NATIONAL NATIVE TITLE TRIBUNAL

REGISTRATION TEST

Reasons for Decision

DELEGATE:	Graham Miner

Application Name:	Miriuwung Gajerrong #4		
Name of Applicant:	Ben Ward, Kim Aldus, Frank Chulung, Sheba Dignari, Jeff Janama, Maggie John, Chocolate Thomas, Danny Wallace, Carol Hapke, Nancy Dilyai, Pamela Simon, Jerry Moore, Paddy Carlton (applicants)		
Region:	Kimberley, WA	NNTT No.:	WC04/4
Date Application Made:	9 June 2004		
Federal Court No.:	W124/04		

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

July 2004

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

Date of Decision

Brief History of the Application

This application was file in the Federal Court on 9 June 2004.

Information considered when making the Decision

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

- the National Native Title Tribunal's Registration Testing files and Legal Services files for this application;
- the National Native Title Tribunal Geospatial Database;
- the Register of Native Title Claims and Schedule of Native Title Applications
- the Native Title Register, and
- geospatial assessment and overlap analysis dated 28 June 2004 updated on 9 July 2004.

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

Note: I have not considered any information and materials provided in the context of mediation of the native title claim group's native title applications. This is due to the 'without prejudice' nature of mediation communications and the public interest in maintaining the inherently confidential nature of the mediation process.

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

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

On 19 May 2004, Christopher Doepel, Native Title Registrar, delegated to members of the staff of the Tribunal including myself all of the powers given to the Registrar under sections 190, 190A, 190B, 190C and 190D of the Native Title Act 1993 (Cth).

This delegation has not been revoked as at this date.

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NOTE TO APPLICANT:

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

Section 190B sets out the merit conditions of the registration test.

Section 190C sets out the procedural conditions of the registration test.

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

Section 190C: Procedural Conditions

Applications contains details set out in ss61 and 62: s190C(2)

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

Native Title Claim Group: s61(1)

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

Reasons relating to this sub-condition

Under s.61(1) of the NTA the Registrar or his delegate must be satisfied that the native title claim group includes all the persons "who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed".

In *Doepel* (*Northern Territory of Australia v Doepel* [2003] 203 ALR 385) Mansfield J held that when considering this question the Registrar is not entitled to have regard to material other than that which is contained in the application itself. Further, the Registrar is not required to undertake some form of merit assessment of the material to determine whether the native title claim group described is in reality the correct native title claim group.

In this case, Schedule A of the application describes the criteria upon which claim group membership is determined. The claim group is said to be

- those persons identified with Miriuwung, Gajerrong, Doolboong, Wardenybeng and Gija language or dialect and country as at the date of this application including descendants of named persons listed, and
- persons adopted by those descendants in accordance with their traditional law and custom.

There is no other information contained in the application that indicates that this group does not include, or may not include, all the persons who hold the communal native title in the area of the application.

Result: **Requirements met**

Name and address of service for applicants: s61(3)

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

Reasons relating to this sub-condition

The names of the persons who are the applicant are provided under the Name of Applicant(s) section in the application and the address for service is provided at Part B of the application.

Result: **Requirements met**

Native Title Claim Group named/described sufficiently clearly: s61(4)

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

Reasons relating to this sub-condition

Schedule A of the application describes the native title claim group. Schedule T of the application refers to Attachment S which includes a document titled "Applicants' Submission in Support of Registration". This document also includes information relevant to the claim group description. For the reasons that led to my conclusions that the requirements for s.190B(3) have been met, I am satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Result: **Requirements met**

Application is in prescribed form: s61(5)

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

Reasons relating to this sub-condition

s.61(5)(a)
The application is in the form prescribed by Regulation 5(1)(a) of the *Native Title (Federal Court) Regulations* 1998.

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

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

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

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

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

Result: **Requirements met**

Application is accompanied by affidavits in prescribed form: s62(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 sub-condition

Twenty-six affidavits were filed with this application, two for each of the people named as the applicant. In each case the deponents have affirmed an initial and supplementary affidavit. The affidavits were affirmed on various dates between 28 April 2004 and 8 June 2004. Each is affirmed by one of the thirteen applicants and witnessed by a qualified witness.

As noted above, two affidavits have been received from each of the persons named as the applicant. For ease of identification, the first of those affidavits will be referred to here as the 'primary affidavit' and the second as the 'supplementary affidavit'.

The primary affidavits similarly seek to satisfy the requirements of s.62(1)(2)(i) – (v). However, in relation to the requirements of s.62(1)(a)(ii), that the applicant believes that none of the area covered by the application is also covered by an entry in the National Native Title Register ["NNTR"], the deponents identify two applications W6029/99 Ning Bingi and W6030/99 Pamela Simon as being on the NNTR. This statement is in fact incorrect as there is no entry relating to either W6029/99 or W6030/99 on the NNTR. Rather, there is an entry relating to each application on the Register of Native Title Claims. No statement is made that satisfies the requirements of s.62(1)(a)(ii).

The supplementary affidavits are identical in content and seek to address the above error. The supplementary affidavits include a statement that satisfies the requirements of s.62(1)(a)(ii). Read together the primary and supplementary affidavits meet the requirements of s.62(1)(2)(i) – (v)

The sufficiency of the statements contained in the affidavits, particularly as they relate to the requirements associated with authorisation, are addressed at my reasons for decision in relation to s.190C(4).

I am satisfied there has been compliance with the procedural requirements of s.62(1)(a).

Result: Requirements met

Application contains details set out in s61(2): s62(1)(b)

Section 62(1)(b) asks the Registrar to make sure that the application contains the information required in s61(2). Because of this, the Registrar's decision for this condition is set out under s61(2) below.

Details of physical connection s62(1)(c)

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

Reasons relating to this sub-condition

This section provides that the application *may* contain details of traditional physical connection and/or any prevention of access.

Some information is provided at Schedules G and M, relating respectively to a general description of activities undertaken by the claim group and traditional physical connection. Additional material is also contained in some of the primary affidavits filed with the application.

Result: Provided

Information about the boundaries of the application area: s62(2)(a)

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

Reasons relating to this sub-condition

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

Result: Requirements met

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

Reasons relating to this sub-condition

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

Result: Requirements met

Map of the application area: s62(2)(b)

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

Reasons relating to this sub-condition

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

Result: Requirements met

Details and results of searches: s62(2)(c)

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

Reasons relating to this sub-condition

At Schedule D the applicant states that no searches have been undertaken to determine the existence of any non-native title rights and interests in relation to the area covered by the application. The applicant goes on to note that the area of this application is the same as an overlapping matter, WG6003/98 Miriuwung Gajerrong #2, and that the applicant's representative has the result of searches undertaken in relation to that overlapping application. The results of those searches are provided with the application at Attachment D.

