National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION

DELEGATE:	Kristy Eulenstein
Application Name:	Wajarri Yamatji
Names of Applicant(s):	Ike Simpson, Robin Boddington, Ron Simpson, Charlie Snowball, Monty Walgar, David Jones, Colin Hamlett, Gavin Egan, Mack Mourambine, Timothy Simpson, Bill Pearce, Malcolm Ryan, Neville Mongoo, Gordon Fraser, Rochelle Baumgarten, William Baumgarten and Pam Mongoo on behalf of the Wajarri Yamatji.
Region:	Geraldton, WA
NNTT No.:	WC04/10
Federal Court No:	WAD6033/98
Date Application(s) Made:	21 December 2004 (combined application)
Date of (Latest) Amendment:	28 July 2005

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

DECISION

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

_____ 1 December 2005

Kristy Eulenstein
Delegate of the Registrar
Pursuant to Section 99 of the Native Title Act 1993 (Cwth)

Date of Decision

Brief History of the Application

This combined application in the Geraldton region of Western Australia was filed in the Federal Court on 21 December 2004, and on 4 February 2005 leave was granted to amend as sought, combining applications WAD6042 of 1999 (WC01/03) and WAD 6033 of 1998 (WC00/12) with the latter being the lead application.

On 8 March 2005 a preliminary assessment was provided to the applicant, and a further preliminary assessment on 16 March 2005. On 23 March 2005 Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (YMBBMAC) wrote to the Tribunal on behalf of the applicant requesting a 4 month extension, noting the contents of the preliminary assessments. The NNTT WA Registry Assistant State Manager approved the time extension.

A further amended application was filed on 28 July 2005 and on 24 August 2005 leave was granted to amend the application in the terms of the order sought by the applicant.

Correspondence from YMBBMAC on 2 September 2005 advised that there would be further delay in providing some of the additional material in the form of affidavits to support the application, due to a death of one of the senior Wajarri elders. It was anticipated that the majority of the additional material would be before the delegate by 15 September 2005 and the balance by 29 September 2005.

Additional material in the form of affidavits was received on 16 September 2005 and again on 30 September 2005 (received by the delegate on 4 October 2005).

The matter was allocated to a new delegate on 26 September 2005.

On 25 October 2005 the delegate sought further information from the applicant, before she could apply the registration test to the application. Response to this request was received on 11 November 2005.

The State was afforded the opportunity to comment, the last comment to be received by 22 November 2005, no comments were received.

Information considered when making the Decision

In applying the registration test to this application the delegate has considered and reviewed the application, including all attachments and accompanying documents, as listed in Attachment A to these reasons.

Note: The delegate has not considered any information or materials that may have been provided in the context of 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.

In this document:

- All references to legislative sections refer to the *Native Title Act 1993* ('the Act' or 'NTA') unless otherwise specified.
- All references to 'the application' or 'the current application' refer to the amended application WC04/10 filed on 28 July 2005 and amended by order of the Court on 24 August 2005 unless otherwise indicated.

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

On 22 September 2005, 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* (Cwth). This delegation has not been revoked as at this date.

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, the Registrar's delegate tests the application against each of these conditions. The procedural conditions are considered first; then the merit conditions.

A. Procedural Conditions – Section 190C

Information required by sections 61 and 63: S.190C(2)

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

Reasons relating to this condition

Section 190C(2) of the Act requires the delegate to test the application against the registration test conditions at s.61 and s.62. If the application meets all these conditions, then it passes the registration test at s. 190C(2). These conditions are set out separately below.

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 condition

The delegate must 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 (see s. 190A(6)(b)). If the description of the native title claim group indicates that not all persons who according to traditional laws hold the common rights, or that it was in fact a sub group of the native title group, then the requirements of s. 190C(2) would not be met and the claim could not be accepted for registration (*Northern Territory of Australia v Doepel* [2003] FCA 1384 at para 36).

This consideration does not involve the delegate going beyond the application, and in particular does not require her to undertake some form of merit assessment of the material to determine whether the native title claim group is in reality the correct native title claim group (*Northern Territory of Australia v Doepel* [2003] FCA 1384). The delegate has consequently confined her consideration of this sub-condition to the information in the application.

The current application is made on behalf of a group of people described as the Wajarri Yamatji people. Schedule A of the application refers to Annexure A which contains the following description of the native title claim group:

The claim is brought on behalf of those Aboriginal persons who are the biological descendents of:
Jim Crow + Badja; Kitty Gilbert; Dija; Molly Oxenham; Mary; Daniel Dann + Annie Dann; Bobby *Jinatharra* Clark; Ivy Walgar, Robby Walgar, Simon Walgar; Jenny Lynn, Emily; Tommy Glass + Polly Glass; Tommy Jones + Fanny Jones; Nyuga + Jimmy Isaacs; Waurene *Wannanu* Porter, Amy Porter; Lena Sullivan; Tiger Ryan, Fanny Ryan, Boomer Ryan, unnamed Ryan; Nellie; Murgoo Fred, Rosie English, Badja, Annie Dann; Jinny + Bedjeeyona; Cindy Tyson nee Sullivan; Amy Porter + Jigaroo; Nyundi;

Grace Jones; Molly; Polly Mary Parker; Dingo Jim, Angeline; Frank *Bubadee* Franklin Punch; Charlie Dongara; Henry Ryan; *Eniwani* Jimmy + Jenny (Jinnie); English Edwards and Mary Jane; Judy and Jimmy; Julia; Paddy (Patrick) Donnelly; Daisy Bunnabuddy, Aubrey and Molly.

It is the delegate's view that this description of the native title claim group is sufficiently comprehensive, and there is no indication from it that it excludes people claiming to hold common or group rights and interests in the area covered by the application.

The delegate is of the opinion that the wording of the description contemplates all the biological descendants of the named ancestors, as in her view there is no words limiting the interpretation.

Result: Requirement 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 condition

The delegate notes Parts A and B of the application, and is of the view that this procedural requirement is thus met.

Result: Requirement 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 condition

Annexure A of the application contains the description of the native title claim group. In the delegate's view the description of the native title group is described sufficiently clearly so as to satisfy the procedural requirement set down in s.61(4) of the Act. It is noted that the merit aspect of this requirement is commented on in relation to s.190B(3) of the Act (see below for the delegate's comments in regard to this section).

Result: Requirement met

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

An application must be in the prescribed form, be filed in the Federal Court, 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 condition
The application is in the form prescribed by Regulation 5(1)(a) of the *Native Title (Federal Court) Regulations 1998*. The application was filed in the Federal Court on 28 July 2005, as required pursuant to s.61(5)(b) and contains such information as is required by s.61(5)(c). Section 61(5)(d) states that the application be accompanied by any prescribed documents, these are set out in s.62 of the Act (see the delegate's comments under s.62 in regard to these documents).

The delegate is not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court.

The delegate is satisfied that the application is in the prescribed form so as to satisfy s.61(5) of the Act.

Result: Requirement 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 s62(1)(a)(i) – s62(1)(a)(v).

Reasons relating to this condition
Section 62(1)(a) of the Act requires an application be accompanied by an affidavit sworn by the applicant addressing certain matters. The delegate notes that affidavits from each of the persons comprising the applicant have been provided. Each affidavit is dated, signed and witnessed.

The affidavits were supplied with the amended application filed on 21 December 2004 in the Federal Court, but not with any subsequent amendment application. The question is whether the affidavits required by s.62(1)(a) are to be submitted with each amendment to an application.

In *Drury v Western Australia* (2000) 97 FCR 169, French J considered the question of whether an amendment should be supported by fresh affidavits under s.62(1)(a). French J held that where a native title determination application has been filed in the Court and it is sought to file an amendment to that application, save in the case of an amendment seeking to replace an applicant, it is not necessary to file a verifying affidavit in support of the proposed amendment.

In considering whether there is a requirement to file fresh affidavits in this instance, the delegate notes that the amendments of this application are recent amendments and since the application with the s.62(1)(a) affidavits were filed, there has been no change to the applicant for the application.

The delegate is therefore satisfied that the affidavits supplied with the amended application filed on 21 December 2004 are sufficient to satisfy this section of the test. In addition, the delegate is satisfied that these affidavits contain the information required under s.62(1)(a)(i) - (v).

Result: Requirement met

Application contains details set out in s.61(2): s.62(1)(b)

Section 62(1)(b) asks the Registrar to make sure that the application contains the information specified in s. 62(2). Because of this, the delegate'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 condition

This section provides that the application *may* contain details of traditional physical connection and/or any prevention of access. However, the absence of such details will not necessarily bar registration of the application.

The application does not contain Schedule M. However the affidavits provided by 14 members of the claim group, provide information regarding traditional physical connection to the area covered by the application.

The delegate is of the view that the procedural requirement is met by the applicant.

Result: Provided

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

s. 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;
s. 62(2)(a)(ii) - Information identifying any areas within those boundaries which are not covered by the application.

Reasons relating to this condition

The delegate notes Annexure B and C to the application, which provides information about the boundaries to the application area.

The delegate is of the view that this information satisfies this procedural requirement.

Result: Provided

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 condition

A map that shows the external boundaries of the area covered by the application is found at Annexure C of the application. The delegate is satisfied that the map contained in the application shows the external boundaries of the area covered by the application, sufficient to satisfy this requirement.

