Registration test decision

Application name	Ballardong People
Name of applicant	Alan Jones, Winnie McHenry, Doug Nelson, Reg Hayden, Ricky Nelson, Tim Riley, Dianne Taylor, Reg Yarran Jnr, Murray Yarran, Fay Slater, Carol Holmes
State/territory/region	Western Australia
NNTT file no.	WC00/7
Federal Court of Australia file no.	WG6181/98
Date application made	3 July 2000
Date application last amended	21 February 2008

Name of delegate Brendon Moore

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

For the reasons attached, I accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

For the purposes of s. 190D, my opinion is that the claim satisfies all of the conditions in s. 190B.

Date of decision: 3 July 2008

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Brendon Moore

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

Reasons for decision

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Introduction

This document sets out my reasons for the decision not to accept the claimant application for registration.

Section 190A of the *Native Title Act 1993* (Cwlth) (the Act) requires the Native Title Registrar to apply a 'test for registration' to the claims made in all claimant applications given to him or her under ss. 63 or 64(4) by the Registrar of the Federal Court of Australia (the Court), with the exception of certain amended applications specified under subsections 190A(1A) and 190A(6A).

I note that the claim being considered here for registration is made in an amended application where the application was amended after the commencement of the *Native Title Amendment (Technical Amendments) Act 2007* (the Technical Amendments Act) on 1 September 2007, but that the claim was originally made prior to this date and was previously caught by schedule 5 of the transitional provisions of the Technical Amendments Act.

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

Delegation of the Registrar's powers

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

The test

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

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

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

Application overview

The application was originally made to the Registrar on 10 July 1997. The application was considered and accepted for registration pursuant to item 11, Schedule 5 of the *Native Title Amendment Act 1998* on 7 July 1999.

On 5 July 2000 the Federal Court granted leave to amend the application (in the form of an amended application filed on 3 July 2000) and to combine it with five other applications:

- Donald & Sylvia Collard WG6032/98 (WC95/36) made 7 August 1995
- Donald Collard, Sylvia Collard WG6053/98 (WC95/71) made 20 October 1995
- Donald and Sylvia Collard WG6160/98 (WC97/27) made 10 April 1997
- Donald & Sylvia Rachel Collard WG6205/98 (WC97/85) made 9 October 1997
- Donald and Sylvia Collard WG6214/98 (WC97/97) made 21 November 1997.

The application was again amended by leave of the Court on 31 July 2000 (in the form of an amended application filed on 21 July 2000 and attachment H filed on 31 July 2000). The claim in this amended application was considered and not accepted for registration on 10 May 2005 and thereafter removed from the Register of Native Title Claims.

On 13 July 2007 a motion was filed in the Federal Court for an order pursuant to s. 66B to replace the applicant.

On 1 September 2007 the Technical Amendments Act commenced and schedule 5 of the transitional provisions of that Act required that the Registrar reconsider the claim in the amended application, which was not accepted for registration in May 2005.

On 13 November 2007 the Federal Court ordered that the 12 persons named on the first page of this decision as the applicant jointly replace the then current applicant (see *Anderson v Western Australia* [2007] FCA 1733, French J). French J also granted the reconstituted applicant leave (to the extent that leave may be required) to amend the application by filing a Form 19 in the form of that found in annexure A to an affidavit by the applicant's legal representative made on 13 July 2007.

On 28 February 2008, the Federal Court varied the second of the two orders made on 13 November 2007 and gave the applicant as reconstituted by the order made on 13 November 2007 leave to amend the application by filing a Form 19 in the form of annexure A to an affidavit by the applicant's legal representative made 28 February 2008.

It is the claim in the application as amended by the Federal Court's order made on 28 February 2008 that I am reconsidering for registration pursuant to schedule 5 of the transitional provisions to the Technical Amendments Act.

Information considered when making the decision

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

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

However, given that the registration test has in this instance been triggered by schedule 5 of the transitional provisions of the Technical Amendments Act 2007, I must also abide by schedule 5, item 1(4). This requires me to apply the registration test under s. 190A as if the conditions in ss. 190B and 190C that require the application to be accompanied by certain information or other things, or to be certified or have other things done, also allowed the information or other things to be provided, and the certification or other things to be done, by the applicant or another person *after* the application *was made*.

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

I have *not* considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK, without the prior written consent of the person who provided the Tribunal with that information, either in relation to this claimant application or any other claimant application or any other type of application, as required of me under the Act.

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

Procedural fairness steps

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

Procedural fairness was offered to the State of Western Australia on 23 May 2008. The office of the State Solicitor for the State of Western Australia advised by letter of 6 June 2008 that it had no comment to make, other than in relation to a particular case of no significance to my decision. The documents forwarded were:

1. Affidavit of (name withheld for cultural reasons) dated 25 January 1999;

2. Affidavit of Winnie McHenry dated 28 January 1999;

3. Affidavit of (name withheld for cultural reasons) dated 29 January 1999;

4. Affidavit of William Riley dated 29 January 1999;

5. Affidavit of Doug Nelson dated 2 February 1999;

6. Letter from Simon Blackshield dated 13 July with attachments:

7. - Affidavit of Yvette Bradley dated 12 July 2007;

8. - Affidavit of Kevin Fitzgerald dated 12 July 2007;

9. - Affidavit of Simon Blackshield dated 13 July 2007;

10. Letter from Simon Blackshield dated 23 November 2007 with attachments:

11. - draft Form 19

12. - Affidavit of Joanne Jones dated 6 July 2007;

13. - Affidavit of Simon Blackshield dated 12 July 2007

14. - Affidavit of Cedric Anderson dated 20 July 2007;

15. - Affidavit of Kevin Fitzgerald dated 29 August 2007;

16. - Affidavit of Rachel Albowicz dated 5 September 2007;

17. - Affidavit of Carole Holmes 2 February 2007

18. - Affidavit of Reg Hayden 5 February 2007;

19. - Affidavit of Alan Jones 5 February 2007;

20. - Affidavit of Winnie McHenry dated 5 February 2007;

21. - Affidavit of Douglas Nelson dated 5 February 2007;

22. - Affidavit of Dianne Taylor dated 5 February 2007;

23. - Affidavit of (name withheld for cultural reasons) dated 11 June 2007;

24. - Affidavit of Faye Slater dated 16 June 2007

25. - Affidavit of Murray Yarran dated 19 June 2007;

26. - Affidavit of Tim Riley dated 9 July 2007

27. - Affidavit of Reg Yarran Jnr dated 10 July 2007;

28. -Affidavit of Ricky Nelson dated 25 July 2007;

29. Letter from Simon Blackshield dated 28 November 2007;

30. Affidavit of Douglas Nelson dated 2 February 2008;

31. Affidavit of Ricky Nelson dated 4 February 2008;

32. Affidavit of Reg Hayden dated 4 February 2008;

33. Affidavit of Dianne Taylor dated 5 February 2008;

34. Affidavit of Timothey Riley dated 6 February 2008

35. Affidavit of Murray Yarran dated 6 February 2008;

36. Affidavit of Carol Holmes dated 8 February 2008;

37. Email from Simon Blackshield dated 10 February with attachments:

38. - draft Attachment F, and

39. - Affidavit of Simon Blackshield dated 1 February 2008

40. Affidavit of Reg Yarran dated 11 February 2008;

41. Affidavit of Winnie McHenry dated 12 February 2008; (filed 13 February 2008)

42. Affidavit of Winnie McHenry (submitted on 15 February)

43. Affidavit of Faye Slater dated 13 February 2008;

44. Affidavit of Simon Blackshield 14 February 2008;

45. Affidavit of Lindsey Langford dated 15 February 2008;

46. Affidavit of Kevin Fitzgerald dated 15 February 2008;

47. Email from Simon Blackshield with attached Supplement to Attachment F, dated 15 February 2008;

48. Affidavit of Alan Jones dated 18 February 2008;

49. Affidavit of Simon Blackshield affirmed 20 February 2008

50. Extract from Applicant's Historical Report by Dr John Host: (filed in the Single Noongar Claim Federal Court proceeding).

Procedural and other conditions: s. 190C

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

> The Registrar/delegate must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.

Delegate's comment

I address each of the requirements under ss. 61 and 62 in turn and I come to a combined result for s. 190C(2) at page 18.

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

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

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

Native title claim group: s. 61(1)

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

Result

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

Reasons

The description of the native title claim group is set out in Attachment A, which was amended by way of Form 19 pursuant to an Order dated 22 February 2008. (In fact, there were several draft versions of the claim group description put forward, but they are not relevant here.) The amended claim group description is now as follows:

> The native title claim group comprises all those Aboriginal people who are:
> 1. The biological descendants of the unions between:
> ● Tommy Yarran + Mary Jane Kickett;
> ● Win mar, an Aboriginal woman + Edwards, a European man;
> ● William 'Bill' Humphreys + Susan White;
> ● Tirban, an Aboriginal woman of Northam + a European man;
> ● Frederick John Blurton + Mary Anne Juberan;
> ● Thomas William Kickett + Mary Mellett;
> ● Jack Nelson + Ada Foss;
> ● George Borndrilditch Riley + Elizabeth Smith;
>
> 2. Persons adopted by the individuals named in 1 above and those persons adopted by the biological descendants of the unions between the individuals named in 1 above, or
>
> 3. Persons that are the biological descendants of the adopted persons included in 2 above.
>
> Adoption occurs in the following manner: if a man dies and his brother or cousin marries the widow, any of the widow's children are adopted as the children of the new husband.

