NATIONAL NATIVE TITLE TRIBUNAL

REGISTRATION TEST

Reasons for Decision

DELEGATE:	Graham Miner

Application Name:	Malarngowem
Names of Applicant(s):	Maggie John, Patrick Mung, Chocolate Thomas, Pearl Gordon, Goody Barrett, Lena Nyadbi, Churchill Cann, Hector Chunda, Paddy McGinty, Bernard Stretch, Norman Thomas, Shirley Purdey, Phyllis Gallagher, Rusty Peters, Rammel Peters, Mabel Peters, Gordon Barney, Topsy Springvale, Mary Thomas, Queenie Malgil.
Region:	Kimberley Region
Date Application Made:	24 September 1999
Application Amended:	24 September 2004
Federal Court No.:	WAG6182/98
NNTT No.:	WC99/44

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

November 2004
Date of Decision

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

Brief History of the Application

This application is a combination of four applications, WC 97/59, WC 97/67, WC 98/3, and WC 99/28.

The WC 97/59 native title determination application was lodged with the National Native Tribunal on or about 21 July 1997. The Federal Court reference for this application is WAG 6182 of 1998.

The WC 97/67 native title determination application was lodged with the National Native Tribunal on 4 August 1997. The Federal Court reference for this application is WAG 6190 of 1998.

The WC 98/30 native title determination application was lodged with the National Native Tribunal on 15 June 1998. The Federal Court reference for this application is WAG 6246 of 1998.

The WC 99/28 native title determination application was filed with the Federal Court on 24 September 1999 and referred to the National Native Tribunal on 28 September 1999. The Federal Court reference for this application is WAG 6028 of 1999.

On 24 September 1999 a Notice of Motion for a new broad country application was filed in the Federal Court. WAG 6028 of 1999 was referred to the Tribunal on 28 September 1999 and given Tribunal reference number WC99/28.

On 24 September 1999 a Notice of Motion to amend and combine WC99/28 with three other existing applications was filed in the Federal Court. The Federal Court ordered that the amendments be accepted in the proposed form of an application on 22 October 1999. The lead application was WC97/59.

The amendment of the application WC97/59 resulted in a change to the applicants.

On 6 September 2004 a Notice of Motion to amend the application was filed in the Federal Court. On 14 September 2004 Registrar Jan granted leave to amend the application and on 16 September 2004 the Tribunal received a copy this order attached to the Form 1 amended application and supporting affidavits. A further amended application was filed in the Federal Court on 24 September 2004. It is this application that I am obliged to test. The difference between the two applications filed in September 2004 is that Schedule T in the application filed on 24 September 2004 is signed.

The area subject to claim is located in the Kimberley region, Western Australia. The Kimberley Land Council represents the Applicants.

Information considered when making the Decision

In deciding if this application can be accepted for registration under s190A of the *Native Title Act* 1993 I have considered and reviewed the application (including all attachments and accompanying documents) and all of the information and documents from the following files, databases and other sources:

- the National Native Title Tribunal's Registration Testing files and Legal Services files for this application
- the National Native Title Tribunal Geospatial Database
- the Register of Native Title Claims and Schedule of Native Title Applications
- the Native Title Register
- geospatial assessment and overlap analysis 1 November 2004.

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

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

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

On 1 October 2004, Christopher Doepel, Native Title Registrar, delegated to members of the staff of the Tribunal including myself all of the powers given to the Registrar under sections 190, 190A, 190B, 190C and 190D of the Native Title Act 1993 (Cth).

This delegation has not been revoked as at this date.

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NOTE TO APPLICANT:

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

S190B sets out the merit conditions of the registration test.

S190C sets out the procedural conditions of the registration test.

In the following decision, the Registrar's delegate tests the application against each of these conditions. The procedural conditions are considered first; then I shall consider the merit conditions.

S190C: Procedural Conditions

Applications contains details set out in ss61 and 62: S190C(2)

S190C(2) first asks the Registrar's delegate to test the application against the registration test conditions at sections 61 and 62. If the application meets all these conditions, then it passes the registration test at s190C(2).

Native Title Claim Group: S61(1)

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

Reasons relating to this sub-condition

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

I must consider whether the application sets out the native title claim group in the terms required by s 61. That is one of the procedural requirements to be satisfied to secure registration: s190A(6)(b). If the description of the native title claim group indicates that not all persons in the native title group were included, or that it was in fact a sub group of the native title group, then the requirements of s190C(2) would not be met and the claim cannot be accepted for registration (*Northern Territory of Australia v Doepel [2003] FCA 1384 at para 36).*

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

The application before me is made on behalf of a group of people known as the Malarngowem People. Schedule A of the application (the amended application filed in the Federal Court on 24 September 2004) contains the following description of the native title claim group:

"The claim is bought on behalf of:
Those Aboriginal People who hold in common the body of traditional law and custom governing the area the subject of the claim.

Those people are -

(a) Descendants of the following people:
[there follows a list of 23 apical ancestors]

and

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

In my view there is nothing in the application to indicate that the group described in Schedule A does not include, or may not include, all the persons who hold native title in the area of the application. Further there is no information in the application to indicate that the native title claim group has been assembled for administrative convenience, and is not a group as required by s.61(1).

See my reasons under s.190C(4) in relation to whether

- the application has been certified under Part 11 of the Act, or
- the applicants have been authorised by all the persons in the group to make, and to deal with matters arising in relation to, the application.

Result: Requirements met

Name and address of service for applicants: S61(3)

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

Reasons relating to this sub-condition

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

Result: Requirements met.

Native Title Claim Group named/described sufficiently clearly: S61(4)

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

Reasons relating to this sub-condition

Schedule A of the application describes the native title claim group. For the reasons which led to my conclusion (below) that the requirements of s.190B(3) have been met, I am satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Result: **Requirements met.**

Application is in prescribed form: s61(5)

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

Reasons relating to this sub-condition

s.61(5)(a)

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

s.61(5)(b)

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

s.61(5)(c)

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.

s.61(5)(d)

The application is accompanied by affidavits in relation to the requirements of s.62(1)(a) from the applicant (at Attachment R). I am satisfied that the application has complied with s.61(5)(d) in relation to the requirement for affidavits pursuant to s.62(1)(a).

There has been compliance with the requirement to include a map pursuant to s.62(1)(b).

See my reasons for decision under s.62(1)(a) and s.62(2)(b) below.

Result: **Requirements met.**

Application is accompanied by affidavits in prescribed form: S62(1)(a)

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

Reasons relating to this sub-condition

A duly sworn or affirmed affidavit dated has been provided by each of the named applicants containing the information prescribed by s. 62(1)(a). I note that the Court in making the Order to amend the application on 14 September 2004 did not require new s62 affidavits to be re-filed. This appears to be consistent with the decision in *Drury v*

Western Australia (2000) 97 FCR 169. In those circumstances I accept the affidavits that have been provided for the purposes of the registration test.