Result: Provided

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 condition

At Schedule D and Annexure D of the application provides details of searches carried out in relation to the application area by the applicant. The delegate is of the view that Annexure D is sufficient to satisfy this procedural requirement.

Result: Provided

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 condition

A description of the claimed native title rights and interests is contained in Schedule E. The 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. Therefore the delegate is satisfied in respect of the procedural requirement at s.62(2)(d) of the Act. For further discussion of these rights and interests in respect of the merit requirements, see below under sections 190B(4), (5) and (6) of the Act.

Result: Provided

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 condition
Schedule F of the application includes a general description of the factual basis upon which it is asserted that the claimed native title rights and interests exist. It addresses each of the particular requirements in s.62(2)(e)(i)(ii) and (iii). The delegate is therefore satisfied that the procedural requirement is met.

Result: Provided

Activities carried out in application area: s.62(2)(f)
If the 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 condition
Schedule G of the application contains a general description of the activities that are carried out by the native title claim group in relation to the land and waters.

The delegate is satisfied that the description is sufficient for this procedural condition.

Result: Provided

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 condition
Schedule H of the application states that the applicant is aware of 4 other applications to the High Court, Federal Court, or a recognised State/Territory body, that seek a determination of Native Title or compensation in relation to native title, for the whole or part of the area covered by the application. These are:
- Mullewa Wadjari (WAG6119/98,WC96/093)
- Malgana Shark Bay (WAG6236/1998,WC98/017)
- Widi Binyardi (WAD286/04,WC04/08)
- Widi Mob (WAG6193/98,WC97/072).

The Tribunal's Geospatial and Mapping Unit provided an assessment, dated 30 August 2005 (GeoTrack 2005/2058) of the application area. The assessment confirms there are 5 applications that overlap this current application, including the above applications as well as Yugunga-Nya People (Federal Court No. WG6132/98 and NNTT no. WG99/046).

Although not all of the overlapping applications were referred to in the current application, the delegate is satisfied that the intent of the section is for the applicant to alert the NNTT to possible overlaps – which the applicant did in this case.

Result: Provided

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 condition

Schedule I of the application refers to Annexure I and lists notices issued under s.29 of the Act (or under a corresponding provision of a law of the State or Territory) in relation to the whole or part of the application area of which the applicant states they were aware. Annexure I is dated 28 July 2005.

The delegate notes GeoTrack 2005/2058 identified 1367 s.29 or equivalent notices that fall within the external boundary of the application as at 30 August 2005. There are some active matters within the area. The Registrar is required to use best endeavour to consider this claim within four months after the notification day specified in the s.29 Notice. There are numerous dates to be considered for testing, but due to a number of factors testing has not occurred on these days.

Although all the notices have not been listed in the application, the delegate notes that the applicant has provided sufficient information in this section to alert the delegate to the fact that the application may be s.29 affected.

The delegate is of the view that s. 62(2)(h) and s.190A(2) of the Act make it reasonably clear that the purpose of the provision is to ensure that the Registrar is made aware whether a claim may be affected by a relevant notice and, therefore, expedite the registration test of the application as required under s.190A(2). The delegate is of the opinion that in these circumstances the applicant has provided sufficient information to alert the delegate to possible s.29 notices.

Result: Requirement 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
Under section 190C(3) of the Act the delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:

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

The policy underlying the subsection is to give priority to the claim which is registered first in time, therefore even where there are claim group members in common, only a previous registered claim will keep the second off the Register.

It is up to the applicant in this matter to satisfy the delegate that if there are previous overlapping claims that no member of the claim group in the current application is also a member of a previous overlapping claim group.

The delegate sets out below the process she has gone through to identify the overlapping claims in respect of this application.

The delegate notes that the application under consideration, WC04/10 is a combination application. A combination application is a combination by *amendment* under s. 64. Combination does not create a new application – therefore when considering the 'current application' as required under s.190C(3) the delegate must consider all the pre-combination applications which make up the application WC04/10.

'Attachment B' to these reasons contains information on the pre-combination applications of WC04/10.

Obviously the delegate need not consider s.190C(3) unless there is an application which overlaps WC04/10. The GeoTrack 2005/2058 assessment lists the applications which appear on the Register of Native Title Claims and fall within the external boundary of the application area of WC04/10, see Table 1 below.

Table 1: Overlap Information – Register of Native Title Claims

Application NNTT No.	Name of Application	Date Application Entered on Register	Application Area (sq km)	Overlap Area (sq km)	% Application Overlapping WC04/10	% WC04/10 Overlapping Application
WC96/93	Mullewa Wadjari Community	19/08/1996	35616.642	14476.470	40.65	14.38
WC98/17	Malgana Shark Bay Peoples	30/03/1998	36071.615	733.403	2.03	0.73
WC99/46	Yugunga-Nya People	12/06/2000	30334.798	0.005	0.00002	0.000005

Note:

- the delegate has removed from the table applications; WC00/12 Ngoonooru Wadjari People and WC01/03 The Wajarri Elders, which are pre-combination applications of the current application and therefore do not need to be considered as 'previous applications' for s.190C(3);
- the applications WC96/93, WC98/17 and WC99/46 are not combination applications.

GeoTrack 2005/2058 shows that the three applications WC96/93, WC98/17 and WC99/46 are previous applications which cover whole or part of the application area of WC04/10. However this assessment does not consider the pre-combination applications of WC04/10.

The delegate must see which of the pre-combination applications have a geographical overlap with the previous applications identified.

The Tribunal's Geospatial and Mapping Unit prepared a table, dated 20 October 2005 (GeoTrack 2005/2193), listing the pre-combination applications of WC04/10 which have a geographical overlap with the identified previous applications, see Table 2 below.

Therefore, the pre-combination applications listed in Table 2 are those applications that satisfy s.190C(3)(a) of the Act.

Table 2: Pre-Combination Applications of WC04/10 with Overlapping Applications

Pre-Combination NNTT No.	Date Pre-Combination Made	Name of Pre-Combination	Date Previous Application on Register	Previous Application NNTT No.	Area of Overlap (Sq Km)
WC95/54	03/10/1995	Tharlirrang	19/08/1996	WC96/93	9.043
WC96/26	15/03/1996	Ngoonooru #3	04/09/1998	WC98/52	0.005
WC96/116	30/12/1996	Ngoonooru #5	04/09/1998	WC98/52	0.005
WC98/05	16/02/1998	Ike Simpson	19/08/1996	WC96/93	108.489
WC98/11	13/03/1998	Baumgarten	04/09/1998	WC98/52	0.002
WC98/35	12/06/1998	Ike Simpson	19/08/1996	WC96/93	456.441
WC98/66	29/09/1998	Walgar Rock	19/08/1996	WC96/93	72.978
WC99/42	21/12/1999	Wajarri Elders	19/08/1996	WC96/93	14471.697
WC99/42	21/12/1999	Wajarri Elders	30/03/1998	WC98/17	733.225

Under s.190C(3)(b) of the Act, only those pre-combinations listed in Table 2 which were made after the overlapping application was entered on the Register will be relevant for the delegate's

consideration. Having considered Table 2, the delegate notes the following pre-combination applications are those which comply with s.190C(3)(a) and (b):

- WC98/05 (Ike Simpson) overlaps with previous application WC96/93 (Mullewa Wadjari)
- WC98/35 (Ike Simpson) overlaps with previous application WC96/93 (Mullewa Wadjari)
- WC98/66 (Walgar Rock) overlaps with previous application WC96/93 (Mullewa Wadjari)
- WC99/42 (Wajarri Elders) overlaps with previous application WC96/93 (Mullewa Wadjari)
- WC99/42 (Wajarri Elders) overlaps with previous application WC98/17 (Malgana Shark Bay).

After consideration of s.190C(3)(a) and (b) we can see that the only previous applications that will need to be considered are WC96/93 and WC98/17, as the other previous application (WC99/46) does not overlap with any of the WC04/10 pre-combination applications.

Section 190C(3)(c) of the Act states that the overlapping previous application must have been entered or not removed from the Register, as a result of consideration of the previous application under s.190A. This means that if the previous applications are old applications, which were tested under the old NTA Act (that is, prior to the 1998 amendments to the Act) and have not gone through the Registration Test at s.190A the delegate will not need to consider it as part of the overlap analysis.

WC96/93 was registered on 19 August 1996, and then it was considered under s.190A and not removed from the Register on 28 April 1999. WC98/17 was registered on 30/03/1998. Therefore both previous applications satisfy s.190C(3)(c) in that they were entered or not removed from the Register as a result of consideration at s.190A.

As has been shown, two previous applications (WC96/93 and WC98/17) satisfy s.190C(3) in that each overlaps part of the current application, each was entered on the Register before the current application was made (see pre-combination analysis) and each was entered or not removed as a result of consideration of s.190A of the Act.

The next requirement is that the delegate be satisfied that no member of the native title claim group in the application WC04/10 is a member of the claim group for either WC96/93 or WC98/17.

