NATIONAL NATIVE TITLE TRIBUNAL

REGISTRATION TEST

Reasons for Decision

DELEGATE:	Graham Miner
Application Name:	Ballardong People.
Names of Applicant(s):	Cedric Anderson, Donald Collard, Sylvia Rachel Collard, Reg Hayden, Alan Jones, Winnie McHenry, Doug Nelson, Ricky Nelson, Robert Riley, Tim Riley, Dianne Taylor, Reg Yarran, Robin Yarran, Saul Yarran.
Region:	South West, WA NNTT No.: WC00/7
Date Application Made:	21 November 1997
Application Amended:	3 July 2000, 21 July 2000
Federal Court No.:	WG6181/98

The application is **NOT ACCEPTED** for registration pursuant to s.190A of the *Native Title Act* 1993 (Cwth).

May 2005

Graham Miner
Delegate of the Registrar pursuant to sections 190, 190A, 190B, 190C, 190D

Date of Decision

Brief History of the Application.

The Combined Ballardong People's native title determination application (WC 00/7, WG 6181/98) lies in the wheat belt region of south west Western Australia covering an area of 114,488.161 sq.km. It consists of the following native title determination applications:

NNTT #.	Fed. Court #	Name	Date lodged/filed
WC95/36	WG6032/98	Donald and Sylvia Collard	7/8/95
WC95/71	WG6053/98	Donald and Sylvia Collard	20/10/95
WC97/27	WG6160/98	Donald and Sylvia Collard	10/4/97
WC97/56	WG6181/98	Ballardong People	10/7/97
WC97/85	WG6205/98	Donald and Sylvia Collard	9/10/97
WC97/97	WG6214/98	Donald and Sylvia Collard	21/11/97

The amended Ballardong application (WC00/7) was filed with the Federal Court on 3 July 2000.

On 5 July 2000, leave to amend and combine the above applications was granted by the Federal Court. A preliminary assessment for registration test purposes was subsequently provided by the National Native Title Tribunal, highlighting potential deficiencies with the application. The Federal Court subsequently granted leave to re-amend the application in terms of the document filed on 21 July 2000, a copy of which was received at the Tribunal on 2 August 2000.

The Tribunal provided a further preliminary assessment for registration test purposes. This identified further deficiencies in the application. An attempt to further amend the application was made to the Federal Court, as was an application pursuant to s 66B of the *Native Title Act 1993* (Cwth) seeking to remove one of the persons comprising the applicant. Both applications were dismissed on 13 December 2002, with an additional corrigendum dated 18 December 2002. (*Anderson v State of Western Australia* [2002] FCA 1558)

Further application to amend and remove persons comprising the applicant was made on 2 September 2003. This was dismissed on 4 December 2003, at which time Justice French ordered *inter alia* that the "application is to stand dismissed unless on or before 31 March 2004 one of the following events occurs:

(a) a motion is filed, which is agreed to by all named applicants, to amend the application or to seek further programming orders in relation to it;
(b) an application is filed by members of the native title claim group pursuant to s 66B of the *Native Title Act 1993* (Cwth) seeking replacement of the applicants."

The South West Land and Sea Council ("SWALSC") attempted to amend the applicant by notice of motion filed on 31 March 2004. This was dismissed on 15 June 2004, "save as to the removal of **[information identifying person**

withheld] and **[information identifying person withheld]** who are hereby removed as applicants". The South West Land and Sea Council ('SWALSC') had also attempted to change the boundaries of the application and to remove persons named as the applicant under s.66B of the NTA by notice of motion filed on 5 May 2004. This was dismissed on 15 June 2004. (*Bolton on behalf of the Southern Noongar Families v State of Western Australia* [2004] FCA 760)

During this period the Registrar's delegate in consultation with staff of the Tribunal, did not apply the registration test to the application. The basis for this was a policy applied broadly within the Tribunal that the test will not be applied where the Registrar or his delegate is aware of pending amendments before the Court. Please note that this is a policy. It is not required by statute and as a policy, may not apply in all circumstances. However, this application has been outstanding for a considerable period and it is the delegate's view that the registration test should be applied. Consequently, the application which is now to be considered is the further amended application that was filed on 21 July 2000.

Information considered when making the Decision

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

- the National Native Title Tribunal's Registration Testing files and Legal Services files for this application;
- the National native Title Tribunal's Registration Testing files and Legal Services files for the pre-combined Ballardong application (WC97/56);
- the National Native Title Tribunal Geospatial Database;
- the Register of Native Title Claims and Schedule of Native Title Applications
- the Native Title Register;
- affidavit of Dr Bruce Shaw sworn 3 June 1999;
- affidavits sworn by **[Information identifying person withheld]** (18 February 1999), **[Information identifying person withheld]** (11 February 1999), **[Information identifying person withheld]** (17 February 1999) and **[Information identifying person withheld]** (24 February 1999);
- geospatial assessment and overlap analysis 19 October 2004, and 22 December 2004 prepared by the Tribunal's Geospatial Analysis and Mapping Branch;
- letter from Mr Michael Rynne, Principal Legal Officer (Retained Counsel) of the Noongar Land Council, dated 16 February 2001;
- correspondence between the Tribunal and the applicant's representative.
- decisions of the Federal Court and High Court referred to in the reasons, and
- other documents referred to in the reasons.

Copies of the applicants' additional information have been provided to the State of Western Australia in the interests of procedural fairness, in line with the decision by Carr J in *State of Western Australia v Native Title Registrar & Ors [1999] FCA 1591 – 1594*.

Note: I have not considered any information and materials provided in the context of any mediation of the native title claim group's native title applications. This is due to

the ‘without prejudice’ nature of mediation communications and the public interest in maintaining the inherently confidential nature of the mediation process.

All references to legislative sections refer to the *Native Title Act 1993* unless otherwise specified.

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

On 22 November 2004, Christopher Doepel, Native Title Registrar, delegated to members of the staff of the Tribunal including myself all of the powers given to the Registrar under sections 190, 190A, 190B, 190C and 190D of the Native Title Act 1993 (Cth).

This delegation has not been revoked as at this date.

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NOTE TO APPLICANT:

To be placed on the Register of Native Title Claims, the application must satisfy *all* the conditions in sections 190B and 190C of the *Native Title Act*.
Section 190B sets out the merit conditions of the registration test.
Section 190C sets out the procedural conditions of the registration test.
In the following decision, I test the application against each of these conditions. The procedural conditions are considered first; then I consider the merit conditions.

S190C: Procedural Conditions

Applications contains details set out in ss. 61 and 62: S190C(2)

Section 190C(2) first asks the Registrar's delegate to test the application against the registration test conditions at sections 61 and 62. If the application meets all these conditions, then it passes the registration test at s190C(2).

Native Title Claim Group: S. 61(1)

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

Reasons relating to this sub-condition

Section 190C(2) of the Act provides that the Registrar must, amongst other matters, be satisfied that the application contains all details and other information required by s.61 of the Act.

I must therefore consider whether the application sets out the native title claim group in the terms required by s 61. That is one of the procedural requirements to be satisfied to secure registration: s190A(6)(b). If the description of the native title claim group indicates that not all persons in the native title group were included, or that it was in fact a sub group of the native title group, then the requirements of s190C(2) would not be met and the claim cannot be accepted for registration (*Northern Territory of Australia v Doepel [2003] FCA 1384 at para 36).*

This consideration does not involve me going beyond the application, and in particular does not require me to undertake some form of merit assessment of the material to determine whether I am satisfied that the native title claim group is in reality the correct native title claim group I say this because in *Northern Territory of Australia v Doepel* [2003] FCA 1384 (*'Doepel'*), Mansfield J stated that:

> "My view that s.190C(2), relevantly to the present argument, does not involve the Registrar going beyond the application, and in particular does not require the Registrar to undertake some form of merit assessment of the material to determine whether he is satisfied that the native title claim group as described is in reality the correct native title claim group, is fortified by s 190B(3). It imposes one of the merit requirements for accepting a claim for registration: s190A(6)(a). Its

> focus also is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained. It, too, does not require any examination of whether all the named or described persons do in fact qualify as members of the native title claim group. Such issues may arise in other contexts, including perhaps at the hearing of the application, but I do not consider that they arise when the Registrar is faced with the task of considering whether to accept a claim for registration." [37]

I have not considered any material outside the application for the purposes of testing the application against the registration test condition as s. 61(1).

