

National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION

DELEGATE: Graham Miner

Application Name: Budina

Names of Applicant(s): Clive Lyndon, Cyril Hayes, Lorna Corbett, Ruben Lyndon

Region: North WA

NNTT No.: WC04/5

Federal Court No: WAD 131/04

Date Application(s) Made: 18 June 2004

Amended Application
filed: 9 June 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 (Cwlth).

DECISION

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

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

August 2005
Date of Decision

Brief History of the Application

This application in the upper Gascoyne region was filed in the Federal Court on 18 June 2004. This application was not filed in response to a s. 29 notice but a notice has since been issued on 26 January 2005, with an end date of 26 May 2005. Due to the applicant's representative having difficulties locating applicants to sign s. 62 affidavits for this application, the registration testing was not achieved by that date.

Following the filing of the application, the applicants' representative requested an extension of time on 5 occasions due to a number of factors. These requests for extensions were approved by the State Manager.

A further amendment was filed in the Federal Court on 9 June 2005 and an order made on 29 June 2005 for this application to be amended. A copy of the amended application was forwarded to the Tribunal on 1 July 2005. This is the current application for consideration pursuant to s.190A of the NTA.

The application has been amended in several respects from the original application. These are identified in Schedule S and include:

1. Definition of Area A
2. Schedule A - Claim group description
3. Schedule E - Native Title rights and interests
4. Schedule I - s. 29 notices
5. Schedule L - Details under s47 and s61A
6. Schedules M, O, P,Q - inserted
7. Schedule R - Certification
8. Schedule S (Attachment S) – amendments made to the original application

Information considered when making the Decision

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

- the National Native Title Tribunal's Registration Testing files and Legal Services files for this application;
- the National Native Title Tribunal Geospatial Database;
- the Register of Native Title Claims and Schedule of Native Title Applications;
- the Native Title Register;
- Geospatial assessment and overlap analysis dated 14 July 2005 prepared by the Tribunal's Geospatial Analysis & Mapping Branch;
- Additional information provided by the applicant as follows:
 - Affidavit of [name removed] sworn 11 May 2004
 - Affidavits of [name removed] sworn 17 August 2004
- Certification document, certified on 10 August 2005, by [name removed], Executive Director, Yamatji Marlpa Barna Baaba Maaja Aboriginal Corporation.

National Native Title Tribunal

Copies of the Affidavits of [name removed] and [name removed] and Certificate referred to above, that were not included in the amended application, were 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 on 22 April 2005. The State was invited to comment on this additional information by 18 July 2005. To date the State has not provided the Registrar with any comments.

Note: I have not considered any information and 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.

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 filed on 9 June 2005 and amended by order of the Court on 29 June 2005 unless otherwise indicated.

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

On 5 May 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 I shall consider the merit conditions.

A. Procedural Conditions

Applications contains details set out in s. 61 and s. 62: S. 190C(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 s. 190C(2).

Native Title Claim Group: S. 61(1)

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

Reasons relating to this sub-condition

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

I must consider whether the application sets out the native title claim group in the terms required by s 61. That is one of the procedural requirements to be satisfied to secure registration: s. 190A(6)(b). If the description of the native title claim group indicates that not all persons in the native title group were included, or that it was in fact a sub group of the native title group, then the requirements of s. 190C(2) would not be met and the claim cannot be accepted for registration (*Northern Territory of Australia v Doepel [2003] FCA 1384 at para 36*).

This consideration does not involve me going beyond the application, and in particular does not require me to undertake some form of merit assessment of the material to determine whether I am satisfied that the native title claim group is in reality the correct native title claim group (*Northern Territory of Australia v Doepel [2003] FCA 1384 at paras 16-17, 37*). I have consequently confined my considerations to all the information in the application.

The application before me is made on behalf of a group of people described as the Budina people. Schedule A of the current application contains the following description of the native title claim group:

The claim is brought on behalf of:

1) The cognatic descendents of persons recognised under traditional laws and customs to be members of the Budina language group (and including persons who have been adopted into the group according to those laws and customs), in particular, the descendents of the following individuals:

Jirbar
Tamiguru (Fanny);

Baliaat (Charlie Gray);
Parndabiddy (Milly); and
Topsy.

2) Persons who have been incorporated into the Budina group under traditional laws and customs, being 'grown up' by a member of the native title claim group and taught about Budina country from a young age. The person is recognised by members of the native title claim group as being a member of the group having rights and interests in the lands and waters of the application area, according to traditional Budina laws and customs.

This description of persons included in the native title claim group would appear to be comprehensive, listing 5 ancestors from whom current recognised members of the group are descended. It may be that descendants of these ancestors do not identify as members of this claim group and elect to be members of other groups. The claim group description as it appears here does not appear to exclude those people electing to identify as members of other groups.

There is no 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. Additionally, there is nothing in the application before me which would indicate that there are people claiming to hold common or group rights and interests in the area covered by the application that have not been included in this claim.

Result: Requirements met

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

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

Reasons relating to this sub-condition

The applicants' names are stated at Part A of the application. The details of address for service appear at Part B of the application.

Result: Requirements met

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

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

Reasons relating to this sub-condition

Schedule A of the application describes the native title claim group and is set out at s. 61(a) above. For the reasons which led to my conclusion that the requirements of 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: s. 61(5)

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

Reasons relating to this sub-condition

The application was filed in the Federal Court on 9 June 2005 as required by s. 61(5)(b) and contains such information as required by s. 61(5)(c). Section 61(5)(d) requires that the application be accompanied by any prescribed documents, these being affidavits from each of the persons comprising the applicant as required by s. 62(1)(a) and a map as specified by s. 62(2)(b). These prescribed documents accompany the application. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court.

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

Affidavits from each of the persons named as the applicant have been provided. Each affidavit is dated, signed and competently witnessed. I am satisfied that these affidavits contain the information required under s.62(1)(a)(i) - (v).

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 specified in s. 62(2). Because of this, the Registrar's decision for this condition is set out under s. 62(2) below.

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

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

Reasons relating to this sub-condition

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

Schedule M states that at least two members of the claimant group currently have a traditional physical connection to the area covered by the application. The Schedule refers to the affidavits by two members of the claim group. Schedule G outlines activities that the claim group continue to carry out within the area of the claim indicating a traditional physical connection with the land and waters covered by the application.

