

National Native Title Tribunal
REASONS FOR DECISION COVER SHEET
REGISTRATION TEST

DECISION MAKER	Hamish MacLeod
-----------------------	----------------

APPLICATION NAME	Lots 825 & 826 Borroloola
-------------------------	---------------------------

NAME OF APPLICANTS	Annie Isaac and Dinah Norman on behalf of the Rumburriya People
---------------------------	---

NNTT NO	DC00/13
FEDERAL COURT NO	D6014/00

REGION	Northern Territory
---------------	--------------------

DATE APPLICATION MADE	1 November 2000
------------------------------	-----------------

I have considered the native title claimant application against each of the conditions contained in s.190B and s.190C of the *Native Title Act* 1993.

DECISION

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

Written notice of the decision, and the reasons for the decision, are to be provided to the applicant.

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

24 November 2000
DATE

Introduction

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

On 26 July 2000 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The delegation of 26 July 2000 has not been revoked as at this date.

Annie Isaac and Dinah Norman and Ors v Northern Territory D6014/00 (“the application”)

On 1 November 2000 the application was filed in the Northern Territory District Registry of the Federal Court of Australia (“the Court”). The application was made by Annie Issac and Dinah Norman (the applicant) on behalf of the Rumburriya people.

The application was filed in response to two *Notices of Proposed Acquisition*. The first relates to proposed Lot 826 Town of Borrooloola (being part of Lot 803 Town of Borrooloola) in the Northern Territory published by the NT Government on 22 July 2000. A copy of this Notice is provided as Attachment A to the Application.

The second Notice of Proposed Acquisition relates to Lot 825 Town of Borrooloola in the Northern Territory published by the NT Government on 18 August 2000. A copy of this Notice is provided as Attachment B to the Application.

Information considered in making the decision

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

- Correspondence from the Solicitor for the Northern Territory of 20 November 2000;
 - Advice provided to the case manager by the National Native Title Tribunal Legal regarding Certification requirements;
 - The Registration Test File, and Federal Court Application for the application;
 - 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;
-

A. Procedural Conditions

190C(2)	<p><i>Information, etc, required by section 61 and section 62:</i></p> <p><i>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></p>
----------------	--

Reasons for the Decision

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(3)	<i>Name and address for service of applicant(s)</i>
----------------	---

<i>Decision: Requirements are met</i>	
Federal Court Form 1, Part B ("Filing and Service") has been completed and sets out details of the applicants' legal representative and their address for service together with a postal address for the applicants.	

s.61(4)	<i>Names persons in native title claim group or otherwise describes the persons so that it can be ascertained whether any particular person is one of those persons</i>
----------------	---

<i>Decision : Requirements are met</i>	
An exhaustive list of names of the persons in the native title claim group has not been provided so the requirements of s.61(4)(a) are not met.	
For the reasons set out in relation to s.190B(3)(b), I find that the persons in the native title claim group are described sufficiently clearly in the description provided in Schedule A of the application so that it can be ascertained whether any particular person is one of those persons in accordance with s.61(4)(b).	

61(5)	<i>Application is in the prescribed form; lodged in the Federal Court, contains prescribed information, and accompanied by prescribed documents</i>
--------------	---

<i>Decision: Requirements are met</i>	
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 1 November 2000.	
The application is accompanied by affidavits as prescribed by s.62(1)(a) and by maps as	

prescribed by s.62(2)(b).

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

I note that s190C(2) only requires me to consider details, other information and documents required by s.61 and s.62. I am not required to consider whether the application was accompanied by the payment of a prescribed fee to the Federal Court.

For the reasons outline above, it is my view the requirements of s61(5) have been met.

Details required in section 62(1)

62(1)(a)	<i>Affidavits address matters required by s62(1)(a)(i) – s62(1)(a)(v)</i>
	<i>Decision: Requirements are met</i>
<p>The application filed in the Federal Court was accompanied by affidavits from the named applicants, Annie Isaac and Dinah Norman (sworn 31 October 2000.) The affidavits have been sworn before Susan Daw, Justice of the Peace, Northern Territory.</p> <p>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.</p> <p>I note that Schedule R Certification confirms that a process of decision making according to traditional law and custom was followed.</p> <p>A further statement has been provided in Part A(2) of the application stating 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</p> <p>I am satisfied that the affidavits satisfactorily address the matters required by s.62(1)(a)-(v) and the additional information provided in Part A(2) and Schedule R further satisfies the requirements of s.62(1)(iv) regarding authorisation by the native title claim group. The application meets the procedural requirements of s.62(1)(a).</p>	

