National Native Title Tribunal

Registration test decision

Application name:	Mullewa Wadjari
Name of applicant:	Leedham Papertalk, Malcolm Papertalk, Douglas Comeagain, Robert Flanagan, Charles Collard, Charles Green, Jamie Joseph, Glenda Jackamarra, Karen Jones, Raymond Merritt
State/territory/region:	Western Australia
NNTT file no.:	WC 96/93
Federal Court of Australia file no.:	WAD 6119/1998
Date application made:	19 August 1996
Date application last amended:	2 March 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 am satisfied that each of the conditions contained in ss. 190B and C are met. I accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

For the purposes of s.190D(1B), my opinion is that the claim satisfies all of the conditions in s. 190B.

Date of decision: 25 June 2007

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

Table of contents

Introduction

This document sets out my reasons for the decision to accept or not accept, as the case may be, the claimant application for registration.

Section 190A of the *Native Title Act 1993* (Cwlth) (the Act) requires the Native Title 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).

I have made this registration test decision as a delegate of the Native Title Registrar (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 26/04/2007. 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.

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 judgements in the courts) relevant to the application of the registration test. Amongst 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 'without prejudice' (see s. 136A of the Act). Further, mediation is private as between the parties and is also generally confidential (see also ss. 136E and 136F).

Application overview

This is an application lodged with the Tribunal on 19 August 1996.

The applicants filed an amended application in the Federal Court on 7 January 1999. It was heard on 15 January 1999, where the Court for procedural reasons adjourned the matter until 22 January 1999, when the Court ordered that the application be further amended in accordance with the amended application filed at the hearing. The applicant filed a further amended application on 16 February 1999. This was heard on 3 March 1999, and the notice of the order was supplied to the Registrar on 5 March 1999 with a copy of the amended application.

In March 2006 the sole surviving applicant for this application passed away leaving the claimants with no living authorised applicant. On 1 August 2006, the Court ordered that: "The application is to stand dismissed as from 1 February 2007 unless before that date an application to amend the native title determination application naming authorised applicants in place of the present named applicants, each of whom is deceased, has been filed in Court."

The claimants filed the amended application on 31 January 2007. The Court accepted the amended application on 2 March 2007. 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 6 March 2007.

All references to the 'amended application' in the present decision, unless otherwise stated, refer to the application as most recently amended on 2 March 2007. However, it should be noted that some schedules, which were amended on 22/1/99, were not further amended on 2 March 2007 and thus the application as amended on 22/1/99 may reflect the current state of the application for such schedules.

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 fair, just and unbiased. 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:

A copy of the application and accompanying documents was provided to the State of Western Australia on 13 June 2007. On 18 June 2007 the State indicated that it did not wish to make submissions.

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 page15.

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).

Information in the application

At Schedule A the application contains a description of the claim group. There is a short introductory paragraph noting that the claimants are members of a number of families, and that the claim group is comprised of all the living adult members of those families and their biological descendants.

The application then lists the 56 members by name. The full description is set out in my reasons at s. 190B(2).

Reasons

Under this section, 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. If the description of the native title claim group in the application indicates that not all persons in the native title group have been included, or that it is in fact a sub-group of the native title claim group, then the relevant requirement of s 190C(2) would not be met and I should not accept the claim for registration: *Attorney General of Northern Territory v Doepel* 203 ALR 385 ('*Doepel*') at [36].

My consideration under this section does not involve me going beyond the information contained in the application: see *Doepel* [39]. In particular it 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: *Doepel* at [37].

Mansfield J in *Doepel* provided further guidance for the application of this section of the registration test in circumstances where there is an exclusion of persons from the group on the face of the application when he remarked that it may be appropriate for an application to meet the requirements of s 61(1) where it expressly excludes persons or clan groups, if those persons or clan groups are members of a competing native title claim group or groups, for example with a claim to an area which overlaps the claim area - see at [43]-[46] and particularly these comments:

> It is only if those other persons or clan groups are in fact members of the native title claim group, but have been excluded from it, that the application might not comply with s 61. If they are members of a competing claim group, for example with a claim to an area which overlaps the claim area, s 61(1) does not require them to be included as part of the native title claim group. [46]

Consideration

There is nothing in the description of the native title claim group in the application which indicates that not all persons in the native title group have been included, or that it is in fact a sub-group of the native title claim group.

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

Although it does not appear at schedule B on the copy of the application before me, the applicants address for service is provided on the cover sheet of the application, which notes that the group is represented by Corser and Corser, Solicitors, of Level 6, 37 St George's Terrace, Perth

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

Section 190C(2) of the Act provides that the Registrar must, amongst other matters, be satisfied that the application contains all details and other information required by s.61 and 62 of the Act. I am of the view, following *Doepel*, that under this section my task is not to assess the quality or substance of the statement required by s 61(4), rather it is to verify that a statement which, on its face, conforms to the requirements of the section has been made.

The description of the native title group appears at schedule A of the application and names the persons in the group.

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*.

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

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 satisfied that the application has complied with s.61(5)(d) in relation to the requirement.

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

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 subs (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.

Section 190C(2) of the Act provides that the Registrar must, amongst other matters, be satisfied that the application contains all details and other information required by s.61 and 62 of the Act. I am of the view, following *Doepel*, that under this section my task is not to assess the quality or substance of the statement required by s 62(1)(a), rather it is to verify that a statement which, on its face, conforms to the requirements of the section has been made.

Affidavits which satisfy the requirements of the section have been filed on behalf of each of the persons named as the applicant. The affidavits do not have within their text full details of the basis on which they were authorised, but the affidavits refer to and verify the contents of the application in which those details appear in full at schedule R. I am of the view that the material thereby verified satisfies the section.

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 sub-requirements in turn, as follows immediately here. My combined result for s. 62(2) is found at page 15 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

Section 190C(2) of the Act provides that the Registrar must, amongst other matters, be satisfied that the application contains all details and other information required by s.61 and 62 of the Act. I am of the view, following *Doepel,* that it does not require me to make any assessment of those details and that information beyond being satisfied that, on its face, it is responsive to the requirement of the section.

There is a written description at schedule B that may enable the external boundary of the area covered by the application to be identified. A written description of the areas within the external boundary of the application area not covered by the application is found in 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

Section 190C(2) of the Act provides that the Registrar must, amongst other matters, be satisfied that the application contains all details and other information required by s.61 and 62 of the Act. I am of the view, following *Doepel,* that it does not require me to make any assessment of those details and that information beyond being satisfied that, on its face, it is responsive to the requirement of the section.

