REGISTRATION TEST

REASONS FOR DECISION

DECISION-MAKER:	Danielle Malek
Application Name:	Yaegl People
Names of Applicants:	Della Walker (nee Laurie), Deidre Ann Randall, Joyce Caroline Clague, (nee Mercy), Ron Heron, Jacqueline Freeburn, William Walker and Selena Blakeney
Region:	NSW/ACT
NNTT No:	NC96/38
Federal Court No:	NG6052/98
Date Application Made:	27 November 1996

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

DECISION

The application is **NOT ACCEPTED** for registration pursuant to s190A of the *Native Title Act* 1993 (Cth).

Danielle Malek

1st April 2004
Date of Decision

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

Brief History of the Application

The application was lodged with the Tribunal on 27 November 1996 and taken to be filed in the Federal Court from that date. The Registrar of the Tribunal applied an abbreviated test to the application on 24 February 2000; the application was not accepted for registration.

The Applicants amended the application in the Federal Court on 26 September 2003. It is this application which is tested against the provisions of s190A below.

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

On 12 November 2002, 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).

This delegation has not been revoked as at this date.

Information considered when making the Decision

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

- Federal Court Application filed 27 November 1996;
- Amended Federal Court Application filed 26 September 2003;
- The Registration Test File;
- The National Native Title Tribunal Geospatial Database and assessments 2003/0324 dated 20 February 2003, & 2003/2135 9 October 2003.
- The Register of Native Title Claims;
- The National Native Title Register;
- ILUA Database;

Please Note: All further reference to the "application" is intended to be a reference to the amended application and all references to legislative sections refer to the *Native Title Act 1993* (*Cwlth*) unless otherwise stated.

NOTE TO APPLICANT:

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

S190B sets out the merit conditions of the registration test.

S190C sets out the procedural conditions of the registration test.

In the following decision, the Registrar's delegate tests the application against each of these conditions. The procedural conditions set out under s190C are considered before the merit conditions set out in s190B.

S190C: Procedural Conditions

S190C(2) Applications contains details set out in ss61 and 62

S190C(2) first asks the Registrar's delegate to test the application against the registration test conditions at sections 61 and 62. If the application meets all these conditions, then it passes the registration test at s190C(2).

S61(1): Native Title Claim Group

The application is made by a person or persons authorised by all of the persons (the* native title claim group) *who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.

Reasons relating to this sub-condition
Schedule A describes the native title claim group as the Yaegl descendants of:

> "Dugald Cameron (who was born in Chatsworth Island around 1870)
> Jack Freeburn (who was born in Yamba around 1868)
> Sailor Morris (who was born in Chatsworth Island around 1831)
> Nodo Combo (who was born in Yamba around 1859)
> Rose Combo (nee Yamba) (a.k.a as Rosie Yamba and who was born in Yamba around 1856)
>
> being both biological descendants and descendants adopted under Yaegl traditional law and custom *who identify themselves as Yaegl and who are recognised by the claimant group as Yaegl*." [emphasis in original].

In *Northern Territory of Australia v Doepel* [2003] FCA 1384 (*Doepel*), his Honour, Mansfield J, discussed what is required of the Registrar's delegate in applying the registration test pursuant to s61(1):

> "In my judgment, s 190C(2) relevantly requires the Registrar to do no more than he did. That is to consider whether the application sets out the native title claim group in the terms required by s 61. That is one of the procedural requirements to be satisfied to secure registration: s 190A(6)(b). If the description of the native title claim group were to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirement of s 190C(2) would not be met and the Registrar should not accept the claim for registration": at [36]

His Honour went on to say that:

> "My view that s 190C(2), relevantly to the present argument, does not involve the Registrar going beyond the application, and in particular does not require the Registrar to undertake some form of merit assessment of the material to determine whether he is satisfied that the native title claim group as described is in reality the correct native title claim group, is fortified by s 190B(3). It imposes one of the merit requirements for accepting a claim for registration: s 190A(6)(a). Its focus also is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained. It, too, does not require any examination of whether all the named or described persons do in fact qualify as members of

the native title claim group. Such issues may arise in other contexts, including perhaps at the hearing of the application, but I do not consider that they arise when the Registrar is faced with the task of considering whether to accept a claim for registration.": at [37]

With those comments in mind, I note that there is no information in the application to suggest to me that the application does not include all those individuals who, according to their traditional laws and customs hold the common or group rights comprising the particular native title claimed. I am consequently satisfied that the application meets the requirements of s.61(1).