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;

Reasons relating to this sub-condition

For the reason that led to my conclusion that the requirements of s. 190B(2) have been met, I am satisfied that the information contained in the application and provided by the applicant is sufficient to enable the external 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 sub-condition

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

A map that shows the external boundaries of the area covered by the application is found at Attachment C. For the reasons that led to my conclusion that the requirements of s. 190B(2) have been met, I am satisfied that the map contained in the application shows the external boundaries of the area covered by the application.

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 it does not have details of any searches that have been carried out to determine the existence of any non-native title rights and interests in relation to the Application area. The applicant is in my view only required to provide details and results of searches of which the applicant is aware.

I am not aware of any searches that have been carried out over the area of this application.

Result: Requirements met

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

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

Reasons relating to this sub-condition

A description of the claimed 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. I have outlined these rights and interests in reasons for decision in respect of s. 190B(4).

Result: Requirements met

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

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

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

Reasons relating to this sub-condition

Schedule F of 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).

Result: Requirements met

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 sub-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. I take this to mean activities on the land and waters of the claim area.

I am satisfied that the description is sufficient for this condition of the registration test.

Result: Requirements met

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

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

Reasons relating to this sub-condition

It is stated in Schedule H that the applicant is unaware of any 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. This is confirmed by the assessment completed by the Tribunal's Geospatial Analysis and Mapping Branch on 14 July 2005. The assessment indicates that there are no other claimant applications within the external boundary of the area covered by the current application.

Result: Requirements met

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

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

Reasons relating to this sub-condition

Schedule I of the application refers to Attachment I and consists of two 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 was aware as at 9 June 2005.

I note that the Tribunal's Geospatial analysis dated 14 July 2005, identifies 38 s.29 or equivalent notices that fall within the external boundary of the application as at this date. I see that, with two exceptions, the notices listed are no longer current. By *no longer current* I mean the four months after the notification day specified in the s 29 notice, in which the Registrar is required to use best endeavours to consider the claim, has expired. The two current notices have not been listed by the applicants. However one of those notices has a notification date of 29 June 2005, i.e. after the application was filed. The other notice (E08/1452) has a notification date of 18 May 2005,

Although all the notices have not been included, I accept that the applicant has included details of the notices of which the applicant was aware. I add that it appears from Attachment I that the applicant was relying upon information supplied by the Tribunal.

However, even if my above conclusion is incorrect, I am of the view that Parliament's intention in relation to the requirements of s. 62(2)(h) is relatively clear. Both the note at the end of that paragraph, which states: "*Notices under s29 are relevant to subsection 190A(2)*", and also s. 190A(2) itself, make it reasonably clear that the purpose of the provision was to ensure that the Registrar was aware that the claim was affected by the relevant notice and, therefore, expedited the registration test of the application as required under s.190A(2). The Tribunal is of course aware of the notices. I am of the opinion that in those circumstance it would be unduly harsh not accept an application for registration for not including details of notices which are no longer current or of which the Tribunal is aware.

Result: Requirements met

Reasons for Decision under s.190C(2):

For the reasons identified above, the application contains all the details and other information, and is accompanied by the affidavits and other documents, required by s. 61 and s. 62 of the Act. I am satisfied that the application meets the requirements of this condition.

Aggregate Result: Requirements 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 for the Decision

Section 190C(3) requires that I be satisfied that no person included in the application was a member of the native title claim group for any previous application in the circumstances set out in s.190C(3).

The assessment completed by the Tribunal's Geospatial Branch on 14 July 2005 and an overlap analysis from GIROII (the Tribunal's Geospatial system) reveals that there are no overlapping applications that cover the whole or part of the area the subject of the claim that were entered on the Register of Native Title Claims. No further applications have been made over that area. It is therefore unnecessary for me to further consider the conditions of s. 190C(3).

Result: Requirements met

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

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

- (a) the application has been certified under paragraph 203BE by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part: or*
- (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.*

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

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

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

Reasons for the Decision

Under this section, I am 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.

The Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (Yamatji) is the representative Aboriginal/Torres Strait Islander Body that covers this area

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, Yamatji is the sole representative body and hence the only one representative body that could certify the application under s. 203BE.

The certificate was not filed in the Federal Court with the application, but was provided separately to the Registrar on or about 10 August 2005. It is signed by [name removed], Executive Director, Yamatji and is dated 10 August 2005. I am of the view that by reason of his position [name removed] has authority to sign on behalf of Yamatji.

As required by s. 203BE(4)(a) the certificate contains statements to the effect that Land Councils 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 certificate sets out briefly Yamatji's reasons for being of that opinion.

The Act provides that the representative body must not certify under this section if it is of the opinion that proper authorisation has not occurred. Yamatji has provided opinions that proper authorisation has occurred and has given brief reasons for being of that opinion. Therefore I am satisfied that Yamatji has met its requirements under the Act 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) have been met.

Requirements met

B. Merits Conditions

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 for the Decision

Written Description and Map of External Boundaries

Schedule B refers to Attachment B for the area of the application. Attachment B describes the application area by reference to coordinates. Notes are included relating to the source and currency of information used to prepare the description.

Schedule C refers to Attachment C. Attachment C is a copy of a map titled "Budina Native Title Application" prepared by Department of Land Information, Land Claims Mapping Unit as at 9 December 2003 and includes:

- the application area depicted by a bold outline and hachuring;
- land tenure as at 1 June 2003;
- scalebar, coordinates, locality map, legend; and
- notes reflecting the datum (GDA94), source and currency of other information used to create the map.

An assessment of the boundary description and map provided by the Tribunal's Geospatial Analysis & Mapping Branch dated 14 July 2005 concludes that the description and the map are consistent and identify the area with reasonable certainty.

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

Areas within the external boundaries that are not covered by the application

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

- 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; and
 - (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. 121 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) was done and the act is attributable to 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 interest 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. The Applicants claim all benefits arising out of provisions of ss47, 47A and 47B of the Act.

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 ("*Daniels*")) 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 does not contain any 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. That Schedule says the applicant does not have details of any searches that have been carried out to determine the existence of non-native title rights and interests in relation to the Application Area.

