National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION

DELEGATE: Mia Bailey

Application Name:	South West Boojarah #2		
Names of Applicant:	William Webb, Bertram Williams, Margaret Culbong, Wendy Williams, Donald Hayward, William Thompson, Barbara Corbett-Councillor Stammner		
Region:	South West	NNTT No.:	WC06/4
Date Application Made:	5 September 2006		
Federal Court No.:	WAD253/2006		

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

DECISION

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

Mia Bailey

Delegate of the Registrar pursuant to
s. 99 of the *Native Title Act 1993* (Cth)
the powers given under
ss. 190, 190A, 190B, 190C, 190D

Date of Decision:
6 October 2006

Brief History of the Application

The South West Boojarah #2 native title determination application ('the application') was filed in the Federal Court on 5 September 2006. A copy was forwarded to the National Native Title Tribunal ('the Tribunal') pursuant to s. 63 of the *Native Title Act 1993* (Cth) ('the Act') on 7 September 2006.

The application was filed by the South West Aboriginal Land and Sea Council ('SWALSC'), the representative body for the application area, on behalf of the Applicant. The application falls within the South West corner of Western Australia and covers an area of approximately 10,072 square kms. The application area covers an identical area to that covered by an earlier South West Boojarah application (WC98/63), with the same external and internal boundaries.

The earlier South West Boojarah application (WC98/63) was originally lodged with the Tribunal on 25 September 1998; was subsequently amended on 9 March 1999 and accepted for registration on 9 April 1999. The application was further amended on 25 October 2000. The registration test was applied to the further amended application on 20 April 2006 which resulted in a decision that the application did not satisfy all the conditions for registration. In accordance with that decision WC98/63 was removed from the Register of Native Title Claims.

Due to the relationship between WC98/63 and this application some material that was previously filed in relation to WC98/63 is relevant to this application and regard will be had that material where appropriate.

This application was filed partly in response to a s. 29 notice for which the notification date was 7 June 2006. In accordance with s. 190A(2) the Registrar or his delegate must use his/her best endeavours to finish considering the claim by the end of 4 months after the notification day specified in the s. 29 notices, that is, by 7 October 2006.

Information considered when making the Decision

In determining this application I have considered and reviewed the documents listed below:

- This application as filed in the Federal Court 5 September 2006;
- Prescribed affidavits of the Applicant pursuant to s. 62(1)(a) filed in the Federal Court 5 September 2006;
- Letter from SWALSC to the Tribunal dated 6 September 2006 enclosing three affidavits in support of registration: affidavit of [name withheld] dated 26 August 2006, affidavit of William Webb dated 26 August 2006 and affidavit of [name withheld] dated 1 September 2006.

- Affidavits previously provided to the Tribunal on 5 March 1999 in support of registration of WC98/63: affidavit of [name withheld] dated 2 March 1999 (with annexure Table G); affidavit of [name withheld] dated 4 March 1999 (with annexures Table G and Attachment M); affidavit of [name withheld] dated 4 March 1999 (with annexures Table G and Attachment M2) and affidavit of [name withheld] dated 4 March 1999 (with annexure Table G).
- The results of searches by the Tribunal's Geospatial & Mapping Unit of the Register of Native Title Claims, Federal Court Schedule of Native Title Applications, National Native Title Register and other databases in relation to the application area, namely Geospatial assessment and overlap analysis dated 6 October 2006.

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

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

Procedural fairness

Copies of the three additional affidavits provided directly to the Tribunal by SWALSC ([name withheld] dated 26 August 2006, William Webb dated 26 August 2006 and [name withheld] dated 1 September 2006) were provided to the State of Western Australia. It was requested that any comments be provided by close of business 27 September 2006. The State advised the Tribunal on 28 September 2006 that it did not intend providing any comments.

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

On 31 May 2006, Christopher Doepel, the Native Title Registrar, delegated to members of the staff of the Tribunal, including myself, all of the powers given to the Registrar under s. 99 of the Act the powers given under ss. 190, 190A, 190B, 190C and 190D.

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.

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

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

In the following decision, I test the application against each of these conditions. The procedural conditions are considered first; then I shall consider the merit conditions.

Section 190C: Procedural Conditions

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

Section 190C(2) requires the Registrar to be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by ss. 61 and 62. If the application meets all these requirements, the condition in s. 190C(2) is met.

Section 61(1): Native Title Claim Group

An application may be 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.

Result: Condition met

Reasons relating to this condition

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

I must consider whether the application sets out the native title claim group in the terms required by s. 61(1). 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 *in the application* indicates that not all persons in the native title group are included, or that it is in fact a sub-group of the native title claim group, then the requirements of s. 190C(2) would not be met and the claim could not be accepted for registration: *Attorney General of Northern Territory v Doepel* [2003] FCA 1384 ('*Doepel*') at [36].

This consideration does not involve me going beyond the information contained in 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. In saying this I refer to the following statements of Mansfield J in *Doepel*:

> My view that s. 190C(2), relevantly to the present argument, does not involve the Registrar going beyond the application, and in particular does not require the Registrar to undertake some form of merit assessment of the material to determine whether he is satisfied that the native title claim group as described is in reality the correct native title claim group, is fortified by s. 190B(3). It imposes one of the merit requirements for accepting a claim for registration: s. 190A(6)(a). Its focus also is not upon the correctness of the description of the native title claim group, but upon its adequacy so that members of any particular person in the identified native title claim group can be ascertained. It, too, does not require any examination of whether all the named or described persons do in fact qualify as members of the native title claim group. Such issues may arise in other contexts, including perhaps at the hearing of the application, but I do not consider that they arise when the Registrar is faced with the task of considering whether to accept a claim for registration (at [37]).

In light of *Doepel*, I have confined my considerations to the information contained in the application itself.

The description of the persons in the native title claim group is found in Attachment A of the application, which states:

> Subject to paragraph 4, the native title claim group comprises those Aboriginal people who are:
>
> 1. biological descendants of the unions between:-
>
> - Ryan and Wooragan, an Aboriginal woman from Augusta
> - Saul Isaacs and Dorinder, a Wardandie Aboriginal woman
> - John Herring and Elizabeth, an Aboriginal woman from Busselton
> - Billy Colbung and Nina Bayla Brockman
> - Billy Colbung and Clara Brockman
> - Billy Colbung and Cloe Wynn
> - James Wynne and Bussels Fanny
> - George Wattling and Cloe Wynn
> - Timothy Harris and Caroline 'Cleo' 'Yorjup' Mallane/Malony/Milany

- George 'John' Dawson and Rebecca, an Aboriginal woman from Busselton
- James Mippy, an Aboriginal man and Edie Ann, an Aboriginal woman from Margaret River
- Mowen Underwood and Ruby Dalgaitch; or

2. persons adopted* by the individuals named in paragraph 1 above and those persons adopted by the biological descendants of the unions between the individuals named in paragraph 1 above; or
3. those persons that are the biological descendants of the adopted persons included in paragraph 2 above.
4. The members of the native title claim group for application WC 96/41 are excluded from the native title claim group for this application. The members of that native title claim group through its authorized applicants have asserted rights and interests to certain land and waters and certain benefits under native title agreements which are inconsistent with the rights and interests claimed in this application pursuant to the traditional laws and customs acknowledged and observed by the members of the native title claim group. Accordingly it is claimed that they are not persons who acknowledge and observe the traditional laws and customs of the native title claim group, and are therefore not among those persons who hold the common or group native title rights and interests claimed (see Attachment F paragraph (iv)).
5. It is claimed in this application that all other identifiable descendants of the persons who fall within the alternative criteria listed in paragraphs 1, 2 and 3 above are all persons who do acknowledge and observe the relevant traditional laws and customs. Accordingly, the Registrar would not need to make inquiries as to whether or not a particular person who fell within one or more of those criteria did or did not acknowledge and observe those laws and customs, in order to ascertain whether that person was a member of the native title claim group.

* Adoption occurs in the following manner: if a man dies and his brother or cousin marries the widow, any of the widow's children are adopted as the children of the new husband.

I note the express exclusion of members of the Harris family claim group (WC96/41) at paragraph 4. The Harris family application is a registered

application that overlaps a small part of the application area. While the exclusion of members of the Harris family claim group may prima facie indicate that not all persons in the native title claim group are included, I am of the preliminary view that the explanation for the exclusion, as contained in Attachment A, is sufficient to satisfy me that that the requirements of s. 61(1) are met.

