National Native Title Tribunal

Registration test decision

Application name	Hutt River
Name of applicant	Sandy Davies, David Drage Snr, Irene Kelly, Lindsay Councillor
NNTT file no.	WC2000/001
Federal Court of Australia file no.	WAD6001/2000

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

For the reasons attached, I am satisfied that each of the conditions contained in ss 190B and 190C are met. I accept this claim for registration pursuant to s 190A of the *Native Title Act 1993* (Cth).

Date of decision: 19 June 2017

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Heidi Evans

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 8 June 2017 and made pursuant to s 99 of the Act.

Reasons for decision

Introduction

[1] This document sets out my reasons, as the delegate of the Native Title Registrar (the Registrar), for the decision to accept the claim for registration pursuant to s 190A of the Act.

[2] The Registrar of the Federal Court of Australia (the Court) gave a copy of the Hutt River claimant application to the Registrar on 15 March 2017 pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[3] The Hutt River application was first accepted for registration pursuant to s 190A(6) and entered onto the Register of Native Title Claims on 7 July 2000. An amended application was filed in the Court on 14 December 2016, however before it was considered by the Registrar pursuant to s 190A, the application was again amended. This is the application that is now before me. The claim has remained on the Register since it was first accepted for registration.

[4] I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim. This is because the application has not been amended as a result of a Court order pursuant to s 87A, nor do the amendments to the application fall within the scope of those set out in s 190A(6A)(d).

[5] Therefore, in accordance with subsection 190A(6), I must accept the claim for registration if it satisfies all of the conditions in ss 190B and 190C of the Act. This is commonly referred to as the registration test.

Procedural and other conditions: 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.

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

[7] 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.

[8] In reaching my decision for the condition in s 190C(2), I understand that this condition is procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss 61 and 62. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s 190C(2)— *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16] and also at [35] to [39]. In other words, does the application contain the prescribed details and other information?

[9] It is also my view that I need only consider those parts of ss 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s 190C(2)). I therefore do not consider the requirements of s 61(2), as it imposes no obligations of this nature in relation to the application. I am also of the view that I do not need to consider the requirements of s 61(5). The matters in ss 61(5)(a), (b) and (d) relating to the Court's prescribed form, filing in the Court and payment of fees, in my view, are matters for the Court. They do not, in my view, require any separate consideration by the Registrar. Paragraph 61(5)(c), which requires that the application contain such information as is prescribed, does not need to be considered by me under s 190C(2). I already test these things under s 190C(2) where required by those parts of ss 61 and 62 which actually identify the details/other information that must be in the application and the accompanying prescribed affidavit/documents.

[10] Below I consider each of the particular parts of ss 61 and 62, which require the application to contain details/other information or to be accompanied by an affidavit or other documents.

Native title claim group: s 61(1)

[11] A description of the persons comprising the native title claim group appears at Schedule A. It is only where, on the face of the application itself, it appears that the group described is a subgroup or part only of the actual native title claim group, or that persons of the group have been excluded, that the application will fail to satisfy this requirement – *Doepel* at [36].

[12] Having considered the description at Schedule A, in my view there is nothing to indicate that the description seeks to exclude persons of the group, nor does it appear that the group described is a subgroup or part only of the actual native title claim group.

[13] The application contains all details and other information required by s 61(1).

Name and address for service: s 61(3)

[14] This information appears in Part B of the Form 1.

[15] The application contains all details and other information required by s 61(3).

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

[16] My only concern at this condition is whether the application contains information identifying the members of the native title claim group in the terms prescribed – *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*) at [34]. It is not for me to consider the correctness of the information provided, or whether the description at Schedule A is 'sufficiently clear' – see *Wakaman* at [34] and *Gudjala People 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [31] and [32].

[17] As above, a description of the persons comprising the native title claim group, pursuant to s 61(4)(b), appears at Schedule A. The application contains all details and other information required by s 61(4).

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

[18] The required affidavits were not filed with the amended application. The previous application, filed in December 2016, was accompanied by four affidavits, one sworn by each of the applicant persons, and each containing statements addressing the matters prescribed by ss 62(1)(a)(i) to (v).

[19] It is my understanding that an amended application does not require fresh affidavits. In *Drury v Western Australia* [2000] FCA 132 (*Drury*), French J held that s 62(1)(a) 'is dealing with the position at the point of filing of the application', and that the sub-provision is 'not intended to cover amendment of applications'. His Honour found that, '[s]ection 62 does not, either expressly or by implication, convey a requirement that fresh affidavits have to be filed on the occasion of every amendment' – at [11].

[20] In light of French J's finding in *Drury*, I am of the view that this requirement is satisfied.

[21] The application is accompanied by the affidavit required by s 62(1)(a).

Details required by s 62(1)(b)

[22] Subsection 62(1)(b) requires that the application contain the details specified in ss 62(2)(a) to (h), as identified in the reasons below.

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

[23] A written description of the external boundaries of the application area appears in Attachment B to Schedule B. Information about those areas within the external boundaries that are excluded from the application area appears in Schedule B.

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

[24] A map showing the external boundary is contained in Attachment C to Schedule C.

Searches: s *62(2)(c)*

[25] Schedule D contains information about searches undertaken by the applicant.

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

[26] This description appears at Schedule E.

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

[27] This description appears at Schedule F.

Activities: s *62(2)(f)*

[28] A list of these activities appears at Schedule G.

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

[29] Schedule H contains information about other applications.

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

[30] Attachment I to Schedule I contains information about s 29 notices.

Conclusion

[31] The application contains the details specified in ss 62(2)(a) to (h), and therefore contains all details and other information required by s 62(1)(b).

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.