This section requires that I consider whether the application is brought on behalf of '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.' If the description of the native title claim group in the application indicates that not all persons in the native title group have been included, or that it is in fact a sub-group of the native title claim group, then the relevant requirement of s. 190C(2) would not be met and I should not accept the claim for registration: *Doepel* at [36].

Doepel (at [16], [37], [39] and [44]) is also authority for the proposition that when considering this question, I must consider only the information in the application and the affidavits filed in support of it.

In my view there is nothing in the description in Schedule A or in the application to indicate that the group does not include, or may not include, all the persons who hold the particular native title in the area of the application.

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

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

Result

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

Reasons

This information is contained at Part B of the application. The information given there is no longer correct, as it states that the applicant's representative is the Noongar Land Council of Suite 44, 7 Short St, Perth, whereas the applicants are now in fact represented by the South West Aboriginal Land and Sea Council (SWALSC), whose address is 1490 Albany Highway, PO Box 585, Cannington WA 6107. *Doepel* requires that I make no merit assessment and accordingly I find that the name and address for service is contained in the application.

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

The application must:

(a) name the persons in the native title claim group, or

(b) otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

Result

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

Reasons

I must be satisfied that the application contains all details and other information required by ss.61 and 62 of the Act. Following *Doepel,* I am not required to make any merit assessment of those details and information beyond being satisfied that what is provided is, on its face, responsive to the requirement of the section.

It is my opinion, and I find, that the application provides a description of the persons in the native title claim group. Whether that description is sufficiently clear so that it can be ascertained whether any particular person is one of those persons is considered by me in the merits test which is made at s. 190B(3).

Application in prescribed form: s. 61(5)

The application must:

(a) be in the prescribed form,

(b) be filed in the Federal Court,

(c) contain such information in relation to the matters sought to be determined as is prescribed, and

(d) be accompanied by any prescribed documents and any prescribed fee.

Result

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

Reasons

The application is substantially in the form prescribed by Regulation 5(1)(a) of the Native Title (Federal Court) Regulations 1998.

The application meets the requirements of s. 61(5)(c) and contains all information prescribed in s. 62. I refer to my reasons in relation to s. 62 below.

The application is accompanied by affidavits in relation to the requirements of s. 62(1)(a) from the applicants. I am not required to consider the Federal Court filing fee, if any. I am satisfied that the application has complied with s. 61(5)(d) in relation to the requirement This condition is met.

See also my reasons in respect of s. 62(1)(a) below.

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

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

(i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and

(ii) the applicant believes that none of the area covered by the application is also covered by an entry in the National Native Title Register, and

(iii) the applicant believes all of the statements made in the application are true, and

(iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and

(v) stating the basis on which the applicant is authorised as mentioned in (iv).

Result

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

Reasons

In considering this section I note that *Doepel* does not require me to consider whether the persons comprising the applicant are in fact authorised:

> His Honour's approach, consistently with my opinion as to what s 190C(2) requires, does not suggest that it required the Registrar to consider whether as a fact the applicant in that case was properly authorised by all the relevant members of the native title claim group. I do not consider that s 190C(2) requires the Registrar to determine whether the claimants are in fact properly authorised– at [73].
> In my judgment, the Registrar did not err in the consideration given to the requirements of s 190C(2) in the way the Territory contends. He identified correctly the matters, on the topic of authorisation, which s 190C(2) required him to address. He identified correctly the material to which he should refer to address those matters. He has addressed them. His conclusion was one reasonably available to him.– at [74].

Fresh affidavits satisfying all five of the requirements of the section have been filed from each of the persons comprising the applicant.

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

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

Delegate's comment

My decision regarding this requirement is the combined result I come to for s. 62(2) below. Subsection 62(2) contains eight paragraphs (from (a) to (h)), and I address each of these subrequirements in turn, as follows immediately here. My combined result for s. 62(2) is found at page 20 below and is one and the same as the result for s. 62(1)(b) here.

Result

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

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

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

Result

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

Reasons

I am of the view that *Doepel* requires me not to make any merit assessment of the details and information provided under s. 190C(2), beyond being satisfied that, on its face, it is responsive to the requirements of the relevant section and I do not.

A description is provided.

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

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

Result

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

Reasons

I am of the view that *Doepel* requires me not to make any merit assessment of the details and information provided under s. 190C(2), beyond being satisfied that, on its face, it is responsive to the requirements of the relevant section and I do not.

A map showing external boundaries is provided.

Searches: s. 62(2)(c)

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

Result

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

Reasons

The section requires 'details and results of all searches carried out' and the requirement is not limited by reference to who carries out those searches, except to say that as a matter of construction the delegate construes the section as meaning 'carried out by or on behalf of the applicant'. It does not appear that the intent of the section is that the applicants should be burdened with a wider obligation to provide, in their own application, details and results of searches not carried out by themselves and on which they may not seek to rely or be able to verify.

That this interpretation is appropriate has now been reinforced by the fact that s. 73 of the *Native Title Amendment (Technical Amendments) Act 2007* amends this section, by adding to it the words 'by or on behalf of the native title group' after the words 'carried out', although the amendment only applies to claims made from the date of commencement of the Act on 1 September 2007.

Schedule D refers to Attachment D. Attachment D contains a statement that the applicants are aware of a number of searches having been carried out by the State in an attempt to determine the existence of any non-native title rights and interests in the claim area. It lists these as being searches in relation to:

> Special Leases;
> Land Act Leases;
> Land Act Reserves;
> Mining Tenements;
> and Petroleum Tenements.

A schedule of 472 Land Act Leases, 3926 Land Act Reserves, and 2175 Mining Tenements, dated 5 August 1998 is provided. In fact, there appear to be various 'versions' of this document in the Tribunal's files, which I take to be an artefact of multiple copying over the years: in view of my findings I do not think this significant. It is my view that there is no requirement under the section for these to be provided if they are searches made by the State.

Copies of two Special Leases are at Attachment D.

I have no information causing me to be aware that the applicants have themselves made other searches but have not disclosed the results.

I am satisfied that the requirements of the section are met.

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

> The application must contain a description of native title rights and interests claimed in relation to particular lands and waters (including any activities in exercise of those

rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

Result

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

Reasons

I am of the view, following *Doepel*, that I am not to make any merit assessment of the details and information provided beyond being satisfied that, on its face, it is responsive to the requirement of the section.

A description of the claimed native title rights and interests is found at Attachment E. The description does not merely consist of a statement to the effect that the native title rights and interests are all the native title rights and interests that may exist, or that have not been extinguished, at law.

I am satisfied that the application contains a description of the native title rights and interests claimed.

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

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

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

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

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

Result

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

Reasons

I am of the view, following *Doepel*, that I am not required by the section to make any merit assessment of the details and information provided beyond being satisfied that, on its face, it is responsive to the requirements of the section.

Schedule F refers to Attachment F and Table F, where a general description is given. I am of the view that this material satisfies the three particular requirements of the section.

Because this matter has also been caught by the transitional provisions of schedule 5 of the Technical Amendments Act, item 1(4) allows me to take into account information in satisfaction of the requirements of s. 190B and 190C provided after the application was made. I also consider relevant here the extract from the Historical Report by Dr John Host and the document identified as a Supplement to Attachment F.

Whether the factual base provided is 'sufficient' for the purposes of s. 190B(5) is considered in my reasons for decision at that section.

Activities: s. 62(2)(f)

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

Result

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

Reasons

Schedule G refers to Attachment G to the application. Attachment G lists a number of activities that have been continuously carried out on the land and waters subject to claim, in the exercise of the rights and interests claimed at Attachment E of the application. The Historical Report by Dr John Host also provides details of activities formerly carried out.

I am not required to make any merit assessment of these details at s. 190C(2).

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

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

Result

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

Reasons

The 'substituted Attachment H' (as it is referred to in Schedule H) lists 29 other claims. It is dated by a Federal Court Registry stamp as having been filed on 31 July 2000. That attachment was not amended in February 2008, so that it still shows the position as at 31 July 2000.

The assessment by the Tribunal's Geospatial Services dated 4 March 2008 identifies that there were at that time nine applications falling within the external boundaries of the application, none of which were on the Register.

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

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

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

Result

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

Reasons

The section does not make the requirement absolute, but rather requires the application to contain details of which 'the applicant is aware'.

I also do not construe the section as requiring details of 'spent' s.29 notices. The note at the end of the section and the Explanatory Memorandum to the Act indicate that one purpose of the requirement is to ensure that the Registrar is made aware of the need to 'use his best endeavours to finish considering the claim by the end of 4 months after the notification day specified in the notice': see s. 190A(2).

The details of notices which had been previously provided with the earlier application are no longer relevant, as those notices have expired. They were, of course, relevant at the time.

The application was amended by Order dated 22 February 2008 (pursuant to a Notice of Motion filed 13 July 2007) when the Court granted the newly constituted applicant leave to amend by filing a Form 19 in the form attached to an affidavit by Mr Blackshield. No information was provided about new s. 29 notices.

I find the subsection to be satisfied.