Based on the explanation in paragraph 4 of Attachment A, the members of the Harris family claim group are not included in the claim group description for this application because it is asserted that they are not persons who hold *in common* with the South West Boojarah #2 group the native title rights and interests in relation to the application area under the traditional laws and customs of the South West Boojarah people.

I have taken into account the fact that the Harris family claim group have filed their own application and appear to assert that they hold native title rights and interests in the area separately from others. In *Colbung v The State of Western Australia* [2003] FCA 774, an application to strike out certain applications (including the Harris family application) on the basis of non-compliance with the requirements of s. 61(1), Finn J made the following comments at [24] in relation to the Harris family application:

> … While the group does not claim that it alone has native title rights in the claim area, I do not consider that the application asserts other than that the *particular rights and interests claimed* by the Harris family group are held in virtue of their membership of that group and that group alone… [emphasis added]

In the circumstances of this application, I am of the view that the exclusion of the Harris family claim group does not prevent compliance with the requirements of s. 61(1) as they are not persons who hold *in common* with the claim group for this application the native title rights and interests in relation to the application area.

For these reasons, I am satisfied that the description of the persons in the native title claim group meets the requirement in s. 61(1), as imposed by s. 190C(2).

Section 61(3): Name and address of service for Applicant

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

Result: Condition met

Reasons relating to this condition

The name and the address for service of the Applicant appear at Part B of the application.

Section 61(4): Native title claim group named or described sufficiently clearly

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 describe the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

Result: Condition met

Reasons relating to this condition

Attachment A of the application describes the native title claim group as set out above under my reasons relating to s. 61(1). For the reasons that led to my conclusion below 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.

Section 61(5): Application is in prescribed form

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.

Result: Condition met

Reasons relating to this condition

Sub-section 61(5)(a)

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

Sub-section 61(5)(b)

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

Sub-section 61(5)(c)

The application meets the requirements of s. 61(5)(c) as, for the reasons outlined below in relation to s. 62, it does contain the information prescribed by s. 62.

Sub-section 61(5)(d)

As required by s. 61(5)(d), the application is accompanied by the prescribed documents, being the Applicant affidavits prescribed by s. 62(1)(a). I refer to my reasons in relation to s. 62(1)(a) below.

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

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

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

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

Result: Condition met

Reasons relating to this condition

Section 62(1)(a) provides that the application must be accompanied by an affidavit sworn/affirmed by the Applicant in relation to the matters specified in sub-paragraphs (i) through to (v). To satisfy the requirements of s. 62(1)(a) the persons comprising the Applicant may jointly swear/affirm an affidavit or alternatively each of those persons may swear/affirm an individual affidavit.

The application is accompanied by affidavits of each person jointly comprising the Applicant, namely:

- William James Webb affirmed 26 August 2006;
- Donald William Hayward affirmed 26 August 2006;
- Bertram Bernard Williams affirmed 26 August 2006;
- William Arthur Thompson affirmed 26 August 2006;
- Margaret Culbong affirmed 26 August 2006;

- Barbara Corbett-Councillor Stammner affirmed 26 August 2006; and
- Wendy Williams affirmed 26 August 2006.

Each of these affidavits are signed by the deponent and witnessed. I am satisfied that each of the affidavits sufficiently address the matters required by s. 62(1)(a)(i)-(v).

I find that the application satisfies the requirements of s. 62(1)(a).

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

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

Section 62(1)(c): Details of physical connection and prevention of access

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

Result: Details provided

Comment on details provided

Schedule M refers to Attachment M which provides details of the traditional physical connection of William Webb, a member of the claim group, with the application area.

Schedule N states that there are currently no details available in which a member of the native title claim group has been prevented from gaining access to any of the land or waters covered by this application.

Section 62(2)(a)(i): Information about the boundaries of the application area

Information, whether by physical description or otherwise, that enables the boundaries of the area covered by the application to be identified.

Result: Condition met

Reasons relating to this condition

Schedule B of the application refers to Attachment B which contains a written description of the external boundaries of the application area. Schedule C refers to Attachment C being a map titled, "South West Boojarah Native Title Claim", and dated 3 November 1998. For the reasons which led to my conclusion, below, that the requirements of s. 190B(2) have been met, I am satisfied that the information contained in the application is sufficient to enable the external boundaries of the claim area covered by the application to be identified. I refer to my reasons under s. 190B(2) below.

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

Result: Condition met

Reasons relating to this condition

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

Section 62(2)(b): Map of the application area

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

Result: Condition met

Reasons relating to this condition

Schedule C of the application refers to Attachment C, which consists of a map showing the external boundaries of the claim area. 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 claim area. I refer to my reasons under s. 190B(2) below.

Section 62(2)(c): Details and results of searches

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.

Result: Condition met

Reasons relating to this condition

Schedule D refers to Attachment D which states:

> The applicants are aware that the following searches have been carried out by the State of Western Australia in order 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:
>
> Searches in relation to "Land Act Leases as at 22/10/98" and "Land Act Reserves" are attached at Page "1 of 4" to "Page 24 of 24".

Attachment D includes copies of search results from the Land Claims Mapping Unit dated 19 November 1998, labelled as "Page 1 of 4" to "Page 4 of 4" and then "Page 5 of 24" through to "Page 24 of 24". In preliminary assessment comments to SWALSC dated 1 August 2005, in relation to the further amended application WC98/63 (for which Attachment D was identical to this application), I queried whether pages 1 to 5 of the 24 page document were missing or whether there may be an error in the page referencing.

In response, SWALSC stated in its letter dated 23 September 2005 that:

> Attachment D to this application appears to be a single document of 24 pages dated 19 November 1998 which contains some eccentric pagination. It is respectfully submitted that any ambiguity regarding this issue should be resolved in favour of the applicant.

I am satisfied with SWALSC's explanation of the pagination at Attachment D. In the circumstances, I am satisfied that the application satisfies the requirements of s.62(2)(c).

Section 62(2)(d): Description of native title rights and interests claimed

The application contains a description of native title rights and interests claimed in relation to particular lands and waters (including any activities in exercise of those rights and interests), but

not merely consisting of a statement to the effect that the native title rights and are all native title rights and interests that may exist, or that have not been extinguished, at law.

Result: Condition met

Reasons relating to this condition

Schedule E refers to Attachment E which contains a description of the claimed rights and interests which does not merely consist of a statement to the effect that the native title rights and interests claimed are all the native title rights and interests that may exist, or that have not been extinguished, at law.

I am satisfied that the requirements of s. 62(2)(d) are met.

Section 62(2)(e): Description of factual basis

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.

Result: Condition met

Reasons relating to this condition

Schedule F of the application refers to Attachment F together with Table F which contains information in support of a factual basis for the native title rights and interests claimed and the particular assertions in s. 62(2)(e).

I am satisfied that the application contains sufficient information to satisfy this procedural condition.

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

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

Result: Condition met

Reasons relating to this condition

Schedule G refers to Attachment G which contains a list of the native title rights and interests claimed (as per Attachment E) and the activities which members of the native title claim group have continuously carried out on the land and waters in the claim area that relate to those claimed rights and interests. I set out the details of Attachment G in relation to my reasons under s. 190B(6) below.

I find that the information provided in Schedule G of the application satisfies the requirements of s. 62(2)(f).

Section 62(2)(g): Details of other applications

The application contains details of any other application 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 a part of the application area and that seek a determination of native title or compensation in relation to native title

Result: Condition met

Reasons relating to this condition

Schedule H refers to Attachment H, which states, "The Applicants have been advised by the National Native Title Tribunal that the following applications (listed below) to the High Court, Federal Court or a recognized State/Territory body have been made in relation to the whole or a part of the area covered by this application and that seek a determination of native title or a determination of compensation in relation to native title." Attachment H then lists the following applications:

- Harris (WC96/41)
- South West Boojarah (WC98/63)
- Single Noongar Claim (Area 1) (WC03/06)
- Single Noongar Claim (Area 2) (WC03/7)

An overlap assessment in relation to the application area undertaken by the Tribunal's Geospatial Unit, dated 6 October 2006, confirms that the above applications are those that fall within the application area.

I am satisfied that the procedural requirements of s. 62(2)(g) are met.

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

Details of any s. 29 notices given pursuant to the amended Act (or notices given under a corresponding State/Territory law) in relation to the area, of which the Applicant is aware.

Result: Condition met

Reasons relating to this condition

Schedule I of the application refers to Attachment I, which states:

> The Applicants have been advised by the Department of Minerals and Energy that the following notices under section 29 of the Act (or under a corresponding provision of a law of a State or Territory) have been given and relate to the whole or a part of the area covered by this application.