In this case, the Attachment A of the application describes membership of the group as follows:

> "The claimants comprise those Aboriginal people who are:
>
> 1. the biological descendants of the unions between:-
>   - Tommy Yarra + Mary Jane Kickett;
>   - Winmar, 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. those persons adopted by the individuals named in 1. above and those persons adopted by the biological descendants of the adopted persons included in 2. above.
> 3. those 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.
>
> Specifically excluded from being claimants are the persons listed in attachment A(1)."

A large number of persons are then listed at Attachment A(1).

I accept that membership of the claim group by virtue of biological descent, or adoption via traditional means, is sufficient to indicate that the application is made on behalf of a native title group constituted according to traditional laws and customs with common rights and interests.

As stated previously, in applying s. 61(1) I must also be satisfied that the native title claim group described includes all of the persons who hold common or group rights and interests comprising the particular native title claimed.

The exclusion of the large number of people listed at Attachment A (1), gives rise to doubt as to whether the description includes all members of the Ballardong claim group. I say this because the implication is that the people listed would be, except for their exclusion, members of the group.

I accept that there may be circumstances in which this is appropriate and thus not fatal to registration of an application. In this regard I note the following comment by Mansfield J in *Doepel*, which I think is applicable in such circumstances:

> "Perhaps because it is expressed in a shorthand way, the Territory's contention that the material revealed 'other individuals and clan groups who may hold native title rights and interests in the claim area and who were not included in the definition of Schedule A', needs to be further qualified. It is only if those other persons or clan groups are in fact members of the native title claim group, but have been excluded from it, that the application might not comply with s 61. If they are members of a competing claim group, for example with a claim to an area which overlaps the claim area, s 61(1) does not require them to be included as part of the native title claim group." [46]

Also applicable is *Harrington-Smith v Western Australia* (No 5) [2003] FCA 218 ('*Harrington-Smith*'), in which Lindgren J noted that:

> "It is conceivable that the traditional laws and customs under which rights and interests claimed are held might…be also traditional laws and customs of a wider population, without that wider population being a part of the claim group. I have rights and interests in land under the laws of New South Waled and those laws are "shared" with other persons, but it is not true that, as a result, my rights and interests in land are shared with them. The same laws apply so as to generate proprietorial rights in a person because of factual circumstances peculiar to that individual. Similarly, it is conceivable that traditional laws and customs shared by members of the Western Desert cultural bloc may apply so as to confer rights and interests on the Wongatha people in relation to the land and waters covered by the application which they do not confer on other members of the Western Desert cultural bloc" – at [53].

I see that Attachment A (1) comprises two lists of names of people:
1) a list of names, addresses and signatures of people who state they "wish to support the initiatives of the Wom-ber Aboriginal land claim and wish to become a party to the claim", and
2) a typed list naming and describing people "who have stated they wish to become members to the Wom-ber Land Claim".

The claim referred to in both 1) and 2) is a land claim. It may be that the intention is to exclude those named and described on the basis that they are or were members of the partially overlapping Wom-Ber (WC96/105) native title claim group at various times. However, that is not clear. There is no explanation in the application as to why the people named and described are excluded. There is no information that assists me see what is intended.

I note that in this instance, Mr Michael Rynne, then Principal Legal Officer (Retained Counsel) of the Noongar Land Council, wrote on 16 February 2001 that he was instructed "that the Wom-Ber claimants have no ties with any of the Ballardong native title group of relevance to native title rights and interests." Applying *Doepel* I cannot have regard to this information as it does not comprise part of the application. I therefore cannot be satisfied that the native title claim group comprises all those persons who may hold native title in the area subject to claim.

If the description of the native title claim group is inadequate it follows that the application must fail. However, I propose to consider the other provisions of the application to decide whether they would otherwise meet the requirements of the Act.

Result: Requirements not met

Name and address of service for applicants: S. 61(3)

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

Reasons relating to this sub-condition

The application lists the Noongar Land Council as representative. The South West Aboriginal Land and Sea Council became recognised as the native title representative body for the region in 1 February 2002. A winding up notice was issued to the Noongar Land Council and it ceased to exist as a representative body as at 31 January 2002.

The South West Land and Sea Council now acts in this matter and appears on the Federal Court records as representative. I am satisfied that the information about this organisation in the application suffices for the name and address of service for the applicants.

Result: Requirements met

Native Title Claim Group named/described sufficiently clearly: S. 61(4)

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

Reasons relating to this sub-condition

The claim group is described at Schedule A, Attachment A and Attachment A(1). For the reasons set out in respect of s. 61(1) and s. 190B(3) of this decision, I cannot be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Result: **Requirements not met**

Application is in prescribed form: S. 61(5)

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

Reasons relating to this sub-condition

s. 61(5)(a)

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

s. 61(5)(b)

The application was filed in the Federal Court on 21 July 2000 as required pursuant to s.61(5)(b) of the NTA.

s. 61(5)(c)

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

s. 61(5)(d)

As required by s. 61(5)(d) the application is accompanied by supporting affidavits as prescribed by s. 62(1)(a) and a map as prescribed by s. 62.(2)(b). I refer to my reasons in relation to those sections.

I note that s.190C(2) only requires me to consider details, other information and documents required by sections 61 and 62. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court.

For the reasons outlined above, it is my view that the requirements of s. 61(5) may have been met.

Result: **Requirements met**

Application is accompanied by affidavits in prescribed form: S. 62(1)(a)

An application must be accompanied by an affidavit sworn by the applicant which addresses the matters required by s.62(1)(a)(i) – s.62(1)(a)(v)

Reasons relating to this sub-condition

This section requires that the application must be accompanied by an affidavit sworn by each of the persons comprising the applicant and that it must contain information addressing the matters identified in subsections s. 62(1)(a)(i) to (v).

The application is accompanied by three affidavits, two of which were provided by Mr Donald Collard and Mrs Sylvia Collard The third was an affidavit by a former employee of the Noongar Land Council and goes to the issue of authorisation. The affidavits provided by Mr and Mrs Collard are in similar terms and were sworn on 14 April 2000.

Schedule R refers to Attachment R which consists of a document signed by Mr Robin Yarran, one of the persons named as the applicant. Mr Yarran refers to "affidavits accompanying the application." It would appear that he is referring to the affidavits provided in support of the pre-combination Ballardong application (WC97/56). There are fourteen of these affidavits, one deposed by each of the persons comprising the applicant. These are sworn differently to those provided by Mr and Mrs Collard, but are in a similar form to one another. They are dated in or about February and March 1999.

Further affidavits were provided by Mr and Mrs Collard both of which were deposed on 11 July 2000. A third affidavit was provided by Ms Lynette Lund, a former employee of the Noongar Land Council. These were provided to the Federal Court and a courtesy copy was provided to the Tribunal by the applicant. These were not accompanied by a Notice of Motion and while accepted by the Court, have not been sufficient to amend the application. Applying *Strickland*, I do not think this information comprises part of the application and thus, I cannot have regard to it when considering this section.

I am satisfied that an affidavit has been provided by each of the persons comprising the applicant, these being those affidavits provided in support of WC97/56 and by Mr and Mrs Collard in support of the amendment to combine their applications with the Ballardong application. I will turn now to consider the requirements of subsections (i) to (v).

s. 62(1)(a)(i) - "the applicant believes that 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."
The affidavits provided by Mr and Mrs Collard each contain a statement that they do not believe the native title rights and interests have not been extinguished in relation to any part of the area covered by the application, (see paragraph 7).

The affidavits provided by the other persons comprising the applicant contain a paragraph in similar terms (see paragraph 2).

