National Native Title Tribunal

Registration test decision

Application name:	Wagyl Kaip — Dillon Bay People.
Name of applicant:	Mr Gerald Williams, Mr Lomas Roberts, Ms Carol Pettersen, Ms Mingli Wunjurri Nungala, Mr Aden Eades, Mr Alistair Pickett, Mr Darryl Smith.
State/territory/region:	Western Australia
NNTT file no.:	WC07/01
Federal Court of Australia file no.:	WAD33/07
Date application made:	19 February 2007
Name of delegate:	Brendon Moore

I have considered this claim for registration against each of the conditions contained in ss. 190B and 190C of the Native Title Act 1993 (Cwlth).

For the reasons attached, I do not accept this claim for registration pursuant to s. 190A of the Native Title Act 1993 (Cwlth).

For the purposes of s. 190D(3), my opinion is that it is not possible to determine whether the claim satisfies all of the conditions in s. 190B because of a failure to satisfy s. 190C.

Date of decision: 13 February 2008

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Brendon Moore

Delegate of the Native Title Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D of the **Native Title Act 1993** (Cwlth)

Reasons for decision

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Introduction

This document sets out my reasons for the decision not to accept the

Wagyl Kaip – Dillon Bay People claimant application for registration.

Section 190A of the Native Title Act 1993 (Cwlth) (the Act) requires the Native Title Registrar (the Registrar) to apply a 'test for registration' to all claimant applications given to him under ss. 63 or 64(4) by the Registrar of the Federal Court of Australia (the Court). This a new application which was filed in the court on 19 February 2007 and subsequently referred to the Registrar.

Delegation of the Registrar's powers

I have made this registration test decision as a delegate of the Registrar. The Registrar delegated his powers regarding the registration test and the maintenance of the Register of Native Title Claims under ss. 190, 190A, 190B, 190C and 190D of the Act to certain members of staff of the National Native Title Tribunal, including myself, on 27 September 2007. This delegation is in accordance with s. 99 of the Act. The delegation remains in effect at the date of this decision.

The test

In order for a claimant application to be placed on the Register of Native Title Claims, s. 190A(6) requires that I must be satisfied that all the conditions set out in ss. 190B and 190C of the Act are met.

Section 190B sets out conditions that test particular merits of the claim for native title. Section 190C sets out conditions about 'procedural and other matters'. Included amongst the procedural conditions is a requirement that the application must contain certain specified information and documents. In my reasons below I consider the s. 190C requirements first, in order to assess whether the application contains the information and documents required by s. 190C before turning to questions regarding the merit of that material for the purposes of s. 190B.

Where the application has not been accepted for registration, a summary of the result for each condition is provided at Attachment A.

Information considered when making the decision

Section 190A(3) directs me to have regard to certain information when testing an application for registration; there is certain information that I must have regard to, but I may have regard to other information, as I consider appropriate.

I am also guided by the case law (arising from judgments in the courts) relevant to the application of the registration test. Among issues covered by such case law is the issue that some conditions of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider wider material.

Attachment B of these reasons lists all of the information and documents that I have considered in reaching my decision.

I have not considered any information provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are regarded as attracting the 'without prejudice' privilege (s. 136A(4)). Further, mediation is intended to be private (see s. 136E) and may be confidential.

Application overview

See Attachment C.

Procedural fairness steps

As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are made in a fair, just and unbiased way. Procedural fairness requires that a person who may be adversely affected by a decision be given the opportunity to put their views to the decision-maker before that decision is made. They should also be given the opportunity to comment on any material adverse to their interests that is before the decision-maker. The steps that the Registrar has undertaken to ensure procedural fairness is observed in this matter are as follows:

See Attachment D.

Please note: All references to legislative sections refer to the Native Title Act 1993 (Cwlth), unless otherwise specified. The description of each condition of the registration test that appears prior to the delegate's result and reasons is in many instances a paraphrasing of the relevant legislative section in the Act. Please refer to the Act for the exact wording of each condition.

Procedural and other conditions: s. 190C

Section 190C(2)
Information etc. required by ss. 61 and 62

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

Delegate's comment

I address each of the requirements under ss. 61 and 62 in turn and I come to a combined result for s. 190C(2) at page 14 below.

Native title claim group: s. 61(1)

> The application must 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

The application **meets** the requirement under s. 61(1).

Reasons

In *Northern Territory of Australia v Doepel* (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*) the Court, when considering how s. 190C(2) and s. 61(1) must be approached, said:

> In my judgment, s 190C(2) relevantly requires the Registrar to do no more than he did. That is to consider whether the application sets out the native title claim group in the terms required by s 61. That is one of the procedural requirements to be satisfied to secure registration: s 190A(6)(b). If the description of the native title claim group were to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirement of s 190C(2) would not be met and the Registrar should not accept the claim for registration. at [36]
>
> 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). — at [37]

The claim group is described at Attachment A as follows:

The native title claim group comprises those Aboriginal people who are:
1. Biological descendants of the unions between:
Billy Colbung and Clara Blockman (Donally) and Nina Bayla Brockman;
Helen Williams and Bill Woods;
Sarah Yettung James and Jack Woods;
Sammy 'Jimmy' Miller and Polly, from Gnowangerup;
Alice Davidson and Alice Williams and Henry Woods;
Charles or Peter Eades and Lucy Coyne;
William Hayward and Minnie Knapp;
Emily Coyne and William 'Peg' Farmer;
Fred Coyne and Margaret Davidson;
Johnny Penny and Margaret ' Maggie' Pigott (Starlight);
Charles Williams and Ellen Nelly Foot;
Elijah Quartermaine and Mary 'Wartum';
Ah-Lee and Mary Bateman;
Peerup Roberts and Monkey and Emily (Mudah) D' Abb;
Edward Smith and Sarah Punch;
Ernie or George Moir Muir and Aboriginal woman named Karlbyirt;
Eddie 'Womber' Williams and Lily 'Tjorlian' Burchell;
George 'Bordriditch' Riley and Eliabeth Smith; 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.

In my view there is nothing in the description in Schedule A or in the application to indicate that the group is a sub-group or that it does not include, or may not include, all the persons who hold native title in the area of the application.

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

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

Result

The application **meets** the requirement under s. 61(3).

Reasons

This is provided at Part B of the application.

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

The application must:
(a) name the persons in the native title claim group, or

(b) otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

Result

The application **meets** the requirement under s. 61(4).

Reasons

I find that the application contains a description of the claim group, reproduced above. After *Doepel* it is not my function to consider here whether the description does in fact describe the members sufficiently clearly; that is the task at s. 190B(3).