Attachment I then lists details of three s. 29 notices, one of which has a notification date of 7 June 2006 and the other two having notification dates of 5 July 2006.

An overlap assessment undertaken by the Tribunal's Geospatial Unit as at 6 October 2006 lists 110 s. 29 or equivalent notices, as notified to the Tribunal, that fall within the external boundary of the application area as at that date. I note that many of the notices listed are no longer current, that is, that the four month period following the notification date specified in the notice, during which the Registrar is required to use 'best endeavours' to consider the claim, has expired.

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 section which states, "Notices under s.29 are relevant to subsection 190A(2)", and the wording of s.190A(2) itself, make it reasonably clear that the purpose of this condition is to ensure that the Registrar is aware that the claim is affected by the relevant notice and therefore expedited the testing of the application as required by s.190A(2). In this case the Tribunal is aware of relevant s.29 notices.

In my view it would be unduly harsh, in the circumstances, to refuse registration of an application on the basis that the application did not contain details of all s.29 notices in relation to the area. I am satisfied that the application meets the requirements of this condition.

Section 190C(2): Combined decision

Aggregate result: Condition met

Reasons relating to this condition

For the reasons outlined above, I am satisfied that the application meets the requirements of s. 190C(2).

Section 190C(3): Common claimants in overlapping claims

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 s. 190A.

Result: Condition met

Reasons relating to this condition

The Geospatial overlap analysis of the application area dated 6 October 2006 identifies one application as per the Register of Native Title Claims that falls within the external boundary of this application: Harris Family (WC96/41).

I note that WC96/41 was entered on the Register of Native Title Claims on 3 April 1996.

In accordance with the principles set out in *Western Australia v Strickland* [2000] FCA 652, an application lodged prior to 30 September 1998 is to be regarded as having been 'made' on the date it was lodged with the Tribunal. This application was lodged with the Tribunal on 25 September 1998 and therefore this is the relevant date when considering the application for the purposes of s. 190C(3).

At the time this application was made (5 September 2006), the Harris Family application was on the Register. It is therefore necessary to consider whether there are common claimants between this application and the Harris Family application.

It is clear from the claim group description at Attachment A of this application (as extracted above under s. 61(1)) that members of the Harris family claim group are excluded from the South West Boojarah #2 claim group. I am therefore satisfied that there are no common claimants between this application and the overlapping Harris family application.

I am satisfied that the application does not infringe the provisions of s. 190C(3).

Section 190C(4): Application is authorised/certified

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

(a) the application has been certified under s. 203BE(2) 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.

Result: Condition met

Reasons relating to this condition

The application is not certified pursuant to s. 190C(4)(a). Therefore I must be satisfied that the application meets the requirements of s. 190C(4)(b). Authorisation is defined in s. 251B and provides, in summary, that where there is a process of decision-making under traditional law and custom for authorising things of this kind then that process must be complied with (s. 251B(a)). Where there is no such process, the native title claim group may authorise the Applicant in accordance with a process of decision-making agreed to and adopted by the group (s. 251B(b)).

It is clear as a matter of law that the requirement that the Applicant be authorised by 'all the persons' in the native title claim group does not necessarily mean that each and every member of the claim group must authorise the Applicant[1]. The Act simply requires all those persons who need to authorise an Applicant according to traditional law and custom, or an agreed and adopted process, do so. There may well be individual members of the claim group who for one reason or another are incapable of authorising an Applicant, for example because

[1] *Moran v Minister for Land and Water Conservation for the State of NSW* [1999] FCA 1637, per Wilcox J. Refer also O'Loughlin J, *Quall v Risk* [2001] FCA 378 at [33-34].

they are of unsound mind, ill, or unable to be located, or are disinclined to do so for whatever reason.

There are two limbs to s. 190C(4)(b) compliance. Firstly, the Registrar must be satisfied that the Applicant is a member of the native title claim group. Under the second limb the Registrar must be satisfied that the Applicant is authorised by all the other persons in the native title claim group to make the application and deal with matters arising in relation to it. In accordance with s. 190C(5) the Registrar cannot be satisfied of compliance with s. 190C (4)(b) 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 sets out the grounds on which the Registrar should consider that it has been met.

Information regarding authorization is contained in Attachment R, the s. 62(1)(a) affidavits of the Applicant and the affidavit of [name withheld] dated 1 September 2006.

1st limb – the applicant is a member of the native title claim group

Attachment R includes a statement that:

> The persons who jointly comprise the applicant for this application are members of the native title claim group, and have been authorized to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

I am satisfied that the first limb of s. 190C(4(b) is met.

2nd limb – the applicant is authorised to make the application and to deal with matters arising in relation to it

I refer to the above statement in Attachment R which also addresses the 2nd limb of s. 190C(4)(b). Each of the s. 62(1)(a) affidavits of the Applicant (at para. 5) also contain a statement that:

> I am authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it.

I am satisfied that the application includes a statement to the effect that the second limb of the authorisation condition is met, as required by s. 190C(5)(a).

I am also satisfied that the application briefly sets out the grounds on which the Registrar should consider that the second limb of the authorisation condition has been met, as required by s. 190C(5)(b). I am of the view that this requirement is

satisfied by information provided in Attachment R and the affidavit of [name withheld].

I will now proceed to consider whether I am satisfied that the second limb of the authorisation condition has been met. In doing so, I note that I am not confined to the information provided in the application and accompanying affidavits (*Western Australia v Strickland* [2000] FCA 652 at [28] and [78]).

The s. 62(1)(a) affidavits of the Applicant each contain a statement (at para. 6) as to the basis upon which they are authorized:

> The basis on which I am authorized … is that a decision was made at a meeting of the native title claim group held at Baardi Mia in Busselton on Saturday 26 August 2006 to authorise myself those persons who comprise "the applicant" for the application (including myself) to make and deal with the application, with this decision being made pursuant to a decision-making process which was agreed to and adopted for that purpose at the meeting of 26 August 2006.

Attachment R also refers to the authorization decision being made at a meeting of the claim group at Baardi Mia in Busselton on Saturday 26 August 2006. Attachment R states that there is no traditionally mandated decision making process that must be complied with and that the decision was made pursuant to a decision making process which was agreed to and adopted at the meeting of 26 August 2006.

The affidavit of [name withheld], a Senior Anthropologist employed with SWALSC, dated 1 September 2006 contains detailed information regarding the authorization process. I note the following information from the affidavit:

- The process used to identify members of the claim group for the purpose of providing notice of the authorization meeting is described (para. 4).
- This process resulted in a list of names and addresses of 278 members of the claim group. A copy of a meeting notice (which is included as Annexure B) was posted to each of these 278 people during the week commencing 7 August 2006. Thirty-one of these notices were returned to SWALSC unopened. Further enquiries resulted in correct addresses being obtained for 23 of those 31 persons and copies of the meeting notices were posted to each of these 23 people in the week commencing 14 August 2006 (para. 5).
- SWALSC placed newspaper advertisements (copies are included as Annexure C) for the authorization meeting in 5 newspapers that circulate

within the application area, which were published between 9 to 17 August 2006. This led to a further 15 meeting notices being mailed (para. 6).

- Mr [name withheld] attended to authorization meeting and was involved in maintaining an attendance list and checking that all attendees could establish a connection with the named ancestors (at Attachment A of the application). Mr [name withheld] states that he is certain that none of the members of the Harris family claim group sought to attend the meeting (para. 8).
- A copy of the attendance list is provided as Annexure E. Mr [name withheld] states that meeting participants can be traced back to one or more of the pairs of apical ancestors (as set out in Attachment A) as set out in para. 9.
- Bertram Williams (one of the named Applicants) did not sign the attendance list (at Annexure E). Mr [name withheld] states that Mr Williams did attend the meeting and notes that he filled in the form providing basic genealogical information (marked as Annexure D). A copy of that signed form is included as Annexure F (para. 10).
- A number of documents were made available to meeting participants including an agenda, copies of Attachments A and E of the application, an A4 colour version of the map of the application area and a description of the Harris family claim group (para. 12).
- There was discussion of the background to the making of the proposed new application, the claim group description, the exclusion of members of the Harris family group and the external boundaries of the application area (para. 14). There was then discussion about the nature of the decision making process. There was "widespread support" for the proposition that there was no traditional decision making process that had to be followed under the laws and customs of the claim group (para. 15).
- Mr [name withheld] states that he is of the opinion that there is no process of decision making that, under the traditional laws and customs of the group, must be complied with in relation to authorizing the making and dealing with applications for determinations of native title (para. 16).
- The meeting attendees expressed a firm view that there was no traditional decision making process which had to be followed. Simon Blackshield of SWALSC advised the meeting that the Act would recognize decisions made in accordance with an agreed and adopted decision making process.