There is a map at Attachment C that apparently shows the external boundaries of the area covered by the application.

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

Schedule D of the application contains a statement that:

> No tenure searches have been conducted by the applicants.

The application notes that some searches have been carried out by the National Native Title Tribunal, and others by the State of Western Australia. The application contains at schedule D a 19

page spreadsheet summarising the results of searches carried out by the Tribunal in 1996 and notes that the more detailed results are not held by the applicants.

The section requires 'details and results of all searches carried out' and the requirement is not limited by reference to who carries out those searches, except to say that as a matter of construction the delegate understands the section as meaning 'carried out by or on behalf of the applicant'. It does not appear that the intent of the section is that the applicants should be burdened with an obligation to provide in their own application details and results of searches not carried out by themselves and on which they may not seek to rely or be able to verify.

I am satisfied that the requirements of the section are met.

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

I am of the view, following *Doepel*, that I am not required to make any merit assessment of those details and that information beyond being satisfied that, on its face, it is responsive to the requirement of the section.

A description of the claimed native title rights and interests is found in schedule 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] FCA 416 at [25] is authority for the proposition that the general description of the factual basis must be contained in the application, and can not be the subject of additional information provided separately to the Registrar or his delegate.

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]

I am of the view, following *Doepel*, that I am not required by the section to make any merit assessment of those details and that information beyond being satisfied that, on its face, it is responsive to the requirement of the section.

The relevant information is provided in Schedule F.

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

Schedule G refers to material provided in Schedule F and Attachment G, the latter being a report from Consultant Anthropologist Rory O'Connor. Relevant information also appears at Schedule T.

Schedule G also refers to long form affidavits by [name removed for cultural reasons] and [name removed for cultural reasons] named but they do not, on the copy provided to me, appear to be 'in the application' and are thus not taken into account by me at this point.

I find that details of activities currently being carried out are supplied

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 section requires the application to contain details of which 'the applicant is aware'

There is no information before me or other reason to believe that the applicant was aware of other applications and failed to list them.

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 section requires the application to contain details of which 'the applicant is aware'. I do not construe the section as requiring details of 'spent' s.29 notices. The note at the end of the section and the Explanatory Memorandum to the Act indicate that the purpose of the requirement is to ensure that the Registrar is made aware of the need to 'use his best endeavours to finish considering the claim by the end of 4 months after the notification day specified in the notice' : see s.190A(2).

Some details were provided in the 1999 applications but the amended application before me states at Schedule I that 'the applicant is not currently aware of any such notices other than those listed in the original application as amended on 3 March 1999.'

There is no information before me or other reason to believe that the applicant is currently aware of s. 29 notices and failed to list them. I find that the application meets the requirement.

Combined result for s. 62(2)

The application meets the combined requirements of s62(2), because it meets each of the sub-requirements of ss. 62(2)(a) to (h). 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 contains 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 satisfies the condition of s. 190C(3).

Reasons

Law

The requirement that the Registrar be satisfied in the terms set out in s 190C(3) — which essentially relates to ensuring there are no common native title claim group members between the application currently being considered for registration ('the current application') and any overlapping 'previous application' — 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) FCR 33 (*Strickland FC)* at [9].

This application was first lodged with the Tribunal on 19 August 1996 and accepted for registration on that same day. The application was subsequently considered under s. 190A and registered on 28 April 1999.

As a first step, s.190C(3) requires identification of any previous overlapping applications entered on the Register as a result of consideration of those applications under s.190A. The applicants state at Schedule H of the application that there are none.

Information before me

The assessment completed by the Tribunal's Geospatial Unit on 29 March 2007 identifies that there are 8 claimant applications falling within the external boundaries of this claim, of which this and 5 others have been accepted, but the application before me was both lodged and accepted first.

Consideration

I am satisfied that there are no previous applications that fall within the external boundary of the current application. I accept that assessment.

As there is no previous application to attract s. 190C(3)(a) I need consider the section no further.

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

For the reasons set out below, I am satisfied that the circumstances described by s. 190C(4)(b) are the case in this application, including that the condition of s. 190C(5) is met..

Reasons

Authorisation or Certification: the role of the Delegate.

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).

Sections 190C(4) and 190C(5) are concerned with the authorisation of the applicant to make the application and to deal with matters arising in relation to it by the rest of the native title claim group.

The importance of authorisation

The Federal Court has consistently emphasised the fundamental importance the NTA places on ensuring that claimant applications are properly authorised.[1]

[1] *Ankamuthi People v Queensland* [2002] FCA 897, Drummond J; *Strickland v Native Title Registrar* (1999) 168 ALR 242, French J; *Moran v Minister for Land & Water Conservation for the State of New South Wales* [1999] FCA 1637; *Quall v Risk* [2001]; FCA 378 *Daniel v State of Western Australia* [2002] FCA 1147, French J.

In *Strickland v Native Title Registrar [1999] FCA 1530 ('Strickland'),* which was later approved by the Full Court in *State of Western Australia v Strickland [200] FCA 652* at [77-78], French J said that:

> Nevertheless, this is a matter of considerable importance and fundamental to the legitimacy of native title determination applications. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title. It is not a condition to be met by formulaic statements in or in support of applications. — at [57]

Who must authorise?

Authorisation must be by 'all the other persons in the claim group.'

It is clear as a matter of law that the requirement that the applicant be authorised by 'all the other persons' in the native title claim group does not necessarily mean that each and every member of the claim group must authorise the applicant[2]. There may, for example, be individual members of the claim group who for one reason or another are incapable of authorising an applicant - for example because they are of unsound mind, ill, or unable to be located or are incapacitated. It may also be the case that 'all the other persons' do not individually have to authorise the making of the application, where, for example, a traditional process is used which allows only some persons, such as male elders, to make the relevant decisions[3].

How may applications be authorised?

If the application is not certified then under s. 190C(4)(b): the delegate must be satisfied that:

(a) 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.

Authorisation is defined at s. 251B of the Act :

> For the purposes of this Act, all the persons in a native title claim group or compensation claim group *authorise* a person or persons to make a native title determination application or a compensation application, and to deal with matters arising in relation to it, if:
>
> (b) where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group or compensation claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group or compensation claim group authorise the person or persons to make the application and to deal with the matters in accordance with that process; or
>
> (b) where there is no such process—the persons in the native title claim group or compensation claim group authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group or compensation claim group, in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

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[2] *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 paras [33-34].