Combined result for s. 62(2)

The application does not meet the combined requirements of s. 62(2), because it **meets each and every one of the subrequirements of ss. 62(2)(a) to(h), as set out above.**

Combined result for s. 190C(2)

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

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

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

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

(b) the previous application was on the Register of Native Title Claims when the current application was made, and

(c) the entry was made, or not removed, as a result of the previous application being considered for registration under s. 190A.

Result

The application **satisfies** the condition of s. 190C(3).

Reasons

The requirement that the Registrar be satisfied in the terms set out in s. 190C(3) is only triggered if all of the conditions found in ss. 190C(3)(a), (b) and (c) are satisfied—see *Western Australia v Strickland* (2000) 99FCR 33 ; (2000) FCR 33 at [9].

(a) Does the previous application cover the whole or a part of the area covered by the current application?

As a first step, s. 190C(3) requires identification of previous overlapping applications covering the whole or part of the area.

An assessment by the Tribunal's Geospatial Services dated 4 March 2008 reveals that the Ballardong application overlaps ten other native title determination applications which are on the Schedule of Native Title Applications:

Tribunal Number	Federal Court Number	Name	Application Type	NTA Area (sq km)	Overlap Area (sq km)	% NTDA Overlapping WC00/7	% WC00/7 Overlapping NTDA
WC95/86	WAD149/98	Ballaruks Peoples	Claimant	4537.833	1473.863	32.48	2.35
WC96/52	WAD6091/98	D and SR Collard (Noongar)	Claimant	202.723	202.723	100.00	0.32
WC96/70	WAD6102/98	Noongar people	Claimant	188.008	188.008	100.00	0.30
WC96/105	WAD6130/98	Wom-Ber	Claimant	127397.499	12152.708	9.54	19.34
WC97/1	WAD6142/98	D Collard and S Collard	Claimant	188.069	188.069	100.00	0.30
WC97/41	WAD6171/98	Donald and Sylvia Collard	Claimant	183.963	183.963	100.00	0.29
WC98/2	WAD6223/98	Donald and Sylvia Collard	Claimant	0.312	0.312	100.00	0.0005
WC03/6	WAD6006/03	Single Noongar Claim (Area 1)	Claimant	193956.595	62822.411	32.39	100.00
WC04/8	WAD286/04	Widi Binyardi	Claimant	27206.129	83.392	0.31	0.13

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

For the purposes of this section, the date upon which the current application was made is the date upon which the last underlying application was made: *Strickland v Native Title Registrar* [2000] FCA

652. In this case, the last of the underlying Ballardong combinations was made on 21 November 1997. For the purposes of s. 190C(3)(b), the application is taken to have been 'made' on that date, but the test is applied when the matter comes before me.

c) Was an entry made, or not removed, as a result of consideration of the previous application under section 190A?

For the purposes of s. 190C(3)(c), consideration of the entry in relation to the previous application under s. 190A takes place at the time that the Registrar applies the registration test to the current application, i.e. the relevant time is not when the current application was made but when it is being considered under s. 190A—see *Western Australia v Strickland* (2000) 99FCR 33 ;(2000) FCR 33 at [53]–[56].

None of the previous applications are currently entered on the Register of Native Title Claims. In fact all have been removed following consideration for registration pursuant to s. 190A or the transitional provisions of the *Native Title Amendment Act 2007*.

Conclusion

I therefore do not need to consider whether there is any common membership between the current claim and any of these claims.

Section 190C(4) Authorisation/certification

Under s. 190C(4) the Registrar/delegate must be satisfied either that:

(a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or

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

Under s. 190C(5), if the application has not been certified, the application must:

(a) include a statement to the effect that the requirement in s. 190C(4)(b) above has been met (see s. 251B, which defines the word 'authorise'), and

(b) briefly set out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been me

Result

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

For the reasons set out below, I am not satisfied that the requirements set out in s. 190C(4)(b) are the case.

Reasons

In these reasons I will, for the sake of convenience, refer to authorisation under s. 251B(a) as 'traditional', and under s. 251B(b) as 'agreed and adopted'.

Authorisation or certification: the role of the delegate

The nature of the Registrar's task was set out in *Doepel* at paragraph [78]:

> In the case of subs (4)(b), the Registrar is required to be satisfied of the fact of authorisation by all members of the native title claim group. Section 190C(5) then imposes further specific requirements before the Registrar can attain the necessary satisfaction for the purposes of s 190C(4)(b). The interactions of s 190C(4)(b) and s 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given. The nature of the enquiry is discussed by French J in *Strickland v NTR* at [259]–[260], and approved by the Full Court in *WA v Strickland* at [51]–[52]. Both *Martin* at [13]–[18], and *Risk v National Native Title Tribunal* [2000] FCA 1589 involved consideration of the condition imposed by s 190C(4)(b).

Sections 190C(4) and 190C(5) are concerned with the authorisation of the applicant to make the application and to deal with matters arising in relation to it by the rest of the native title claim group.

Does s. 190C(4)(a) or (b) apply?

The application has not been certified, so I must consider the requirements of s. 190C(4)(b), which are that the Registrar (or his delegate) must be satisfied that:

> (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.

Is s. 190C(5) satisfied?

If the application has not been certified and s.190C(4)(b) applies, the Act imposes two conditions at s. 190C(5) (a) and (b) which are largely procedural in nature, being preconditions about which the Registrar must be satisfied before proceeding to consider the more evaluative task at s. 190C(4)(b). The section states that the Registrar may not be satisfied at s. 190C(4)(b) unless the application

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

In this case I am not required to consider if the application contains the statement and brief setting out of the grounds in relation to authorisation required by s. 190C(5). This is because my consideration of the application is governed by the provisions of schedule 5(4) of the transitional provisions to the Technical Amendments Act which provides that I must have regard to information provided by the applicant after the application was made and apply s. 190A as if the conditions in ss. 190B and 190C requiring that the application contain certain information, also

allowed the information or other things to be provided by the applicant or another person after the application was made.

The following persons were authorised at the 9 December 2006 meeting. They were

- Alan Jones
- Winnie McHenry
- Doug Nelson
- Reg Hayden
- (name withheld for cultural reasons0
- Ricky Nelson
- Tim Riley
- Dianne Taylor
- Reg Yarran Jnr
- Murray Yarran
- Fay Slater
- Carol Holmes

(name withheld for cultural reasons) was subsequently removed by way of an application pursuant to s. 66B, the Orders being made on 16 June 2008.

Each stated in their affidavits that an agreed and adopted process had been used at the meeting. There are two sets of affidavits which have been filed referring to the same meeting. The first were sworn by the applicants variously in February, June and July 2007. Each of the affidavits makes the assertion that the deponent

> was authorised by a decision made by the native title claim group at a meeting of the native title claim group in Northam on 9 December 2006, pursuant to a decision-making process that was agreed and adopted by the native title claim group at that meeting.

A further set of affidavits was made in February 2008 by each of the applicants. They make virtually identical statements, except that they add the detail that 'decisions were made by majority vote on a show of hands.'

The meeting was widely and appropriately advertised.

Kevin Fitzgerald, a Ballardong man and a Senior Projects Officer at SWALSC (who has been similarly employed, including by the Noongar Land Council, SWALSC's predecessor, since 2001), and who attended the meeting, says in his affidavit dated 12 July 2007 at paragraph 7 that;

> From my earliest memories, family groups within the Ballardong people would get together to make decisions relating to speaking for country. However, to the best of my knowledge and recollection, there has never been any traditional process in existence by which the Ballardong people would make decisions as a whole in regards to speaking for country. Accordingly, there is no process of decision making that, under

> the traditional laws and customs of the Ballardong people, must be complied with to authorise persons to make an application for a determination of native title and to deal with matters arising in relation to it.

An affidavit by Mr Blackshield dated 12 July 2007 includes a copy of the minutes of the meeting on 9 December 2006 at annexure L. Under the heading 'Decision-making' the minutes note that:

> Simon Blackshield raised the issue of decision making processes at the meeting: If there was a decision making process that must be followed to do things in the nature of authorising people to make and deal with native title applications under the laws and customs of the claim group that process would need to be followed. However, it can be argued that the technical white law of native title simply does not mesh with Aboriginal law, and that there accordingly may be not be any process that must be followed by this group. Comments on this issue were sought from the meeting: no comments were made.

A resolution was then put that the group

> adopts a decision making process whereby decisions for authorising members of the native title claim group to make and deal with matters arising in relation to the application, are to be made by a majority of those members of the native title claim group present and voting.

The resolution was passed with 53 votes for, and 22 against. The minutes are silent as to what view the 22 dissenters had taken.

Consideration.

Authorisation is defined at s. 251B of the Act:

> a) where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group or compensation claim group, must be complied with in relation to authorising things of that kind – the persons in the native title claim group or compensation claim group authorise the person or persons to make the application and to deal with the matters in accordance with that process; or
> (b) where there is no such process – the persons in the native title claim group or compensation claim group authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group or compensation claim group, in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.'

The Federal Court has consistently emphasised the fundamental importance the Act places on ensuring that claimant applications are properly authorised. The Court in *Strickland v Native Title Registrar* [1999] FCA 1530, a decision upheld by the Full Court, said:

> Nevertheless, this is a matter of considerable importance and fundamental to the legitimacy of native title determination applications. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title. It is not a condition to be met by formulaic statements in or in support of applications—at [57].