The meeting then decided by acclamation to adopt a decision making process whereby decisions were made by majority vote (para. 17).

- Mr [name withheld] observed the following decisions being made, pursuant to the agreed and adopted decision making process. It is noted that there was considerable discussion preceding each of these decisions which explains the slight differences in voting numbers as some people left the room between resolutions:
    - That the claim group description for the new claim is approved – carried 45 for, nil against, 3 abstaining.
    - That we approve lodging the new application over land and waters within the external boundaries of the map shown to this meeting – carried 43 for, 4 against, nil abstaining.
    - That the native title claim group for the new South West Boojarah application authorizes the following people to make and deal with the application on behalf of the native title claim group: Wendy Williams, Bill Webb, Don Hayward, Bill Thompson, Margaret Culbong, Barbara Corbett-Councillor Stammner, Bertram Williams – carried 42 for, 1 against, nil abstaining (para's 18 and 19).

Based on the material provided, I am of the view that the Applicant is authorized to make the application and deal with matters arising in relation to it by all the other persons in the native title claim group.

I am satisfied, based on the material before me, that all reasonable steps were taken to advise members of the claim group of the authorization meeting. The information in the affidavit of [name withheld] indicates that the notification process for the authorization meeting was comprehensive and thorough, involving individual notices and newspaper advertisements.

It appears that 285 meeting notices were successfully mailed to people who were identified as potentially being members of the claim group. Based upon the attendance list, at Annexure D to Mr [name withheld] affidavit, it appears that 54 people attended the authorization meeting. The fact that not all members of the claim group attended the meeting does not necessarily invalidate the authorization decision. In this regard, I note the following comments of Stone J in *Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of NSW* [2002] FCA 1517 ('*Lawson*'), an application under s. 66B of the Act, at [25] to [27]:

> …s. 251B specifies what is required to establish that "all the persons in a native title claim … **authorize** a person or persons to make a native title

> determination application"… The effect of the section is to give the word "all" a more limited meaning than it might otherwise have… In s. 251B(b) there is no mention of "all" and, in my opinion the subsection does not require that "all" the members of the relevant claim Group must be involved in making the decision… It is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision making process.
>
> The evidence shows that all reasonable steps were taken to advise members of the Claim Group of the proposed meeting… In the absence of evidence to the contrary I am prepared to accept that those who did not participate chose not to be involved in the decision-making of the Claim Group.

As noted by Kiefel J in *Butchulla People v State of Queensland* [2006] FCA 1063, "the NTA does not require that all members of the claim group be present (*Lawson* at [25]) or that all persons present agree (*Moran v Minister of Land and Water Conservation for NSW* [1999] FCA 1637 at [48])".

The information in Mr [name withheld] affidavit further indicates that the decision to authorize the Applicant to make the application and deal with matters arising in relation to it was validly made in accordance with the agreed and adopted decision-making process, being by majority vote.

I am therefore satisfied that the requirements of the second limb of s. 190C(4)(b) have been met.

In conclusion, I am satisfied that the requirements of s. 190C(4)(b) are met.

Section 190B: Merit Conditions

Section 190B(2): Identification of application area

The Registrar must be satisfied that the information and map contained in the application as required by ss. 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

Result: Condition met

Reasons relating to this condition

External Boundaries

Schedule B of the application refers to Attachment B, which describes the application area by an external boundary description bounded by the Low water

mark and a series of coordinate points and includes a number of general exclusions.

The general exclusions are detailed under the heading "Internal Boundaries" and include, in summary:

- Any areas covered by Category A past acts as defined in s. 229;
- Any areas covered by Category A intermediate period acts as defined in s. 232B;
- Any areas in relation to which a previous exclusive possession act, as defined in s. 23B, was done;
- Any areas in relation to which native title rights and interests have otherwise been extinguished.

Attachment B also states that the above exclusions are subject to such of the provisions of ss. 47, 47A and 47B as apply to any part of the application area, "particulars of which will be provided prior to hearing but which include areas that are occupied by one or more of the native title claim group and may be listed in Schedule L at a later date." I note that no such details are listed in Schedule L of the application.

Schedule C refers to Attachment C, which is a reduced monochrome copy of a map prepared by the Land Claims Mapping Unit, WALIS dated November 1998 and includes:

- The application area depicted by a bold outline and hachured;
- Underlying tenure colour coded and referenced in the Legend;
- Scalebar, north point, locality map and notes the source of the base data used to prepare the map.

The Tribunal's Geospatial Unit assessed the map and written description and concluded in its assessment dated 6 October 2006 that:

> The description and map filed with this application are the same as that filed with WAD6279/98 South West Boojarah (WC98/63). That description and map has been previously assessed in April 1999, May 2003, July 2005 and August 2006. It was noted in each of those assessments that a number of coordinate points at the beginning of the description had been repeated. This issue has not been addressed in the description used for this application either.
>
> This aside the description and map are consistent and identify the application area with reasonable certainty.

For these reasons, I am satisfied that the information contained in the application describes the external boundaries of the area covered by the application with reasonable certainty.

I am of the view that the stated exclusion by class amounts to information that enables areas not covered by the application to be identified with reasonable certainty. In some cases, research of tenure data held by the State of Western Australia may be required, but nevertheless it is reasonable to expect that the task can be done on the basis of information provided by the applicant.

For these reasons, I am satisfied that the description in the application of areas not covered by the application complies with s. 190B(2) and s. 62(2)(a)(ii).

To conclude, I am satisfied that the information and the maps required by paragraphs 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights or interests are claimed in relation to particular areas of the land or waters. In my opinion, the requirements of s. 62(2)(a), s. 62(2)(b) and s. 190B(2) are met.

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

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.

Result: Condition met

Reasons relating to this condition

In *Doepel* at [51], Mansfield J stated that:

> The focus of s. 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group. Section 190B(3) has two alternatives. Either the persons in the native title claim group are named in the application: subs 3(a). Or they are described sufficiently clearly so it can be ascertained whether any particular person is in that group: subs (3)(b). Although subs (3)(b) does not expressly refer to the application itself, as a matter of construction, particularly having regard to subs (3)(a), it is intended to do so.

And at [37], Mansfield J states that the focus of s. 190B(3) is not "upon the correctness of the description of the native title claim group, but upon its

adequacy so that the members of any particular person in the identified native title claim group can be ascertained."

Mansfield J also states at [16] that s. 190B(3) has "requirements which do not appear to go beyond consideration of the terms of the application." In accordance with these comments I have confined my considerations to the information contained in the application itself.

The description of the persons in the native title claim group is found in Attachment A of the application as set out above under s. 61(1).

Schedule A does not name the persons in the native title claim group for the purposes of s. 190B(3)(b). I must therefore be satisfied that the requirements of s. 190B(3)(b) are met, namely 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. In accordance with *Doepel* that description must appear in the application itself.

In my view, s. 190B(3)(b) requires that an objective method of determining who is in the claim group be described in the application. The fact that some factual inquiry may be required to ascertain whether or not a person is in a claim group does not mean that the group has not been sufficiently described: *Western Australia v Native Title Registrar* (1999) 95 FCR 93 at [67].

In *Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732 at [25] – [27], Carr J stated that the test under s. 190B(3)(b) is whether the group is described sufficiently clearly so that it can be ascertained whether any particular person is in the group, i.e. by a set of rules or principles. However, this does not necessarily mean that any formula will be sufficient to meet the requirements of s. 190B(3)(b). It is for the Registrar or his delegate to determine whether or not the description is sufficiently clear and the matter is largely one of degree with a substantial factual element.

I accept that the description of the native title claim group in Attachment A, in terms of named apical ancestors and their biological and adopted descendants, is acceptable under s. 190B(3)(b). By referencing the identification of members of the native title claim group to named apical ancestors, I am of the view that it is possible to objectively verify the identity of members of the claim group, such that it can be clearly ascertained whether any particular person is in the group. I note that the description of the claim group at Attachment A includes a clear explanation of how persons may be adopted into the group.

For the above reasons I am satisfied that the requirements of s. 190B(3)(b) are met.

Section 190B(4): Native title rights and interests claimed are readily identifiable

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

Result: Condition met

Reasons relating to this condition

Attachment E of the application sets out the claimed native title rights and interests as follows:

The Qualifications

The applicants claim in relation to the claim area, including land and waters, the native title rights and interests set out below ("The Rights and Interests") subject to the following qualifications.