[3] *Strickland v Native Title Registrar [1999] FCA 1530*

Consideration

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) – set out above – is met. They are that the application is either certified or that it is authorised. The wording of the section, in my view, does not preference either alternative, unlike s. 251B for example, in which an agreed and adopted process may be used only if there is no mandatory traditional process, nor does the section suggest that either process, once adopted, may not be changed by the subsequent use of a different process.

Submissions in relation to how I should consider this section have been made by letter of 2 March 2007 by Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation ("YMBBMAC") which in this area trades as Yamatji Land and Sea Council ("YLSC") and I have considered them. YMBBMAC was the relevant Native Title Representative Body ("NTRB") for the area at that time. The letter raise questions concerning the decision made by a delegate of the Registrar on 26 April 1999 (in relation to whether the application then being considered was certified or authorised) and whether the delegate's decision was correct. The delegate at that time apparently found in his decision that the application was certified, a conclusion disputed by YLSC. The delegate's decision was not reviewed.

YLSC submits that, for reasons set out in the letter, I should find the application to be no longer certified. As will be seen, I have come to that conclusion but not on grounds relating to what was said to be a certificate

I do not believe that I need to consider the question of what occurred at that time, for two reasons. The first is that the previous administrative decision is not binding on me, nor do I have power to reconsider or revisit it in any way; that would be a matter for the courts. Secondly, I must consider the application and information currently before me. It does not make any assertion that it is certified nor seek to rely on any prior process, so that whatever was the case then is no longer relevant to my decision.

The application before me clearly states that it has been authorised. It provides extensive details of the processes used to authorise the 10 persons named as the applicant. None of those persons were named as part of the applicant in 1999. The minutes of the claim group meeting show that the group was intent on 'revitalising' an application which had lain fallow for some time. As part of that exercise the group set up working groups, made fresh decisions as to the conduct of the matter and decided to appoint new persons to be the applicant. There is a sense in the minutes of the group wishing to start again, afresh, following a 'period of mourning following the death of the last member of the original applicant group.'[4]

I have come to the conclusion that the group's express assertion (see the minutes generally) that they intended to undertake a fresh authorisation process demonstrates that they did not wish to rely on any prior certification. That new process is what I must now consider for the purposes of s. 190C(4)(b). In saying that, I do not find that the claim was or was not certified when it was

[4] At schedule R.

considered in 1999, but rather that whatever went before is no longer relevant and in any event is not relied upon in any way by the group.

That is a conclusion I would reach even were there no dispute about what occurred. It is the applicants alone who are invested with the authority to pursue an action. The role of an NTRB is to assist but not to control: see ss 203BB(2) and 203BC(1), for example. I would not understand the certification powers of NTRBs in the Act as enabling an NTRB to override a later (or, indeed, prior) decision by the applicants or to bind them by the issue of a certificate. Therefore, even if there had been a certificate in 1999 (and I do not make any finding either way for the reasons above) it is my conclusion that an act by the claim group itself would take precedence or would override any certificate.

I find that this application is not certified pursuant to s. 190C(4) (a) because a fresh process has taken place, so that I must consider whether it has been properly authorised 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[5]. 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 set out the grounds on which the Registrar should consider that it has been met.

There is a statement at schedule R which satisfies these requirements by making the necessary statement and providing a summary of the process. Schedule R in turn refers to Attachment R2/1 to R 2/4 and to affidavits going to the circumstances of authorization by each of the persons named as the applicant. The material in the Attachment and the affidavits satisfies the requirements of subsection (b).

As s. 190C(5) is satisfied I now turn to consider whether I am able to be satisfied under s. 190C(4)(b).

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.

What does the application say about the authorisation process?

It is apparent from the minutes that at the time of the authorisation meeting relied upon the claim group did not have the benefit of legal advice. As a result the minutes provided are sometimes not directly responsive to the requirements of the Act and are not always phrased in the language of the Act. Other business is mingled in with that concerned with the authorisation of persons. At

[5] *Strickland* at [56]-[57]

times it has been necessary to draw inferences from the surrounding circumstances in order to understand what has occurred.

I first consider whether the authorisation was pursuant to s 251B((a) or (b). At schedule R the application says that:

> 'The authorisation was made under a process of decision making that under the traditional laws and customs of the persons in the native title claim group, must be complied with in authorising matters of this kind, modified for the specific purpose of the application in accordance with a process of decision making agreed to by the persons in the native title group.', and
>
> 'It was agreed that the meeting in question would be held in accordance with the traditional laws and customs of the group, that is, that all members would be entitled to have an opportunity to speak and that all opinions would be considered by the group.', and
>
> 'In accordance with the traditional laws and customs of the claimant group, all parties wishing to speak for or against motions or to bring up any matters of relevance to the claimant group were allowed to do so. The meeting then debated all such issues and reached decisions on them by show of hands.'

These statements are reflected in the minutes of the meeting and I find that authorisation was carried out pursuant to s 251B (b). I now turn to consider whether authorisation was by 'all the other members of the claim group.'

Schedule R gives details of the advertising of the meeting in the West Australian newspaper on 21 September 2006. The advertised notice specified that the meeting was open to claimants only. Copies of a notice were also sent by mail to all the members of the group advising them of the meeting. It is apparent from the minutes that there had already been considerable discussion about the meeting and who might represent the claimant between claim group members in advance of it taking place.

The minutes of the meeting show that some 48 persons were in attendance . Attachment R2/3 also notes indications of support for the claim from a number of persons unable to attend. Given the relatively small size of the claim group I am satisfied that this represents a significant proportion of the claim group, and that all members of the claim group had the opportunity to attend and take part.

At the meeting two parallel processes were undertaken, which confuses the minutes a little. There was firstly a process to appoint persons to a Mullewa Wadjari Working Group. Representatives of each family were appointed together with proxies for them. I do not understand the minutes or the application to say that this group comprised the applicant. I draw that inference from the statement on page 7 that 'general discussion followed regarding how the family representatives and their proxies would relate to the applicants on the claim.' As best I understand the minutes the function of the Mullewa Wadjari Working group is to assist the applicant.

The actual motion appointing the persons appears on page 9 of the minutes and states 'that each family member who has been nominated as per motion 71006-2 as a representative of their family groups also be listed on the Mullewa Wadjari Claim as an applicant.' I note that this motion does not mention the proxies, which I take to be confirmatory of my conclusion in the paragraph above as to the relationship between the working group and the applicant. The motion was carried unanimously.

I am satisfied that 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.

