement under s. 62(2)(c).

Reasons

The section requires 'details and results of all searches carried out'. The requirement is not limited by reference to who carries out those searches however, as a matter of construction I understand the section as meaning 'carried out by or on behalf of the applicant'. Further, the section could be satisfied by no response, in the event that none had been carried out. That is, the section only requires details when searches have in fact been made by the applicant. Schedule D of the application contains this statement:

> Department of Land Information, Land Claims Mapping Unit Land Tenure Map produced on 26 May 2004, for current tenure information as at 1 June 2003. See map at Attachment C to this application.

Attachment C does not contain the details of any searches and there is no evidence before me of any searches that have been undertaken. Therefore I am satisfied that this requirement is met.

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

> The application must contain a description of native title rights and interests claimed in relation to particular lands and waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

Result

The application meets the requirement under s. 62(2)(d).

Reasons

Schedule E of the application contains a description of the claimed native title rights and interests. The description does not merely consist of a statement to the effect that the claimed native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law. Therefore I am satisfied that this procedural requirement is met.

Description of factual basis: s. 62(2)(e)

The application must contain 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.

Result

The application meets the requirements under s. 62(2)(e).

Reasons

The applicant provides a general description of the factual basis in schedule F and schedule G of the application. The general description provided does more than recite the particular assertions and in my view meets the requirements of a general description of the factual basis for the assertions identified in this section: see *Queensland v Hutchison* (2001) 108 FCR 575.

Activities: s. 62(2)(f)

If the native title claim group currently carries out any activities in relation to the area claimed, the application must contain details of those activities.

Result

The application meets the requirement under s. 62(2)(f).

Reasons

The application contains these details in schedule G.

Other applications: s. 62(2)(g)

The application must contain details of any other applications to the High Court, Federal Court or a recognised state/territory body of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application and that seek a determination of native title or of compensation in relation to native title.

Result

The application meets the requirement under s. 62(2)(g).

Reasons

The application contains these details in schedule H.

Section 29 notices: s. 62(2)(h)

The application must contain details of any notices given under s. 29 (or under a corresponding provision of a law of a state or territory) of which the applicant is aware that relate to the whole or a part of the area covered by the application.

Result

The application meets the requirement under s. 62(2)(h).

Reasons

The application contains these details in attachment I.

Combined result for s. 62(2)

The application meets the combined requirements of s. 62(2), because it satisfies each of the subrequirements of ss. 62(2)(a) to (h), as set out above.

Combined result for s. 190C(2)

The application satisfies the condition of s. 190C(2), because it contains all of the details and other information and documents required by ss. 61 and 62, as set out in the reasons above.

Subsection 190C(3)
No common claimants in previous overlapping applications

The Registrar/delegate 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) 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 the previous application being considered for registration under s. 190A.

Result

The application does not satisfy the condition of s. 190C(3).

Reasons

The requirement that the Registrar be satisfied in the terms set out in s. 190C(3) — which requires that there are no common native title claim group members between the application currently being considered for registration ('the current application') and any overlapping 'previous

application' — is only triggered if all of the conditions found in ss. 190C(3)(a), (b) and (c) are satisfied—see *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*) at [9].

The current application was filed in the Federal Court on 22 March 2006. This is the date that the application was 'made' for the purposes of subsection (b) of s. 190C(3). Therefore, a previous application would need to have been on the Register of Native Title Claims (RNTC) on this date, i.e. 22 March 2006, for the condition in of s. 190C(3)(b) to be met.

For the purposes of s. 190C(3)(c), the relevant time to consider if an entry for the 'previous' application has been made on the RNTC as a result of a consideration under s. 190A, is the time that the Registrar applies the registration test to the current application. That is, the relevant date is not when the current application was made but when it is being considered under s. 190A— see *Strickland FC* at [53]–[56].

The geospatial overlap analysis dated 29 October 2007 indicates that there is one overlapping application in relation to the claim area as per the RNTC, being the Martu application (WC96/78, WAD6110/98). The Martu application was accepted for registration and entered onto the RNTC on 26 June 1996. It was therefore on the RNTC when the Karnapyrri people's application was made on 22 March 2006. Part of the Martu application was determined on 27 September 2002. The undetermined part of Martu remains on the RNTC.

The test under s. 190C(3) applies as follows:

a) the previous application (Martu) covers the whole of the area covered by the current application (Karnapyrri). This overlap is confirmed by the Geospatial analysis dated 29 October 2007, schedules H and O and attachment R of the application; and

b) As noted, Martu was on the Register of Native Title Claims when Karnapyrri was made 22 March 2006; and

c) the entry in relation to Martu was made, or not removed, as a result of consideration of Martu under section 190A. The decision under 190A was made on 30 March 1999 and, as it met all conditions, Martu was not removed from the Register.