This is a convenient place to note that the affidavit required by s62(1)(a) from [Applicant 2], sworn 30 March 2004, has upon it a certification indicating that the affidavit was read to him, that he seemed to understand it and signified to the witness that he swore the affidavit. The applicant's affidavit of 12 October 1999 attached at Attachment F does not have such a certificate. This may be because his physical condition has deteriorated since 1999 or because of an oversight on behalf of the witness. No explanation is given. However I propose accepting the information in the document dated 12 October 1999 as the applicant has signed it and it is witnessed although it may not comply with the Federal Court Rules. He has clearly intended to swear an affidavit.

Result: Requirements met

Application contains details set out in s62(2): S62(1)(b)

S62(1)(b) asks the Registrar to make sure that the application contains the information required in s62(2). Because of this, the Registrar's decision for this condition is set out under s62(2) below.

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

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

Reasons relating to this sub-condition

Schedule G states activities currently undertaken by the claim group within the area of the claim indicating a traditional physical connection with the land and waters covered by the application. This is supported by the affidavits of members of the native title claim group at Attachment F of the application.

Result: Provided.

Information about the boundaries of the application area: S62(2)(a)

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

Reasons relating to this sub-condition

For the reasons which led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the information and maps in the application are sufficient to enable the area covered by the application to be identified.

Result: **Requirements met.**

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

Reasons relating to this sub-condition

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

Result: **Requirements met.**

Map of the application area: S62(2)(b)

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

Reasons relating to this sub-condition

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

Result: **Requirements met.**

Details and results of searches: S62(2)(c)

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

Reasons relating to this sub-condition

In this case although the applicants have not themselves conducted any searches, they have provided the following information about searches conducted by others. Schedule D of the application states that:

> "The Applicant has not carried out any searches. The Applicant believes that any searches that have been carried out to determine the existence of any non-native title rights and interests in relation to the land or waters in the area

covered by the application are in the possession of the National Native Title Tribunal at the date of application."

I am of the view that under this condition I need only be informed of searches conducted by the applicant in order to be satisfied that the application complies with this condition. To expect the applicant to have details of searches carried out by other persons would be unreasonably onerous. I am satisfied the application complies with this condition

Result: **Requirements met.**

Description of native title rights and interests: S62(2)(d)

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

Reasons relating to this sub-condition

A description of the claimed native title rights and interests is contained in Schedule E. The description does not merely consist of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law. I will outline these rights and interests in the reasons for decision in respect of s.190B(4).

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

Result: **Requirements met.**

Description of factual basis: S62(2)(e)

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

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

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

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

Reasons relating to this sub-condition

The decision in *State of Queensland v Hutchison* [2001] FCA 416 at [25] is authority for the proposition that only material that is part of the application can be relied in support of this requirement.

Information relevant to this subsection is contained in Schedules F and G of the application and in the affidavits at Attachment F. It is my view that the information in Schedules F, G and the affidavits in Attachment F amounts to a general description of the factual basis so as to comply with the requirements of s.62(2)(e) (i)-(iii). See my reasons under s.190B(5) for details of this material.

Result: **Requirements met.**

Activities carried out in application area: S62(2)(f)

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

Reasons relating to this sub-condition

The application provides general details of the activities that the native title claim group carries out in relation to the area claimed at Schedule G of the application and in the affidavits attached to the application at Attachment F. It is my view that this description of activities is sufficient to comply with the requirements of s.62(2)(f).

Result: **Requirements met.**

Details of other applications: S62(2)(g)

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

Reasons relating to this sub-condition

Schedule H of the application states:

> "The other applications to the High Court, Federal Court or recognized State /Territory body that have been made in relation to the whole or a part of any area covered by this application and that seek a determination of native title or compensation in relation to native title are:
>
> WAG6190 of 1998 (WC97/67)
> WAG6246 of 1998 (WC98/30)
> Native Title Determination Claimant Application of [Applicant 1], filed 24 September 1999."

I note that the last of applications mentioned appears to be W6028 of 1999 (WC99/28).

However the assessment completed by the Tribunal's Geospatial Analysis and Mapping Branch on 1 November 2004 indicates that no claimant applications as per the Register of Native Title claims fall within the external boundary of the area covered by the current application. The assessment states that one (1) application as per the Schedule

of Applications - Federal Court, falls within the external boundary of this application as at 1 November 2004 - WC97/79 WG6199/98 – Jiddngarri.
The assessment also notes as follows:
"*Technical Overlaps*
The following have been validated as "technical" overlaps (ie issues with spatial records, but not overlaps "on the ground"):
WG6107/98 Ngarrawariji (WC96/75)
WI2002/003 Argyle Diamond Mine Participation Agreement
These will be resolved and reflected in future updates of GIRO."

The three applications to which the applicants have referred have been combined with this application. I am satisfied that the applicants have sought to set out the applications of which they are aware. This is what is required by the section. There is no other information before me to the contrary. I am of the view the applicants have met their obligation in respect of this provision of the Act.

Result: **Requirements met.**

Details of s29 notices: S62(2)(h)

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

Reasons relating to this sub-condition

Schedule I states that the applicants are aware of the notices contained in Attachment I which in turn lists over 200 notices.

This condition only applies to the state of knowledge of the applicant at the time the amended application was lodged and there is nothing before me to indicate that the applicants did not provide details all the notices of which they had knowledge.

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

Result: **Requirements met.**

Combined decision for s190C(2)

For the reasons identified above the application contains all details and other information, and is accompanied by the documents, required by ss.61 & 62.

Result: Requirements met

Common claimants in overlapping claims: S190C(3)

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

(a) the previous application covered the whole or part of the area covered by the current application; and

(b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made: and

(c) the entry was made, or not removed, as a result of consideration of the previous application under section 190A.

Reasons relating to this condition

Schedule O states:

> "Details of the membership of the applicant or any member of the native title claim group in a native title claim group for any other application that has been made in relation to the whole or part of the area covered by this application.
>
> Nil."

Section 190C(3) requires me to be satisfied that any person who is a member of the native title claim group is not also a member of the native title claim group for any previous native title determination application ("the previous application"), where:

(a) the previous application overlaps in whole or part the claim area covered by the current application (cf. s.190C3(a)); and

(b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made (cf. s.190C3(b)); and

(c) the entry in the Register was made, or not removed, as a result of consideration of the previous application under s.190A (cf. s.190C3(c)).

The assessment of this application conducted by the Tribunal's Geospatial Analysis and Mapping Branch, dated 1 November 2004, states that no applications as per the Register of Native Title Claims fall within the external boundary of the application. It is therefore not necessary for me to further consider the conditions of s.190C(3).

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

Result: Requirements met.

Application is authorised/certified: s190C(4)

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

(a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part: or

(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
Note: s.190C(5) – Evidence of authorisation:
If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:

(a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and

(b) briefly set out the grounds on which the Registrar should consider that it has been met.

Reasons relating to this condition

The application has been certified under paragraph Part 11 of the Act by the Kimberley Land Council. The certificate accompanies the application at Attachment R.