62(1)(c)	<i>Details of traditional physical connection (information not mandatory)</i>
-----------------	---

<i>Comment on details provided:</i>	
<p>Schedule E (1) provides details of the native title rights and interests claimed. Schedule F provides details of continuing spiritual, physical and historical connection that give rise to the native title rights and interests claimed. Schedule G and Schedule M provide details of current physical connection by the claim group in general. Schedule N states that no information is provided regarding any circumstances in which any member of the claimant group has been prevented from gaining access to the application area. The provision of this non-mandatory information in the application does not affect a decision as to whether the application meets the conditions of s.190C(2).</p>	

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

62(2)(a)(i)	<i>Information identifying the boundaries of the area covered</i>
--------------------	---

<i>Decision: Requirements are met.</i>	
<p>Schedule B (a) sets out a physical description of the application area as being all land and waters subject to</p> <p>(i) a notice of proposal under the Lands and Acquisition Act (NT) dated 27 July 2000. A copy of the notice is contained at Attachment A. The land and waters subject to this notice of proposal is comprised of Lot 826 Town of Borroloola (being part of Lot 803) and containing a total area of approximately 9,990 square metres.</p> <p>and</p> <p>(ii) a notice of proposal dated 25 August 2000 under the Lands Acquisition Act (NT). A copy of the notices is contained at attachment B. The land and waters subject to this notice of proposal is comprised by Lot 825 Town of Borroloola (being part of Lot 803) and containing a total area of approximately 4,750 square metres.</p> <p>I note that the notice of proposal dated 25 August 2000 does not identify Lot 825 Town of Borroloola, as being part of Lot 803. However in every other respect the information provided a Schedule B(a)1(ii) agrees with that in the notice of proposal.</p> <p>Schedule B(b) identifies the boundaries of any areas within the claim area boundaries that are not covered by the application. Maps have also been provided.</p> <p>For the reasons set out in consideration of s.190B(2), I am satisfied that this physical description is sufficient to meet the procedural requirements of s.62(2)(a)(i).</p>	

62(2)(a)(ii)	<i>Information identifying any areas within those boundaries which are not covered by the application</i>
---------------------	---

<i>Decision: Requirements are met</i>	
<p>For the reasons which lead to my conclusion that the requirements of s 190B(2), have been met, I am satisfied that the information and maps provided is sufficient to enable the area not covered by the application to be identified with reasonable certainty.</p>	

62(2)(b)	<i>A map showing the external boundaries of the area covered by the application</i>
-----------------	---

<i>Decision: Requirements are met.</i>	
<p>For the reasons which lead to my conclusion that the requirements of s 190B(2), have been met, I am satisfied that the information and maps provided is sufficient to enable the external boundaries of area covered by the application to be identified with reasonable certainty.</p>	

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

<i>Decision: Requirements are met</i>	
---------------------------------------	--

Schedule D asserts that the applicant has not conducted any title searches of the area claimed to determine the existence of any non-native title rights in relation to the land and waters in the area covered by the application.
The application meets the procedural requirements of s.62(2)(c).

62(2)(d)	<i>Description of native title rights and interests claimed and any activities in exercise of those rights and interests</i>
-----------------	--

<i>Decision: Requirements are met</i>	
---------------------------------------	--

A description of the native title rights and interests claimed by the applicant is contained in Schedule E of the application. I have outlined these rights and interests in my reasons for decision in respect of s.190B(4).

The application meets the procedural requirements of s.62(2)(d).

62(2)(e)(i)	<i>Factual basis – claim group has, and their predecessors had, an association with the area</i>
--------------------	--

<i>Decision: Requirements are met</i>	
---------------------------------------	--

A general description of the factual basis on which it is asserted that the native title claim group has, and their predecessors had, an association with the area is provided at Schedule F, G and M.

The application meets the procedural requirements of s.62(2)(e)(i).

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

<i>Decision: Requirements are met</i>	
---------------------------------------	--

A general description of the factual basis on which it is asserted that there exist traditional laws and customs that give rise to the claimed native title is provided at Schedule F, G and M.

The application meets the procedural requirements of s.62(2)(e)(ii).