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 26 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

Section 190B(2) requires that the information in the application describing the areas covered by the application is sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters. The information required to be contained in the application is that described in ss 62(2)(a) namely:

- information, whether by physical description or otherwise, that enables the boundaries of:
  a. the area covered by the application (the external boundary of the application area); and
  b. any areas within those boundaries that are not covered by the application (internal areas within the external boundary that are not covered by the application)

  to be identified.

The Courts have considered what information needs to be provided in satisfaction of this section. In *Daniel for the Ngaluma People & Monadee for the Injibandi People v State of Western Australia* [1999] FCA 686 Nicholson J held that such 'formula' descriptions could be acceptable (at [32) but that when it might be appropriate to do so depended on the circumstances of the particular case. He then considered the implications for both parties at [37] to [39], noting that the intent of the Act is to ensure that persons holding interests have such certainty as is available, but that certainty may have to await determination (at [38]). He concluded at [39] that;

whether a class or formula description satisfies the Act requires consideration by the Court in the light of evidence of consideration given to the relevant issues by the first applicants and how feasible it is that greater certainty in detail can be provided consistently with the other requirements of the Act.

I do not understand the Court as having said that there are no circumstances in which a formula description may not be used.

Information before me

A written description of the external boundary of the application area is found in Schedule B which in turn refers to Attachment B and a map showing this boundary is found in Attachment C. Attachment B is a description by geographical co-ordinates in decimal degrees on an AGD 1984 datum

A written description of the internal areas within that external boundary that are not covered by the application is found in schedule B, the whole of which I set out below:

(1) The applicants exclude from the claim any areas covered by valid acts on or before 23 December 1996 comprising such of the following as are included as extinguishing acts within the Native Title Act 1993, as amended, or Titles Validation Act 1994, as amended, at the time of the Registrar's consideration: Category A past acts, as defined in NTA s228 and s229; Category A intermediate period acts, as defined in NTA s232A and s232B.

(2) The applicants exclude from the claim any areas in relation to which a previous exclusive possession act, as defined in s23B of the NTA, was done in relation to the area, and either the act was an act attributable to the Commonwealth, or the act was an act attributable to the State of Western Australia and a law of that State has made provision as mentioned in s23E in relation to the act.

(3) The applicants exclude from the claim areas in relation to which native title rights and interests have otherwise been extinguished, including areas subject to: .

(a) an act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or

(b) actual use made by the holder of a tenure other than native title which is permanently inconsistent with the continued existence of native title.

To avoid any uncertainty, the applicants exclude from the claim area the tenures set out in Schedule B1 below.

Schedule B1

B1.1 An unqualified grant of an estate in fee simple.

B1.2 A lease which is currently in force, in respect of an area not exceeding 5,000 square metres; upon .which a dwelling house, residence, building or work is constructed; and which comprises:

(1) a lease of a worker's dwelling under the Workers' Homes Act 1911-1928;

(2) a 999 year lease under the Land Act 1898;

(3) a lease of a Town Lot or Suburban Lot pursuant to the Land Act 1933 (WA), sl17; or

(4) a special lease under sl17 of the Land Act 1933 (WA).

B1.3 A Conditional Purchase Lease currently in force in the Agricultural areas of the South West Division under clauses 46 and 47 of the Land Regulations 1827, which includes a condition that the lessee reside on the area of the lease and upon which a residence has been constructed.

B1.4 A Conditional Purchase lease of cultivable land currently in force under Part V, Division 1 of the Land Act 1933 (WA) in respect of which habitual residence by the lessee is a statutory condition in accordance with the Division and upon which a residence has been constructed.

B1.5 A Perpetual Lease currently in force under the War Service Land Settlement Scheme Act 1954.

B1.6 A permanent public work.

B1.7 An existing public road or street used by the public.

(4) Paragraphs (1) to (3) above are subject to such of the provisions of sections 47, 47A and 47B of the NTA as apply to any part of the application, particulars of which will be provided prior to the Mullewa Wadjari native title hearing.

Consideration

I am satisfied that the information contained in the application describes the external boundary of the area covered by the application with reasonable certainty. The use of geographic coordinates, coupled with a map that shows the external boundary consistently with the written description of it, enable that boundary to be located on the earth's surface with reasonable certainty.

I have before me a Geospatial Assessment and Overlap Analysis Number 2007/0447 dated 29 March 2007 prepared by the Tribunal's Geospatial Services Unit. That assessment finds that the description and map are consistent and identify the application area with reasonable certainty. I accept that assessment and so find.

I am of the view that the stated exclusion by class of areas within the external boundary also amounts to information that enables those areas to be identified with reasonable certainty.

In some cases, research and consideration of tenure data held by the State may be required, but nevertheless it is reasonable to expect that the task can be done on the basis of the information provided by the applicant.

The use of a generic formula to describe land or waters falling within the external boundaries that are not covered by the application is acceptable, depending on the state of the applicant's knowledge at the time that the application is made or amended. As the proceedings are at an early stage, it is reasonable to expect that the applicant has not the knowledge of the tenure history for the application area to more specifically exclude areas covered by known extinguishing events. See *Daniels & Ors v State of Western Australia* [1999] FCA 686. I am not provided with any information which would allow me to conclude that the applicant is in possession of knowledge to enable a more precise identification of areas that need to be excluded from the application

Accordingly, I find the use of a generic formula to exclude areas within the external boundary acceptable in this case.

To conclude, I am satisfied that the information required by ss 62(2)(a) is 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 and the requirements of s 190B(2) are met.

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 map marks the external boundary in a clear contrasting ink, with the application area also clearly marked by diagonal lines within that line. There is a scale bar, locality map and notes relating to its sources and the date it was produced. Underlying cadastral boundaries are shown.

I have before me a Geospatial Assessment and Overlap Analysis Number 2007/0447 dated 29 March 2007 prepared by the Tribunal's Geospatial Services Unit. That assessment finds that the description and map are consistent and identify the application area with reasonable certainty. I accept that assessment and so find.

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 satisfies the condition of s. 190B(3).

Reasons

Law

In *Doepel* Mansfield J said at [16]:

> 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 [37], Mansfield J also noted in relation to s 190B(3) that:

> 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.

And at [51]

> 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.

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]. 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: *Ward v Native Title Registrar* [1999] FCA 1732. In my view, s.190B(3)(b) requires that the description contain an objective method of determining who is in the claim group.