A search of the Tribunal's Geospatial database reveals that the Kimberley Land Council Aboriginal Corporation is the sole representative body for the region covered by the application. This is confirmed by the Tribunal's Geospatial Analysis and Mapping Branch in its assessment dated 1 November 2004. The relevant provisions of Part 11 for the purposes of this condition are found in s.203BE(1)(a), (2) and (4). The section provides:

(1) The certification functions of a representative body are:

(a) to certify, in writing, applications for determinations of native title relating to areas of land or waters wholly or partly within the area for which the body is the representative body;

(2) A representative body must not certify under paragraph (1)(a) an application for a determination of native title unless it is of the opinion that:

(a) all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and

(b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

(3) If the land or waters covered by the application are wholly or partly covered by one or more applications (including proposed applications) of which the representative body is aware, the representative body must make all reasonable efforts to:

(a) achieve agreement, relating to native title over the land or waters, between the persons in respect of whom the applications are, or would be, made;

(b) minimise the number of applications covering the land or waters. However a failure by the representative body to comply with this subsection does not invalidate any certification of the application by the representative body.

(4) A certification of an application for a determination of native title by a representative body must:

(a) include a statement to the effect that the representative body is of the opinion that the requirements in paragraphs (2)(a) and (b) have been met; 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 subsection (3).

The certification by Kimberley Land Council is in writing and signed by an apparently authorised delegate. The Act does not prescribe the form of certification or how it may be executed on behalf of the representative body. It is signed by the Executive Director, Kimberley Land Council. I am satisfied therefore that the first requirement in s. 203BE (found in subparagraph (1)(a)) is met.

The second requirement in s.203BE is that the representative body must not certify a native title determination application unless it holds the opinions found in subparagraphs (2)(a) and (b). The certification outlines the reasons for Kimberley Land Council holding the requisite opinions.

The third requirement is that found in s. 203BE(4)(a)&(b). For a valid certification of a native title determination application pursuant to s.203BE, the certification must include a statement to the effect that the representative body is of the opinion that

- the requirements in s.203BE(2) have been met, and
- briefly set out the body's reasons for being of that opinion.

I am of the view that the certification at Attachment R contains the statement and briefly sets out the grounds required by this sub-section. The statements, in my view, adequately outline the grounds for Kimberley Land Council being of the requisite opinion. The statements are also consistent with information deposed to by the applicants in their s. 62(1) affidavits.

The fourth requirement is that found in s.203BE(4)(c). The certification must, if applicable, briefly set out what the representative body has done to meet the requirements in subsection (3), being the making of all reasonable efforts to achieve agreement and minimisation of applications over the area of the particular application it is certifying. However a failure to comply with subsection (3) does not invalidate any certification of the application by the representative body. There is no indication in the certificate that the representative body has complied with (3). It follows in my view there is no requirement to set out anything pursuant to subsection (4)(c).

For these reasons I am satisfied that Kimberley Land Council is the sole representative body for the area covered by the application and that it has certified the application under Part 11 of the Act.

Result: **Requirements met.**

Merits Conditions: s190B

Identification of area subject to native title: S190B(2)

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

Reasons relating to this condition

Written Description and Map of External Boundaries
The written description of the external boundaries prepared by the Tribunal's Geospatial Analysis and Mapping Branch (3 August 2004) is found in Attachment B of the application. Attachment B describes two areas as comprising the application area.

A map of land and waters covered by the application is provided at Attachment C. The map has been prepared by the Tribunal's Geospatial Analysis and Mapping Branch (30 July 2004) and includes:

- The application area depicted by a bold outline;
- Cadastral boundaries and land tenure;
- Scale bar, north point, coordinate grid legend and locality map, and
- Notes relating to the source, currency and datum of data used to prepare the map.

I am satisfied that the map and area description are consistent and identify the area of the application with reasonable certainty. This is confirmed by the Tribunal's Geospatial Analysis and Mapping Branch assessment dated 1 November 2004.

Para (5) of Schedule B states: "The claim is a combination of the following claims: WAG 6190 of 1998, WAG6246 of 1998, and W6028 of 1999."
This omits reference to WG6128 of 1998. However, in my view this omission does not detract from my conclusions concerning the description.

Further, I am satisfied that the description meets the requirements of s.62(2)(a)(i).and the map meets the requirements of s62(2)(a)(ii).

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

Internal boundaries

(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 NTA, 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 section 23B of the NTA, was done in relation to an area, and, either the act was an act attributable to the

Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in section 23E in relation to the act.

(3) The Applicants exclude from the claim areas in relation to which native title rights and interest 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.

(4) The applicant excludes from the claim any areas covered by Mineral Lease 259SA and Mining Lease M80/114.

To avoid any uncertainty, the Applicants exclude from the claim area any of the areas contained within the following descriptions or tenures which have been validly granted, set out in Schedule Bl.

Schedule B1

B 1. 1 Any former or current unqualified grant of an estate n fee simple and all other freehold land.

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), s.117; or
(4) A Special Lease under s.117 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 1887* which includes a condition that the lessee reside on the area of the lease and upon which a residence has been constructed.

B 1.4 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.

B 1.5 A Perpetual Lease currently in force under the *War Service Land Settlement Scheme Act* 1954.

B 1.6 A Permanent public work and "the- land or waters on which a public work is constructed, established or situated" within the meaning given to that phrase by the *Native Title Act 1993* (Cth) s.251D.

B 1.7 A public road.

I am satisfied that the written description and map satisfactorily locate the internal boundaries of the claim area on the earth's surface, allowing the claim area to be identified with reasonable certainty. In this regard I have taken into account the judgment of Nicholson J in *Daniels and Ors, et al v The State of Western Australia* [1999] FCA 686. I refer specifically to para. 32 of Nicholson J's judgment in which he states:

"These requirements are to be applied to the state of knowledge of an applicant as it could be expected to be at the time the application or amendment is made. Consequently a class or formula approach could satisfy the requirements of the paragraphs where it was the appropriate specification of detail in those circumstances. For example, at the time of an initial application when the applicants had no tenure information it may be satisfactory compliance with the statutory requirement."

In my view, the information provided enables the internal boundaries of the claim area to be adequately identified. This may require research of tenure and geographic /topographic information of data held by the State of Western Australia, but it is reasonable to expect that the task can be done on the basis of the information provided by the applicants.

The requirements of s.62(2)(a), s.62(2)(b) and s.190B(2) are met.

Result: **Requirements met**

Identification of the native title claim group: S190B(3)

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

Reasons relating to this condition

To meet this condition, I must be satisfied that the requirements of either s.190B(3)(a) or (b) have been met.

A list of names of all persons in the claim group is not provided in the application. Consequently the requirements of s.190B(3)(a) of the Act are not met.

Section 190B(3)(b) requires the Registrar to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

The native title claim group is described at Schedule A of the application. The description is set out under s61(1) above.