Result: **Requirements met**

Description of native title rights and interests: s62(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 are all native title rights and interests that may exist, or that have not been extinguished, at law.

Reasons relating to this sub-condition

An adequate description of the native title rights and interests claimed is contained in the application at Schedule E. The description does not merely consisting of a statement to the effect that the native title rights and are all native title rights and interests that may exist, or that have not been extinguished, at law. I have outlined these rights and interests claimed in my reasons for decision in relation to s.190B(4).

Result: **Requirements met**

Description of factual basis: s62(2)(e)

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

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

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

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

Reasons relating to this sub-condition

At Schedule F the application includes a general description of the factual basis upon which it is asserted that the native title rights and interests claimed exist. It addresses each of the particular requirements in s.62(2)(e)(i), (ii) and (iii). Additional information is also provided in the primary affidavits filed with the application.

Result: **Requirements met**

Activities carried out in application area: s62(2)(f)

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

Reasons relating to this sub-condition

Schedule G contains general details of the activities that members of the native title claim group carry out activities in claim area. Those activities are said to be performed in accordance with traditional law and custom. Additional and more specific details are provided in the primary affidavits filed with the application.

Result: **Requirements met**

Details of other applications: s62(2)(g)

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

Reasons relating to this sub-condition

At Schedule H the applicant identifies one application that overlaps with Miriuwung Gajerrong #4. This is consistent with results obtained from the NNTT's Geospatial database. See further my reasons for decision at s.190C(3)

Result: **Requirements met**

Details of s29 notices: s62(2)(h)

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

Reasons relating to this sub-condition

Attachment I of the application consists of a list of notices issued under s29 of the NTA of which the applicant was aware as at 6 May 2004.

Result: Requirements met

Combined decision for s190C(2)

For the reasons identified above the application contains all details and other information, and is accompanied by the documents, required by ss.61 & 62.

Result: Requirements met

Common claimants in overlapping claims: s190C(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

In order for the application to comply with s.190C(3), I must be satisfied that no person included in the application is a member of a native title claim group for any previous application in the circumstances set out in s.190C(3).

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

A search of the NNTT's Geospatial database indicates that there was one previous application that covered, in whole or part, the area covered by Miriuwung Gajerrong #4:

NNTT No.	Federal Court No.	Application Name	Date Made
WC94/6	WG6003/98	Miriuwung Gajerrong #2	10 August 1994

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

There was no entry on the Register of Native Title Claims in relation to the previous application when Miriuwung Gajerrong #4 was made. Accordingly, I need not consider the provisions of s.190C(3) any further.

For the reasons outlined above I am satisfied that the requirements of s. 190C(3) have been met.

Result: **Requirements met**

Application is authorised/certified: s190C(4)

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

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

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

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

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

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

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

Reasons relating to this condition

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

The application is certified by the Kimberley Land Council ["KLC"] pursuant to s.190C(4)(a) (and s.203BE) of the NTA (see Attachment R to the application). The KLC is the sole Aboriginal/Torres Strait Islander representative body that could certify the application under s.203BE. The certificate is signed and dated 4 June 2004 by Mr Wayne Bergman, Executive Director of the KLC.

As required by s.203BE(4)(a) the certificate contains statements to the effect that the KLC believes the requirements of s.203BE(2)(a) and (b) have been met. Namely, that it is of the opinion that:

(a) all the persons in the native title claim 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 certificate briefly sets out the KLC's reasons for being of that opinion.

I note that the certificate indicates the applicant was authorised pursuant to a traditional decision making process. This is consistent with information contained in the primary affidavits accompanying the application, most of which attests to authorisation by way of a traditional decision making process. The only exceptions to this are the affidavits of **[Applicant 1]** and **[Applicant 2]** whose affidavits indicate that an agreed and adopted decision making process was followed. However, further supplementary affidavits from **[Applicant 1 and Applicant 2]** were subsequently provided directly to the NNTT together with an affidavit from Justine Twomey, a legal officer with the KLC, which seek to address this anomaly.

The further supplementary affidavits of **[Applicant 1 and Applicant 2]** are identical in content. Both were affirmed by the deponents on 24 June 2004 and witnessed by a person qualified to do so. The affidavits indicate that the reference to an agreed and adopted decision making process in their original affidavits was a drafting error. They confirm authorisation to have occurred in accordance with a traditional decision making process. Ms Twomey's affidavit, affirmed 28 June 2004, supports the drafting error explanation. I accept that explanation.

The KLC does not provide any information in relation to the requirements of s.203BE(3) regarding overlapping applications. However, a failure by the representative body to comply with this subsection does not invalidate any certification of the application by the representative body.

The NTA provides that the representative body must not certify under this section, if it is of the opinion that proper authorisation has not occurred. The KLC has provided an opinion that proper authorisation has occurred, and its reasons for being of this opinion. Therefore I am satisfied that the KLC has met its requirements under the NTA and that the applicants have authority to lodge this application and deal with matters arising in relation to it.

I am satisfied that the requirements of s.190C(4)(a) have been met.

Result: **Requirements met**

Merits Conditions: s190B

Identification of area subject to native title: s190B(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

External Boundary

Schedule B of the application describes the application area by reference to specific land parcels, including pastoral leases, general leases and reserves. The geographic extent of the application is also identified in square kilometres.

A map of the application area, prepared by the NNTT's Geospatial Analysis and Mapping Branch (Geospatial Unit) and dated 4 May 2004, forms Attachment C. The area covered by the application is clearly defined by a bold outline. The map includes background cadastre and land tenure, a scale bar, a coordinate grid and notes relating to the datum, source and currency of the data used to prepare the map. A small locality map is also included.

An assessment prepared by the NNTT's Geospatial Unit, dated 9 July 2004, notes that while reserves 46253, 46265 and 46534 have been identified on the map they have not been included in the description and are therefore not included in the application area.

The Tribunal's Geospatial Unit also concluded that "the description and map are consistent and locate the application area with reasonable certainty".

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

Internal Boundaries

The internal boundaries are described at Schedule B of the application.

Schedule B provides information identifying the internal boundaries of the claimed area by way of a formula that excludes a variety of tenure classes from the application area. Those excluded areas are described as follows:

Internal boundaries

1. The Applicants exclude from the claim area:

   a. Reserve No. 37862
   b. Reserve No. 39612
   c. Freehold Lot 647 on Plan 216714

2. The Applicants exclude from the claim any areas covered by valid acts on or before 23 December 1996 comprising such of the following as are included as extinguishing acts within the NTA, as amended, or Titles Validation Act 1994, as amended, at the time of the Registrar's consideration:

   a. Category A past acts, as defined in NTA s228 and s229;
   b. Category B intermediate period acts as defined in NTA s232A and s232B.

