

National Native Title Tribunal
REASONS FOR DECISION COVER SHEET
REGISTRATION TEST

DELEGATE:	Monica Khouri
DATE:	26 July 2002

APPLICATION NAME:	Iman People #2
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NAME(S) OF APPLICANTS:	Russell Tatow, Patrick Silvester, Cynthia Kemp, Eve Fesl, Troy Noble, Fred Tull, Fergus Waterton, Richard Doyle and Madonna Barnes.
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NNTT NO:	QC97/55
FEDERAL COURT NO:	QG6162/98
DATE APPLICATION MADE:	30 October 1997
REGION:	QLD

The delegate has considered the application against each of the conditions contained in s190B and 190C of the *Native Title Act* 1993.

DECISION

The application is **ACCEPTED** for registration pursuant to s190A of the *Native Title Act* 1993.

Monica Khouri
Delegate of the Registrar

26 July 2002
Date of Decision

Brief History of the application

The application was lodged with the NNTT on 30 October 1997. Amendments were filed in the Federal Court on 27 January 1999. The application was not accepted for registration on 28 July 1999. Further amendments were filed on 26 September 2000 and 9 November 2000 and heard in the Federal Court on 1 December 2000. A re-engrossed application was filed in the Court on 7 December 2000. Further amendments to the application were filed 21 September 2001. Further amendments were filed 18 February 2002. A re-engrossed application was filed 12 March 2002.

The notification of interested persons and organisations has not yet commenced.

Unless otherwise indicated, references to “the application” throughout these Reasons for Decision refer to the latest amended version of the application.

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

On 28 November 2001 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).

The delegation of 28 November 2001 has not been revoked as at this date.

Information considered in making the decision

In determining this application I have considered and reviewed all of the information and relevant documents from the following files, databases and other sources:

- ◆ The Registration Test Compliance File QC97/55 (RTF);
- ◆ The Registration Test Compliance File QC99/3 (RTF 99/3)
- ◆ The Registration Test Compliance File QC97/54 (RTF 97/54)
- ◆ The National Native Title Tribunal Geospatial Database;
- ◆ The Register of Native Title Claims;
- ◆ The Native Title Register;
- ◆ The Register of Indigenous Land Use Agreements

ITEM	DATE	DESCRIPTION
1	7/12/00	Form 1 – Amended Application
2	11/11/00	Affidavits of [Claimant 1 – name deleted] and [Claimant 2 – name deleted]
3	13/12/00	Memo from Geospatial Unit, NNTT
4	13/11/00	Letter Gurang Land Council to NNTT
5	17/2/99	Letter Gurang Land Council to NNTT
6	21/9/01	Letter [Legal 1] to NNTT
7	21/9/01	Form 1 – Amended Application
8	2/10/01	Letter [Legal 1 – name deleted] to NNTT
9	18/2/02	Form 1 – Amended Application
10	12/3/02	Form 1 – re-engrossed application
11	12/3/02	NNTT Geospatial assessment
12	4/7/02	Letter Gurang Land Council to NNTT

Material provided by the native title claim group to the NNTT for registration test purposes was provided to the State, as is required by *State of Western Australia v Native Title Registrar & Ors* [1999] FCA 1591 – 1594. The State has indicated that it does not intend to provide any comments in response to the contents of this material.

A. Procedural Conditions

190C2	<i>Information, etc., required by section 61 and section 62:</i> <i>The Registrar 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.</i>
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Information, etc., required by section 61 and section 62:

The Registrar 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.

On 12 April 2001 Keifel J handed down her decision in *State of Queensland v Hutchison* [2001] FCA 416. Among other things, her Honour refers to:

“.....the statutory obligation, on the part of the Registrar or delegate, to ensure that the application contains all of the information required by s 62. This is part of the registration test: s 190C(2).”

I refer to the individual reasons for decision in relation to sections 61 and 62 set out below. I find that the procedural requirements of sections 61 and 62 have been met and accordingly I find that the application meets the requirements of s.190C(2).

Details required in section 61

61(1)	<i>The native title claim group includes all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.</i>	
Reasons relating to this sub-condition		Application passes the condition
Attachment A of the application provides a description of the native title claim group which is comprised of the descendants of [Ancestor 1 – name deleted], [Ancestor 2 – name deleted], [Ancestor 3 – name deleted], [Ancestor 4 – name deleted], [Ancestor 5 – name deleted], [Ancestor 6 – name deleted], [Ancestor 7 – name deleted], [Ancestor 8 – name deleted] and [Ancestor 9 – name deleted]. (hereafter referred to as “The Native Title Claim Group”).		
I am satisfied that the group described includes all the persons who, according to their traditional laws and customs, hold the native title claimed.		

61(3)	<i>Name and address for service of applicant(s)</i>
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Reasons relating to this sub-condition	Application passes the condition
The application identifies the names of the applicants and the address for service at Part B of the application.	