[32] It is only where there is a previous application satisfying all three criteria set out in ss 190C(3)(a) to (c), that the requirement for me to consider the possibility of common claim group members between the previous application and the current application is triggered – *Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

[33] The geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services division provides that there are no applications as per the Register of Native Title Claims that overlap any part of the current application. Therefore, as the first criterion at s 190C(3)(a) is not satisfied, I have not turned to consider the remaining criteria.

[34] I am satisfied that no person included in the native title claim group for the application was a member of the native title claim group for any previous application.

[35] The application satisfies the condition of s 190C(3).

Subsection 190C(4)
Authorisation/certification

Under s 190C(4) the Registrar/delegate must be satisfied that either:
(a) the application has been certified under Part 11 of the Act 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.

Note: The word ***authorise*** is defined in section 251B.

Under s 190C(4A), the certification of an application under Part 11 of the Act by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

[36] 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. Schedule R states that the application has been certified. The requirement at s 190C(4)(a) applies in these circumstances.

[37] The application satisfies the requirement at s 190C(4)(a) as it has been certified by the representative body that can certify the application under Part 11 of the Act.

[38] The requirement is that I am satisfied of the fact of certification by an appropriate representative body – *Doepel* at [78]. This is a two-pronged test. Firstly, does the representative body who certified the application have the appropriate powers to certify? And secondly, does the certification comply with s 203BE(4)?

[39] Schedule R states that the application has been certified by Yamatji Marlpa Aboriginal Corporation (YMAC). The geospatial assessment confirms that YMAC is the only representative body in relation to the application area.

[40] The certification is at Attachment R. It is dated 2 November 2011 and has been signed by the Chief Executive Officer of YMAC as representative for the body.

[41] From consideration of the Tribunal's national 'Representative Aboriginal and Torres Strait Islander Body Areas' map, on the Tribunal's website, I am aware YMAC is a recognized representative body pursuant to s 203AD of the Act. It follows that it has power to administer all the functions of a representative body, including certification of native title determination applications. Therefore, YMAC is an appropriate body who can certify the application.

[42] Section 203BE(4) sets out the requirements of a valid certification. Having considered the information within the certification, I am satisfied that it contains the statement required by s 203BE(4)(a) and the brief information supporting that statement pursuant to s 203BE(4)(b).

[43] The certification document does not speak to the requirement at s 203BE(4)(c). This requirement relates to action the representative body has taken to address overlapping claims. The geospatial assessment confirms that there are no claims overlapping the current application. Noting the wording of s 203BE(4)(c), 'where applicable', it is my view that as there are no overlapping claims, it is not crucial to the certificate's validity that it address the requirement. Therefore, the certification meets the requirements of s 203BE(4).

[44] Therefore, I am satisfied of the fact of certification of the application by the single representative body for the area.

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.

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

[46] As above, information describing the boundaries of the application area is contained in Attachment B to Schedule B. Those areas within the external boundary that are not included in the application area are set out by way of general exclusion clauses at Schedule B. My view is that this method of describing excluded areas does not prevent the description of the area from being 'reasonably certain' for the purposes of this condition – see *Strickland v Native Title Registrar* (*Strickland*) [1999] FCA 1530 at [50]-[55].

[47] Attachment B is titled 'External Boundary Description – Hutt River' and provides a written metes and bounds description of the application area boundary. It references the 12 nautical mile seaward limit and coordinate points. It specifically excludes the areas subject to five native title determination applications: WAD6136/1998 Nanda People, WAD6119/1998 Mullewa Wadjari Community, WAD6003/1998 Wajarri Yamatji, WAD6194/1998 Naaguja Peoples and WAD6002/2004 Amangu People.

[48] A map showing the external boundary of the application area is in Attachment C. It is titled 'WAD6001/2000 Hutt River WC2000/001' and includes:

- the application area depicted by bold blue outline;
- the 12 NM Territorial Sea Baseline depicted by a bold aqua line;
- the Nanda People claim depicted by dashed brown outline and hatched fill;
- the Naaguja Peoples depicted by dashed pink outline and pink hatched fill;
- scale bar, northpoint, coordinate grid; and
- notes relating to the source, currency and datum of data used to prepare the map.

[49] The geospatial assessment and overlap analysis provides that the map and description are consistent and identify the application area with reasonable certainty. Having considered the information before me about the application area, I agree with the assessment and am satisfied that the information allows for the boundaries of the area to be identified on the earth's surface.

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.

[50] The application satisfies the condition of s 190B(3).

[51] A description of the persons comprising the native title claim group appears at Schedule A. The requirement at s 190B(3)(b) is applicable in these circumstances. The description appears as follows:

> The claim is brought on behalf of the descendants of Sarah Feast.

[52] It is my understanding, therefore, that there is one criterion that governs whether an individual is a member of the group. That is, that person must be a descendant of Sarah Feast.

[53] While it may take some factual inquiry to determine at any one point in time who the persons are that comprise the native title claim group, in my view this is not fatal to the description at s 190B(3) – *Western Australia v Native Title Registrar* [1999] FCA 1591 (*WA v NTR*) at [67]. In *WA v NTR*, Carr J found a description involving the same criterion sufficiently clear for the purposes of this condition – at [67].

[54] I note that the description does not specify whether descent must be by biological means, or whether it includes descent by adoption. However, again, by engaging in some factual inquiry, such as consideration of the group's laws and customs around descent lines, I am satisfied that the members of the group could be identified. Section 190B(3) requires an assessment of the sufficiency of the description for allowing the reliable identification of the persons in the native title claim group – see *Wakaman* at [34] and *Doepel* at [51]. It does not require me to consider the correctness of the description – *Wakaman* at [34].

[55] Therefore I am satisfied that the persons in the group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

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.

[56] The application satisfied the condition of s 190B(4).

[57] The test of identifiability is whether the rights and interests described are understandable and have meaning – *Doepel* at [123]. It is my view that reference to the definition of 'native title rights and interests' in s 223(1) is also appropriate. A consideration of whether each individual right or interest satisfies the requirements of that definition, however, I have reserved for the task at s 190B(6) as to whether rights and interests can be prima facie established. I undertake this assessment at that condition below.