3. The Applicants exclude from the claim any areas in relation to which a previous exclusive possession act, as defined in section 23B of the NTA, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in section 23E in relation to the act.

4. The Applicants exclude from the claim areas in relation to which native title rights and interests have otherwise been extinguished, including areas subject to:-

   a. an act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or
   b. actual use made by the holder of a tenure other than native title which is permanently inconsistent with the continued existence of native title.

5. To avoid any uncertainty, the Applicants exclude from the claim area any of the areas contained within the following descriptions or tenures which have been validly granted:

   a. Any former or current unqualified grant of an estate in fee simple and all other freehold land.
   b. A Lease which is currently in force, in respect of an area not exceeding 5,000 square metres, upon which a dwelling house, residence, building or work is constructed, and which comprises –
   c. A Lease of a Worker's Dwelling under the Workers' Homes Act 1911 – 1928;
   d. A 999 Year Lease under the Land Act 1898;
   e. A Lease or Town Lot or Suburban Lot pursuant to that Land Act 1933 (WA), s.117; or
   f. A Special Lease under s.117 of the Land Act 1933 (WA).
   g. A Conditional Purchase lease currently in force in the Agricultural Areas of the South West Division under clauses 46 and 47 of the Land regulations 1887 which includes a condition that the lessee reside on the area of the lease and upon which a residence has been constructed.
   h. A Conditional Purchase Lease of cultivable land currently in force under Part V, Division (1) of the Land Act 1933 (WA) in respect of which habitual residence by the lessee is a statutory condition in accordance with the Division and upon which a residence has been constructed.

i. A Perpetual Lease currently in force under the War Service Land Settlement Scheme Act 1954.
j. A Permanent public work and "the land or waters on which a public work is constructed, established or situated" within the meaning given to that phrase by the Native Title Act 1933 (Cth) s.251D.
k. A public road

6. Paragraphs (2) to (4) above are subject of such of the provisions of s.47, 47A and 47B of the Act as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing but which include such areas as may be listed in Schedule L.

The qualification at paragraph (6) limits what might be extinguished to the extent that such extinguishment is to be disregarded under ss.47, 47A or 47B pursuant to s.190C(9)(c).

The applicant has chosen to define the internal boundaries of the application by what are known as 'class' or 'formula' exclusions. *Daniels v Western Australia* [1999] FCA 686 ("*Daniels*") is authority for the proposition that the acceptability of class or formula exclusions will depend upon the state of knowledge of the claimants of the tenure in the claim area at the date the application is made. In *Dieri v South Australia* [2000] FCA 1327 the Court held that if tenure information might reasonably have been used to exclude areas from an application then reliance cannot be placed on class or formula exclusions.

At Attachment D of the application the applicant provides details of tenure searches obtained for the overlapping Miriuwung Gajerrong #2 application, including pastoral leases, reserves and special leases.

However, in relation to this question I note the following comments of Nicholson J in *Daniels*:

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

In *Strickland* French J noted that "the Act is to be construed in a way that renders it workable in the advancement of its main objects….The requirements of the registration test are stringent. It is not necessary to elevate them to the impossible…" [55].

In light of the above, I am satisfied that the class exclusion clauses used by the applicant at Schedule B amount to information that enables the internal boundaries of the application area to be identified with reasonable certainty.

The requirements of ss.62(2)(a), 62(2)(b) and 190B(2) are met.

Result: **Requirements met**

Identification of the native title claim group: s190B(3)

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

Reasons relating to this condition

An exhaustive list of names of the persons in the native title claim group has not been provided as required by s.190B(3)(a). In the alternative I must consider whether the application meets the requirements of s.190B(3)(b).

Schedule A details the criteria upon which membership of the Miriuwung Gajerrong #4 claim group is determined:

> This claim is brought on behalf of those Aboriginal People who hold in common the body of traditional law and custom governing the area the subject of the claim. Those people are:
>
> (a) Persons identified with Miriuwung, Gajerrong, Doolboong, Wardenybeng and Gija language or dialect and country as at the date of this application, including descendants of the following persons, which persons are identified as:
>
> (i) Gajerrong/Doolboong/Wardenyberg
>
> Linmirr, Dambilik, Noongmarria, Bungara Boongara, Ngabitj, Jerad Djerad, Goolingin and Clement Tjulan
>
> (ii) Miriuwung
>
> Mialiny, Tjebelying Djibulyerring, Nilkbarria, Kulalbainy, Waniwung, Biwugin Biwoogin, Kutji, Wulgoi, Wungawyi, Gulbuk, Yirrimaliny, Djuburl, Gubering, Gungui, Dandji, Wunmi, Birrwi, Dunmi, Wumbi, Argyler, Wiyuga, Jungurangan and Kneevil
>
> (iii) Gija
>
> Jungurangan, Kneevil, Wajali, Djuderriny, Nadurur, Banggarrabainy, Lammuiy Lamoin, Ngarri and Biyuwin
>
> (iv) Dundun
>
> Polly Munbi and King O'Malley
>
> and
>
> (b) Persons adopted by those descendants in accordance with their traditional law and custom.

The applicant has provided additional information about the formulation of the native title claim group at Attachment S in a document titled *Applicants' Submission in Support of Registration*. In this document the applicant provides background to the relationship between Miriuwung Gajerrong #4 and the related Miriuwung Gajerrong #1, #2 and #3 applications [WG6001/95, WG6003/98 and DG6008/98 respectively]. The relevant sections of this submission to the Miriuwung Gajerrong #4 claim group description are Parts 2 and 5:

- Part 2 details the determination of native title in Miriuwung Gajerrong #1 and, relevantly, Part 2(c) describes the native title claim group agreed by consent and accepted by the Federal Court. I note this description is essentially the same as that detailed in Miriuwung Gajerrong #4;
- Part 5 details the formulation of the native title claim group as follows:

> The description of the native title claim group in Schedule B (sic) of the application has been prepared having regard to the comments of the majority in State of Western Australia v Ward (2002) 292 ALR 1 [set out in 2(b) above] and the formulation of the native title holding group accepted by the parties and the Full Court as proper in the Consent Determination. The claimant group description has been amended from that contained in Schedule 5 to the Consent Determination as follows:
>
> (a) reference to the Balangarra native title holding group has been deleted, as those traditional owners claimed area only in respect of Boorroongoong (Lacrosse Island); and
> (b) the description has been amended to include reference to the native title holders of land within the south western part of the Ivanhoe Station pastoral lease.
>
> This description of the native title claimant group is consistent with the approaches taken in recent native title jurisprudence, including by Mansfield J in *The Alyawarr, Kaytetye, Warmumungu, Wakay Native Title Claim Group v Northern Territory of Australia* [2004] FCA 472, Wilcox, Sackville and Merkel JJ in *De Rose v State of South Australia* [2003] FCAFC and Sundberg J in *Neowarra v State of Western Australia* [2003] FCA 1402.