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

<i>Decision: Requirements are met</i>	
---------------------------------------	--

A general description of the factual basis on which it is asserted that the native title claim group has continued to hold native title in accordance with traditional laws and customs is provided as Schedule F, G and M.

The application meets the procedural requirements of s.62(2)(e)(iii).

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

<i>Decision: Requirements are met</i>	
---------------------------------------	--

Schedule G of the application provides a non-exhaustive list of a number of activities of the native title claim group members on, and associated with, the application area. A statement regarding current activities is provided at Schedule M. The application meets the procedural requirements of s.62(2)(f).

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

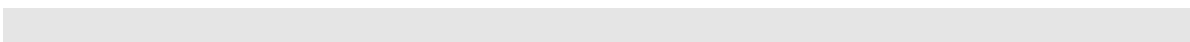
<i>Decision: Requirements are met</i>	
---------------------------------------	--

Schedule H of the application states that the applicant is not aware that any other applications seeking a determination of native title, or a determination of compensation, have been made in relation to the whole or a part of the area covered by the application. The application meets the procedural requirements of s.62(2)(g).

62(2)(h)	<i>Details of any S29 Notices (or notices given under a corresponding State/Territory law) in relation to the area, which the applicant is aware of</i>
-----------------	---

<i>Decision: Requirements are met</i>	
---------------------------------------	--

Schedule I of the application sets out that :
The area claimed is subject to the notices of proposal referred to in schedule B.
The application meets the procedural requirements of s.62(2)(h).



190C(3)	<p><i>Common claimants in overlapping claims:</i></p> <p><i>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:</i></p> <ul style="list-style-type: none"> <i>(a) the previous application covered the whole or part of the area covered by the current application; and</i> <i>(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</i> <i>(c) the entry was made, or not removed, as a result of consideration of the previous application under section 190A.</i>
----------------	---

Reasons for Decision

Section 190C(3) requires identification of those claims that were on the Register of Native Title Claims after consideration under s 190A at the time the current application was made and have not subsequently been removed. In particular I must be satisfied that no member of the claim group for this application is identified as a member of any other claim on the Register of Native Title Claims which has been considered under s 190A, and which overlaps this application area.

A search of the Register of Native Title Claims and Schedule of the Native Title Applications on 20 November 2000 reveals there are no applications that cover any of this area.

Requirements are met..

<p>190C(4)(a) and 190C(4)(b)</p>	<p><i>Certification and authorisation:</i></p> <p><i>The Registrar must be satisfied that either of the following is the case:</i></p> <p><i>(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</i></p> <p><i>(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.</i></p>
---	--

Reasons for Decision

The applicant relies on the first limb of s.190C4, namely that there has been compliance with s.190C(4)(a) – certification by a representative Aboriginal/Torres Strait Islander body. An inspection of the Native Title Representative Body gazetted boundaries establishes that the claim area is wholly within the gazetted area for one representative body, which is the Northern Land Council. The Northern Land Council is the sole Aboriginal/Torres Strait Islander representative body that could certify the application under s203BE(1)(a) and 203BE(2)(a) and (b) of the Act.

I note that certification signed by Jeff Stead, Manager Anthropology Branch, Northern Land Council and dated 1 November, refers to s202(7) (a) (b) and (c) of the Act. These provisions were repealed on 1 July 2000. Nevertheless I also note advice provided on 20 November by Ron Levy, Solicitor, Northern Land Council which states that at the time certification was undertaken it was the Council's intention to certify the application in accordance with the provisions in the *Native Title Act* 1993 as in force from 1 July 2000, and that the repealed provisions referred to in the certificate were in error.

I am satisfied that it is the proper body to provide the required certification.

The information required has been provided in Schedule R of the application and meets the requirements of s.203BE(1)(a) and 203BE(2)(a) and (b).

Requirements are met.

190C(5)	<p><i>Evidence of authorisation:</i></p> <p><i>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:</i></p> <p><i>(a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and</i></p> <p><i>(b) briefly sets out the grounds on which the Registrar should consider that it has been met.</i></p>
----------------	--

Reasons for Decision

Certification in writing has been provided at Schedule R, pursuant to s.190C(4) above. The application is not considered further under this condition.