[58] The description of the rights and interests claimed appears at Schedule E as follows:

> The native title rights and interests claimed are the rights to possession, occupation, use and enjoyment as against the whole world (subject to any native title rights and interests which may be shared with any others who establish that they are native title holders) of the area, and in particular comprise:
>
> (a) Right to possess, occupy, use and enjoy the area;
> (b) The right to make decisions about the use and enjoyment of the area;
> (c) The right of access to the area;
> (d) The right to control the access of others to the area;
> (e) The right to use and enjoy resources of the area;
> (f) The right to control the use and enjoyment of others of resources of the area;
> (g) The right to trade in resources of the area;
> (h) The right to receive a portion of any resources taken by others from the area;
> (i) The right to maintain and protect places of importance under the traditional law, customs and practices in the area; and
> (j) The right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area.

[59] Following this list are five paragraphs setting out limitations on the rights and interests claimed. These include that exclusive possession is not claimed over areas where a previous non-exclusive possession act has been done, and that the rights and interests are not claimed to the exclusion of any other rights or interests validly created by the laws of the State or Commonwealth or by the common law.

[60] From this information, it is my understanding that the native title claim group claims a right of exclusive possession over areas where that right can be claimed (ie, where there has been no previous exclusive possession act or previous non-exclusive possession act, or where native title has not been extinguished). Where it cannot be claimed, the native title claim group claim the rights set out at (a) to (j).

[61] In my view, this description is clear and easily understood. I consider the rights and interests to have meaning as native title rights and interests. Having read the list of rights and interests claimed and the limitations that follow, there is nothing ambiguous in the description.

[62] Therefore, I am satisfied that the description is sufficient to allow the native title rights and interests to be readily identified.

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.

[63] The application satisfies the requirement at s 190B(5). The factual basis is sufficient to support all three assertions at ss 190B(5)(a), (b) and (c).

[64] At this condition, I am to 'address the quality of the asserted factual basis for [the] claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests' – *Doepel* at [17]. I am not to 'test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence', as this is the role of the Federal Court – *Doepel* at [17].

[65] Section 62(2)(e) requires only a 'general description' of the factual basis. However, where the facts provided are not at a sufficient level of detail to enable a genuine assessment of the application by the Registrar, the application may not be able to satisfy the condition. The material must comprise 'more than assertions at a high level of generality' – *Gudjala People 2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala 2008*) at [92].

[66] To satisfy the condition, therefore, the material must contain sufficient details addressing the particular native title, claimed by the particular native title claim group, over the particular land and waters of the application area – see *Gudjala People 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [39].

[67] Through reliance on the statements contained in the affidavits sworn by the applicant persons pursuant to s 62(1)(a) and accompanying the original application that they believe the statements contained in the application to be true, I have accepted the asserted facts as true – *Gudjala 2008* at [91] to [92].

[68] The factual basis material is found in Schedules F and G, and in additional material supplied by the applicant to the Registrar for the purposes of applying the registration test to the

claim on 5 May 2017. This additional material consisted of a cover letter, and a statement by an anthropologist employed by YMAC with various annexures (the anthropologist statement).

[69] I consider each of the three assertions set out in the three paragraphs of s 190B(5) in turn in my reasons below.

Reasons for s 190B(5)(a)

[70] The application satisfies the condition at s 190B(5)(a), as the factual basis is sufficient to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the application area.

[71] The case law indicates that the following is required at this condition:

- material supporting an association of the group as a whole presently with the area – *Gudjala 2007* at [51] and [52];
- material supporting an association of the predecessors of the whole claim group with the area over the period since sovereignty, or at least European settlement – *Gudjala 2007* at [51] and [52];
- it is not necessary for the factual basis to support an association of all members of the group with the area at all times – *Gudjala 2007* at [52];
- material supporting the association of the group presently, and of the group's predecessors, as being with the whole of the area – *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [23] to [26].

Is there a sufficient factual basis for the 'association' assertion at s 190B(5)(a)?

[72] I am satisfied that the factual basis is sufficient to support an assertion that the predecessors of the group had an association with the area. The information contained in the anthropologist statement gives specific and direct examples of the association of a number of predecessors of the claim group with parts of the application area.

[73] The anthropologist statement provides that the application area was traditionally a shared boundary area between two socio-linguistic groups, the Naaguja and Nanda. Addressing the pre-settlement period, the anthropologist statement refers to ethno-historical sources, such as the recorded observations of early settlers and explorers in the area, which support the presence of Aboriginal people in the region comprising the claim area. Annexure AV-2 states that Bates, in 1908 located the 'Ngoogooja' in the area between Geraldton and the Bowes River mouth. It further states Brown in 1913 and Connelly in 1932 as having identified the Nanda tribe on the coast in the area between Northampton and north to the Murchison River.

[74] According to the anthropologist statement, settlement in the area occurred in the 1850s. Regarding the group's apical ancestor Sarah Feast, it states that she was born circa 1861, and through ethno-historical sources is known to have had a physical association with Bowes River

Station, Northampton, Nolba, Lynton Station and Geraldton. Her Aboriginal mother is stated as being born circa 1841 and having been in occupation of the claim area at the time of settlement. In my view this material is sufficient to support an assertion that the predecessors of the group were associated with the area at settlement.

[75] The anthropologist statement contains further information in support of an association of the group's predecessors with the area since that time. For example, it states that historical records indicate a number of the eight children of Sarah Feast and John Yoona Councillor were born and lived at places within the application area. The anthropologist statement also names deceased claim group members who described their country as comprising parts of the application area, such as Bowes Homestead and the area east of Isseka, and Nabawa and Yuna. One of these individuals is identified as the granddaughter of Sarah Feast.