In relation to the question of class exclusions I note the following comments of Nicholson J in *Daniels*:

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

In *Strickland*, French J noted that:

"the act is to be construed in a way that renders it workable in the advancement of its main objects...The requirements of the registration test are stringent. It is not necessary to elevate them to the impossible..."

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

Result: Requirements met

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

The Registrar must be satisfied that:

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

Reasons for the Decision

The claim group is described at Schedule A of the application. This is set out fully in my reasons at s. 61(1) above.

As no exhaustive list of names has been provided and as such, the requirements of s.190B(3)(a) have not been met. I must now consider whether or not the requirements of s.190B(3)(b) have been met.

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

Identification of members of the native title claim group by reference to descendants of apical ancestors is capable of satisfying the requirements of s. 190B(3). No descendants are individually named and some process of inquiry would need to be undertaken in order to determine if any one person is a member of the claim group.

Persons not listed as descendants of apical ancestors may also be incorporated into the Budina group under traditional laws and customs, being "grown" up by a member of the native title claim group and taught about Budina Country from a young age. The person is recognised by members of the native title claim group as being a member of the group having rights and interests in the lands and waters of the application area, according to traditional Budina laws and customs.

It is not for me to inquire as to the circumstances giving rise to the composition of the claim group, whether they be historical or current.

In this particular instance, I am satisfied that the descendants of the ancestors and persons incorporated into the group under traditional laws and customs as named at Schedule A to the application could be identified with some inquiry.

I am satisfied that the requirements of s. 190B(3)(b) have been met.

Result: Requirements 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 be readily identified.

Reasons for the Decision

The description of the rights and interests claimed is provided in Schedule E of the application. These are as follows.

Subject to laws and customs

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 rights and interests are possessed and by which native title claim groups have a connection to the area of land and waters the subject of this Application.
- 4) In accordance with sub section 61A(3) of the NTA, the applicants do not make claim to native title rights and interests which confer possession, occupation, use and enjoyment to the exclusion of others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in section 23F of the NTA, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in section 23I in relation to that act;
- 5) In accordance with sub section 61A (4), paragraph 3 above is subject to such of the provisions of section 47B of the Act as apply to any part of the area in this application.

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'.

The native title rights and interests in relation to Area A comprise:

- 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;

National Native Title Tribunal

- 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;
- 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;
- 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

Area B rights

The native title rights and interests which are claimed in relation to Area B are all the rights in paragraphs (13) - (35) inclusive as listed above.

Area C rights

The native title rights and interests which are claimed in relation to Area C are rights identified in paragraphs (9)-(35) inclusive as identified above.

The application includes a definitions section, which provides definitions of Areas A, B and C. These are as follows:

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 which are “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.

I propose including the above definitions in the Register.

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 areas in Area B that are a “nature reserve” or “wildlife sanctuary” the native title rights and interests claimed are in effect further limited, by excepting hunting, fishing and the taking of fauna and traditional resources.

Section 190B(4) requires the Registrar or his delegate to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be readily identified. For the purposes of the condition 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 interests) but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.” This terminology suggests that Parliament intended to ‘screen out’ of applications which describe native title rights and interests that are vague, or unclear.

Furthermore, the use of the phrases ‘native title’ and ‘native title rights and interests’ exclude any rights and interests that are claimed but are not native title rights and interests as defined by s.223 of the *Native Title Act 1993* (Cth). Section 223(1) reads as follows:

‘The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia’.

¹ *Queensland v Hutchinson* (2001) 108 FCR 575.

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 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

Are the rights and interests claimed readily identifiable?

Area A Rights

The High Court in *Ward* at [52] said of it *'It is necessary to recognise that the holder of a right, as against the whole world, to possession of land, may control access to it by others and, in general, decide how the land will be used.* Whether the claim be phrased as 'possess, occupy use and enjoy' or as the sum of all the rights (the whole of the 'bundle of rights') enumerated here is, at the prima facie level of the registration test, of little moment. I am of the view that where exclusive possession may be shown the holders may 'decide how the land will be used' and will have all the rights in land which might flow from that. I accept that as a matter of logic, the holder of exclusive rights will also hold lesser rights of the same type. However, the applicant has claimed each of the rights listed separately and hence they must in my opinion be considered separately.

The right claimed at para 35 - . The 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. Such a claim 'addresses 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 persons are who hold the common or group rights. This therefore cannot itself be a native title right and interest.' - *Daniel v State of Western Australia* at [302]. I am of the view this claimed right is not readily identifiable.

I am satisfied that the rights and interests claimed in respect of Area A at paragraphs 1) - 34) are capable of recognition in those areas.

Area B rights

Area B is defined as an area over which exclusive possession cannot be made out.

As set out above, the rights and interests claimed in this area are all the rights in paragraphs (13) - (35) inclusive as listed above. The right to possess, occupy, use and enjoy the areas as against the whole world and the other rights set out at paragraphs (1) - (8) inclusive are not claimed. Similarly, the rights (9) - (12) inclusive which identify the rights to hunt, fish, take fauna and traditional resources are not claimed.

The rights claimed at 35) are not readily identifiable in respect of Area B for the reasons stated under Area A above.

² *Western Australia v Ward* (2002) 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.

Looking to the other rights and interests that the applicant is claiming in relation to Area B, those rights are sufficiently clear in their scope and extent to be readily identifiable for the purposes of this section of the registration test.

Area C rights

Area C is defined as an area over which exclusive possession cannot be made out.

The native title rights and interests which are claimed in relation to Area C are

- the rights identified in paragraphs 9) - 12) inclusive as identified above, and
- rights 13) - 35) inclusive.

The right to possess, occupy, use and enjoy the areas as against the whole of the world and the other rights set out at paragraphs 1) - 8) inclusive are not claimed.

For the reasons set out for Area A above, I am of the view that the rights and interests at paragraphs 9) – 12) above that were readily identifiable in Area A are readily identifiable in respect of Area C. For the reasons set out for Area B above, I am of the view that the rights and interests that were readily identifiable in Area B, 13) – 34), are readily identifiable in respect of Area C. Thus, the rights claimed at 35) is not readily identifiable in respect of Area C for the reasons stated under Area A above.

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

On the basis that most of the rights and interests claimed are readily identifiable as required by this section I am satisfied that the requirements for this section have been met.

Result: Requirements met.

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 for the Decision

Section 190B(5) requires that the Registrar (or his 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).