In *State of Western Australia v Native Title Registrar* [1999] FCA 1591-1594, Carr J said that *"[i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently….The Act is clearly remedial in character and should be construed beneficially."* I note that a description of the native title claim group in terms of named apical ancestors, their descendants and adoption is acceptable under s.190B(3)(b), even though the descendants and adopted persons are not always named, and some factual inquiry would need to be made in these instances to determine if any one person is a member of the group.

It is apparent from the information in Schedule A that a person may be a member of the native title claim group through being descended from the named apical ancestors and adoption.

I am satisfied that the descendants of the named apical ancestors and adopted persons could be identified with minimal inquiry and as such, ascertained as being a member of the native title claim group. By referencing the identification of members of the native title claim group as the applicants have done it is possible to objectively verify the identity of members of the native title claim group, such that it can be clearly ascertained whether any particular person is in the group.

The requirements of s.190B(3)(b) are met.

Result: **Requirements met.**

Native title rights and interests are readily identifiable: S190B(4)

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

Reasons relating to this condition

The native title rights and interests claimed at Schedule E are:

"Non-exclusive rights to use and enjoy the land and waters in accordance with traditional laws and customs as follows:

(a) The right of access to the land and waters;
(b) The right to live on the land, to camp, to erect shelters and to move about the land;
(c) The right to take flora and fauna from the land and waters;
(d) The right to take other natural resources of the land such as ochre, stones, soils, wood and resin;
(e) The right to take waters, including flowing and subterranean waters;
(f) The right to engage in cultural activities on the land and waters, to conduct ceremonies, to hold meetings and to participate in cultural practices relating to birth and death;
(g) The right to care for and maintain sites and areas that are of significance to the native title holders under their traditional laws and customs.

Subject to:

i) To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants.
ii) The claim area does not include any offshore places.
iii) The said native title rights and interests are not claimed to the exclusion of any other rights or interests validly created by or pursuant to the common law, or law of the State, or a law of the Commonwealth.

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

The native title claim group do not assert that they possess exclusive possession to any land or waters within the claim area."

Schedules P and Q contain the following qualifications:

Schedule P: This application does not cover any offshore areas.

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

The requirements of the Act

Section 190B(4) requires the Registrar or his delegate to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be readily identified. For the purposes of the condition only the description contained in the application can be considered.[1]

Section 62(2)(d) requires that the application contain

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

This terminology suggests that the legislation is intended to screen out of applications native title rights and interests that are vague, or unclear.

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

> 'The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
> (c) the rights and interests are recognised by the common law of Australia'.

Some interests which may be claimed in an application may not be native title rights and interests and are not 'readily identifiable' for the purposes of s.190B(4). These are rights and interests which the courts have found to fall outside the scope of s.223. Rights which are not readily identifiable include:

- the rights to control the use of cultural knowledge that goes beyond the right to control access to lands and waters;[2]
- rights to minerals and petroleum under relevant legislation;[3]
- an exclusive right to fish offshore or in tidal waters, and

[1] *Queensland v Hutchinson* (2001) 108 FCR 575.
[2] *Western Australia v Ward* (2002) 191 ALR 1, para [59]
[3] *Western Australia v Ward*, paras [383] and [384]; *Wik v Queensland* (1996) 63 FCR 450 at 501-504; 134 ALR 637 at 686-688.

- any native title right to exclusive possession offshore or in tidal waters.[4]

I note the above qualifications to which the claim is subject.

I have considered the rights and interests claimed in light of the definition of native title rights and interests in the Act and the judicial decisions I have referred to. I am satisfied that the native title rights and interests claimed in Schedule E are readily identifiable.

Result: **Requirements met.**

Factual basis for claimed native title: S190B(5)

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

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

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

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

Reasons relating to this condition

Section 190B(5) requires that the Registrar (or his delegate) must be satisfied that the factual basis provided in support of the assertion that the claimed native title rights and interests exist is sufficient to support that assertion. In particular, the factual basis must be sufficient to support the assertions set out in subparagraphs (a), (b) and (c).

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

> "Provision of material disclosing a factual basis for the claimed native title rights and interests, for the purposes of registration, is ultimately the responsibility of the applicant. It is not a requirement that the Registrar or his delegate undertake a search for such material" [23].

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

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

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

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

[4] *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 144-145.

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

In *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (the *Yorta Yorta* decision), the majority of the High Court noted that the word 'traditional' refers to a means of transmission of law or custom, and conveys an understanding of the age of traditions. Their Honours said that 'traditional' laws and customs are those normative rules which existed or were "rooted in pre-sovereignty traditional laws and customs": at [46], [79]. This normative system must have continued to function uninterrupted from the time of acquisition of sovereignty to the time when the native title group sought determination of native title. This is because s.223(1)(a) speaks of rights and interests as being 'possessed' under traditional laws and customs, and this assumes a continued "vitality" of the traditional normative system. Any interruption of that system which results in a cessation of the normative system would be fatal to claims to native title rights and interests because the laws and customs which give rise to the rights and interests would have ceased to exist and could not be effectively reconstituted even by a revitalization of the normative system. Their Honours noted, however, that this does not mean that some change or adaptation of the laws and customs of a native title claim group would be fatal to a native title claim; rather that an assessment would need to be made to decide what significance (if any) should be attached to the fact that traditional law and custom had altered. In short, the question would be whether the law and custom was 'traditional' or whether it could "no longer be said that the rights and interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified" - at [82] and [83].

In considering this condition, I have had regard to:

- information contained at Schedules F, and G, and
- the affidavits sworn by members of the native title claim group attached to the application as Attachment F.

I note that Schedule M does not contain any information on the traditional physical connection of the native title claim group with any of the land or waters covered by the application.

A general description of the factual basis on which it asserted that the three criteria identified at s.190B(5)(a) -(c) are met is provided in Schedule F of the application. Schedule G provides details of activities currently carried out within the claim area. The affidavits sworn by members of the native title claim group, attached to the application as Attachment F, support the statements in F and G.

I note that it is not the role of the delegate to reach definitive conclusions about complex anthropological issues pertaining to applicants' relationships with country subject to native title claimant applications. What I must do is consider whether the factual basis provided by the applicants is sufficient to support the assertion that claimed native title rights and interests exist. In particular this material must support the assertions noted in s.190B(5) (a), (b) and (c). I have formed the view that the information referred to above provides sufficient probative detail to address each element of this condition. I will now deal in turn with each of these elements.