In *Daniel v State of Western Australia* [2002] FCA 1147, His Honour Justice French J emphasised that:

> it is of central importance to the conduct of native title determination applications and the exercise of the rights that flow from their registration, that those who purport to bring such applications and to exercise such rights on behalf of a group of asserted native title holders have the authority of that group to do so— at [11].

I am satisfied that the applicants are properly authorised.

Merit conditions: s. 190B

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

The Registrar must be satisfied that the information and map contained in the application as required by ss. 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

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

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

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

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

Result

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

Reasons

Schedule B refers to Attachment B, which describes the application area using geographical coordinates referenced to the Australian Geodetic Datum 1984 (GDA84), local government area boundaries, and Noongar Land Council boundaries.

Attachment B then lists areas within the external boundaries which are excluded from the claim. Attachment B provides information identifying the internal boundaries of the claimed area by way of a formula that excludes a variety of tenure classes from the claim area.

Areas that are excluded from the claim area are set out as follows:

1 The applicants exclude from the claim any areas covered by valid acts on or before 23 December 1996 comprising such of the following as are included as extinguishing acts within the Native Title Act 1993, as amended, or the Titles Validation Act 1994, as amended, at the time of the Registrar's consideration:
(a)Category A past acts, as defined in NTA section 229;
(b)Category A intermediate period acts as defined in NTA section 232B.

2. The applicants exclude from the claim any areas in relation to which a previous exclusive possession act, as defined in section 23B 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 23E in relation to the act as at the time of the Registrar's consideration.

3. The applicants exclude from the claim any areas in relation to which native title rights and interests have otherwise been extinguished, including areas subject to:
(a) an act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or
(b) actual use made by the holder of a tenure other than native title which is permanently inconsistent with the continued existence of native title,
AND, to avoid any uncertainty, the applicants exclude from the claim:
(c) an unqualified grant of an estate in fee simple; or
(d) a lease which is currently in force, in respect of an area not exceeding 5,000 square metres, upon which a dwelling house, residence, building or work is constructed, and which comprises:
i) a Lease of a Worker's Dwelling under the Worker's Homes Act 1911-1928; or
ii) a 999 year Lease under the Land Act 1898; or
iii) a Lease of a Town Lot or Suburban Lot pursuant to section 117 of the Land Act 1933 (WA); or
iv) a Special Lease under section 117 of the Land Act 1933 (WA); or
(e) a Conditional Purchase Lease currently in force in the Agricultural Areas of the South West Division under clauses 46 and 47 of the Land Regulations 1887 which includes a condition that the lessee reside on the area of the lease and upon which a residence has been constructed; or
(f) a Conditional Purchase Lease of a cultivable land currently in force under Part V, Division (1) of the Land Act 1933 (WA) in respect of which habitual residence by the lessee is a statutory condition in accordance with the Division and upon which a residence has been constructed; or
(g) a Perpetual Lease currently in force under the War Service Land and Settlement Scheme Act 1954; or

(h) a permanent public work; or
(i) an existing public road or street used by the public.
4. Paragraphs (1), (2) and (3) above are subject to such of the provisions of sections 47, 47A and 47B of the NTA as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing but which include areas that are occupied by one or more of the native title claim group and may be listed in Schedule L at a later date.

Daniel v State of Western Australia [1999] FCA 686 (*Daniel*) is authority for the proposition that the acceptability of class or formula exclusions will depend upon the state of knowledge of the claimants of the tenure in the claim area at the date the application is made. In *Dieri v South Australia* [2000] FCA 1327 (*Dieri*) the Court said that if tenure information might reasonably have been used to exclude areas from an application then reliance cannot be placed on class or formula exclusions.

At Attachment D of the application, the applicant includes a copy of tenure searches conducted by the State of Western Australia.

However in relation to this question of class exclusions I note the following comments of Nicholson J in *Daniel*:

> The Act recognises the need to provide certainty for people with interests as to whether it is the subject of a claim. The class formula approach proposed by the applicants to the definition of exclusion does, if otherwise appropriate, give certainty for respondent interest holders in that they know their interest is subject to claim unless specifically excluded. The determination of whether particular interests meet the definition referred to in that section will often have to await the determination of the application – at [38].

In *Strickland*, French J noted that

> the Act is to be construed in a way that renders it workable in the advancement of its main objects… The requirements of the registration test are stringent. It is not necessary to elevate them to the impossible…– at [55].

Having regard to the formulation of the exclusion clauses, I am satisfied that the area excluded is described with sufficient certainty to meet the requirements of this condition of the registration test. I am also satisfied that the requirements of s. 62(2)(a)(ii) are met.

A map produced by the Land Claims Mapping Unit, DOLA dated 12 May 1998 is included at Attachment C. Attachment C is an A4 monochrome map entitled 'Ballardong Native Title Claim WC97/56'. The application area is depicted by a bold outline and diagonal hachuring. The map includes reference cadastral data shaded according to tenure classification; localities and towns; a scale bar; north point; coordinate frame; locality map; legend; currency; and source notes.

On 4 March 2008 the Tribunal's Geospatial Services prepared a 'Geospatial assessment and overlap analysis' of the map and description. That expert assessment relevantly says:

> It appears that this amendment is in part to reduce the overall area of the application by the inclusion of item (j) to the Internal Boundary description. Neither the external

boundary description in Attachment B nor the map in Attachment C has been amended to reflect the reduction in the area.

It could be said that the inclusion of item (j) in the list of internal boundaries is sufficient to clearly identify that this application area has been reduced to remove any areas outside of native title determination application WAD6006 of 2003 (SNC Area 1) as [at] 1 July 2007. However the map at Attachment C has not been amended to reflect this reduced area.

Until a map is included which clearly depicts the amended area the description and map are inconsistent and do not identify the amended application area with reasonable certainty.

It is noted that assistance was provided in November 2007 to prepare a new external boundary description and map to clearly identify the amended area.

If the application were to be amended in the future, then both the external boundary description at Attachment B and the map at Attachment C should be replaced with the updated description and map provided.

I do not entirely accept that assessment.

I have compared the map currently provided in the application against the draft map of the amended claim area which was prepared by Geospatial Services on 14 November 2007. It is clear that without referencing the internal area exclusions in the written description the map significantly misrepresents the claim area as it now is. However, the written description should, in my view, be regarded as clarifying the map. When the map and description are taken together they do enable identification, with reasonable certainty, of the boundaries of the area covered by the application, and any areas within those boundaries that are not covered by the application.

Section 190B(3)
Identification of the native title claim group

The Registrar must be satisfied that:
(a) the persons in the native title claim group are named in the application, or
(b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Result

The application **satisfies** the condition of s. 190B(3).

Reasons

The description of the claim group which I must consider, following the final amendments made by Order of 21 February 2008, is as follows:

The native title claim group comprises all those Aboriginal people who are:

1. biological descendants of the unions between:
- Tommy Yarran + Mary Jane Kickett;
- Win mar, an Aboriginal woman + Edwards, a European man;
- William 'Bill' Humphreys + Susan White;
- Tirban, an Aboriginal woman of Northam + a European man;
- Frederick John Blurton + Mary Anne Juberan;
- Thomas William Kickett + Mary Mellett;
- Jack Nelson + Ada Foss;
- George Borndrilditch Riley + Elizabeth Smith;

2. Persons adopted by the individuals named in 1above and those persons adopted by the biological descendants of the unions between the individuals named in 1 above, or

3. Persons that are the biological descendants of the adopted persons included in 2 above.

Adoption occurs in the following manner: if a man dies and his brother or cousin marries the widow, any of the widow's children are adopted as the children of the new husband.

What I must consider is whether the description is such that the persons in the group are described sufficiently clearly that it can be ascertained whether any particular person is in the group.

The relevant law

I am of the view that for a group to be 'described sufficiently clearly' it is necessary that the description contain objective tests. If that were not so, and subjective criteria were used then it would provide no more than a description of eligibility but requiring some further assessment or evaluation, beyond the description in the application, to identify a member. In *Doepel* the Court noted that:

> Although subs (3)(b) does not expressly refer to the application itself, as a matter of construction, particularly having regard to subs (3)(a), it is intended to do so – at [51.]

The requirement for an objective test has been expressed in a number of different ways.

In *Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732 the court required a 'set of rules or principles':

> First, the delegate's decision was not based on the proposition that it was necessary to identify each and every member of the claim group. The delegate clearly understood that the test was whether the group was described sufficiently clearly so that it could be ascertained whether any particular person was in the group i.e. by a set of rules or principles– at [25].

In *State of Western Australia v Native Title Registrar* [1999] FCA 1591–1594 the Court approved a description which was in terms of 'all the biological descendants of', noting that 'a factual inquiry

as to who all those persons are may be necessary to determine if any one person is a member of the group'. This 'factual enquiry' of which Carr J spoke was the consideration of the description's objective determinant or criteria, not a wider search – at [67].

Finally, in *Doepel* the Court considered the Registrar's reasons at s. 190B(3), noting that they specifically required an 'objective means', and approved of that test:

> The Registrar was satisfied that the description of the native title claim group in the application provided an objective means of verifying the identity of members of the native title claim group. He was therefore satisfied that the condition imposed by s 190C(3)(b) was met – at [23].
>
> The attack upon the Registrar's conclusion under s 190B(3)(b), in my judgment, must also fail. I consider the Registrar addressed the issue which he was required to address, and reached a conclusion available to him– at [51].