In *Martin v Native Title Registrar* [2001] FCA 16, French J considered this condition of the registration test. I have had regard to his Honour's findings that:

"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" [23].

With respect to paragraph (a) of s.190B(5), his Honour said:

"...What he (the delegate) had to be satisfied of was that the factual basis on which it was asserted that the native title rights and interests claimed exist supported the proposition that the native title claim group and the predecessors of those persons had an association with the area" [22].

His Honour imparts the same formulation of the question to the circumstances of paragraph (b) - see [27].

With respect to paragraph (c), his Honour noted that:

"...the delegate had to be satisfied that there was a factual basis supporting the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs. This is plainly a reference to the traditional laws and customs which answer the description set out in par (b) of s.190B(5)" [29]

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

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

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

Affidavits by [name removed] (11 May 2004) and [name removed] (17 August 2004) were provided as additional information in support of this and other conditions of the registration test. [name removed] is one of the persons named as the applicant. [name removed] states that he is a member of the Budina native title claim group.

The applicants also provide 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 details of activities 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.

It is not the role of the delegate to reach definitive conclusions about complex anthropological issues pertaining to applicants' 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 information contained in the application and the additional information referred to above provides sufficient probative detail to address each element of this condition. I will now deal in turn with each of these elements.

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

To be satisfied under this criterion, it must be evident that the association with the area is and was communal, that is, shared by a number of members of the native title claim group.

At Schedule F of the application, assertions are made an association with the area as follows:

"The native title rights and interests claimed exist on the following factual basis:

- (i) the native title group have an association with the area based on traditional laws which they acknowledge and traditional customs which they observe;
- (ii) the predecessors of the native title claim group had an association with the area from a time prior to the assertion of British sovereignty in relation to the area;
- (iii) the native title rights and interests are possessed under a body of traditional laws acknowledged and traditional customs observed by the native title claim group and their predecessors; and
- (iv) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs, including laws and customs which vest land and waters in the native title claim group on the basis of:
 - (a) descent from ancestors connected with the area;
 - (b) conception in the area;
 - (c) birth in the area;
 - (d) traditional religious knowledge of the area;

National Native Title Tribunal

- (e) traditional knowledge of the creation and geography of the area;
- (f) traditional knowledge of the resources of the area; and
- (g) knowledge of and participation in traditional ceremonies and rituals associated with the area."

Schedule G provides a summary of the activities the native title claim group currently carries out in relation to the claim area:

- (i) hunting, gathering and fishing;
- (ii) moving about, living, residing, erecting shelters and camping;
- (iii) conducting and engaging in cultural activities, ceremonies, rituals, meetings and teaching of, maintaining, conserving and protecting the significant and physical attributes of the area and places, works and objects within the area; and
- (iv) taking resources from the area, including fauna, flora, soil, sand, stone, flint, clay, gravel, ochre, water for use and consumption for food, shelter, healing, decoration, cultural, religious, ceremonial and ritual purposes and for manufacture and trade of objects, materials and goods, in the form of tools, weapons, clothing, shelter and decoration."

In my view these activities are indicative of the native title claim group's association with the claimed area. This assertion of association is supported by the claimant affidavits provided as additional material. For example:

- Affidavit of [name removed] dated 11 May 2004 at paragraphs [1], [3], [4], [5], [7], [9], [10], [11], [13], [14], [15], [16], [17], [18]. [name removed] states that he is a Budina man and that all the land and waters covered by the claim belongs to Budina people and it has always been their country (1). He talks about growing up in the claim area (3) and his knowledge of the country and the right to speak for that country (4). He discusses his current association with the area including teaching his children about Budina country and camping and fishing.
- Affidavit of [name removed] dated 17 August 2004 at [3], [4], [5], [6], [7], [8], [9], [13], [14], [15], [18]. [name removed] states he is a member of the Budina native title claim group and that the land and waters covered by the Budina claim belong to the Budina people and was passed on to us by the old Budina people. He says: "It has always been our country" (1). He continues in noting he that he worked in and around the claim area and learnt much about Budina country and traditional laws and customs (para 4). He states he goes camping, hunting and 'get bush tucker' from all over the claim area (para 4 – 7).

In their affidavits there is reference to their predecessors as being the source of their knowledge and continuing practice. The deponents attribute their knowledge of the claim area to their elders and other people they grew up with. I take this as evidence of the communal nature of the association with the claim area.

On the basis of the information contained in the application and the additional material referred to above, I am satisfied that there is a sufficient factual basis to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the area subject to this application.

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

Information at Schedules F and G of the application and in the two additional affidavits provides 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.

In particular I note the statements in para (iv) of Schedule F to the effect that laws and customs vest land and waters in the native title claim group on the basis of: descent from ancestors connected with the area; conception in the area; birth in the area; traditional religious knowledge of the area; traditional knowledge of the creation and geography of the area; traditional knowledge of the resources of the area; and knowledge of and participation in traditional ceremonies and rituals associated with the area.

Schedule G describes current activities carried out by the claimants on their country. The activities described are consistent with the claim to native title rights and interests and with the existence of traditional laws acknowledged and traditional customs observed by the native title claim group that give rise to the claim to native title rights and interests.

These statements are supported by information in the claimants' additional information affidavits. For example:

- Affidavit of [name removed] dated 11 May 2004 at [6], [7], [8], [9], [10], [11], [12], [14], [15], [16]. In paragraph 6) [name removed] states... "I can understand the Budina language. I learnt this from my parents.I got my rights to Budina country from my mother and my nyami". Para 7:... "My other 'grandfather', [name removed], also lived on Towera and taught me lots of things about Budina country. I called him 'nyami'. He was Budina man and he taught me where to fish and hunt. He taught me about being Budina, he told me that this country that we are claiming belonged to us". Further information is provided in the affidavit as noted in the above paragraphs.
- Affidavit of [name removed] dated 17 August 2004 at [4], [7], [9], [10], [11], [12], [14], [15], [16], [17], [18]. [name removed] states in para 4.... "I worked alongside [name removed] for many years, in and around the claim area and he taught me much about our country and traditional laws and customs. I also learnt a lot about the Law from my grandmother's sister, [name removed]." Para 10.... "[information regarding customary practice – details removed]. You have to do it because that's the old people's way. [information regarding customary practice – details removed]." Para 15... "I am the custodian of [identified site – details removed]. [Identified site – details removed] is part of the Yannarie River, near Towera Station. The old people gave the [name removed] to me. It once belonged to my grandmother, who was reared and born there. No one can go to [identified site – details removed] without me. You can get very sick and die if you go there. I will pass on the custodianship of the pool to my nephew Jimmy one day".