The native title claim group for WC04/10 is described in the application at Annexure A as:

> The claim is brought on behalf of those Aboriginal persons who are the biological descendents of:
> Jim Crow + Badja; Kitty Gilbert; Dija; Molly Oxenham; Mary; Daniel Dann + Annie Dann; Bobby *Jinatharra* Clark; Ivy Walgar, Robby Walgar, Simon Walgar; Jenny Lynn, Emily; Tommy Glass + Polly Glass; Tommy Jones + Fanny Jones; Nyuga + Jimmy Isaacs; Waurene *Wannanu* Porter, Amy Porter; Lena Sullivan; Tiger Ryan, Fanny Ryan, Boomer Ryan, unnamed Ryan; Nellie; Murgoo Fred, Rosie English, Badja, Annie Dann; Jinny + Bedjeeyona; Cindy Tyson nee Sullivan; Amy Porter + Jigaroo; Nyundi; Grace Jones; Molly; Polly Mary Parker; Dingo Jim, Angeline; Frank *Bubadee* Franklin Punch; Charlie Dongara; Henry Ryan; *Eniwani* Jimmy + Jenny (Jinnie); English Edwards and Mary Jane; Judy and Jimmy; Julia; Paddy (Patrick) Donnelly; Daisy Bunnabuddy, Aubrey and Molly.

The native title claim group for WC96/93 is described, and appears on the Register on Native Title Claims as:

> The Mullewa Wadjari Native Title claims are members of the Collard, Merritt, Flanagan, Hannah, Joseph, Jones, Green, Papertalk, Comeagain and Collins families, whose adult members are here under

listed in their entirety. Therefore, the Native Title Claim Group is those people listed, and their biological descendants.

1. Rae Collard nee Papertalk 2. Charlie Collard 3. Cindy Collard 4. Gavin Collard 5. Marshel Collard 6. Christine Collard 7. Adrian Collard 8. Raymond Merritt 9. Graham Merritt 10. Marilyn Merritt 11. Helen Merritt 12. Eric Merritt 13. William Flanagan 14. Les Flanagan 15. Roslyn Kelly nee Flanagan 16. Henry Flanagan 17. Elizabeth Flanagan 18. Robert Flanagan 19. Ernist Flanagan 20. Dawn Hamlet nee Flanagan 21. Donna Rose Flanagan 22. Herman Edward Hannah 23. Norma May Hannah 24. Michael John Hannah 25. Francis Jean Hannah 26. Norman Little 27. Robert Joseph 28. Max Joseph 29. Francis Borsic nee Joseph 30. Phillip Joseph 31. Maxwell Jones 32 Carol Whitehurst nee jones [sic] 33. Jennifer Jones 34. tony Jones (sic) 35. Robert Jones 36. Margaret Green nee Papertalk 37. Charlie Harvey 38. Charmaine Green 39. Coraline Green 40. Charlie Green (Jnr) 41. Carl Green 42. Eric Papertalk 43. Taffy Papertalk 44. Ken Papertalk 45. Donald Papertalk 46. Victoria Papertalk 47. Kate Papertalk 48. John Papertalk 49. Doreen Papertalk 50. Margaret Papertalk 51. Henry Papertalk 52. Leedom Papertalk 53. Patrick Papertalk 54. Dorothy Papertalk 55. Marilyn Papertalk 56. Allison Papertalk nee Wood 57. Brian Comeagain 58. Douglas Comeagain 59. Dennis Comeagain 60. Elizabeth Comeagain 61. Allan Comeagain 62. Grace Comeagain 63. Morris Comeagain 64. Jackaleen Comeagain 65. Malcolm Papertalk 66. Alison Collins 67. Victor Collins 68. Edward Collins

The native title claim group for WC98/17 is described, and appears on the Register on Native Title Claims as:

> The claimant group is comprised of the biological descendants of Julia Culliewerri Thompson, Sarah Feast, Hookey alias Angelick, Panna, Forti, Mary Jane Kelly, Withia and Alice.

The delegate notes Schedule O of the application which may be considered a statement addressing the s.190C(3) requirement:

> At the time of this Application, and to the best of knowledge of the Applicant, no member of the native title claim group is also a member of a previously registered native title application over any part of the Application area.

The delegate also notes the information provided by YMMMAC, on behalf of the applicant, dated 11 November 2005, including an affidavit from Anthropologist [name deleted] who states:

> I am familiar with the Wajarri Yamatji claim and the identified native title determination applications which overlap it – the Malgana Shark bay People's claim (WAG6236 of 1998) ("the Malgana claim") and the Mullewa Wadjari claim (WAG6119 of 1998) and the previous research which has been conducted into these applications…There are significant cultural differences between the Malgana and the Wajarri Yamatji claim groups, reflecting distinct and well known cultural blocs…The apical ancestors for each group are also distinct representing very two different descent groups comprising family groups associated with each descent line. I am not aware of any overlapping members of the two claim groups…The claimants of this group [the Mullewa Wadjari claim] are mostly of coastal origin, namely Arnangu. They do not identify themselves as Wajarri Yamatji people.

Taking all this information, the delegate is satisfied that there is no common claim group member in the applications WC04/10 and WC96/93, nor in WC04/10 and WC98/17.

Result: Requirement 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

Under this section, the delegate is only required to be satisfied that one of the two conditions of s.190C(4) is met.

At Schedule R the applicant states that the amended application has been certified under s.203BE of the Act by the Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (YMBBMAC) and Ngaanyatjarra Council Aboriginal Corporation (NCAC).

Section 190C(4)(a) requires that the application be certified by each Aboriginal or Torres Strait Islander body that could certify the application. In this instance, the YMBBMAC and the NCAC are the only representative Aboriginal/Torres Strait Islander Bodies that cover this area, the delegate notes GeoTrack 2005/2058.

As required by s. 203BE(4)(a) the certificates contain statements to the effect that YMBBMAC and NCAC are of the opinion that:

(a) all the persons in the native title group have authorised the applicant to make the application and deal with matters arising in relation to it; and

(b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

As required by s. 203BE(4)(b) the Certificates set out briefly the reasons for YMBBMAC and NCAC are of that opinion.

Having considered these documents the delegate is satisfied that this requirement under the Act is satisfied.

Result: Requirement met

B. Merit Conditions – Section 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 of the application refers to Annexure B which describes the application area by reference to coordinates. Notes are included relating to the source and currency of information used to prepare the description.

At Schedule B, the applicant has provided information identifying areas within the external boundaries of the application area that are not included in the claim. This is done by way of a formula that excludes a variety of tenure classes from the area covered by the application.

The acceptability of the use of class or formula exclusions as appear here will depend on the state of knowledge of the claimants of the tenure in the claim area at the date the application is made (*Daniels v State of Western Australia* [1999] FCA 686). In *Dieri v State of South Australia* [2000] FCA 1327 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.

Schedule D to the application contains details of searches that have been conducted to determine the existence of any non-native title rights and interests in relation to the application area. These are annexed as Annexure D. The information contained in this Annexure identifies areas as Pastoral Leases, Special Leases, Special Lease Over Reserves, Reserves, and vacant Crown Land.

In relation to the question of class exclusions, note the comments of Nicholson J in *Daniels* at [38]:

> 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.

Although details of the searches have been included in the application, there are no further details as to the current status of the tenure and when or how it was granted.

Having regard to the information contained in the application, the delegate is satisfied that the class exclusion clauses used by the applicant amount to information that enables the internal boundaries of the application area to be identified with reasonable certainty.

Schedule C of the application refers to Annexure C of the application and is a copy of a map titled "Combined Wajarri Native Title Application" prepared by Department of Land Information, Land Claims Mapping Unit as at 24 December 2003 and includes:

- the application area depicted by a bold outline and hachuring;
- land tenure as at 1 June 2003;
- scale bar, coordinates, locality map and legend.

An assessment of the boundary description and map provided in GeoTrack 2005/2058 concluded that the description and the map are consistent and identify the area with reasonable certainty.

Having accepted the GeoTrack 2005/2058 assessment, the delegate is satisfied that the requirements of s.190B(2) are met.

Result: **Requirement 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

Under this section, the delegate is only required to be satisfied that one of the requirements in s.190B(3) is met. That is, either the persons in the native title claim group must be named in the application (s.190B(3)(a)) or the persons in that group must be described sufficiently clearly so that it can be ascertained whether any particular person is in that group (s.190B(3)(b)).

The description is not a complete list of names of the claim group members which means that it does not satisfy s.190B(3)(a). The claim group description must therefore satisfy s.190B(3)(b).

To satisfy s.190B(3)(b) the claim group must be described so that individuals can be readily identified objectively. The delegate does not assess the 'correctness' of the claim group. In *State of Western Australia v Native Title Registrar* [1999] FCA 1591-1594 Carr J said that:

> It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently….The Act is clearly remedial in character and should be construed beneficially.

