

National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION

DELEGATE: Kristy Eulenstein

Application Name: Lumugal

Names of Applicant(s): Una Morgan, Peggy Patrick, John Toby.

Region: Kimberley region, Western Australia

NNTT No.: WC06/01

Federal Court No: WAD15/2006

Date Application(s) Filed: 17 January 2006

Date of Amendment: n/a

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).

February 2006

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Kristy Eulenstein
Delegate of the Registrar

Date of Decision

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

Brief History of the Application

This application was filed in the Federal Court on 17 January 2006.

The application is affected by two active s.29 notices (NNTT No: WS05/2585 and WS05/2586) both with a notification date of 19 October 2005. Under s.190A(2) of the Act the Registrar must his best endeavours to finish considering the claim by the end of 4 months after the notification day specified in the notice. In respect of the current application, that date is 19 February 2006.

The State was afforded the opportunity to comment on the material supplied by the applicant. On 15 February 2006 the State responded that there was no comment on the material of the application.

Information considered when making the Decision

In applying the registration test to this application I have considered and reviewed the following documents:

- Claimant application, as filed 17 January 2006.
- GeoTrack 2006/0125, dated 27 January 2006.
- Letter dated 3 February 2006 from Kimberley Land Council.

Note: The delegate does not consider any information or materials that may be provided in the context of mediation of a native title claim group's native title application. This is due to the 'without prejudice' nature of mediation communications and the public interest in maintaining the inherently confidential nature of the mediation process.

In this document:

- All references to legislative sections refer to the *Native Title Act 1993* ('the Act' or 'NTA') unless otherwise specified.
- All references to 'the application' or 'the current application' refer to the application WAD15/2006 as filed on 17 January 2006 unless otherwise indicated.

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

On 22 September 2005, Christopher Doepel, Native Title Registrar, delegated to members of the staff of the Tribunal including myself all of the powers given to the Registrar under sections 190, 190A, 190B, 190C and 190D of the *Native Title Act 1993* (Cwth). This delegation has not been revoked as at this date.

Note to Applicant:

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

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

A. Procedural Conditions - Section 190C

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

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 I 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 (see 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 could not be accepted for registration (*Northern Territory of Australia v Doepel* [2003] FCA 1384 at para 36).

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

Schedule A of the application states:

National Native Title Tribunal

The claim is brought on behalf of those Aboriginal People of the Miriuwung, Gija and Woolah language or dialect and country subject of the claim and who hold in common the body of traditional law and custom governing the area the subject of the claim. Those persons are:

(a) the descendants of:

- i. Polly Mundi, King O'Malley and Sambo Djimbilainy;
- ii. Jangurangan/ Old Jimmy McCarthy and Old Kitty; and
- iii. Paddy Wulbalminy and Nellie Wadibarl;

and

(b) persons adopted by those descendants in accordance with their traditional law and custom.

The description of the native title claim group is sufficiently comprehensive, and there is no indication from it that it excludes people claiming to hold common or group rights and interests in the area covered by the application. I read 'the descendants' as meaning 'all the descendants' of the named persons.

Result: Requirement met

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

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

Reasons relating to this sub-condition

I note Parts A and B of the application, and am of the view that this procedural requirement is thus met.

Result: Requirement met

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

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

Reasons relating to this sub-condition

Schedule A of the application contains the description of the native title claim group. It is my view that the native title group is described sufficiently clearly so as to satisfy the procedural requirement set down in s.61(4) of the Act. The merit aspect of this

requirement is commented on below in relation to s.190B(3) of the Act.

Result: Requirement met

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

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

Reasons relating to this sub-condition

The application is in the form prescribed by Regulation 5(1)(a) of the *Native Title (Federal Court) Regulations 1998*. The application was filed in the Federal Court on 17 January 2006, as required pursuant to s.61(5)(b) and contains such information as is required by s.61(5)(c). Section 61(5)(d) states that the application be accompanied by any prescribed documents, these are set out in s.62 of the Act (see my comments under s.62 in regard to these documents).

I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court.

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

Result: Requirement met

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

An application must be accompanied by an affidavit sworn by the applicant which addresses the matters required by s62(1)(a)(i) - s62(1)(a)(v).