61(4)	<i>Names persons in native title claim group or otherwise describes the persons so that it can be ascertained whether any particular person is one of those persons</i>
Reasons relating to this sub-condition	Application passes the condition
An exhaustive list of names of the persons in the native title claim group has not been provided so the requirements of section 61(4)(a) are not relevant.	
For the reasons set out in relation to section 190B(3)(b) I find that the persons in the native title claim group are described sufficiently clearly in Attachment A, so that it can be ascertained whether any particular person is one of those persons in accordance with section 61(4)(b).	

61(5)	<i>Application is in the prescribed form¹, lodged in the Federal Court, contains prescribed information², and accompanied by prescribed documents and fee</i>
Reasons relating to this sub-condition	Application passes the condition
The application meets the requirements of s.61(5)(a) in that it is in the form prescribed by Regulation 5(1)(a), Native Title (Federal Court) Regulations 1998.	
As required by s.61(5)(b), the application was filed in the Federal Court.	
The application is accompanied by nine affidavits by the applicants as prescribed by s.62(1)(a) and by a map as prescribed by s.62(2)(b).	
I refer to my reasons for decision in relation to those sections of the Act.	
I note that s.190C(2) only requires me to consider details, other information and documents required by s.61 and s.62. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court. For the reasons outlined above, it is my view that the requirements of s.61(5) have been met.	
For the reasons outlined above, it is my view that the requirements of s. 61(5) are met.	

Details required in section 62(1)

62(1)(a)	<i>Affidavits address matters required by s62(1)(a)(i) – s62(1)(a)(v)</i>
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¹ Note that in relation to pre 30.09.98 applications, the application does not need to be in the prescribed form as required by the amended *Act*. Note also that pre 30.09.98 applications are deemed to have been filed in the Federal Court.

² Note also that “prescribed information” is that which is required by s62 as set out in the text of this reasons document under “Details required in section 62(1)”.

Reasons relating to this sub-condition	Application passes the condition
<p>The application filed in the Federal Court was accompanied by nine (9) affidavits from the named applicants. In the affidavits the applicants are identified by name and address. The affidavits were sworn before [Lawyer 1 – name deleted], Barrister at Law, at Rockhampton in Queensland on 1 February 2002, 2 February 2002 and 6 February 2002, respectively.</p> <p>The applicants depose in paragraphs (1) to (4) of the affidavits to the matters contained in s.62(1)(a)(i)-(iv) essentially using the words of the statute, and the requirements of these sub-paragraphs are therefore satisfied.</p> <p>Section (1)(a)(v) requires that the affidavits state the basis on which the applicants are authorised as mentioned in subparagraph (iv). Section 251B states what it means for the applicants to be authorised by all the persons in the native title claim group. Essentially, authorisation is said to have occurred if it is (a) in accordance with a process of decision making under traditional laws and customs, or, where there is no such process, (b) in accordance with a process of decision making agreed to and adopted by the persons in the native title claim group.</p> <p>The applicants state that they are authorised in accordance with a decision making process involving consultation with the members of the native title claim group and approval by those members at a meeting held in Rockhampton on 14 September 2000, 20 September 2000, 6 and 7 December 2001 as well as at a meeting held at Rockhampton on 1 February 2002, as set out in Schedule R of the application.</p> <p>Schedule R of the application sets out the grounds on which the applicants are authorised to make the application and deal with matters arising in relation to it.</p> <p>A further statement has been provided in Part A of the application under Authorisation. The application states that the applicants are entitled to make this application as the persons authorised by the native title claim group to make the native title determination application.</p> <p>I am satisfied that the application is accompanied by nine (9) affidavits that meet the procedural requirements of section 62(1)(a).</p>	

62(1)(c)	<i>Details of any traditional physical connection (information not mandatory)</i>
Comment on details provided	Application passes the condition
<p>Schedule F contains a general description of native title rights and interests claimed, and refers to the factual basis on which the claim group asserts association with the land, the existence of traditional laws and customs giving rise to the claimed native title, and the continuity of that title.</p> <p>Schedule G provides details of activities carried out in the application area.</p> <p>Schedule M provides details of traditional physical connection covered by the application.</p> <p>Further details are provided in the form of affidavit material submitted directly to me on behalf of members of the native title claim group.</p>	

Details required in section 62(2) by section 62(1)(b)

62(2)(a)(i)	<i>Information identifying the boundaries of the area covered</i>
Reasons relating to this sub-condition	Application passes the condition
Schedule B1 provides a description of the external boundary of the application and includes latitudinal and longitudinal points. Schedule C provides a map showing the external boundary of the area covered by the application and includes a locality map.	
I am satisfied that the application complies with this subsection. See my reasons for decision provided under s. 190B(2).	

62(2)(a)(ii)	<i>Information identifying any areas within those boundaries which are not covered</i>
Reasons relating to this sub-condition	Application passes the 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 provided by the applicants at Attachment B to the application is sufficient to enable the areas not covered by the application to be identified with reasonable certainty and meets the procedural requirements of s.62(2)(a)(ii).	

62(2)(b)	<i>A map showing the external boundaries of the area covered by the application</i>
Reasons relating to this sub-condition	Application passes the condition
A map is provided at Attachment C to the application and clearly identifies the external boundaries of the area covered by the application.	