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

Reasons relating to this condition
I refer to the contents of Schedule F:

> "The native title rights and interests are non-exclusive rights to use and enjoy the land and waters in accordance with traditional laws and customs as follows: -
> (d) The right of access to the land and waters;
> (e) The right to live on the land, to camp, to erect shelters and to move about the land;
> (f) The right to take flora and fauna from the land and waters;
> (d) The right to take other natural resources of the land such as ochre, stones, soils, wood and resin;
> (e) The right to take waters, including flowing and subterranean waters;
> (f) The right to engage in cultural activities on the land and waters, to conduct ceremonies, to hold meetings and to participate in cultural practices relating to birth and death;
> (g) The right to have access to, care for and maintain sites and areas that are of significance to the native title holders under their traditional laws and customs.
>
> The native title rights and interests are based upon the following facts:
>
> (1) The native title claim, group and their ancestors have prior to and at the time of the assertion of the assertion of British Sovereignty, and since the assertion of British Sovereignty possessed, used and enjoyed the claim area and have an association with it; and
> (2) Such use and enjoyment has been pursuant to and possessed under the laws and customs of the claim group, including traditional laws and customs that rights and interests in land and waters vest in members of the native title claim group on the basis of:
>
> (a) descent from ancestors connected to the area;
> (b) conception in the area;
> (c) birth in the area;
> (d) traditional religious knowledge of the area;
> (e) traditional knowledge of the geography of the area;
> (f) traditional knowledge of the resources of the area;
> (g) knowledge of traditional ceremonies of the area.
>
> (3) Such traditional law and custom has been passed by traditional teaching, through the generations preceding the present generations to the present generations of persons comprising the native title claim group;
>
> (4) The native title claim group continues to acknowledge and observe those traditional laws and customs;
>
> (5) The native title claim group by those laws and customs have a continuing connection with the land in respect of which the claim is made.
>
> Please refer to Attachment F."

In Schedule G of the application the applicants state that:

"Members of the native title claim group have continuously carried out activities on the land and waters within the area of the claim and have possessed, occupied, used and enjoyed the area, including by way of:

- camping and living and building structures;
- moving freely about and having access to the claim area;
- hunting and gathering and fishing;
- taking and using the resources of the area, including forest products, water, minerals and other resources from the land and waters;
- manufacturing tools and weapons from the resources of the land and waters;
- disposing of the products of the land and waters or manufactured from the products of the land and waters by trade or exchange;
- managing, conserving and caring for the land and waters and controlling access to the land and waters;
- conducting and taking part in ceremonies;
- visiting and protecting sites;
- passing on the knowledge of the country and of the traditional law and custom:

in accordance with custom and tradition.'

The applicants verify the information in the application in their s62(1)(a) affidavits.

The statements in Schedules F and G are consistent with the native title claim group having, and the predecessors of those people having had, an association with the area

This association is supported by the affidavits of the members of the native title claim group at Attachment F. For instance [Applicant 5] in an affidavit sworn on 15 June 2004 refers to an affidavit of 12 October 1999 and deposes as follows:

"2. My family has come part of this claim area, from before Europeans arrived in Australia. I should not say the real name of my daawam or even the Gardia (European) name for the station that is over some of it, because both names were my dead brother's names. Because of Gija law and custom, I call my daawam and that station No Name or Kurnanji. In Gija law and custom, my father and all the generations before him were daawam (that some people call traditional owners) of that country since it was given to them from the Ngaranggani (that some people call the Dreaming) when all the Dreamings were men. The Ngaranggani became animals, and turned into places on the land. The land and the Dreamings passed from generation to generation, from that time long ago, to Gija a people alive today.

3. Under Gija law and custom, the rights and interests of daawam come from the Ngaranggani. The Ngaranggani gave us the law. All Gija people must follow that law, in the same way that our parents and grandparents followed the law.

4. Under Gija law and custom, daawam have the right to speak for their country, and to make decisions about who can come on to the country and what they can do on it. It is my responsibility as daawam to look after visitors to my country. I carry out manthe ceremony to introduce visitors to the Ngaranggani, to make sure they are safe when they are on my country."

I also refer to the affidavit sworn on 31 August 2004 by [Applicant 5] which also indicates an association with country, and that of her family.

9. When we go onto our country we take kangaroo and bush foods and medicines without asking anyone, but we share it with *warringarri,* that means the large group of people in a camp. If other people, like Jaru people, come onto our country we ask them to give us some of the fish or kangaroo that they catch.

10. I work in the cross-cultural awareness programme. I look after the places that we take white people to. Some of these places we can only take women, not boys. We show them the *naranggani* Dreamtime places. We smoke them, we call it *kongolji,* it protects them. We tell them to look only and not to touch or take anything they see.

11. We *munda* them too. That means we rub them with leaves so that they don't get lost or sick and they can go in the water without being afraid.

12. I am a painter. I paint the stories for my country. Other people are not allowed to paint these things. If someone else did a painting for my country or told the story they would get into trouble and get sick. If 1 saw someone paint my country I would tell them 'you cant do that'. In the early days we would fight. Someone might get killed. Nowadays we would just argue.

13. There are places on my country were I can get ochre for painting or for body paint when we do ceremonies. There is *Burungorin - yellow* ochre, *Bardul - red* ochre, and *Mawandu - white* ochre. I can take this ochre without asking anyone. Other people can't take it. Ochre is not always found in a *naranggani* [Dreamtime] place, but still only the right people can take it.

Similarly [Applicant 3] deposes (15 June 2004):

"2. I refer to paragraph 2 of my affidavit of 12 October 1999. My family has come from Tildawum, which is part of this claim area, from before Europeans arrived in Australia. In Gija law and custom, my father and all the generations before him were daawam (that some people call traditional owners) of Tildawum since it was given to them from the Ngaranggani (that some people call the Dreaming) when all the Dreamings were men. The Ngaranggani became animals, and turned into places on the land. The land and the Dreamings passed from generation to generation, from that time long ago, to Gija people alive today. (Paragraph 2 of the affidavit of 12 October 1999 says. "I was born at old Lissadell, which called Tildawum. My father was from

Tildawum and all the generations: before him back to before white people came here.")

3. Under Gija law and custom, the rights and interests of daawam come from the Ngaranggani. The Ngaranggani gave us the law. All Gija people must follow that law, in the same way that our parents and grandparents followed the law."

5. I keep on going onto my country very often. I have done that all my life. I hunt kangaroo and turkey, and take fish.

6. I have responsibility to look after Ngaranggani places on my country. Some people call them sacred sites. In the 1990's I took part in two site surveys over my daawam. A mining company ran the Bow River mine They wanted to explore over some Ngaranggani places. My family and I said no to mining over the Ngaranggani places. There were arguments with the mine, but they did not go ahead, and we protected those places. That was my right and responsibility under Gija law and custom.

I am satisfied that the information that has been provided is a sufficient factual basis to support the assertion that the native title claim group have, and their predecessors had an association with the area.

I am satisfied that the requirements of s.190B(5)(a) have been met.

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

This sub-section requires me to be satisfied that:

- traditional laws and customs exist;
- those laws and customs are respectively acknowledged and observed by the native title claim group, and
- those laws and customs give rise to the claim to native title rights and interests.

In Schedule F of the application the applicants state that:

"(1) The native title claim, group and their ancestors have prior to and at the time of the assertion of British Sovereignty, and since the assertion of British Sovereignty possessed, used and enjoyed the claim area and have an association with it; and

(2) Such use and enjoyment has been pursuant to and possessed under the laws and customs of the claim group, including traditional laws and customs that rights and interests in land and waters vest in members of the native title claim group on the basis of:

(a) descent from ancestors connected to the area;
(b) conception in the area;
(c) birth in the area;
(d) traditional religious knowledge of the area;
(e) traditional knowledge of the geography of the area;
(f) traditional knowledge of the resources of the area;
(g) knowledge of traditional ceremonies of the area.