Information before me

At Attachment A the application describes the claim group in these terms:

> The Mullewa Wadjari Native Title Claimants are members of the Collard, Merritt, Flanagan, Hannah, Joseph, Jones, Green, Papertalk, Comeagain and CoIlins families, all originally from the Mullewa region, whose adult living members are hereunder listed in their entirety. The native title claim group is those people here listed and their biological descendants.
>
> Rae Collard, Charles Collard, Cynthia Collard, Gavin Collard, Christine Collard, Adrian Collard Raymond Merritt, Graham .Merritt, Marilyn Merritt, Helen Merritt, Eric Merritt.
> William Flanagan, Leslie Flanagan, Roslyn Kelly, Henry Flanagan, Elizabeth Flanagan, Robert Flanagan, Emest Flanagan, Dawn Hamlett, Donna Flanagan.
> Norma Hannah, Michael Hannah, Francis Hannah.
> Robert Joseph, Max Joseph, Francis Joseph, Jamie Joseph.
> Jennifer Jones, Tony Jones, Robert Jones.
> Charmaine Green, Caroline Green, Charlie Green (jnr), Carl Green.
> Donald Papertalk, Victoria Papertalk, Kate Papertalk, John Papertalk, Doreen Papertalk, Margaret Papertalk, Henry Papertalk, Leedham Papertalk, Patrick Papertalk, Dorothy Papertalk, Marilyn Papertalk, Alison Papertalk.
> Douglas Comeagain (Snr), Elizabeth Comeagain, Allan Comeagain, Grace Comeagain, Morris Comeagain, Jacqueline Comeagain.
> Malcolm Papertalk (Collins), Alison Collins, Victor Collins, Edward Collins.

Consideration

The application describes the claim group as being certain named persons and their biological descendants. Because the descendants are not themselves named the description cannot therefore comply with s 190B(3)(a). I must consider if 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 my view, the description provides an objective means of ascertaining where a person is a member of that group. Some factual investigation may be necessary to ascertain whether a person is a biological descendant of one or more of the named members, however, this is not an impediment to the description meeting the requirements of the section (see *Western Australia v Native Title Registrar* (1999) 95 FCR 93 at [67]).

I find that the description satisfies the requirements of the section.

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. 61(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

Law

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.

The use of the phrases 'native title' and 'native title rights and interests' in s.190B(4) is intended to screen from registered status those rights and interests that do not fall within the definition of that term found in s 223 of the Act. 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 can not be 'readily identified' for the purposes of s 190B(4).

In *Northern Territory of Australia v Doepel* [2003] FCA 1384 Mansfield J suggests 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])

Examples of rights which are not readily identifiable include the right to control the use of cultural knowledge that goes beyond the right to control access to lands and waters,[6] rights to minerals and petroleum under relevant Queensland legislation,[7] an exclusive right to fish offshore or in tidal waters and any native title right to exclusive possession offshore or in tidal waters.[8]

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.

Information before me

Schedule E of the application contains this description of the claimed native title rights and interests:

> The native title rights and interests claimed are the rights to the possession, use, occupation and enjoyment of the land and waters claimed, and in particular are comprised of:
>
> A) The right to possess, use, occupy and enjoy the area claimed.
> 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 the resources of the area, subject to the exclusions of Schedules P and Q.
> F) The right to control the use and enjoyment of others of the resources of the area, subject to the exclusions of Schedules P and Q.
> G) The right to trade in resources of the area, subject to the exclusions of Schedules P and Q. .
> H) The right to receive a portion of any resources taken by others from the area, subject to the exclusions of Schedules P and Q.
> I) The right to maintain and protect places of importance under traditional laws, practices and customs in the area.
> J) The right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area.
> K) The right to hold meetings and traditional ceremonies on the land.
> L) The right to manage and protect the sacred sites and spirituality of the land and to camp, hunt, fish, gather bush tucker, medicines and building materials according to the laws and customs of the Mullewa Wadjari people.
> M) The right to gather materials to make tools, weapons and utensils to perform our traditional ceremonies.
> N) The right to maintain and care for water resources (particularly springs) in significant areas of the land.
> 0) The right to prevent others from fouling our sacred areas and water resources.
>
> Along with the exclusions of Schedules P and Q below, the above-listed native title rights and interests are subject to the following:
>
> (1) The applicants do not make a claim for native title rights or interests which confer

[6] *Western Australia v Ward* (2002) 191 ALR 1, para [59].
[7] *Western Australia v Ward*, para [383] and [384]; *Wik v Queensland* (1996) 63 FCR 450 at 501-504; 134 ALR 637 at 686-688.
[8] *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 144-145.

possession, occupation, use or 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 s23F 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 s23L of the NTA in relation to the act.

(2) Paragraph (1) above is subject to such of the provisions of s47, s47A and s478 of the Act as apply to any part of the area contained within the application, particulars of which will be provided prior to the native title hearing.

(3) The said native title rights and interests are not claimed to the exclusion of any other rights and interests validly created by or pursuant to the common law, the law of the State or a law of the Commonwealth.

The schedules at P and Q referred to respectively state that the application makes no claim to exclusive possession over offshore areas and that no claim is made to minerals petroleum or gas such as are wholly owned by the Crown.

Consideration

The right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area at (J) clearly offends against the findings of the High Court in *WA* v *Ward* [2002] HCA 28, at [57]-[60] and is not a native title right.

The remaining rights are readily identifiable. Whether they are able to be prima facie established is considered at 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

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 34 below.

The law

In *Doepel* Mansfield J held:

> 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—at [17].
>
> ... There is nothing in s 190B(5) or in s 190B generally which indicates that the assertions in the application itself may not be considered by the Registrar in addressing the condition imposed by s 190B(5). In both *WA v Strickland* at 54-55 [88 - 89] citing with approval *Strickland v NTR* at 261, and *Martin* at [23]–[26], the Court was prepared to consider the material included in the application as material relevant to the satisfaction of the condition imposed by s 190B(5)—at [125].

Under this section I must be satisfied that a sufficient factual basis is provided to support the assertion that the claimed native title rights and interests exist. The factual basis must support the particular assertions set out in subsections (a), (b) and (c) of s.190B(5). These sub-sections set out the important aspects of the overall requirement that there is a sufficient factual basis for the assertion that the claimed native title rights and interests exist, referring as they do to the current and previous members of the native title claim group having an association with the area, the existence of traditional laws and customs acknowledged and observed by the native title claim group and that group continuing to hold the native title in accordance with those traditional laws and customs.

I am not limited to consideration of information contained in the application but may have regard to information provided by the applicant (*Western Australia v Strickland* (2000) 99 FCR 33 at [88] – [89] (*Strickland FC*)). I may also have regard to information from other sources relevant to my consideration, subject to providing procedural fairness to the applicant, where it is potentially adverse and the applicant has not seen that material (refer concluding words of s. 190A(3) that the Registrar 'may have regard to such other information as he or she considers appropriate').