62(2)(c)	<i>Details/results of searches carried out to determine the existence of any non-native title rights and interests</i>
Reasons relating to this sub-condition	Application passes the condition
Section 62(2)(c) combined with section 62(1)(b) requires that the application contain 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 or waters in the area covered by the application.	
The applicants state at Schedule D that "No searches have been conducted by the Gurang Land Council (Aboriginal Corporation)."	
The requirements of s. 62(2)(c) can be read widely to include all searches conducted by any person or body. However, I am of the view that under this condition I need only be informed of searches conducted by the applicants in order to be satisfied that the application complies with this condition.	
The application passes this condition.	

62(2)(d)	<i>Description of native title rights and interests claimed</i>

Reasons relating to this sub-condition	Application passes the condition
A description of the native title rights and interests claimed by the applicants is contained at Schedule E of the application. I have outlined these rights and interests in my reasons for decision in respect of s.190B(4).	
The application passes this condition.	

62(2)(e)	<i>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> <i>(i) the native title claim group have, and the predecessors of those persons had, an association with the area; and</i> <i>(ii) there exist traditional laws and customs that give rise to the claimed native title; and</i> <i>(iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.</i>
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Reasons relating to this sub-condition	Application passes the condition
A general description of the factual basis as required by s62(2)(e) is contained within Schedules F, G and M of the application and the applicants' affidavits.	
Schedule F of the application describes the association of the native title claim group with the area as being in accordance with their traditional system of laws and customs, and similar to their Iman ancestors they have lived, visited and travelled through the area. Further they attribute their knowledge of the area to knowledge passed on to them by their Iman ancestors.	
Schedules F, G and M of the application as well as the applicants' affidavits provide descriptions of the traditional usage of their country by the claimants including but not limited to visiting the area, managing conserving and protecting the area, conducting traditional rituals on the area, and passing on spiritual and cultural knowledge of country to younger generations.	
For the reasons detailed above I am satisfied that a general description of the factual basis, that specifically addresses each of the three particular requirements in (i), (ii) and (iii), does form part of the application itself.	

62(2)(f)	<i>If native title claim group currently carry on any activities in relation to the area claimed, details of those activities</i>
Reasons relating to this sub-condition	Application passes the condition
At Schedules F and G of the application the applicants provide details of activities that the native title claim group carries out in relation to the area claimed.	
The application passes this condition.	

62(2)(g)	<i>Details of any other applications to the High Court, Federal Court or a recognised State/Territory body the applicant is aware of (and where the application seeks a determination of native title or compensation)</i>
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Reasons relating to this sub-condition	Application passes the condition
At Schedule H of the application the applicants state “None known”.	
The Tribunal’s Geospatial assessment and overlap analysis of 12 March 2002 confirms that no other applications overlap with this application.	
The application passes this condition.	

62(2)(h)	<i>Details of any S29 Notices (or notices given under a corresponding State/Territory law) in relation to the area, and the applicant is aware of</i>
Reasons relating to this sub-condition	Application passes the condition
At Schedule I of the application the applicants state “The native title claim group is not aware of any current section 29 future act notification within the claim area.”	
The Tribunal’s Geospatial assessment and overlap analysis of 12 March 2002 confirms that no Section 29 or equivalent notices, as notified to the NNTT, fall within the external boundary of the application.	
The application passes this condition.	

Reasons for the Decision

The application meets the requirements of s.190C(2), for the reasons detailed above.
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190C3	<p><i>Common claimants in overlapping claims:</i></p> <p><i>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:</i></p> <ul style="list-style-type: none"> <i>(a) the previous application covered the whole or part of the area covered by the current application; and</i> <i>(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</i> <i>(c) the entry was made, or not removed, as a result of consideration of the previous application under section 190A.</i>
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Reasons for the Decision

<p>If all three conditions nominated at section 190C(3) apply, I must consider whether any person included in the native title claim group was a member of the native title claim group(s) for any previous application(s).</p> <p>Condition (a) of s.190C(3) is that the previous application covered the whole or a part of the area covered by the current application. A search of the Schedule of Native Title</p>

Applications, Register of Native Title Claims and Geospatial's assessment dated 12 March 2002 did not identify applications which overlap this current application.

Condition (b) of s.190C(3) is that an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made. This is not applicable in this application.

Condition (c) of s.190C(3) requires that potential previous application(s) must have been entered onto (or not removed from) the Register as a result of consideration under s.190A (the Registration Test.) This is not applicable in this application.

Therefore there is no application which meets the criterion in subsection 190C(3)(c), and as such, no further consideration of this section is required.

The application **passes** the condition.

<p>190C4(a) and 190C4(b)</p>	<p><i>Certification and authorisation:</i> <i>The Registrar must be satisfied that either of the following is the case:</i> <p>(a) <i>the application has been certified under paragraph 202(4)(d) by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part; or</i></p> <p>(b) <i>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.</i></p> </p>
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Reasons for the Decision

The application has not been certified by the relevant representative Aboriginal/Torres Strait Islander body. Therefore the conditions of s.190C4(a) are not relevant.

The application at Part A(2) states that “The applicants are entitled to make this application as the persons authorised by the native title claim group to make the Native Title Determination Application.”