Application in prescribed form: s. 61(5)

The application must:
(a) be in the prescribed form,
(b) be filed in the Federal Court,
(c) contain such information in relation to the matters sought to be determined as is prescribed, and
(d) be accompanied by any prescribed documents and any prescribed fee.

Result

The application **meets** the requirement under s. 61(5).

Reasons

The application is substantially in the form prescribed by Regulation 5(1)(a) of the Native Title (Federal Court) Regulations 1998 and was filed in the Federal Court on 19 February 2007.

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

The application is accompanied by affidavits in relation to the requirements of s. 62(1)(a) from the applicants. I am not required to consider the Federal Court filing fee, if any. I am satisfied that the application has complied with s. 61(5)(d) in relation to the requirement. This condition is met.

See also my reasons in respect of s. 62(1)(a) below.

Affidavits in prescribed form: s. 62(1)(a)

The application must be accompanied by an affidavit sworn by the applicant that:
(i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
(ii) the applicant believes that none of the area covered by the application is also covered by an entry in the National Native Title Register, and
(iii) the applicant believes all of the statements made in the application are true, and
(iv) the applicant is 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, and

(v) stating the basis on which the applicant is authorised as mentioned in subparagraph (iv).

Result

The application **meets** the requirement under s. 62(1)(a).

Reasons

Affidavits satisfying all five requirements of the section have been provided from each of the persons comprising the applicant

Application contains details required by s. 62(2): s. 62(1)(b)

The application must contain the details specified in s. 62(2).

Delegate's comment

My decision regarding this requirement is the combined result I come to for s. 62(2) below. Subsection 62(2) contains 8 paragraphs (from (a) to (h)), and I address each of these subrequirements in turn, as follows immediately here. My combined result for s. 62(2) is found at page page 14 below and is one and the same as the result for s. 62(1)(b) here.

Result

The application **meets** the requirement under s. 62(1)(b).

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

The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:
(i) the area covered by the application, and
(ii) any areas within those boundaries that are not covered by the application.

Result

The application **meets** the requirement under s. 62(2)(a).

Reasons

There are maps and information contained in the application which provide information about the boundaries, the area covered and any areas within the boundaries that are not covered by the application.

I am not required here to make any merit assessment of that information beyond being satisfied that, on its face, it is responsive to the requirement of the section. See, however, my further reasons at s. 190B(2).

A written description of the boundaries appears at Attachment B and a description of an area, a Lease of Crown Land not covered by the application, is also to be found at schedule B.

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

> The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

Result

The application **meets** the requirement under s. 62(2)(b).

Reasons

The application contains three maps at Attachment C apparently identifying the claim area.

Searches: s. 62(2)(c)

> The application must contain the 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

The application **meets** the requirement under s. 62(2)(c).

Reasons

At Attachment D the application contains details of a search carried out by the State of Western Australia. The parcel so identified is the one excluded from the claim area.

I have no reason to believe that the applicant has carried out other searches which are not disclosed.

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

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

Result

The application **meets** the requirement under s. 62(2)(d).

Reasons

A description of the claimed native title rights and interests is found in Attachment E. The description does not merely consist of a statement to the effect that the native title rights and interests are all the native title rights and interests that may exist, or that have not been extinguished, at law.

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

The application must contain 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

The application **meets** the requirements under s. 62(2)(e).

Reasons

The decision in *Queensland v Hutchison* (2001) 108 FCR 112; [2001] FCA 416 at [25] is authority for the proposition that the general description of the factual basis must be contained in the application and cannot be supplemented by, or be the subject of, additional information provided separately to the Registrar or his delegate for the purposes of this section.

The Court said:

> The information here required by s 62(2)(e) is clearly part of the application filed in Court and changes to it should be notified to the Court and the parties in the manner prescribed, which is to say by a process of amendment: and see *Strickland & Anor v Western Australia & Ors* (1999) 89 FCR 117. Had such an application been made, the State would have been made aware of the new detail, either on or following the application and these proceedings would have been largely unnecessary. Other parties would also be notified after amendment: see s 64(4)— at [21].

The application contains a general description of the factual basis for the assertion that the claimed native title rights and interests exist and for the particular assertions in Attachment F. There is a reference to further relevant material in Table F, Attachment G and two 'long form' affidavits prepared for the purposes of the test.

I find that a general description is provided.

Activities: s. 62(2)(f)

If the native title claim group currently carries out any activities in relation to the area claimed, the application must contain details of those activities.

Result

The application **meets** the requirement under s. 62(2)(f).

Reasons

Activities carried out by members of the claim group are set out in Attachment G and there is also some relevant material at Table F.

Other applications: s. 62(2)(g)

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

Result

The application **meets** the requirement under s. 62(2)(g).

Reasons

The Act does not impose an absolute requirement to provide details of any or all other applications which have been made in relation to the area. It only requires details of those 'of which the applicant is aware'.

Details are provided at Attachment H of the following claims:

- Single Noongar Area 1; WC03/006.
- Southern Noongar; WC96/109
- Wagyl Kaip; WC98/70
- Wom-Ber; WC96/05

I accept the statement in schedule H and find s. 62(2)(g) to be satisfied as I have no information before me to suggest that the applicant is otherwise aware.

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

> The application must contain details of any notices given under s. 29 (or under a corresponding provision of a law of a state or territory) of which the applicant is aware that relate to the whole or a part of the area covered by the application.

Result

The application **meets** the requirement under s. 62(2)(h).

Reasons

The Act only requires the application to provide details of those s. 29 notices (or their equivalents under State or Territory laws) 'of which the applicant is aware'.

Because the word 'relate' is in the present tense I understand the section to require only details of current notices. That conclusion is supported by the fact that the apparent intent of the section is to ensure that if such notices are given and details are provided in the application the Registrar's attention will be directed to them for the purposes of s. 190A(2).

Schedule I states that the applicants are not aware of any relevant notices.

I accept the statement in schedule I and find that s. 62(2)(h) is satisfied as I have no information before me to suggest that the applicant is otherwise aware.

Combined result for s. 62(2)

The application **meets** the combined requirements of s. 62(2), because it **meets** each of the subrequirements of ss. 62(2)(a) to (h), as set out above. See also the result for s. 62(1)(b) above.

Combined result for s. 190C(2)

The application **satisfies** the condition of s. 190C(2), because it **does** contain all of the details and other information and documents required by ss. 61 and 62, as set out in the reasons above.

Section 190C(3)
No common claimants in previous overlapping applications

> The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:
> (a) the previous application covered the whole or part of the area covered by the current application, and
> (b) 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 the previous application being considered for registration under s. 190A.

Result

The application **does not satisfy** the condition of s. 190C(3).