Therefore, as each paragraph of s. 190C(3) is met, 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. In undertaking this assessment I note the following:

- 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.

[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.

- Attachment R contains a certificate from the Ngaanyatjarra Council dated 22 March 2006. The final paragraph of the certificate, in relation to the requirements of s.203BE(4)(c), states:

  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.

- The description of the Martu native title claim group includes Mr Billy Landy, who is one of the applicants for the current application.
- The Karnapyrri native title claim group 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 having regard to the information before me it is evident that persons included in the native title claim group for this Karnapyrri application are also members of the overlapping Martu application. Therefore, the application does not satisfy the requirements of s. 190C(3).

Subsection 190C(4) Authorisation/certification

Under s. 190C(4) the Registrar/delegate must be satisfied either that:
(a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, 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.

Under s. 190C(5), if the application has not been certified, the application must:
(a) include a statement to the effect that the requirement in s. 190C(4)(b) above has been met (see s. 251B, which defines the word 'authorise'), and
(b) briefly set out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

Result

I must be satisfied that the requirements set out in either ss. 190C(4)(a) or (b) are met, in order for the condition of s. 190C(4) to be satisfied.

For the reasons set out below, I am not satisfied that the requirements set out in either ss.190C(4)(a) or (b) are met.

Reasons

Has the application been certified by each representative body that could certify the application?

Attachment R of the application contains a copy of a certificate from the Ngaanyatjarra Council dated 22 March 2006. The certificate contains the relevant statements required by s. 203BE(4)(a),

including that the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it.

However, the geospatial overlap analysis of the application area dated 29 October 2007 identifies the YMBBMAC as the sole representative body for the area of the application. Ngaanyatjarra Council is not identified as representative body for any part of the application area. Paragraph 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).

Therefore, in this instance YMBBMAC is the only body that 'could certify the application' as there are no other recognised bodies for the application area.

Given that the Ngaanyatjarra Council is not a representative body for any part of the application area, the certificate at attachment R does not satisfy the requirements of s. 190C(4)(a). Rather 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).

The alternative to certification under s. 190C(4)(a) is authorisation of the application by the claim group under s. 190C(4)(b). However, schedule R(2) of the application which provides for evidence of authorisation under s. 190C(4)(b) contains no information that assists me to be satisfied that this condition has been complied with. Rather schedule R(2) states 'not applicable' which would seem to imply that the applicant is not seeking to claim authorisation on this basis in the event that it cannot be established under s 190C(4)(a).

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

Merit conditions: s. 190B

Subsection 190B(2)
Identification of area subject to native title

The Registrar must be satisfied that the information and map contained in the application as required by ss. 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.

Information regarding external and internal boundaries: s. 62(2)(a)

The application must contain information, whether by physical description or otherwise, that enables identification of the boundaries of:
(i) the area covered by the application, and
(ii) any areas within those boundaries that are not covered by the application.

Map of external boundaries: s. 62(2)(b)

The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

Result

The application satisfies the condition of s. 190B(2).

Reasons

The application contains a written description of the external and internal boundaries in attachment B. A map showing the external boundary is found in attachment C of the application.

The written description of the external boundary (attachment B) is thorough and comprehensive using a mixture of topographic features, cadastral boundaries and geographic decimal coordinates, to locate the boundary on the earth's surface.

The map in attachment C clearly depicts the external boundary. The map contains a scale bar, north point, coordinate grid, locality map and source and datum notes. There is a clearly shown commencement point.

A written description of the areas within the external boundary that are not covered by the application is found in attachment B part B. This is a generic description that excludes from the application area any land covered by the acts described in s. 23B of the NTA. Schedule L also states that pursuant to ss. 47, 47A or 47B all vacant Crown land included in the application is occupied by members of the native title claim group and is covered by the application.

A generic or class formula to describe the internal boundaries of an application is acceptable if the applicant has only a limited state of knowledge about any particular areas that would fall within the generic description provided: see *Daniels & Ors v State of Western Australia* [1999] FCA 686. There is nothing in the information before me to the effect that the applicant is in possession of a

tenure history or other information such that a more comprehensive description of these areas would be required to meet the requirements of the section. In these circumstances, I find the written description of the internal boundaries provides an objective mechanism to identify which areas fall within the categories described. This may require research of tenure data held by the particular custodian of that data, but nevertheless it is reasonable to expect that the task can be done on the basis of the information in attachment B part B.