However, the provision of material demonstrating a sufficient factual basis for the claimed rights and interests is ultimately the responsibility of the applicant and there is no requirement that I undertake a search for this material (see French J in *Martin v Native Title Registrar* [2001] FCA 16 at [23]).

I do not understand *Doepel* or *Martin* as holding that I must uncritically accept all material that is before me, nor to say that I may not consider potentially adverse information in the assessment of what is before me. The assessment of any 'proper' (see *Doepel*), or 'sufficient' (see words in the section) factual basis must necessarily involve an assessment of the factual basis provided as well as to ascertain whether it conforms with the High Court's consideration in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 (*Yorta Yorta*) of what the term 'traditional' means in the s. 223 definition of the expressions 'native title' and 'native title rights and interests' particularly as these expressions are found also in s. 190B(5).

I have also considered the Second Reading Speech of the Attorney-General, Hansard, House of Representatives, 9 March 1998 at p. 784 when the Attorney-General explained the purpose of the introduction of the proposed amendments to Part 7 of the Act so as to introduce a more stringent

test (the registration test) to be applied by the Registrar when considering applications for registration and entry onto the Register of Native Title Claims, thereby allowing the registered native title claimant to participate in the right to negotiate process:

> . . . it is essential to the continuing acceptance of the right to negotiate process that only those people with a credible native title claim should participate. Application of an improved test will go a long way to removing the ambit and unprepared claims which are now clogging the National Native Title Tribunal .

It is my view that the factual basis condition found in s. 190B(5) is critical to Parliament's intent, namely that the Registrar deny registration to 'ambit and unprepared claims'.

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

I am satisfied that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(a).

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

I must consider whether there is a sufficient factual base to support the assertion that that the native title claim group have, and the predecessors of those persons had, an association with the area.

The application at schedule F provides useful information on which I have relied.

I have before me affidavits by [name removed for cultural reasons] and [name removed for cultural reasons] each sworn and dated 5 January 1999. Each deposes to a personal family history able to be traced and identified in a direct line to a period prior to white settlement. I infer from the affidavits that their earliest remembered forebear may have been born around the middle of the 19th century. That information is further detailed in the Oral History project paper and in the transcripts prepared by Rory O'Connor, an anthropologist. There is extensive material concerning various members of the predecessors of the current claim group living on and travelling over the area over a period from the late 19th century up until the present time. In particular I note at p 20 of the Oral History document an extract from the Commissioner for Native Affairs records of the many members of the group living in and around Mullewa in 1943.

There is some corroborative material at p. 19ff in the South West Geraldton Cluster Research Report. prepared by the Native Title Tribunal's research unit in 2006. That material is essentially a survey of the writings of anthropologists from 1888 onwards. It is too general to be of significant value but it does confirm that the Wadjari people (by various names and in differing orthographies) were known to be in and around the area where the claim is made.

I have no reason to doubt the evidence from the members of the group and I accept that the group has had an association with the area since prior to sovereignty. I am prepared to infer from the fact that the claim group was in the area at the time of contact that it is also probable that they were also there at the time of sovereignty.

I find that there is a sufficient factual basis for the assertions made.

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

I am satisfied that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(b).

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

I must consider whether there is a sufficient factual basis to support the assertion 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.

There are many references to the existence of traditional law and custom in the Oral History Project, although that document is primarily directed at family histories. That such references occur in a context not directed at such matters adds weight. Examples are at pages 5, 7, 8, 9, 10, 11, and 20.

The transcripts of videotaped interviews prepared by the anthropologist Rory O'Connor provide multiple examples of the existence of wider ranging laws and customs and of the adherence of the claim group to them. In his introductory letter Mr O'Connor notes about [name removed for cultural reasons] that he has 'also realised the vast store of traditional knowledge which [he] possesses and how faithfully he has guarded and cherished the secrets of his ancestors. It would not be appropriate to discuss such matters in a letter...' For the same reason I do not propose to set out the nature or extent of the material discussed in the transcripts in great detail in these reasons.

I have also relied upon Schedules F, G, M and T.

References to the observation of law and custom are to be found at each of pages 5 to 17, 19 to 26, 28 to 29, 34, 36 to 37 and 39 – 40.

Both of the affidavits (by [name removed for cultural reasons] and [name removed for cultural reasons]) contain, in each paragraph, evidence of the laws and customs of the group and their observation.

All of these sources refer to the traditional nature of those laws and customs by speaking of their unchanging nature and of their being handed down.

I accept all that material and find that there is a sufficient factual bas demonstrated to support the assertion 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.

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

I am satisfied that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(c).

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

I must consider whether there is a sufficient factual basis to support the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

For the same reasons as expressed above, and relying on the same material, I find that this subsection is satisfied.

Combined result for s. 190B(5)

The application satisfies the condition of s. 190B(5) because the factual basis provided is 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 satisfies the condition of s. 190B(6). The claimed native title rights and interests that I consider can be prima facie established are identified in my reasons below.

Reasons

The law.
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 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].'

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 at paras 134-5 :

> '134. Although North Ganalanja Aboriginal Corporation v The State of Queensland (1996) 185 CLR 595 (Waanyi) was decided under the registration regime applicable before the 1998 amendments to the NT Act, there is no reason to consider the ordinary usage of `prima facie' there adopted is no

> longer appropriate: see the joint judgment of Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ at 615 - 616. Their Honours' remarks at 622 - 623 indicate the clearly different legislative context in which that case was decided
>
> 135. ……see e.g. the discussion by McHugh J in Waanyi at 638 - 641. To adopt his Honour's words, if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis.'

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

The Court considered the role of the Registrar when testing this section in *Northern Territory of Australia v Doepel* [2003] FCA 1384, noting that an evaluation is necessary at s. 190B(6):

> 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[, and
>
> ... 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], and
>
> Consequently, in my view, the Registrar did not err in focussing primarily upon the particular requirements of s 190B(5). That is the way in which the NT Act directs his attention. If any of the particular requirements were not met, then the general requirement would not be met. 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]

In considering this section I have relied upon the application as a whole, Schedules F, G, M and T, the two affidavits, the transcripts and, to a lesser extent, the Oral History. The latter three have the merit of being first hand and in the words of members of the claim group and I accord them more weight than the more general assertions in the application. I have however taken all that material into account and have considered the application as a whole in coming to my findings.

The Registrar is of the view that it is only necessary for one right to be recognised for the application to satisfy this section.