(3) Such traditional law and custom has been passed by traditional teaching, through the generations preceding the present generations to the present generations of persons comprising the native title claim group;

(4) The native title claim group continues to acknowledge and observe those traditional laws and customs;

(5) The native title claim group by those laws and customs have a continuing connection with the land in respect of which the claim is made.

Please refer to Attachment F."

In Schedule G of the application (see above) the applicants summarise the groups continued usage of the area in accordance with custom and tradition.

The applicants depose to the truth of the statements in Schedules F and G in their s.62(1)(a) affidavits.

In their affidavits at Attachment F members of the native title claim group indicate the existence of traditional laws and customs which gives rise to their native title rights and interests in the land and waters of the application area. See for instance the information in the affidavits of [Applicant 5] and [Applicant 3] set out under (a) above.

I am satisfied that the native title claim group has held and exercised native title rights and interests in the claim area in accordance with acknowledged laws and observed customs and continues to do so. I am satisfied they have passed on their laws and customs and their native title rights and interests, in accordance with those customs, to their descendants.

The information outlined above supports the contention that these traditional laws and customs form the normative system which gives rise to the native title rights and interests of these people in the land and waters of the application area.

Having regard to the above, I am satisfied that 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 native title rights and interests claimed. I am therefore satisfied that the requirements of s.190B(5)(b) have been met.

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

In summary, at Schedule F, the applicants assert that the claim group has continued to hold native title in accordance with traditional laws and customs (see above).

As outlined above, I am satisfied that traditional laws and customs exist which give rise to the claim to native title rights and interests by the native title claim group. Section 190B(5)(c) requires that the claim group have continued to hold native title in accordance with those traditional laws and customs.

On the basis of the information set out in respect of s.190B(5)(a) and (b) above, I am satisfied that there is sufficient factual basis to support the claim group having continued to hold native title in accordance with those traditional laws and customs. I am therefore satisfied that the requirement of s.190B(5)(c) have been met.

Conclusion
I am satisfied that the information before me is sufficient to support the assertion that the claimed native title rights and interests exist, and also supports the following assertions:

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

Result: **Requirements met**

Native title rights and interests claimed established prima facie: S190B(6)

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

Reasons relating to this condition

Under s.190B(6), I must consider that, prima facie, at least some of the rights and interests claimed can be established. The term "*prima facie*" was considered in *North Ganalanja Aboriginal Corporation v Qld* 185 CLR 595 by their Honours Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, who noted:

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

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

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

The claimed native title rights and interests are found at Schedule E of the application and are set out under s190B(4) above.

Taking into account:

- the express qualifications to the claimed native title rights and interests;
- the above material (see reasons under s.190B(5)), and
- the decisions to which I have referred,

I am satisfied that in respect of areas where exclusive possession cannot be sustained the non-exclusive native title rights and interests claimed are capable of being *prima facie* established.

Turning now to whether the specified rights and interests to use and enjoy the land and waters claimed can be prima facie established:

Non-exclusive rights to use and enjoy the land and waters in accordance with traditional laws and customs as follows:

(a) The right of access to the land and waters.

Established

Most of the activities referred to in Schedule G (see above) indicate that the members of the native title claim group access the land and waters. This is supported by the statements of members of the group in their affidavits at Attachment F.
For instance [Applicant 2] says as follows (12 October 1999):

> "I have lived all my life in the area of the native title claim. I have walked over the land and used it without asking permission of any other Aboriginal person. In the past during holiday time on the station I would go back to my country without asking anyone. I would just go. Today we are supposed to ring up the manager to visit the station but sometimes we just go if the gates are not locked. Not long ago one of the managers found me and [Claimant 5] on the land and told us to go. We I told him 'I have always been coming here long before you came, this is our country', and he couldn't tell me to go." (paragraph 3)

[Applicant 5] says in an affidavit of 12 October 1999 that her father told her "this is your country' and told her the names of places and Dreamtime stories (paragraph 5). She speaks of going onto country to hunt and get bush foods and medicines (paragraph 9). She also tells of her painting the stories from her country (paragraph 12). I believe it is reasonable to conclude that this painting would involve accessing country.

In her affidavit of 31 August 2004 [Applicant 5] again speaks of going onto country to take kangaroo and bush foods and medicines without asking anyone. She says "we share it with *warringarri*, that means the large group of people in a camp. If other people, like Jaru people, come onto our country we ask them to give us some of the fish or kangaroo that they catch." (paragraph 9).

[Applicant 5] also deposes in her affidavit of 15 June 2004 that part of the claim area is her land and that under Gija law and custom she does not need to ask permission of anyone to go onto her country, or to use it in any way she wants to (paras. 2 and 5).

[Applicant 3] provides similar information in his affidavits of 12 October 1999 (paragraph 1 – 10) and 15 June 2004 (paragraph 5).

[Applicant 12] also speaks of accessing her country in her affidavit (12 October 1999).

Based on the above information, I am satisfied that this right can be prima facie established.

(b) The right to live on the land, to camp, to erect shelters and to move about the land;

Established

Over areas where a claim to exclusive possession cannot be sustained, the majority in the High Court in *Western Australia v Ward* (2002) 191 ALR 1 (*Ward*) questioned whether it would be appropriate to claim rights to <u>control access to and use of the land</u>: "without a right of possession of that kind [i.e., an exclusive right], it may be greatly

doubted that there is any right to control access to land or make binding decisions about the use to which it is put" - at [52].

In the light of *Ward* a question arises here whether the rights claimed *necessarily* amount to a right to control access to and use of the claim area. To the extent that it would do so, such a right is not *prima facie* capable of being established over areas for which a claim to exclusive possession could not be sustained.

I note that, despite the absence of exclusive possession in that case, the majority decision in *Ward* did not preclude the recognition of native title rights to *reside* upon the claim area. I see this as similar to the right to live upon the claim area. Considering this claim in the context of the Schedule as a whole there is nothing in the description of this right which conveys to me an intention or capacity on the part of the members of the native title claim group to control access to or use of those areas. The claim is clearly non-exclusive. There is no claim to rights to control access to and use of the land. Also camping, erecting shelters and moving about the land does not necessarily involve or indicate an intention or capacity on the part of the members of the native title claim group to control access to or use of those areas. In my view the right to *live on the land* should be considered in that context.

Further, the claim to the rights is to use and enjoy the land and waters *in accordance with traditional laws and customs*. Such traditional use does not indicate to me permanent living or residence on the land. Similarly it does not indicate to me that the *shelters* would be permanent so as to prevent access or use of the claim area by others.

It follows that I am satisfied that the right to live on the land, camp, to erect shelters and move about the land is capable of being established *prima facie*. I will now consider if the rights and interests can be prima facie established. Although claimed as a composite right I will consider each of the elements of the right claimed separately.

(i) the right to live on the land.