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

(ii) To the extent that the native title rights and interests claimed may relate to waters in an offshore place, those rights and interests are not to the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under international law in relation to the whole or any part of the offshore place.

(iii) The applicants do not make a claim to native title rights and interests which confer possession, occupation use and enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in s.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 s.23I in relation to the act. Without limiting the foregoing, the applicants specifically exclude all enclosed pastoral lands and mining lease lands where extinguishment of native title has occurred.

(iv) Paragraph (iii) above is subject to such of the provisions of ss.47, 47A and 47B of the NTA as apply to any part of the area contained within this application, particulars of which will be provided prior to hearing but which include such areas as may be listed in Schedule L.

(v) The native title rights and interests claimed are subject to any valid rights created under the common law or a law of the State or the Commonwealth.

The Rights and Interests

Subject to the above qualifications, the rights and interests claimed in relation to the claim area, including land and waters, are:

(a) rights and interests to exclusively possess, occupy, use and enjoy the area;
(b) the right to make decisions about the use and enjoyment of the area;
(c) the right of access to the area;
(d) the right to control the access of others to the area;
(e) the right to use and enjoy resources of the area;
(f) the right to control the use and enjoyment of others of resources of the area;
(g) the right to maintain and protect places of importance under traditional laws, customs and practices in the area;
(h) the right to rear and teach children in their country;
(i) the right to live on and erect residences and other infrastructure on the land;
(j) the right to trade in resources of the area;
(k) the right to manage, conserve and look after the land, water and resources, including locating and cleaning water sources and drinking water on the land.

Section 190B(4) requires the Registrar or his delegate to be satisfied that the description contained in the application of the claimed native title rights and interests is sufficient to allow the rights and interests to be readily identified. For the purposes of the condition, then, only the description contained in the application can be considered.[2]

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

[2] *Queensland v Hutchinson* (2001) 108 FCR 575 and *Doepel* at [16].

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 applications that describe native title rights and interests in a manner that is vague or unclear.

It may be argued that the use of the phrases 'native title' and 'native title rights and interests' in s. 190B(4) are used to exclude any rights and interests that are claimed but are not native title rights and interests as defined by s. 223.

Section 223(1) states:

> 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.

On this basis it may be argued that rights and interests that have been found by the courts to fall outside the scope of s. 223 are not 'readily identifiable' for the purposes of s. 190B(4). On another view, s. 190B(4) is only intended to cover those rights and interests that are not readily identifiable in the sense of being unintelligible or not understandable. On this view, rights that fall outside the scope of s. 223 should be considered under s. 190B(6) as not able to be 'prima facie' established. I have adopted the latter interpretation and will consider those rights that fall outside the scope of s. 223 under s. 190B(6) below.

I have considered the description of native title rights and interests in Schedule E and am satisfied that the rights and interests claimed by the applicants are readily identifiable for the purposes of s.190B(4).

I am satisfied that the requirements of s. 190B(4) are met.

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

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.

Result: Condition met

Reasons relating to this condition

For satisfaction of s. 190B(5), the Registrar (or his delegate) is not limited to consideration of statements contained in the application (as for s. 62(2)(e)) but may refer to additional material supplied to the Registrar under this condition: *Martin v Native Title Registrar* [2001] FCA 16 and *Doepel* at [16]. Regard will be had to the application as a whole; subject to s. 190A(3); regard may also be had to relevant information that is not contained in the application. The provision of material disclosing a factual basis for the claimed native title rights and interests is the responsibility of the applicant. It is not a requirement that the Registrar (or his delegate) undertake a search for this material: *Martin v Native Title Registrar* per French J at [23].

In *Queensland v Hutchinson* (2001) 108 FCR 575, Kiefel J said that "[s]ection 190B(5) may require more than [s62(2)(e)], for the Registrar is required to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to assert a wider consideration of the evidence itself, and not of some summary of it." For each native title right or interest claimed, there should be some factual material that demonstrates the existence of the traditional law and custom of the native title claim group that gives rise to the right or interest.[3]

In *Doepel*, Mansfield J stated at [17] that:

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the 'factual basis on which it is asserted' that the claimed native title rights and interests exist 'is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts.

[3] See *Western Australia v Ward* (2002) 191 ALR at [382].

In essence, I must be satisfied, pursuant to s. 190B(5), that a sufficient factual basis is provided to support the assertion that the rights and interests claimed in the application exist. In particular, I must be satisfied that the factual basis provided is sufficient to support the assertions that:

- the native title claim group have, and their predecessors had, an association with the area claimed;
- the traditional laws and customs, acknowledged and observed by the native title group exist, and
- the native title claim group continue to hold native title in accordance with those traditional laws and customs.

In considering the application as required by this section I have also relied upon the High Court's decision in *Members of the Yorta Yorta Aboriginal Community v State of Victoria [2002] HCA 58 ('Yorta Yorta'),* particularly those passages at [50] to [56] and again at [82] to [89]. In that 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 an apparent revitalisation of the normative system because the laws and customs would then be those of the 'new' society. 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 necessarily 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 court at [50] emphasized the importance of the continuity of the society or group having those 'normative' laws and customs:

> To speak of rights and interests possessed under an identified body of laws and customs is, therefore, to speak of rights and interests that are the creatures of the laws and customs of a particular society that exists as a group which acknowledges and observes those laws and customs. And if the society out of which the body of laws and customs arises ceases to exist as a group which acknowledges and observes those laws and customs, those laws and customs cease to have continued existence and vitality. Their content may be known but if there is no society which acknowledges and observes them, it ceases to be useful, even meaningful, to speak of them as a body of laws and customs acknowledged and observed, or productive of existing rights or interests, whether in relation to land or waters or otherwise.

As noted by Mansfield J in *Risk v NT of Australia* [2006] FCA 404 at [57]), the requirement for continuity of connection is not absolute. In this regard, his Honour refers to the following statements from *Yorta Yorta*:

> …demonstrating some change to, or adaptation of, traditional law or custom or some interruption of enjoyment or exercise of native title rights or interests in the period between the Crown asserting sovereignty and the present will not necessarily be fatal to a native title claim… The key question is whether the law and custom can still be seen to be a traditional law and traditional custom. Is the change or adaptation of such a kind that it can no longer be said that the rights or interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples… (at [83]).

It must be shown that, "the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout that period as a body united by its acknowledgment and observance of the laws and customs" (*Yorta Yorta* at [89]).

Material which addresses the requirements of s. 190B(5) is contained in Attachment F, Table F, Attachment G, Attachment M and affidavits of members of the claim group as detailed below.

I turn now to the particular assertions of this section:

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

Attachment F includes the general assertion that:

- The native title claim group and their ancestors have, since the assertion of British sovereignty possessed, occupied, used and enjoyed the claim area.

Table F includes the following statements, in support of the assertion in s.190B(5)(a):

- The claimants are descended from Aboriginal people who occupied, used and enjoyed the claim area at the time of British sovereignty.
- This descent is generally biological however in some cases a person has been adopted into the group.
- Because of the above traditional links to country, individuals place great importance on connections of their families and themselves to the area. Many of the claimants have tried to live most of their lives in their country; the place they call home. This country is the home grounds of their parents, grandparents, great grandparents etc.
- As these connections have existed for longer than white settlement, these ties are not with a particular town, but to an area of land upon which a number of towns may now be located.
- This land is regarded as the traditional family lands of certain Aboriginal people who are the custodians of the land. It is clearly recognised amongst Noongar families which Aboriginal people 'speak for' or are custodians of certain areas of this country, a fact that is usually well known, recognised and respected among the other Noongar families in adjacent areas.

Attachment G sets out a list of the native title rights and interests claimed in Schedule E and "the activities which members of the native title claim group have continuously carried out on the land and waters" that relate to those rights and interests. For example in regard to the right to possess, occupy, use and enjoy the area, the activities listed include:

- the existence of a permission rule relating to land, waters and resources;
- camping on country;
- travelling around country; and
- taking the children and young adults to country.

In regard to the claimed right of access to the area, the activities listed include visiting waterholes, rivers, estuaries, freshwater springs and surrounding environments; visiting sacred sites; visiting current and former campsites; visiting places of importance to Aboriginal people as identified by elders and visiting coastal and riverine areas.