However, in *Doepel* the Court also said of s. 190B(3) that:

> Its focus is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the membership of the identified native title claim group can be ascertained. It . . . 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– at [37].

I therefore make no finding as to whether the claim group description is correct or accurately describes the members of the group. As the tests in the description of the 'identified native title claim group' are objective, I find the requirements of the section to be satisfied.

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

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

Result

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

Reasons

The claim to rights is set out in Attachment E and is reproduced in my reasons at s. 190B(6).

Section 190B(4) requires the Registrar or his delegate to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be readily identified. For the purposes of the condition, then, only the description contained in the application can be considered.

Section 62(2)(d) requires that the application contain 'a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of

those rights and interests) but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law. This terminology suggests that the legislative intent of the provision is to screen out claims that describe native title rights and interests in a manner which is vague, or unclear, and to claim them with some specificity.

The phrases 'native title' and 'native title rights and interests' are defined by s. 223(1) which provides 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 the courts have indicated are not readily identifiable as native title rights include the right to control the use of cultural knowledge that goes beyond the right to control access to lands and waters, rights to minerals and petroleum under relevant Queensland legislation, an exclusive right to fish offshore or in tidal waters and any native title right to exclusive possession offshore or in tidal waters.

Rights which are not rights in lands or waters, such as rights to receive a portion of a catch, rights to uphold and enforce traditional laws and customs, and rights to determine and regulate membership cannot be readily identified as native title rights.

In *Doepel* His Honour Justice Mansfield suggested this test:

> In my judgment, the Registrar is not shown to have erred in any reviewable way in addressing the condition imposed by s 190B(4). ... He reached the required satisfaction that ... the claimed native title rights and interests did meet the requirements of being understandable as native title rights and interests and of having meaning— at [123].

To meet the requirements of s. 190B(4), I need only be satisfied that at least one of the rights and interests sought is sufficiently described for it to be readily identified.

I am of the view that all the rights claimed, other than—

> (h) the right to maintain, protect and prevent the misuse of cultural knowledge of the common law native title holders associated with the area; and
> (l) the right to receive a portion of any resources taken by others from the area—

are readily identifiable. These rights are not rights in land and have been held by the courts not to be native title rights.

Some of the remaining rights, however, whilst readily identifiable as claiming native title, offend against the principles in *Attorney-General of the Northern Territory v Ward* [2003] FCAFC 283 at [16] – [21] when considered for the requirements of s. 190B(6).

Section 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.

Delegate's comments

I consider each of the three assertions set out in the three paragraphs of s. 190B(5) in turn and come to combined result for s. 190B(5) at page 36 below.

The information considered

As well as the application and its schedules, tables and attachments from time to time, I have also had particular regard to the following materials and information when considering this section, as well as s. 190B(6) and s. 190B(7):

1. The following affidavits were chiefly filed in relation to authorisation, but contain some supportive information on the role and responsibilities of elders and of associations with the country.

- Affidavits by: Reg Hayden dated 9 August 2000, Tim Riley dated 31 July 2000, Alan Jones dated 9 August 2000, Winnie McHenry dated 9 August 2000, Doug Nelson dated 9 August 2000, William Riley dated 9 August 2000, Reg Yarran dated 3 August 2000, Robin Yarran dated 2 August 2000, Alec Yarran dated September 2000, Dianne Taylor dated 30 August 2000, Ricky Nelson dated 7 September 2000, (name withheld for cultural reasons) dated September 2000, Donald Collard dated 24 August 2000, and Sylvia Collard dated 24 August 2000.

2. The following affidavits go principally to supplying information about authorisation, but again contain some supportive information relating to the identification by members of themselves as Ballardong people:

- Affidavits by: Lindsay Langford dated 15 February 2008, Yvette Bradley dated 12 July 2007, Kevin Fitzgerald dated12 July 2007, and Jo-Anne Jones dated 6 July 2007.

3. Affidavits pursuant to s. 62(1) by the persons comprising the applicant, which, amongst other things, verify the truth of all the statements in the application.

4. The following affidavits and other information contain more substantial information, principally directed at the issues considered in this section and s. 190B(6).

- Supplement to Attachment F, provided 15 February 2008
- An extract (of some 250 pages) from the Applicant's Historical Report by Dr John Host, undated, but filed 23 May 2005. The extract is of pages 47 to 290. As far as I can tell, it appears to have been written in support of the case put for the applicants in the Single Noongar matter, rather than Ballardong (see 304).
- Affidavits by: Bruce Shaw dated 3 June 1999, Winnie McHenry dated 28 January 1999 and 12 February 2008, William Riley dated 29 January 1999, (name withheld for cultural reasons) dated 29 January 1999, Doug Nelson dated 2 February 1999, and Kevin Fitzgerald dated 15 February 2008.

5. Submissions from the solicitor for the claim group by emails of 28 November 2007 and 15 February 2008. Prior to its overturning by the Full Bench of the Federal Court (in *Bodney v Bennell* [2008] FCAFC 63) the applicants (submitted by letters of 10th and 15th October 2007) that I should 'adopt relevant findings made by Wilcox J in *Bennell v Western Australia* [2006] FCA 1243' and said, in relation to some of the requirements of s. 190B(5), that the applicant sought to rely on the certain findings by Wilcox J in *Bennell* at [791], which the submissions then set out. The submission continued that 'the applicant also (seeks) to rely on the finding by Wilcox J in *Bennell* in support of the factual assertions which had been made to the effect that from immediately prior to18 June 1829 through to the present day, the Noongar people, including the members of the native title claim group, have at all times acknowledged and observed the traditional laws and customs by which the Noongar people are connected to a wider area which includes the application area.'

Even if I were to accept the submission, which I do not in the circumstances, it would be of limited utility because the decision spoke only of the whole Noongar society, not the particular group of Noongar persons who identify as Ballardong and who comprise the claim group. I note that this claim is overlapped by the Single Noongar claim, but asserts a right to exclusive possession, so that there is a question of competing claims.

That said, I note that the enquiry at s. 190B(5)(a) relates only to 'association' rather than the s.223(b) 'connection' 'by laws and customs'. This seems to me to imply a 'lower' test.

When considering s. 190(B)(5), the Registrar is not limited to the statements contained in the application but may refer to additional material supplied to the Registrar: *Martin v Native Title Registrar* [2001] FCA 16 [23]. I have had regard to the application as a whole; and, pursuant to s. 190A(3), also to relevant information that is not contained in the application. Because this application is affected by the transitional provisions of the amendments to the Native Title Act, item 90(4) requires me to take into account other materials supplied. As it is also affected by schedule 5 of the transitional provisions of the Technical Amendments Act 2007, I must also abide by schedule 5, item 1(4).

In *Queensland v Hutchinson* (2001) 108 FCR 575, Kiefel J said that '[s]ection 190B(5) may require more than [s. 62(2)(e)], for the Registrar is required to be satisfied that the factual basis asserted is

sufficient to support the assertion. This tends to assert a wider consideration of the evidence itself, and not of some summary of it.'

The task of the Registrar was considered in *Doepel*:

> Section 190B(5) … requires the Registrar to address the quality of the asserted factual basis for those 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 … The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts– at [17]; and
>
> It does not itself require some weighing of that factual assertion whether the asserted facts can support the claimed conclusions —at [127].

In *Members of Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*) the majority of the High Court explained that the word 'traditional' refers to a means of transmission of law or custom, and conveys an understanding of the age of traditions. Those principles may be summarised as:

> '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 uninterrupted from the time of acquisition of sovereignty to the time when the native title group sought 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 interest 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].

s. 190B(5)(a) – that the native title claim group have, and the predecessors of those persons had, an association with the area.

Gudjala People #2 v Native Title Registrar [2007] FCA 1167 is the most recent consideration by the courts of how this subsection should be approached:

> The identified rights and interests must belong to the identified claim group.... The applicant may not have been obliged to identify the relationship between the claim group and the relevant land and waters in describing the claim group for the purposes of subs 190B(3), but that step had to be undertaken for the purposes of subs 190B(5) – at [41].

> Even if it be accepted that all members of the claim group are descended from people who had an association with the claim area at the time of European settlement, that says nothing about the history of such association since that time. Some members of the claim group and their predecessors may be, or may have been, so associated, but that does not lead to the conclusion that the claim group as a whole, and their predecessors, were similarly associated. – at [51] However there must be evidence that there is an association between the whole group and the area. Similarly, there must be evidence as to such an association between the predecessors of the whole group and the area over the period since sovereignty – at [52].

The Historical Report by Dr John Host claims (at 227) that 'Aboriginal people, whose numbers at the moment of settlement can never be known, occupied the entire south-west of Western Australia'. Of the period up to 1840 he concludes (at 289) that 'Noongars remained robust in 1840'.

At paragraph 290 he turns to consider 'Traditional law and custom: continuity and change 1801 – 1840' in chapter 16, and at 329, 'Aboriginal adaptation and cultural maintenance 1841 – 1900' in chapter 17. Of the remainder of the report, the information in chapters 18 ('Into the 20th century: meeting new challenges 1880 – 1905'), chapter 21 ('Enduring connections') and chapter 19 ('Historical connections') provides, in my view, an amply sufficient factual basis for the assertion that the Noongar people have, and their predecessors had, an association with the area. The claim group, however, asserts rights against that group.