Result: **Requirements met**

S61(2): Applicant for claims authorised by claim group

S61(2) sets out information about the applicant in a claim authorised by the claim group. One of the things it provides is that a person is, or several people, are known jointly as the 'applicant'.

S61(3): Name and address of service for applicants

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

Reasons relating to this sub-condition
Details provided at the commencement of the application and in Part B of the application.

Result: **Requirements met**

S61(4): Native Title Claim Group named/described sufficiently clearly

A native title determination application, or a compensation application, that persons in a native title claim group or a compensation claim group authorise the applicant to make must name the persons or otherwise describes the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

Reasons relating to this sub-condition
An exhaustive list of names of the persons in the native title claim group has not been provided so the requirements of section 61(4)(a) are not met. In accordance with s61(4)(b), I must then determine whether the native title claim group otherwise describes the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

For the reasons set out in relation to section 190B(3)(b), I am satisfied that the persons in the native title claim group are described sufficiently clearly in Schedule A: see further set out under s190B(3).

Result: **Requirements met**

s61(5) Application is in prescribed form

An Application must be in the prescribed form, and be filed in the Federal Court, and contain such information in relation to the matters sought to be determined as is prescribed, and be accompanied by any prescribed documents and any prescribed fee

Reasons relating to this sub-condition
The application 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 27 November 1996 and amended on 26 September 2003.

The application is accompanied by the affidavits of the applicants as prescribed by s.62(1)(a) and by a map as prescribed by s.62(2)(b).

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

Result: **Requirements met**

S62(1)(a) Application is accompanied by affidavits in prescribed form

An application must be accompanied by an affidavit sworn by the applicant which addresses the matters required by s62(1)(a)(i) – s62(1)(a)(v)

Reasons relating to this sub-condition
The application filed in the Federal Court is accompanied by affidavits from the 7 (seven) individuals who make up 'the Applicant.' These people are identified by name and address and their affidavits are signed, dated, and appear to be competently witnessed.

In each affidavit, the individual deposes satisfactorily to the matters required in s.62(1)(a)(i)-(iv). Section (1)(a)(v) also requires that each affidavit states the basis on which the applicant is authorised as mentioned in subparagraph (iv). At paragraph 6 of each affidavit, the deponents state that the basis of their authorisation is " set out in Schedule R to this amended application, and includes a meeting of the members of the native title claim group at Angourie on 21 and 22 June 2003." Schedule R contains some further details of the process of authorisation (see further comments under s190C(4)),

I am satisfied that the affidavits accompanying the application are in the correct form prescribed by the Federal Court; and that they address each of the matters required under s.62(1)(a) of the NTA.

Result: **Requirements met**

S62(1)(b) Application contains details set out in s61(2)

S62(1)(b) asks the Registrar to make sure that the application contains the information required in s61(2). Because of this, the Registrar's decision for this condition is discussed under s61(2) below.

s62(1)(c) Details of physical connection

Details of traditional physical connection (information not mandatory) and prevention of access to lands and waters (where appropriate)

Comment on details provided
Schedule G provides details of activities carried out in the application area. Schedule M provides details of traditional physical connection covered by the application.

Result: **Provided**

S62(2)(a) Information about the boundaries of the application area

62(2)(a)(i) Information, whether by physical description or otherwise that enables the boundaries of the area covered by the application to be identified;

62(2)(a)(ii) Information, whether by physical description or otherwise that enables the boundaries of any areas within those boundaries that are not covered by the application to be identified.

Reasons relating to this sub-condition
For the reasons which lead to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the application contains information identifying the boundaries of the area covered by the application and any areas within those boundaries not covered by the application.

Result: **Requirements met**

S62(2)(b) Map of the application area

The application contains a map showing the external boundaries of the area covered by the application

Reasons relating to this sub-condition
The application contains an AO-sized map, which is at Attachment C, showing the external boundaries of the area covered by the application.