[76] From this information, I am satisfied that the factual basis is sufficient to support an assertion that the predecessors of the group has an association with the area over the period since sovereignty.

[77] The factual basis material is also sufficient to support an assertion of an association of the group presently with the area. The anthropologist statement explains that the native title claim group comprises three contemporary family groups: the [names removed] families. It goes on to provide a number of examples of the present physical association that members of these families have with different parts of the application area. For example, it states that three particular claimants regularly visit two important sites in the claim area, namely Willigulli art site at the Bowes River mouth and Mulyga Munga 'Man Rock' in Chapman Valley to make sure these places are 'looked after and respected'.

[78] Another example is where the anthropologist statement states that another claimant has always hunted and camped in parts of the claim area, and fished along the coast at places such as Willigulli, Lucky Bay and Coronation Beach. It states that another three claimants collect bush foods such as *bimba* (jam tree) and *anowara* (bush potato) around many of the hilly outcrops in the claim area, such as Elephant Hill.

[79] The claimants named are from each of the family groups identified in the material as comprising the native title claim group. From this information, I am satisfied that the factual basis is sufficient to support an assertion that the group as a whole presently has an association with the area.

[80] Throughout the material addressing the claim group's and its predecessors' association with the area, various places are named. These are places where the claimants and their predecessors have lived, been born, worked and carried out activities required by their laws and customs. Annexed to the anthropologist statement at AV-1 is a map showing the location of all of

the places named in the material. Having considered the information contained in this map, I am satisfied that the factual basis is sufficient to support an assertion that the association of the group and its predecessors relates to the application area as a whole.

[81] In light of my reasoning above, it follows that I am satisfied the factual basis is sufficient to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the application area.

Reasons for s 190B(5)(b)

[82] I am satisfied that the requirement at s 190B(5)(b) is met, as the factual basis is sufficient to support an assertion that there exist traditional laws acknowledged by and traditional customs observed by, the native title claim group giving rise to the claim to native title.

[83] The case law indicates the following is required of the material at s 190B(5)(b):

- information supporting the existence of a society of people living in the area at sovereignty, or at least European settlement, acknowledging laws and customs of a normative character – *Gudjala 2007* at [63];
- an explanation of how the laws and customs of the claim group are 'traditional', that is, how they have been passed down through the generations to the claim group and how they are rooted in the laws and customs of a society at sovereignty – *Yorta Yorta* at [46] and *Gudjala 2009* at [72];
- an explanation of the link between the claim group described in the application and the area covered by the application, which may require identification of a link between the apical ancestors named in Schedule A, and the society at sovereignty – *Gudjala 2007* at [66] and [81];
- evidence of the claim group's acknowledgement and observance of laws and customs in relation to the claim area – *Gudjala 2009* at [74].

Does the factual basis address the identity of a pre-sovereignty society in the area?

[84] I am satisfied that the factual basis is sufficient to support an assertion of a society at settlement acknowledging and observing laws and customs in the application area. I have summarised below the information before me that I have relied on in reaching this view.

[85] The anthropologist statement provides that 'effective sovereignty' in the application area occurred in the late 1850s, and that during the period 1860 to 1900 a number of explorers and surveyors passed through the region recording their observations of Indigenous occupation of the Bowes River district. It further states that the town of Northampton, within the claim area was established in 1864. From this information, it's my understanding that European settlement in the area took place in the mid to late 1860s.

[86] The anthropologist statement (at [25] to [27]) sets out the following evidence taken from ethno-historical sources addressing the laws and customs of the society at settlement:

- coastal middens found in the claim area today provide archaeological and historical evidence of the occupation of the area by Aboriginal people;
- in 1841 the Aboriginal occupants of the area were observed using natural resources such as the native yam, collecting seafood including abalone, and camping in the area;
- also in 1841 the Aboriginal people of the claim area were observed using resources to make kangaroo skin cloaks, clay villages and yam beds;
- in the 1850s they were observed using edible roots for food;
- spiritual and religious practices including ceremonial gatherings and rituals associated with death and burial were observed in 1865 – practices extended to avoidance of graves and areas associated with 'spirit demons', and calling out to spirits before entering an area.

[87] Specific ethno-historical sources are identified in Annexure AV-2 of the anthropologist statement. For example, section 1.1 of Annexure AV-2 provides that Oldfield in 1865 provided data demonstrating that Aboriginal groups occupying the region from Geraldton to Shark Bay have laws and customs associated with social and spiritual aspects of life, as well as a distinct land tenure system. In 1839, Grey observed Aboriginal people about 18km from the Hutt River valley utilising native yams. In 1908, Bates reported overlapping territorial affiliations and intermingling between the 'Ngoogooja' and Nanda socio-linguistic groups in the region including the application area. Elsewhere, the anthropological statement provides that the application area was traditionally a shared boundary area between these two groups, the Naaguja and Nanda.

[88] Further regarding the land tenure system of the society at settlement, the anthropologist statement provides ethno-historical sources indicate that this system most likely involved local estate groups where membership was attained and recognised through certain types of descent.

[89] I note that the dates of the sources included in the material are around the time of, or in the decades immediately following, settlement in the area. Therefore, I consider it reasonable to infer that these observations provide an accurate description of the society at settlement.

[90] Therefore, I understand that the society at sovereignty comprised local estate groups who inherited rights and interests in the area by way of descent. It's also my understanding that these local estate groups comprised persons who identified as one of either the Naaguja or Nanda socio-linguistic groups. These socio-linguistic groups shared cultural responsibilities and rights and interests across the area covered by the application. From the material, therefore, I accept that the members of the society at settlement were united by laws and customs which provided for their sole entitlement to rights and interests in the claim area on the basis of descent.

Does the factual basis explain the links between the pre-sovereignty society, the claim group and their apical ancestors?

[91] I am satisfied that the factual basis explains the links between the society at settlement, the claim group and their ancestors.