Reasons

The requirement that the Registrar be satisfied in the terms set out in s. 190C(3) is only triggered if all of the conditions found in ss. 190C(3)(a), (b) and (c) are satisfied—see *Western Australia v Strickland* (2000) 99FCR 33 ; (2000) FCR 33 at [9].

For the purposes of s. 190C(3)(c), consideration of the entry in relation to the previous application under s. 190A takes place at the time that the Registrar applies the registration test to the current application, i.e. the relevant time is not when the current application was made but when it is being considered under s. 190A—see *Western Australia v Strickland* (2000) 99FCR 33 ;(2000) FCR 33 at [53]-[56].

This application was filed in the Federal Court on 19 February 2007 For the purposes of s.190C(3)(b), the application is taken to have been 'made' on that date.

As a first step, s. 190C(3) requires identification of previous overlapping applications entered on the Register as a result of consideration of those applications under s.190A.

Details are provided at Schedule H of the following claims which have been made in relation to whole or part of the area:

- Single Noongar Area 1; WC03/006.
- Southern Noongar; WC96/109
- Wagyl Kaip; WC98/70
- Wom-Ber; WC96/05

Of these, Southern Noongar (WC96/109 WAD134/98) and Wagyl Kaip (WC98/70, WAD6286/98) were entered on the Register or not removed from it following consideration under s. 190A, prior to the filing of the present application.

I must then be satisfied that no person included in the native title claim group for the current application was a member of the native title claim group in those prior applications.

At Attachment O the application states that:

> All members of the native title claim group for this application are also members of the native title claim group for application WC03/006 – Single Noongar Claim (Area 1) and application WC98/70 Wagyl Kaip.
> Many members of the native title claim group for this application are also members of the native title claim group for applications WC96/109 – Southern Noongar and WC 96/05 – Wom-Ber.

In a letter of 21 June 2007, following previous discussions with Tribunal staff about whether a short form decision could be made, as had previously occasionally been done by the Registrar (see letter of 17 May 2007; Edwards to Maher), the applicant's representative noted that 'it is a fore-gone conclusion that the claim cannot be registered', and in a letter dated 17 August 2007 he states that '[t]his application will of course fail the registration test, due to the fact that the requirements of s. 190C(3) have not been met'.

I do not need to enquire further. I have no reason to doubt Attachment O and I therefore find that there are persons included in the native title claim group for the current application who are members of the native title claim group for the previous application.

I am therefore unable to be satisfied that the application meets the condition set out in s. 190C(3) of the Act

Section 190C(4) Authorisation/certification

Under s. 190C(4) the Registrar/delegate must be satisfied either that:

(a) the application has been certified under s. 203BE, or under the former s. 202(4)(d), by each representative Aboriginal/Torres Strait Islander body that could certify the application, 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.

Under s. 203BE(4), certification of a claimant application by a representative body must:
(a) include a statement to the effect that the representative body is of the opinion that the requirements of ss. 203BE(2)(a) and (b) have been met (regarding the representative body being of the opinion that the applicant is authorised and that all reasonable efforts have been made to ensure the application describes or otherwise identifies all the persons in the native title claim group), and
(b) briefly set out the body's reasons for being of that opinion, and
(c) where applicable, briefly set out what the representative body has done to meet the requirements of s. 203BE(3)(regarding overlapping applications).

Under s. 190C(5), if the application has not been certified, the application must:
(a) include a statement to the effect that the requirement in s. 190C(4)(b) above has been met (see s. 251B, which defines the word 'authorise'), and
(b) briefly set out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

Result

I must be satisfied that the circumstances described by either ss. 190C(4)(a) or (b) are the case, in order for the condition of s. 190C(4) to be satisfied.

For the reasons set out below, I am **satisfied** that the application has been authorised according to the requirements in s. 190C(4)(b) and that the requirements of s. 190C(5) have been met.

Reasons

The nature of the Registrar's task was set out in *Doepel* at paragraph [78]:

> In the case of subs (4)(b), the Registrar is required to be satisfied of the fact of authorisation by all members of the native title claim group. Section 190C(5) then imposes further specific requirements before the Registrar can attain the necessary satisfaction for the purposes of s 190C(4)(b). The interactions of s 190C(4)(b) and s 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given. The nature of the enquiry is discussed by French J in *Strickland v NTR* at [259]–[260], and approved by the Full Court in *WA v Strickland* at [51]–[52]. Both Martin at [13]–[18], and *Risk v National Native Title Tribunal* [2000] FCA 1589 involved consideration of the condition imposed by s 190C(4)(b).

Does s. 190C(4)(a) or (b) apply?

Under this section, I am only required to be satisfied that one of the two conditions in s. 190C(4) is met. This application is not certified pursuant to s. 190C(4)(a), so I must consider whether it has been authorized under s. 190C(4)(b). To do so I must first consider s. 190C(5).

Is s. 190C(5) satisfied?

In applications which are not certified under s. 190C(4)(a) this section imposes a formal requirement which must be met before I am able to consider the substance of the material on authorisation. I cannot be satisfied that an application is authorised unless it:

(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.

The necessary statement appears at schedule R which satisfies these requirements.

Is the Applicant a member of the native title claim group?

Each of the persons named as the applicant has filed an affidavit for the purposes of s. 62(1)(a) in which they also state that they each are members of the native title claim group, as does the application at schedule R, thus satisfying s. 190C(5)(a).

What does the application say about the authorisation process?

There is a limited description of the authorisation processes at Attachment R and in the applicant's affidavits filed in response to s. 62 (1)(a).

Further details were subsequently supplied in a draft affidavit by Mr Blackshield, the applicant's legal representative and in a sworn affidavit by Jo-Anne Jones dated 17 August 2007. I note that through illness Mr Blackshield was subsequently unable to provide a sworn version before the application of this test. Notwithstanding that, I have taken the view that the document was clearly drafted by him as a document of truth and I accept what is said in it as though it were sworn. Similarly, a draft affidavit of Mr Lomas Roberts in which there is material which is chiefly relevant to ss. 190B(5) and (6) was provided unsworn. There is no necessity that such information be provided in sworn form but a sworn copy was later provided.

The present claim was filed to take advantage of the provisions of s. 47B. I note that Wagyl Kaip (the underlying, principal application, WAD6286/98; WC98/70) was filed nearly ten years ago by the same claim group. I think it reasonable to infer from that fact, in combination with the material adduced in Ms Jo-Anne Jones' affidavit relating to the keeping of records about the group, that its membership is reasonably well established and known to the South West Aboriginal Land and Sea Council ('SWALSC'). I gather from paragraph 4 that it may be about 150 persons.