Description of the claimed native title rights and interests in the application

The rights and interest claimed are set out in schedule E. The claim is drafted as a claim for the right to possess, occupy, use and enjoy the area: a claim to exclusive possession. Fifteen rights which are incidents of the right to exclusive possession are claimed.

The native title rights and interests claimed are subject to the following qualifications:

> Along with the exclusions of Schedules P and Q below, the above-listed native title rights and interests are subject to the following:
>
> (1) The applicants do not make a claim for native title rights or interests which confer possession, occupation, use or 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 s23F 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 s23L of the NTA in relation to the act.
>
> (2) Paragraph (1) above is subject to such of the provisions of s47, s47A and s478 of the Act as apply to any part of the area contained within the application, particulars of which will be provided prior to the native title hearing.
>
> (3) The said native title rights and interests are not claimed to the exclusion of any other rights and interests validly created by or pursuant to the common law, the law of the State or a law of the Commonwealth.

Schedules P and Q state respectively:

> To the extent that the native title rights and interests claimed may relate to waters in an offshore place, those rights and interest are not to the exclusion of other rights and interest validly created by 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., and
>
> To the extent that any minerals, petroleum or gas within area of the claim are wholly owned by the Crown in right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants.

Schedule L also makes a claim to the benefits of ss 47, 47A and 47B.

I am not able to make findings specifying which parts of the claimed area may be subject to a claim of exclusive possession, if any, as I am not provided with adequate tenure information.

A number of the incidents sought are consistent only with exclusive possession but, while others may be consistent with non-exclusive possession, as I understand the drafting no claim is made to rights where exclusive possession cannot be found.

The incidents of the right to exclusive possession claimed which are able to be established prima facie are:

A) The right to possess, use, occupy and enjoy the area claimed.
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 the resources of the area, subject to the exclusions of Schedules P and Q.
F) The right to control the use and enjoyment of others of the resources of the area, subject to the exclusions of Schedules P and Q.
I) The right to maintain and protect places of importance under traditional laws, practices and customs in the area.
K) The right to hold meetings and traditional ceremonies on the land.

L) The right to manage and protect the sacred sites and spirituality of the land and to camp, hunt, fish, gather bush tucker, medicines and building materials according to the laws and customs of the Mullewa Wadjari people.

M) The right to gather materials to make tools, weapons and utensils to perform our traditional ceremonies.

N) The right to maintain and care for water resources (particularly springs) in significant areas of the land.

0) The right to prevent others from fouling our sacred areas and water resources.

A prima facie case is established for the observation of law and custom and of the rights listed above flowing from them and is to be found in Attachment F 3 at each of pages 5 to 17, 19 to 26, 28 to 29, 34, 36 to 37 and 39 – 40. The affidavits by [name removed for cultural reasons] and [name removed for cultural reasons] also contain, in each paragraph, evidence of the laws and customs of the group and the rights flowing from them.

I am unable to find sufficient probative material to establish the following two rights:

G) The right to trade in resources of the area, subject to the exclusions of Schedules P and Q. .

H) The right to receive a portion of any resources taken by others from the area, subject to the exclusions of Schedules P and Q.

I find, on the basis of the material above, that these rights may be prima facie established when a right to exclusive possession may be found or the benefits of s 238 apply.

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 satisfies the condition of s. 190B(7).

Reasons

For the reasons expressed at s. 190B(5) I am satisfied that [name removed for cultural reasons] previously had a traditional physical connection with the land and waters covered by the application.

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 39.

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 approved determination of native title over any part of the application area.

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 application specifically excludes any such area at schedule B (2)

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 application specifically excludes claims to possession occupation use and enjoyment to the exclusion of all others where acts subject to s. 61(3) apply, at schedule E (1)

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 41.

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

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

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

The application states in schedule Q that no claim is made to minerals, petroleum or gas wholly owned by the Crown.

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

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

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

The application specifically excludes any claim to exclusive possession rights over any offshore place at schedule P.

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

- a break in traditional physical connection;
- non-existence of an identifiable native title claim group;
- by the non-existence of a system of traditional laws and customs linking the group to the area;
- an entry on the Register of Indigenous Land Use Agreements;
- Legislative extinguishment.

A search of the Register of Indigenous Land Use Agreements reveals that there are no indigenous land use agreements (ILUAs) entered on the Register that affect part of the claim area.

I do not have any information before me to find that the claimed native title rights and interests have otherwise been extinguished.

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
Information to be included on the Register of Native Title Claims

Application name:	Mullewa Wadjari
NNTT file no.:	WC96/93
Federal Court of Australia file no.:	WAD 6119/98
Date of registration test decision:	25 June 2007

In accordance with ss. 190(1) and 186 of the *Native Title Act 1993* (Cwlth), the following is to be entered on the Register of Native Title Claims for the above application.

Section 186(1): Mandatory information

Application filed/lodged with:

Federal Court

Date application filed/lodged:

19 August 1996

Date application entered on Register:

25 June 2007

Applicant:

Leedham Papertalk, Malcolm Papertalk, Douglas Comeagain, Robert Flanagan, Charles Collard, Charles Green, Jamie Joseph, Glenda Jackamarra, Karen Jones, Raymond Merritt

Applicant's address for service:

C/- Corser and Corser

Level 6

37 St Georges Terrace

Perth

W.A. 6000

Area covered by application:

External boundary

As set out in Attachment B.

Internal areas within that external boundary that are not covered by the application:

(1) The applicants exclude from the claim any areas covered by valid acts on or before 23 December 1996 comprising such of the following as are included as extinguishing acts within the Native Title Act 1993, as amended, or Titles Validation Act 1994, as amended, at the time of the Registrar's consideration: Category A past acts, as defined in NTA s228 and s229; Category A intermediate period acts, as defined in NTA s232A and s232B.

(2) The applicants exclude from the claim any areas in relation to which a previous exclusive possession act, as defined in s23B of the NTA, was done in relation to the area, and either the act was an act attributable to the Commonwealth, or the act was an act attributable to the State of Western Australia and a law of that State has made provision as mentioned in s23E in relation to the act.

(3) The applicants exclude from the claim areas in relation to which native title rights and interests have otherwise been extinguished, including areas subject to: .

(a) an act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or

(b) actual use made by the holder of a tenure other than native title which is permanently inconsistent with the continued existence of native title.

To avoid any uncertainty, the applicants exclude from the claim area the tenures set out in Schedule B1 below.

Schedule B1

B1.1 An unqualified grant of an estate in fee simple.