The above and other information in the affidavits to which I have referred satisfies me that there is sufficient factual basis to support the assertion that there exist traditional laws and customs that are acknowledged by and observed by the native title claim group that give rise to the claimed native title rights and interests.

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

Under this criterion, I must be satisfied that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

For the reasons set out in s. 190B(5)(b) above and having regard to the same material I am satisfied that there is sufficient factual basis to support the assertion that the claim group has continued to hold native title in accordance with those traditional laws and customs.

See above Schedule F paras (iii) and (iv) and G para (iii).

The continued observation of traditional laws and customs for which the native title rights and interests claimed are said to derive can be found in the claimants' additional affidavits and includes:

- the teaching of Budina country including taking children camping on Budina country and showing them to hunt and get bush foods, and what they can and can't go;
- observance of cultural practices including rituals when approaching and using certain places;
- practice of giving general permission to other Aboriginal people to hunt and fish on country.

Based on the information before me and to which I have referred above I am satisfied that there is sufficient factual basis for the assertion that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs identified at s. 190B(5)(b).

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 for the Decision

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]."

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

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

Where rights and interests are not readily identifiable, it follows that they cannot be prima facie established. Therefore, it is necessary for me to consider whether the application and any of the supporting material prima facie establishes the rights and interests listed at Attachment E with the exception of that at para 35).

Schedule E lists thirty five (35) separate rights and interests which are claimed in relation to the application area. These are listed in my reasons regarding s. 190B(4) above. Not all thirty five 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” are further refined to take into account native title rights that might otherwise be claimed if not for inconsistent legislation.

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

The rights and interests claimed are qualified as follows:

“Subject to laws and customs

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 rights and interests are possessed and by which native title claim groups have a connection to the area of land and waters the subject of this Application.
- 4) In accordance with sub section 61A(3) of the NTA, the applicants do not make claim to native title rights and interests which confer possession, occupation, use and enjoyment to the exclusion of others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in section 23F of the NTA, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in section 23I in relation to that act;
- 5) In accordance with sub section 61A (4), paragraph 3 above is subject to such of the provisions of section 47B of the Act as apply to any part of the area in this application.

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.”

The application includes a definitions section, which provides definitions of Areas A, B and C. These are as follows:

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 which are “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.

Rights in Area A

The native title rights and interests in relation to Area A comprise:

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

Established

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.⁵

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 applicants claim the benefit of ss.47, 47A or 47B). This is recognised by the applicant in this application.

I add that over areas where a claim to exclusive possession cannot be sustained (i.e., where the claim is non-exclusive in nature), the Court has indicated that a claim to 'possession, occupation, use and enjoyment' of the land and waters cannot, prima facie, be established. In other words, where native title rights and interests do not amount to an exclusive right, as against the whole world, to possession, occupation, use and enjoyment of the claim area, the Court said that "it will seldom be appropriate or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms": at [51].⁶ Similarly, in *De Rose v South Australia* [2002] FCA 1342, O'Loughlin J said that such a description was "inappropriate": at [919].⁷

It would seem, then, that without further investigation, a non-exclusive right to possession, occupation, use and enjoyment is not capable of being *prima facie* established.

The applicants noted in Schedule L that they have not obtained or analysed the land tenure status of the claim area. Information available from the Tribunal's Geospatial system indicates that there are seven pastoral leases and six reserves in the area of the claim. No further information is available as to the type of leases or the purpose for the reserves, which are identified as watering place for travellers and stock; and a natural gas pipeline. I have no further information available and therefore cannot determine if the leases and reserves are exclusive or non-exclusive in their nature and how these were vested. Given this uncertainty on the face of the application and the general exclusion clauses provided, it would appear that prima facie the applicants can establish exclusive possession in Area A.

I now consider the information available to support the prima facie establishment of the right claimed.

Schedule F states that:

- (i) the native title group have an association with the area based on traditional laws which they acknowledge and traditional customs which they observe;
- (ii) the predecessors of the native title claim group had an association with the area from a time prior to the assertion of British sovereignty in relation to the area;
- (iii) the native title rights and interests are possessed under a body of traditional laws acknowledged and traditional customs observed by the native title claim group and their predecessors; and

⁵ At [51].

⁶ Refer also *Ward*, [48], [52], [53] and [89].

⁷ Refer also *De Rose*, [918]-[920]

National Native Title Tribunal

- (iv) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs, including laws and customs which vest in land and waters in the native title claim group on the basis of:
 - (a) descent from ancestors connected with the area;
 - (b) conception in the area;
 - (c) birth in the area;
 - (d) traditional religious knowledge of the area;
 - (e) traditional knowledge of the creation and geography of the area;;
 - (e) traditional knowledge of the resources of the area; and
 - (f) knowledge of and participation in traditional ceremonies and rituals.

Schedule G provides a summary of the activities the native title claim group currently carries out in relation to the claim area:

- (i) hunting, gathering and fishing;
- (ii) moving about, living, residing, erecting shelters and camping;
- (iii) teaching of, maintaining, conserving and protecting the significant and physical attributes of the area and places, works and objects within the area, and
- (iv) taking resources from the area, including fauna, flora, soil, sand, stone, flint, clay, gravel, ochre, water for use and consumption for food, shelter, healing, decoration, cultural, religious, ceremonial and ritual purposes and for manufacture and trade of objects, materials and good, in the form of tools, weapons, clothing, shelter and decoration.

These activities are consistent with the native title claim group's possession occupation use and enjoyment of the relevant area.

Further the affidavits of [name removed] sworn on 11 May 2004 and [name removed] sworn on 17 August 2004 support the existence of this composite right. See:

[name removed] in paras 1, 3, 4, 6, 7, 11, and 12;

[name removed] in paras 1, 3, 4, 5

For instance [name removed], an applicant, states ... "I am a Budina man. All the land and waters covered by the Budina claim belongs to the Budina people. It was passed onto us by the old Budina people. It has always been our country" (para 1). He continues in paragraph 11 – "People know their own country and other people can't come and argue about that. They can't take it off you." And in para 12... "We have given other Aboriginal people general permission to hunt and fish on our country but they are not allowed to take too much and if they wanted to do something out there, like build a house or set up a community, they would have to come and as Budina People."