It is worth noting at this point that although I accept, for the purposes of this section, that SWALSC as the applicant's representative is aware of the composition of the claim group, having worked with it for many years, I have not been able to find that the description of the group provided at Attachment A satisfies the test at s. 190B(3). Usually such a finding at s. 190B(3) would make it very difficult to assess the authorisation procedures but in this case I think that the relatively small size and 'long term' nature of the claim group is relevant and of assistance. The minutes of the meeting suggest a knowledgeable and involved claim group, also a relevant fact in the circumstances.

I also accept what is said by Mr Blackshield in his affidavit at points 2 and 3 concerning long term research into Noongar identity.

Notices of the meeting were posted to the names held on SWALSC's list and a notice was also placed in the regional newspaper: this assumes that potential members would be living only in the claim area, an assumption hard to accept given that Mr Lomas notes in his draft affidavit that he has lived in many other places. But for the fact that the group has been in existence for some time, and many were personally notified, I would not be satisfied that sufficient notice had been given to potential members. Indeed, the addresses supplied by attendees show that a significant number do not live in the area.

In all the circumstances, however, and noting that some thirty or more persons attended, I find that reasonable attempts were made to ensure that all persons having or asserting rights in the area were advised of the meeting and its purpose.

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. [*Lawson on behalf of the `Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales* [2002] FCA 1517 at {25].

Does the application satisfy the tests?

Minutes of the meeting on 15 February 2007 are provided and show that the group agreed that no traditional process was adequate to deal with white laws, and a resolution was passed that a majority vote would be adopted. The affidavit of Mr Blackshield notes that a Mr Mitchell was a dissenter; given the decision making process this is not relevant.

After discussion of nominations a vote was taken and the seven named persons 'or such of them as are willing and able to act in respect of the application in the future' were authorised to make the application.

I find that the applicant 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.

Merit conditions: s. 190B

Section 190B(2)
Identification of area subject to native title

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.

Delegate's comment

I consider whether the condition of s. 190B(2) is met firstly with respect to what is required by s. 62(2)(a) and then with respect to what is required by s. 62(2)(b). I come to a combined result for whether or not s. 190B(2) as a whole is met at page 21 below.

Information regarding external and internal boundaries: s. 62(2)(a)

The application must contain information, whether by physical description or otherwise, that enables identification of the boundaries of:
(i) the area covered by the application, and
(ii) any areas within those boundaries that are not covered by the application.

Result

The application **satisfies** the condition of s. 190B(2) with respect to what is required by s. 62(2)(a).

Reasons

The description of the area claimed at Attachment B is as follows:

External Boundary:
1. Subject to paragraph 2, the external boundaries of those areas covered by this application are the external boundaries of the Unallocated Crown Land (UCL) parcels Lot 2117 on Deposited Plan 238332 and Lot 2118 on Deposited Plan 238146.

2. The external southern boundary of the application area is the low water mark of the Southern Ocean.

Internal boundaries:
1. The applicants exclude from the claim Lease of Crown Land, L GE J987369, Lot 1989 on Deposited Plan 4065.

2. As the Applicants seek to rely on section 47B of the NTA, no further areas within the external boundaries of the application which may have been subject to prior extinguishing acts are excluded from the application.

I note that the Tribunal's Geospatial assessment dated 16 April 2007 concluded that while 'the area subject to the application is described with reasonable certainty; the maps depicting the lots subject to the application are illegible.' It goes on to state that 'therefore the description and map must be considered inconsistent and do not identify the area with reasonable certainty.'

I do not accept that assessment. The description, given as it is by nominating registered parcels of land, is in my opinion clear and easily allows the identification of both internal and external boundaries, albeit requiring a search of the relevant tenure records. I do not think that an 'inconsistency' such as that described is fatal; the land is identified satisfactorily.

Map of external boundaries: s. 62(2)(b)

> The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

Result

The application **satisfies** the condition of s. 190B(2) with respect to what is required by s. 62(2)(b).

Reasons

The application contains three maps. I do not know whether the copies provided to the Tribunal's Geospatial unit had suffered from multiple copying, but that may be the case. On the copies before me however it is possible to identify the named parcels and other geographical features (the coastline, roads, other parcels or lots) sufficiently well that I am satisfied that the maps, when read in conjunction with the written description (as they would normally be), show the boundaries of the area mentioned.

Combined result for s. 190B(2)

The application **satisfies** the condition of s. 190B(2) as a whole.

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

The application **does not satisfy** the condition of s. 190B(3).

Reasons

Section 190B(3) of the Act sets out the two ways in which a claim group may be described for the purposes of registration. It says:

> 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.

Section 190B(3) does not require me to consider how the claim group is formed or the basis on which persons are members: it is directed solely at the manner in which the description is expressed.

The purpose of the 1998 amendments to Part 7 of the Act was to impose a gateway to the statutory benefits which registration provides by requiring the identification of `only those people with a credible native title claim': Second Reading Speech of the Attorney-General, Hansard, House of Representatives, 9 March 1998, p. 784.

This requirement must be satisfied for groups seeking the benefits of registration. The description in the application is not, in this form, a requirement for a Determination of Native Title: see s. 225(a). A claim which fails this section (or any other) and thus does not become registered, may still proceed in the Federal Court to determination.

Although it is apparent that the identities of the claim group's members are known to SWALSC, the application does not name them for the purposes of s. 190B(3)(a). I must then look to see whether the description provided in the application satisfies the requirements of s. 190B(3)(b).

The law

Mansfield J in *Doepel*, on considering the application of s. 190B(3), held that the following important principles apply:

> Section 190B . . . has requirements which do not appear to go beyond consideration of the terms of the application: subs 190B(2), (3) and (4) — at [16].
> Its focus is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the membership of the identified native title claim group can be ascertained. It . . . 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 — at [37], and
> The focus of s 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group.— at [51].

The courts have considered what is required for 'reliable identification' a number of times.

In *Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732 His Honour Justice Carr was of the view that there were at least two answers to the contention that it was not necessary to identify each and every member of the claim group.:

> First, the delegate's decision was not based on the proposition that it was necessary to identify each and every member of the claim group. The delegate clearly understood that the test was whether the group was described sufficiently clearly so that it could be ascertained whether any particular person was in the group i.e. by a set of rules or principles— at [25].

In *State of Western Australia v Native Title Registrar* [1999] FCA 1591-1594 Carr J approved a description which was in terms of 'the biological descendants of unions between certain named people', 'persons adopted by the named people and by the biological descendants of the named people' and 'the biological descendants of the adopted people…'. His Honour stated that the

question was whether the native title claim group was described sufficiently clearly so that it could be ascertained whether any particular person was in the group:

> The fact that it was necessary to engage in some factual inquiry to ascertain whether a particular person was is in the group did not mean that the group had not been described sufficiently clearly —at [67]

I note that each of the elements of the description approved by the Court is objective in nature; that is, each can be independantly determined or verified.