Reasons relating to this sub-condition

Section 62(1)(a) of the Act requires an application be accompanied by an affidavit sworn by the applicant addressing certain matters. I note that affidavits from each of the persons comprising the applicant have been provided. Each affidavit is dated, signed and witnessed. The affidavits were supplied with the application when it was filed on 17 January 2006 in the Federal Court.

I am therefore satisfied that this requirement is met. I am satisfied that these affidavits contain the information required under s.62(1)(a)(i) - (v).

Result: Requirement met

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

Section 62(1)(b) asks the Registrar to make sure that the application contains the information specified in s. 62(2). Because of this, my 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 of the application provides information on the group's current activities on the land rather than the traditional physical connection. However the affidavit material supplied provides information regarding traditional physical connection to the area covered by the application, including:

- Peggy Patrick, 15 December 2005:
 - "I still follow the Law today...Under the Law, following a woolwah, which is the Law and like a truth, means following the stories from long ago. I got that Lumugal woolwah from my mother, who got it from her mother. It goes back like that to the old people."
- John Toby, 15 December 2005:
 - "I still live on my grandfather's country...This is the way under the traditional Law and we still follow it today. We got this traditional law from our grandfathers and our old people, and they got followed it from their old people. This is what makes us strong and helps us to protect and look after country today."
"

I am of the view that the procedural requirement is met by the applicant.

Result: Provided

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

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

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

Reasons relating to this sub-condition

I note Schedules and Attachments B and C to the application, which provides information about the boundaries to the application area.

I am of the view that this information satisfies this procedural requirement.

Result: Provided

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

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

Reasons relating to this sub-condition

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

Result: Provided

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

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

Reasons relating to this sub-condition

Schedule D of the application reads:

No searches have been carried out to determine the existence of any non-native title rights and interests in relation to the land or waters in the area covered by the application.

The Act does not necessarily require that the applicant undertake searches, merely that details and results be provided of those carried out. Therefore the application satisfies this procedural requirement.

Result: Provided

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

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

Reasons relating to this 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. Therefore I am satisfied in respect of the procedural requirement at s.62(2)(d) of the Act. For further discussion of these rights and interests in respect of the merit requirements, see below under sections 190B(4), (5) and (6) of the Act.

Result: Provided

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

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

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

Reasons relating to this sub-condition

Schedule F of the application addresses the three points in s.62(2)(e)(i)(ii) and (iii). I am therefore satisfied that the procedural requirement is met.

Result: Provided

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

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

Reasons relating to this sub-condition

Schedules G and M of the application contain a general description of the activities that are currently carried out by the native title claim group in relation to the land and waters.

I am satisfied that the description is sufficient for this procedural condition.

Result: Provided

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

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

Reasons relating to this sub-condition

Schedule H of the application states that the applicant is aware of no 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.

The Tribunal's Geospatial and Mapping Unit provided an assessment, dated 27 January 2006 (GeoTrack 2006/0125) of the application area. That assessment confirms there are no applications that overlap the current application.

I am therefore satisfied that this requirement is met.

Result: Provided

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

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

Reasons relating to this sub-condition

Schedule I of the application states:

The applicants are aware of the notices under section 29 of the Act (or under a corresponding provision of law of a State or Territory) that have been given and that relate to the whole or a part of the area as set out in Attachment I

Attachment I contains a table listing six finalised notices and two active s.29 notices which relate to the whole or a part of the area of the application. The two active matters both have a notification date of 19 October 2005. Below the table the applicant has written:

No section 29 or equivalent notices, as notified to the NNTT, fall within the external boundary of this application as at 22 December 2005

It is clear from the application, and from GeoTrack 2006/0125 that the two active notices are relevant to the application.

I am satisfied that the Attachment I table is correct and that the note below that table is a slip, that is it is meant to be read that there are s.29 notices which fall within the external boundary of the application.

Under s.190A(2) the Registrar is required to use best endeavour to consider this claim within four months after the notification day specified in the s.29 notice. I am of the view that s.62(2)(h) of the Act is intended to allow the applicant to notify the Registrar or delegate of s.29 notices for the purposes of the Registrar considering the application within the statutory timeframe.

I am satisfied that the applicant has provided sufficient information in this section to alert the delegate to the fact that the application is s.29 affected.

Result: Requirement met

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

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

- (a) the previous application covered the whole or part of the area covered by the current application; and
- (b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made: and
- (c) the entry was made, or not removed, as a result of consideration of the previous application under section 190A.