[92] The anthropologist statement provides that the apical ancestor of the native title claim group, Sarah Feast, was born circa 1861. It provides that her mother was an Aboriginal woman from the Geraldton district born circa 1841. From this, I understand the material to assert that Sarah Feast was born around the time of settlement, and was therefore a member of the society at settlement, as was her mother.

[93] The anthropologist statement explains that the members of the Hutt River native title claim group claim native title in the area on the basis of cognatic descent from Sarah Feast. I understand 'cognatic descent' to mean that descent can be traced through either male or female predecessors. It states that ethno-historical sources imply that Sarah Feast was a member of the local estate groups living in the area at the time of settlement in the area.

[94] Regarding a link with the society at settlement, the statement further provides that some members of the claim group identify as the Naaguja socio-linguistic group, while others identify as Nanda. From this, I am satisfied the factual basis addresses the links between the society at settlement, the apical ancestors, and the native title claim group.

Does the factual basis address 'traditional laws and customs'?

[95] The factual basis addresses laws and customs of the claim group today that are 'traditional'. It contains detailed information about the laws and customs acknowledged and observed by the claim group today. In light of the facts about the laws and customs of the society at settlement, this information allows me to consider that these laws and customs are rooted in those of the society at settlement.

[96] Schedule F states that laws and customs have been passed by traditional teaching, through the generations down to the claimants today. Evidence of this pattern of teaching today is given in the anthropologist statement. For example, it provides that current claimants such as [names removed] were taught by their elders that an important aspect of caring for the spiritual and natural resources of the claim area involves the cleaning and maintaining of specific waterholes, including Wheelara rock hole and Wanerenooka spring. It also provides that before he passed away, another claimant taught his children and grandchildren how to collect bush food in the claim area.

[97] It's my view that in the material, there are a number of aspects of the laws and customs of the claim group today that mirror aspects of the laws and customs of the society at settlement. For example, there are a number of statements about claimants using resources in the claim area. The anthropologist statement provides:

> Senior claimants [names removed] all regularly take their children and grandchildren around the town of Northampton, and along the Bowes River, to collect bush tucker. They do this throughout

> the year, but particularly during the winter and early fall, when bush foods such as wild mushroom and *ajico* (bush yam) are plentiful – at [36].

[98] As above, the material includes recorded observations around the time of settlement of Aboriginal people in the application area gathering natural products such as native yam. From the material, I understand claimants consider it their right, pursuant to their laws and customs, to take these resources.

[99] Another example of an aspect of the system of laws and customs of the claim group that mirrors an aspect of the society at settlement, is in the way claimants assert rights in and over the application area. The anthropologist report states:

> Claimants such as [names removed] continue to access places of significance in the claim area such as Lucky Bay, an important camping and fishing place for the [names removed] families. These individuals and their families continually assert the right to access places of significance in the claim area and to be consulted about appropriate land use activities for the area – at [49].

[100] The material above talks about the way in which the society at settlement observed a system of land tenure whereby local descent groups possessed rights and interests in the claim area. It is my understanding that the claimants today assert their rights of access and rights to control the activities undertaken within the area pursuant to their laws and customs. I consider I can infer that this is the same system of laws and customs acknowledged and observed by the society at settlement which gave those persons primary rights of occupation and use of the claim area, and which has been passed down to the claimants today.

[101] A further example of an aspect of the laws and customs today that appear to mirror the laws and customs of the society at settlement is in the spiritual beliefs of the claimants. The anthropologist statement provides:

> The serpent is a spiritual creature associated with water courses. Claimants let the snake/serpent know that they are accessing particular waterholes by a combination of behaviours. For example, [name removed] was always told by her mother to throw sand into the waterhole to warn the snake. Other claimants also shout out and talk to the water serpent as they enter to introduce themselves – at [46].

[102] The material explains above how records of early settlers in the application area included that the Aboriginal persons observed practices such as calling out to spirits before entering an area. Again, I consider that I can infer the system of laws and customs pursuant to which claimants acknowledge the spiritual presences in the area today is the system passed down to them by their predecessors.

[103] Noting the similarities in these aspects of the system of laws and customs at settlement and the system today, I consider I can infer that it is pursuant to a system of laws and customs that is

rooted in the system of the society at settlement, passed down to the claimants through the generations, that they continue to use the resources of the area, assert rights of occupation and access to the area, and observe spiritual practices in the area.

[104] I note that there are relatively few generations separating the claimants today with apical ancestor Sarah Feast. For example, the anthropologist statement refers to elder [name removed] as being a grandchild of John Jack 'Warran'guree' Councillor. Jack 'Warran'guree' Councillor is elsewhere identified as one of Sarah Feast's sons. Therefore, I understand that only three generations separate this elder from apical ancestor Sarah Feast. In my view, this provides support for the inference I have made regarding the system of laws and customs and it being rooted in the laws and customs of the society at settlement.

[105] In light of these examples, I am satisfied that the factual basis material addresses 'traditional' laws and customs acknowledged and observed by the claim group today.

[106] It follows that I am satisfied that the factual basis is sufficient to support an assertion that there exist traditional laws acknowledged by and traditional customs observed by, the native title claim group giving rise to the claim to native title.

Reasons for s 190B(5)(c)

[107] The application satisfies the condition of s 190B(5)(c) because the factual basis is sufficient to support an assertion that the native title claim group have continued to hold their native title in accordance with the group's traditional laws and customs.

[108] The case law indicates the following matters must be addressed by the factual basis at this condition of the registration test:

- that there was a society at settlement that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed to the claim group;
- that there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement – Gudjala 2007 at [82].

[109] I have already discussed above at s 190B(5)(b) the reasons for which I am satisfied the factual basis is sufficient to support an assertion of a society at settlement in the area acknowledging and observing laws and customs from which the present laws and customs are derived. I have also explained in my reasons the way the factual basis speaks about the passing down of knowledge about laws and customs to successive generations and how claim group members today continue this pattern of teaching.