I am satisfied that these are sufficient for the purposes of this subsection.

s. 62(1)(a)(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"
The affidavits provided by Mr and Mrs Collard do not contain such a statement. Consequently, I am not satisfied that these affidavits are sufficient to meet the requirements of this subsection of the Act.

The affidavits provided by the other persons named as the applicant do contain such a statement (see paragraph 3) and I am thus satisfied that they meet the requirements of s.62(1)(a)(ii).

s.62(1)(a)(iii) - "that the applicant believes that all of the statements made in the application are true"
All of the affidavits include a statement to this effect. (See paragraph 12 of Mr and Mrs Collard's affidavits and paragraph 4 of the other affidavits)

S62(1)(a)(iv) - "that the applicant is authorized by all of the persons in the native title claim group to make the application and to deal with matters arising in relation to it"
The affidavits provided by Mr and Mrs Collard contain a statement to this effect (see paragraph 5 of each).
The affidavits provided by the rest of the persons comprising the applicant each contain a statement to this effect (see paragraph 5).
I am satisfied that the requirements of s.62(1)(a)(iv) have been met.

s.62(1)(a)(v) - "stating the basis on which the applicant is authorised as mentioned in subparagraph (iv)"
While the affidavits provided by Mr and Mrs Collard contain statements indicating that they are authorised, they do not state the basis upon which this authorisation has been conferred. The fourteen affidavits deposed by the persons comprising the applicant contain a statement that they are authorised "in accordance with a process of decision-making agreed to, and adopted, by the persons in the native title claim group…" While I am satisfied that the requirements of this subsection have been met by the paragraph in the affidavits deposed in 1999, I do not consider the statements made in the affidavits of Mr and Mrs Collard satisfactory for the purposes of this subsection.

Result: Requirements not met

Application contains details set out in s. 62(2): S. 62(1)(b)

Section 62(1)(b) asks the Registrar to make sure that the application contains the information required in s. 62(2). Because of this, the Registrar's decision for this condition is set out under s. 62(2) below.

Details of physical connection: s. 62(1)(c)

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

Reasons relating to this sub-condition
This section provides that the application *may* contain details of traditional physical connection and/or any prevention of access.

The application contains the following statements:

> "All named claimants have a traditional physical connection with the land and waters covered by the application."

and

> There are currently no details available in which a member of the native title claim group has been prevented from gaining access to any of the land or waters covered by this application."

Additional information is also contained at Schedule F and Table F(1) of the application and in additional information provided to the Tribunal in confidence.

Result: **Provided**

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

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

Reasons relating to this sub-condition

For the reasons which led to my conclusion that the requirements of s. 190B(2) have been met, I am satisfied that the information in the application is sufficient to enable to area covered by the application to be identified.

Result: **Requirements met**

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

Reasons relating to this sub-condition

For the reasons which led to my conclusion that the requirements of s. 190B(2) have been met, I am satisfied that the information in the application is sufficient to enable any areas within the external boundaries of the claim area which are not covered by the application to be identified.

Result: **Requirements met**

Map of the application area: S. 62(2)(b)

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

Reasons relating to this sub-condition

For the reasons which led to my conclusion that the requirements of s 190B(2) have been met, I am satisfied that the map contained in the application shows the external boundaries of the claim area.

Result: **Requirements met**

Details and results of searches: S. 62(2)(c)

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

Reasons relating to this sub-condition

Schedule D 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.

Also included are spreadsheets and deeds detailing each of these interests.

I am satisfied that the applicant has provided details of all searches, of which the applicant is aware, carried out to determine the existence of any non-native title rights and interests.

Result: **Requirements met**

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

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

Reasons relating to this sub-condition

A description of the claimed rights and interests is contained in Attachment E to the Form 1 application. This description does not merely consist 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. See also my reasons at s. 190B(4).

Result: **Requirements met**

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

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

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

Reasons relating to this sub-condition

The application includes a general description of the factual basis upon which it is asserted that the native title rights and interests claimed exist. Schedule F refers to Attachment F and Table F of the application. The information contained in these attachments addresses each of the three particular requirements in (i), (ii), and (iii). See also my reasons for s. 190B(5) for details of this material.

Result: **Requirements met**

Activities carried out in application area: S. 62(2)(f)

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

Reasons relating to this sub-condition

Schedule G 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.

Result: **Requirements met**

Details of other applications: S. 62(2)(g)

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

Reasons relating to this sub-condition

Schedule H of the application refers to Attachment H which says:

> "The Applicants have been advised by the National Native Title Tribunal that the following applications (listed below) to the High Court, Federal Court or a recognised State/Territory body have been made in relation to the whole or a part of the area covered by this application and that seek a determination of native title or a determination of compensation in relation to native title."

The attachment lists a number of applications as overlapping the Ballardong claim. This information appears to be identical to that provided with the pre-combination Ballardong application (WC97/56, WG6181/98), but nonetheless, I am satisfied that this is sufficient to meet the requirements of this condition of the registration test.

Result: **Requirements met**

Details of s. 29 notices: S. 62(2)(h)

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

Reasons relating to this sub-condition
The required detail must in my view be contained in the application.

The application in its current form lists only three s 29 notices at Schedule I (Attachment I), however, NNTT records show that the Ballardong claimants have lodged 56 objections to the inclusion of future acts in the expedited procedure.

I note that an attempt was made to rectify this by filing fresh affidavit material, copies of which were provided to the Tribunal by the Noongar Land Council. It would appear that while these documents were accepted by the Federal Court, they were not sufficient to amend the application and as such, do not comprise part of the application. The Noongar Land Council was advised of this on various occasions, the most recent being via comment included in the preliminary assessment of 29 November 2004. Consequently, I am of the view that I am restricted to considering only that material that comprises the application and am therefore unable to have regard to the additional affidavits.

However, I am of the view that Parliament's intention in relation to the requirements of s. 62(2)(h) is relatively clear. Both the note at the end of that paragraph, which states: "*Notices under s29 are relevant to subsection 190A(2)*", and also s. 190A(2) itself, make it reasonably clear that the purpose of the provision was to ensure that the Registrar was aware that the claim was affected by the relevant notice and, therefore, expedited the registration test of the application as required under s. 190A(2). The Tribunal is of course aware of the notices.

The Explanatory Memorandum to the *Native Title Amendment Bill 1997* provides further assistance in relation to the legislature's intent:

> **"Section 29 notices affecting the claim area**
>
> 25.39 The applicant must also include details of any notices about future acts that were given under section 29 and apply to any part of the claim area of which the applicant is aware

[paragraph 62(2)(h)]. There is a note drawing attention to the fact that notices under section 29 are relevant to section 190A; if the Registrar is aware that there is a section 29 notice when he or she is applying the registration test to a claim over an area, the Registrar must try to make a decision about registration before the notification period for the section 29 notice expires..."

None of the notices that have been omitted are "current" in the sense that the Registrar must try to make a decision about registration before the notification period for the section 29 notice expires. In those circumstances it would, in my view, be unreasonably harsh to refuse registration of an application on this basis.

For the above reasons I am satisfied that the requirements of this section have been met.

Result: Requirements met

Combined decision for s. 190C(2)

For the reasons identified above the application does not meet all the requirements of ss. 61 & 62.

Result: Requirements not met

Common claimants in overlapping claims: S. 190C(3)

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

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

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

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

Reasons relating to this condition

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

An assessment by the Tribunal's Geospatial Branch dated 19 October 2004 reveals that Ballardong overlaps nine other Native Title determination applications that are on the Register of Native Title Claims:

Tribunal Number	Federal Court Number	Name	Registered From	NTDA Area (sq km)	Overlap Area (sq km)	% NTDA Overlap
WC97/56	Ballardong People	Accepted	10/07/1997	114490.193	114490.1347	100
WC99/29	Central West Goldfields People	Accepted	04/10/1999	67220.471	31365.6610	46.66
WC99/2	Ngadju	Accepted	28/9/2000	102607.203	2137.6579	2.08

WC96/64	The Esperance Nyungars	Accepted	16/7/1999	49115.889	2133.0817	4.34
WC97/27	Donald and Sylvia Collard	Not Applicable	10/4/1997	756.558	756.558	100
WC97/85	Donald and Sylvia Rachel Collard	N/A	9/10/1997	670.211	670.2114	100
WC97/97	Donald and Sylvia Collard	N/A	21/11/1997	289.0789	289.0786	100
WC95/71	Donald and Sylvia Collard	N/A	20/10/1995	27.7570	27.7570	100
WC95/36	Donald and Sylvia Collard	N/A	12/8/1995	9.948	9.9478	100

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. At that time, several of the Central West (WC99/29), Ngadju (WC99/2) and Esperance Nyungar (WC96/64) pre-combination applications had been made.