In *De Rose v State of South Australia* [2002] FCA 1342 His Honour Justice O'Loughlin stressed that what was required were 'criteria' by which persons could be identified, concluding:

> By an application of the above criteria it is possible, in my view, to conclude who is, and who is not Nguraritja for the claim area. It is not necessary that every single applicant be personally named, although they do need to be identified by a set of appropriate criteria: see *Risk v National Native Title Tribunal* [2000] FCA 1589 at [43*]; Ngalakan People v Northern Territory of Australia* [2001] FCA 654 at [53]; *Russell v Bissett-Ridgeway* [2001] FCA 848 at [18-19]—at [928].

In *McKenzie v State Government of South Australia & Ors* [2005] FCA 22 His Honour Justice Finn held that what was necessary was clarity or certainty:

> …it is in my view impossible to say that the application itself describes the persons "sufficiently clearly so that it can be ascertained whether any particular person is one of those persons": cf s 61(4)(b).
> It should be emphasised that the clarity (or certainty) required is in the description of the persons constituting the group. This needs to be distinguished from what in other contexts is described as "evidential uncertainty"… cf Ford and Lee, Principles of the Law of Trusts, par 5170; i.e. a person claiming to be a member of the group may not be able to furnish convincing evidence of his or her membership of a group which itself is sufficiently clearly described— at [42]-[43].

Consideration

The description of the claim group is set out at Attachment A as follows.

> The native title claim group comprises those Aboriginal people who are:
>
> 1. Biological descendants of the unions between:
> Billy Colbung and Clara Blockman (Donally) and Nina Bayla Brockman;
> Helen Williams and Bill Woods;
> Sarah Yettung James and Jack Woods;
> Sammy 'Jimmy' Miller and Polly, from Gnowangerup;
> Alice Davidson and Alice Williams and Henry Woods;
> Charles or Peter Eades and Lucy Coyne;
> William Hayward and Minnie Knapp;
> Emily Coyne and William 'Peg' Farmer;
> Fred Coyne and Margaret Davidson;
> Johnny Penny and Margaret ' Maggie' Pigott (Starlight);
> Charles Williams and Ellen Nelly Foot;
> Elijah Quartermaine and Mary 'Wartum';
> Ah-Lee and Mary Bateman;
> Peerup Roberts and Monkey and Emily (Mudah) D' Abb;

> Edward Smith and Sarah Punch;
> Ernie or George Moir Muir and Aboriginal woman named Karlbyirt;
> Eddie 'Womber' Williams and Lily 'Tjorlian' Burchell;
> George 'Bordriditch' Riley and Eliabeth Smith; 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.

I understand the phrase 'are biological descendants of [the apical ancestors]' as meaning that each claim group member shares the characteristic of being a descendant of the named persons but not necessarily that the claim group is comprised of all of the descendants of that person. They are two different things. Unless the description goes further to enable the (objective) identification of which of those descendants comprise the claim group this section will not be satisfied. Such a description only identifies the class of persons from which the claim group may be drawn, not the actual members. It will be seen shortly that this is in fact the case

If the description were 'the biological descendants of' there would be no difficulty unless some contrary intention were shown. The use of the definite article 'the' I read as meaning 'all the biological descendants of' and, although a factual inquiry as to who all those persons are may be necessary to determine if any one person is a member of the group, the description contains or constitutes an objective test.

The description provided at Attachment A is qualified by a further statement at Table F, schedule F(a), where the application also states that:

> This descent is generally biological, however in some case a person has been adopted into the group (see attachment A)
> Biological descent can be traced either through the patriline (Father's way), or matriline (Mother's way), often both, and is termed cognatic descent.

It appears from this statement that the phrase 'biological descendants' describes a group of persons who are eligible for membership if they so identify, but not otherwise. When one principle of membership is that a person who is a descendant of the named apical ancestors may take their descent or identity from either their father or their mother, and thus choose whether or not to identify with the claim group (often described as being 'able to follow their mother's line or their father's line') there is no objective test 'in the application' which will allow a person to be readily identified. It is not objectively possible to identify, from the description, who has identified with whose line, or when, or even in which generation.

There is, of course, no reason why the claim group should not, if it sees fit, be comprised by such a group. The question I must consider at s. 190B(3) is not whether the group is properly constituted but solely whether the description satisfies the requirements of the Act.

In *Colbung v The State of Western Australia* [2003] FCA 774 at [40] the court commented on and described the distinction between a 'definitive' and a 'permissive' description. The description given here is, in my opinion, merely 'permissive'; the description is that of a class of persons

eligible for membership if they take the further step of identifying as such. The Courts have rejected similarly non-defining descriptions in such cases as *Ridgeway on behalf of the Worimi People, in the matter of Russell v Bissett-Ridgeway*[2001] FCA 848, *Ford v NSW Minister for Land & Water Conservation* [2000]FCA 1913 and *Korewal People - Longbottom v NSW Minister for Land & Water Conservation* (No. 2) [2000] FCA 1237.

More recently, in *Wakaman People # 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 the Court in obiter, said that:

> It may be observed that identification with a group may be relevant to findings of fact about membership of the group, which may be made later in the proceedings. The registration process is concerned with the clarity of the description of persons making up a claim group, so that it may be determined whether a person is a member of it. A requirement of self-identification would not appear to meet such an objective and might be thought to provide grounds for refusal of registration— at [38].

I find that the persons in the group are not described sufficiently clearly so that it can be ascertained whether any particular person is in that group. The description provided for the purpose of s. 61(4) is not adequate.

Section 190B(4)
Native title rights and interests identifiable

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

Result

The application **satisfies** the condition of s. 190B(4).

Reasons

The claim to rights and interests made in the application is:

> 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.
> 1. 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.
> 2. 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.
> 3. 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.
> 4. As the Applicant relies on s. 47B of the NT A in relation to the whole of the application area, there are no other qualifications on the native title rights and interests claimed.

> The Rights and Interests
> Subject to the above qualifications, the rights and interests claimed in relation to the 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, waters and resources, including locating and cleaning water sources and drinking water on the land.

There is a further list of activities referred to at schedule G and provided at attachment G. I have considered whether those activities may be read as part of the claim to rights at attachment E. I have done so because of the comments of the High Court in Ward that non-exclusive rights should be described in terms of the activities which are the incidents of the right. I consider this issue in detail in my reasons at s. 190B(6). I have come to the conclusion that I may not do so nor is it intended that I do. Neither schedule E nor attachment E refer me to attachment G in those terms, Lastly, some of the 'activities' listed are in fact statements of law and custom; for example, one of the 'activities' listed under '(a) the right to possess, occupy, use and enjoy the area' is 'the existence of a permission rule relating to land, waters and resources'.