The application at Schedule R states that:

“The native title claim group has adopted a contemporary traditional process of authorising the application, involving a combination of:

- Approval of families associated with particular areas within the claim area;
- Consent of senior members of the native title claim group; and
- Consensus, through debate and dialogue through all members of the native title claim group.

The claimant group lodged an original application under the pre-amended Native Title Act after a series of meetings through the Gurang Land Council, which culminated in the authorization of the original application on 30 October 1997. The claim has since been amended such that certain specific parcels of land have been apportioned to meet the requirements of the registration test at claim meetings held in Rockhampton on 11 November 1998, 07 December 1998 with the final authorisation on 14 December 1998.

Between October 1998 and 03 January 1999 a Consultant Anthropologist and the Research Assistant, an employee of the representative body, Gurang Land Council (Aboriginal Corporation) undertook consultation and research with members of the native title claim group. This information was provided to the NNTT as supporting material for the Iman People Application. The current in-house GLC Anthropologist again perused and discussed this research with members of the group leading to the final authorization meeting in Rockhampton. Meetings by members of the claimant group (including elders) in relation to the form of this claim were held in Rockhampton on 20-21 March 2000 and again on 14 September 2000.

Members of the claimant group (including elders) attended the final authorisation meeting that took place in Rockhampton on the 20 September 2000. The draft contents of this application were discussed and it was agreed to authorise the named applicants as representatives of lines of descent from Iman ancestors to proceed with this application for a native title determination and to deal with matters arising from the application on behalf of the native title claim group.

Copies of the final application were distributed later that day which, was discussed and amended as considered appropriate. The authorisation of the named applicants was re-affirmed. The application was then endorsed by all present at the meeting and this endorsement was formalised as a resolution passed at the meeting.

Amendments to this application were discussed at meetings held at Rockhampton on 17 and 18 September 2001, 6 and 7 December 2001 and 1 February 2002 with officers of Gurang Land Council (Aboriginal Corporation) and members (including elders) of the native title claim group. The members of the native title claim group agreed through the contemporary traditional process (noted above) that [Claimant 3 – name deleted] and [Claimant 4 – name deleted] (who were present at these meetings) be removed as applicants and that [Applicant 1 – name deleted] (who is a descendant of [Ancestor 8]), [Applicant 2 – name deleted] (the elder brother of [Claimant 3]), [Applicant 3 – name deleted] (who replaces [Claimant 4] in that descent line) and [Applicant 4 – name deleted] (who is a descendant of [Ancestor 9]) (who were also present at the meetings) be added as applicants to this application and that they and the remaining applicants be authorised to continue to make the application and deal with matters arising in relation to it on behalf of the native title claim group.

The members of Iman native title claim group were notified of the various meeting details by written invitation and were also contacted by phone through the Land Council wherever possible and also by word of mouth amongst members of the native title claim group.”

Each of the applicants’ affidavits that were provided pursuant to s.62(1)(a) state the following at paragraph 5 :

“I was authorised by all the persons in the native title claim group to make this Application and to deal with matters arising in relation to it in accordance with a decision making process involving consultation with the members of the native title claim group and approval by those members at a meeting held in Rockhampton on 14 September 2000, 20 September 2000, 6 and 7 December 2001 as well as at a meeting held at Rockhampton on 1 February 2002, as set out in Schedule R of this amended application.”

For these reasons I am satisfied that the requirements of s.190C(4)(b) are met.

The application **passes** the condition.

190C5	<p><i>Evidence of authorisation:</i></p> <p><i>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:</i></p> <ul style="list-style-type: none"> <i>(a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and</i> <i>(b) briefly sets out the grounds on which the Registrar should consider that it has been met.</i>
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Reasons for the Decision

The application **passes** the condition. Refer to my reasons under s.190C(4).

B. Merits Conditions



190B2	<i>Description of the areas claimed: 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.</i>
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Reasons for the Decision

Map and External Boundary Description

The application at Attachment C provides a map depicting the external boundaries of the application area and a locality map. The map includes grid references.

Further, the application at Schedule B provides a description of the application area and includes latitudinal and longitudinal coordinates.

On 12 March 2002 the Tribunal's Geospatial Unit provided an assessment of the map and the description and state that they are consistent and clearly identify the application area with *reasonable* certainty.

Internal Boundaries

At Schedule B, the applicants have provided information identifying the internal boundaries of the claimed area by way of a formula that excludes a variety of tenure classes from the claim area.