An assessment provided by the Tribunal's Geospatial Services dated 29 October 2007 (Reference: Geotrack 2007/1922) indicated that the description and map are consistent and identify the application area with reasonable certainty. Since that time the description and map have not been changed, therefore that assessment remains relevant.

For these reasons, I am satisfied that the information and map in the application required by ss. 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether the native title rights and interests are claimed in relation to the particular areas of land or waters and the requirements of s. 190B(2) are therefore met.

Subsection 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.

Result

The application **does not satisfy** the condition of s. 190B(3).

Reasons

In *Doepel*, Mansfield J stated that:

> The focus of s. 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group. Section 190B(3) has two alternatives. Either the persons in the native title claim group are named in the application: subs (3)(a). Or they are described sufficiently clearly so it can be ascertained whether any particular person is in that group: subs (3)(b)—at [51].

Mansfield J said also that the focus of s. 190B(3) is:

> …not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained—at [37].

Further, in *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93 (*WA v NTR*), His Honour Justice Carr found that:

> It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently—at [67].

The application does not name the persons in the native title claim group so I must consider if, pursuant to s. 190B(3)(b), the description is sufficiently clear so that it can be ascertained whether any particular person is in the native title claim group.

Information in the application

The native title claim group is described in schedule A of the application as follows:

> The native title claim group comprises 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 and who, in accordance with their traditional laws and customs, identify themselves as being members of one, some or all of the following language groups:
>
> (a) Manyjilyjarra;
> (b) Kartujarra;
> (c) Kiyajarra;
> (d) Putijarra
> (e) Nyiyaparli;
> (f) Warnman;
> (g) Ngulipartu;
> (h) Pitjikala
> (i) Kurajarra;
> (j) Jiwaliny;
> (k) Mangala; and
> (l) Nangajarra.

Self-identification

The only criterion relied on in schedule A to qualify as a claim group member is self-identification, i.e. 'Aboriginal people who identify as Martu and who, in accordance with their traditional laws and customs, identify themselves as being members of one, some or all of the following language groups …'.

In *Wakaman People # 2 v Native Title Registrar and Authorised Delegate* (2006) 155 FCR 107; [2006] FCA 1198, Her Honour Justice Keifel stated:

> It may be observed that identification with a group may be relevant to findings of fact about membership of the group, which may be made later in the proceedings. The registration process is concerned with the clarity of the description of persons making up a claim group, so that it may be determined whether a person is a member of it. A requirement of self-identification would not appear to meet such an objective and might be thought to provide grounds for refusal of registration—at [38].

The difficulty with 'self-identification' is that it is imprecise and does not provide any objective means through which to assess whether a particular individual is a member of the claim group. The application itself does not elaborate on the basis for which self-identification can occur other than the requirement that persons who do identify as Martu may also identify themselves as belonging to particular language groups.

I note schedule F paragraph (b) states:

> …such possession, occupation, use and enjoyment has been pursuant to, and possessed under, the traditional laws and customs of the native title claim group, including traditional laws and customs of rights and interests in land and waters vesting in members of the native title claim group on the basis of:
>
> (i) descent from ancestors;
> (ii) conception in the area covered by the application;
> (iii) birth in the area covered by the application;
> (iv) traditional religious knowledge of the area covered by the application;
> (v) traditional knowledge of the geography of the area covered by the application; and
> (vi) knowledge of traditional ceremonies conducted in the area covered by the application.

These statements suggest that there are additional criteria which can be relied on to determine the membership of the native title claim group. However, as no other information has been provided, for example a list of the ancestors, I am unable to find that this information alone or in conjunction with the information provided in schedule A satisfies the requirements of the condition.

It is not for me under this section to consider the correctness of the claim group description (see *Doepel* at [37]) and I do not consider this. However, s. 190B(3)(b) requires that the description contains an objective method of determining who is in the claim group and I must therefore be satisfied that the persons in the native title claim group are described sufficiently clearly in the application so that it can be ascertained whether any particular person is in that group. It follows then that as self-identification is a completely subjective criterion I cannot be satisfied that the condition in s. 190B(3) has been met.

Subsection 190B(4)
Native title rights and interests identifiable

> The Registrar must be satisfied that the description contained in the application as required by s. 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.

Result

The application satisfies the condition of s. 190B(4).

Reasons

Subsection 190B(4) requires the Registrar to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be identified—*Doepel* at [92].

Native title rights and interests are defined in s. 223(1) of the Act as:

> The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) The rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) The Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) The rights and interests are recognised by the common law of Australia.

In my view the purpose at s. 190B(4) is to screen out those rights and interests that are not readily identified insofar as being unintelligible or not understandable. In contrast, at s. 190B(6) I must determine whether a claimed right is a 'native title right and interest' as defined in s. 223 and therefore, subject to their being an adequate factual basis, able to be registered or not.