(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?

A number of applications that currently comprise the currently overlapping claims were on the Register of Native Title Claims as at 21 November 1997. These applications now comprise the Ngadju, Central West and Esperance Nyungar applications.

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

The Esperance Nyungar claim has been considered under s.190A and was removed from the Register of Native Title Claims on 19 March 1999. Although it was subsequently restored on 16 July 1999 I do not believe I need consider it further. However see my comment below.

The Central West and Ngadju applications have been considered under s.190A and have been entered on, or not removed from, the Register of Native Title Claims. I believe that I therefore need to consider whether there is any common membership of the current claim and any of these claims.

(d) Are there common claimants between the current application and the application listed in paragraph (c)?

At Schedule O the applicant states “None”. I understand this to mean that there are no claimants in common. There is no information before me to the contrary.

This is supported by a comparison of the claim group descriptions of each group. No common names appear in the claim group descriptions of the Ngadju and Central West applications. I note that even if I am incorrect in respect of the Esperance Nyungar application I see that no common names appear in the claim group description.

Result: **Requirements met**

Application is authorised/certified: s. 190C(4)

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

(a) the application has been certified under paragraph 203BE by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part: or

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

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

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

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

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

Reasons relating to this condition

The amended application filed 3 July 2000 purported to be certified by the Noongar Land Council under the Act. The certificate was dated and signed 3 July 2000. However, from 30 June 2000 the Noongar Land Council ceased to be recognised as a Native Title Representative Body. It therefore lacked authority to certify the application.

When the application was amended on 31 July 2000, (application filed 21 July 2000) Attachment R was amended. Attachment R contains a statement by Mr Robin Yarran that the persons comprising the applicant were authorised under traditional law and custom. Specifically, he states that the persons comprising the applicant were chosen at a series of meetings held by the group, following "extensive community consultation and discussion." He states that these meetings were widely publicised and that selection of the applicant "has resulted in full representation of the group by consensual agreement according to the traditional Ballardong way." He notes that those chosen are either authorised as elders or spokespersons for elders, but that the applicant includes younger persons who are able to assist the elders in understanding the native title process.

Mr Yarran refers to affidavits provided in support of his statement. It would appear that these affidavits are those that accompanied the "original" Ballardong application (WC97/56) pursuant to s. 62(1) and three additional affidavits from Mr and Mrs Collard and Ms Lynette Lund a former employee of the Noongar Land Council. There are fourteen affidavits provided in support of the pre-combined Ballardong application. These were deposed between February and

March 2000. Each of these is sworn in similar terms and attests to the authorisation of each person in accordance with "a process of decision-making agreed to, and adopted, by the persons in the native title 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."

On 15 April 2002, application was made to the Federal Court pursuant to s 66B of the Act seeking to remove Mr Robin Yarran as an applicant. This application was ultimately dismissed owing to an insufficiency of evidence. French J noted:

> 15 The evidence so far filed in support of the motion is clearly insufficient to meet the evidentiary requirements of an application under s 66B. That is particularly so in relation to proof of questions of withdrawal of authorisation, excess of authority and authorisation of the ongoing applicants required in terms of s 251B. Again, it is unnecessary for present purposes to revisit the discussion of that topic in the Daniel case. (*Anderson v State of Western Australia 18 December 2002*)

On 2 September 2003 a further motion to amend the application was filed. This involved reducing the area subject to claim and removing persons comprising the applicant pursuant to s. 66B of the Act. Judgment was delivered on 4 December 2003. Justice French said that there were serious inadequacies in the evidence going to the important question whether the application for replacement of the applicants is authorised by the native title claim group. The motion to amend was dismissed (*Anderson v State of Western Australia* [20031 FCA 1423 (4 December 2003). In that case French J noted:

> "25 Common form affidavits in support of the motion to amend the application were sworn by the following:
>
> Cedric Anderson, Donald Collard, Alan Jones, Winnie McHenry, Ricky Nelson, Tim Riley, Robert Riley, Dianne Taylor, and Saul Yarran.
>
> Cedric Anderson, Donald Collard, Tim Riley, Dianne Taylor and Saul Yarran attended neither the meeting of 13 February nor the meeting of 7 May. Winnie McHenry, Ricky Nelson and Robert Riley attended only the meeting of 13 February. Alan Jones attended only the meeting of 7 May. Each of them said that he or she supported and agreed with the decisions that were made and said:
>
> > *'. As a result of these decisions I confirm that I am no longer authorized by the claim group to make the Ballardong application and to deal with matters arising in relation to it.*
> >
> > *'. My rights and interests will now be represented in the Single Noongar Claim.'*
>
> In particular, Mr Saul Yarran's affidavit, in common with a number of the others, added that he was in favour of the Single Noongar Claim and the proposed amendments to the existing Ballardong claim.
>
> 26 Subsequently, on 21 November 2003, a further affidavit purporting to have been sworn by Saul Yarran was filed in which he expressed his opposition to the SWALSC, his support for the former Noongar

Land Council Aboriginal Corporation and its Chief Officer, Mr Peter David and his opposition to the Single Noongar Claim. He also expressed his desire that the Ballardong claim, as lodged by the former Noongar Land Council, should proceed.

27 It will be noted from the preceding that nine of the fourteen living named applicants have filed affidavits acknowledging they are no longer authorised to make the Ballardong application……"

Further His Honour later noted:

"42 To the extent that an applicant is unwilling to continue as such it could be taken that the want of authority condition under s 66B(1) is satisfied. In my opinion, authorisation, of its very nature, is only able to be conferred upon a willing party. A party unwilling to continue as an applicant may therefore be replaced on the basis of an implied lack of authority. When a person who is an authorised applicant consents to being removed and replaced as an applicant that consent may be evidence that he or she, as a member of the native title claim group, recognises that authority has been withdrawn. That recognition may be probative of the fact of the withdrawal and may be sufficient, according to the circumstances of the case, to establish the condition under s 66B for the making of an order."

The continuing authorisation of the applicant is an important matter. Although no order was made under s. 66B the above raises the issue whether the applicants named have ceased to be authorised. I am of the opinion that they have. I say this as it appears that the applicants referred to have in effect resigned and are no longer persons named as the applicant. Further, two of the people named as the applicant have died, **[information identifying persons withheld]**. The Court ordered that their names be removed (15 June 2004). It follows from the above that the applicant has changed. There is no information before me that supports the remaining persons named as the applicant having been authorised as required by the Act.

Further, I refer to Attachment R and the applicants' affidavits. There is a lack of detail about the process of authorisation by the native title claim group.
There is insufficient information about matters such as:

- the purpose of, and agenda for, the meeting/s where authorisation was apparently given;
- who convened that meeting/s;
- how and to whom notice of the meeting/s was given;
- who attended the meeting/s and with what authority;
- who compiled and who verified any attendance or apology list;
- who chaired or controlled the meeting and by what right;
- the resolutions passed or decisions made; and
- whether those resolutions or decisions were unanimous, and if not, the numbers for and against.[1]

[1] See *Ward v Northern Territory* [2002] FCA 171.

Detailed information of the above nature is not necessarily the standard that is required by me as an administrative rather than a judicial decision maker. However I am of the view that some information such as this is required.

The lack of the above information leads me to conclude that:

1. There is insufficient information to support a conclusion that the meeting were adequately notified.
2. There is no evidence that those who attended were sufficiently representative of all of the members of the native title claim group.
3. There is no evidence to support a finding that the authorisation decisions made at the meetings were supported by all members of the native title claim group.