The native title claim group description as appears in the application is:

> The claim is brought on behalf of those Aboriginal persons who are the biological descendents of:
> Jim Crow + Badja; Kitty Gilbert; Dija; Molly Oxenham; Mary; Daniel Dann + Annie Dann; Bobby *Jinatharra* Clark; Ivy Walgar, Robby Walgar, Simon Walgar; Jenny Lynn, Emily; Tommy Glass + Polly Glass; Tommy Jones + Fanny Jones; Nyuga + Jimmy Isaacs; Waurene *Wannanu* Porter, Amy Porter; Lena Sullivan; Tiger Ryan, Fanny Ryan, Boomer Ryan, unnamed Ryan; Nellie; Murgoo Fred, Rosie

English, Badja, Annie Dann; Jinny + Bedjeeyona; Cindy Tyson nee Sullivan; Amy Porter + Jigaroo; Nyundi; Grace Jones; Molly; Polly Mary Parker; Dingo Jim, Angeline; Frank *Bubadee* Franklin Punch; Charlie Dongara; Henry Ryan; *Eniwani* Jimmy + Jenny (Jinnie); English Edwards and Mary Jane, Judy and Jimmy; Julia; Paddy (Patrick) Donnelly; Daisy Bunnabuddy, Aubrey and Molly.

The delegate is of the opinion that some factual inquiry may be required to identify members of the native title claim group in this matter, that is, to identify who are the descendants of the named ancestors. However, the delegate is of the view that this inquiry is not onerous or unreasonable, and therefore that identification of members by reference to biological descendants of ancestors is capable of satisfying the requirements of s.190B(3) in this instance.

Result: **Requirement 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

Section 190B(4) is the imposed registration condition by reference to s.62(2)(d) of the Act, it requires the delegate to be satisfied that the description of the native title rights and interests contained in the application is sufficient to allow the rights and interests claimed to be readily identified.

The delegate is 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. Any assessment of whether the rights can be prima facie established as native title rights and interests will be discussed in relation to the requirement under s.190B(6) of the Act. At this stage the delegate is focussing only on whether the rights and interests as claimed are *identifiable*.

Schedule E of the application describes the claimed native title rights and interests. The claimed rights and interests are subject to a number of qualifications also set out in Schedule E. The applicant has differentiated areas, 'A', 'B' and 'C'. In summary, the applicant is claiming exclusive possession, occupation use and enjoyment in relation to Area A, and non-exclusive rights and interests in relation to all other areas. In respect of Area B where there is a nature reserve or wildlife sanctuary the native title rights and interests claimed exclude hunting, fishing and the taking of fauna.

The applicant has listed 35 claimed rights and interests as activities. The delegate is satisfied that the claimed rights are sufficiently clear to be understood and therefore the requirement of this section has been met.

Result: **Requirement 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

Under s.190B(5) of the Act the delegate must be satisfied that there is sufficient factual basis to support the existence of the claimed native title rights and interests. It is the delegate's view that each claimed right and interest must be considered separately and each must have sufficient factual basis to support it.

The delegate is not limited to consideration of statements contained in the Form 1 application but may refer to additional material supplied to the delegate under this condition, however the delegate will not usually look beyond the material provided to her and will not investigate issues of credit of the supplied material. For support of this position, note the consideration of French J in *Martin v Native Title Registrar* [2001] FCA 16 at [23]:

> Provision of material disclosing a factual basis for the claimed native title rights and interests, for the purposes of registration, is ultimately the responsibility of the applicant. It is not a requirement that the Registrar or his delegate undertake a search for such material.

The delegate notes that the test in section 190A involves an administrative decision – it is not a trial or hearing of a determination of native title pursuant to s.225, and therefore it is not appropriate to apply the standards of proof that would be required at such a trial or hearing. It is not the task of the delegate to make findings about whether or not the claimed native title rights and interests *exist*. It is not the role of the delegate to reach definitive conclusions about complex anthropological issues pertaining to applicant's relationship with country subject to native title claimant applications. That is a judicial enquiry.

What the delegate must do is consider whether the factual basis provided by the applicant is sufficient to support the assertion that claimed native title rights and interests exist. In particular this material must support the assertions noted in s.190B(5)(a), (b) and (c).

The applicant provided material in support of s.190B(5) at Schedules F and G. Schedule F contains a general description of the factual basis on which it is asserted that the three criteria identified at s. 190B(5)(a)-(c) are met. Schedule G provides brief details of activities currently being carried out within the area claimed. The veracity of the statements in these Schedules is attested to by each of the persons named as the applicant in their affidavits required by s.62(1)(a) accompanying the application.

In addition, affidavits by members of the claim group were provided as additional information in support of this and other conditions of the registration test. These affidavits are very comprehensive and have been considered by the delegate.

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

This encompasses both past and current association with the area. In *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 it was stated that:

> …the connection which the peoples concerned have had with the land or waters must be shown to be a connection by their traditional laws and customs…'traditional' in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty

Schedule G of the application provides a summary of the activities the native title claim group currently carries out in the claim area. In the delegate's view these activities are indicative of the native title claim group's association with the claimed area. In the material provided by the applicant on 28 September 2005, a comprehensive list was provided of the affidavit material which was relied upon in demonstrating s.190B(5)(a) of the Act. The delegate does not intend to quote at length all of this material, but notes the following extracts:

- [name deleted] "Before white men came here tribes lived around Walga Rock and there could be 2-3 tribes around, sharing it, and they lived in the shadow of the rock. They kept to their area but they have a connection there. People met and had their ceremonies and dances there and they respected each other. People would come there from outside areas as well."
- [name deleted] "I was born 20 March 1942 at Muggon Station. There was a small creek that ran alongside, and I was born in the wash. That's on Wajarri country. My mother's mother was the midwife. I was put in hot sand ashes a few days after I was born. This was so that I wouldn't grow up cheeky and I would be kind to everyone. They made a fire, raked the coals away and put me in the hot sand until it cooled down."
- [name deleted] "I was born on Mount Augustus Station near Burringurrah (the mountain itself) in the Yamatji camp, on the 1 of August 1939… My grandmother, her brother [name deleted] , and their people lived around Mount Augustus before the white man came to the area. [name deleted] and [name deleted] were children when the white people first came…"
- [name deleted] "I call the whole of the Murchison home. There is no one specific place, only Mileura. We were the only family actually there for years."
- [name deleted] "My father's name was [name deleted] . He was a Ngoonooru Wadjari man and the last 'tribal' man in the area. He was born at Belele in 1911."

The delegate accepts that the claim group is, and has been associated with the area, as required by s.190B(5)(a) of the Act.

s.190B(5)(b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests;

The interpretation of the term 'traditional' by the High Court majority in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 must be considered by the delegate here. In brief, the majority held that only laws and customs that have their origins before the assertion of British sovereignty are capable of being considered 'traditional' for the purposes of s.223. This normative system must have continued to function substantially uninterrupted from the time of acquisition of sovereignty to the time when the native title group sought determination of native title. 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.

Information at Schedules F and G of the application and the affidavits provide a factual basis to support the existence of laws and customs observed by the native title claim group that give rise to a claim for native title rights and interests in the area. It is noted that the majority of the affidavit material talks of the claimed rights and interests in the current tense, however the delegate is of the view that the material does provide enough material to support the factual basis to demonstrate the traditional basis which gives rise to the claimed rights.

In particular the delegate notes that the statements in para (iv) of Schedule F. The affidavits supplied also make reference to activities carried out by the claim group with some reference to a traditional law or custom as its base. The delegate notes the comprehensive list of affidavit material provided by the applicant on 28 September 2005, relied upon to demonstrate s.190B(5)(b) of the Act. The delegate does not intend to quote at length this material, but does note the following extracts:

- [name deleted] "My mother was [name deleted] …My father was married to her sister who died giving birth to one of my brothers, [name deleted] . My mother was the next eldest sister so he married her. It would have been traditionally arranged like that."
- [name deleted] "Under our law you can't talk to your sister straight to face, making eye contact. You can't walk in front of your sister, mother, grandmother, and all women in your family. My mum, dad, uncles and aunts told me these rules. Sometimes I accidentally broke the rules and I was hit by anyone who was older than me."
- [names and cultural reference deleted]

Also of particular assistance is the table of rights and interests provided on 28 September 2005 and labelled 'Attachment A1: Schedule F' which provides the traditional law and custom which give rise to each of the claimed rights.

Having considered all the information provided, the delegate accepts, that s.190B(5)(b) is satisfied as required.

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

Under this requirement, the delegate must be satisfied that the claim group continues to hold native title in accordance with their traditional laws and customs. The affidavits supplied contain extensive material referring to current activities that are in line with traditional

customs. The delegate does not propose to set them all out here, but does note the following extracts:

- [name deleted] "I talk Wajarri. I learnt Wajarri from the people that lived on the stations that I grew up and lived on."
- [name deleted] "I do go and see the Wajarri Elders mob for permission to go on their country…"
- [name deleted] "It is important as an Aboriginal person to know your boundaries. I live here in Sandstone, but I don't visit the breakaways near here because it isn't my country. My mum and step-dad, [name deleted] , taught me about the boundaries of my country and the sites.
- [name deleted] "I was one of the last men to be put through the Law in the Murchison and I have a lot of secret information that has been passed down to me. I can only pass on this information to other men who are 'tribal'."

For the reasons set out in s.190B(5)(b) and having regard to the same material the delegate is satisfied that there is sufficient factual basis to support the assertion as required.

Result: **Requirement met**

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

The Registrar or his delegate 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

Only one of the claimed native title rights or interests needs to be prima facie established for the claim to be registered (subject to all other requirements being met). However those that cannot be prima facie established will not be entered on the Register.