[name removed] who is a member of the Budina native title claim group states in para 5) of his affidavit... "I camp, go hunting and get bush tucker from all over the claim area". Paragraph 8 ... "We also go fishing in the claim area. "[information regarding customary practice – details removed]. "[information regarding customary practice – details removed". Para 11... "You also have to talk the language. The river will only allow you so much fish. It might give you five big cobbler or catfish. But then it will give you a sign that you have taken enough by sending a wily-wily. Then you can take no more".

Schedule E lists native title rights and interests at para 2) – 35) claimed over the application Area A. In practical terms, registration of an exclusive right to possession, occupation, use and enjoyment of the area would presumably subsume those rights listed. I say this because the Courts have indicated that the right to 'possession, occupation, use and enjoyment to the exclusion of all others' is the fullest expression of native

title rights and interests. That said, Schedule E is constructed in such a way that each right is expressed separately and stands or falls independently.

- 2) *A right to occupy the area;*
- 3) *A right to use the area;*
- 4) *A right to enjoy the area;*
- 9) *A right to hunt in the area;*
- 10) *A right to fish in the area;*
- 13) *A right to be present on or within the area;*

Established

Based on the information referred to under para 1) above, I am satisfied there is sufficient information to support the prima facie establishment of the rights claimed at paras (2)-(4), (9), (10) and (13) above in respect of Area A.

- 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;*
- 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;*

Established

These three native title rights, 5), 14) and 15), are interests that can be seen as an integral part of the right of exclusive possession which right I am satisfied can be prima facie established. However, they are claimed separately and thus must be considered separately.

Schedule G provides a summary of the activities the native title claim group currently carries out in relation to the claim area and the activities include maintaining, conserving and protecting the significant and physical attributes of the area and places, works and objects within the area. I believe that these activities must involve the making of decisions about the use of the area and who may be permitted access.

Further the affidavits of [name removed] sworn on 11 May 2004 and [name removed] sworn on 17 August 2004 support the existence of this composite right. See:
[name removed] in paras 9, 11, 12;
[name removed] in paras 15 and 16

I am satisfied there is sufficient information in the application and in the additional material to support the prima facie establishment of the rights claimed at paras. 5), 14) and 15) above in respect of Area A.

- 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;*

Established

In para 3 of Schedule G the applicants says that the native title claim group currently protects maintains, conserves and protects the significant attributes of the area and places, works and objects within the area. In my view this involves the control of access. I add that "Significant" is defined in the application under the heading **Definitions**.

Affidavits of [name removed] (paras 9, 11, 12) and [name removed] (paras 15 and 16)

I am satisfied there is sufficient information in the application and in the additional material to support the prima facie establishment of the rights claimed at paras. 6) and 7) in respect of Area A.

8) *A right to control the taking, use and enjoyment by others of the resources of the area;*

Established

This right is akin to that claimed at paras 6) and 7) above in that the control of the taking of and use of resources involves the control of access. Based on the same information referred in respect of those paragraphs I am satisfied that there is sufficient information to support the prima facie establishment of the right claimed at para 8) in respect of Area A.

- 11) *A right to take fauna;*
- 12) *A right to take traditional resources, other than minerals and petroleum from 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;*

Established

I refer to para (iv) of Schedule G which is set out above and to the affidavits to which I have referred. In particular the statements in the following affidavits of [name removed] and [name removed].

[name removed] - paras 1, 6, 7, 10, 12, 15, 16, 17 and 18.

[name removed] - paras 1, 4 - 8, 9 - 11, 13, 14, 15, 16, 18.

I am satisfied the above information is sufficient to support the prima facie establishment of the rights and interests listed.

- 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;*

Established

Based on the same information referred to under para. 1) above I am satisfied there is adequate information to support the prima facie establishment of the rights claimed at paras 16 - 22 above in respect of Area A.

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

Not established

The right to trade in the resources of the area (paragraph 33), has been considered by the Court. In *Commonwealth of Australia v Ymirr* (1999) 101 FCR 171, the Full Federal Court in obiter noted that "It may well be right... and as seems logical, to view the right to trade as an 'integral part' or integral aspect of a right of exclusive possession".

At first instance in this case, Olney J commented in obiter that the trade consisted of the exchange of goods and did not amount to a right or interest in relation to land or waters as required by s.223. This finding was noted by Merkel J on appeal but his Honour made no comment about it. This issue was not put before the High Court. However, based on the obiter comments of the Full Court it seems that the rights of trade can be established over areas where a claim to exclusive possession can be sustained, but only in respect of such areas.

Schedule G states in part that the native title claim group currently carryout the following activities in relation to the land and waters:

- (iv) taking resources from the area, including fauna, flora, soil, sand, stone, flint, clay, gravel, ochre, water for use and consumption for food, shelter, healing, decoration, cultural, religious, ceremonial and ritual purposes *and for manufacture and trade of objects, materials and goods, in the form of tools, weapons, clothing, shelter and decoration* (italics added).

However I can find no other information that supports the trade of resources of the area. I am not satisfied there is sufficient information to support the prima facie establishment of the rights claimed at paragraph 33) in respect of Area A.

I refer to s. 190(3A) of the Act. That section permits an applicant to provide additional information to the Registrar in support of any rights and interests that were not registered when the application was tested and accepted for registration. In brief, provided that additional information satisfies the Registrar (or his delegate) that, had it been before him at the time of testing, the right would have been accepted for registration, then, subject to meeting the other conditions of the test, the right in question will be entered in the Register of Native Title Claims.

34) *A right to maintain conserve and protect significant places and objects located within the area;*

Established

Schedule G states in part that the native title claim group currently carryout the following activities in relation to the land and waters:

National Native Title Tribunal

“(iii) conducting and engaging in cultural activities, ceremonies, rituals, meetings and teaching of, *maintaining, conserving and protecting the significant and physical attributes of the area and places, works and objects within the area.*”(italics added)

I also refer to the affidavits to which I have had regard above. I am satisfied that collectively they demonstrate that the native title claim group has a close association with their country and that this supports the applicants' statements that the group currently carry out the activities set out in para (iii) of Schedule G.