Schedule G of the application states that members of the native title claim group continue to carry out activities on the land and waters within the area of the claim and lists those activities including "living".
Based on the same information and for the same reasons as appear in respect of (a) above I am satisfied that this right can be prima facie established.

(ii) the right to camp on the land

Schedule G of the application states that members of the native title claim group have continuously carried out activities on the land and waters within the area of the claim and lists those activities, including camping. In my view many of those activities such as hunting, fishing and collecting traditional foods are consistent with member of the claim group camping on the land. Also in their affidavits the members of the group speak of activities consistent with camping on the land. See for instance affidavit of [Applicant 5] (15 June 2004) in which she says:

> "Under Gija law and custom I do not need to ask permission of anyone to go onto my country, or to use it in any way I want to. I have the right to take animals, fish, plants, resources such as ochre and water from my country, and to live on it however I want to." (Paragraph 5).

[Applicant 3] deposes in similar terms in paragraph 5 of his affidavit of 15 June 2004. He also refers to camping on the land in his affidavit of 12 October 1999 (paragraph 13). [Applicant 17] in his affidavit affirmed on 12 October 1999 speaks of travelling around hunting and taking the hunted animals back to people in the camp (paragraph 6).
[Applicant 2] (12 October 1999) speaks of camping (paragraph 12).

"12. When I was about 15 year old I went through the Law. I started out from Texas with the my elders [Claimant 5] and [Claimant 6]. We walked to Lissadell station, and picked up some boys for the initiation then we began the trip back to Mabel Downs. We camped along the way……. "

(iii) erect shelters the land.

Schedule G of the application says that members of the native title claim group carry out activities on the land and waters within the claim area. The activities include camping, living on the land and building structures on the land. The word "shelters" do not convey to me the notion of permanent structures. Rather it is an activity or right associated with access to the area, travelling over the area and camping on the area. There is in my view sufficient evidence of those activities in the affidavits to which I have referred. I am satisfied that this right can be prima facie established.

(iv) the right to move over the land.
This is similar to the right to access the land (see (a) above. Schedule G of the application states that members of the native title claim group have continuously carried out activities on the land and waters within the area of the claim and lists those activities including, moving freely about the claim area. Based on the same information and for the same reasons as appear in respect of (a) and (b)(ii) above I am satisfied that this aspect of the right claimed can be prima facie established.

I am satisfied that the right claimed at (b) can be prima facie established.

(c) The right to take flora and fauna from the land and waters.

Established

Schedule G says that members of the native title claim group have continuously carried out activities on the land and waters within the area of the claim including taking and using the resources of the area, including: forest products, water, minerals and other resources from the land and waters.

These statements are supported by the affidavits of the members of the native title claim group attached to the application. For example [Applicant 5] deposes (15 June 2004):

"5. Under Gija law and custom I do not need to ask permission of anyone to go onto my country, or to use it in any way I want to. I have the right to take animals, fish, plants, resources such as ochre and water from my country, and to live on it however I want to."

Also in her affidavit sworn 31 August 2004 [Applicant 5] says:

"When we go onto our country we take kangaroo and bush foods and medicines without asking anyone, but we share it with *warringarri*, that means the large group of people in a camp. If other people, like Jaru people, come onto our country we ask them to give us some of the fish or kangaroo that they catch."(paragraph 9)

[Applicant 3] also deposes (15 June 2004) that he has the right to take animals, fish, plants, resources such as ochre and water from his country (paragraph 5). He also says that he hunts kangaroo, turkey and takes fish (paragraph 6).

[Applicant 17] (12 October 1999) tells of hunting animals (paragraph 6) and of the gathering of ochre by Binor people (paragraph 7).

[Applicant 2] (12 October 1999) speaks of his parents obtaining things such as ochre spears to trade with other people (paragraph 10).

[Claimant 1] says she takes white people onto the country and tells them about bush food and does cooking (paragraph 12).

I am satisfied that this right can be prima facie established.

(d) The right to take other natural resources of the land such as ochre, stones, soils, wood and resin;

Established

Based on the same information referred to in respect of (c) above, I am satisfied that this right can be prima facie established.

(e) The right to take waters, including flowing and subterranean waters;

Established

Schedule G says that members of the native title claim group have continuously carried out activities on the land and waters within the area of the claim including taking and using water. The applicants s62(1)(a) affidavits verify the statements in the application.

Further the use of water would clearly be an essential aspect of accessing, camping on, and moving about the land. Water is an essential requirement for life on the land. Water is also used ceremonially. I say this because the deponents speak of having to *munda* visitors to country. This involves throwing water on them, e.g. see paragraph 4 of an affidavit by [Claimant 2] (12 October 1999).

I am satisfied that this right can be prima facie established.

(f) The right to engage in cultural activities on the land and waters, to conduct ceremonies, to hold meetings and to participate in cultural practices relating to birth and death;

Schedule G says that members of the native title claim group have continuously carried out activities on the land and waters within the area of the claim, including conducting and taking part in ceremonies.

[Applicant 5] speaks in her affidavit (15 June 2004) of conducting ceremonies associated with the land:

> "4. Under Gija law and custom, daawam have the right to speak for their country, and to make decisions about who can come on to the country and what they can do on it. It is my responsibility as daawam to look after visitors to my country. I carry out manthe ceremony to introduce visitors to the Ngaranggani, to make sure they are safe when they are on my country."

Again in her affidavit of 31 August 2004 [Applicant 5] refers to certain ceremonies:

> "10 I work in the cross-cultural awareness programme. I look after the places that we take white people to. Some of these places we can only take women, not boys. We show them the *naranggani* Dreamtime places. We smoke them, we call it *kongolji*, it protects them. We tell them to look only and not to touch or take anything they see.
>
> 11. We munda them too. That means we rub them with leaves so that they don't get lost or sick and they can go in the water without being afraid."

[Applicant 2] (12 October 2004) speaks of going through the law, of initiation ceremonies and of law ceremonies. He also speaks of now teaching "our children their Law, language and special places" (paragraph 12 to 15).

I am satisfied that this right can be prima facie established

(g) The right to care for and maintain sites and areas that are of significance to the native title holders under their traditional laws and customs.

Established

In the light of *Ward* (see under (b) above) a question arises here whether the rights claimed *necessarily* amount to a right to control access to, and use of, the significant sites and areas. To the extent that it would do so, such a right is not *prima facie* capable of being established over areas for which a claim to exclusive possession cannot be sustained.
However, I am satisfied that the right to *care for and maintain* sites and areas of significance does not necessarily involve the control of access to, or use of, those places. I say this because the application makes it clear that the native title claim group does not assert that they possess exclusive possession to any land or waters within the claim area.(see last para of Schedule E).
In arriving at this conclusion I have considered the affidavits attached to the application. Some do refer to protecting sites. This may be seen as control of access or use. However, in my view those activities do not reflect the existence of a claimed right to do so, rather they are an expression of the importance of some areas to the group, or members of the group, and the recognition of that by others and their compliance with the groups wish to care for and maintain those sites and areas.