Although I am unable to find any reference to the Ballardong people in that report, I do note the remark at 306 that 'early observers were quick to note that specific Aboriginal groups were associated with particular areas of land'. That there is no specific mention of the Ballardong people as such does not seem to me to be significant: the application is based on an assertion that the Ballardong are Noongars following the 'Noongar Way'.

I must then consider whether there is information which would support the assertion that this particular claim group had that association, as required by *Gudjala.*

Schedule F, Attachment F contains a statement to the effect that 'the native title claim group and their ancestors have, since the time of sovereignty possessed, occupied, used and enjoyed the claim area…'. Table F provides further information including information about the process of connection based on cognatic descent. It also refers to the importance individuals place on the connections of claimants and their families to the area giving rise to mutual respect in recognition of the custodial relationship enjoyed by families within the area.

That material is expanded upon in the Supplement to Attachment F which explains that 'the particular native title rights claimed by the native title claim group in relation to the application area are group rights and interests held under the communal native title of the wider Noongar people'. The submissions made on 28 November also address whether the rights are communal in nature or otherwise. There is information which confirms that the Ballardong group, at the least, are Noongar and follow the Noongar Way, but I do not think that I am required to resolve this issue of the nature of the rights, it being a matter for trial.

The affidavits provided by Winnie McHenry dated 28 January 1999 and 12 February 2008, William Riley dated 29 January 1999, (name withheld for cultural reasons) dated 29 January 1999, and Doug Nelson dated 2 February 1999 each annex or verify the same table. The table contains a column headed 'Noongar elders association with their country within the claim area' which details the descent of each deponent in relation to one of the rights or interests claimed. It does not

provide information as to the association of the claim group as a whole to the entire area subject to claim, a question considered in *Gudjala* at [51] – [52] (see above).

Dr Bruce Shaw's affidavit of 3 June 1999 at paragraph 8, however, states that the four deponents were chosen as representative of 'sub-groups' for their particular areas and that these 'sub-groups' collectively identified as Noongar. Dr Shaw then sets out families that share the collective identity of Noongar, but identify with specific geographic regions within the area of the claim and are recognised 'as having rights of ownership and use' in relation to these specific areas.

The affidavit of Kevin Fitzgerald dated 15 February 2008 provides further information.

On the basis of all the information mentioned above, and the application read as a whole, I find that there is a sufficient factual basis to support the assertion that the native title claim group have, and the predecessors of those persons had, an association with the area.

The requirements of s. 190B(5)(a) are therefore met.

s.190B(5)(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.

There must be a factual basis sufficient to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the claim group, which laws and customs give rise to the native title claim. *Gudjala* held that the factual basis must be capable of demonstrating that:

- there are traditional laws and customs;
- acknowledged or observed by the Native Title claim group; and
- giving rise to the group's claim to Native Title rights and interests – at [62].

The Court also said:

> The decision in Yorta Yorta (supra) demonstrates that the requirement that the laws and customs be traditional means that they must have their source in a pre-sovereignty society and have been observed since that time by a continuing society. The applicant submits that this does not lead to the conclusion that the apical ancestors must have comprised a society. I accept that submission – at [63].
>
> The starting point must be identification of an indigenous society at the time of sovereignty or, for present purposes, in 1850-1860 – at [66]; and,
>
> … at some point the applicant must explain the link between the claim group and the claim area. That process will certainly involve the identification of some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage – at [66].

I note that in *Gudjala* the evidence was that the period 1850–60 was that of first contact/dispossession, and in this matter I would understand from Host that the relevant date may be about 1830–40. The report clearly identifies a Noongar society at that time. The affidavit of Lindsey Langford dated 15 February 2008 provides information linking the apical ancestors to that society, mostly around 1860. It is reasonable to infer that those persons were part of that continuing society identified as existing in 1830 or thereabouts. I find that there is information to suggest that those laws do have their origin in pre-sovereignty society.

Schedule F, Attachment F contains a statement that:

> (ii) such possession, occupation, use and enjoyment has been pursuant to and possessed under the laws and customs of the claim group, including traditional laws and customs that rights and interests in land and waters vest in members of the native title claim group on the basis of:
>
> a) descent from ancestors connected to the area
> b) traditional religious knowledge of the area
> c) traditional knowledge of the geography of the area
> d) traditional knowledge of the resources of the area, and
> e) knowledge of traditional practices of the area.

Table F also includes assertions that a number of traditional and inter-connected laws and customs exist, creating what is known as 'Noongar Way' and some detail is provided as to its components, these being custodianship of sites, importance of elders within the community, recognition of other families' rights to country and a concomitant right to control one's own land, and 'sharing and caring for the land'.

The Supplement to Attachment F, although much of it is assertional rather than providing facts, details some of 'the rules which were acknowledged and observed by Noongar people immediately prior to 18 June 1829 [which] have been handed down from one generation of the Noongar people to the next …in an unbroken chain'.

The Historical Report by Dr Host also supports the contention that there are traditional laws and customs of the Noongar people that give rise to rights in land and thus also the native title. Many factual examples of Noongar laws and customs are provided, especially in chapters 16 and 21. Broadly speaking, these are echoed in the affidavit material, although in less detail. Even though the Report does not at any point (so far as I can determine) mention any Ballardong rights, I accept it on the basis that the applicants state that their rights flow from or are held under Noongar law and custom.

The affidavits referred to at my reasons in s. 190B(5)(a) also refer to the Noongar Way and provide further more detailed information as to some of the dictates of 'Noongar life'. These are identical and contain information presented in the table attached to them under various headings. These seek to identify each right or interest claimed, identify one person who participates in an associated activity, and to describe the particular activity. Three further columns are headed Schedule F(a), Schedule F(b) and Schedule F(c). These provide details specific to the Schedules within the Form 1 application to which they correspond.

Dr Bruce Shaw's affidavit provides additional information relevant to this subsection. Specifically he includes information as to the rights and obligations flowing from the 'Noongar Way' in respect of land. This includes a form of custodianship extending to the resources of the area observed by members of the claim and those external to the group. Such a form of law and custom as is described in Dr Shaw's affidavit is, in my view, consistent with that described in the affidavits and is confirmed in the activities described at Attachment G as flowing from the rights and interests claimed.

I find that that there is a sufficient factual basis to support the assertion 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 and as a result I am satisfied that the requirements of s. 190B(5)(b) have been met.

s.190B(5)(c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Of this subsection Dowsett J in *Gudjala* observed:

> Subsection 190B(5) required that there be a factual basis supporting the assertion that the Native Title claim group have continued to hold Native Title in accordance with traditional laws and customs. This implies a continuity of such tenure going back to sovereignty, or at least European occupation as a basis for inferring the position prior to that date and at the time of sovereignty – at [82].

Attachment F contains the following statements:

> (iii) such traditional laws and customs have been passed by traditional teaching, through the generations preceding the present generations to the present generations of persons comprising the native title claim group;
> (iv) the native title claim group continues to acknowledge and observe those traditional laws and customs;
> (v) the native title claim group by those laws and customs have a connection with the land in respect of which the claim is made;

Table F provides additional information that includes details of the maintenance of laws and customs comprising the Noongar Way, specifically the means of transmission to younger generations. Practices referred to include the retelling of stories both orally and in written form and the visitation of places within the claim area. Other matters referred to in support of this continued association are 'a strong desire, in keeping with "Noongar Way" … to protect and maintain the environment', the continued practice of 'observing the proper interpersonal etiquette' and observance of customs associated with places of special spiritual significance.

The affidavit of Winnie McHenry includes statements specific to the deponent which illustrate the broader association of the group to the area under claim. Examples of this include the paragraph appearing in the column relevant to Schedule F(c) on page 5. She states:

> I was told as a young girl about the country. I was taught how to collect bush tucker. As an adult, the elders in preparation for me becoming an elder, showed me places of historical and spiritual importance to our Noongar people.

> Another example appears at the column headed 'Transmission of native title in accordance with the Noongar Way' (Schedule F(c)) on page 6 of the affidavits. It appears as follows:As part of being an Aboriginal elder from the region I received knowledge about Noongar Way from my own elders. This knowledge concerns matters both secular and sacred which includes knowledge about spiritual links to the place you call home; and the fact that for my entire life I have observed the conventions and dictates of Noongar Way.

The Historical Report, particularly at chapters 18 to 21 provides considerable information about the continuity of Noongar laws and customs into the twentieth century and during the lifetimes of claim group members.

I am of the view that the information contained in the material I identified at the beginning of my consideration of this section as a whole is sufficient for me to conclude that there is a sufficient factual basis to support the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The requirements of s. 190B(5)(c) have therefore been met.

Combined result for s. 190B(5)The application satisfies the conditions of s. 190B(5) because it satisfies each of the conditions of ss. 190B(5) (a), (b) and (c).

Section 190B(6)
Prima facie case

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

Result

The application **satisfies** the condition of s. 190B(6). I consider that some of the claimed rights and interests can be prima facie established.

Reasons

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 Registrar takes the view that this requires only one right or interest to be registered.

The term 'prima facie' was considered by the High Court in *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595. In that case, the majority of the court 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].'