Reasons for the Decision

The policy underlying s.190C(3) is to give priority to the claim which is registered first in time, therefore even where there are claim group members in common, only a prior registered claim will keep the second off the Register.

It is up to the applicant to satisfy the delegate that if there are overlapping claims which were on the Register before this current application was made; there are no common members of the claim groups.

Obviously I need not consider s.190C(3) unless there is an application which overlaps the current application. GeoTrack 2006/0125 confirms that there are no applications which appear on the Register of Native Title Claims and fall within the external boundary of the application area of WAD15/2006.

I am therefore satisfied that this requirement is met.

Result: Requirement met

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

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

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

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

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

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

Reasons for the Decision

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

Schedule R indicates that the application has been certified under s.203BE of the Act by the Kimberley Land Council Aboriginal Corporation (KLC). The certificate is provided as Attachment R to the application.

Section 190C(4)(a) requires that the application be certified by each Aboriginal or Torres Strait Islander body that could certify the application. In this instance, the KLC is the only representative Aboriginal/Torres Strait Islander body that covers the application area, I note GeoTrack 2006/0125.

As required by s.203BE(4)(a) the certificate contain statements to the effect that KLC is 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 the reasons for KLC being of that opinion.

Having considered this document I am satisfied that this requirement under the Act is met.

Result: Requirement met

B. Merit Conditions - Section 190B

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

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

Reasons for the Decision

Schedule B of the application refers to Attachment B which describes the application area as:

The application area covers all lands and waters subject to mineral leases M80/599 and M80/600, located within Lot 703 on Deposited Plan 220061 (being also part of Doon Doon Pastoral Lease 3114/953).

Schedule C of the application refers to Attachment C of the application and is a copy of a map which includes:

- the application area depicted by a bold outline;
- the component mineral leases M80/599 and M80/600;
- cadastral boundaries and a topographic image referenced as background;
- scalebar, northpoint, coordinate grid and locality map;
- notes relating to the source, currency and datum of data used to prepare the map.

An assessment of the boundary description and map provided in GeoTrack 2006/0125 concluded that the description and the map are consistent and identify the area with reasonable certainty.

Having considered GeoTrack 2006/0125 and the application, I am satisfied that the requirements of s. 190B(2) are met.

Result: Requirement met

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

The Registrar must be satisfied that:

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

Reasons for the Decision

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

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

To satisfy s.190B(3)(b) the claim group must be described so that individuals can be readily identified objectively. In *State of Western Australia v Native Title Registrar* [1999] FCA 1591-1594 Carr J said that:

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

The delegate is of the opinion that some factual inquiry may be required to identify members of the native title claim group in this matter, that is, to identify whether a particular person is a descendant of the named ancestors. However, the delegate is of the view that this inquiry is not onerous or unreasonable, and therefore, in this instance, identification of members by reference to

biological descendants of apical ancestors is capable of satisfying the requirements of s.190B(3).

I am satisfied that the description as provided at Schedule A of the application is sufficiently clear to satisfy the requirement of s.190B(3)(b).

Result: Requirement met

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

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

Reasons for the Decision

Section 190B(4) is the imposed registration condition by reference to s.62(2)(d) of the Act, it requires the delegate to be satisfied that the description of the native title rights and interests contained in the application is sufficient to allow the rights and interests to be readily identified. Only information contained within the application may be considered for the purposes of this section (*Queensland v Hutchison* (2001) 108 FCR 575).

The delegate is of the view that for a description to be sufficient to allow the claimed native title rights and interests to be readily identified it must describe what is claimed in a clear and easily understood manner. Any assessment of whether the rights can be prima facie established as native title rights and interests will be discussed in relation to the requirement under s.190B(6) of the Act. At this stage the delegate is focussing only on whether the rights and interests as claimed are *identifiable*.

Schedule E of the application claims the right to possession, occupation, use and enjoyment of the land and waters of the claim area as against the whole world.

The applicant has claimed exclusive possession and this is sufficiently clear to be understood from the application. The delegate is therefore satisfied that the requirement of this section is met.

Result: Requirement met

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

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

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

Reasons for the Decision

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

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

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

Factual basis must support the assertions as set out in s.190B(5)(a), (b) and (c) of the Act.

Information on the current activities of the claim group alone will be insufficient to satisfy s.190B(5) of the Act. It is necessary for the applicant to sufficiently describe the relationship between the traditional laws and customs and the native title rights and interests claimed.