Schedule G says that members of the native title claim group have continuously carried out activities on the land and waters within the area of the claim including:

- managing, conserving and caring for the land and waters and controlling access to the land and waters, and
- visiting and protecting sites.

These statements are supported by the affidavits at Attachment F of the application. For instance, [Applicant 3] says in his affidavit affirmed 12 October 1999 that:

- He works for the Argyle diamond mine looking after country (para 10).
- When the miners want to work a new area they have consult him and he explains what is happening to the old people and tells the miners what they can do (para 10). This not just for Dreamtime places. He looks after the soil animals and vegetation too (para 11).

He protects the area and gives examples of his doing so (para 11).

[Applicant 17] deposes in his affidavit (12 October 1999) that: "We tell miners not to mine in sacred places" (para 9).

[Applicant 2] says (12 October 1999) that he is responsible for several areas of the claim through his father, his grandmother and through his birth (para 6). He also says that he protects sacred areas of his country and speaks of others also being responsible for country (para 8).

[Applicant 5] also tells of her responsibility for country in her affidavits of 12 October 1999 (para 6) and 31 August 2004 (para 6).

[Claimant 3] (12 October 1999) speaks of protecting sacred places from mining (para 14).

I am satisfied that this right can be prima facie established

Conclusion: I am satisfied that the requirement of s.190B(6) have been met.

Result: **Requirements met.**

Traditional physical connection: S190B(7)

The Registrar must be satisfied that at least one member of the native title claim group:
(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or
(b) previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
(i) the Crown in any capacity; or
(ii) a statutory authority of the Crown in any capacity; or
(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

Reasons relating to this condition

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

Details by [Applicant 5] and [Applicant 3] of traditional physical connection with the land covered by the application are provided in their affidavits at Attachment F of the application.

[Applicant 5] deposes in her affidavit sworn 15 June 2004 that:

> "2 My family has come part of this claim area, from before Europeans arrived in Australia. I should not say the real name of my daawam or even the Gardia (European) name for the station that is over some of it, because both names were my dead brother's names. Because of Gija law and custom, I call my daawam and that station No Name or Kurnanji. In Gija law and custom, my father and all the generations before him were daawam (that some people call traditional owners) of that country since it was given to them from the Ngaranggani (that some people call the Dreaming) when all the Dreamings were men. The Ngaranggani became animals, and turned into places on the land. The land and the Dreamings passed from generation to generation, from that time long ago, to Gija a people alive today.
>
> 6. I keep on going onto my country very often. I have done that all my life.
>
> 7. I have responsibility to look after Ngaranggani places on my country. Some people call them sacred sites. In the 1990's I took part in two site surveys over my daawam. A mining company ran the Bow River mine. They wanted to explore over some Ngaranggani places. My family and I said no to mining over the Ngaranggani places. There were arguments with the mine, but they did not go ahead, and we protected those places. That was my right and responsibility under Gija law and custom."

[Applicant 5] also says in her affidavit sworn 31 August 2004 that:

> "2 I am Kija and speak the Kija language.
>
> 3. I was born at Lissadell old station. I can't say the name for this place because it is the name of my brother [Claimant 4]. My mother and father were walking around in the bush when the manager, McNamara, brought them in for tucker. My mother was from Bedford Downs but my father was from Lissadell. I get this country from my father. He got it from his mother, [Claimant 7], she is buried there at the old station in a grave near the gate.
>
> 5. My father always told me 'this is your country'. He told me the names of places and the Dreamtime stories."

[Applicant 3] deposes in his affidavit of 15 June 2004 that:

> "2. I refer to paragraph 2 of my affidavit of 12 October 1999. My family has come from Tildawum, which is part of this claim area, from before Europeans arrived in Australia. In Gija law and custom, my father and all the generations before him were daawam (that some people call traditional owners) of Tildawum since it was given to them from the Ngaranggani (that some people call the Dreaming) when all the Dreamings were men. The Ngaranggani became animals, and turned into places on the land. The land and the Dreamings passed from generation to generation, from that time long ago, to Gija people alive today.
>
> 6. I keep on going onto my country very often. I have done that all my life. I hunt kangaroo and turkey, and take fish.
>
> 7. I have responsibility to look after Ngaranggani places on my country. Some people call them sacred sites. In the 1990's I took part in two site surveys over my daawam. A mining company ran the Bow River mine They wanted to explore over some Ngaranggani places. My family and I said no to mining over the Ngaranggani places. There were arguments with the mine, but they did not go ahead, and we protected those places. That was my right and responsibility under Gija law and custom."

I am satisfied that each of the above deponents has the requisite physical connection with the land/waters covered by the application and that consequently the requirement of this provision is met.

Result: **Requirements met.**

No failure to comply with s61A: S190B(8)

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

S61A contains four sub-conditions. Because s190B(8) asks the Registrar to test the application against s61A, the decision below considers the application against each of these four sub-conditions.

S61A(1)- Native Title Determination

Reasons relating to this sub-condition

A search of the National Native Title Register has revealed that there is no determination of native title in relation to any part of the claim area. This has been confirmed by the Tribunal's Geospatial Branch in its assessment dated 1 November 2004.

Result: Requirements met

S61A(2)- Previous Exclusive Possession Acts (PEPAs)

Reasons relating to this sub-condition

Attachment B excludes from the area covered by the application any area in relation to which a previous exclusive possession act as defined in s23B of the act was done (see para 2 – Internal boundaries).

Result: Requirements met

S61A(3) – Previous Non-Exclusive Possession Acts (PNEPAs)

Reasons relating to this sub-condition

I am satisfied that the applicant is not seeking exclusive possession over the areas the subject of previous non-exclusive possession acts (see last para of Schedule E above).

Result: Requirements met

S61A(4) – Areas to which sections 47, 47A or 47B may apply

Reasons relating to this sub-condition

The benefit of sections 47, 47A or 47B are not claimed. However see s61A(2) and (3) above.

Result: Requirements met.

No claim to ownership of Crown minerals, gas or petroleum: S190B(9)(a)

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

(a) to the extent that the native title rights and interests claimed consist or include ownership of minerals, petroleum or gas – the Crown in the right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas they are not claimed by the applicants.

Reasons relating to this sub-condition

Schedule Q states that to the extent that any minerals, petroleum or gas are owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants.

Result: **Requirements met**

No exclusive claim to offshore places: S190B(9)(b)

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

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

Reasons relating to this sub-condition

The application does not cover any offshore areas.

Result: **Requirements met**

Native title not otherwise extinguished: S190B(9)(c)

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

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

Reasons relating to this sub-condition

The application does not disclose, and I am not otherwise aware that the native title rights and interests have otherwise been extinguished.

A search of the Register of Indigenous Land Use Agreements reveals that there are no agreements entered on the Register that affects any part of the claim area. This was confirmed in the assessment prepared by the Tribunal's Geospatial Analysis & Mapping Branch dated 1 November 2004.

Result: **Requirements met**

[End of document]