Information in support of members of the claim group and their predecessors having an association with the application area is contained in the affidavits of [name withheld] dated 26 August 2006, William Webb dated 26 August and the affidavits of [name withheld] dated 2 March 1999 (with annexure Table G);

[name withheld] dated 4 March 1999 (with annexures Table G and Attachment M); [name withheld] dated 4 March 1999 (with annexures Table G and Attachment M2) and [name withheld] dated 4 March 1999 (with annexure Table G). The last four of these affidavits were provided to the Tribunal in 1999 in support of application WC98/63. I note, by way of example, the following statements:

- William Webb states that he was born in 1952, his mother is [name withheld] and his father was [name withheld], he has "lived within the area covered by the application for pretty much [his] whole life", he lives on his family's country and still goes camping and visits sites in his family's country with his family and children. Mr [name withheld] provides many examples of his association with the application area including living on the application area, accessing the area to camp, hunt, fish and gather bush tucker and visiting and maintaining special sites within the area.
- [Name withheld] states that he has "lived in the claim area for most of [his] life" and frequently visits sites within his country including sites around Yallinup, Busselton and Lake Jasper. Mr [name withheld] provides details of his ancestors back to his "great great great great grandparents" - John [name withheld] and Elizabeth an Aboriginal woman from Busselton. Mr [name withheld] states that over "the years the Aboriginal people of the South West Boojarah claim area have maintained physical contact and pursued traditional uses of the area, in large part to ensure ourselves a spiritual home after death."
- [Name withheld] states that she was born in Busselton in 1919 and has lived in the claim area for most of her life. Mrs [name withheld] provides details of her ancestors back to her great grandparents; her great grandmother on her father's side being a "full blood Aboriginal woman from Busselton." Mrs [name withheld] further states: "I am descended from [name withheld] and [name withheld] who were on the land at the time of European settlement. I am in the oldest living generation of my family and possess knowledge of the Noongar Way that I received from my elders…"

I am of the view that the asserted facts are sufficient to support the assertion at s. 190B(5)(a) that the native title claim group have, and their predecessors had, an association with the area.

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

This subsection requires me to be satisfied of the factual basis on which it is asserted that there exist traditional laws and customs; that those laws and customs are respectively acknowledged and observed by the native title claim group.

Attachment F includes the following general assertions:

- Such possession, occupation, use and enjoyment has been pursuant to and possessed under the laws and customs of the claim group, including traditional laws and customs that rights and interests in land and waters vest in members of the native title claim group on the basis of:
    - (a) descent from ancestors connected to the area;
    - (b) traditional religious knowledge of the area;
    - (c) traditional knowledge of the geography of the area;
    - (d) traditional knowledge of the resources of the area; and
    - (e) knowledge of traditional practices of the area.
- Such traditional laws and customs have been passed by traditional teaching, through the generations preceding the present generations to the present generations of persons comprising the native title claim group.
- The native title claim group continues to acknowledge and observe those traditional laws and customs.
- The native title claim group by those laws and customs have a connection with the land in respect of which the claim is made.

Table F includes the following statements in support of the assertion at 190B(5)(b):

- The rights and interests of the Aboriginal people of the South West Boojarah claim area are derived from the dictates of a number of traditional laws and customs that are still in existence. There exists a set of inter-related laws and customs that create what *Noongar* people refer to as *Noongar Way*.
- One component includes the custodianship of sites. These sites can be viewed in two ways; they are places that have living cultural significance to Aboriginal people today, and/or they may be places that provide physical evidence of past Aboriginal occupation and land use. These sites

can be of historical, spiritual or cultural significance to Aboriginal people. This includes such places as caves and waterholes.

- Another aspect of the *Noongar Way* is the importance of elders within the community. These elders may be either male or female and have the 'right to speak' for their country with strong responsibilities towards their families and family lands. A person might be an elder by reason of descent; usually they are the oldest living member of a family who has formal traditional rights and responsibilities for the land. Alternatively, a person may be nominated as an elder for a particular region by relevant Aboriginal communities or organizations in an area.
- The *Noongar Way* also includes the recognition of another family's traditional rights to country and a concomitant right to control one's own land. Aboriginal people have learned bush crafts and the making of shelters etc. from their parents and/or grandparents. They have been taught how to do this by learning through example, through a hands-on approach.
- The *Noongar Way* of sharing (food, artefacts); and the caring for land and its creatures are other dictates of *Noongar* life.

Information in support of the existence and observance of traditional laws and customs by the claim group is contained in the affidavits of [name withheld] dated 26 August 2006, William Webb dated 26 August and the affidavits of [name withheld] dated 2 March 1999 (with annexure Table G); [name withheld] dated 4 March 1999 (with annexures Table G and Attachment M); [name withheld] dated 4 March 1999 (with annexures Table G and Attachment M2) and [name withheld] dated 4 March 1999 (with annexure Table G). I note, by way of example, the following statements:

- William Webb states that "I inherited the right to speak for my family's run through my father who told me information about where my family can speak for and my responsibilities relating to the family run"; "Children are taught by their grandparents and parents and uncles and aunties…"; "Elders also have to be responsible for the law and to try to sustain the traditional ways". Mr Webb also talks of marriage rules, special ways for burials, the importance of special places and stories and traditional practices in relation to hunting, fishing and gathering bush tucker.
- [Name withheld] states that "as part of being an Aboriginal elder from the claim area I received knowledge about the Noongar Way from my elders,

especially my grandparents, which concerns matters both secular and sacred. This includes knowledge about spiritual links to the place that I call home. For the majority of my life I have observed the conventions and dictates of the Noongar Way."

- [Name withheld] states that "whenever possible I visit places that are of spiritual importance under the Noongar Way. I visit these places as they are important to my family and me. It is part of my obligation as an elder to visit and care for these sites. I visit these whenever I can. I exercise my right of access across the country during these visits." And in another section, "I instruct younger members on the Noongar Way, including both spiritual and physical aspects. One of the ways in which I do this is by taking younger members of my family to sites and telling them what I know."
- [Name withheld] provides details of how he enacts his right to use and enjoy the resources of the claim area including by regularly fishing and collecting bush tucker within the claim area. Mr [name withheld] states that he learned about bush tucker through his parents and grandparents and he teaches his children and grandchildren about bush tucker in the same way he was taught: by being told and by a hands-on approach through visiting the claim area with elders and learning by their example.
- [Name withheld] states that the "knowledge regarding bush tucker is passed from the older generation to the younger generation. With this knowledge is passed the responsibility according to the Noongar Way that all life is spiritually connected. When I teach children to hunt and gather they are told to only take what they need and to leave the rest to ensure that there will be enough tucker for the next season."

I am of the view that the asserted facts are sufficient to support the assertion at s. 190B(5)(b), that traditional laws and customs exist, that those laws and customs are acknowledged and observed by the native title claim group, and that those laws and customs give rise to the claimed native title rights and interests.

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

Table F includes the following statements in support of the assertion at s.190B(5)(c):

- Such traditional customs and laws as those mentioned in Schedule F(b) [Table F(b) as detailed above] which form part of the *Noongar Way* are

actively transmitted from older generations to younger generations today. Hence those customs and laws are maintained.

- The means of transmission of knowledge by which this is done include the writing and retelling of the old stories (dreaming stories and tales about prominent ancestors) for the children and grandchildren of today. Many Aboriginal elders will take their grandchildren out into the country and relate relevant stories at the places they refer to. This facilitates a strong continued connection between the generations, and enables strong attachments both spiritually and emotionally to family traditional country to be maintained. There exists a continued desire to gain and/or control access to family lands, the place you call home, in order to nurture it both physically and spiritually and continue custodianship. This is evident through the revisiting of country and teaching about it to grandchildren.
- A strong desire, in keeping with the *Noongar Way*, is Aboriginal people's desire to protect and maintain the environment.
- Continuing practices also include the sharing of resources and observing the proper inter-personal etiquette. The latter is particularly important as a sign of respect to elders. Young Aboriginal people are also taught the customs associated with places of special significance to Aboriginal people.

Information in support of the continued holding of native title in accordance with the traditional laws and customs of the group is contained in the affidavits of [name withheld] dated 26 August 2006, William Webb dated 26 August and the affidavits of [name withheld] dated 2 March 1999 (with annexure Table G); [name withheld] dated 4 March 1999 (with annexures Table G and Attachment M); [name withheld] dated 4 March 1999 (with annexures Table G and Attachment M2) and [name withheld] dated 4 March 1999 (with annexure Table G). I refer to the evidence extracted above under s.190B(5)(a) and (b) which indicates a continued exercise of traditional law and custom by members of the claim group in relation to the claim area.