Finally, in my opinion there is a lack of detail about the authority of the working group to authorise Mr and Mrs Collard and, if that group had such authority, of the process involved in the authorisation of Mr and Mrs Collard.

Result: **Requirements not met**

Merits Conditions: s. 190B

Identification of area subject to native title: S. 190B(2)

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

Reasons relating to this condition

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 exclusions.

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

The assessment prepared by the Tribunal's Geospatial Unit dated 19 October 2004 noted a typographic error in the description of the commencement point in Attachment B, this being that the second coordinate describing the intersection line had been omitted. However, if this description was read in conjunction with the map, the commencement point can be generally located. Notwithstanding this error, the Geospatial Unit concluded that the description and map are consistent and locate the application with reasonable certainty.

For the reasons discussed above, I am satisfied that the requirements of s 190B(2) are met in relation to the area covered by the application. It follows that I am also satisfied that the physical description of the area covered by the application meetings the requirements of s. 62(2)(a)(i) and that the map shows that boundaries of the claim area in compliance with the requirements of s. 62(2)(c).

Internal Boundaries

The relevant information is provided at Attachment B to the application. 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.

Daniels v State of Western Australia [1999] FCA 686 (‘*Daniels’*) 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 *Daniels*:

> “The Act recognises the need to provide certainty for people with interests as to whether it is 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.” [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…” [55].

Having regard to the formulation of the exclusion clauses, I am satisfied that the area 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.

Result: Requirements met

Identification of the native title claim group: S. 190B(3)

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

Reasons relating to this condition

An exhaustive list of names of persons in the native title claim group has not been provided and so, the requirements of s. 190(b)(3)(a) have not been met. It is therefore necessary to consider if the application meets the requirements of s. 190(b)(3)(b).

Schedule A, Attachment A describes the persons comprising the native title claim group and is set out at s. 61(1) above.

In *State of Western Australia v Native Title Registrar* [1999] FCA 1591-1594 Carr J said that "[i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently….The Act is clearly remedial in character and should be construed beneficially".

Identification of members of the native title claim group by reference to apical ancestors is capable of satisfying the requirements of s.190B(3) even though the descendants are not individually named and some process of inquiry would need to be undertaken in order to determine if any one person is a member of the claim group. It is not for me to inquire as to the circumstances giving rise to the composition of the claim group, whether they be historical or current.

However, a large number of persons listed at Attachment A(1) are specifically excluded from the claimant group. I see that Attachment A(1) comprises two lists of names of people:
1) a list of names, addresses and signatures of people who state they "wish to support the initiatives of the Wom-ber Aboriginal land claim and wish to become a party to the claim", and
2) a typed list naming and describing people "who have stated they wish to become members to the Wom-ber Land Claim".

The claim referred to in both 1) and 2) is a land claim. It may be that the intention is to exclude those named and described on the basis that they are or were members of the partially overlapping Wom-Ber (WC96/105) native title claim group at various times. However, that is not clear. There is no explanation here, or elsewhere in the application that I can find, of why the people named and described are excluded. There is no information that assists me see what is intended.

The exclusion of such a large number of persons gives rise to doubt whether the group is described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

There may be circumstances in which such an exclusion is appropriate and thus, not necessarily fatal to the registration of an application. In these circumstances the Registrar will require the provision of an explanation as to the basis of the exclusion. In this instance, Mr Michael Rynne, then Principal Legal Officer (Retained Counsel) of the Noongar Land Council, wrote on 16 February 2001 that he was instructed "that the Wom-Ber claimants have no ties with any of the Ballardong native title group of relevance to native title rights and interests." While the letter provides some information, I do not consider it sufficient explanation to satisfy this condition of the registration test.

The requirements of this section have not been met.

Result: **Requirements not met**

Native title rights and interests are readily identifiable: S. 190B(4)

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

Reasons relating to this condition

The description of rights and interests claimed is contained in Schedule E, Attachment E. The rights and interests claimed are as follows:

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

(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.

The native title rights and interests claimed are preceded by a series of qualifications, which are as follows:

(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 State of Western Australia, and a law of that State has made provision as mentioned in section 23I 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, 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 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.

The requirements of the Act

Section 190(B)(4) requires the Registrar or his delegate to be satisfied that the description contained in the application of the claimed native title rights and interests is sufficient to allow the rights and interests to be readily identified. Only information contained within the application may be considered for the purposes of this section (*Queensland v Hutchison* (2001) 108 FCR 575)

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 legislation is intended to screen out of applications native title rights and interests that are vague, or unclear.

The phrases 'native title' and 'native title rights and interests' are used to exclude any rights and interests that are claimed but are not native title rights and interests as defined by s.223 of the Act.

Section 223(1) reads as follows:

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

I am therefore of the view that for a description to be sufficient to allow the claimed native title rights and interests to be readily identified it must describe what is claimed in a clear and easily understood manner and in such a way so that what is claimed is quickly and easily recognised as a native title right and interest as that phrase is defined in s. 223.

The majority of the High Court in *Western Australia v Ward* (2002)191 ALR 1 indicated that subject to the satisfaction of other requirements, a claim to exclusive possession, occupation, use and enjoyment of lands and waters can, *prima facie*, be established in relation to some part of a claim area.[2] A claim to exclusive possession may be able to be established over areas where there has been no previous extinguish extinguishment of native title or where the non-extinguishment principle in s.238 of the *NTA* applies (such as areas for which the benefit of ss.47, 47A or 47B is claimed, and in relation to areas affected by category C and D past and intermediate period acts). This is not recognised in the wording of the claim to the right to possess, occupy, use and enjoy the area. It is not limited to those areas where there has been no extinguishment of native title or where s.238 of the *NTA* applies. At Attachment B paragraph 4, the applicants claim the benefit of ss.47, 47A and 47B in relation to lands within the application area. The effect of these sections is to allow previous extinguishment events to be disregarded in relation to areas of land to which the sections apply. In relation to other areas of land within the application area, it may be supposed that native title rights and interests are unlikely to be exclusive.

Over areas where a claim to exclusive possession cannot be sustained (i.e., where the claim is non-exclusive in nature), the Court has indicated that a claim to 'possession, occupation, use and enjoyment' of the land and waters cannot, *prima facie*, be established. In other words, where native title rights and interests do not amount to an exclusive right as against the whole world, to possession, occupation, use and enjoyment of the claim area, the Court said that "it will seldom be appropriate or sufficient to express the nature and extent of the relevant native title rights and interests by using those terms": at [51][3] .

[2] At [51]
[3] Refer also *Ward* [48], [52], [53], and [89].

Similarly, in *De Rose v South Australia* [2002] FCA 1342, O'Loughlin J said that such a description was "inappropriate": at [919][4]

I also note that in practical terms, registration of an exclusive right to possession, occupation, use and enjoyment of the area would subsume those rights listed in paragraphs (b) to (m) in those areas where exclusive possession can be sustained. I say this because the Courts have indicated that the right to 'possession, occupation, use and enjoyment to the exclusion of all others' is the fullest expression of native title rights and interests. That said, I am of the view that Attachment E is constructed in such a way that each right is expressed separately and stands or falls independently.

Subject to the comments above as to the composite right claimed, I am satisfied that the rights and interests appearing at Schedule E, with exceptions, fall within the scope of s. 223. The exceptions are those listed at (h), (k) and (l).

(h) the right to maintain, protect and prevent the misuse of cultural knowledge of the common law native title holders associated with the area;

In *Western Australia v Ward* [2000] 191 ALR 1 the High Court held that such a right went beyond the right to control access to land or waters and was therefore not readily identifiable. Their Honours stated:

> "However, it is apparent that what is asserted goes beyond [a right to control access] to something approaching an incorporeal right akin to a new species of intellectual property…[t]he 'recognition' of this right would extend beyond the denial or right of access to land held under native title…It is here that the second and fatal difficulty appears" at [59].

It follows that I cannot be satisfied that the right claimed at (h) meets this condition of the registration test.

(k) the right to trade in the resources of the area.