B. Merit Conditions

190B(2)	<p><i>Description of the areas claimed:</i></p> <p><i>The Registrar must be satisfied that the information and map contained in the application as required by paragraphs 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.</i></p>
----------------	---

Reasons for Decision

Map and External Boundary Description

Maps produced by the Department of Lands, Planning and Environment have been supplied with the application and are included as Attachments A and B. The maps supplied show the external boundaries of the areas claimed and identifies the relevant claim areas as being, respectively Lots 826 and 825 Town of Borroloola

The maps are not provided with a co-ordinate system, however the land claimed is described by specific lot number and is readily identifiable. The maps have been professionally prepared and provide a high level of detail of the claimed area, including appropriate scale.

Further, I am satisfied that there is no contradiction between the physical description and map provided.

Internal Boundaries

Schedule B(b) expressly excludes any area in relation to which a previous exclusive possession act (within the meaning of s.23B) has been done.

In Schedule E(2) the claimants acknowledge:

- *their native title rights and interests are subject to all valid and current laws of the Commonwealth and Northern Territory; and*
- *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, this application does not claim that the native title rights and interests confer possession, occupation, use and enjoyment to the exclusion of all others in relation to any area regarding which a previous non-exclusive possession act under s23F of the NTA has been done.

The description of the claimed area plus the exclusion from the claim area of s.23B acts establishes a formula that can be applied objectively to establish whether any particular area of land within the external boundary of the application.

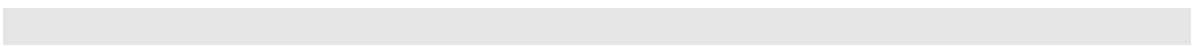
Also in Schedule L the applicants claim the benefit of s.47B of the NTA in regard to this

claim.

Whether the exclusions identified by this formula are sufficient to meeting the conditions of s.190B (8) and (9) is not considered here. I refer to my reasons for decision in relation to those sections.

Conclusion

I find that the information and maps contained in the application 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.



190B(3)	<p><i>Identification of the native title claim group:</i></p> <p><i>The Registrar must be satisfied that:</i></p> <p><i>(a) the persons in the native title claim group are named in the application; or</i></p> <p><i>(b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.</i></p>
----------------	---

Reasons for the Decision

To meet this condition the description of the claim group must be sufficiently clear, so that it can be said with reasonable certainty whether any particular person is a member of the native title claim group.

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

Membership of the native title claim group is defined by reference to specified criteria set out in paragraphs 1, 2, and 3 of Schedule A.

The native title claim group is said to be comprised of persons descended from 3 named apical Rrumburriya persons and their respective descendant sub-groups or families (Schedule A, 3(a) (b) and (c)).

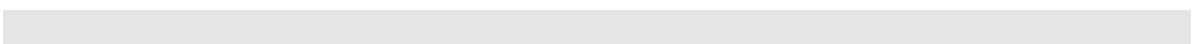
In correspondence from Mr Stephen Herne dated the 20th of November, 2000, for the Solicitor for the Northern Territory in reply to the invitation to comment on this application, he stated "I advise that the Northern Territory does not propose to file submissions in this matter."

It is my view that the applicant has provided a formula whereby membership of the native title claim group might be established. I am satisfied that the persons in the group are defined sufficiently clearly so that it can be ascertained whether any particular person is in that group.

It is not necessary to ascertain now whether a particular individual is a member of the group. It is necessary only to be satisfied that, on the information provided, this can be ascertained. It does appear that further inquiry would have to be made in the case of any individual to determine both descent and non-descent based membership.

However this inquiry is limited to review of genealogies (in the case of descent-based membership) and confirmation of the decisions of senior descent based members according to specified criteria (in the case of non-descent based membership). This is a limited inquiry but one properly conducted by the Court hearing the application and not as part of an administrative decision under s.190A of the Act.

For the reasons set out above I am 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.



190B(4)	<p><i>Identification of claimed native title:</i></p> <p><i>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.</i></p>
----------------	--

Reasons for the Decision

This condition requires me to be satisfied that the native title rights and interests claimed can be readily identified. It is insufficient to merely state that these native title rights and interests are 'all native title interests that may exist, or that have not been extinguished at law'. To meet the requirements of s.190B(4), I need only be satisfied that at least one of the rights and interests sought is sufficiently described for it to be readily identified.

Schedule E (1) (a)-(j) lists the native title rights and interests. These rights and interests described are subject to matters set out in paragraphs 2, 3 and 5 of Schedule E.