Result: **Requirements met**

S62(2)(c) Details and results of searches

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

Reasons relating to this sub-condition
Schedule D of the application states: "No searches have been carried out by the claimant group to date." Also, I have no information before me to indicate that the Applicant was aware of any other searches carried out to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application.

Result: **Requirements met**

S62(2)(d) Description of native title rights and interests

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

Reasons relating to this sub-condition

A description of the native title rights and interests claimed by the Applicant is found at Schedule E of the application together with statements which qualify these claimed rights and interests. I am satisfied that the native title rights and interests claimed by the Applicant at Schedule E does not merely consist of a statement to the effect that the native title rights and interests are all native title rights that may exist, or have not been extinguished at law.

Result: **Requirements met**

S62(2)(e) Description of factual basis

The application contains a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that:

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

(ii) there exist traditional laws and customs that give rise to the claimed native title; and

(iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Reasons relating to this sub-condition

A general description of the factual basis as required by s62(2)(e) is contained at Schedules F, G and M of the application. I refer to my reasons at s190B(5) in respect of the sufficiency of the factual basis and in particular addressing the requirements in (i), (ii) and (iii).

Result: Requirements met

S62(2)(f) Activities carried out in application area

If native title claim group currently carry on any activities in relation to the area claimed, the application contains details of those activities

Reasons relating to this sub-condition

Schedule G of the application lists a number of current activities which the native title claim group currently carry on in relation to the area claimed. Further particulars of current activities are also provided at Schedule M of the application.

Result: **Requirements met**

S62(2)(g) Details of other applications

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

Reasons relating to this sub-condition

Schedule H of the application states that the Applicant is not aware of any other application to the High Court, Federal Court or a recognised State/Territory body which seeks a determination of native title or compensation over the area.

Result: **Requirements met**

S62(2)(h) Details of s29 notices

The application contains details of any notices under section 29 (or under a corresponding provision of a law of a State or Territory) of which the applicant is aware, that have been given and that relate to the whole or a part of the area

Reasons relating to this sub-condition

Schedule I states that the Applicants are 'not aware of any current notices under section 29 of the *Native Title Act 1993* (or under a corresponding provision of the law of the State of New South Wales) that relate to the whole or a part of the area claimed." However, the Applicant notes that a "notice was given under section 29 of the *Native Title Act 1993* by the NSW Minister for Land & Water Conservation in relation to some of the area covered by the application in 1996 however, to the best of the claimants knowledge, the notice was withdrawn."

Result: **Requirements met**

Combined decision for s190C(2)

For the reasons outlined above, I consider that the application **PASSES** the conditions contained in s.190C(2).

S190C(3): Common claimants in overlapping claims

The Registrar must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:

(a) the previous application covered the whole or part of the area covered by the current application; and

(b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made: and

(c) the entry was made, or not removed, as a result of consideration of the previous application under section 190A.

Reasons relating to this condition

If all three conditions nominated at section 190C(3) apply, I must consider whether any person included in the native title claim group was a member of the native title claim group(s) for any previous application(s).

A geospatial assessment of the draft application conducted on 9 October 2003 (2003/2135) revealed there were no registered native title claims overlapping with the present application. This was confirmed by an overlap analysis undertaken on 31 March 2004.

Result: Requirements met

s190C(4) Application is authorised/certified

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

(a) the application has been certified under paragraph 202(4)(d) by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part: or

(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

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

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

(a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and

(b) briefly set out the grounds on which the Registrar should consider that it has been met.

Reasons relating to this sub-condition

The application has not been certified by an Aboriginal/Torres Strait Islander representative body as set out under 203BE. In the alternative, this means that I must be satisfied that the application is one which is properly authorised (section 190C(4)(b)). Proper authorisation of a claimant application is a fundamental requirement of the Act and *all* claimant applications, whether or not they are certified, must be properly authorised.