I am satisfied there is sufficient information before me in the application and affidavits to support the prima facie establishment of the right claimed at para 34) in respect of Area A.

Area B rights

As set out above, the rights and interests claimed in this area, are all the rights in paragraphs (13)-(35) inclusive. I list them below. Thus the rights as listed in paragraphs 1) - 12) inclusive are not claimed. Area B as it is defined in the definitions section of the application is an area over which exclusive possession cannot be made out.

Having regard to the definition of Area B the qualifications at the commencement of Schedule may well result in many of the rights and interests claimed in respect of Area B being restricted.

The native title right and interests claimed in relation to Area B are:

- 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

The rights claimed at para 35) is not readily identifiable in respect of Area B for the reasons stated in respect of that right under Area A above.

Turning now to consider if the native title rights and interests claimed can be prima facie established.

13) A right to be present on or within the area;

Established

Based on the same information referred to under para 1) above (Schedule G and the additional affidavits) I am satisfied there is adequate information to support the prima facie establishment of the rights claimed at paras. (13) above in respect of Area B.

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;

Established

Schedule G provides a summary of the activities the native title claim group currently carries out in relation to the claim area and the activities include maintaining, conserving and protecting the significant and physical attributes of the area and places, works and objects within the area. I believe that these activities must involve the making of decisions about the use of the area and who may be permitted access. I see that this right is limited to *members of the Aboriginal society to which the native title claim group belong*.

I am satisfied there is sufficient information in the application and in the additional material to support the prima facie establishment of the above right in Area B.

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

Not established

This right is not limited to members of the Aboriginal society to which the native title claim group belongs as is that claimed at 14) above.

This right, in my opinion, involves the control of access and hence cannot be prima facie established in respect of areas where exclusive possession is not claimed or cannot be sustained.

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;

Established

The applicants claim the right to live within the area and erect shelters upon or within the area. A question which arises here is whether the right to live on the land or erect shelters *necessarily* amounts to a right to control access to and use of the claim area. To the extent that it would do so, such a right is not *prima facie* capable of being established over areas for which a claim to exclusive possession could not be sustained.

National Native Title Tribunal

I note that, despite the absence of exclusive possession in that case, the majority decision in *Ward* did not preclude the recognition of native title rights to reside upon the claim area; nor is there anything in the description of these right which conveys to me an intention or capacity on the part of the members of the native title claim group to control access to or use of those areas. Rather, rights to control access to or use and enjoyment of the claim area are claimed separately at paras. 6) and 7) in respect of Area A.

It follows that I am satisfied that the rights claimed above are capable of being *prima facie* established.

There is evidence for this right in Schedules F and G and the affidavits I have referred to above. For instance in Schedule G the applicants state that the group currently carryout the activities set out in para (ii):
“(ii) moving about, living, residing, erecting shelters and camping”

Based on the above information and the additional information supplied in the affidavits referred to I am satisfied there is sufficient information to support the *prima facie* establishment of the rights claimed at paras. 16)- 18) inclusive in respect of Area B.

- 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;*

Established

Based on the information in Schedule G and in the affidavits to which I have referred above I am satisfied there is sufficient information to support the *prima facie* establishment of the rights claimed at paras. 19) - 22) in respect of Area B.

- 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;*

Established

I refer to para (iv) of Schedule G which is set out above and to the affidavits to which I have referred.

I am satisfied there is sufficient information to support the *prima facie* establishment of the rights claimed at paras. 23) - 32) above in respect of Area B.

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

Not established

The right to trade in the resources of an area, has been considered by the Court. In *Commonwealth of Australia v Yarmirr* (1999) 101 FCR 171, the Full Federal Court in obiter noted that

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

At first instance in this case, Olney J commented in obiter that the trade consisted of the exchange of goods and did not amount to a right or interest in relation to land or waters as required by s. 223. This finding was noted by Merkel J on appeal but his Honour made no comment about it. This issue was not put before the High Court. However, based on the obiter comments of the Full Court it seems that the rights of trade can **only** be established over areas where a claim to exclusive possession can be sustained.

Further, even if I am wrong in the above view, there is insufficient information available to support the prima facie establishment of this right (see above under Area A).

34) A right to maintain, conserve and protect significant places and objects located within the area;

Established

A question arises here as to whether the right to *protect* significant places and objects located within the area *necessarily* amounts to a right to control access to and use of the claim area. To the extent that it would do so, such a right is not *prima facie* capable of being established over areas for which a claim to exclusive possession could not be sustained. There is nothing in the description of this right which conveys to me an intention or capacity on the part of the members of the native title claim group to control access to or use of those areas. Indeed, the applicant has specifically excluded such rights in respect of this Area B. I say this because the rights to control access to or use and enjoyment of the claim area are reflected separately at paras. 6) and 7) and those rights are specifically excluded in respect of Area B.

Schedule G states in part that the native title claim group currently carryout the following activities in relation to the land and waters:

“(iii) conducting and engaging in cultural activities, ceremonies, rituals, meetings and teaching of, *maintaining, conserving and protecting the significant and physical attributes of the area and places, works and objects within the area;*”(italics added)

I also refer to the affidavits to which I have referred above. I am satisfied that they demonstrate that the native title claim group has a close association with their country and that this supports the applicants' statements that the group currently carryout the activities set out in para (iii) of Schedule G.

I am satisfied there is sufficient information before me in the application and affidavits to support the prima facie establishment of the right claimed at para 34) in respect of Area B.

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.

Not established

This right is not readily identifiable hence it follows that it cannot be prima facie established.

Area C rights

Area C is defined as an area over which exclusive possession cannot be made out.

The native title rights and interests which are claimed in relation to Area C are rights identified in paragraphs 9) - 12) inclusive as identified above and rights 13) - 35) inclusive. The right to possess, occupy, use and enjoy the areas as against the whole of the world (para 1)) and the other rights set out at paragraphs 2) - (8) are not claimed.

The following native title rights and interests are prima facie established in respect of Area C based on the same information and for the same reasons as appear in respect of those rights under Area B: 13), 14), 16) -18), 19) - 22), 23) - 32) and 34).