Firstly, it is said that, based on traditional laws and customs, persons of different age, gender, physical and mental capacity within the native title claim group may possess or exercise the rights and interests claimed in a variety of different ways (Schedule E, (5).

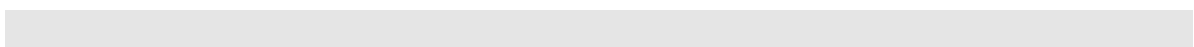
Secondly, the applicants acknowledge that the rights and interests claimed are subject to all valid and current laws of the Commonwealth and the Northern Territory and that exercise of such rights and interests might be regulated controlled, curtailed, restricted, suspended or postponed by reason of the existence of valid concurrent rights and interests in others by or under such laws. (Schedule E, (2).

The applicant further states that they do not claim native title rights and interests to the exclusion of all others, in the case of areas the subject of a non-exclusive possession act under s23F of the NTA.

I refer to my reasons for recommendation in relation to s.62(2)(d). I have found that the description of native title rights and interests and the activities in relation to those rights and interests is sufficient to meet the procedural requirements of that section.

In my view the native title rights and interests described at Schedule E are readily identifiable. The description is more than a statement that native title rights and interests are 'all native title interests that may exist, or that have not been extinguished at law'.

Requirements are met.



190B(5)	<p><i>Sufficient factual basis:</i></p> <p><i>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:</i></p> <ul style="list-style-type: none"><i>(a) that the native title claim group have, and the predecessors of those persons had, an association with the area;</i><i>(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;</i><i>(c) that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.</i>
----------------	--

Reasons for Decision

This condition requires me to be satisfied that the factual basis on which it is asserted that there exist native title rights and interests described at Schedule E of the application is sufficient to support that assertion. In reaching this decision I must be satisfied that the factual basis supports the 3 criteria identified at s.190B5(a)-(c).

The applicants provide the following statement in Schedule M in regard to the area being claimed:

The Rumburriya People have maintained a traditional physical connection with the land and waters covered by the application. The Rumburriya People reside on Rumburriya country, respectively, and there are many examples of such physical connections, both in respect of Rumburriya country generally, and the area claimed in particular.”

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

The application asserts association since time immemorial, including at the time when British sovereignty was asserted and at the time of contact with non-Aboriginal people (Schedule F(2)).

The connection of the members of the native title claim group and the predecessors of those persons with the application area is based on possession, occupation, use and enjoyment of the application area derived from a system of traditional laws and customs, including, kinship, intermarriage, spiritual ancestry, co-existence and shared historical, economic, religious and social interests.

Schedule F(3), states that the traditional connection of the native title claim group with the application 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.

Schedule F(9) the applicants state that there is material evidence of physical connections by the ancestors of the Rumburriya People in Rumburriya country, and is illustrated by the presence of archaeological evidence of both pre-contact and post-contact Aboriginal habitation. The evidence includes artefact fragments, rock art and traditional occupancy

sites.

I am satisfied that the native title claim group has, and the predecessors of those persons had, an association with the area.

(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) set out details of the traditional ownership of the claimed area by the Rumburriya People.

Further details of traditional laws and customs are provided in this schedule under (10) and include; recognition of common ancestors; observance of common laws relating to land tenure and traditional usage of land and waters.

Details of the activities associated with the observation, maintenance and passing on of a body of traditional law and customs are provided in Schedule G.

I am satisfied that there exists traditional laws acknowledged and customs observed by the native title claim group with the area.

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

Information on 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).

Continued observance of a common kinship system by the claimants, and outlined in Schedule F, (11) 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 (10); and activities in furtherance of the above rights and interests (Schedule G).

I am satisfied that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.

Conclusion

There is evidence to support the factual basis in each of the 3 criteria identified at s 190B5(a)-(c). This evidence in turn is sufficient to support the assertion.

Requirements are met.

190B(6)	<p><i>Prima facie case:</i></p> <p><i>The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.</i></p>
----------------	--

Reasons for the Decision

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

“Native Title Rights and Interests” are defined at s.223 of the Act. This definition specifically attaches native title rights and interests to land and water, and in summary requires that:

- the rights and interests are held under traditional laws and customs;
- those claiming the native title rights and interests have a connection with the relevant land and waters; and
- those rights and interests are recognised under the common law of Australia.