In *Commonwealth of Australia v Yamirr* (1999) 101 FCR 171, the Full Federal Court in obiter noted that

> "It may well be right… and as seems logical, to view the right to trade as an 'integral part' or integral aspect of a right of exclusive possession".

At first instance in this case, Olney J commented in obiter that the trade consisted of the exchange of goods and did not amount to a right or interest in relation to land or waters as required by s.223. This finding was noted by Merkel J on appeal but his Honour made no comment about it. This issue was not put before the High Court. However, based on the obiter comments of the Full Court it seems that the rights of trade are not recognisable as native title rights and interests as defined in s.223 and cannot be readily identifiable over areas where a claim to exclusive possession cannot be sustained. Thus, I am not satisfied that this right meets this condition of the registration test in respect of such areas.

(l) the right to receive a portion of any resources taken by others from the area.

[4] Refer also *De Rose*, [918]-[920]

While the right to take resources from an area was recognised by Lee J in the determination at first instance of *Ward v State of Western Australia* [1998] FCA 1478, it was not included in either the Full Court's determination or the High Court's reasons for decision, without any reasons as to why.

However, in *Croker* at first instance, 'the right of clan members to receive a portion of a major catch taken from the waters or land of the clan's estate' was held not to be a right and interest *in relation to lands or waters* and, therefore, not to come within the ambit of the statutory definition of 'native title rights and interests' in s.223(1)[5]. This finding was not challenged in the appeal proceedings.

On this basis, I am not satisfied that this condition of the registration test has been met.

It is worth noting that not all rights and interests have to be readily identifiable for the application to meet the requirements of this section of the registration test. Only one right or interest need be readily identifiable for the application to satisfy this section. However, it follows that those rights and interests not readily identifiable will not be capable of registration.

On the basis that some of the rights and interests claimed are readily identifiable for the purposes of this section, I am satisfied that the requirements for this section have been met.

Result: **Requirements met**

Factual basis for claimed native title: S. 190B(5)

The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

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

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

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

Reasons relating to this condition

Each of (a) – (c) above require that there be a *native title claim group*. I propose considering whether this condition has been complied with notwithstanding the fact that, in my opinion, the description of the *native title claim group* is inadequate (see the comments at the end of my reasons under s. 61(1)).

Section 190B(5) requires that the Registrar (or his delegate) must be satisfied that the application contains a sufficient factual basis to support the assertion

[5] *Yarmirr v Northern Territory* (1998) 82 FCR 533 at [118], Olney J

that the rights and interests claimed in the application exist. In particular, I must be satisfied that the factual basis provided to support the following assertions is sufficient to support them: that the native title claim group have, and their predecessors had, an association with the area claimed; that the traditional laws and customs acknowledged and observed by the native title group exist, and that the native title claim group continue to hold native title in accordance with those traditional laws and customs.

For satisfaction of s.190(B)(5), the Registrar (or his delegate) is not limited to consideration of statements contained in the application (as for s. 62(2)(e)) but may refer to additional material supplied to the Registrar under this condition: *Martin v Native Title Registrar* [2001] FCA 16 [23]. Regard will be had to the application as a whole; and, subject to s. 190A(3), regard will also be had to the relevant information that is not contained in the application.

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."

For each native title right or interest claimed, there should be some factual material that demonstrates the existence of the traditional law and custom of the native title claim group that gives rise to the right of interests.[6]

In *Members of Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 ('*Yorta Yorta*') the majority of the High Court noted that the word 'traditional' refers to a means of transmission of law or custom, and conveys an understanding of the age of traditions. Their Honours said that:

> 'traditional' laws and customs are those normative rules which existed or were "rooted in pre-sovereignty traditional laws and customs": at [46], [79].
>
> This normative system must have continued to function 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

[6] See *Ward* at [382]

> 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].

While these statements in the *Yorta Yorta* decision assist in interpreting the terms "traditional laws", "traditional customs" and "native title rights and interests" as found in s. 190B(5), the registration test is an administration test, not a trial or a hearing of a determination of native title. It is therefore not appropriate to apply the standards of proof that would be required to support a determination that native title exists.

In considering this condition I have had regard to:

- the information contained at Attachment F, Table F, Attachment G;
- the affidavit of Mr Bruce Shaw dated 3 June 1999;
- affidavits provided in confidence by **[Information identifying persons withheld]**, deposed between 11 and 24 February 1999.

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

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…" (paragraph (i). Table F includes 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.

The affidavits provided by **[Information identifying persons withheld]** contain a table in identical terms. This table contains a column headed "Noongar elders association with their country within the claim area". This then details the descent of each person deposing an affidavit in relation to one of the rights or interests claimed. This table does not provide information as to the association of the deponents to the entire area subject to claim, a matter that was raised with the then representative, the Noongar Land Council. In response, Dr Bruce Shaw swore an affidavit (3 June 1999) in which he, amongst other things, addressed this point. Dr Shaw states that the four persons to depose affidavits were chosen as representative of 'sub-groups' for their particular areas and that these 'sub-groups' collectively identified as Noongar (paragraph 8). 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.

In paragraph 8 of his affidavit Dr Shaw also refers to shared language (paragraph (viii)) a shared sense of continuity of traditions (paragraph (ix)), body of knowledge (paragraph (x)), and a social imperative to transmit cultural knowledge (paragraph (xi)).
Dr Shaw also refers to the recognition by others of family rights to particular areas (at paragraph (10)).

Based on the information contained in:

- Schedule F, Attachment F, Table F;
- The affidavits sworn by **[Information identifying persons withheld]**; and
- The affidavit sworn by Dr Bruce Shaw dated 3 June 1999,

I am of the view that it is reasonably to conclude 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 the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.

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". Some detail is provided as to the components of "Noongar Way", 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 affidavits deposed by **[Information identifying persons withheld]** also refer to "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 a table 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 of **[Information identifying persons withheld]**, and is confirmed

in the activities described at Attachment G as flowing from the rights and interests claimed.

When taken together, I am of the view that the information at:

- Attachment F;
- Table F;
- Schedule G;
- Affidavits of **[Applicants 1, 2, 3 and 4]**; and
- Affidavit of Dr Bruce Shaw,

provide sufficient basis for me to find that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claimed native title rights and interests.

I am satisfied that the requirements of s. 190B(5)(b) have therefore 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.

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 "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 affidavits of **[Information identifying persons withheld]** contain further information. This includes statements specific to the deponents 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. **[Information identifying person withheld]** 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*.”

I am of the view that the information contained in:

- The affidavits provided for the purposes of s. 62(1);
- The information at Schedule F, Attachment F and Table F;
- Schedule G, Attachment G;
- The additional affidavits provided by **[Applicants 1, 2, 3 and 4]** referred to above; and
- The affidavit provided by Dr Bruce Shaw (sworn 3 June 1999)

provide sufficient information for me to conclude 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.

Summary

In summary, each applicant has sworn to the truth of the statements contained in the amended application, which contain certain assertions that support the factual basis.

The accompanying information tells a 'story' about the claim group's association with the claim area and a life governed by traditional laws and custom which in turn give rise to the native title rights and interests claimed.

Statements are made connecting members of the claim group to the area of the claim and to their adherence to traditional laws and customs.

There is evidence of 'hunting, gathering for food and medicinal purposes, camping, and visiting and protecting sites and of the ownership of land (in accordance with traditional laws and customs taught by their predecessors). There is evidence that members of the claim group continue to pass on custodianship of the land, and the associated traditional dreaming stories. There is also information that supports their continuing to observe traditional law and protocol in respect of this information, for example, rights to speak about certain parts of the country.

Conclusion

On the assumption that the native title claim group had been adequately described, there is evidence to support the factual basis in each of the three (3) criteria identified at s. 190B5 (a) - (c). This evidence in turn is sufficient for me to be satisfied that the factual basis on which the assertion of the existence of the native title rights and interests claimed is sufficient to support the assertion.