- "2. Subject to paragraphs 4 and 5, the area covered by the application exclude any land or waters which is presently or was previously covered by -
- (a) a scheduled interest;
 - (b) a freehold estate (including any right in land or waters taken to be the vesting of a freehold estate by virtue of subsection 23B(3));
 - (c) a commercial lease that is neither an agricultural lease nor a pastoral lease;
 - (d) an exclusive agricultural lease or an exclusive pastoral lease;
 - (e) a residential lease;
 - (f) a community purpose lease;
 - (g) a lease dissected from a mining lease referred to in subparagraph 23B(2) (c) (vii) of the Native Title Act 1993 (Cth);
 - (h) any lease (other than a mining lease) that confers a right to exclusive possession over particular land or waters; which was validly granted or vested on or before 23 December 1996.
3. Subject to paragraphs 4 and 5, the land and waters the subject of the application excludes any area covered by the valid construction or establishment of any public work (as defined by the Native Title Act 1993 (Cth), where the construction or establishment of the public work commenced on or before 23 December 1996.
4. Where the act specified in paragraph 2 or 3 falls within the provisions of -
- (a) section 23B(9) - Exclusion of acts benefiting Aboriginal peoples or Torres Strait Islanders
 - (b) section 23B(9A) - Establishment of a national park or a state park;
 - (c) section 23B(9B) - Acts where legislation provides for non-extinguishment; or
 - (d) section 23B(10) - Exclusion by regulation,
- the land and waters affected by the act is not excluded from the application.
5. Where an act referred to in paragraph 2 or 3 affects or affected land or waters referred to in -
- (a) section 47 - pastoral leases held by or on behalf of as trustee for any of the members of the native title claim group;
 - (b) section 47A - reserves etc. covered by claimant applications; or
 - (c) section 47B - vacant Crown land covered by claimant applications,

the land and waters affected by the act is not excluded from the application."

The applicants also acknowledge at Attachment E that the native title claimed "is not claimed by the native title claim group in relation to any part of the Claim Area that have

been validly extinguished by operation of the laws of the State or the Commonwealth” and further:

- “ 2. The native title rights and interests claimed in relation to the claim area are always subject to and in accordance with:
(a) the laws of the State and the Commonwealth;“
- “ 3. To the extent that any area is or has been the subject of a previous non-exclusive possession act, as defined by the *Native Title Act* 1993 (Cth), the native title claim group does not claim possession, occupation, use and enjoyment of the area to the exclusion of all others.”

Whether the exclusions identified by this formula are sufficient to meet the conditions of s190B(8) and (9) is not considered here. I refer to my reasons for decision in relation to those sections.

Conclusion

I find that the description and map contained in 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 application **passes** the condition.



190B3	<i>Identification of the native title claim group:</i> <i>The Registrar must be satisfied that:</i> <i>(a) The persons in the native title claim group are named in the application; or</i> <i>(b) The persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.</i>
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Reasons for the Decision

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

Attachment A of the application provides a description of the native title claim group. The description is as follows:

1. The descendants of [Ancestor 1]
2. The descendants of [Ancestor 2]
3. The descendants of [Ancestor 3]
4. The descendants of [Ancestor 4]
5. The descendants of [Ancestor 5]
6. The descendants of [Ancestor 6]
7. The descendants of [Ancestor 7]
8. The descendants of [Ancestor 8] and [Ancestor 9].

A letter provided by Gurang Land Council to the NNTT on 13/12/2000 requests “*that in considering the amended application, the National Native Title Tribunal have regard to*

the material submitted in support of QG6003/99 which includes all supporting affidavits and the Anthropological Report prepared by [Anthropologist 1 – name deleted] in 1998.”

Accordingly, I have had regard to the material prepared by [Anthropologist 1], provided to the NNTT 17/2/99 in the QC99/3 matter and attached to a letter from the Gurang Land Council.

The “Description of the Iman Native Title Claim Group” contained within [Anthropologist 1]’s report is as follows:

The Native Title Claim Group consists of the biological descendants of seven apical Iman ancestors, being:

1. [Ancestor 10 – name deleted] (but excluding [Applicant 2] and his biological descendants)
2. [Ancestor 3]
3. [Ancestor 4]
4. [Ancestor 6]
5. [Ancestor 8]
6. [Ancestor 11 – name deleted]
7. [Ancestor 7]

Although there are ostensible differences between the anthropologists findings on the native title claim group, and the group as described in the current application, I am satisfied that some of the changes are ones of form only, and not substance. In correspondence dated 21 September 2001, the applicants’ legal representatives state that “[Ancestor 11] is no longer referred to within the definition of the native title claim group as he was erroneously included previously. He is not an Aboriginal person although his descendants from his partnership with [Ancestor 5] are.” I am therefore satisfied that the replacement of [Ancestor 11] as a named ancestor with [Ancestor 5] represents the same group of people claiming to hold native title.

I am further satisfied that the exclusion of [Applicant 2] and descendants from the description of native title claim group on another application is not an issue which concerns me in considering this application for registration, as [Applicant 2] and his descendants have been included in this description of the claim group. I further note the inclusion of the descendants of [Ancestor 2] (who is the father of [Applicant 2]).

I also note the inclusion of [Ancestor 9]. In correspondence dated 4 July 2002, Gurang Land Council confirmed that further research has been conducted since [Anthropologist 1]’s anthropological report which warrants the inclusion of [Ancestor 9]’s descendants in the description of native title claim group.

I am satisfied that the group described includes all the persons who, according to their traditional laws and customs, hold the native title claimed.

The application **passes** the condition.

190B4

Identification of claimed native title

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

Reasons for the Decision

This condition requires me to be satisfied that the native title rights and interests claimed can be readily identified. It is insufficient to merely state that these native title rights and interests are 'all native title interests that may exist, or that have not been extinguished at law'. 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 readily identified.