[110] In my view, the factual basis addresses continuity in the acknowledgment and observance of laws and customs. One example of this type of material is where the anthropologist statement

describes the on-going physical association of a number of descendants of Sarah Feast's son, Warran'guree Jack Councillor.

[111] According to the anthropologist statement, [name removed], elder of the claim group, was born in Northampton. This was also the traditional country of[name removed]'s grandfather Warran'guree Jack Councillor. As a young person, [name removed] would regularly camp, hunt and fish at places within the claim area with her father and grandfather. In the anthropologist statement it explains that [name removed]was taught her laws and customs by her parents and her grandparents, including how to appease spirits within the area to avoid harm. It states that [name removed] and her family have a strong attachment to particular sites within the claim area that they continue to visit regularly.

[112] I have discussed above my understanding that there are only three generations separating the members of the claim group from the group's apical ancestor Sarah Feast. From the information above, I accept that laws and customs, such as those surrounding access and use of resources within the claim area, the importance of protecting significant sites, and employing particular behaviours to avoid harm from spirits in the area, have been passed down through the generations to the claim group today. I consider it reasonable to infer that these laws and customs were first passed from Sarah to her son, Warran'guree Jack Councillor, and then he in turn passed these laws and customs to his grandchildren, including [name removed]. It is clear, in my view, that the passing on of laws and customs involved physical instruction on the land and waters of the claim area. In this way, I understand that laws and customs and the activities associated were acknowledged and observed by each generation on their traditional country. From the material, I further understand that [name removed] has passed these laws and customs onto her own descendants, such that they continue to be acknowledged and observed today within the area.

[113] It follows, therefore, that I am satisfied the factual basis supports continuity in the acknowledgment and observance of traditional laws and customs, and that the claim group and its predecessors have continued to hold their native title in accordance with those laws and customs.

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.

[114] The native title rights and interests that I consider can be prima facie established are set out below:

- the right of access to the area;
- the right to use and enjoy resources of the area;

- the right to maintain and protect places of importance under traditional law, customs and practices in the area.

[115] As per my reasons above at s 190B(4), I have approached them as non-exclusive rights and interests.

[116] The condition at s 190B(6) will be met even if only some of the native title rights and interests claimed can be prima facie established – see *Doepel* at [16].

[117] The case law indicates the test at s 190B(6) requires 'some measure of the material available in support of the claim' – *Doepel* at [126]. In applying the standard of 'prima facie', I am to consider that 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis' – *Doepel* at [135].

[118] In undertaking the task at this condition, I have also considered whether each right or interest satisfies the definition of 'native title rights and interests' at s 223(1). That is, does the material provide prima facie support for the right or interest as one that is:

- held pursuant to the traditional laws and customs of the native title claim group;
- a right or interest in relation to land or waters; and
- recognised by the common law of Australia.

[119] Where a right or interest does not meet the requirements of that definition, it is my view that it cannot be, prima facie, established at s 190B(6).

[120] I have addressed the material in support of each right or interest claimed below.

Consideration

Right to exclusive possession

[121] I do not consider this right can be established on a prima facie basis as there is insufficient information before me that speaks to a right of this nature.

[122] The nature of a native title right to exclusive possession was discussed in *Western Australia v Ward* [2002] HCA 28 (*Ward*), where the High Court held that:

> A core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'. It is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others – at [88].

[123] Since *Ward*, the following principles have emerged from the case law, indicating what the material may need to address in providing prima facie support for a right of exclusive possession:

- a native title right to exclusive possession includes the right to make decisions about access to and use of the land by others – *Sampi v State of Western Australia* [2005] FCA 777 at [1072];
- the right cannot be formally classified as proprietary - its existence depends on what the evidence discloses about its content under traditional law and custom – *Griffiths v Northern Territory* [2007] FCAFC 178 (*Griffiths*) at [71];
- the material must speak to how, pursuant to their laws and customs, the group is able to 'exclude from their country people not of their community', acting as 'gatekeepers for the purpose of preventing harm and avoiding injury to country' – *Griffiths* at [127].

[124] The information I have before me that speaks to these matters is minimal. Schedule F states that the native title claim group and their predecessors have, pursuant to their laws and customs, possessed, occupied, used and enjoyed the application area. The anthropologist statement gives some information about the group's laws and customs surrounding territorial rights and interests. For example, it provides that the traditional land tenure system involved local estate groups where membership was attained and recognised through descent – see at [28].

[125] The anthropologist statement does not, however, include any information about an exclusive nature of the rights and interests held by these local estate groups. There is no information that suggests laws and customs allowed them to exclude non-members from their local estate, or that others had to seek the landholders' permission to access that local estate. My view is that this general information about the land tenure system does not address a prima facie right held by the group to be asked permission to access their country.

[126] In stating a number of aspects of the laws and customs, the anthropologist statement provides that the group's laws and customs give rise to native title rights and interests including the right to 'make decisions about the occupation and use of the claim area'. There is no further information, or detail given of the exercise of this right. There is nothing which explains or describes how particular claim group members have made these decisions. In my view, this general statement within the anthropologist statement is insufficient for me to consider the right, prima facie established.

[127] The anthropologist statement talks about a common belief held by claimants that 'failing to follow social rules or use resources appropriately can lead to unfortunate experiences' and that 'people who act improperly there will risk spiritual reprisal' – at [45]. This and further information within the anthropologist statement suggests claimants adopt certain behaviours and practices to ensure they do not come to any harm from spiritual forces in the area. There is, however, no information describing how claimants seek to exclude others for the purposes of preventing harm to their country and/or upsetting its spiritual forces.