Rights and interests that cannot be readily identified, as required by s.190B(4) cannot be prima facie established under s.190B(6). In addition, the delegate's view is that claimed rights and interests which do not have a factual support as required by s.190B(5) will not satisfy s.190B(6).

In respect of s.190B(6) the delegate considers whether the claimed rights and interests can be prima facie established *as* native title rights and interests, that is whether the claimed rights are recognisable as native title rights. Native title rights and interests which are not recognisable are those that;

- are not within the definition of native title rights and interests as found in s.223 of the Act, or
- are inconsistent with common law, or
- have been extinguished (the delegate will have regard to s.47, s.47A and s.47B areas).

The delegate is of the view that each right must be viewed individually and that each must have a sufficient prima facie basis.

Schedule E of the application lists 35 separate rights and interests which are claimed in relation to the application area. Not all the rights are claimed in relation to all of the application area, a distinction is made between rights claimed in relation to land where exclusive possession is claimed and rights claimed in relation to where exclusive possession is not claimed. The rights claimed in relation to nature reserves and wildlife sanctuaries (Area B as defined in the application) are further refined.

Rights claimed in Area A only

The applicant has listed 8 rights which are claimed in respect of Area A only. These are claimed as exclusive possession rights.

(1) *The right to possess, occupy, use and enjoy the area as against the world;*
(2) *A right to occupy the area;*
(3) *A right to use the area;*
(4) *A right to enjoy the area;*
(5) *A right to make decisions about the use of the area by persons who are not members of the Aboriginal society to which the native title claim group belong;*
(6) *A right to control access of others to the area;*
(7) *A right to control access of others to the area except such person as may be exercising a right accorded by the common law, statute law of the Commonwealth or the State of Western Australia or a lawful grant by the British sovereign or its successor;*
(8) *A right to control the taking, use and enjoyment by others of the resources of the area;*

Subject to the satisfaction of other requirements, the majority of the High Court in *Western Australia v Ward* (2002) 191 ALR 1 indicated that a claim to exclusive possession, occupation, use and enjoyment of lands and waters can, prima facie, be established. However, the Court indicated that such a claim may only be able to be prima facie established in relation to some parts of a claim area, such as those areas where there has been no previous extinguishment of native title, or where extinguishment is to be disregarded (for example, where the applicant claims the benefit of ss.47, 47A or 47B). This is recognised by the applicant in this application, as demonstrated by the exclusions listed in Schedule E of the application.

The rights and interests claimed in (2) through to (8) above are elements of the right claimed at (1), which can be seen as an integral part of the right of exclusive possession which is claimed over Area A.

The affidavit support for these rights are referred to in the Table provided by the applicant on 28 September 2005. It seems clear from the material that under traditional laws and customs members of the claim group have rights and responsibilities over the land. The delegate does note the following extracts from the affidavit material:

- [name deleted] "The traditional boundaries for Wajarri have Mullewa as the south boundary, east is Meekatharra, then north around Coordewandy Station and Wooramel River and back inland, cutting down through Muggon and Yallalong Station and back down Mullewa…People from outside Wajarri country better check with us before they come onto our country. If they don't check with us first, there'd be a fight I reckon. Some of the Wajarri elders get very upset if they think people are hunting on their country without permission."

Having considered these rights in relation to s.190(4) and s.190(5) and having considered the affidavits in support, the delegate is satisfied there is sufficient information in the application and in the additional material to support the prima facie establishment of the rights claimed at (1) through to (8) in respect of Area A. the delegate also notes the statement in the application that the said native title rights are not claimed to the exclusion of any other rights or interests validly created by or pursuant to the Common Law, a Law of the State or a Law of the Commonwealth. On the face of the material there is no partial extinguishment over the whole of the area.

Established - claimed rights (1) through (8) in Area A.

Rights claimed in Area A and C

(9) A right to hunt in the area;
(10) A right to fish in the area;
(11) A right to take fauna;
(12) A right to take traditional resources, other than minerals and petroleum from the area;

The rights claimed at (9) to (12) are rights which can be established in areas where there is exclusive possession, and areas where there is non-exclusive possession.

The affidavit support for these rights are referred to in the Table provided by the applicant on 28 September 2005, the delegate notes the following extracts:

- [name deleted] "When I was younger I would go hunting for kangaroos, turkeys, bangarras (black goannas) and look for emu eggs in April."
- [name deleted] "Now my health is not so good so I only go out hunting if I have time. I love the bush. My son goes out every weekend and brings me back some kangaroo, emu eggs, cogla, bimba and gabaru (bush medicine)…I used to go fishing in the Murchison River where I caught yellow tail."
- [name deleted] "My grandfather and grandmother had an outcamp where we would dig for freshwater for drinking, and another hole we had for swimming, as it was brackish. At another spot, water came out of the ground and white marks (salt) were left. We would collect the salt for our meat…"

Based on the information provided to the delegate, she is satisfied there is sufficient information to support the prima facie establishment of the rights claimed at paras (9) through to (12) in respect of Areas A and C.

Established - claimed rights (9) through (12) in Areas A and C.

Rights claimed in Area A, B and C

(13) A right to be present on or within the area;
(14) A right to make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;
(15) A right to invite and permit others to have access to and participate in or carry out activities in the area;
(16) A right of access to the area;

(17) A right to live within the area;
(18) A right to erect shelters upon or within the area;
(19) A right to camp upon or within the area;
(20) A right to move about the area;
(21) A right to engage in cultural activities within the area;
(22) A right to conduct and participate in ceremonies and meetings within the area;
(23) A right to visit, care for and maintain places of importance and protect them from physical harm;
(24) A right to take flora (including timber);
(25) A right to take soil;
(26) A right to take sand;
(27) A right to take stone and/or flint;
(28) A right to take clay;
(29) A right to take gravel;
(30) A right to take ochre;
(31) A right to take water;
(32) A right to manufacture traditional items from the resources of the area;
(33) A right to trade in the resources of the area;
(34) A right to maintain conserve and protect significant places and objects located within the area;
(35) A right to be identified and acknowledged, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the traditional owners in relation to the land and waters of the area.

Where there is a claim to control access to and use of an area, *Ward v Registrar [1999] FCA 1732* states that where there is not exclusive possession it is generally doubted that there is any right to control access to land or make binding decisions about its use.

The rights claimed at (13), (16), (19) - (22) and (24) - (31) are rights which can be established in both areas of exclusive and non-exclusive possession, as there is no intention to control access or use by others. The delegate is satisfied there is sufficient information to prima facie establish the rights in Areas A, B and C, noting the following extracts:

- [name deleted] "When I go camping with the family we usually go to the same camp spots…I have shown my grandkids how to make fire, like my old grandparents taught me…"
- [name deleted] "There were plenty of gatherings when I was growing up. Corroborees happened in Mileura. A lot of people would come along and there'd be singing and I learnt some of the songs."
- [name deleted] "My mother taught me about bush tucker such as beans, cogla (bush pears), quandongs, bardis (grubs), gulyu (yams) and gurrlgal (berries). We could find lots of these everywhere all over Belele and we still can."

The affidavit support for these rights are referred to in the Table provided by the applicant on 28 September 2005, which is too extensive to list here, however the delegate does have regard to that material.

The remaining rights, (14), (15), (17), (18), (23), (32), (33) (34) and (35) are discussed below.

(14) A right to make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;

The right at (14) intends to limit the use of the area, and therefore under *Ward* may not be able to be established in areas where there is non-exclusive possession. In this instance, the right may be established in Area A as defined by the application, but not B or C.

The question is whether there is any impact or difference if the right is limited to the 'members of the Aboriginal society to which the native title group belong' as it is here. This issue was discussed in two recent Federal Court cases *Gawirrin Gumana v Northern Territory (No 2)* [2005] FCA 1425 and *Northern Territory v Alyawarr* [2005] FCAFC 135.

In *Alyawarr* the Full Court of the Federal Court discussed the right to make decisions about use & enjoyment by Aboriginal people. The Court at [151] said that such a right was:

> …not without difficulty. There is a risk that it may be seen as creating a criterion for exclusion based in part upon Aboriginality. In any event it does not appear in this case that there are persons other than the native title holders who are bound by their traditional laws and customs. The position would be different were the native title holders a subset of a wider society incorporating other groups bound by the same traditional laws and customs…To the extent that the native title holders could collectively exclude particular members from particular areas, such as women from law grounds, that is a matter best left to the intramural workings of the traditional laws and customs. It is not a matter requiring determination as a distinct native title right.

In *Gawirrin* the court stated that such a right in that case was to remain only on the basis that it is expressed to refer to those Aboriginal people who recognise themselves as governed by those laws, it cannot operate more extensively.

In the delegate's view the right as claimed at (14) can therefore be established in both exclusive and non-exclusive areas. The affidavit material supporting these rights are referred to in the Table provided by the applicant on 28 September 2005. The delegate notes the following extracts:

- [name deleted] "One of the pools I speak for is near Mt Hale hills and its name is Kalamunda."
- [name deleted] "My mother and older brother used to tell is where all the sacred places were that we could not go."

This right is therefore prima facie established in Areas A, B and C as defined in the application.