Under s.190B(6) I must consider that, prima facie, at least some of the rights and interests claimed can be established. The term “prima facie” was considered in *North Galanjanja Aboriginal Corporation v Qld* 185 CLR 595 by their Honours Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, who noted:

“The phrase can have various shades of meaning in particular statutory contexts but the ordinary meaning of the phrase “prima facie” is: “At first sight; on the face of it; as it appears at first sight without investigation” [citing Oxford English Dictionary (2nd ed) 1989].”

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

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

However, the majority also found that where s 47 and s 47A applied, the applicants in that matter were entitled to possession, occupation, use and enjoyment of the area concerned as against the whole world. The applicants have expressly stated in Schedule L: *...Pursuant to s 47B of the NTA, extinguishment is to be disregarded in relation to vacant Crown land.*

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

“their [the claimants’] native title rights and interests are subject to all valid and current laws of the Commonwealth and the Northern Territory” and

“the exercise of their [the claimants’] 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.”

A similar statement to the latter is also found in the draft order at Schedule J (4). I am satisfied that these statements qualify all the rights and interests claimed, even those which, prima facie, are claimed exclusively.

Further, at Schedule E (3), the following statement is made:

“Subject to Schedule L, this application does not claim that the native title rights and interests confer possession, occupation, use and enjoyment to the exclusion of all others in relation to any area regarding which a previous non-exclusive possession act under s23F of the NTA has been done.”

I have nothing before me which indicates that such an act has ever been done over the area claimed but if it had been, then the rights and interests claimed below would also be qualified by the statement made in Schedule E (3).

In correspondence from Mr Stephen Herne dated the 20th of November, 2000, for the Solicitor for the Northern Territory in reply to the invitation to comment on this application, he stated “I advise that the Northern Territory does not propose to file submissions in this matter.”

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

The claim to exclusive possession, occupation, use and enjoyment of the area is qualified in the application. It is potentially limited by reason of valid concurrent rights and interests in others by, or under laws of the Commonwealth of Territory (Schedule E, para 2.)

It is expressly stated that the applicants do not claim possession, occupation, use and enjoyment of the area to the exclusion of all others in relation to any area on which an exclusive possession act within the meaning of s23B has been done, and a previous non-exclusive possession act within the meaning of s23F. (Subject to Schedule L and s47B applying.)

Further, s 47B 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 areas to which s 47A (which also provides that prior extinguishment must be disregarded in certain circumstances) was applied by the majority.

On the face of it, there is nothing to indicate that s 47B is not attracted – as noted above, the Crown in right of the Northern Territory has not provided any information which would indicate that s 47B(1)(b) is attracted to the area concerned. If it were to apply, then it is arguable that the same could be said in relation to areas subject to s 47B as was said in Ward’s case in relation to s 47A.

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 and J mentioned above.

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

(b) to speak for and to make decisions about the use and enjoyment of the application area

The applicant provides examples about decisions related to the use and enjoyment of the area claimed and also of land and waters proximate to the application area. Some of the activities listed in Schedule G which provide support for the rights claimed appear to be of a kind which the majority in Ward's case rejected. However, on the face of it, some of the activities described in paragraphs (a) to (d), (f) to (h), (j), (k) and (o) could be characterised as activities which involve physical presence on the land or activities on the land associated with traditional social and cultural practices.

In the determination in Ward's case, the majority found that a non-exclusive right to make decisions about the use and enjoyment of the land was recognisable at common law over areas where native title was found to exist but to which s 47 and 47A did not apply.

Prima facie this right is not claimed to the exclusion of all others. As previously noted, s 47B has been asserted in relation to the claim area (refer to comments above).

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

(c) to reside upon and otherwise have access to and within the application area

The applicant provides examples about residency and access of the area claimed and also of land proximate to the application area in accordance with traditional laws and customs. For example, Schedule G refers to accessing, travelling across the lands and waters and building and using shelters on the land and also refers to accessing the land for particular purposes. Clearly, these can be characterised both as activities which involve physical presence on the land and activities on the land associated with traditional social and cultural practices.

Prima facie this right is not claimed to the exclusion of all others. See also the statements made in Schedules E and J. As previously noted, s 47B has been asserted in relation to the claim area (refer to comments above).