The word 'authorise' is defined at section 251B of the Act. Section 251B requires that all the persons in a native title claim group authorise a person or persons to make a native title determination application and to deal with matters arising in relation to it if:

- where there is a decision-making process under the traditional laws and customs of the group that must be complied with in relation to authorising things of that kind, that this process has been followed in relation to the application (as described in subsection (a) of section 251B); or

- if there is no such traditionally based decision-making process, then the authorisation is in accordance with a decision-making process that has been agreed to and adopted by the group (as described in subsection (b) of section 251B).

To satisfy the Registrar's delegate that the application is properly authorised, s.190C(4)(b) says that the Applicant:

- must be a member of the native title claim group, and
- that the applicant must have been authorised to make the application and deal with matters arising in relation to it by all other persons in the claim group.

There are seven named individuals for this application who are known together as 'the Applicant'. Each of these individuals depose that they are:

- members of the claim group;
- authorised by the native title claim group to make the application and to deal with matters arising in relation to it, by all other persons in the native title claim group.

The affidavits of these individuals provide some information about an authorisation meeting said to have taken place at Angourie on 21 and 22 June 2003. It is at this meeting that the individuals say they were authorised by the claim group.

Schedule R provides some detail about authorisation although information given about authorisation at Schedule R is generally scant. The authorisation process is said to have been "in accordance with the traditional decision making processes of the Yaegl People" (para. (b)(iv)), and involved:

- advertisement of the meeting by NSW Native Title Services
- the convening of a meeting by NSW Native Title Services
- attendance by members of the claim group (including Yaegl Elders) at that meeting
- authorisation of the Applicant

On 1 March 2004, the Tribunal provided the legal representative for Applicant with a preliminary assessment of the amended application which discussed how the Yaegl People's application met the conditions of the registration test. The assessment let the Applicant know that there was little detail in the affidavits or at Schedule R about authorisation, and invited the Applicant to give further information about the meeting held on 21 and 22 June 2003. The letter suggested that it would be useful for the Applicant to give details about how the meeting was conducted, who attended the authorisation meeting, what role the Elders referred to at Schedule R had in the process, and the nature of the traditional decision-making process used by the claim group to authorise the Applicant (for example, a decision by Elders? By heads of family groups? Majority vote?). Without information of this kind, it is not possible to determine whether there is a decision-making process under the traditional laws and customs of the group that must be complied with in relation to authorising things of that kind, and (importantly) that this process *has been followed*.

The Tribunal also noted that at the directions hearing of 6 August 2003, the NSW Farmer's Association had questioned why the application (originally made on behalf of the Yaegl, Bundjalung and Gumbaynggir People) was made now by the Yaegl people alone. The preliminary assessment suggested that it may be useful if the Applicant provided some explanation about this, particularly because there were so few details about authorisation in

the application and accompanying materials. The assessment also noted that legal representatives for the claim group may have provided the Tribunal with an explanation of the change in the constitution of the native title claim group in the course of mediation but that it was Tribunal policy that material received in the course of mediation not be made available to the delegate. This is because of the 'without prejudice' nature of mediation.

To date, no response has been received from the Applicant's legal representative.

As a result, I feel I cannot be satisfied that the Applicant is authorised to make the application and deal with matters arising in relation to it by all the persons in the native title claim group.

Result: **Requirements not met**

s190B: Merits Conditions

S190B(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 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.

Reasons relating to this condition

Area covered by the application:

A map is provided with the application and is identified as Attachment C. Attachment C is a colour map produced by the Land Information Centre (LIC). The map indicates the application area by blue colouring and contains a legend, scale, locality map, datum, projection and data statements. A metes and bounds description of the boundary of the application is provided at Attachment B.

The Tribunal's Geospatial and Mapping Unit provided an expert assessment of the map and written description (2003/2135, 9 October 2003). The geospatial analysis noted that there was some discrepancy between the map and the written description in that the map appeared to include in the application area islands which were excluded from the written description at Attachment B. The assessment also noted some typographic errors in the written description which, the unit recommended, ought to be altered if the application is ever amended.

I accept that the written description is the authoritative description of the application area and that the discrepancy noted by Geospatial is not of such a material nature that it renders the description uncertain or could not be rectified easily at a later date. For these reasons, I am satisfied that the requirements of s.62(2)(a)(i), s.62(2)(b) and s.190B(2) are met in relation to the land component of the claim area.