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

I note that the Schedule describes the native title claim group in terms of persons identified with Miriuwung, Gajerrong, Doolboong, Wardenybeng and Gija language or dialect and country including descendants of certain named persons and adopted persons. The description of a native title claim group in terms of apical ancestors and their descendants is acceptable under s.190B(3)(b). This is so even though these descendants are not always named and some factual inquiry would need to be made in these instances to determine if any one person is a member of the group. It is not for me to inquire into the circumstances giving rise to the composition of the claim group, whether they be historical or current. I am of the view that the description is clear and I am satisfied that it is capable of certain application. Additionally, the parties and Federal Court have considered essentially the same description proper in the consent determination of the adjoining Miriuwung Gajerrong #1 application.

I am satisfied that the persons in the group, including the descendants of the named ancestors, could be identified with some inquiry and, as such, ascertained as a member of the native title claim group. By referencing the membership of the native title claim group to those persons identified with named languages or dialects and country, including the descendants of named ancestors, and through the additional process described at paragraph (b), it is possible to objectively verify the identity of members of the native title claim group such that it can be clearly ascertained whether any particular person is in the group.

The requirements of s.190B(3)(b) are satisfied.

Result: **Requirements met**

Native title rights and interests are readily identifiable: s190B(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

At Schedule E of the application the native title rights and interests claimed are described as follows:

1. Non-exclusive rights to use and enjoy the land and waters in accordance with traditional laws and customs as follows:-

(a) the right to hunt and fish together and use the resources of the land such as food and medicinal plants and trees, timber, charcoal, ochre and stone to have access to and use of water on or in the land;
(b) the right to live on the land, to camp, erect shelters and other structures, and to travel over and visit any part of the land and waters;
(c) the right to engage in cultural activities on the land, to conduct ceremonies and hold meetings, to teach the physical and spiritual attributes of places and areas of importance on or in the land and waters and to participate in cultural practices relating to birth and death, including burial rights;
(d) the right to have access to, maintain and protect places and areas of importance on or in the land and waters, including rock art, engraving sites and stone arrangements;
(e) the right to make decisions about access to the land and waters by people other than those exercising a right conferred by or arising under a law of Western Australia or the Commonwealth in relation to the use of the land and waters;
(f) the right to make decisions about the use and enjoyment of the land and waters and the subsistence and other traditional resources thereof, by people other than those exercising a right conferred by or arising under a law of Western Australia or the Commonwealth in relation to the use of the land and waters;
(g) the right to share, exchange or trade subsistence and other traditional resources obtained on or from the land and waters;
(h) the right to control the disclosure (other than in accordance with traditional laws and customs) of spiritual beliefs or practices, or of the paraphernalia associated

with them (including songs, narratives, ceremonies, rituals and sacred objects) which relate to any part of or place on the land or waters;

(i) the right to determine and regulate the membership of and recruitment to a landholding group.

2. Subject to:

(a) To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants.
(b) The claim area does not include any offshore places.
(c) The said native title rights and interests are not claimed to the exclusion of any other rights or interests validly created by or pursuant to the common law, or law of the State, or a law of the Commonwealth.

3. The claimants do not claim native title rights and interests that have been extinguished by operation of Law.

4. The native title claim group do not assert that they possess exclusive possession to any land or waters within the claim area.

The above description claims non-exclusive rights and interests in relation to the whole of the claim area. All the rights and interests claimed are further qualified by making them subject to a series of exclusions in legal circumstances that prohibit or limit native title rights where other rights or interests have been created by State or Commonwealth legislation or by the common law.

Also at Schedule P the applicant states that offshore areas are not covered by the application. At Schedule Q it is said that minerals, petroleum and gas wholly owned by the Commonwealth and State of W.A. are not claimed by the applicants.

The requirements of s.190B(4)

Section 190B(4) requires the Registrar or his delegate to be satisfied that the description contained in the application of the claimed native title rights and interests is sufficient to allow the rights and interests to be readily identified. For the purposes of the condition then, only the description contained in the application can be considered.[1]

Section 62(2)(d) requires that the application contain "a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interest) but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished at law". This terminology suggests that the legislative intent is to 'screen out' applications which describe native title rights and interests in a manner which is vague or unclear. Thus, in my view the test to be applied here is whether the claimed native title rights and interests are readily identifiable in the sense that they are understandable and have meaning.

Furthermore, the phrases 'native title' and 'native title rights and interests' used exclude any rights and interests that are claimed but are not native title rights and interests as defined by s.223 of the NTA. Section 223(1) reads as follows:

[1] *Queensland v Hutchinson* [2001] 108 FCR 575

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

Some interests which may be claimed in an application may not be native title rights and interests and are not 'readily identifiable' for the purposes of s.190B(4). These are rights and interests which the courts have found to fall outside the scope of s.223. Rights which are not readily identifiable include the rights to control the use of cultural knowledge that goes beyond the right to control access to lands and waters[2], rights to minerals and petroleum under relevant State legislation[3], an exclusive right to fish offshore or in tidal waters and any native title right to exclusive possession offshore or in tidal waters[4].

The following rights and interests are not readily identifiable for the reason given.

(h) The right to control the disclosure (other than in accordance with traditional laws and customs) of spiritual beliefs or practices, or of the paraphernalia associated with them (including songs, narratives, ceremonies, rituals and sacred objects) which relate to any part of or place on the land or waters. In my view this is a right akin to that to control the use of cultural knowledge that goes beyond the right to control access to lands and waters and as such is not readily identifiable (see *Western Australia v Ward* [2000] 191 ALR 1, para [59]).

(i) The right to determine and regulate membership of and recruitment to a landholding group. In my opinion this is a right in respect of the relationship between people and not a right in relation to land or waters. In my opinion, as such it is not readily identifiable as a native title right and interest. (See *Daniel v State of Western Australia* [2003] Federal Court of Australia 666 at [303])

I have considered the description of native title rights and interests in the present application in light of previous judicial findings in *Ward* and elsewhere and find that, with the exception of (h) and (i), the rights and interests claimed fall within the scope of s.223 and are readily identifiable as native title rights and interests.