While it is likely that there has been some adaptation in the group's traditional laws and customs due to the impact of colonization, as stated by the court in *Yorta Yorta* at [83], the "key question is whether the law and custom can still be seen to be a traditional law and traditional custom. Is the change or adaptation of such a kind that it can no longer be said that the rights or interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples…"

Based on the information before me, I have formed the view for the purposes of the registration test that, despite some change or adaptation of the laws and customs of the claim group from the time of British sovereignty, they may still be seen to be 'traditional' laws and customs, as that term is used in *Yorta Yorta*.

I am of the view that the asserted facts are sufficient to support the assertion at s. 190B(5)(c), that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

In conclusion, I am satisfied that the requirements of s. 190B(5) are met.

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

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

Result: Condition met

Reasons relating to this condition

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

In *Doepel*, Mansfield J noted at [16] that s. 190B(6), together with ss. 190B(5) and (7), "clearly calls for consideration of material which may go beyond the terms of the application, and for that purpose the information sources specified in s. 190A(3) may be relevant."

The term "prima facie" was considered in *North Ganalanja Aboriginal Corporation v Qld* (1996) 185 CLR 595. In that case, the majority of the court (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ) 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]."

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

I note that the meaning of *prima facie* was recently considered in and approved in *Doepel* at [134 -135]. Briefly, the Court concluded that although the above case was decided before the 1998 amendments to the Act, there is no reason to consider the ordinary usage of 'prima facie' there adopted is no longer appropriate.

I am of the view that my task under s. 190B(6) is to consider whether there is any probative factual material before me evidencing the existence of the particular native title rights and interests claimed, having regard to relevant law about what is a "native title right and interest (as that term is defined in s. 223) and whether or not the right has been extinguished.

As noted in my reasons under s. 190B(4) above, I have taken the view that it is under this condition that I must consider whether the claimed rights and interests have been found by the courts to be "native title rights and interests" within s. 223. If a claimed right and interest has been found by the courts to fall outside the scope of s. 223, then it will not be capable of being 'prima facie established' for the purposes of s. 190B(6).

I have noted already the description of native title rights and interests claimed by the applicants in Attachment E of the application under my reasons for decision for s. 190B(4) above.

I turn now to a consideration of whether each of the native title rights and interests claimed in Attachment E can be prima facie established.

The rights claimed are stated to be subject to the qualifications in para's (i) to (v) of Attachment E and are claimed in relation to the "claim area". I note that there is no distinction between those rights claimed in relation to areas where a claim to exclusive possession can be sustained and where such a claim cannot be sustained. As such it appears that each of the rights are claimed in relation to the entirety of the claim area.

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

Result: Established

In *Western Australia v Ward* (2002) 191 ALR 1 at [51] ('*Ward'*), the majority of the High Court found that a right of possession, occupation, use and enjoyment is the fullest expression of native title there is and where "native title rights and interests that are found to exist do not amount to a right, as against the whole world, to possession, occupation, use and enjoyment of land or waters, 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".

and at [89]:

> The expression "possession, occupation, use and enjoyment … to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land. To break the expression into its constituent elements is apt to mislead. In particular, to speak of "possession" of the land, as distinct from possession to the exclusion of all others, invites attention to the common law content of the concept of possession and whatever notions of control over access might be thought to be attached to it, rather than to the relevant task, which is to identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms.

Therefore a claim to possession, occupation, use and enjoyment is only capable of being prima facie established in relation to those areas where a claim to exclusive possession can be recognized. In light of the comments in *Ward*, I am of the view that in order to prima facie establish this claimed right, there must be sufficient information available to establish, prima facie, the right of the claim group, under traditional law and custom, to control access to and use of those parts of the claim area in relation to which a right to exclusive possession can be recognized.

Attachment G lists the following activities, which members of the claim group have continuously carried out in relation to the claim area, in support of this claimed right:

- the existence of a permission rule relating to land, waters and resources
- organising funerals
- organising corroborees
- camping on country
- travelling around country
- visiting country
- taking the children and young adults to country.

Attachment G also lists, in support of the claimed right to "control the access of others to the area", the following activities:

- controlling access of Aboriginal and non-Aboriginal people unrelated to the native title claim group through the existence of a permission rule relating to land, waters and resources
- denying access to young Aboriginal people to particular important sites
- controlling access of people (both Aboriginal and non-Aboriginal) to sites of significance

The affidavit of William Webb dated 26 August 2006 includes the following statement:

> If a council or company wanted to do something to the land in my family's country, they should consult with my family first. This is the right way to do things under our law, whether you are Aboriginal or not. The right protocol can then follow, which will generally involve a site evaluation and site monitoring by Elders. While in practical terms it is not possible to enforce all of our laws against non-Aboriginal people, it is our law that both non-Aboriginal people and Aboriginal people who are not associated with the South West Boojarah area should seek permission to enter our country…

The affidavit of [name withheld] dated 4 March 1999 includes the following statement in relation to the control of access of other Aboriginal people:

> As Aboriginal elders we have the right to control the access of Aboriginal people upon whom group membership has not been conferred. For example, Aboriginal people from Central Australia came to see us as traditional owners of the country in order for us to welcome them into our country in accordance with the dictates of the Noongar Way.

I am of the view that the above statements provide some information to prima facie establish that, under the laws and customs of the claim group, there does exist a right to control access to and use of the claim area by both Aboriginal and non-Aboriginal people. I also note Mr Webb's acknowledgement that "in practical terms it is not possible to enforce all of our laws against non-Aboriginal people". However, for the purposes of the registration test I am prepared to find that, on the basis of the information available to me, this claimed right can be prima facie established in relation to those areas where a claim to exclusive possession can be recognised.

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

Result: Established

In my view, this claimed right implies a claim to control access to and use of the claim area, which, in relation to areas where a claim to exclusive possession cannot be sustained, the majority in *Ward* questioned its appropriateness: "…Without a right of possession of that kind [i.e., an exclusive right], it may be greatly doubted that there is any right to control access to land or make binding decisions about the use to which it is put" - at [52].

As such it would only be capable of being prima facie established in relation to those areas where a claim to exclusive possession can be recognised.

Attachment G lists the following activities, which members of the claim group have continuously carried out in relation to the claim area, in support of this claimed right:

- the existence of a permission rule relating to land, waters and resources
- meetings of the elders to determine issues that affect their traditional country
- right to 'speak for' country as recognised in State legislation.

I refer to the affidavit evidence as extracted above under right (a) which in my view provides some support for a right of the claim group, under traditional law and custom, to control access to the claim area and make binding decisions in relation to the use of the claim area by Aboriginal and non-Aboriginal people.

I am therefore satisfied that there is sufficient information available to prima facie establish this claimed right in relation to those areas where a claim to exclusive possession can be recognised.

(c) the right of access to the area

Result: Established

I am satisfied that there is sufficient information available to prima facie establish this claimed right.

Attachment G lists the following activities, which members of the claim group have continuously carried out in relation to the claim area, in support of this claimed right:

- visiting waterholes, rivers, estuaries, freshwater springs and surrounding environments
- visiting sacred sites
- visiting current and former campsites
- visiting places of importance to Aboriginal people as identified by elders

The affidavit evidence of William Webb, [name withheld], [name withheld], [name withheld] and [name withheld], some of which is referred to above under s. 190B(5), contains information in support this claimed right. For example, the deponents state that they continue to live on or visit the application area; use the area for hunting, fishing and gathering bush tucker, they visit places of special significance to them under traditional law and custom and take their children and/or grandchildren to such places.

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

Result: Established

For the reasons provided above under rights (a) and (b) I am satisfied that this right can be prima facie established in relation to those areas where a claim to exclusive possession can be recognised.

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

Result: Established

I am satisfied that there is sufficient information available to prima facie establish this claimed right.

Attachment G lists the following activities, which members of the claim group have continuously carried out in relation to the claim area, in support of this claimed right:

- hunting kangaroos, emus and other animals
- trapping/fishing of marine animals, freshwater fish and crustaceans
- gathering of native vegetables and fruits
- collecting plants, animals and minerals for the production of cultural, ceremonial and medicinal purposes, objects and products.

The affidavit evidence of William Webb, [name withheld], [name withheld], [name withheld] and [name withheld], as referred to above, contains information in support of this claimed right. For example:

- William Webb talks of being taught different signs of the bush to know when to get certain foods and how to use different fish traps to catch fish and collecting bush tucker including bird eggs, grubs, goanna, possums and turtles and bush plants for medicinal purposes.
- [Name withheld] states that he regularly goes fishing and collects bush tucker in the claim area, in accordance with traditional knowledge passed down to him.
- The affidavit of [name withheld] also contains information regarding the collection and use of bush tucker such as possums and fish.