Result: **Requirements met**

Native title rights and interests claimed established prima facie: S. 190B(6)

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

Reasons relating to this condition

As with s. 190B(5) I propose considering whether this condition has been complied with notwithstanding the fact that, in my opinion, the description of the *native title claim group* is inadequate, i.e. as if the description met the requirements of the Act.

Under s. 190B(6), I must consider that, prima facie, at least some of the rights and interests claimed can be established. The Registrar takes the view that this requires only one right or interest to be prima facie established.

The term "*prima facie*" was considered in *North Ganalanja Aboriginal Corporation v Qld* 185 CLR 595 by their Honours Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, who noted:

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

This test was recently considered and approved in *Northern Territory v Doepel* [2003] FCA 1384, see at paras 134 -135. Briefly, the Court concluded that although the above case was decided before the 1998 amendments of the Act there is no reason to consider the ordinary usage of 'prima facie' there adopted is no longer appropriate.

I have adopted the ordinary meaning referred to by their Honours in considering this application for the purpose of deciding which native title rights and interests claimed can be established on a prima facie basis.

Where rights and interests are not readily identifiable, it follows that they cannot be prima facie established. Therefore, it is only necessary for me to consider whether the application and any of the supporting material establishes prima facie the rights and interests listed at Attachment E paragraphs (a) to (m), but excluding paragraphs (h), (k) and (l) as indicated (see s 190B(4).

The rights and interests as they appear in Attachment E of the application have been set out at s. 190B(4). Relevant to this section is the statement at paragraph (a) of this attachment that the applicants claim the right to "exclusively possess, use and enjoy the area." Other rights and interests are itemised and claimed in paragraphs (b)-(m). Having regard to how the Schedule is written I am of the view that the native title rights and interests at (b) to (m) are claimed non-exclusively.

(a) rights and interests to exclusively possess, occupy, use and enjoy the area

Not established

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). This claim is not limited to such areas. At paragraph (a) of Attachment E, the claim to exclusive possession, occupation, use and enjoyment is made in respect of "the area". I have interpreted this to mean the whole area subject to claim. This involves areas where exclusive possession *can* be sustained and area where it *cannot* be sustained.

Over areas where a claim to exclusive possession cannot be sustained, the majority in Ward questioned the appropriateness of claims to control access to and use of the land, specifically stating "without a right of possession of that kind [that is, an exclusive right], it may be greatly doubted that there is any right to control access to land or make binding decisions about the use to which it is put." (at [52]). Thus rights which amount to a right to control access to the land or a right to control the use made of the land, are not capable of registration where a claim to exclusive possession cannot be sustained. (See *Ward* at [16] – [23]) The right to possession occupation use and enjoyment is clearly such a right.

Applied to this application and the rights as it is currently formulated, I am not satisfied that the right claimed is able to be prima facie established.

The result is that I am not satisfied that this right can be prima facie established.

(b) *the right to make decisions about the use and enjoyment of the area*

Not established.

As outlined above, the court has indicated that where there is no exclusive right to the claimed area, rights to control the use to which land is put may not be capable of being established under s.190B(6) without further investigation.

As noted above, I am of the view that this right as claimed in the application is intended to be held non-exclusively. The right as it is described requires a level of control that is consistent only with exclusive possession. Applying the principle set out in *Ward* I am not satisfied that this right is capable of being held non-exclusively and as such, cannot satisfy the requirements of this section of the Act. I find that this right cannot be prima facie established.

(c) *the right of access to the area*

Established

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

The requirements of this section have been met.

(d) *the right to control the access of others to the area*

Not established

As I have taken this right to be claimed non-exclusively, I do not think it is capable of being established under this section of the Act for the reasons set out at (b) above.

It follows that I am not satisfied that this right is capable of being prima facie established.

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

Established

I refer to *Attorney-General of the Northern Territory v Ward* [2003] FCAFC 283. In respect of a claim to *use and enjoy*, the Court disapproved the use of a non-exhaustive list of rights and interests said to be "*included*" in the right of "occupation, use and enjoyment of the lands and waters". At [21] the Court said, speaking of "use and enjoy" that there must be a specification of the contents of the relevant rights and interests to which the reader may look in considering the effect of the determination. Of the specified contents of the right the Court said: "They must exhaustively indicate the determined incident of the right to use and enjoy" (at [21]).

In my opinion the right as formulated is specific enough for it to be capable of being prima facie established.

The right claimed at para (e) of Schedule E, is a right to use and enjoy the resources of the claim area. At Schedule Q, the applicant states that the native title claim group do not claim ownership of minerals, petroleum or gas wholly owned by the Crown (in compliance with the requirements of s.190B(9)(a)). Given this qualification, I am satisfied that this right can be established *prima facie* (subject to the satisfaction of other requirements) whether or not a claim to exclusive possession can be sustained over the lands and waters of the claim area.

I am satisfied that there is *prima facie* information to support the existence of this right at Attachment G (see for example Schedule G para. (e)) and further at Schedule M. It is supported by the affidavits to which I have referred. For instance, **[Information identifying person withheld]** in his affidavit sworn 18 February 1999 deposes to camping in the area, living off the land and eating bush tucker. He also speaks of actively teaching younger Aboriginal People about the country's resources whilst visiting his country and collecting bush tucker.

I find therefore that this right can be prima facie established over the whole claim area.

(f) *The right to control the use and enjoyment of others of resources of the area*

Not established

The formulation of this right is such that it appears consistent only with exclusive possession. As I am of the view that it is claimed non-exclusively, I am not satisfied that it can be prima facie established on the basis of the principles set out in *Ward*.

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

Established.

Such a right has been recognised by the courts as capable of being prima facie established (see *Yarmirr, Daniel v State of Western Australia, Ward (FC), and Neowarra*).

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

My reasons at s.190B(5) refer to information contained in various affidavits and in Schedules F and G. I am of the view that sufficient information is contained in these documents to support the prima facie establishment of this right.

(h) *the right to maintain, protect and prevent the misuse of cultural knowledge of the common law native title holders associated with the area.*

Not established

This right was not capable of recognition at s.190B(4). It follows that it cannot be prima facie established.

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

Established

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, **[Information identifying person withheld]** 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). **[Information identifying person withheld]** 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.

(j) *the right to live on and erect residences and other infrastructure on the land*

Not established

A question which arises here is whether the above right necessarily amounts to a right to control access to and use of the claim area. To the extent that is would do so, such a right would be incapable of being *prima facie* established over areas for which a claim to exclusive possession could not be sustained.

A right to live on country has been held to be potentially problematic as it suggests a level of permanence (See *Daniels*). The description of this right conveys to me an intention or capacity on the part of the members of the native title claim group to control access to or use of those areas. In my view, as it is formulated, such a right is only consistent with exclusive possession. I have noted previously that I understand this right to have been claimed non-exclusively. The claim is not limited to areas where native title has not been extinguished or where the non-extinguishment principle might apply. Applying the principles outlined above, I am not satisfied that this right can be prima facie established.

(k) *the right to trade in resources of the area*

Not established.

In *Commonwealth v Yarmirr* (1999) 101 FCR 171, Olney J considered the 'right to engage in the trade and exchange of estate resources' of senior *yuwurrumu* members of the Croker Island region. Ultimately, Olney J found that *"[t]he so-called 'right to trade' was not a right or interest in relation to the waters or land"* [para. 120], and was, therefore, not capable of being claimed as a native title right and interest under s. 223 of the Act.

On appeal, the Full Federal Court spoke of this right in these terms: *"It may well be right, as the argument runs, and as seems logical, to view the right to trade as 'an integral part,' or integral aspect of a right to exclusive possession."* The Full Court noted that Olney J had not considered the right to trade as a right in relation to land and water within the meaning of s.223 of the *NTA*, but made no finding on the issue. The issue was not raised before the High Court.

Based on these comments, it appears that the Full Court accepted that this right was a native title right or interest in relation to land and water (i.e., that the right to trade is readily identifiable for the purposes of s190B(4)) and that the right to derive economic benefit from and to trade in the traditional resources of the claim area is properly seen as co-extensive with a claim to *exclusive* possession, occupation, use and enjoyment of lands and waters. [my emphasis]

I am satisfied that this right can only be prima facie establish in respect of areas where a claim to exclusive possession can be sustained.