Areas within those boundaries that are not covered by the application:

Paragraph 2 of Schedule B states that '[s]ubject to Schedule L, any area within the external boundaries of the area claimed in relation to which all native title rights and interests have been wholly extinguished by laws of the Commonwealth or New South Wales, including the common law, is excluded from the area claimed'.

In addition the description and Attachment B includes a list of islands which are excluded from the claim. These islands are excluded by name. Three unnamed islands excluded from the claim are described on page 2 of Attachment B.

I am of the view that these statements amount to information that enables areas within the external boundaries not covered by the application to be identified with reasonable certainty. I am satisfied that the information in the application in relation to areas within the external boundaries that are not covered by the application amounts to compliance with s.190B(2) and s.62(2)(a)(ii).

Result: **Requirements met**

S190B(3) Identification of the native title claim group

The Registrar must be satisfied that:

(a) the persons in the native title claim group are named in the application; or

(b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Reasons relating to this condition

A list of names of the persons in the native title claim group has not been provided in the application, so the requirements of section 190B(3)(a) are not met. In the alternative, section 190B(3)(b) requires me to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Schedule A of the application describes the native title claim group primarily by descent from specified apical ancestors:

> *'The Native Title Claim Group comprises the Yaegl descendants of:-*
> *Dugald Cameron (who was born in Chatsworth Island around 1870)*
> *Jack Freeburn (who was born in Yamba around 1868)*
> *Sailor Morris (who was born in Chatsworth Island around 1831)*
> *Nodo Combo (who was born in Yamba around 1859)*
> *Rose Combo (nee Yamba) (a.k.a as Rosie Yamba and who was born in Yamba around 1856)*
> *being both biological descendants and descendants adopted under Yaegl traditional law and custom who identify themselves as Yaegl and who are recognised by the claimant group as Yaegl'.*

In a preliminary assessment of the amended application, the Tribunal noted that the application did not contain any detailed information about how individuals become adopted into the claim group. To date, no response has been received from the Applicant or their legal representatives on this or other issues raised by that assessment. It is interesting to note, however, that membership of the claim group by adoption does not 'widen' the claim group beyond descendants of the 5 (five) named apical ancestors. Rather, membership by adoption would appear (from the phrasing of Schedule A) to be a sub-set of that set of descendants. I take it to mean that membership by adoption requires an individual not only to be a descendant of a named ancestor, but one who identifies as Yaegl and is accepted as Yaegl by other claim group members.

As the adoption rule does not widen the claim group beyond those families descended from named apical ancestors, I am satisfied that it is capable of certain application. In *Ward v Native Title Registrar* [1999] FCA 1732, Carr J remarked [at 67] that: "It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is

in the group as described. But that does not mean that the group has not been described sufficiently."

Result: **Requirements met**

S190B(4) Native title rights and interests are readily identifiable

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 the readily identified.

Reasons relating to this condition

S190B(4) requires the delegate to be satisfied that the description contained in the application is sufficient to allow the native title rights and interests as defined by s.223 of the Act to be readily identified. The phrases 'native title' and 'native title rights and interests' are defined in s.223 of the *Native Title Act 1993* (Cwth).

s.223(1) reads as follows:

> *"The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:*
> *(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and*
> *(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and*
> *(c) the rights and interests are recognised by the common law of Australia."*

Rights which are not readily identifiable include rights to control the use of cultural knowledge that go beyond the right to control access to lands and waters,[1] rights to minerals and petroleum under relevant State legislation,[2] exclusive rights to fish offshore or in tidal waters and any native title right to exclusive possession offshore or in tidal waters.[3] To meet the requirements of s.190B(4), I need only be satisfied that at least one of the rights and interests claimed is sufficiently described for it to be readily identified.

Claimed native title rights and interests are set out in paragraphs 1 and 2 of Schedule E and qualified by statements in paragraphs 3 and 4 and in Schedules L, P and Q.

Subject to my findings in s.190B(5) and (6) below, the claimed native title rights and interests are readily identifiable.