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

(d) to control the access of others to the application area

The applicant provides examples about the controlling the access of others to the application area and land and waters proximate to the application area. In Schedule G, paragraphs (l), and (m) respectively mention regulating access to parts of the land according to gender, age, and ritual experience and restricting the access of outsiders to the land and waters. All these could be characterised as activities which involve physical presence on the land or activities on the land associated with traditional social and cultural practices.

I note that, in Ward's case, this right formed part of Justice Lee's determination but not that of the majority. However, there was no discussion as to why this right was not

included in the draft determination. As noted above, the application of s 47A in that case resulted in the applicants having the right of use, occupation, possession and enjoyment as against the whole world. The majority found this would give rise to rights similar to those available under a freehold title which would include the right to control the access of others to the area (subject to the laws of Australia): see para [207] of the decision.

Prima facie this right is not claimed to the exclusion of all others. See also the statements made in Schedules E and J. As previously noted, s 47B has been asserted in relation to the claim area (refer to comments above).

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

(e) to use and enjoy the resources of the application area

The applicant provides examples about the use, enjoyment and management of resources to the application area and land and waters proximate to the application area. Information is provided in Schedule G (b) about hunting and gathering on the land and waters; (d) using waters from the land, (f) collecting materials including timber, stones, minerals, ochre, resin, grass and shell. In Ward's case, a claim to use and enjoy the traditional resources of the land was recognised in the draft determination and, specifically, a claim to ochre was acceptable: see [524] to [544]. I am satisfied that the resources particularised in the application, namely food resources and water, timber, stones, ochre, resin, grass and shell, fall within the scope of "traditional resources" as used by the majority in Ward's case.

In *Yarmirr v Northern Territory* (1998) 82 FCR 533 at 601 and in Ward's case, it was found that native title to minerals, petroleum or gas has been extinguished in the Northern Territory. I note that the applicants are not claiming ownership of minerals, petroleum or gas wholly owned by the Crown and am satisfied that the resources claimed can be read to exclude minerals, petroleum or gas.

Prima facie this right is not claimed to the exclusion of all others. See also the statements made in Schedules E and J. As previously noted, s 47B has been asserted in relation to the claim area (refer to comments above).

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

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

The applicant provides examples about the use and enjoyment of others of the resources of the application area and land and waters proximate to the application area. The claim group make a claim in paragraph (m) of Schedule G which states that they restrict the access of outsiders to the land and waters and (n) responsibility for caring for the land and waters in accordance with spiritual, economic and social obligations. These activities could be characterised as activities which involve physical presence on the land or activities on the land associated with traditional social and cultural practices. On the face of it, access to and responsibility for the land and waters would include traditional resources e.g. food and fish of the area. This would provide, prima facie, evidence for the rights claimed.

However, I note that although this right formed part of Justice Lee's determination, the majority in Ward's case did not include it in their draft determination. There was no

discussion as to why this was so. As noted above, the application of s 47A in that case resulted in the applicants having the right of use, occupation, possession and enjoyment as against the whole world. The majority found this would give rise to rights similar to those available under a freehold title which would include the right to control the use and enjoyment of others of the resources of the application area, subject to the laws of Australia: see para [207] of the decision.

See also the statements made in Schedules E and J. As previously noted, s 47B has been asserted in relation to the claim area (refer to comments above).

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

(g) to share, exchange and/or trade resources derived on and from the application area

Prima facie, I am not satisfied that there is sufficient information provided in regard to this right to make it capable of being established. Schedule G (e) merely recites, as an activity, the right claimed. No further information was provided to support this right.

(h) to maintain and protect places of importance under traditional laws, customs and practices in the application area

The applicants provide information about the maintenance and protection places of importance of the application area and land and waters proximate to the application area.

Schedule G lists activities in (k), (l), (n), (p) and (q) which would support this right. The following which support this right. These activities could be characterised as activities which involve physical presence on the land or activities on the land associated with traditional social and cultural practices.

The right is claimed subject to the qualifications set out in Schedules E and J mentioned above. As previously noted, s 47B has been asserted in relation to the claim area (refer to comments above).

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

(i) to maintain, protect, prevent the misuse of and transmit to others their cultural knowledge, customs and practices associated with the application area

Notwithstanding the assertions in the application, the majority in Ward's case held that the right to maintain, protect, prevent the misuse of and transmit to others their cultural knowledge, customs and practices associated with the application is not a native title right and interest which can be recognised in a determination of native title: see [666]. Therefore, I am not satisfied that this right is prima facie capable of being established.