Result: **Requirements met**

[2] *Western Australia v Ward* [2000] 191 ALR 1, para [59]
[3] *Western Australia v Ward*, paras [383] and [384]; *Wik v Queensland* [1996] 63 FCR 450 at 501-504, 134 ALR 637 at 686-688.
[4] *Commonwealth v Yarmirr* [2001] 184 ALR 113 at 144-145

Factual basis for claimed native title: s190B(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

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

This section requires that the delegate must be satisfied that the factual basis provided in support of the assertion that the claimed native title rights and interests exist is sufficient to support that assertion. In particular, the factual basis must be sufficient to support the assertions set out in subparagraphs (a), (b) and (c). This requires that the applicant provides a sufficient factual basis for a continuing acknowledgement and observance of traditional laws and customs and a continuing connection with the land.

In *Queensland v Hutchinson* [2001] 108 FCR 575, Kiefel J said that "[s]ection 190B(5) may require more than [s62(2)(e)], for the Registrar is required to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to assert a wider consideration of the evidence itself, and not of some summary of it. For each native title right or interest claimed, there should be some factual material that demonstrates the existence of the traditional law and custom of the native title claim group that gives rise to the right or interest."[5]

In *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (the *Yorta Yorta* decision), the majority of the High Court noted that the word 'traditional' refers to a means of transmission of law or custom, and conveys an understanding of the age of traditions. Their Honours said that 'traditional' laws and customs are those normative rules which existed or were "rooted in pre-sovereignty traditional laws and customs": at [46], [79]. This normative system must have continued to function uninterrupted from the time of acquisition of sovereignty to the time when the native title group sought determination of native title. This is because s.223(1)(a) speaks of rights and interests as being 'possessed' under traditional laws and customs, and this assumes a continued "vitality" of the traditional normative system. Any interruption of that system which results in a cessation of the normative system would be fatal to claims to native title rights and interests because the laws and customs which give rise to the rights and interests would have ceased to exist and could not be effectively reconstituted even by a revitalisation of the normative system. Their Honours noted, however, that this does not mean that some change or adaptation of the laws and

[5] See *Ward* at [382].

customs of a native title claim group would be fatal to a native title claim, rather that an assessment would need to be made to decide what significance (if any) should be attached to the fact that traditional law and custom had altered. In short, the question would be whether the law and custom was 'traditional' or whether it could "no longer be said that the rights and interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified" - at [82] and [83].

The information contained in the application which may go to the factual basis of this application is at Schedules F, G and M, the veracity of which is attested to by each of the persons named as the applicant in the affidavits accompanying the application. Additionally, the primary affidavits for six of the applicants contain information relevant to the factual basis of this application. Those six affidavits are from:

- **[Applicant 3]**, affirmed 28 April 2004;
- **[Applicant 1]**, affirmed 21 May 2004;
- **[Applicant 4]**, affirmed 20 May 2004;
- **[Applicant 5]**, affirmed 28 April 2004;
- **[Applicant 6]**, affirmed 29 April 2004; and
- **[Applicant 7]**, affirmed 28 April 2004.

A further affidavit from **[Claimant 1]**, affirmed on 6 May 2004, also accompanies the application at Attachment S.

Although three additional affidavits were received by way of further information, as noted at my reasons for s.190C(4), those affidavits were for the sole purpose of clarifying the authorisation process. The additional affidavits did not go to factual basis of the application. Accordingly, I will have regard only to the information supplied with the application itself.

Schedule F makes statements to support the assertions at subparagraphs (a), (b) and (c). Schedule G and M details activities undertaken by members of the claim group in relation to the claim area and in accordance with traditional laws and customs. The affidavit material provides personal accounts of the exercise of these activities according to traditional law and customs and supports the assertions contained in the formal application. The application and affidavits read together support the assertions that:

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

It is not the role of the delegate to reach definitive conclusions about complex anthropological issues pertaining to applicant's relationships with country subject to native title claimant applications. That is a judicial enquiry. What I must do is consider whether the factual basis provided by the applicants 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).

I have formed the view that the abovementioned material contains sufficient detail to consider each element of this condition. I will now deal in turn with each of them:

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

At Schedule F the application states that "[t]he native title claim group and their ancestors have, since the assertion of British Sovereignty possessed, occupied, used and enjoyed the claim area and have an association with it".

At Schedules G and M the application provides details of activities the native title claim group have continuously undertaken in relation to the claim area. Such activities are said to include camping, living and building structures, moving freely about and having access to the claim area and taking and using resources of the area for various purposes.

The deponents of the affidavits accompanying the application each identify various places within the claim area as their own country, refer to their relationships with other members of the claim group and of the places for which they are responsible as well as activities undertaken, including protection of sites and participation in ceremony. The knowledge of country and participation in activities are said to have been obtained from their ancestors and continue today. For example:

Affidavit of **[Applicant 3]**

[Applicant 3]:

- identifies his father as Miriuwung [2];
- attests to having a home on his country at **[place in claim area]** and of his association with his country [5];
- identifies the general area of Miriuwung country as extending through the Ivanhoe pastoral lease and Glen Hill, both of which are in the claim area [7];
- explains his relationship to other members of the native title claim group and their relationship to specific areas within the claim [1], [4], [7], [8] ; and
- speaks of having gone through the law at **[two places in claim area]** [9].

Affidavit of **[Applicant 7]**

[Applicant 7]:

- identifies his father's country as Bullo River and his mother's father's country as also being on the Western Australia side of Miriuwung and Gajerrong country [1]; and
- attests to having grown up on Ningbing and, as a child, walking to Carlton Hill with his ancestors [5].

Affidavit of **[Applicant 6]**

[Applicant 6]:

- identifies two people he is related to according to law, including his mother's father, who were *dawawang* for the country [1];
- **[Applicant 6]** notes that he is currently *dawawang* for his country and will pass this that country on to his daughter, according to law [1].

Affidavit of **[Applicant 5]**

[Applicant 5]:

- identifies his grandfather, grandmother, father and mother as each being Miriuwung [1];
- explains that his country (Ivanhoe area) came from his father [2]; and
- tells of looking after his country, including sites [7], [8]

Having regard to the information contained in the application I am satisfied that there is a sufficient factual basis to support the assertion that the native title claim group have, and the predecessors of those persons had, an association with the area subject to this application. The requirements of s.190B(5)(a) are therefore met.