(l) *the right to receive a portion of any resources taken by others from the area*

Not established

As this right is not readily identifiable (see at s. 190B(4)) it follows that it cannot be prima facie established.

(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*

Established

The right claimed may appear to be a claim to control access to and use of the area which could only be capable of being established *prima facie* over areas where a claim to exclusive possession can be made out. Nevertheless, I see that

in *Mary Yarmirr v Northern Territory* [1998] 1185 FCA, the Court accepted a right to maintain and protect places of cultural importance over an area where a claim to exclusive possession was not available. This right is similar. Thus, I accept that this right is capable of being established *prima facie* over such areas.

There is prima facie evidence for the existence of such a right at Attachment G which sets out activities which members of the native title claim group have continuously carried out on the land and waters in the claim area that relate to those claimed rights and interests, including:

> (m) the right to manage, conserve and look after the land, waters and resources;
> - locating and cleaning water sources and drinking water on the land
> - protecting the habitats of bush tucker
> - caring for orphaned joeys
> - protecting the spirit of the land by conserving the natural habitat

[Information identifying person withheld] asserts in her affidavit at Table G (p. 15)

> I feel that protecting water resources is very important. For example, a drain that was dug recently, within the last two years, on **[part of the claim area]** blocked off a traditional water-course. My family have nominated me as spokesperson on the issue, and I have instructed solicitors to enforce my family's rights in the courts if necessary.

[Information identifying person withheld] also states that

> The need to preserve water resources is part of the Noongar Way as all living creatures and the land are spiritually connected to people of the land. By protecting the environment, the traditional owners such as myself are ensuring that the resources necessary for subsistence will be there in the future. I not only have the right to look after the country I have the responsibility to do so.

[Information identifying person withheld] also says:

> I was taught from an early age about the connection between all life and the land. I teach this high level of importance to my children and grandchildren.

I am satisfied that, prima facie, this right can be established.

As I need only be satisfied that one right or interest can be prima facie established, I find that the requirements of s. 190B(6) have been met.

Result: **Requirements met**

Traditional physical connection: S. 190B(7)

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

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

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

(i) the Crown in any capacity; or

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

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

Reasons relating to this condition

The requirements of this section are such that I must be satisfied that at least one member of the native title claim group currently has, or previously had, a traditional physical connection with any part of the land or waters covered by the application.

'Traditional physical connection" is not defined in the Act. I interpret this phrase to mean that physical connection should be in accordance with the particular traditional laws and customs relevant to the claim group. The Explanatory Memorandum to the *Native Title Act* 1993 explains that this "connection must amount to more that a transitory access or intermittent non-native title access" (paragraph 29.19 of the 1997 EM on page 304).

Attachment F and Table F contain more general statements that convey a sense of physical connection with the area in question, but do not identify current members of the claim group who have this physical connection. For example, at Schedule F(c) of Table F, the second paragraph reads:

> "The means of transmission of knowledge by which this is done include the writing and retelling of the old stories… Many Aboriginal elders will take their grandchildren out into the country and relate relevant stories at the places they refer to…"

Attachment G also contains a list of activities from which it can be inferred that members of the claim group have a continued physical connection with the area. For example, paragraph (a) includes activities such as "visiting country" and "camping on country." Other examples exist throughout this Schedule.

Further information specific to members of the claim group can be found in the affidavits provided as additional information by **[Information identifying person withheld]**.

The affidavit of **[Information identifying person withheld]** establishes that he is a member of the native title claim group. An example of his connection to the area of the claim can be found at page 3, under the heading "Description of one activity as an example of the rights and interests claimed. **[Information identifying person withheld]** deposes the following:

> "I have visited old caves in **[the claim area]** since I was a boy, and I continue to do this…The last time I visited was about three months ago, i.e., around November/December 1998."

Another example can be found at page 5 of **[Information identifying person withheld]** affidavit under the heading "Description of one activity as an example of the rights and interests claimed." It reads as follows:

> "I visit the country around **[part of the claim area]** today to collect bush tucker. I visit sites that are associated with stories and sites where our ancestors visited. I live in Quairading and spend a large part of my time in the bush."

[Information identifying person withheld] deposes to his having continued to camp in the bush in particular areas within the claim, living off the land when camping there.

The affidavit of Dr Shaw sworn 3 June 1999 contains a statement specific to **[Information identifying person withheld]**. He states:

> "I have observed that, when visiting important sites associated with his family's country, **[Information identifying person withheld]** refers continually to his memories of the past, his fond recollections of tutelary uncles, grandparents, and great-grandparents, the Dreaming stories attached to the country (which he knows well), and the sense of well-being he experiences when standing in that place, to name only a few elements that go toward the complex set of values, observances and practices that we describe as Noongar way(s)." (paragraph 14 (iv))

On the basis of this information, I am satisfied that **[Information identifying person withheld]** and other members of the native title claim group currently have, and previously had, a traditional physical connection with part of the land covered by the application.

I am satisfied that the requirements of this section have been met.

Result: **Requirements met**

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

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

Section 61A contains four sub-conditions. Because s. 190B(8) asks the Registrar to test the application against s. 61A, the decision below considers the application against each of these four sub-conditions.

S. 61A(1)- Native Title Determination

Reasons relating to this sub-condition

A search of the Native Title Register conducted on 19 October 2004 revealed that there are no approved determinations of native title in relation to the area claimed in this application.

Result: **Requirements met**

S. 61A(2)- Previous Exclusive Possession Acts (PEPAs)

Reasons relating to this sub-condition

In Schedule B of the application, certain tenures are excluded from the claim area. For reasons provided above at s. 190B(2) these exclusions are sufficiently clear to provide reasonable certainty about all tenure excluded and include all previous exclusive possession acts.

Result: **Requirements met**

S. 61A(3) – Previous Non-Exclusive Possession Acts (PNEPAs)

Reasons relating to this sub-condition

Attachment E states

> (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 23l 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.

Result: **Requirements met**

S. 61A(4) – Areas to which sections 47, 47A or 47B may apply

Reasons relating to this sub-condition

Attachment B of the application states that the exclusions in Attachment B are subject to such provisions of s 47, s. 47(A), and s. 47(B) as apply to any part of the area contained within the application. It notes that particulars of these would "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 at Schedule L at a later date."

Result: **Requirements met**

No claim to ownership of Crown minerals, gas or petroleum: S. 190B(9)(a)

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

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

Reasons relating to this sub-condition

This section states the application must not disclose, and I must not otherwise be aware, that there is any native title right or interest claimed in this amended application which either consists of or includes a claim to ownership over minerals, petroleum or gas wholly owned by the Crown in right of the Commonwealth, a State or Territory.

At Schedule E, Attachment E (i), of the application it is stated:

> "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."

Schedule Q contains a similar disclaimer.

I am satisfied that this is sufficient to meet the requirements of this section.

Result: Requirements met

No exclusive claim to offshore places: S. 190B(9)(b)

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

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

Reasons relating to this sub-condition

This section states the application must not disclose, and I must not otherwise be aware, that if there is any native title right or interest claimed in the application which relates to waters in an offshore place, that those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place.

At Attachment E, para (ii), contains a statement as follows:

> 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 of accorded under international law in relation to the whole or any part of the offshore place.

I am satisfied that the requirements of this section have been met.

Result: **Requirements met**

Native title not otherwise extinguished: S. 190B(9)(c)

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

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

Reasons relating to this sub-condition

The application and accompanying documents do not disclose, and it is not otherwise apparent to me that the native title rights and interests claimed have otherwise been extinguished.

In addition, the application contains a statement at paragraph 3 of Attachment B that the applicants exclude from the claim areas in relation to which native title rights and interests have otherwise been extinguished. I am satisfied that because native title rights and interests must relate to land and waters (as per definition in s. 223 of the Act) the exclusion of particular land and waters is an exclusion of native title rights and interests over those lands and waters.

I am satisfied that the application meets the requirements of this section of the Act.

Result: **Requirements met**

[End of document]