(j) to determine and regulate membership of, and recruitment to, a landholding group

The application provides information on the traditional laws and customs governing membership of, and recruitment to, the native title claim group and describes the differing roles and responsibilities of members recruited to the group (Schedule A, (1) and (3), Schedule F, par (10) to (13), and Schedule G, pars (l), (m), (p) and (q)). However, it does not appear to satisfy the criterion set out in Ward's case mentioned above as, prima

facie, it does not seem to describe activities which involve physical presence on the land or activities on the land associated with traditional social and cultural practices. It may be possible to characterise this right as involving such activities but there is nothing before me to support such a characterisation. Therefore, I am not satisfied that this right is prima facie capable of being established.

Conclusion

I am satisfied the rights and interests claimed above numbered (a) to (f) inclusive and (h) are, prima facie, capable of being made out. I am not satisfied with respect to the rights and interests numbered (g), (i) and (j).

190B(7)	<p><i>Traditional physical connection:</i></p> <p><i>The Registrar must be satisfied that at least one member of the native title claim group:</i></p> <p><i>currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or</i></p> <p><i>previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to land or waters) by:</i></p> <ul style="list-style-type: none">• <i>the Crown in any capacity; or</i>• <i>a statutory authority of the Crown in any capacity; or</i>• <i>any holder of a lease over any of the land or waters, or any person acting on behalf of such holder of a lease.</i>
----------------	---

Reasons for Decision

It is my view there is sufficient information provided in the application (particularly in Schedules F, G and M), to enable me to be satisfied that members of the claim group have a traditional physical connection with the application area.

Requirements are met.

190B(8)	<p><i>No failure to comply with s61A:</i></p> <p><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that, because of s61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.</i></p>
----------------	--

Reasons for the Decision

S 61A(1) – Native Title Determination

The National Native Title Register shows no approved determinations of native title for the application area and the application therefore complies with s.61A(1).

S 61A(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).

S 61A(3) - Previous Non-exclusive possession Acts

The native title rights and interests claimed in relation to previous non-exclusive possession acts attributable to the Commonwealth or the Territory have been limited as required by s.61A(3), by virtue of Schedule E(3). The application therefore complies with s.61A(3).

S61A(4) – s. 47, 47A 47B

The applicant states in Schedule L of the application the area claimed is vacant Crown Land and claim the benefit of s.47B of the NTA. I am required to ascertain whether this is an application that should not have been made because of the provisions of s 61A. In my opinion, the applicants' statement with respect to the provisions of that section is sufficient to meet the requirements of s 190B(8).

Conclusion

Requirements are met.

190B(9)(a)	<p><i>Ownership of minerals, petroleum or gas wholly owned by the Crown:</i> <i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i></p> <p><i>(a) to the extent that the native title rights and interests claimed consist or include ownership of minerals, petroleum or gas - the Crown in right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas;</i></p>
-------------------	---

Reasons for the Decision

<p>Schedule Q of the application states that the claimants do not claim ownership of minerals, petroleum or gas wholly owned by the Crown.</p> <p>It is sufficient under this condition to consider only whether there is any claim to ownership of minerals, the application meets the requirements of s.190B(9)(a).</p>

190B(9)(b)	<p><i>Exclusive possession of an offshore place:</i></p> <p><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i></p> <p><i>(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;</i></p>
-------------------	---

Reasons for the Decision

Schedule P of the application does not provide details of any claim by the native title claim group for exclusive possession of all or part of an offshore place.

Paragraph 1 of that Schedule simply states “not applicable”, and this is obviously so because of the inland location of the application area.

No further consideration of the requirements of s.190B(9)(b) is necessary.

190B(9)(c)	<p><i>Other extinguishment:</i></p> <p><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i></p> <p><i>(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)).</i></p>
-------------------	--

Reasons for the Decision

Section 190B(9)(c) looks to events that may have extinguished native title other than those described as previous exclusive possession acts defined in s.23B.

There is no general formula in the application that provides for the exclusion from the claim land and waters subject to “other extinguishment”.

Further, there is no other documentation showing that – apart from areas excluded as affected by previous exclusive possession acts – there are other areas claimed that cannot be claimed because native title has been extinguished.

I therefore find that the application meets the requirements of s.190B(9)(c).

End: S190A Reasons for Decision