[128] While the material does speak to actions taken by claimants to protect and maintain sites and places within the claim area, there is nothing to indicate that they achieve this end by excluding persons not of their community. Similarly, there is no information that talks about

decisions being made by members of the claim group, or any measure of control the group has exercised, to regulate the access of non-claim group members to the claim area.

[129] It follows that I do not consider a right to exclusive possession, prima facie, established.

Right to possess, occupy, use and enjoy the area

[130] I do not consider the non-exclusive right to possess, occupy, use and enjoy the area is prima facie established.

[131] As I have explained in my reasons above at s 190B(4), my understanding of the rights and interests claimed in Schedule E is that where exclusive possession cannot be prima facie, established, the native title claim group claim the rights in a) to j) of that description as non-exclusive rights.

[132] In *Ward*, in discussing the nature of an exclusive native title right, the High Court held that 'possession, occupation, use and enjoyment to the exclusion of all others' is a composite expression, and 'to break the expression into its constituent elements is apt to mislead' – at [89]. In my view, the right expressed as a right to possess land, occupy land, use land and enjoy land is an exclusive right. To express that right as a non-exclusive right is 'apt to mislead'. It follows that I do not consider the right to possess, occupy, use and enjoy the area, prima facie, established.

Right to make decisions about the use and enjoyment of the area

[133] I do not consider the non-exclusive right to make decisions about the use and enjoyment of the area is prima facie established.

[134] I understand that the right to make decisions about the use and enjoyment of an area is a right that involves the exercise of a measure of control by the members of the claim group over the claim area. In *Ward*, comments by the High Court indicate that that particular measure of control over land is to be equated with an exclusive native title right. It is my view, therefore, that the right as termed is of the nature of an exclusive right, rather than a non-exclusive right, and on that basis it cannot be prima facie established.

Right of access to the area

[135] I consider the non-exclusive right of access to the area is, prima facie, established.

[136] The anthropologist statement talks in detail of the way claimants and their predecessors were born within the claim area, have lived and worked within the area, and continue to visit places within the area to fish, hunt and check on important sites. For example, it provides that John Jack Warran'guree Councillor (son of apical ancestor Sarah Feast) would take his grandchildren out camping and hunting in the application area, and that he worked as a jockey and horse trainer in his traditional country around Northampton. Elsewhere the anthropologist statement refers to ethno-historical sources which identify the ancestors of the claim group as the

Aboriginal persons of the Nanda and Naaguja socio-linguistic groups who occupied the claim area around sovereignty.

[137] In light of this information, I consider the right of access to the area is prima facie, established.

Right to control the access of others to the area

[138] I do not consider the right to control the access of others prima facie, established.

[139] Again, it is my view that this right necessarily involves a measure of control of the claim group over the area, which is characteristic of an exclusive right. It follows that I do not consider the non-exclusive right to control the access of others to the area, prima facie, established.

Right to use and enjoy the resources of the area

[140] I consider the right to use and enjoy the resources of the area, prima facie, established.

[141] The anthropologist statement contains various information addressing this right. For example, it provides that certain claimants regularly go to Williguli and Coronation Beach for fishing, crayfish diving and to collect oysters from nearby shoals. Elsewhere, the anthropologist statement explains that coastal middens within the claim area today offer archeological evidence of the use of shellfish by the claimants' predecessors occupying the area prior to settlement.

[142] From this information, I consider the right of the claim group to use and enjoy the resources of the area, prima facie, established.

Right to control the use and enjoyment of others of resources of the area

[143] I do not consider the right to control the use and enjoyment of others of resources of the area prima facie established.

[144] Again, where a right involves some measure of control held by the claim group over the area, it is my view that such a right is of the nature of an exclusive right, rather than a non-exclusive native title right. Consequently, I do not consider this non-exclusive right prima facie established.

Right to trade in resources of the area

[145] I do not consider a right to trade in resources of the area, prima facie, established.

[146] There is no information before me that speaks of this right that would allow me to consider it prima facie, established. One reference is made within the anthropologist statement to claimants 'exploiting the shellfish resources of offshore reefs and shoals', however there is no further detail given of ways in which these resources are exploited, and nothing to suggest this exploitation involved trade.

Right to receive a portion of any resources taken by others from the area

[147] I do not consider a right to receive a portion of any resources taken by others from the area, prima facie, established.

[148] While there are a number of references within the anthropologist statement to the taking of resources from the area by members of the claim group and their predecessors, there is no information before me addressing this particular right. That is, there are no examples given of this right being exercised, and no information that suggests there are circumstances where pursuant to their laws and customs claimants are entitled to receive a portion of any resource taken by another within the claim area.

Right to maintain and protect places of importance under traditional law, customs and practices in the area

[149] I consider the right to maintain and protect places of importance under traditional law, customs and practices, prima facie, established.

[150] There are a number of examples of this right given in the material. For example, the anthropologist statement provides that two particularly important sites within the claim area are the Williguli art site and Mulya Munga 'Man Rock' in Chapman Valley. It states that certain claimants 'visit these two places on a regular basis to make sure they are looked after and respected' – at [31]. Elsewhere, the anthropologist statement refers to claimants' explanations of the importance of maintaining waterholes as taught by their elders – at [31].

[151] In light of this type of information contained in the material, I consider the right to maintain and protect places of importance under traditional law, customs and practices in the area, prima facie, established.

Right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area

[152] I do not consider the right to maintain, protect and prevent the misuse of cultural knowledge associated with the area, prima facie, established.

[153] There is no information that explains what is involved in the exercise of this right, or that provides an example of the exercise of the right. There is nothing to suggest that the group's laws and customs give rise to this particular right. The anthropologist statement provides that one claimant has knowledge of important sites that he has passed onto his sons, which I can infer constitutes 'cultural knowledge'. However, there is no information explaining how this information is protected, nor is there information about the actions taken by claimants to prevent the misuse of such information.

Conclusion

[154] The application satisfies the condition of s 190B(6).