The following native title rights and interests claimed are **not** prima facie established in respect of Area C: 15), 33) and 35). This conclusion is based on the same information and the same reasons as appear in respect of those rights under Area B:

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

Overall Result: Requirements met

Traditional physical connection: S. 190B(7)

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

- (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or*
- (b) previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:*
 - (i) the Crown in any capacity; or*
 - (ii) a statutory authority of the Crown in any capacity; or*
 - (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.*

Reasons for the Decision

Under s.190B(7)(a), I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.

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

Schedule M of the amended application refers to affidavit material provided by two members of the native title claim group who currently have a traditional physical connection to the area covered by the application.

References are provided in the affidavits. Affidavits of [name removed] (paras 7, 11 and 12) and [name removed] (paras 3, 4, 15, 16) are provided and support this section of the test. For instance [name removed] says:

7. My other 'grandfather'. [name removed], also lived on Towera and taught me lots of things about Budina country. I called him 'nyami'. He was a Budina man and he taught me where to fish and hunt. He taught me about being Budina, he told me that this country that we are claiming belonged to us. It is our nyarrari (home). [name removed] made spears, boomerangs and shields out of mulga tree and snakewood. He used to make me a small boomerang and [information regarding customary practice – details removed]. [name removed] was a maparn (medicine) man and he used to fix us kids up when we were sick. He got that maparn passed down to him. Other people still have this maparn today.
11. All Budina people belong to Budina country but we also have our own areas within Budina country. My family is from a place on Nyang Station. We got this place passed on to us from our *nyami* [name removed]. Our family now has a name from that place. Our family is known as Paliyat which is the name of our country. This is how other Budina and Aboriginal people know us and know where we come from, People know their own country and other people can't come and argue about that. They can't take it off you. It is just like when you own your own house, no one can take it off you.
12. We have given other Aboriginal people general permission to hunt and fish on our country but they are not allowed to take too much and if they wanted to do something out there, like build a house or set up a community, they would have to come and ask Budina people. They know that. And if it was in my family's area they would have to come and ask us first, either me or my sisters. Under Budina law we really have the right to tell people what they can and can't do on our country. After they have been out to Budina country, people will come and tell me, tell me what they got hunting and where they went, where they camped and where they cooked their feed. If they went out there hunting and they did something wrong to our country, then maybe I wouldn't like them to go out there anymore. Sometimes I take people out there. People who are not Budina. They always ask me where they can go and what they can do.

Similarly [name removed] says:

3. My traditional country is around Towera and Lyndon stations. My mother, [name removed], was a Budina woman born at Lyndon Station. [name removed] and her siblings, such as [name removed], were named after Lyndon Station. When my family arrived at the Moore River mission, everyone knew we were from that country.
4. My mother died when I was boy and I grew up in the South West with my father's family. When I became a man, I wanted to learn about my mother's country, so I went north, with my father's blessing, to work with my Uncle [name removed]. I worked alongside [name removed] for many years, in and around the claim area and he taught me much about our country and traditional laws and customs. I also learnt a lot about the Law from my grandmother's sister, [name removed]. I call her my grandmother. Due to my knowledge of the country, the laws and customs of the claim group, I identify with my mother's country and group.
5. I camp, go hunting and get bush tucker from all over the claim area.

Paragraphs 6 – 11 of the affidavit also talks about hunting and fishing. [name removed] continues:

15. I am the custodian of [information regarding an identified site – details removed] [Name of identified site removed] is part of the Yannarie River, near Towera Station. The old people gave the [name of site removed] to me. It once belonged to my grandmother, who was reared and bom there. No one can go to [name name of site removed] without me. You can get very sick and die if you go there. I will pass on the custodianship of the pool to my nephew [name removed] one day.

16. There is an old water snake in [name of site removed]. [information regarding customary practice – details removed]. If I want rain I just sing out in language. The words that I say are secret. You can get fish that way too.

In summary, [name removed] says in his affidavit that he was born and raised in the claim area. He was taught about law and culture in the claim area through observance of activities, customs and practices taught from his family members. He continues to maintain an association with the claim area and the traditional ways by teaching his and his siblings children.

Similarly, in his affidavit [name removed] speaks of his association with the application area and being taught the laws and customs of his country by his extended family. He references many practices and activities he has participated in the claim area and his responsibilities to certain sites.

It seems to me that given the beneficial nature of the Act, its objects and its preamble, that I should take the view that so long as there is sufficient factual material to show that a member of the claim group has, or had, traditional physical connection to some part or parts of the traditional land or waters of the claimant group then that will be sufficient.

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

Accordingly, I am 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. I find that the application passes this condition.

Result: Requirements met

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

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

Section 61A contains four 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.

Reasons for the Decision

For the reasons that follow I have concluded that there has been compliance with s.61A.

S. 61A(1)- Native Title Determination

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 the Tribunal's Geospatial Analysis & Mapping Branch in its assessment dated 14 July 2005.

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

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

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

The applicant is not seeking exclusive possession over areas the subject of previous non-exclusive possession acts. (See Schedule E para. 4).

S. 61A(4) – s. 47, 47A, 47B

In Schedule B, para 4) of the application the applicant states:

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. The applicants claim all benefits arising out of provisions of ss. 47, 47A and 47 B of the Act.

Schedule L to the application includes a statement that the applicant does not have details of:

- (a) any area for which a pastoral lease is held by or on behalf of the members of the native title claim group;
- (b) any 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;
- (c) any vacant crown land occupied by the members of the native title claim group; and
- (d) any area mentioned in paragraph (a), (b) or (c) over which the extinguishment of native title is required by ss 47, 47A or 47B of the Act to be disregarded.

The applicants also note in this Schedule that they have not had the opportunity nor the resources to fully obtain or analyse the land tenure status of the whole of the claim area and so must take advice on the tenure history. It is to be noted that the Applicants reserve the right to dispute the tenure history as may be provided by the State.

Result: Requirements met

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

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

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

Reasons for the Decision

Schedule Q of the application states that the applicants do not claim any rights, title or interests in 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.

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 for the Decision

Schedule P of the application states the applicants do not claim exclusive possession of any offshore place.

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 for the Decision

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.

I am satisfied that the application meets the requirements of this condition.

Result: Requirements met

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