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

Result: Established

For the reasons provided above under rights (a) and (b) I am satisfied that this right can be prima facie established in relation to those areas where a claim to exclusive possession can be recognised.

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

Result: Established

In relation to the use of the word 'protect' in this claimed right, I am satisfied that it does not involve an assertion of a right to control access and to exclude others from the claim area. In this regard, I note the comments of the Full Court in *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 ('*Alyawarr*') in relation to a claimed right to "have access to, maintain and protect places and areas of importance on or in the land and waters …" where it was found that such a right did not necessarily imply a general control of access.

In light of the above, I find that this right is capable of being prima facie established in relation to those areas where a claim to exclusive possession cannot be recognized.

Attachment G lists the following activities, which members of the claim group have continuously carried out in relation to the claim area, in support of this claimed right:

- right to 'speak for' country as recognised in State legislation
- protection of areas that are of spiritual, cultural and historical significance to Aboriginal people of the country

The affidavit evidence of William Webb, [name withheld], [name withheld], [name withheld] and [name withheld], referred to above, contains information in support of this claimed right. For example:

- William Webb states that "I try to visit sites around my country regularly to make sure that they are maintained properly. I feel that I have to visit them and I have never considered not visiting them, it is my duty and it is part of my culture." And, "I live on my family's country and still go camping and visit sites in my family's country with my family and children. I do this to keep an eye on what's happening and to make sure that the sites do not get damaged or wrecked." And, "From a very early age I would go with my father to visit places and sites and we were there, my father would tell me stories about those places. My father taught me how to take care of the sites and also stories about spirits and animals".
- [Name withheld] states that as an elder, in accordance with the Noongar Way, she has the right and responsibility to maintain and protect places of importance under traditional laws, customs and practices, located within the claim area. Mrs [name withheld] states: "I take my children and grandchildren to visit important sites when passing through the area. I sit down with them and tell them dreaming stories. I also instruct the

younger generation about the proper comportment that is required when at a sacred site. For example, only certain stones can be disturbed at a particular fishing site on the coast near Margaret River."

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

Result: Established

I am satisfied that there is sufficient information available to prima facie establish this claimed right.

Attachment G lists the following activities, which members of the claim group have continuously carried out in relation to the claim area, in support of this claimed right:

- showing children certain bush tucker
- teaching children about gathering and hunting for certain bush tucker
- taking children to visit sites associated with stories passed down by the elders
- teaching children about traditions associated with the country.

The affidavits of William Webb, [name withheld], [name withheld], [name withheld] and [name withheld], as referred to above, contain information in support of this claimed right.

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

Result: Established

I am satisfied that there is sufficient information available to prima facie establish this claimed right. In relation to the use of the word 'infrastructure' I am satisfied, in the context of the claimed right and supporting information, that it is limited to structures associated with providing shelter.

Attachment G lists the following activities, which members of the claim group have continuously carried out in relation to the claim area, in support of this claimed right:

- the construction of traditional structures on reserves
- construction of camps/out-stations on blocks located within their country.

The affidavit evidence of William Webb, [name withheld], [name withheld], [name withheld] and [name withheld], referred to above, contains information in support this claimed right. For example, the deponents state that they and/or their families have lived on the claim area and/or continue to live on the claim area, which in my view implies a right to erect residences on the claim area.

William Webb states that when he was growing up his family lived in "a little humpy made of Hessian bags, tin and bushes" and they would move around within his family's country, especially along the coast.

[Name withheld] states in her affidavit that as a young woman she built miamias on the land in the claim area; has spent the majority of her life living in the claim area and frequently travels to the claim area to spend time with her family.

(j) the right to trade in resources of the area

Result: Not established

The Full Court in *Alyawarr* at [153] found that the right to trade is a right in relation to land and waters, stating that the "right to trade is a right relating to the use of the resources of the land. It defines a purpose for which those resources can be taken and applied".

However, in *Commonwealth v Yarmirr* (1999) 101 FCR 171 the Full Bench of the Federal Court indicated that it seemed logical to view the right to trade as an integral part of a right to exclusive possession. As such I am of the view that this claimed right is capable of being prima facie established only in those areas where a claim to exclusive possession can be recognized.

Schedule G lists the following activities in support of this claimed right:

- arose from rights of exclusive possession, occupation, use and enjoyment inferred from the existence of a permission rule relating to land, waters and resources
- exchanging and sharing artifacts
- intellectual property e.g. knowledge of sites
- material resources for production of cultural artifacts e.g. spears, boomerangs

However, in my view there is insufficient information available to establish prima facie the existence of such a right under the traditional law and custom of the claim group. There is no information in the affidavits of [name withheld], [name withheld], [name withheld] and [name withheld], referred to above, to support this claimed right. The affidavit of William Webb includes a statement that the stems of bullrushes "can be made into rope and then bags" and that his grandmother told him that peppermint tree is good for making spears. However, in my view this is insufficient to prima facie establish a right to trade.

(k) the right to manage, conserve and look after the land, water and resources, including locating and cleaning water sources and drinking water on the land

Result: Established

The use of the word 'manage' in this claimed right appears to imply some element of control and the right to make binding decisions on the use to which the claim area is put. As outlined above in relation to right (b) I am of the view that such a right is only be capable of being prima facie established in relation to those areas where a claim to exclusive possession can be recognised.

Schedule G lists the following activities in support of this claimed right:

- arose from rights of exclusive possession, occupation, use and enjoyment inferred from the existence of a permission rule relating to land, waters and resources
- locating and cleaning water sources and drinking water on the land
- protecting the habitats of bush tucker
- caring for orphaned joeys
- protecting the spirit of the land by conserving the natural habitat

As noted above under rights (a) and (b) I am of the view that the affidavit evidence includes some material to support a right of the claim group, under traditional law and custom, to control access to the claim area and make binding decisions in relation to the use of the claim area by non Aboriginal people.

For the reasons, outlined above, that I have found that there is sufficient information to prima facie establish rights (a), (b) and (g), I am of the view that there is sufficient information available to prima facie establish this claimed right.

Conclusion: I have found that at least some of the claimed rights and interests at Schedule E of the application can be prima facie established. Consequently, I am satisfied that the requirements of s. 190B(6) are met.

Section 190B(7): Traditional physical connection

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.

Result: Condition met

Reasons relating to this condition

Under s. 190B(7), 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.

Attachment M provides information regarding the traditional physical connection of William Webb in relation to the application area. This information is essentially a brief summary of the more detailed information provided in the affidavit of William Webb dated 26 August 2006, parts of which have been extracted above in relation to s. 190B(5) and s. 190B(6). On the basis of his affidavit material, I am satisfied that Mr Webb, a member of the native title claim group, currently has a traditional physical connection with parts of the application area.

I am satisfied that the requirements of s. 190B(7) are met.

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

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.

Result: Condition met

Reasons relating to this condition

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

Sub-section 61A(1): Native Title Determination

A search of the Native Title Register as at 6 October 2006 has revealed that there are no determinations of native title in relation to the area claimed in this application.

Section 61A(2): Previous Exclusive Possession Acts

In Attachment B of the application, any area that is covered by the categories of previous exclusive possession acts defined in s. 23B, is excluded from the claim area. I am therefore satisfied that the claim is not made over any such areas.

Section 61A(3): Previous Non-Exclusive Possession Acts

The Applicant states in Attachment E, para. (iii), that they do not claim exclusive possession over areas covered by previous non-exclusive possession acts (s. 23F).

Conclusion

For the reasons as set out above I am satisfied that the application does not disclose, and it is not otherwise apparent that, pursuant to s. 61A, the application should not have been made.

Section 190B(9)(a): Ownership of minerals, petroleum or gas wholly owned by the Crown

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

Result: Condition met

Reasons relating to this condition

The Applicant states at Schedule Q of the application that:

> To the extent that the Crown in right of the Commonwealth or the State of Western Australia wholly owns any minerals, petroleum or gas within the area of the claim, the applicants do not claim them.

A similar statement appears at Attachment E, para (i).

Section 190B(9)(b): Exclusive possession of an offshore place

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

Result: Condition met

Reasons relating to this condition

The Applicant states at Schedule P of the application that:

> To the extent that the native title rights and interests claimed may relate to waters in an offshore place, those rights and interests are not claimed to the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under International Law in relation to the whole or any part of the offshore place.

A similar statement appears at Attachment E, para. (ii).

Section 190B(9)(c): Other extinguishment

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 subsections 47(2), 47A(2) or 47B(2)).

Result: Condition met

Reasons relating to this condition

There is no information in the application or otherwise to indicate that any native title rights and/or interests in the application area have been extinguished.

[End of Document]