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.

[155] The application satisfies the condition at s 190B(7) because I am satisfied that at least one member of the native title claim group has a traditional physical connection with part of the application area. That claim group member is [name removed].

[156] The following principles have emerged from the case law about what is required at s 190B(7):

- the material must satisfy the delegate of particular facts;
- evidentiary material is, therefore, required; and
- the focus is confined to the relationship of at least one member of the native title claim group with some part of the claim area – *Doepel* at [17];
- the physical connection must be shown to be in accordance with the traditional laws and customs of the claim group – *Gudjala 2007* at [89];
- the material may need to address an actual presence on the area – *Yorta Yorta* at [184].

Is there evidence that a member of the claim group has a traditional physical connection with some part of the claim area?

[157] The anthropologist statement provides the following information about claim group elder, [name removed]:

- he grew up around Northampton, the traditional country of his grandfather;
- as a child, he regularly camped at certain places within the claim area, and he continues to visit these areas today;
- he has knowledge of significant sites which he has passed onto his sons;
- he visits these sites to ensure they are looked after and respected;
- he continues to visit waterholes within the claim area to clean them and maintain them in the way his elders taught him;
- he and his family fish and collect shellfish along the coastal strip of the claim area;
- he takes efforts to ensure the maintenance of species within the claim area, choosing game that will not cause depletion of populations.

[158] From this information, I accept that throughout his life [name removed] has spent, and continues to spend, a considerable amount of time within the claim area. The material explains that [name removed]'s knowledge of his country, and laws and customs in relation to it, such as laws and customs around maintaining waterholes, was passed down to him by his elders. I have explained above at s 190B(5)(b) the way in which the material supports the intergenerational transfer of knowledge as a key element of the system of laws and customs observed.

[159] I have also explained at s 190B(5)(b) above my understanding from the material of the way those laws and customs provide for the claimants' use of resources within the claim area. The information above describes the way [name removed]continues to access and take those resources for his use.

[160] It follows, therefore, that I consider [name removed]'s physical connection is one held pursuant to the traditional laws and customs of the claim group.

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.

Section 61A provides:

(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.

(2) If:

(a) a previous exclusive possession act (see s 23B) was done in relation to an area; 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 provision as mentioned in s 23E in relation to the act;

a claimant application must not be made that covers any of the area.

(3) If:

(a) a previous non-exclusive possession act (see s 23F) was done in relation to an area; 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 provision as mentioned in s 23I in relation to the act;

a claimant application must not be made in which any of the native title rights and interests claimed confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.

(4) However, subsection (2) or (3) does not apply to an application if:

(a) the only previous exclusive possession act or previous non-exclusive possession act concerned 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 section 47, 47A or 47B, as the case may be, applies to it.

[161] In the reasons below, I look at each part of s 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

Section 61A(1)

[162] Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title. The geospatial assessment provides that there are no determinations of native title covering any part of the application area at 16 March 2017. I have produced an overlap analysis, of today's date, which confirms that there have not been any changes in this regard since that date.

Section 61A(2)

[163] Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply. Paragraph two of Schedule B states that any areas in relation to which a previous exclusive possession act was done are excluded from the claim.

Section 61A(3)

[164] Section 61A(3) provides that an 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 previous non-exclusive possession act was done, unless the circumstances described in s 61A(4) apply. Paragraph (iii) of Schedule E provides that the applicant does not make a claim to exclusive native title rights and interests in respect of any areas in relation to which a previous non-exclusive possession act was done.

Conclusion

[165] In my view the application does not offend any of the provisions of ss. 61A(1), 61A(2) and 61A(3) and therefore the application satisfies the condition of s 190B(8).

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.

[166] I consider each of the subconditions of s 190B(9) in my reasons below.

Section 190B(9)(a)

[167] Schedule E states '[t]o the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicant'.

Section 190B(9)(b)

[168] Schedule E also states that to the extent the native title rights and interests claimed relate to waters in an offshore place, those rights and interests are not to the exclusion of other rights and interests validly created by a law of the Commonwealth or State of Western Australia, or accorded under international law.

Section 190B(9)(c)

[169] Schedule B provides that the applicant excludes from the claim any area in relation to which native title rights and interests have been otherwise extinguished.

Conclusion

[170] In my view the application does not offend any of the provisions of ss 190B(9)(a), (b) and (c) and therefore the application meets the condition of s 190B(9).

[End of reasons]

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Hutt River
NNTT file no.	WC2000/001
Federal Court of Australia file no.	WAD6001/2000

In accordance with ss 190(1) and 186 of the *Native Title Act 1993* (Cth), the following is to be entered on the Register of Native Title Claims for the above application.

Section 186(1): Mandatory information

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

7 February 2000

Date application entered on Register:

7 July 2000

Applicant:

As per the Schedule

Applicant's address for service:

As per the Schedule

Area covered by application:

As per the Schedule

Persons claiming to hold native title:

As per the Schedule

Registered native title rights and interests:

The native title rights and interests claimed are:

(c) the right of access to the area;

(e) the right to use and enjoy resources of the area;

(i) the right to maintain and protect places of importance under traditional law, customs and practices in the area.

Subject to:
(i) To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicant.
(ii) To the extent that the native title rights and interests claimed relate to waters in an offshore place, those rights and interests are not to the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under international law in relation to the whole or any part of the offshore place.
(iii) The applicant does not make a claim to native title rights and interests which confer possession, occupation, use and enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in section 23F of the NTA was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the state of Western Australia and a law of that State has made provision as mentioned in section 23I in relation to the act;
(iv) Paragraph (iii) above is subject to such of the provisions of sections 47, 47A and 47B of the Act as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing.
(v) The said native title rights and interests are not claimed to the exclusion of any other rights or interests validly created by or pursuant to the common law, a law of the State or a law of the Commonwealth.

[*End of document*]