The interpretation of the term 'traditional' by the High Court majority in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA must be considered here. In brief, the majority held that only laws and customs that have their origins before the assertion of British sovereignty are capable of being considered

'traditional' for the purposes of s.223. This normative system must have continued to function uninterrupted from the time of acquisition of sovereignty to the time when the native title group sought determination of native title. Their Honours noted, however, that this does not mean that some change or adaptation of the laws and customs of a native title claim group would be fatal to a native title claim; rather that an assessment would need to be made to decide what significance (if any) should be attached to the fact that traditional law and custom had altered.

The test in section 190A involves an administrative decision - it is not a trial or hearing of a determination of native title pursuant to s.225, and therefore it is not appropriate to apply the standards of proof that would be required at such a trial or hearing. It is not the task of the delegate to make findings about whether or not the claimed native title rights and interests exist. It is not the role of the delegate to reach definitive conclusions about complex anthropological issues pertaining to applicant's relationship with country subject to native title claimant applications. That is a judicial enquiry. What I must do is consider whether the factual basis provided by the applicant is sufficient to support the assertion that claimed native title rights and interests exist. In particular this material must support the assertions noted in s.190B(5)(a), (b) and (c) of the Act.

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

This encompasses both past and current association with the area. Schedule G of the application provides a summary of the activities the native title claim group currently carries out in the claim area. In addition, affidavits from claim group members indicate the native title claim group's association with the claimed area in relation to their traditional law. I do not intend to quote at length all of this material, but note the following extracts:

- Peggy Patrick, 15 December 2005:
 - [at 2] I grew up in the bush with my mother...I know the Law from my mother and follow it today. The Law comes from country and tells us who speaks for country and how to look after country.

- Evelyn Hall, 3 December 2006:¹
 - [at 5] Mandangala country is hill and valley country. Gooworing is a big hill on Mandangala. It goes up through Glen Hill Station and into Doon Doon. This is still Mandangala country even though it is over the boundary from Glen Hill because all of that country

¹ On 1 March 2006 this footnote was created to note an error - the correct date of Evelyn Hall's affidavit is 3 February 2006.

belonged to Jangurangan before gardiyas [white people] came along and put their boundaries on it.

Having reviewed the information provided, I accept that the claim group is, and has been associated with the area, as required by s.190B(5)(a) of the Act.

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

Information at Schedules F and G of the application and the affidavits provide a factual basis to support the existence of traditional 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. The delegate is of the view that the affidavit material also demonstrates the traditional basis which gives rise to the claimed rights.

I do not intend to quote at length the material provided, but note the extracts above, as well as the following:

- Peggy Patrick, 15 December 2005:
 - [at 3] I have two dreamings from my mother, which she got from her mother. I have the Jimbala dreaming, which is the Bottle Spear dreaming, for Crocodile Hole to Jimbala. I also have the Lumugal dreaming, which is the Blue Tongue Lizard dreaming. The word for the dreaming is ngarrangarni or woolwah. The woolwah is the Law which we have to follow.
 - [at 5] When you have woolah for a place that means you have to follow that woolwah, that Law, for that place...Woolwah is like truth for us.
 - [at 8] Under the Law, following a woolwah, which is the Law and like a truth, means following the stories from long ago. I got that Lumugal woolwah from my mother, who got it from her mother. It goes back like that to the old people.

- John Toby, 15 December 2005:
 - [at 8] We all follow the ngarringarni, which is the Law, so we know who speaks for country and who backs up. There is always some one to look after country and make sure that it is protected and that the Law is followed. This is the way under the traditional Law and we still follow it today. We got this traditional law from our grandfathers and our other old people, and they followed it from their old people.

- Morton Moore, 15 December 2005:

- o [at 6] The wirnan is like a relationship or friendship, but it comes from the Law. The wirnan comes from a place, but then sticks to the people who have it...The wirnan is about relationships and respect and sharing.
- Evelyn Hall, 3 December 2006:²
 - o [at 3] Looking after country means that we are following the traditional Law, which we call the ngarrangarni, for that place. Following the Law also means looking after men's business and women's business and passing all the law and stories on to our children.