B1.2 A lease which is currently in force, in respect of an area not exceeding 5,000 square metres; upon .which a dwelling house, residence, building or work is constructed; and which comprises:

(1) a lease of a worker's dwelling under the Workers' Homes Act 1911-1928;

(2) a 999 year lease under the Land Act 1898;

(3) a lease of a Town Lot or Suburban Lot pursuant to the Land Act 1933 (WA), sl17; or

(4) a special lease under sl17 of the Land Act 1933 (WA).

B1.3 A Conditional Purchase Lease currently in force in the Agricultural areas of the South West Division under clauses 46 and 47 of the Land Regulations 1827, which includes a condition that the lessee reside on the area of the lease and upon which a residence has been constructed.

B1.4 A Conditional Purchase lease of cultivable land currently in force under Part V, Division 1 of the Land Act 1933 (WA) in respect of which habitual residence by the lessee is a statutory condition in accordance with the Division and upon which a residence has been constructed.

B1.5 A Perpetual Lease currently in force under the War Service Land Settlement Scheme Act 1954.

B1.6 A permanent public work.

B1.7 An existing public road or street used by the public.

(4) Paragraphs (1) to (3) above are subject to such of the provisions of sections 47, 47A and 47B of the NTA as apply to any part of the application, particulars of which will be provided prior to the Mullewa Wadjari native title hearing.

Persons claiming to hold native title:

The Mullewa Wadjari Native Title Claimants are members of the Collard, Merritt, Flanagan, Hannah, Joseph, Jones, Green, Papertalk, Comeagain and CoIlins families, all originally from the Mullewa region, whose adult living members are hereunder listed in their entirety. The native title claim group is those people here listed and their biological descendants.

Rae Collard, Charles Collard, Cynthia Collard, Gavin Collard, Christine Collard, Adrian Collard Raymond Merritt, Graham .Merritt, Marilyn Merritt, Helen Merritt, Eric Merritt.
William Flanagan, Leslie Flanagan, Roslyn Kelly, Henry Flanagan, Elizabeth Flanagan, Robert Flanagan, Emest Flanagan, Dawn Hamlett, Donna Flanagan.
Norma Hannah, Michael Hannah, Francis Hannah.
Robert Joseph, Max Joseph, Francis Joseph, Jamie Joseph.
Jennifer Jones, Tony Jones, Robert Jones.
Charmaine Green, Caroline Green, Charlie Green (jnr), Carl Green.
Donald Papertalk, Victoria Papertalk, Kate Papertalk, John Papertalk, Doreen Papertalk, Margaret Papertalk, Henry Papertalk, Leedham Papertalk, Patrick Papertalk, Dorothy Papertalk, Marilyn Papertalk, Alison Papertalk.
Douglas Comeagain (Snr), Elizabeth Comeagain, Allan Comeagain, Grace Comeagain, Morris Comeagain, Jacqueline Comeagain.
Malcolm Papertalk (Collins), Alison Collins, Victor Collins, Edward Collins.

Registered native title rights and interests:

The native title rights and interests claimed are subject to the following qualifications:

Along with the exclusions of Schedules P and Q below, the above-listed native title rights and interests are subject to the following:

(1) The applicants do not make a claim for native title rights or interests which confer possession, occupation, use or 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 s23F 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 s23L of the NTA in relation to the act.

(2) Paragraph (1) above is subject to such of the provisions of s47, s47A and s478 of the Act as apply to any part of the area contained within the application, particulars of which will be provided prior to the native title hearing.

(3) The said native title rights and interests are not claimed to the exclusion of any other rights and interests validly created by or pursuant to the common law, the law of the State or a law of the Commonwealth.

Schedule P

To the extent that the native title rights and interests claimed may relate to waters in an offshore place, those rights and interest are not to the exclusion of other rights and interest validly created by 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., and

Schedule Q

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

The following rights are prima facie established where exclusive possession may be found or s 238 applies:

A) The right to possess, use, occupy and enjoy the area claimed.
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 the resources of the area, subject to the exclusions of Schedules P and Q.
F) The right to control the use and enjoyment of others of the resources of the area, subject to the exclusions of Schedules P and Q.
I) The right to maintain and protect places of importance under traditional laws, practices and customs in the area.
K) The right to hold meetings and traditional ceremonies on the land.
L) The right to manage and protect the sacred sites and spirituality of the land and to camp, hunt, fish, gather bush tucker, medicines

and building materials according to the laws and customs of the Mullewa Wadjari people.

M) The right to gather materials to make tools, weapons and utensils to perform our traditional ceremonies.

N) The right to maintain and care for water resources (particularly springs) in significant areas of the land.

0) The right to prevent others from fouling our sacred areas and water resources.

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.

Application filed 2 March 2007 as amended

Attachments to the application.

Affidavits dated 5 January 1999 by [name removed for cultural reasons] and [name removed for cultural reasons]

South West Geraldton Cluster Research Report by Dr Lincoln Hayes, National Native Title Tribunal, November 2006.

Correspondence from Yamatji Barna Baba Maaja Aboriginal Corporation t/as Yamatji Land and Sea council dated 2 March 2007.

Correspondence from the State of Western Australia dated 18 June 2007.

Attachment C
Application overview

This is an application lodged with the Tribunal on 19 August 1996.

The applicants filed an amended application in the Federal Court on 7 January 1999. It was heard on 15 January 1999, where the Court for procedural reasons adjourned the matter until 22 January 1999, when the Court ordered that the application be further amended in accordance with the amended application filed at the hearing. The applicant filed a further amended application on 16 February 1999. This was heard on 3 March 1999, and the notice of the order was supplied to the Registrar on 5 March 1999 with a copy of the amended application.

In March 2006 the sole surviving applicant for this application passed away leaving the claimants with no living authorised applicant. On 1 August 2006, the Court ordered that: "The application is to stand dismissed as from 1 February 2007 unless before that date an application to amend the native title determination application naming authorised applicants in place of the present named applicants, each of whom is deceased, has been filed in Court."

The claimants filed the amended application on 31 January 2007. The Court accepted the amended application on 2 March 2007. 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 6 March 2007.

All references to the 'amended application' in the present decision, unless otherwise stated, refer to the application as most recently amended on 2 March 2007. However, it should be noted that some schedules, which were amended on 22/1/99, were not further amended on 2 March 2007 and thus the application as amended on 22/1/99 may reflect the current state of the application for such schedules.

Attachment D
Procedural fairness steps

A copy of the application and accompanying documents was provided to the State of Western Australia on 13 June 2007. On 18 June 2007 the State indicated that it did not wish to make submissions.

[End of document}