(15) A right to invite and permit others to have access to and participate in or carry out activities in the area;

The native title right claimed at (15) is an interest that can be seen as an integral part of the right of exclusive possession in respect of Area A. As noted in *Alyawarr* the right to control access cannot be sustained where there is no right to exclusive occupation against the whole world. The right of exclusion is an exclusive right and such can not be established where there is non-exclusive possession, such as Areas B and C in this application. The right at (15) is not limited to members of the Aboriginal society to which the native title claim group belongs as the right at (14) is.

The delegate is therefore not satisfied that the right at (15) can be prima facie established in Areas B and C. The affidavit support for this right in Area A are referred to in the Table provided by the applicant on 28 September 2005. The delegate notes the following extracts:

- [name deleted] "People met and had their ceremonies and dances there and they respected each other. People would come there from outside areas as well."

The delegate is of the view that there is sufficient information to support the prima facie establishment of the right claimed at (15) in Area A.

(17) A right to live within the area;

(18) A right to erect shelters upon or within the area;

The applicant claims the right to live and erect shelters within the area. While *Ward* did not preclude the recognition of native title rights to reside upon a claim area despite the absence of exclusive possession in that case, the question which arises here is whether the rights to live or erect shelters on the land necessarily amounts to a right to control access to and use of the claim area. To the extent that they would do so, such rights are not prima facie capable of being established over areas for which a claim to exclusive possession could not be sustained, that is Areas B and C in this application.

The Northern Territory in *Alyawarr* argued that the right to live and erect structures in that claim embraced a right to live permanently on the area. The Full Court held that the right to live on the land does not necessarily involve permanent settlement at a particular place. The Court considered the interaction of the right with the pastoral lease rights on the land, holding that there were not inconsistent. Therefore, it would seem that such rights could be established in areas of non-exclusive possession.

The delegate notes that there is nothing in the description of these rights which conveys an intention or capacity on the part of the members of the native title claim group to control access to or use of the area as an integral part of this right. Rather, rights to control access to, or use of the application area are claimed separately.

The delegate notes the following extracts:

- [name deleted] "My grandparents always lived in Wajarri country. They moved around the Murchison and Gascoyne area, and lived and worked at lots of stations including Dalgety Downs, Errong Springs, Milly Milly, Carey Downs and Mt Augustus. My mother, father and my old grandparents worked and lived out there."
- [name deleted] "There were camps and homesteads. When the old people went mustering with horses they camped all over the stations. They did use some places as bases where they put up sheds. We had a boughshed out at Googadoongu Windmill where I lived with my family."
- [name deleted] "The old people also taught me to make a bough shed. You put a big post down and lay the bush on top. You are supposed to use tea trees for better shade."

Having regard to the affidavit material above, and the list in the Table of 28 September 2005, the delegate is satisfied that the rights claimed above are capable of being prima facie established in Areas A, B and C as defined in the application.

(23) A right to visit, care for and maintain places of importance and protect them from physical harm;
(34) A right to maintain conserve and protect significant places and objects located within the area;
The delegate notes recent Federal Court cases with similar claimed rights, where it was discussed whether the term 'protect' necessarily involved an intention to exclude or control access.

In *Gawirrin* the Court said that the right to protect sites included the right to exclude others from those sites. The Full Court in *Alyawarr* (at [140]) found that the notion of protection of sites may involve physical activities on the site to prevent its destruction, but need not be read as implying a general right to control access.

These two cases appear to be at odds with each other. It is noted that the Court in *Gawirrin* were happy to delete the word 'protect' from the claimed right to 'protect and maintain' allowing the right to be determined.

The delegate is of the view that the rights as expressed in this application do not convey an intention to control access to the areas as an integral part of these two rights. As noted, rights to control access to, or use of the application area are claimed separately. The delegate is satisfied the rights (23) and (34) can exist in areas of exclusive and non-exclusive possession.

The delegate notes the following affidavit material:

- [name deleted] "Burringurrah, Mount Augustus, is the most important site to the people from Burringurrah Wajarri country. My eldest brother, [name deleted] , used to be the keeper of the story for the area, which he looked after. He and the other elders used to keep all the stories and look after the country. A lot of the old fella are all gone now and I have taken over from them. It is now my job to visit the sites and make sure they are okay. Some of the squatters don't like you to go to them sites but I reckon it ought to be done."

The delegate has regard to the substantial affidavit material provided in support of these rights, and is of the view that there is a sufficient basis for these rights to be established prima facie.

(32) A right to manufacture traditional items from the resources of the area;
The question which arises in respect of this claimed right is whether it is a right in relation to land or waters, as required under s.223 of the Act.

In *Neowarra v WA* [2003] FCA 1402 at [509] the Court rejected a submission that this was not a right or activity in relation to land or waters but rather a right in respect of chattels, that is something that has been severed from the land or taken from the waters. The right however was limited to the manufacture of traditional items such as spears and boomerangs. In the

current application, the right, as expressed limits the manufacture to traditional items. The affidavit material also supports this:

- [name deleted] "I used to go out to Wilgie Mia to collect red ochre, which I use when I'm making spears and didgeridos."

The delegate, having considered all the material is satisfied that the right may exist in all areas of the application area and that there is sufficient prima facie basis for the right.

(33) A right to trade in the resources of the area;

Similar to the right to manufacture, the question which arises in respect of this claimed right to trade is whether it is a right in relation to land or waters, as required under s.223 of the Act.

The Full Court in *Alyawarr* considered the right to trade and said at [153]:

> The right to trade is a right relating to the use of the resources of the land. It defines a purpose for which those resources can be taken and applied. It is difficult to see on what basis it would not be a right in relation to the land.

The Court also considered the case of *Commonwealth v Yarmirr* (2001) 201 CLR 1 which at first instance referred to evidence related to trade by way of exchange, between Indigenous groups of items including spearheads, stone axes, bailer shells, cabbage palm baskets and turtle shells. The *Alyawarr* Full Court said (at [155]) of the *Yarmirr* decision:

> Olney J's observation does not involve the proposition that trade in the resources of the land can never be a 'right' in relation to the land. There the evidence was of an activity. It did not amount to evidence of the exercise of a right……. *Yarmirr* cannot be taken as authority for the proposition that there cannot be a right to trade in the resources of the land as a right in relation to the land.

Having come to this conclusion however, the Full Court in *Alyawarr* was of the opinion that in the matter before them, there had been insufficient evidence before the Court at first instance for the right to survive on appeal. The finding by the Court was that the word 'trade' should be omitted from the lower Court's formulation, leaving as the right:

> the right to share or exchange subsistence and other traditional resources obtained on or from the land and waters.

By taking that view, the delegate believes that the Court has implicitly accepted that the right to trade is capable of being established (where satisfactorily evidenced) over land where exclusive possession is not available. The delegate therefore assesses that the right at (33) can be made out in Areas A, B and C as defined in the application.

The delegate takes the view that in defining 'resources' as claimed in the right, they are the 'traditional resources', this is also supported by the affidavit material:

- [name deleted] "Wajarri people still collect the ochre from Wilgie Mia and trade it with others. The ochre is used all over the country, it is important because it is used for painting in corroborees."

(35) *A right to be identified and acknowledged, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the traditional owners in relation to the and and waters of the area.*
The right claimed at (35) appears to address the matter of law falling to be decided in the context of ss.223 and 225 of the NTA. That is, determination of native title must determine who the persons or each group of perons are who hold the common or group rights. This therefore cannot itself be a native title right and interest (see *Daniel v State of Western Australia* at [302]).

In the alternative, the right is not 'in relation to land' as required by s223. The right to 'be acknowledges' is also unenforceable, and therefore unlikely to be made out.

The delegate is of the view this claimed right cannot be recognised as a native title right and therefore cannot be prima facie established.

As many of the native title rights and interests claimed are prima facie established the application meets the requirements of s. 190B(6).

Result: Requirement 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

Under s.190B(7)(a), the delegate 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. The delegate interprets 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, page 304).

The application does not contain Schedule M, however, on 14 September 2005 the applicant's representative provided a substantial list of affidavit material to support s.190B(7). Substantial amounts of the material provide support for the traditional physical connection to the land of the claim group in this application. The majority of deponents were born within the area and have lived most of their life within the area. The delegate also notes the following extract as one example:

- [name deleted] "I was born 20 March 1942 at Muggon Station. There was a small creek that ran alongside, and I was born in the wash. That's on Wajarri country. My mother's mother was the midwife. I was put in hot sand ashes a few days after I was born. This was so that I wouldn't grow up cheeky and I would be kind to everyone. They made a fire, raked the coals away and put me in the hot sand until it cooled down."

The delegate is satisfied that the above information in Schedules F and G as well as in the affidavits adequately supports the deponents continuing and previous physical connection with the area the subject of the application. The delegate is satisfied that much of that connection occurs in accordance with traditional customs and involves traditional practices.

Accordingly, The delegate is satisfied that at least one member of the native title claim group currently has and previously had a traditional physical connection with any part of the land or waters covered by the application. The delegate finds that the application meets this condition.

Result: Requirement 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.

Reasons relating to this condition

Section 61A contains four 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 conditions. For the reasons that follow the delegate has concluded that there has been compliance with s.61A.