I am of the view that for a description to be sufficient to allow the claimed native title rights and interests to be readily identified under this section, it must be a native title right and describe what is claimed in a clear and easily understood manner.

In *Doepel* His Honour Justice Mansfield suggested a dual test:

> In my judgment, the Registrar is not shown to have erred in any reviewable way in addressing the condition imposed by s 190B(4). ... He reached the required satisfaction that ... the claimed native title rights and interests did meet the requirements of being understandable as native title rights and interests and of having meaning— at [123].

Rights which are not rights in relation to lands or waters cannot be native title rights. Also rights and interests which have been held by the Courts not to be native title rights and interests under s. 223 cannot be claimed for example the right to control the use of cultural knowledge or any native title right to exclusive possession offshore or in tidal waters.

To meet the requirements of s. 190B(4), I need only be satisfied that at least one of the rights and interests sought is sufficiently described for it to be registered. I find all the rights to be readily identifiable.

Some of these rights, however, whilst readily identifiable as claiming native title, offend against the principles in *Attorney-General of the Northern Territory v Ward* [2003] FCAFC 283 at [16] – [21] when considered for the requirements of s. 190B(6).

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, and

(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 interest, and

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

Delegate's comments

In *Gudjala People # 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala*) His Honour Justice Dowsett gave extensive consideration to what is required when applying the registration test at s. 190B(3) and s. 190B(5). This was the first time that the court had considered in detail what is required to provide a sufficient factual basis for the purposes of s. 190B(5), and the interdependence of, or relationship between, the people, who under traditional law and custom were connected to the claim area and the 'normative' society which is discussed in *Yorta Yorta* (at, for example, [2002] HCA 58 [42] and [47]), both at the time of the acquisition of sovereignty and the present native title claim group. The Court also considered the 'normative' society which is discussed in *Yorta Yorta* (at, for example, [2002] HCA 58 [42] and [47]).

The court in *Gudjala* also considered more widely how the key principles in *Yorta Yorta* HCA 58 at [32] to [89]) informs the delegate's assessment of the nature and quality of the material required to establish a sufficient factual base for the assertions at s. 190B(5), and the relationship between the traditional laws and customs and the claim to native title rights and interests.

The material provided to me and on which I have relied in coming to my conclusions is the application generally and in particular at Attachment F, Table F, Attachment G and Attachment M. I have also relied upon the affidavit sworn 3 September 2007 by Mr Lomas Roberts.

I consider each of the three assertions set out in the three paragraphs of s. 190B(5) in turn and come to combined result for s. 190B(5) at page 28 below.

Result re s. 190B(5)(a)

I am **not satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(a).

Reasons re s. 190B(5)(a)

As a result of my finding at s. 190B(3) that I am unable to identify the membership of the native title claim group I cannot, as a matter of logic, make any meaningful assessment of whether the group or its predecessors have or had an association with the area.

In *Gudjala* the court said about s. 190B(5) that 'the subsection assumes identification of the claim group pursuant to subs 190B(3) and identification of claimed Native Title rights and interests pursuant to subs 190B(4)'— at [36]. The court went on to say:

> Identification of the claim group, the claimed rights and interests and the relationship between the two are not totally independent processes. The identified rights and interests must belong to the identified claim group. Subsection 190B(5) requires a description of the alleged factual basis which demonstrates that relationship. The applicant may not have been obliged to identify the relationship between the claim group and the relevant land and waters in describing the claim group for the purposes of subs 190B(3), but that step had to be undertaken for the purposes of subs 190B(5)— at [41].

Mr Lomas, in his affidavit, speaks of his own association with the area and that of his immediate ancestors but says little about the associations of the remainder of the group and whether it, as a society, has the same associations. The affidavit does not deal with why or how this particular group (rather than, say, all Noongar people) have the necessary association. In *Gudjala* Dowsett was of the view that it was not sufficient for a small number of people to establish that they and their predecessors have had an association with the area since European settlement. 'There must be evidence that there is an association between the whole group and the area'— at [52].

As a result of these considerations and the want of evidence I am not able to find, on the material before me, that the native title claim group have, and the predecessors of those persons had, an association with the area.

Result re s. 190B(5)(b)

I am **not satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(b).

Reasons re s. 190B(5)(b)

As a result of my finding at s. 190B(3) that I am unable to identify the membership of the native title claim group I cannot, as a matter of logic, make any meaningful assessment of whether there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claimed native title rights and interest

The present application lacks almost any explanation of how the group (as it is defined) came to be, under its laws and customs, a group holding native title rights and interests over the particular areas claimed, or how the present laws and customs observed may be said to be 'traditional' as that word must be understood after *Yorta Yorta.* The only information available to me in relation to the composition, size, or history of the group since sovereignty or first contact is largely inferential. I am not able to ascertain when the apical ancestors were alive - was it in the 1940s or the 1840's? – so that there is no satisfactory starting point for me to consider issues of whether the laws and customs are 'substantially unchanged'. That lack of knowledge about the group's background is exacerbated by the fact that the claim group description is, as I have found elsewhere, 'permissive'.

The affidavit by Mr Lomas shows that he has a considerable body of knowledge about Noongar ways, laws and customs. The problem for me, however, is that much of what he describes is either

current practice but without the necessary tracing or establishing of its 'traditional' nature, or his recollections of what he recalls the old people doing when he was young. The laws and customs are not linked to the group as described, although they are identified as Noongar laws and customs. Nor is there any information as to how this group has rights under Noongar law to the Wagyl Kaip area in particular.

In particular, there is an absence of any explanation of how the present laws and customs are referrable to those at sovereignty, as well as a similar absence of any information about who else in the group observes those rules.

Result re s. 190B(5)(c)

I am **not satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(c).

Reasons re s. 190B(5)(c)

As a result of my findings at subsection (b), I am also unable to find that that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Combined result for s. 190B(5)

The application **does not satisfy** the condition of s. 190B(5) because the factual basis provided is **not sufficient** to support each of the particularised assertions in s. 190B(5), as set out in my reasons above.

Section 190B(6)
Prima facie case

> 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

The application **does not satisfy** the condition of s. 190B(6). I consider that none of the claimed native title rights and interests can be prima facie established.

Reasons

Under s.190B(6) I must consider that, prima facie, at least some of the native rights and interests claimed, as defined at s. 223 of the Act, can be established. The Registrar takes the view that this requires only one right or interest to be registered.