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

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

Under this requirement, the delegate must be satisfied that the claim group continues to hold native title in accordance with their traditional laws and customs. The affidavits supplied contain extensive material referring to the traditional law of the claim group. I note, in addition to those above, the following extracts:

- Peggy Patrick, 15 December 2005:
 - o [at 4] I still follow that Law today, because I got it from my mother, and she got it from her mother. I have passed that Law onto my kids and they will pass it onto their kids.
- Evelyn Hall, 3 December 2006:³
 - o [at 7] I have also taken my children, Ted, Jody, Maureen and Gordon, up to Goowooring where the special trees are and I have told them the tree dreaming. I have to do this under our Law. I still follow that law today.

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

Result: Requirement met

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

² On 1 March 2006 this footnote was created to note an error – the correct date of Evelyn Hall's affidavit is 3 February 2006.

³ On 1 March this footnote was created to note an error- the correct date of Evelyn Hall's affidavit is 3 February 2006.

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

Reasons for the Decision

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

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

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

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

I am of the view that each right must be viewed individually and that each must have a sufficient prima facie basis.

At Schedule E of the application the following is claimed:

1. The right to possession, occupation, use and enjoyment of the land and waters as against the whole world.
2. Subject to:
 - a. To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth of the State of Western Australia, they are not claimed by the applicants; and
 - b. The claim area does not include any offshore places.
3. The claimants do not claim native title rights and interests that have been extinguished by operation of law.

The applicant has claimed exclusive possession rights. Subject to the satisfaction of other requirements, the majority of the High Court in *Western Australia v Ward* (2002) 191 ALR 1 indicated that a claim to exclusive possession, occupation, use and enjoyment of lands and waters can, prima facie, be established. However, the Court indicated that such a claim may only be able to be prima facie established in relation to some parts of a claim area, such as those areas where

there has been no previous extinguishment of native title, or where extinguishment is to be disregarded (for example, where the applicants claim the benefit of ss.47, 47A or 47B).

The map at Attachment C of the application indicates that the entirety of the application area is within a pastoral lease, Doon Doon Station. The applicant is seeking the benefit of s.47, 47A or 47B in respect of the application area. In addition, Schedule B and E of the application makes it clear that the applicant is not seeking native title over areas where extinguishment has occurred (save for the application of s.47, s.47A, s.47B of the Act).

It is therefore my view that, prima facie, the application area may be subject to a claim of exclusive possession by the applicant. However, the applicant will need to provide information to support the prima facie establishment of this right.

The delegate notes the extracts below from the affidavit material which supports the claimed right:

- Peggy Patrick, 15 December 2005:
 - [at 6] The gardiya [European] name for that Lumugal dreaming is Pompey's Pillar. I speak for that country because I got that dreaming for that place from my mother. Speaking for country means that you are first in line and the boss for that place.
 - [at 11] I do not need to ask permission to go on to that country for the Lumugal dreaming, or for any of that country around there. I can go to that country any time I want for hunting or to sugar bag, or just to be on that country. My family can come on to that country too because they have that Lumugal dreaming as well.
 - [at 12] If a stranger wants to come on to my country we have to mantha them, which means introducing them to that country...Mantha is like permission, but it does not come from us, it comes from the woolah.
 - [at 13] Because I have got the Law for that Lumugal country from my mother I have to look after the Lumugal place and the country around it. Country near that Lumugal place has a mix, with Una Morgan, Morton More, John Toby and all their families also speaking for that country and having to look after it and protect it under the law...We also follow that Law together today...We have that country from Glen Hill side across to Pompey's Pillar under the Law, and we keep that strong up to now and also into the future.

- John Toby, 15 December 2005:
 - [at 2] I got that Mandangala country from my grandfather and am first for that country now. This means I speak for

country...That is my country under our traditional Law, which means I have responsibility to look after and protect that country.

- o [at 3] I do not need to ask anyone's permission to come on to Mandangala country, or to get any rock or plant or hunt any animal on that place.
 - o [at 4] If someone, a stranger, wants to come on to Mandangala country they have to ask permission from me and my family first. This comes from the Law and protects the stranger from country they don't know. It also protects the country from the stranger who might mess something up if they don't know that country.
- Evelyn Hall, 3 February 2006:
 - o [at 2] That is my country under our traditional Law, which means we have a responsibility to look after and protect that country. Having that country means that we are like the guardians for that place and have to look after it under our Law.
 - Morton Moore, 15 December 2005:
 - o [at 6] John Toby and I also have wirnan which goes from Lissadell Gap. The wirnan is like a relationship or friendship, but it comes from the Law...The wirnan is important for this country between Glen Hill and Pompey's Pillar because it says how John Toby and I have to respect and look after certain things. The Law says what those certain things are. I cannot say anymore about this because it would not be right under the law.