Native Title Determination – s.61A(1)

A search of the National Native Title Register has revealed that there is no determination of native title in relation to any part of the claim area. This has been confirmed by GeoTrack 2005/2058.

Previous Exclusive Possession Acts – s.61A(2)

Schedule B excludes from the application any area in relation to which a previous exclusive possession act was done as defined in s.23B of the Act.

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

Section 61A(3) of the Act states that *if* a previous non-exclusive possession act was done in relation to an area, a claimant application must not be made in which any of the native title rights and interests claimed confer possession, occupation, use and enjoyment of any area to the exclusion of all others.

The current application does not contain a statement specifically referring to previous non-exclusive possession acts (PNEPAs), however the delegate notes that to satisfy s.61A(3) of the Act, the applicant does not necessarily need to provide a statement of similar wording to that section.

Having considered the application as a whole, the delegate is of the view that other statements contained within the application indicate that the native title rights and interests claimed are not intended to confer exclusive possession over areas where a PNEPA was done. The applicant has specified in the application that exclusive possession is only claimed in respect of 'Area A' which is defined within the application as:

> Area A means lands and waters within the Application area and which comprises:
>
> (i) areas of unallocated Crown land that have not been previously subject to any grant by the Crown;
>
> (ii) areas to which section 47 of the Act applies;
>
> (iii) areas to which section 47A of the Act applies;
>
> (iv) areas to which section 47B of the Act applies; and
>
> (v) other areas to which the non-extinguishment principle, set out in section 238 of the Act, applies and in relation to which there has not been any prior extinguishment of native title.

The delegate also notes Schedule B of the application which states:

> (3) subject to (4), the Applicant also excludes from the Application area areas in relation to which native title rights and interests have otherwise been wholly extinguished.

A PNEPA will usually extinguish any native title rights and interests to the extent that they are inconsistent with the rights granted under the lease (*Western Australia v Ward* (2002) 213 CLR 1 and *De Rose v South Australia* (No 2) [2005] FCFCA 110).

Therefore, it is the delegates view that the as definition of 'Area A' in the application excludes area where there has been any prior extinguishment of native title, and Schedule B also excludes areas where native title rights and interests have been wholly extinguished, there is sufficient information to conclude that the applicant does not intend to claim exclusive possession over any area where PNEPAs have been done.

s.47, 47A, 47B Areas – s.61A(4)

Schedule B, para 4 of the application states:

> The Application area includes any area in relation to which the non-extinguishment principle (as defined in section 238 of the Act) applies, including any area to which sections 47, 47A and

47B of the Act apply, particulars of which will be provided prior to the hearing but which include such areas as may be listed in Schedule L.

Schedule L to the application states that the applicant does not have the details of any area over which the extinguishment of native title is required by sections 47, 47A or 47B of the Act to be disregarded, save for the following:

(i) Belele Station which is an area for which a pastoral lease is held by or on behalf of the members of the native title claim group; or an area leased, held or reserved for the benefit of Aboriginal peoples or Torres Strait Islanders and occupied by or on behalf of the members of the native title claim group;
(ii) Reserve 42783, which is an area leased, held or reserved for the benefit of Aboriginal peoples or Torres Strait Islanders and occupied by or on behalf of the members of the native title claim group;
(iii) Burringurrah Aboriginal Community which is an area held, leased or reserved for the benefit of Aboriginal people or Torres Strait Islanders and occupied by or on behalf of the members of the native title claim group;
(iv) Pia Wadjari Aboriginal Community which is an area held, leased or reserved for the benefit of Aboriginal peoples or Torres Strait Islanders and occupied by or on behalf of the members of the native title claim group;
(v) Goolumburoo Aboriginal Community which is an area held, leased or reserved for the benefit of Aboriginal peoples of Torres Strait Islanders and occupied by or on behalf of the members of the native title claim group.

Section 61A(4)(b) requires a statement in the application that section 47, 47A or 47B applies to the application. The delegate is satisfied that this condition is met.

Result: **Requirement met**

S.190B(9)

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;
(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;
(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 condition
For the reasons that follow the delegate has concluded that there has been compliance with s.190B(9).

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

Schedule Q of the application states that the applicant does not claim any rights, title or interests in any minerals, petroleum or gas as defined in the *Petroleum Act 1936 (WA)*, the *Petroleum Act 1967 (WA)* or the *Petroleum Act 1967 (Cth)* wholly owned by the Crown.

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

Schedule P of the application states that the application does not include any offshore place.

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

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

In addition, Schedule B to the application excludes from the application area any area in relation to which native title rights and interests have otherwise been wholly extinguished.

Result: Requirement met

End of Document

ATTACHMENT A

The following is a list of documents considered by the delegate in making the decision

- Amended Application, filed in Federal Court on 21 December 2004
  S.62 affidavits of applicant;
  Affidavit of [name deleted] , 9 June 2000;
  Affidavit of [name deleted] , 9 June 2000;
  Affidavit of [name deleted] , 8 June 2000;

- Colour Map of claim area, 21 December 2004

- Amended Application, filed in Federal Court on 28 July 2005
  Certification of YLSC (previously YMBBMAC), 14 June 2004
  Certification of NCAC Council, 22 June 2005

- Letter from YMBBMAC, 14 September 2005, enclosing:
  Affidavit of [name deleted] , 7 September 2005;
  Affidavit of [name deleted] , 7 September 2005;
  Affidavit of [name deleted] , 6 September 2005;
  Affidavit of [name deleted] , 8 September 2005;
  Affidavit of [name deleted] , 7 September 2005;
  Affidavit of [name deleted] , 7 September 2005;
  Affidavit of [name deleted] , 12 September 2005;
  Affidavit of [name deleted] , 10 September 2005;
  Affidavit of [name deleted] , 13 September 2005;
  Affidavit of [name deleted] , 8 September 2005;
  Affidavit of [name deleted] , 8 September 2005;
  Attachment R - Certification document, 7 September 2005, YMBBMAC;
  Attachment F: Schedule F Table.

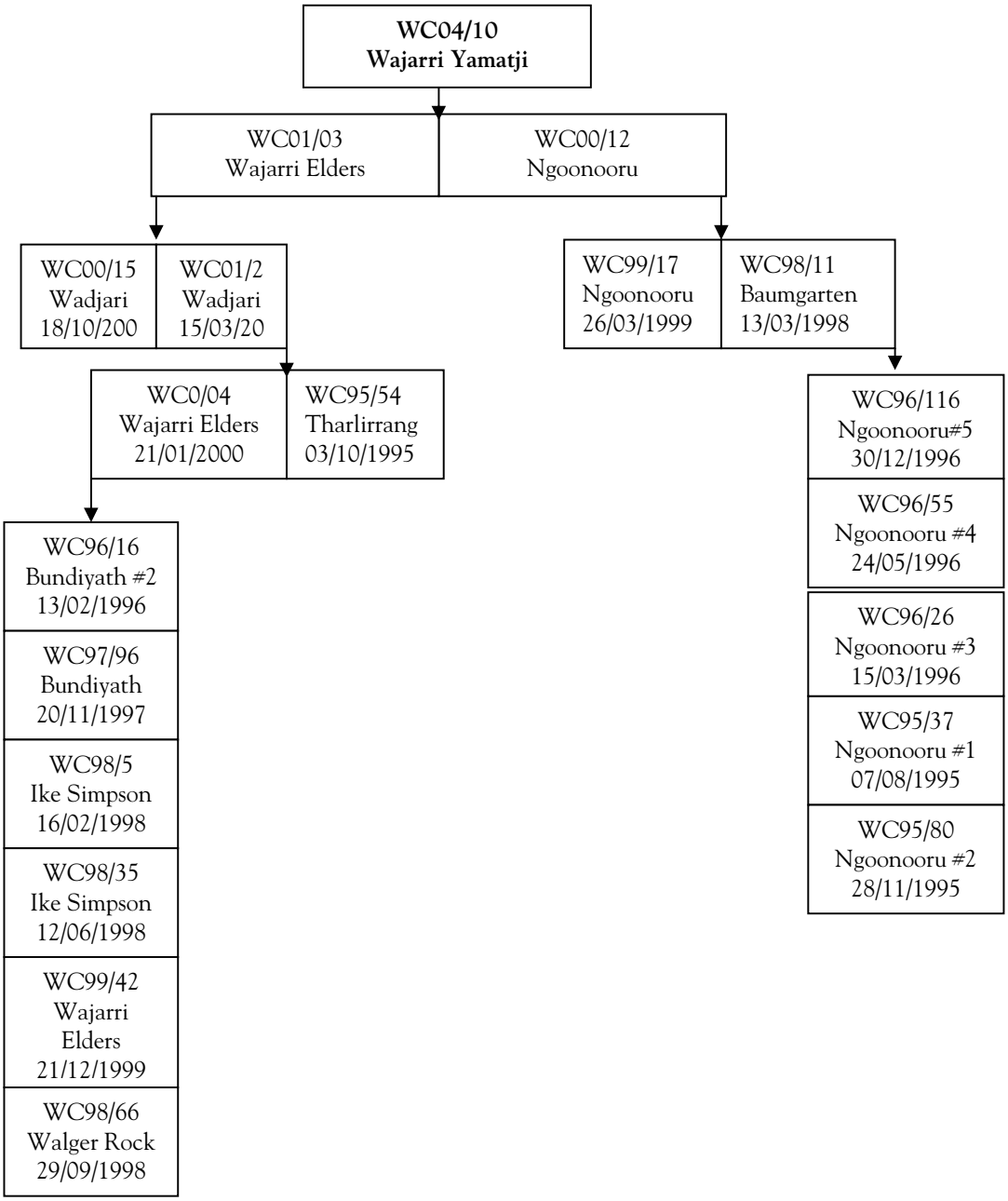
- Letter from YMBBMAC, 28 September 2005, enclosing:
  Attachment A1: Schedule F Table
  Affidavit of [name deleted] , 22 September 2005;
  Affidavit of [name deleted] , 20 September 2005;
  Affidavit of [name deleted] , 28 September 2005;

- Facsimile from YMBBMAC, 11 November 2005, enclosing:
  Affidavit of [name deleted] , 11 November 2005.