Attachment E to the application (item 1) lists ten native title rights and interests claimed by the applicants. These are detailed in my reasons under s.190B6

The application also includes the following qualifications to the claimed rights and interests at Schedule E:

"2. The native title rights and interests claimed in relation to the land and waters are always subject to and in accordance with:

- (a) the laws of the State and the Commonwealth; and
- (b) the traditional laws acknowledged and traditional customs observed by the native title claim group

3. To the extent that any area of the claim is or has been the subject of a previous non-exclusive possession act, as defined by the Native Title Act 1993 (Cth), the native title claim group does not claim possession, occupation, use and enjoyment of the area to the exclusion of all others.

4. The native title claimed –

- (a) does not operate exclusive of the Crown's valid ownership of any minerals, petroleum or gas;
- (b) is not exclusive rights or interests if they relate to waters in an offshore place; and
- (c) is not claimed by the native title claim group in relation to any part of the Claim Area that have been validly extinguished by operation of the laws of the State or Commonwealth.

In my view the native title rights and interests described are readily identifiable. The description is more than a statement that native title rights and interests are 'all native title interests that may exist, or that have not been extinguished at law'.

The application **passes** the condition.

190B5	<p><i>Sufficient factual basis:</i></p> <p><i>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:</i></p> <ul style="list-style-type: none"> <i>(a) that the native title claim group have, and the predecessors of those persons had, an association with the area;</i> <i>(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;</i> <i>(c) that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.</i>
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Reasons for the Decision

On 19 January 2001 French J handed down his decision (*Martin v Native Title Registrar* [2001] FCA 16 (*Martin*)). Amongst other things, his Honour considered this condition of the registration test in that case. I note, at the outset, 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" - at [23].

In regard to paragraph (a) of s190B(5) his Honour noted,

"...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 " - at [22].

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

In regard to paragraph c).his Honour noted that,

"...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). It followed from his conclusion in relation to that paragraph that he could not be so satisfied that there was a factual basis set out for the assertion referred to in par (c)...." - at [29]

As noted under my reasons in relation to s190C(2) above, the application does provide a general description of the factual basis provided to support the assertion that the native title rights and interests claimed exist and also provides the factual basis to support the assertions as set out in s190B(5)(a)-(c) as required by s62(2)(e).

What I must determine here is whether or not the factual basis is sufficient to support these assertions. In *Martin*, French J noted that the delegate was not limited to considering the statements in the application but may refer to additional material under this condition. In *Queensland v Hutchison* [FCA] 416, Keifel J (commenting on that finding) said, *obiter*, that reference may be had to additional evidence if:

"such evidence goes beyond what was required to be set out in the application...Section 190B(5) may require more than [s 62(2)(e)], for the Registrar [or his delegate] is required to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to suggest a wider consideration, of the evidence itself, and not of some summary of it." At [25].

The Supplementary Explanatory Memorandum to the *Native Title Amendment Bill 1997* [No. 2] states that s 190B(5) was "designed to ensure that only credible, well research [sic] claims which are likely to be established can be registered." – at p 35].

The applicants list at Attachment E a description of the native title rights and interests

claimed in relation to the area subject to the application. The applicants also provide material in support of s190B(5) at Schedules F, G and M.

Schedule F contains a general description of the rights and interests claimed and describes, in particular, the factual basis on which it is asserted that the three criteria identified at s 190B(5)(a)–(c) are met.

Schedules G and M provide details of traditional usage asserted by the claimants.

It is apparent from the above that the applicants have made a series of assertions in relation to the existence of the claimed native title rights and interests, including statements which related to the three particular matters referred to in s 190B(5). What I must determine here is whether or not the applicants have also provided a factual basis which is sufficient to support the assertions made in the application.

There are three criteria to consider in determining over all whether or not I am satisfied that there is a sufficient factual basis to support the applicants' assertion about the existence of the native title rights and interests listed at Schedule E of the application.

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

In considering this condition I have had particular regard to the affidavits sworn by [Claimant 1] and [Claimant 2]. On the basis of their affidavits, the Anthropological Report attached to the application in QC99/3 (Iman People #3) and Schedules F, G and M of the application, it is clear that these people have an association with the claim area and are descended from people who also had an association with the claim area:

- [Claimant 2] paras 3-6, 8-11;
- [Claimant 1] paras 2-3, 7-8, 11.

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

In considering this condition I have had particular regard to the affidavits sworn by [Claimant 1] and [Claimant 2]. On the basis of their affidavits, the Anthropological Report attached to the application in QC99/3 (Iman People #3), Attachment E and Schedules F, G and M of the application, it is clear that there exist traditional laws and customs observed by the native title claim group that give rise to the claim to native title rights and interests:

- [Claimant 2] paras 3-9, 11;
- [Claimant 1] paras 3, 6-10.

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

For the reasons set out in 190B(5)(b) and having regard to the same affidavit material, the Anthropological Report attached to the application in QC99/3 (Iman People #3), Attachment E and Schedules F, G and M, I am satisfied that there is a factual basis for the claim group continuing to hold native title in accordance with those traditional laws and customs.