Result: Requirement met

Traditional physical connection: S. 190B(7)

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

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

Reasons for the Decision

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

Traditional physical connection is not defined in the Act. 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).

I am satisfied that the information as provided in Schedules F and G, as well as in the affidavits adequately supports the deponents continuing and previous physical connection with the area the subject of the application. I am satisfied that much of that connection occurs in accordance with traditional laws and customs. The traditional law by which the group connects to the land is emphasised in the affidavit material.

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, and therefore that the application passes this condition.

Result: Requirement met

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

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

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 the delegate has concluded that there has been compliance with s.61A.

Native Title Determination - s.61A(1)

A search of the National Native Title Register has revealed that there is no determination of native title in relation to any part of the claim area. This has been confirmed by GeoTrack 2006/0125.

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

Schedule B excludes from the application any area in relation to which a previous exclusive possession act has been done.

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

The applicant is not seeking exclusive possession over areas the subject of previous non-exclusive possession acts. The delegate notes Schedule B paragraph 5.

s.47, 47A, 47B Areas - s.61A(4)

Schedule L of the application states that Pastoral Lease 3114/953 (Doon Doon Station) is an area leased, held or reserved for the benefit of Aboriginal Peoples or Torres Strait Islanders that is occupied by or on behalf of the members of the native title claim group. The applicant seeks that the extinguishment of native title over all of the Pastoral Lease 3114/953 which is within the application area be disregarded.

The applicant has provided in Attachment L to the application title documents for Doon Doon Station pastoral lease held by the Aboriginal Lands trust of the Department of Indigenous Affairs.

Result: Requirement 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 applicant does not claim any minerals, petroleum or gas within the claim area which is wholly owned by the Crown.

Result: Requirement met

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

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

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

Reasons for the Decision

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

Result: Requirement met

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

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

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

Reasons 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 (except for that area referred to in Schedule L where the party seeks such extinguishment to be disregarded).

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.

The delegate is satisfied that the application meets the requirements of this condition.

Result: Requirement met

End of Reasons.

Attachment B: Reasons for Decisions

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

S186 (1)

- (a) **whether the application was filed in the Federal Court or lodged with a recognised State/Territory body**
Federal Court
- (b) **if the application was lodged with a recognised State/Territory body - the name of that body**
Not applicable
- (c) **the date on which the application was filed or lodged**
17 January 2006
- (d) **the date on which the claim is entered on the Register**
The date on which the decision is made.
- (e) **the name and address for service of the applicant/s**

Applicant/s:

Una Morgan, Peggy Patrick, John Toby

Address for service:

C/- Kimberley Land Council Aboriginal Corporation
PO Box 2145
Broome WA 6725

- (f) **the area of land or waters covered by the claim**
The application area covers all lands and waters subject to mineral leases M80/599 and M80/600 located within Lot 703 on Deposited Plan 220061 (being also part of Doon Doon Pastoral Lease 3114/953).
- (g) **a description of the persons who it is claimed hold the native title**
The claim is brought on behalf of those Aboriginal People of the Miriuwung, Gija and Woolah language or dialect and country the subject of the claim and who hold in common the body of traditional law and custom governing the area the subject of the claim. Those persons are:

- (a) the descendants of:
 - i. Polly Mundi, King O'Malley and Sambo Djimbilainy;
 - ii. Jangurangan / Old Jimmy McCarthy and Old Kitty; and
 - iii. Paddy Wulbalminy and Nellie Wadibarli;
- and
- (b) Persons adopted by those descendants in accordance with their traditional law and custom.

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

The right to possession, occupation, use and enjoyment of the land and waters as against the whole world. Subject to:

- (a) to the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed; and
- (b) the claim area does not include any offshore places.

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

Subject to laws and customs

S.186 (2)

The Registrar may include in the Register such other details about the claim as the Registrar thinks appropriate.

Please include:

- a copy of the area map at Attachment C of the application;
- a copy of the area description at Schedule B of the application;
- a copy of the area description at Attachment B of the application;
- a copy of the title documents at Attachment L of the application.