Result: **Requirements met**

[1] *Western Australia v Ward* (2002) 191 ALR 1, para [59]
[2] *Western Australia v Ward*, paras [383] and [384]; *Wik v Queensland* (1996) 63 FCR 450 at 501-504; 134 ALR 637 at 686-688.
[3] *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 144-145.

S190B(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;

(b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests;

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

Reasons for the Decision

Under this section I 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 that assertion. It appears that, at the very least, the factual basis provided must support the particular assertions at subparagraphs (a) to (c) of s190B(5).

The phrases 'native title' or 'native title rights and interests', found in s.190B(5), are defined in s.223 of the NTA. See my reasons under s. 190B(4) for the text of this section.

In *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 (the *Yorta Yorta* decision), the majority of the High Court considered the meaning and consequences of the definitions found in s.223. The comments of the High Court about the meaning of the word 'traditional', as it appears in s. 223 are useful for consideration of the present condition. The majority were of the view that this phrase, as used in s.223, in conjunction with 'laws and customs', refers to a means of transmission of law or custom, and conveys an understanding of the age of traditions. Their Honours said that 'traditional' laws and customs are those normative rules which existed or were "rooted in pre-sovereignty traditional laws and customs": at [46], [79]. This normative system must have continued to function from the time of acquisition of sovereignty to the time when the native title group sought their determination of native title. This is because s.223(1)(a) speaks of rights and interests as being 'possessed' under traditional laws and customs, and this assumes a continued "vitality" of the traditional normative system.

Any interruption of that system which results in a cessation of the normative system would be fatal to claims to native title rights and interests because the laws and customs which give rise to the rights and interests would have ceased to exist and could not be effectively reconstituted even by a revitalisation of the normative system. Their Honours noted, however, that this does not mean that some change or adaptation of the laws and customs of a native title claim group would be fatal to a native title claim; rather that an assessment would need to be made to decide what significance (if any) should be attached to the fact that traditional law and custom had altered. In short, the question would be whether the law and custom was 'traditional' or whether it could "no longer be said that the rights and interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified" - at [82] and [83].

I find these statements in the *Yorta Yorta* decision of assistance in interpreting the terms "traditional laws", "traditional customs" and "native title rights and interests", as found in s.190B(5). However, I am also mindful that the "test" in section 190A involves an administrative decision – it is not a trial or hearing of a determination of native title pursuant to s.225, and it is therefore not appropriate to apply the standards of proof that would be required at such a trial or hearing. I note also that the test in s.190B(5) requires the provision of a sufficient factual basis for the assertion that the native title

rights and interests claimed exist; it is not the task of the Registrar or his delegates to make findings about whether or not the claimed native title rights and interests exist. Indeed, the particular wording of s.190B(5) differs from the definition in s.223, and this suggests to me that I should pay close attention to whether the factual basis satisfactorily addresses the particular assertions identified in sub-paragraphs (a) to (c).

At Schedule F the Applicant provides some general information towards the factual basis on which it is asserted that:

(a) the native title claim group has, and the predecessors of those persons had, an association with the area; and
(b) there exist traditional laws and customs that give rise to the claimed native title; and
(c) the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.

The Applicant asserts that:

(1) Members of the Native Title Claimant Group are, traditionally, the owners of the land and waters in the area claimed.
(2) The rights and interests described in *Schedule E* [emphasis in original], and the traditional laws acknowledged, and customs observed, have been possessed and exercised, and acknowledged and observed, by the Native Title Claimant Group, since time immemorial, including-
    a. at the time when sovereignty was asserted by the Crown of the United Kingdom; and
    b. at the time of contact with non-Aboriginal people.
(3) The traditional connection of the Native Title Claimant Group with the area claimed, and native title rights and interests, were inherited from their ancestors in accordance with traditional laws and customs.
(4) The Native Title Claimant Group continue to acknowledge traditional laws, observe customs, and possess and exercise their traditional rights and interests, in relation to country which includes the area claimed.

Paragraphs 5 to 8 of Schedule F provide some general assertions which relate to "[h[istorical, archaeological and site information" (per heading). Paragraphs 9 to 13 contain some general information on traditional laws and customs. Apart from a list of activities which the Applicant asserts are carried out by the claim group at Schedule G, no other information is provided either in the application or in accompanying materials to support the three factual assertions at s.190B(5).