The description of the claimed native title rights and interests is found in schedule E:

> The native title rights and interests claimed in relation to the area covered by the application are:
> (a) the right to possess, occupy, use and enjoy the land and waters of the area covered by the application to the exclusion of all others, including:
> (i) the right to live on the area covered by the application;
> (ii) the right to make decisions about the use and enjoyment of the area covered by the application;
> (iii) the right to hunt and gather, and to take the waters for the purpose of satisfying the native title claim group's personal, domestic , social, cultural, spiritual, ceremonial and communal needs;
> (iv) the right to control access to, and activities conducted by others on, the land and waters of the area covered by the application;
> (v) the right to maintain and protect sites and areas which are of significance to the members of the native title claim group under their traditional laws and customs;
> (vi) the right as against any other Aboriginal group or individual to be acknowledged as the traditional Aboriginal owners of the area covered by the application;
>
> (b) the right to use the following traditionally accessed resources:
> (i) ochre;
> (ii) Soils;
> (iii) rocks and stones; and
> (iv) flora and fauna,
> for the purpose of satisfying their personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs; and
>
> (c) the right to take, use and enjoy the flowing and subterranean waters in accordance with their traditional laws and customs for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs, including the right to hunt on and gather and fish from the flowing and subterranean water.

I am satisfied that this description is sufficient to allow the native title rights and interests claimed to be readily identified as required under s. 190B(4).

Subsection 190B(5)
Factual basis for claimed native title

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

Result s. 190B(5)

I am not satisfied that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(a) to (c).

Reasons

In *Gudjala,* Dowsett J noted that the task at s. 190B(5):

> [A]ssumes the identification of the claim group pursuant to subs. 190B(3) and identification of claimed native title rights and interests pursuant to subs. 190B(4)'— at [36].

In His Honour's view it is necessary for a delegate to be satisfied that there is an alleged factual basis sufficient to support the assertion that the claim group is entitled to the claimed native title rights and interests. It was therefore necessary that the alleged facts supported the claim that the identified claim group (and not some other group) held the identified rights and interests—at [39].

In my reasons at s. 190B(3), I came to the conclusion that the description is not sufficiently clear as to allow the identity of persons in the native title claim group to be determined. As noted in *Gudjala*, the task at s. 190B(5) assumes the identification of the claim group pursuant to s. 190B(3). If the claim group cannot be adequately identified it is not possible to assess whether the alleged facts support the claim being made by the applicant on behalf of the claim group (and not some other group)—*Gudjala* at [39].

As I am of the view that the native title claim group is not adequately identified in the application, it follows that I cannot be satisfied that the requirements of s. 190B(5)(a) to (c) are met.

Subsection 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.

Result

The application does not satisfy the condition of s. 190B(6). I consider that none of the claimed native title rights and interests can be established prima facie.

Reasons

In *Gudjala* at [85] to [86], the court held that in the absence of a sufficient factual basis being provided for the assertion that the claimed native title rights and interests exist, it must necessarily follow that the requirements of s. 190B(6) are also not met. I therefore find that I am not satisfied that, prima facie, at least some of the claimed native title rights and interests can be established.

Subsection 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 be expected to currently 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.

Result

The application does not satisfy the condition of s. 190B(7).

Reasons

Under s. 190B(7)(a) I must 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. The word 'traditional' as it is used here must be understood as it was defined in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58. That is, it is necessary to show that the connection is in accordance with the laws and customs of a group or society which has its origins in the society that existed at the acquisition of sovereignty.

I was unable to find that the material currently before me is sufficient to support an assertion as to the existence of traditional laws acknowledged and customs observed by the claim group that give rise to the claim to native title rights and interests. It therefore follows that I am unable to be satisfied that the requirements of this condition in relation to traditional physical connection are met. I find myself in a similar situation to Dowset J in *Gudjala*, where he stated that:

> As I can see no basis for inferring that there was a society of the relevant kind, having a normative system of laws and customs, as at the date of European settlement, the Application does not satisfy the requirements of subs 190B(7)—at [89].

Subsection 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.

Delegate's comments

Section 61A contains four subsections. The first of these, s. 61A(1), stands alone. However, ss. 61A(2) and (3) are each limited by the application of s. 61(4). Therefore, I consider s. 61A(1) first, then s. 61A(2) together with (4), and then s. 61A(3) also together with s. 61A(4). I come to a combined result at page 26 below.

No approved determination of native title: s. 61A(1)

A native title determination application must not be made in relation to an area for which there is an approved determination of native title.