190B(5)(b)
There exist traditional law acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests

At Schedule F the application states that that native title claim group's association with the claim area "has been pursuant to and possessed under the laws and customs of the native title claim group, including traditional laws and customs that rights and interests in land and waters vest in members of the native title claim group on the basis of:

a. descent from ancestors connected to the area;
b. conception in the area;
c. birth in the area;
d. traditional religious knowledge of the area;
e. traditional knowledge of the geography of the area;
f. traditional knowledge of the resources of the area; and
g. knowledge of traditional ceremonies of the area".

Additionally, Schedule F states that "[t]he native title claim group continues to acknowledge and observe those traditional laws and customs" and, in doing so, has "a continuing connection with the land in respect of which the claim is made".

As noted above, Schedules G and M of the application provide details of activities the native title claim group have continuously undertaken in relation to the claim area. These activities are said to be undertaken according to traditional laws and customs.

The deponents of the affidavits accompanying the application support this. Each affidavit refers to various traditional laws and customs that give rise to rights associated with granting access to areas, maintenance of sites, the collection and use of resources and the generational passing of cultural knowledge. For example:

Affidavit of **[Claimant 1]**

[Claimant 1]:

- attests to being able to access his country and the resources on it, such as water, bush tucker, bush medicine, stones and ochre, without having to ask permission of others to do so [4];
- attests to strangers having to seek his permission to access his country and of the ritual performed in allowing another access to his country [4]; and

- identifies various sites and associated stories for those places for which he and others are responsible and continue to protect and maintain [6], [7], [8].

Affidavit of **[Applicant 4]**

[Applicant 4]:

- recounts hunting, collection and sharing of food obtained from the claim area and of sharing such produce with older relatives, in accordance with law and custom [3]; and
- attests to asking other senior law men, who are also members of the native title claim group, about sites in the claim area and of his responsibility to protect sites [4], [5]

Affidavit of **[Applicant 1]**

[Applicant 1]:

- attests to his knowledge of the Law of his country and of his responsibility under Law to pass on the stories for country to the younger generation [2];
- identifies his place of residence within the claim area and of his rights in respect of his country under the Law [3].
- tells of hunting for porcupine, kangaroo, goanna and turkey [3];
- attests to the need for other's to ask permission to access his country and of his responsibility to look after country [4]; and
- attests to having been initiated and of continuing initiation practices [6].

The information outlined above provides a sufficient factual basis to support the assertion that traditional laws and customs exists, that those laws and customs are acknowledged and observed by the native title claim group and that those laws and customs give rise to the claimed native title rights and interests.

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

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

At Schedule F the application states, of the traditional laws and customs that "[s]uch traditional law and custom has been passed by traditional teaching, through the generations preceding the present generations to the present generations of persons comprising the native title claim group".

As noted above, Schedules G and M of the application and the accompanying affidavits provide details of the continuing exercise of activities according to traditional laws and customs. For example:

Affidavit of **[Applicant 6]**

[Applicant 6]:

- attests to senior members of the native title claim group continuing to teach others about traditional laws and customs and provide instruction to ensure those laws and customs are followed [3]; and

- tells of his obligation under the Law to protect country through maintenance of sites and vetting access to country [2], [4].

Affidavit of **[Applicant 7]**

[Applicant 7]:
- attests to having been taught by his father how to make implements (spears) and of the continuing manufacture of such [4]; and
- explains how he received knowledge of traditional laws and customs from his ancestors and of the process for transmission to the next generation [5]

Affidavit of **[Applicant 5]**

[Applicant 5]:
- attests to following the law for his country through granting others access to country and the process for doing so under traditional law and custom [3], [4], [5], [6];
- speaks of the present obligation to look after country and the consequences of not doing so [5].
- identifies a specific site, inherited from his father, that he continues to protect [7], and
- tells of continuing to follow law and custom today in the collection and use of resources, including bush tucker and bush medicine [11].

Affidavit of **[Applicant 3]**

[Applicant 3]:
- attests to having different levels of access to country and rights on that country, dependant on the permission given to him though traditional law and custom [5]; and
- explains the ongoing process for transmitting cultural knowledge between generations [12].

In my view the evidence contained in the application describes a traditional process by which spiritual and cultural knowledge and rights and interests associated with the land in the application area is acquired, currently practiced by and transmitted to members of the native title claim group. Accordingly, I am satisfied that there is a sufficient factual basis to support an assertion that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

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

Conclusion

For the reasons outlined above, I am satisfied that a sufficient factual basis has been provided to support all of the assertions required by s.190B(5).

I am 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.

Result: Requirements met

Native title rights and interests claimed established prima facie: s190B(6)

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

Reasons relating to this condition

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

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

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

And at 35:

> However, the notion of a good prima facie claim which, in effect, is the concern of s63(1)(b) and, if it is still in issue, of s 63(3)(a) of the Act, is satisfied if the claimant can point to material which, if accepted, will result in the claim's success.

This test was explicitly considered and approved in *Northern Territory v Doepel* 2003 FCA 1384 at paras 134-5:

> 134. Although *North Ganalanja Aboriginal Corporation v The State of Queensland* (1996) 185 CLR 595 (Waanyi) was decided under the registration regime applicable before the 1998 amendments to the NT Act, there is no reason to consider the ordinary usage of `prima facie' there adopted is no longer appropriate: see the joint judgment of Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ at 615 - 616. Their Honours' remarks at 622 - 623 indicate the clearly different legislative context in which that case was decided
> 135. ……see e.g. the discussion by McHugh J in Waanyi at 638 - 641. To adopt his Honour's words, if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis.

I have adopted the ordinary meaning referred to by their Honours in considering this application, and in deciding which native title rights and interests claimed can be established *prima facie*.

I note that the applicant has sought to invoke the provisions of ss 47, 47A and 47B (see Schedule B) so far as those provisions may relate to any parcels of land within the claim area. At Schedule L the application states the following:

> For the area covered by the application, details of:
>
> a. Not applicable;
>
> b. (i) Special Lease 3116/10690 King Location 725; and

(ii) Reserve 41312 King Location 695

c. Not applicable;

d. Extinguishment is required by section 47A to be disregarded in respect of the following areas:
   (i) Special Lease 3116/10690 King Location 725; and
   (ii) Reserve 41312 King Location 695

Schedule E states that non-exclusive native title rights and interests are claimed and that the native title claim group do not assert that they possess exclusive possession to any land or waters in the claim area (para 4).

Over areas where a claim to exclusive possession cannot be sustained, the majority in *Ward* (Gleeson CJ, Gaudron, Gummow and Hayne JJ) questioned the appropriateness of claims to control access to and use of the land: "without a right of possession of that kind [i.e., an exclusive right], it may be greatly doubted that there is any right to control access to land or make binding decisions about the use to which it is put" - at [52]. *Ward* is authority for the proposition that rights which amount to a right to control access to the land or a right to control the use made of the land, are not capable of registration where a claim to exclusive possession cannot be maintained. I believe this applies to areas where exclusive possession is not claimed.