The term 'prima facie' was considered by the High Court in *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595. In that case, the majority of the court noted:

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

And at 35:

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

This test was explicitly considered and approved in *Northern Territory v Doepel* 2003 FCA 1384:

> Although *North Ganalanja Aboriginal Corporation v The State of Queensland* (1996) 185 CLR 595 ('Waanyi') was decided under the registration regime applicable before the 1998 amendments to the NT Act, there is no reason to consider the ordinary usage of `prima facie' there adopted is no longer appropriate: ... if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'— at [135].

In considering this application and in deciding which native title rights and interests claimed can be established prima facie I have adopted the ordinary meaning referred to by their Honours and the expressions of it in the concepts of 'material which, if accepted, will result in the claims success' and 'a claim which is arguable, whether involving disputed questions of fact or disputed questions of law should be accepted on a prima facie basis'

In *Northern Territory of Australia v Doepel* [2003] FCA 1384 His Honour Justice Mansfield considered the task of the Registrar in these terms, noting that an evaluative approach is to be taken at and that it may be necessary to consider adverse material in weighing up the factual evidence – at [126] - [127].

> Clearly the requirements upon registration imposed by s 190B should be read together. Section 190B(6) requires the Registrar to consider that, prima facie, at least some of the native title rights and interests claimed can be established. It is necessary that only the claimed rights and interests about which the Registrar forms such a view are those to be described in the Native Title Register: see s 186(1)(g). It is therefore clear that a native title determination application may be accepted for registration, even though not all the claimed rights and interests, prima facie, can be established. Section 190B(6) requires some measure of the material available in support of the claim— at [126].
>
> On the other hand, s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s 190B(6). As counsel for the Territory also pointed out, addressing s 190B(6) may also require consideration of controverting evidence— at [127].
>
> Having been satisfied of the particular requirements, of s 190B(5), and because s 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed, it follows that the Registrar is not shown to have erred in his consideration of s 190B(5) in the manner asserted by the Territory— at [132].

As a result of my inability to determine at s. 190B(3) who comprises the claim group and also of my inability to apply the test at s. 190B(5) because of a lack of any factual base, I am also unable to

meaningfully consider whether any of the claimed native title rights may be prima facie established.

That said, I am of the view that many of the rights, as draughted, could not be established even if there were sufficient information for me to consider. I now turn to consider this issue. The rights and interests claimed are set out below, although for clarity I have not included the qualifications referred to in line 2: they appear in my reasons at s. 190B(4).

> The Rights and Interests
> Subject to the above qualifications, the rights and interests claimed in relation to the 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, waters and resources, including locating and cleaning water sources and drinking water on the land.

The right at (a) is a claim to exclusive possession. There is no difficulty with this right. A number of the other rights, notably those at (b), (d) and (f) imply a level of control which is inconsistent with non-exclusive possession and thus would only be available where exclusive possession could be found. If the right at (a) were established it would presumably subsume the remaining rights, all of which could be seen as incidents of the right to exclusive possession. Subject to other requirements being met, a claim to exclusive possession may be established prima facie over areas where:

- there has been no previous extinguishment of native title;
- or the non-extinguishment principle in s. 238 of the Native Title Act applies; for example where s. 47, s. 47A or s. 47B applies and in relation to areas affected by Category C and D past and intermediate period acts.

The remaining rights are non-exclusive in character, with the possible exception of (i), in relation to which it would be necessary to consider whatever factual basis might be provided underpinning the words 'live', 'residences' and 'infrastructure' to determine whether the claimed right could be consistent with other rights or whether it, too, is consistent only with exclusive possession. The right at (h) would need a similar consideration of whether the incidents of a right to 'rear children' on country implies permanent occupation and thus exclusive possession.

With appropriate evidentiary material the rights at (c), and (g) are capable of being established.

The balance of the rights, those at (e), (f), (j) and (k) may not be, for the following reasons.

In the determination hearing in *Attorney-General of the Northern Territory v Ward* [2003] FCAFC 283 (*Ward*) the Court commented on the use of 'composite' expressions such as 'use and enjoy' in relation to non-exclusive rights, and the need to describe them in terms of activities. Omitting some material for clarity, the Court said:

> The opening words of clause 5 of the proposed determination identify the native title holders' rights as being 'non-exclusive rights to occupy, use and enjoy the land and waters in accordance with their traditional laws and customs, including, as incidents of that entitlement' certain identified rights. Counsel for the Commonwealth and the State of Western Australia argue for two changes to these words: the omission of the word 'occupy' and the substitution of 'being' for the words 'including, as incidents of that entitlement'. These changes are resisted by counsel for the claimants, Mr J Basten QC. — at [16]
>
> As was pointed out by Gleeson CJ, Gaudron, Gummow and Hayne JJ in the High Court (at [89]), the expression 'possession, occupation, use and enjoyment', used in s 225(e) of the Act, 'is a composite expression directed to describing a particular measure of control over access to land'. The words of the proposed determination, 'occupy, use and enjoy' are not identical to, but are reminiscent of, this composite expression ... — at [17]
>
> The argument for an exhaustive, rather than inclusive, list of the incidents of the entitlement is based on para (b) of s 225 of the Act. That paragraph requires 'a determination of ... the nature and extent of the native title rights and interests in relation to the determination area' — at [18]
>
> In their High Court joint judgment, Gleeson CJ, Gaudron, Gummow and Hayne JJ said (at [51]): A determination of native title must comply with the requirements of s 225. In particular, it must state the **nature** and **extent** of the native title rights and interests in relation to the determination area. Where, as was the case here in relation to some parts of the claim area, 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.' (Original emphasis) – at [19]), and
>
> ... A statement about the right to 'occupy, use and enjoy' (or merely 'use and enjoy') in accordance with traditional laws and customs conveys no information as to the nature and extent of the relevant rights and interests. It is equivalent to a statement that the holders of the traditional rights and interests are entitled to exercise their traditional rights and interests. Something more is obviously required. There must be a specification of the content of the relevant rights and interests. That is why the parties included sub-clauses (a) to (e). It is to those sub-clauses that a reader may look in considering the effect of the determination. They must exhaustively indicate the determined incidents of the right to use and enjoy'— at [21].

Following paragraph [51] quoted above from *Western Australia v Ward; Attorney-General (NT) v Ward; Ningarmara v Northern Territory* [2002] HCA 28, the majority in the High Court went on to say at [52]:

> It is necessary to recognise that the holder of a right, as against the whole world, to possession of land, may control access to it by others and, in general, decide how the land will be used. But without a right of possession of that kind, it may greatly be doubted that there is any right to control access to land or make binding decisions about the use to which it is put. To use those expressions in such a case is apt to mislead. Rather, as the form of the Ward claimants'

statement of alleged rights might suggest, it will be preferable to express the rights by reference to the activities that may be conducted, as of right, on or in relation to the land or waters.