- GeoTrack 2005/0379 – WC04/10, 22 February 2005.
- GeoTrack 2005/2058 – WC04/10, 30 August 2005.
- GeoTrack 2005/2193 – WC04/10, 20 October 2005.

ATTACHMENT B

Pre-combination Applications of WC04/10



ATTACHMENT C

The following is to be entered as contents of the Register of Native Title Claims pursuant to s.186

S186 (1)

(a) whether the application was filed in the Federal Court or lodged with a recognised State/Territory body
Federal Court

(b) if the application was lodged with a recognised State/Territory body – the name of that body
Not applicable

(c) the date on which the application was filed or lodged
The application to amend, combining applications WAD6042 of 1999 and WAD 6033 of 1998, was filed in the Federal Court on 21 December 2004.

(ca) the date on which the claim is entered on the Register
The date the decision is made (1 December 2005)

(d) the name and address for service of the applicant/s

Applicant/s: Ike Simpson, Robin Boddington, Ron Simpson, Charlie Snowball, Monty Walgar, David Jones, Colin Hamlett, Gavin Egan, Mack Mourambine, Timothy Simpson, Bill Pearce, Malcolm Ryan, Neville Mongoo, Gordon Fraser, Rochelle Baumgarten, William Baumgarten and Pam Mongoo on behalf of the Wajarri Yamatji.

Address for service:
C/- Principal Legal Officer
Yamatji Marlpa Barna Baaba Maaja Aboriginal Corporation
Level 5
256 Adelaide Terrace
PERTH WA 6000

(e) the area of land or waters covered by the claim
The external boundaries of the area of land and waters covered by the external boundary are set out in the document entitled "Description of External Boundary" which is Annexure 'B' to the application and is included as Attachment 1 to the Register of Native Title Claims.

Areas of land and waters within those boundaries that are not covered by the application

(1) Subject to (4), the Applicant excludes from the Application area any areas that are covered by any of the following acts as these are defined in either the Act as amended (where the act in question is attributable to the Commonwealth), or *Titles (Validation)and Native Title (Effect of Past Acts) Act 1995* (WA, as amended, where the

act in question is attributable to the State of Western Australia) at the time of the Registrar's consideration:

(a) Category A past acts;
(b) Category A intermediate period acts;
(c) Category B past acts that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests;
(d) Category B intermediate period acts that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests

(2) Subject to (4), the Applicant excludes from the Application area any areas in relation to which:

(a) a "previous exclusive possession act", as defined in s. 23B of the Act, was done and the act was an act attributable to the Commonwealth; or
(b) a "relevant act" as that term is defined in s. 12I of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA)was done and the act is attributable to the State of Western Australia; or
(c) a previous exclusive possession act under s. 23B(7)of the act was done in relation to the area and the act was attributable to the State of Western Australia

(3) Subject to (4), the Applicant also excludes from the Application area areas in relation to which native title rights and interests have otherwise been wholly extinguished.

(4) The Application area includes any area in relation to which the non-extinguishment principle (as defined in s. 238 of the Act) applies, including any area to which ss. 47, 47A and 47B of the Act apply, particulars of which will be provided prior to the hearing but which include such areas as may be listed in Schedule L.

(f) a description of the persons who it is claimed hold the native title

The claim is brought on behalf of those Aboriginal persons who are the biological descendents of:

Jim Crow + Badja; Kitty Gilbert; Dija; Molly Oxenham; Mary; Daniel Dann + Annie Dann; Bobby *Jinatharra* Clark; Ivy Walgar, Robby Walgar, Simon Walgar; Jenny Lynn, Emily; Tommy Glass + Polly Glass; Tommy Jones + Fanny Jones; Nyuga + Jimmy Isaacs; Waurene *Wannanu* Porter, Amy Porter; Lena Sullivan; Tiger Ryan, Fanny Ryan, Boomer Ryan, unnamed Ryan; Nellie; Murgoo Fred, Rosie English, Badja, Annie Dann; Jinny + Bedjeeyona; Cindy Tyson nee Sullivan; Amy Porter + Jigaroo; Nyundi; Grace Jones; Molly; Polly Mary Parker; Dingo Jim, Angeline; Frank *Bubadee* Franklin Punch; Charlie Dongara; Henry Ryan; *Eniwani* Jimmy + Jenny (Jinnie); English Edwards and Mary Jane; Judy and Jimmy; Julia; Paddy (Patrick) Donnelly; Daisy Bunnabuddy, Aubrey and Molly.

(g) a description of the native title rights and interests in the claim that the Registrar in applying subsection 190B(6) considered, prima facie, could be established.

The following rights and interests can be prima facie established in 'Area A' as defined in the application:

(1) The right to possess, occupy, use and enjoy the area as against the world;

(2) *A right to occupy the area;*
(3) *A right to use the area;*
(4) *A right to enjoy the area;*
(5) *A right to make decisions about the use of the area by persons who are not members of the Aboriginal society to which the native title claim group belong;*
(6) *A right to control access of others to the area;*
(7) *A right to control access of others to the area except such person as may be exercising a right accorded by the common law, statute law of the Commonwealth or the State of Western Australia or a lawful grant by the British sovereign or its successor;*
(8) *A right to control the taking, use and enjoyment by others of the resources of the area;*

The following rights and interests can be prima facie established in Areas A and C:

(9) *A right to hunt in the area;*
(10) *A right to fish in the area;*
(11) *A right to take fauna;*
(12) *A right to take traditional resources, other than minerals and petroleum from the area;*

The following rights and interests can be prima facie established in Areas A, B and C:

(13) *A right to be present on or within the area;*
(14) *A right to make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;*
(16) *A right of access to the area;*
(17) *A right to live within the area;*
(18) *A right to erect shelters upon or within the area;*
(19) *A right to camp upon or within the area;*
(20) *A right to move about the area;*
(21) *A right to engage in cultural activities within the area;*
(22) *A right to conduct and participate in ceremonies and meetings within the area;*
(23) *A right to visit, care for and maintain places of importance and protect them from physical harm;*
(24) *A right to take flora (including timber);*
(25) *A right to take soil;*
(26) *A right to take sand;*
(27) *A right to take stone and/or flint;*
(28) *A right to take clay;*
(29) *A right to take gravel;*
(30) *A right to take ochre;*
(31) *A right to take water;*
(32) *A right to manufacture traditional items from the resources of the area;*
(33) *A right to trade in the resources of the area;*
(34) *A right to maintain conserve and protect significant places and objects located within the area;*

The application contains the following definitions:

Application Area means the area of land and water waters covered by this Application as described in Schedule B and Attachment B of the application.

Area A means land within the Application area and which comprises:

(i) areas of unallocated Crown land that have not been previously subject to any grant by the Crown;
(ii) areas to which s. 47 of the Act applies;
(iii) areas to which s. 47 A of the Act applies;
(iv) areas to which s. 47B of the Act applies; and
(v) other areas to which the non-extinguishment principle applies, set out in s. 238 of the Act, applies and in relation to which there has not been any prior extinguishment of native title.

Area B means land and waters within the application area which is not within Area A and which comprises land and waters which are a "nature reserve" or "wildlife sanctuary" (as those terms are defined in the *Wildlife Conservation Act 1950* (WA)) created before 31 October 1975.

Area C means land and waters within the Application area that is not included in Areas A or B above.

Significant means having social, cultural, religious, spiritual, ceremonial, ritual or cosmological importance or significance to the common law native title holders connected to the area under traditional laws, customs and practices of the Aboriginal society to which they belong.

All words used in this Application which are defined in the Act bear the same meaning as in that Act, or the meaning in the Native Title (Effect of Past Acts) Act 1995 (WA), where that meaning differs from the meaning in the Act, unless the context dictates otherwise.

The above rights and interests can be prima facie established subject to the qualifications:
The native title rights and interests claimed in this Application are subject to and exercisable in accordance with:

1. the common law, the laws of the State of Western Australia and the Commonwealth of Australia;
2. valid interests conferred under those laws, and
3. the body of traditional laws and customs of the Aboriginal society under which the rights and interests are possessed and by which the native title claim group have connection to the area of land and waters the subject of this Application.

S.186 (2)
The Registrar may include in the Register such other details about the claim as the Registrar thinks appropriate.

1. Copy of Annexure B of the Application.
2. Copy of the Map at Annexure C of the Application.