I am satisfied from the express wording in Schedule E that that the applicant is claiming non-exclusive rights to use and enjoy the land and waters in accordance with traditional law and custom. The content of the use and enjoyment claimed is specified at (a) to (i).

In considering this condition I have had regard to the information at Schedules F and G and the six primary affidavits accompanying the application, as relied upon for my reasons for decision at s.190B(5).

Schedule G says that members of the native title claim group have continuously carried out activities on the land and waters within the area of the claim and have possessed, occupied, used and enjoyed the area, including by way of:

1. camping and living and building structures;
2. moving freely about and having access to the claim area;
3. hunting and gathering and fishing
4. taking and using the resources of the area, including forest products, water, minerals and other resources from the land and waters;
5. manufacturing tools and weapons from the resources of the land and waters;
6. disposing of the products of the land and waters or manufactured from the products of the land and waters by trade or exchange;
7. managing, conserving and caring for the land and waters and controlling access to the land and waters;
8. conducting and taking part in ceremonies;
9. visiting and protecting sites;
10. passing on the knowledge of the country and of the traditional law and custom;

in accordance with custom and tradition.

I have added the numbering.

I will now consider each right and interest claimed and whether *each* can be prima facie established based on the basis of the relevant information.

(a) the right to hunt and fish together and use the resources of the land such as food and medicinal plants and trees, timber, charcoal, ochre and stone to have access to and use of water on or in the land
Established

See:
Affidavit of **[Applicant 3]** at [5];
Affidavit of **[Applicant 1]** at [3], [5];
Affidavit of **[Applicant 4]** at [3], [6];
Affidavit of **[Applicant 5]** at [11], [12];
Affidavit of **[Applicant 6]** at [2];
Affidavit of **[Applicant 7]** at [4];
Affidavit of **[Claimant 1]** at [4]

(b) the right to live on the land, to camp, erect shelters and other structures, and to travel over and visit any part of the land and waters
Established

See:
Affidavit of **[Applicant 3]** at [5]; [8];
Affidavit of **[Applicant 1]** at [3], [5], [6];
Affidavit of **[Applicant 4]** at [3], [6];
Affidavit of **[Applicant 5]** at [3], [11];
Affidavit of **[Applicant 6]** at [2];
Affidavit of **[Applicant 7]** at [1];
Affidavit of **[Claimant 1]** at [4]

(c) the right to engage in cultural activities on the land, to conduct ceremonies and hold meetings, to teach the physical and spiritual attributes of places and areas of importance on or in the land and waters and to participate in cultural practices relating to birth and death, including burial rights
Established.

See:
Affidavit of **[Applicant 3]** at [3], [5], [9], [12];
Affidavit of **[Applicant 1]** at [1], [2], [5], [6];
Affidavit of **[Applicant 4]** at [2], [4], [6], [7];
Affidavit of **[Applicant 5]** at [4], [6], [7], [8], [11], [12];
Affidavit of **[Applicant 6]** at [2], [4];
Affidavit of **[Applicant 7]** at [3], [5];
Affidavit of **[Claimant 1]** at [2], [4], [6], [9]

(d) the right to have access to, maintain and protect places and areas of importance on or in the land and waters, including rock art, engraving sites and stone arrangements
Established

See:
Affidavit of **[Applicant 3]** at [6], [13];

Affidavit of **[Applicant 1]** at [3], [4], [5];
Affidavit of **[Applicant 4]** at [4], [5];
Affidavit of **[Applicant 5]** at [2], [3], [7], [8];
Affidavit of **[Applicant 6]** at [2], [4];
Affidavit of **[Applicant 7]** at [3];
Affidavit of **[Claimant 1]** at [2], [3], [6], [7]

(e) the right to make decisions about access to the land and waters by people other than those exercising a right conferred by or arising under a law of Western Australia or the Commonwealth in relation to the use of the land and waters
Established

The right to non-exclusive use and enjoyment of which this right forms part is said to be in accordance with traditional law and custom. Being so qualified I am of the opinion that this right is capable of being prima facie established.

I am satisfied there is sufficient information in the application to support the prima facie establishment of this right.

See:
Affidavit of **[Applicant 3]** at [5], [8], [11];
Affidavit of **[Applicant 1]** at [4];
Affidavit of **[Applicant 4]** at [5];
Affidavit of **[Applicant 5]** at [4], [5], [6];
Affidavit of **[Applicant 6]** at [2];
Affidavit of **[Applicant 7]** at [2];
Affidavit of **[Claimant 1]** at [4]

(f) the right to make decisions about the use and enjoyment of the land and waters and the subsistence and other traditional resources thereof, by people other than those exercising a right conferred by or arising under a law of Western Australia or the Commonwealth in relation to the use of the land and waters
Established

Please see my reasons in respect of (e) above. For the same reason as appears there I am of the opinion that this right is capable of being prima facie established. I am satisfied there is sufficient information in the application to support the prima facie establishment of this right.

See:
Affidavit of **[Applicant 3]** at [5], [11];
Affidavit of **[Applicant 1]** at [3], [4], [5];
Affidavit of **[Applicant 4]** at [5], [6];
Affidavit of **[Applicant 5]** at [3], [4], [6], [11], [12]
Affidavit of **[Applicant 6]** at [3];
Affidavit of **[Applicant 7]** at [1], [2], [4];
Affidavit of **[Claimant 1]** at [4]

(g) the right to share, exchange or trade subsistence and other traditional resources obtained on or from the land and waters.
Not established

In *Commonwealth v Yarmirr* (1999) 101 FCR 171, Olney J considered the 'right to engage in the trade and exchange of estate resources' of senior *yuwurrumu* members of

the Croker Island region. Ultimately, Olney J found that "[t]he so-called 'right to trade' was not a right or interest in relation to the waters or land" [para. 120], and was, therefore, not capable of being claimed as a native title right and interest under s. 223 of the Act.

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

Based on these comments, it appears that the Full Court accepted that this right was a native title right or interest in relation to land and water (i.e., that the right to trade is readily identifiable for the purposes of s.190B(4)) and that the right to derive economic benefit from and to trade in the traditional resources of the claim area is properly seen as co-extensive with a claim to *exclusive* possession, occupation, use and enjoyment of lands and waters [my emphasis].

However, I note Mansfield J accepted this specific right in *Alyawarr & Others v Northern Territory* [2004] FCA 472 on both an exclusive a non-exclusive basis. Having regard to that decision I am of the view that this claimed right is capable of being prima facie established.