Result

The application meets the requirement under s. 61A(1).

Reasons

The Geospatial overlap analysis dated 29 October 2007 confirms that the application area does not cover any area where there is an approved determination of native title.

No Previous Exclusive Possession Acts (PEPAs): ss. 61A(2) and (4)

Under s. 61A(2), the application must not cover any area in relation to which
(a) a previous exclusive possession act (see s. 23B)) was done, and
(b) either:
    (i) the act was an act attributable to the Commonwealth, or
    (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act.

Under s. 61A(4), s. 61A(2) does not apply if:
(a) the only previous exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
(b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

Result

The application meets the requirement under s. 61A(2), as limited by s. 61A(4).

Reasons

Schedule B excludes from the application area any area covered by previous exclusive possession acts as defined in the Act.

No exclusive native title claimed where Previous Non-Exclusive Possession Acts (PNEPAs): ss. 61A(3) and (4)

Under s. 61A(3), the application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where:

(a) a previous non-exclusive possession act (see s. 23F) was done, and

(b) either:

  (i) the act was an act attributable to the Commonwealth, or

  (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act.

Under s. 61A(4), s. 61A(3) does not apply if:

(a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and

(b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

Result

The application meets the requirement under s. 61A(3), as limited by s. 61A(4).

Reasons

There is nothing on the face of the application or in any material before me to indicate that the application area includes any PNEPAs. Therefore, as I am satisfied that as the application does not disclose, and I am not otherwise aware, that because of s. 61A(3) the application should not have been made, this requirement has been met.

Combined result for s. 190B(8)

The application satisfies the condition of s. 190B(8), because it meets the requirements of s. 61A, as set out in the reasons above.

Subsection 190B(9)
No extinguishment etc. of claimed native title

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

(a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or

(b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or

(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 ss. 47, 47A or 47B.

Delegate's comments

I consider each subcondition under s. 190B(9) in turn and I come to a combined result below.

Result re s. 190B(9)(a)

The application satisfies the subcondition of s. 190B(9)(a).

Reasons re s. 190B(9)(a)

I refer to schedule Q, which states that the applicant does not claim ownership of minerals, petroleum or gas wholly owned by the Crown.

Result re s. 190B(9)(b)

The application satisfies the subcondition of s. 190B(9)(b).

Reasons re s. 190B(9)(b)

The claim area does not include any offshore areas.

Result re s. 190B(9)(c)

The application satisfies the subcondition of s. 190B(9)(c).

Reasons re s. 190B(9)(c)

I do not have any information before me to suggest that the claimed native title rights and interests have otherwise been extinguished.

Combined result for s. 190B(9)

The application satisfies the condition of s. 190B(9), because it meets all of the three subconditions, as set out in the reasons above.

[End of reasons]

Attachment A
Summary of registration test result

Application name:	Karnapyrri
NNTT file no.:	WC06/3
Federal Court of Australia file no.:	WAD77/06
Date of registration test decision:	31 January 2008

Test condition (see ss.190B and C of the Native Title Act 1993)	Subcondition/requirement	Result
s. 190C(2)		Combined result: Met
	re s. 61(1)	Met
	re s. 61(3)	Met
	re s. 61(4)	Met
	re s. 61(5)	Met
	re s. 62(1)(a)	Met
	re s. 62(1)(b)	Met
	re s. 62(2)(a)	Met
	re s. 62(2)(b)	Met
	re s. 62(2)(c)	Met
	re s. 62(2)(d)	Met
	re s. 62(2)(e)	Met
	re s. 62(2)(f)	Met
	re s. 62(2)(g)	Met
	re s. 62(2)(h)	Met
s. 190C(3)		Not Met
s. 190C(4)		Not Met
s. 190B(2)		Met

s. 190B(3)		Not met
s. 190B(4)		Met
s. 190B(5)		Combined result: Not Met
	re s. 190B(5)(a)	Not Met
	re s. 190B(5)(b)	Not Met
	re s. 190B(5)(c)	Not Met
s. 190B(6)		Not Met
s. 190B(7)		Not Met
s. 190B(8)		Combined result: Met
	re s. 61A(1)	Met
	re ss. 61A(2) and (4)	Met
	re ss. 61A(3) and (4)	Met
s. 190B(9)		Combined result: Met
	re s. 190B(9)(a)	Met
	re s. 190B(9)(b)	Met
	re s. 190B(9)(c)	Met

Attachment B
Documents and information considered

The following lists all documents and other information that were considered by the delegate in coming to his/her decision about whether or not to accept the application for registration.

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

- This Form 1 application and accompanying s. 62(1)(a) affidavits of the applicant 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).

[End of document}