A preliminary assessment of the amended application (dated 1 March 2004) indicated to the Applicant that there was little material going to satisfy the requirements of s190B(5) and invited the Applicant to provide further information. To date, no response has been received from the Applicant's legal representative.

Given the generality and scarcity of information in the application materials, I am not satisfied that the requirements of s.190B(5) are met..

Result: **Requirements not met**

S190B(6) Claimed native title rights and interests established *prima facie*

The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.

Reasons relating to this condition

Under s. 190B(6) I must consider that, *prima facie*, at least some of the native rights and interests claimed, as defined at s.223 of the Act, can be established.

The term "prima facie" was considered in *North Ganalanja Aboriginal Corporation v Qld* (1996) 185 CLR 595. In that case, the majority of the court (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ) 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 *Northern Territory of Australia v Doepel* [2003] FCA 1384 at [134], Mansfield J confirmed that the 'ordinary meaning' approach taken to the term "*prima facie*" in that case is still appropriate, notwithstanding the fact that the *North Ganalanja* case was decided before the 1998 amendments to the Act.. As a result, I adopt the ordinary meaning approach in considering this application.

Paragraph (1), Schedule E, states: "Where a right to exclusive possession can be made out, or where s.47, 47A or 47B of the Native Title Act apply, the native title rights and interests claimed by the native title claim group in relation to the land and waters in the claim area, under traditional laws acknowledged and customs observed, are, any one or more of all of the rights and interests'; this claim for exclusive possession is then followed by certain named individual rights and interests at sub-paras (a) to (n).

Paragraph (2), Schedule E, states: "Where a right to exclusive possession cannot be made out, the native title rights and interests claimed by the native title claim group in relation to the land and waters in the claim area, under traditional laws acknowledged and customs observed, are, any one or more or all of the right and interests' individual rights and interests are then listed from (a) to (e) including (b), (e), (f), (g), (h), (i), (j), (k), (l), (m) and (n) from paragraph (1).

All of these rights are subject to qualifications in Schedule E (3) and (4) and Schedules P and Q.

Generally, a claim to exclusive possession may be able to be established, *prima facie*, over areas where there has been no previous extinguishment of native title, where the non-extinguishment principle found in s 238 of the NTA applies (eg areas where ss.47, 47A or 47B applies), and in relation to areas affected by category C and D past and intermediate period acts. The Applicant makes no claim to the benefit of ss47, 47A or 47B in the application area (see Schedule L). As the application is primarily a claim to rivers and tidal waters, it is likely that much (if not all of the application area) is subject to non-native title rights and interests and cannot be claimed exclusively.

In *Western Australia v Ward* (2002) 191 ALR 1, the majority of the High Court found that a right of possession, occupation, use and enjoyment (see Schedule E, 1(a)) is the fullest expression of native title there is, and where "native title rights and interests that are found to exist do not amount to a right, as against the whole world, to possession, occupation, use and enjoyment of land or waters, it will seldom be appropriate, or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms": at [51].

Similarly, in *Western Australia v Ward* [2002], the majority of the High Court noted that rights which amount to a right to control access to or the use made of the lands and waters of the application are unlikely to be capable of registration where a claim to exclusive possession cannot be maintained.

S190B(6) asks me to be satisfied that at least some of the native title rights and interests claimed in the application can be established *prima facie*. At s190B(5), I found that I was not satisfied that there was a factual basis sufficient to support the assertion that the claimed native title rights and interests exist. The application did not contain sufficient material to support the three assertions set out at s190 B(5); nor was additional material provided which would provide a factual basis for the present claim.

Without a factual basis under s190B(5) for the claimed native title, it does not seem possible (or meaningful) for me to say that the native title rights and interests claimed in the application can be established *prima facie*. It follows that I am not satisfied that the application meets the condition at s.190B(6). I do not propose, therefore, to deal individually with each of the claimed native title rights and interests set out in Schedule E against the condition at s.190B(6).