Schedule G states that the native title claim group engages in "disposing of the products of the land and waters or manufactured from products of the land and waters by trade or exchange". However I am unable to find sufficient information in the affidavits referred to above to satisfy me that this right can be prima facie established. I am of the view that this right cannot be prima facie established.

In relation to this right and interest which is not established, I direct the applicant's attention to the provisions of s 190(3A). Briefly, that section provides that

- if an application is accepted for registration; and
- afterwards the applicant provides further information relating to any native title rights and interests that were claimed in the application but were not accepted for registration, and
- it is considered that had information been provided earlier the claim would have been accepted for registration,

the rights and interests can be included in the Register.

(h) the right to control the disclosure (other than in accordance with traditional laws and customs) of spiritual beliefs or practices, or of the paraphernalia associated with them (including songs, narratives, ceremonies, rituals and sacred objects) which relate to any part of or place on the land or waters
Not established

I refer to my reasons under s 190B(4) above. As this right and interest is not readily identifiable it follows that it cannot be prima facie established.
This does not necessarily mean that this right may not exist but it is not in my view a native title right or interest.

(i) the right to determine and regulate the membership of and recruitment to a landholding group.
Not established

I refer to my reasons under s 190B(4) above. As this right and interest is not readily identifiable it follows that it cannot be prima facie established.

As noted above, I need only be satisfied that at least one of the native title rights and interests claimed has been prima facie established. The requirements of s.190B(6) are therefore met.

Result: **Requirements met**

Traditional physical connection: s190B(7)

The Registrar must be satisfied that at least one member of the native title claim group:
(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or
(b) previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
(i) the Crown in any capacity; or
(ii) a statutory authority of the Crown in any capacity; or
(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

Reasons relating to this condition

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

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

Schedule F states that the traditional laws and customs continue to be observed by members of the native title claim group and through those laws and customs the native title claim group maintains a continuing connection with the land the subject of this application. At Schedules G and M the application provides details of activities undertaken by members of the native title claim group, in accordance with traditional laws and customs.

Additionally, the six primary affidavits of **[Applicant 3]**, **[Applicant 1]**, **[Applicant 4]**, **[Applicant 5]**, **[Applicant 6]** and **[Applicant 7]** that accompanying the application, contain details of the traditional physical connection the deponents and other members of the native title claim group maintain in relation to the application area. A further affidavit from **[Claimant 1]**, was which also filed with the application, similarly contains such information.

The material in the application and accompanying affidavits is discussed extensively in my reasons under s.190B(5). For the requirements of this section I provide the following summary of material that illustrates a traditional physical connection with the claim area:

- The six applicants and claim group member identify places within the claim area where they and their forebears have lived and undertaken particular cultural activities;
- The deponents explain the *ngarrangarni* and its relationship to both themselves and other members of the claim group through their conduct in relation to land and waters in the claim area and the transmission of knowledge to others;
- The deponents attest to the enforcement of traditional laws and customs through permitting access of others to the claim area and/or the imposition of conditions upon entry;
- The deponents attest to the continuing transmission of cultural knowledge and ceremony and to continuing to care for country according to traditional law and custom.

Based on the material contained in the affidavits accompanying the application I am satisfied that the six applicants and **[Claimant 1]**, together with other members of the claim group, previously had and currently have a traditional physical connection with the area covered by the application.

Result: **Requirements met**

No failure to comply with s61A: s190B(8)

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

Section 61A contains four sub-conditions. Because s190B(8) asks the Registrar to test the application against s61A, the decision below considers the application against each of these four sub-conditions.

s61A(1)- Native Title Determination

Reasons relating to this sub-condition

A search of the Native Title Register conducted on 28 June 2004 reveals that there is no approved determination of native title in relation to the area claimed in this application. This is confirmed by the Tribunal's Geospatial Analysis and Mapping Branch's updated assessment dated 9 July 2004.

Result: **Requirements met**

s61A(2)- Previous Exclusive Possession Acts (PEPAs)

Reasons relating to this sub-condition

In Schedule B of the application certain tenures are excluded from the claim area. For the reasons provided in relation to s190B(2) these exclusions are sufficiently clear to provide reasonable certainty about all tenure excluded. This includes all previous exclusive possession acts.

Result: **Requirements met**

s61A(3) – Previous Non-Exclusive Possession Acts (PNEPAs)

Reasons relating to this sub-condition

The applicant does not seek exclusive possession over areas the subject of previous non-exclusive possession.

Result: **Requirements met**

s61A(4) – Areas to which sections 47, 47A or 47B may apply

Reasons relating to this sub-condition

The applicant has sought to invoke the provisions of ss.47, 47A or 47B of the NTA as apply to any areas within the application. The specific details of the areas to which the provisions may apply have been provided at Schedule L of the application.

Result: **Requirements met**

For the reasons identified above the application and accompanying documents do not disclose and it is not otherwise apparent that because of s.61A the application should not have been made.

Overall Result: **Requirements met**

No claim to ownership of Crown minerals, gas or petroleum: s190B(9)(a)

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

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

Reasons relating to this sub-condition

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

At Schedule Q to application states:

To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants.

I am satisfied that these statements ensures the application complies with the requirements of s190B(9)(a).

Result: **Requirements met**

No exclusive claim to offshore places: s190B(9)(b)

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

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

Reasons relating to this sub-condition

This section requires that the application must not disclose and I must not be otherwise aware that if there is any native title right or interest claimed in this application which relates to water on 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.

This application does not include any offshore areas.

Result: **Requirements met**

Native title not otherwise extinguished: s190B(9)(c)

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

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

Reasons relating to this sub-condition

The application and accompanying documents do not disclose and it is not otherwise apparent that the native title rights and interests claimed have otherwise been extinguished by any mechanism, including:

- a break in traditional physical connection;
- non-existence of an identifiable native title claim group;
- by the non-existence of a system of traditional laws and customs linking the group to the area;

- an entry on the Register of Indigenous Land Use Agreements [as per a search of the NNTT's Geospatial Database, as at 9 July 2004 – no ILUA falls within the area.]; or
- legislative extinguishment. [Schedule B of the application (paragraph 4) seeks to exclude all areas where native title rights and interests have otherwise been extinguished. I am satisfied that because native title rights and interests must relate to land and waters (as defined by s.223 of the NTA), the exclusion of particular land and waters is an exclusion of native title rights and interests over those land and waters.]

The State of Western Australia has not provided any submissions which contain information as to other extinguishment.

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

Result: **Requirements met**

[End of document]