Conclusion

I am satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertions described for each of the criteria set out in s.190(B)(5).

The application **passes** the condition.

190B6

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.

Reasons for the Decision

Under s190B(6) I must consider that, prima facie, at least some of the native rights and interests claimed can be established.

‘Native title rights and interests’ are defined at s.223 of the Act. This definition specifically attaches native title rights and interests to land and water, and in summary requires:

- the rights and interests are possessed under traditional laws and customs;
- those claiming the rights and interests, under traditional law and custom have a connection with the relevant land and waters; and
- these rights and interests are recognised under the common law of Australia.

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 appears at first sight without investigation.” [Citing the Oxford English Dictionary (2nd ed 1989)]”.

In the *State of Western Australia v Ward* [2000] FCA 191 (Ward’s case), handed down on 3 March 2000, the majority of the full Federal Court held that some of the native rights and interests which had previously been accepted following Lee J’s first instance decision may not be recognisable under the NTA. The majority held that the common law does not protect purely religious or spiritual relationships with land. It was held that only rights and interests which involve physical presence on the land and activities on the land associated with traditional social and cultural practices are recognised and protected under the NTA see [104] of Ward’s case. In finalising the determination the Court confirmed these findings. (See *State of Western Australia v Ward* [2000] FCA 611 dated 11 May 2000.)

Following Ward’s case, the rights which can be made out, prima facie, appear to be only those which can be characterised as having an aspect involving physical use and enjoyment of the land claimed. I have considered this aspect of the judgement in relation to the rights and interests claimed as set out below.

The applicants state in Schedule E:

2. The native title rights and interests claimed in relation to the claim area are always subject to and in accordance with:

- (a) the laws of the State and the Commonwealth; and
- (b) the traditional laws acknowledged and traditional customs observed by the native title claim group.

3. To the extent that any area of the claim area is or has been the subject of a previous non-exclusive possession act, as defined by the Native Title Act 1993 (Cth), the native title claim group does not claim possession, occupation, use and enjoyment of the area to the exclusion of all others.

4. The native title claimed –

- (a) does not operate exclusive of the Crown's valid ownership of any minerals, petroleum or gas;
- (b) is not exclusive rights or interests if they relate to waters in an offshore place; and
- (c) is not claimed by the native title claim group in relation to any part of the Claim Area that have been validly extinguished by operation of the laws of the State or the Commonwealth."

I am satisfied that these statements qualify all the rights and interests claimed.

In considering this condition I have had particular regard to the affidavits of [Claimant 1] and [Claimant 2], the Anthropological Report (provided in QC99/3) and Schedules F, G and M of the application.

(a) An entitlement as against the whole world to possession, occupation, use and enjoyment of the claim area;

The application, affidavits and Anthropological Report provide sufficient evidence of the members of the native title claim group exercising and/or having these rights, some of which is detailed below:

- [Claimant 2] affidavit paras 1-11;
- Anthropological Report pp. 4-8;
- Schedules F, G and M of the application.

Although the applicants claim these rights to the exclusion of all others, the claim is subject to the general statements provided in Schedule E noted above. I am satisfied that these statements are qualifications to the rights claimed and are sufficient to show, prima facie, that these rights are not asserted exclusively where such a claim cannot be established.

Therefore, I am satisfied that this right is, prima facie, capable of being established.

(b) A right to possess, use, occupy and enjoy the claim area;

The application, affidavits and Anthropological Report provide sufficient evidence of the members of the native title claim group exercising and/or having these rights, some of which is detailed below:

- [Claimant 2] affidavit paras 1-11;

- Anthropological Report pp. 4-8;
- Schedules F, G and M of the application.

Although the applicants claim these rights to the exclusion of all others, the claim is subject to the general statements provided in Schedule E noted above. I am satisfied that these statements are qualifications to the rights claimed and are sufficient to show, *prima facie*, that these rights are not asserted exclusively where such a claim cannot be established.

Therefore, I am satisfied that this right is, *prima facie*, capable of being established.

(c) A right to make decisions about the use and enjoyment of the claim area and its natural resources;

The application, affidavits and Anthropological Report provide sufficient evidence of the members of the native title claim group exercising and/or having these rights, some of which is detailed below:

- [Claimant 1] affidavit para 10;
- [Claimant 2] affidavit para 11;
- Anthropological Report pp. 9 - 10;
- Schedules F and G of the application.

In the draft determination in Ward's case, the majority found that a non-exclusive right to make decisions about the use and enjoyment of the land was recognisable at common law over areas where native title was found to exist but to which s 47 and 47A did not apply.

Prima facie this right is not claimed to the exclusion of all others. See also the statements made in Schedule E.

Therefore, I am satisfied that this right is, *prima facie*, capable of being established.

(d) A right to give or refuse, and determine the terms of any, permission to enter, remain on, use or occupy the claim area by others;

The application provides sufficient evidence of the members of the native title claim group exercising and/or having these rights, some of which is detailed below:

- Schedules F and G of the application.