And at [35]:

> However, the notion of a good prima facie claim which, in effect, is the concern of s. 63(1)(b) and, if it is still in issue, of s. 63(3)(a) of the Act, is satisfied if the claimant can point to material which, if accepted, will result in the claim's success.

This test was explicitly considered and approved in *Doepel*:

> Although *North Ganalanja Aboriginal Corporation v The State of Queensland* (1996) 185 CLR 595 *(Waanyi*) was decided under the registration regime applicable before the 1998 amendments to the NT Act, there is no reason to consider the ordinary usage of `prima

> facie' there adopted is no longer appropriate: ... 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'— at [135].

In considering this application and in deciding which native title rights and interests claimed can be established prima facie I have adopted the ordinary meaning referred to by their Honours and the expressions of it in the concepts of 'material which, if accepted, will result in the claims success' and 'a claim which is arguable, whether involving disputed questions of fact or disputed questions of law should be accepted on a prima facie basis'.

In *Doepel* Mansfield J considered the task of the Registrar in these terms, noting that an evaluative approach is to be taken at and that it may be necessary to consider adverse material in weighing up the factual evidence – at [126]–[127].

> Clearly the requirements upon registration imposed by s 190B should be read together. Section 190B(6) requires the Registrar to consider that, prima facie, at least some of the native title rights and interests claimed can be established. It is necessary that only the claimed rights and interests about which the Registrar forms such a view are those to be described in the Native Title Register: see s 186(1)(g). It is therefore clear that a native title determination application may be accepted for registration, even though not all the claimed rights and interests, prima facie, can be established. Section 190B(6) requires some measure of the material available in support of the claim— at [126].
>
> On the other hand, s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s 190B(6). As counsel for the Territory also pointed out, addressing s 190B(6) may also require consideration of controverting evidence— at [127].
>
> Having been satisfied of the particular requirements, of s 190B(5), and because s 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed, it follows that the Registrar is not shown to have erred in his consideration of s 190B(5) in the manner asserted by the Territory— at [132].

Native title rights are defined at s. 223 and are those communal, group or individual rights in relation to lands and waters held by the native title claim group. In order to consider whether such rights exist, the anterior questions of whose rights they are and on whose laws and customs they are based must be considered.

A number of the rights and interests claimed are not, in my view, able to be established. The claim to rights is set out in Attachment E and is as follows:

> The Rights and Interests
> The applicants claim in relation to the claim area, including land and waters, the native title rights and interests set out below ("The Rights and Interests") subject to the following qualifications.

(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 applicants.
(ii) To the extent that the native title rights and interests claimed may 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 applicants do 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 231 in relation to the act. 'Without limiting the foregoing, the applicants specifically exclude all enclosed pastoral lands and mining lease lands where extinguishment of native title has occurred.
(iv) Paragraph (iii) above is subject to such of the provisions of sections 47, 47 A and 47B of the NTA as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing but which include such areas as may be listed in Schedule L.
(v)The native title rights and interests claimed are subject to any valid rights created under the common law or a law of the State or the Commonwealth.

Subject to the above qualifications, the rights and interests claimed in relation to the claim area, including land and waters, are:

(a) rights and interests to exclusively 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 maintain and protect places of importance under traditional laws, customs and practices in the area;
(h) [not a native title right: see s. 190B(4)]
(i) the right to rear and teach children in their country;
(j) the right to live on and erect residences and other infrastructure on the land;
(k) the right to trade in resources of the area
(l) [not a native title right: see s. 190B(4)]
(m) the right to manage, conserve and look after the land, waters and resources, including locating and cleaning water sources and drinking water on the land.

Rights where there has been no extinguishment or where s. 238 applies

Some of the rights are consistent only with a claim to exclusive possession because of the level of control over land either expressed or necessarily implied by them. For the sake of clarity I will consider those rights first. They are:

(a) rights and interests to exclusively possess, occupy, use and enjoy the area;
(b) the right to make decisions about the use and enjoyment of the area;
(d) the right to control the access of others to the area;
(f) the right to control the use and enjoyment of others of resources of the area;
(j) the right to live on and erect residences and other infrastructure on the land;
(k) the right to trade in resources of the area;

The rights (b), (d), (f) and (j) may all be seen as incidents of an all-embracing right to exclusively possess, occupy, use and enjoy, and would be subsumed by it. They are not consistent with partial extinguishment by pre-existing interests.

Following *Attorney General of the Northern Territory v Ward* [2003] FCAFC 283 9 (*Ward*), a claim to exclusive possession, occupation, use and enjoyment may be able to be prima facie established over areas where a claim to exclusive possession can be sustained, that is, where there has been no extinguishment of native title and/or areas where the non-extinguishment principle found in s.238 applies (e.g. areas where s.47, S.47A or s.47B applies).

At paragraph (a) of Attachment E, the claim to exclusive possession, occupation, use and enjoyment is made in respect of 'the area'. At Attachment E (iii) the application expressly eschews any claim to exclusive possession over any area over which a previous non-exclusive possession act (as defined in s. 23F) has taken place. An exception is claimed where (and if) the provisions of s. 47, 47A and 47B apply; in relation to those sections, schedule L makes no claim and only says 'particulars to be supplied.' The right at (k) is, after *Mary Yarmirr & Ors v Northern Territory of Australia & Ors* [1998] FCA 1185, best seen as an exclusive right if it is available at all. I can find no information leading me to conclude that such a right may be established.

I am not satisfied that the rights claimed are able to be prima facie established. I am unable to find sufficient probative information which supports the present existence of such rights. Indeed, Dr Shaw's affidavit at paragraph 10, dealing with this issue, phrases most of what is said as being in the past. The result is that I am not satisfied that the rights at (a), (b), (d), (f), (j) can be prima facie established.

Rights where non-exclusive possession may be established

The following rights are, subject to what follows, consistent with partial extinguishment and thus non-exclusive possession.

(c) the right of access to the area;
(e) the right to use and enjoy resources of the area;
(g) the right to maintain and protect places of importance under traditional laws, customs and practices in the area;
(i) the right to rear and teach children in their country;
(m) the right to manage, conserve and look after the land, waters and resources, including locating and cleaning water sources and drinking water on the land.

I will first consider those rights which I consider may be established.

(c) the right of access to the area;

I am of the view that this right is capable of being held non-exclusively and is sufficiently clearly described to be capable of being prima facie established.

I must now consider whether or not there is sufficient factual information in the application to support it being established.

My reasons for s. 190B(5) above include detail as to the activities carried out on the land as described in various affidavits and Attachments F and G to the application. The activities all involve accessing the area. The report by Dr John Host similarly provides multiple examples of Noongar persons accessing the area.

I am of the view that these provide sufficient factual information to support the prima facie establishment of this right.

(g) the right to maintain and protect places of importance under traditional laws, customs and practices in the area;

Such a right has been recognised by the courts as capable of being prima facie established since the Full Court decision in *Ward.*

I must now consider if there is sufficient information available to support the prima facie establishment of such a right.

In my reasons at s.190B(5) I refer to information contained in or annexed to various affidavits, the Host report, and in Schedules F (including the Supplement) and G. For example, William and Robert Riley are said in Attachment G to have a particular interest in protecting a site, the name of which is provided.

I am of the view that sufficient information is contained in these documents to support the prima facie establishment of this right.

(i) the right to rear and teach children in their country;

This claimed right does not amount to a right to control the access or use of others to the claim area. I am satisfied that this right is capable of being prima facie established as a non-exclusive right.

I am satisfied that there is sufficient information in the application to support the right being prima facie established. For instance, Winnie McHenry states that child rearing is important and is associated very closely with activities on land such as knowledge of how to get food, an awareness of directions and seasons. She says she has many grandchildren including her sister's grandchildren and speaks of taking twenty of them out into the bush and teaching them bush

stories (Table G). Doug Nelson also speaks of actively teaching younger Aboriginal people about the country's resources as he was taught, 'a hands on approach', whilst visiting his country and collecting bush tucker.

(e) the right to use and enjoy resources of the area;
(m) the right to manage, conserve and look after the land, waters and resources, including locating and cleaning water sources and drinking water on the land;
These two rights cannot in my view be established for the reasons which follow.

In the determination hearing in*Ward,* the Full Court commented on the use of 'composite'expressions such as 'use and enjoy' in relation to non-exclusive rights, and the need to describe such rights in terms of activities. Omitting some material for clarity, the Court said:

> The opening words of clause 5 of the proposed determination identify the native title holders' rights as being 'non-exclusive rights to occupy, use and enjoy the land and waters in accordance with their traditional laws and customs, including, as incidents of that entitlement' certain identified rights. Counsel for the Commonwealth and the State of Western Australia argue for two changes to these words: the omission of the word 'occupy' and the substitution of 'being' for the words 'including, as incidents of that entitlement'. These changes are resisted by counsel for the claimants, Mr J Basten QC. As was pointed out by Gleeson CJ, Gaudron, Gummow and Hayne JJ in the High Court (at [89]), the expression 'possession, occupation, use and enjoyment', used in s 225(e) of the Act, 'is a composite expression directed to describing a particular measure of control over access to land'. The words of the proposed determination, 'occupy, use and enjoy' are not identical to, but are reminiscent of, this composite expression.
> The argument for an exhaustive, rather than inclusive, list of the incidents of the entitlement is based on para (b) of s 225 of the Act. That paragraph requires 'a determination of ... the nature and extent of the native title rights and interests in relation to the determination area' – at [16] – [17]

In that High Court joint judgment referred to, Gleeson CJ, Gaudron, Gummow and Hayne JJ also said:

> A determination of native title must comply with the requirements of s 225. In particular, it must state the **nature** and **extent** of the native title rights and interests in relation to the determination area. Where, as was the case here in relation to some parts of the claim area, 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. (Original emphasis)—at [51]

The Full Bench continued:

> A statement about the right to 'occupy, use and enjoy' (or merely 'use and enjoy') in accordance with traditional laws and customs conveys no information as to the nature and extent of the relevant rights and interests. It is equivalent to a statement that the

> holders of the traditional rights and interests are entitled to exercise their traditional rights and interests. Something more is obviously required. There must be a specification of the content of the relevant rights and interests. That is why the parties included sub-clauses (a) to (e). It is to those sub-clauses that a reader may look in considering the effect of the determination. They must exhaustively indicate the determined incidents of the right to use and enjoy'—at [21].