Result: **Requirement not met**

S190B(7) Traditional physical connection

The Registrar must be satisfied that at least one member of the native title claim group:

(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or

(b) previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:

(i) the Crown in any capacity; or

(ii) a statutory authority of the Crown in any capacity; or

(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

Reasons for the Decision

This section requires that I am satisfied that at least one member of the native title claim group currently has, or previously had, a traditional physical connection with any part of the land covered by the application.

Traditional physical connection is not defined in the *Native Title Act*. I am interpreting this phrase to mean that physical connection should be in accordance with the particular traditional laws and customs relevant to the claim group. Again, I am of the opinion that without a factual basis under s190B(5) for the claimed native title, it is not possible to be satisfied that at least one member of the native title claim group has or previously had a traditional physical connection with the application area. I feel I am supported in this opinion by the direction which the High Court has provided in its discussion of the word 'traditional' in *Yorta Yorta* (and discussed in greater detail in my reasons for decision under s190B(5)). Additionally, I note that the application contains little information about the traditional physical connection of any member of the claim group with the application area.

I am not satisfied that the application meets the requirements of s.190B(7).

Result: **Requirements not met**

S190B(8) No failure to comply with s61A

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.

S61A contains four sub-conditions. Because s190B(8) asks the Registrar to test the application against s61A, the decision below considers the application against each of these four sub-conditions.

Reasons for the Decision

S61A(1) – Native Title Determinations
A search of the National Native Title Register (dated 31 March 2004) shows there are no approved determinations of native title for the application area claimed in this application.

61A(2) - Previous exclusive possession acts

Schedule B(2) provides that: any area within the external boundaries of the area claimed in which native title rights and interests have been wholly extinguished by the laws of the Commonwealth or New South Wales (including the common law) is excluded from the area claimed. Additionally, there is no information in the application and accompanying documents which discloses that the claimant application is made over any area which is subject to a previous exclusive possession act under s23B of the Act.

S61A(3) - Previous non-exclusive possession acts

The Applicant states in Schedule E(3) that
'To the extent that interests, other than native title rights and interests, exist in the determination area, in these draft orders called 'the other interest', the native title rights and interests described in paragraphs 1 and 2 above and the other interests are concurrent right and interests but by operation of legislation or by reason of the nature and extent of the other interests, the exercise of some of those concurrent rights, including the native title rights and interests, may be regulated, controlled, curtained, restricted, suspended or postponed'. Additionally, there is no information in the application and accompanying documents which discloses that the claimant application claims possession, occupation, use and enjoyment over any area which is subject to a previous non-exclusive possession act under s23F of the Act.

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

s61A(4) - s.47, 47A 47B

At Schedule L, the application states 'the native title claim group is not aware of any area (referred to in (a), (b) or (c) above) within the land or waters covered by the application.

I am therefore, satisfied the application meets the requirements of s 190B(8).

Result: **Requirements met**

S190B(9)(a) No claim to ownership of Crown minerals, gas or petroleum

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

(a) to the extent that the native title rights and interests claimed consist or include ownership of minerals, petroleum or gas – the Crown in the right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas;

Reasons for the Decision

Schedule Q states:
(1) The applicants make no claim to minerals, gas or petroleum wholly owned by the Crown.
(2) The Native Title Claim Group does assert that the Crown does not wholly own minerals, petroleum or gas in and beneath the area covered by the application.

While the Applicants assert at Schedule Q that the Crown does not wholly own minerals, petroleum or gas in the area subject to the application, it is clear that where the Crown is shown to wholly own these resources, the Applicant explicitly disavows any claim to ownership.

Result: **Requirements met**

S190B(9)(b) No exclusive claim to offshore places

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

(b) to the extent that the native title rights and interests claimed relate to waters in an offshore place – those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place;

Reasons for the Decision

The present application does not make any claim to exclusive possession of an offshore place.

Result: **Requirements met**

S190B(9)(c) Native title not otherwise extinguished

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

(c) in any case – the native title rights and interests claimed have otherwise been extinguished (except to the extent that the extinguishment is required to be disregarded under subsection 47(2), 47A(2) or 47B(2).

Reasons for the Decision
The application does not disclose and I am not otherwise aware that the native title rights and interests claimed have otherwise been extinguished.

Result: **Requirements met**

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