Each of the rights (e), (f), (j) and (k) fails to set out the nature and extent of the right. The rights at (e) and (f) are draughted as 'use and enjoy' and (e), (f) and (j) speak of 'resources'. There is a problem in the use of such omnibus words as 'resources' for the same reason: the word is too general for it to be said that the nature and extent of the right is clear. See, for example, *Neowarra v State of Western Australia* [2003] FCA 1402 at [479] – [482]. Finally, right (k) indicates in its use of the word 'including' that not all of the incidents of the right are set out.

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 be expected to currently 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

The application **does not satisfy** the condition of s. 190B(7).

Reasons

For the same reasons expressed at s. 190B(5) and (6), I am not able to meaningfully apply the test to the application at this section. If I cannot be satisfied that laws and customs are 'traditional' (in the sense given to it by *Yorta Yorta)* at s. 190B(5), it follows that I cannot assess the nature of the connection at this section.

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.

Delegate's comments

Section 61A contains four subsections. The first of these, s. 61A(1), stands alone. However, ss. 61A(2) and (3) are each limited by the application of s. 61(4). Therefore, I consider s 61A(1) first, then s. 61A(2) together with (4), and then s. 61A(3) also together with s. 61A(4). I come to a combined result at page 34.

No approved determination of native title: s. 61A(1)

A native title determination application must not be made in relation to an area for which there is an approved determination of native title.

Result

The application **meets** the requirement under s. 61A(1).

Reasons

There is no relevant determination.

No Previous Exclusive Possession Acts (PEPAs): ss. 61A(2) and (4)

Under s. 61A(2), the application must not cover any area in relation to which
(a) a previous exclusive possession act (see s. 23B)) was done, and
(b) either:
  (i) the act was an act attributable to the Commonwealth, or
  (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act.

Under s. 61A(4), s. 61A(2) does not apply if:
(a) the only previous exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
(b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

Result

The application **meets** the requirement under s. 61A(2), as limited by s. 61A(4).

Reasons

The claim area consists of two parcels of Unallocated Crown land, but excluded from it is a Lease of Crown Land. At Attachment B the applicants state that a claim is made pursuant to s. 47B

No exclusive native title claimed where Previous Non-Exclusive Possession Acts (PNEPAs): ss. 61A(3) and (4)

Under s. 61A(3), the application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where:
(a) a previous non-exclusive possession act (see s. 23F) was done, and

(b) either:
    (i) the act was an act attributable to the Commonwealth, or
    (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act.

Under s. 61A(4), s. 61A(3) does not apply if:
(a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
(b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

Result

The application **meets** the requirement under s. 61A(3), as limited by s. 61A(4).

Reasons

The claim area consists of two parcels of Unallocated Crown land, but excluded from it is a Lease of Crown Land. At Attachment B the applicants state that a claim is made pursuant to s. 47B

Combined result for s. 190B(8)

The application **satisfies** the condition of s. 190B(8), because it **meets** the requirements of s. 61A, as set out in the reasons above.

Section 190B(9)
No extinguishment etc. of claimed native title

The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:
(a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
(b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
(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 ss. 47, 47A or 47B.

Delegate's comments

I consider each sub-condition under s. 190B(9) in turn and I come to a combined result at page 35.

Result re s. 190B(9)(a)

The application **satisfies** the sub-condition of s. 190B(9)(a).

Reasons re s. 190B(9)(a)

Any such claim is explicitly excluded at schedule Q.

Result re s. 190B(9)(b)

The application **satisfies** the sub-condition of s. 190B(9)(b).

Reasons re s. 190B(9)(b)

Any such claim is explicitly excluded at schedule P. There is no claim to offshore waters.

Result re s. 190B(9)(c)

The application **satisfies** the sub-condition of s. 190B(9)(c).

Reasons re s. 190B(9)(c)

The application makes a specific claim pursuant to s. 47B over the whole area.

Combined result for s. 190B(9)

The application **satisfies** the condition of s. 190B(9), because it **meets** all of the three sub-conditions, as set out in the reasons above.

[End of reasons]

Attachment A

Summary of registration test result

Application name:	Wagyl Kaip — Dillon Bay People
NNTT file no.:	WC 07/1
Federal Court of Australia file no.:	WAD 33 of 2007
Date of registration test decision:	13 February 2008

Test condition (see ss.190B and C of the Native Title Act 1993)	Sub-condition/requirement	Result
s. 190C(2)		Combined result: Met
	re s. 61(1)	Met
	re s. 61(2)	Met
	re s. 61(3)	Met
	re s. 61(4)	Met
	re s. 61(5)	Met
	re s. 62(1)(a)	Met
	re s. 62(1)(b)	Met
	re s. 62(2)(a)	Met
	re s. 62(2)(b)	Met
	re s. 62(2)(c)	Met
	re s. 62(2)(d)	Met
	re s. 62(2)(e)	Met

	re s. 62(2)(f)	Met
	re s. 62(2)(g)	Met
	re s. 62(2)(h)	Met
s. 190C(3)		Not met
s. 190C(4)		Met
s. 190B(2)		Combined result: Met
	re s. 62(2)(a)	Met
	re s. 62(2)(b)	Met
s. 190B(3)		Not met
s. 190B(4)		Met
s. 190B(5)		Combined result: Not met
	re s. 190B(5)(a)	Not met
	re s. 190B(5)(b)	Not met
	re s. 190B(5)(c)	Not met
s. 190B(6)		Not met
s. 190B(7)		Not met
s. 190B(8)		Combined result: Met
	re s. 61A(1)	Met
	re ss. 61A(2) and (4)	Met
	re ss. 61A(3) and (4)	Met
s. 190B(9)		Combined result: Met

	re s. 190B(9)(a)	Met
	re s. 190B(9)(b)	Met
	re s. 190B(9)(c)	Met

Attachment B
Documents and information considered

The following lists all documents and other information that were considered by the delegate in coming to his/her decision about whether or not to accept the application for registration.

I have had regard to the application dated 19 February 2007 and to the other documents contained in National Native Title Tribunal delegate's file WC07/1 Volume 1, prepared for me by the relevant Tribunal case manager. Where I have had particular regard to documents I have identified them in the text of this statement of reasons.

Attachment C
Application overview

This application was first filed on 19 February 2007. It entirely overlaps Wagyl Kaip WAD 6286 of 1998 (WC98/70) brought by the same claim group, as well as other claims.

The application was filed specifically to make a claim pursuant to s. 47B over two parcels of Unallocated Crown Lands which could not be brought under the original application.

Attachment D
Procedural fairness steps

There was no need to extend procedural fairness to any persons.

[End of document}