Following paragraph [51] quoted above from *Western Australia v Ward; Attorney-General (NT) v Ward; Ningarmara v Northern Territory [2002] HCA 28,* the majority went on to say at [52]:

> It is necessary to recognise that the holder of a right, as against the whole world, to possession of land, may control access to it by others and, in general, decide how the land will be used. But without a right of possession of that kind, it may greatly be doubted that there is any right to control access to land or make binding decisions about the use to which it is put. To use those expressions in such a case is apt to mislead. Rather, as the form of the Ward claimants' statement of alleged rights might suggest, it will be preferable to express the rights by reference to the activities that may be conducted, as of right, on or in relation to the land or waters.

Neowarra v State of Western Australia [2003] FCA 1402 further explained why:

> As a result of the injunction in Ward at [52] that in certain situations it will be preferable to express rights by reference to activities that may be conducted as of right on or in relation to land and waters, the applicants also claim the right to engage in particular activities. They say the activities are "particular incidents of, but do not comprise or define the legal content of the rights previously considered". But for extinguishment considerations, there would be no need to examine the various things that could be done in the exercise of the applicants' general ownership right. But where, as here, pastoral leases are involved, it is useful to consider the activities relied on to illustrate aspects of inconsistency of rights'—at [501].

The use of the word 'resources' itself makes the identification of the evidence necessary to establish the right problematic. In short, the word 'resources' is undefined and is a word of broad import. In *Neowarra v State of Western Australia* [2003] FCA 1402 the Court considered a similar but more defined right, which was 'taking and using the resources of the area, including forest products, water, minerals and other resources from the land and waters' and said:

> I refer to what I have said in [478] about resources. Some of the resources of the area are covered by the activities hunting, gathering and fishing. This activity is too wide and general - "taking and using", "minerals" and "other resources". If it were expressed as "using traditional resources of the area for the purpose of satisfying personal, domestic or non-commercial needs" it would not be inconsistent with pastoral leases. Whether "traditional resources" includes minerals is considered at [599]– at [508].

At [478] His Honour said that when a right is 'expressed with this generality—"use", "enjoy" and "resources"— the claim is inconsistent with the rights conferred by a pastoral lease.' He went on to

note that unless 'resources' were further defined, such a right could not be established. This is the case with right (e).

The same analysis applies to the right (m); but further, the use of the word 'including' confirms that the 'nature and extent' of the right is not fully detailed so that it is not possible to know the incidents of it—what the activities are comprising the right—and thus the evidence required to establish it. The content of the right as expressed is open-ended.

I find that these two rights may not be established.

Section 190B(7)
Traditional physical connection

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

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

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

  (i) the Crown in any capacity, or

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

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

Result

The application **satisfies** the condition of s. 190B(7).

Reasons

It is implicit in my reasons at s. 190B 5(b) and (c) that the members of the claim group continue to have a traditional physical connection to the area. I have found at s. 190B(5) that the association of the members is traditional (as that word was defined by *Yorta Yorta*) and there is ample evidence throughout the information provided, and particularly at Table G, about the lives of the claimants on country.

Section 190B(8)
No failure to comply with s. 61A

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s.61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Delegate's comments

Section 61A contains four subsections. The first of these, s. 61A(1), stands alone. However, ss. 61A(2) and (3) are each limited by the application of s. 61(4). Therefore, I consider s. 61A(1) first, then s. 61A(2) together with (4), and then s. 61A(3) also together with s. 61A(4). I come to a combined result at page 45.

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

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

Result

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

Reasons

There is no relevant determination.

No previous exclusive possession acts (PEPAs): ss. 61A(2) and (4)

> Under s. 61A(2), the application must not cover any area in relation to which
> (a) a previous exclusive possession act (see s. 23B)) was done, and
> (b) either:
> (i) the act was an act attributable to the Commonwealth, or
> (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act.
>
> Under s. 61A(4), s. 61A(2) does not apply if:
> (a) the only previous exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
> (b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

Result

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

Reasons

The application at schedule B refers to Attachment B. Although (on my copy, at least) not so labelled, there are two pages headed 'Internal Boundaries', which I take to be Attachment B.

Any such area mentioned in the section is excluded by Attachment B.

No exclusive native title claimed where previous non-exclusive possession acts (PNEPAs): ss. 61A(3) and (4)

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

(a) a previous non-exclusive possession act (see s. 23F) was done, and
(b) either:
    (i) the act was an act attributable to the Commonwealth, or
    (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act.

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

(a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
(b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

Result

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

Reasons

Attachment E (iii) expressly excludes any such claim.

Combined result for s. 190B(8)

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

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

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

(a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
(b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
(c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss. 47, 47A or 47B.

Delegate's comments

I consider each subcondition under s. 190B(9) in turn and I come to a combined result at page 46.

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

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

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

Any such claim is expressly excluded at Attachment E (i).

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

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

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

Any such claim is expressly exclude at Attachment E (ii).

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

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

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

Any such claim is expressly excluded at Attachment B (iii), which states that:

> The applicants exclude from the claim area any areas in relation to which native title rights have otherwise been extinguished, including areas subject to:
>
> (a) an act authorised by legislation which demonstrates the exercise of adverse dominion in relation to native title, or
>
> (b) actual use made by the holder of a tenure other than native title which is permanently inconsistent with the continued existence of native title.

Although the propositions in (a) and (b) are obviously informed by the decision at first instance of Lee J in *Ben Ward & Ors v Western Australia & Ors* [1998] FCA 1478, adopting the construction in *Delgamuukw v British Columbia,* I do not think they add anything or detract from the clear statement of the first two lines.

A claim, albeit as yet unparticularised, is also made there for the benefits of ss. 47, 47A and 47B.

Combined result for s. 190B(9)

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

[End of reasons]

Attachment A
Summary of registration test result

Application name:	Ballardong People
NNTT file no.:	WC00/7
Federal Court of Australia file no.:	WAD6181/98
Date of registration test decision:	3 July 2008

Test condition (see ss.190B and C of the Native Title Act 1993)	Subcondition/requirement	Result
s. 190C(2)		Combined result: Met
	re s. 61(1)	Met
	re s. 61(3)	Met
	re s. 61(4)	Met
	re s. 61(5)	Met
	re s. 62(1)(a)	Met
	re s. 62(1)(b)	Met
	re s. 62(2)(a)	Met
	re s. 62(2)(b)	Met
	re s. 62(2)(c)	Met
	re s. 62(2)(d)	Met
	re s. 62(2)(e)	Met
	re s. 62(2)(f)	Met

	re s. 62(2)(g)	Met
	re s. 62(2)(h)	Met
s. 190C(3)		Met
s. 190C(4)		Met
s. 190B(2)		Met
s. 190B(3)		Met
s. 190B(4)		Met
s. 190B(5)		Combined result: Met
	re s. 190B(5)(a)	Met
	re s. 190B(5)(b)	Met
	re s. 190B(5)(c)	Met
s. 190B(6)		Met
s. 190B(7)		Met
s. 190B(8)		Combined result: Met
	re s. 61A(1)	Met
	re ss. 61A(2) and (4)	Met
	re ss. 61A(3) and (4)	Met
s. 190B(9)		Combined result: Met
	re s. 190B(9)(a)	Met
	re s. 190B(9)(b)	Met
	re s. 190B(9)(c)	Met

Attachment C
Documents and information considered

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

I have had available to me the following files:

- Nine volumes, being the Case Management/Delegates files prepared by a case manager for the Registrar's delegate, Graham Miner, in relation to the 2005 application of the registration test. Those files are numbered WC00/7 and bar-code numbered 2005/03253 Vol 01 to 2005/0325 Vol. 09.
- One volume containing the delegate's 2005 decision, also numbered WC00/7 but not bar-coded.
- One volume prepared for me by the relevant case manager numbered WC00/7 and bar-coded.
- Documents and submissions forwarded by the applicant pursuant to the transitional provisions. .

It is not administratively effective to list each and every document in those files, not least because many documents have been often reproduced. I have nonetheless considered all that material and have taken some into account, although the vast majority of it is administrative in nature and not of any probative value to any matters I must consider.

Where a document or piece of information was both relevant and has been relied upon by me or taken into account in making my findings, I specifically identify that document or the source of that information in the text of my reasons.

2.