The Full Court held in *Ward* that:

“If the evidence establishes that the indigenous community is entitled as against the whole world to possession, occupation, use and enjoyment of the land, that entitlement will be similar in its enjoyment to the incident which attached to a freehold title. Subject to the general laws of Australia which regulate or restrict the use and enjoyment of the land, insofar as those laws apply to the indigenous community, the community will have the *right to control access* to the land, *to make decisions about its use and as to the use and enjoyment of its resources*...subject to its own traditionally-based laws and customs.”

It would appear therefore that where the claim is for exclusive possession and these rights and interests can be factually established they are claimable. It also appears that

they can be claimed where the claim is one for non-exclusive possession. They were included in the Full Court's *Ward* determination in relation to areas over which the claim group were determined to hold non-exclusive possession, *WA v Ward* [323-324].

Although the applicants claim these rights to the exclusion of all others, the claim is subject to the general statements provided in Schedule E noted above. I am satisfied that these statements are qualifications to the rights claimed and are sufficient to show, prima facie, that these rights are not asserted exclusively where such a claim cannot be established.

Therefore, I am satisfied that this right is, prima facie, capable of being established.

(e) A right to access and use the claim area and its natural resources for customary purposes including to perform customary ritual and ceremony;

The application, affidavits and Anthropological Report provide sufficient evidence of the members of the native title claim group exercising and/or having these rights, some of which is detailed below:

- [Claimant 2] affidavit, para 7;
- Anthropological Report, p.9;
- Schedule G of the application.

Prima facie this right is not claimed to the exclusion of all others. See also the statements made in Schedule E.

Therefore, I am satisfied that this right is, prima facie, capable of being established.

(f) A right to engage in a way of life consistent with the traditional connection of the native title holders to the claim area;

The application, affidavits and Anthropological Report provide sufficient evidence of the members of the native title claim group exercising and/or having these rights, some of which is detailed below:

- [Claimant 2] affidavit, para 6 and 9;
- Anthropological Report, pp.8 -11;
- Schedules F, G and M.

Prima facie this right is not claimed to the exclusion of all others. See also the statements made in Schedule E.

Therefore, I am satisfied that this right is, prima facie, capable of being established.

(g) A right to use and enjoy the natural resources of the claim area for customary and commercial purposes;

The affidavits and Anthropological Report provide sufficient evidence of the members of the native title claim group exercising and/or having these rights, some of which is detailed below:

- [Claimant 2] affidavit, para 7;
- Anthropological Report, pp.8-9.

Prima facie this right is not claimed to the exclusion of all others. See also the statements made in Schedule E and the statement made in Schedule Q, namely, "The native title claim group does not claim ownership of minerals, petroleum and gas where they are wholly owned by the Crown".

Therefore, I am satisfied that this right is, prima facie, capable of being established.

(h) A right to protect, manage, and maintain sites and places of importance under traditional laws, customs and practices in the claim area;

The application, affidavits and Anthropological Report provide sufficient evidence of the members of the native title claim group exercising and/or having these rights, some of which is detailed below:

- [Claimant 2] affidavit, para 11;
- Anthropological Report, pp.9-10;
- Schedule F of the application.

Prima facie this right is not claimed to the exclusion of all others. See also the statements made in Schedule E.

Therefore, I am satisfied that this right is, prima facie, capable of being established.

(i) A right to be acknowledged as the traditional Aboriginal owners of the claim area;

The application and Anthropological Report provide sufficient evidence of the members of the native title claim group exercising and/or having these rights, some of which is detailed below:

- Anthropological Report, pp.4-5;
- Schedules F and G.

This right was recognised in *Ngalpil v State of Western Australia*, and in *Mark Anderson on behalf of the Spinifex People v State of Western Australia*.

Therefore, I am satisfied that this right is, prima facie, capable of being established.

(j) A right to inherit and transmit native title rights and interests.

The application, affidavits and Anthropological Report provide sufficient evidence of the members of the native title claim group exercising and/or having these rights, some of which is detailed below:

- [Claimant 2] affidavit, paras 3 and 9;
- [Claimant 1] affidavit, paras 3 and 10;
- Anthropological Report, pp. 8 and 11;
- Schedule F of the application.

This right was recognised in the Bar-Barrum determination and the Dauar Island determination.

Therefore, I am satisfied that this right is, prima facie, capable of being established.

The application **passes** the condition.

190B7	<p>Traditional physical connection:</p> <p>The Registrar must be satisfied that at least one member of the native title claim group:</p> <ul style="list-style-type: none"> (a) <i>Currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or</i> (b) <i>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 land or waters) by:</i> <ul style="list-style-type: none"> (i) <i>the Crown in any capacity; or</i> (ii) <i>a statutory authority of the Crown in any capacity; or</i> (iii) <i>Any holder of a lease over any of the land or waters, or any person acting on behalf of such holder of a lease.</i>
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Reasons for the Decision

There is at least one member of the native title claim group with a current or previous traditional physical connection with part of the land or waters covered by the application.

This section requires that I am 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 covered by the application.

Traditional physical connection is not defined in the Native Title Act. I am interpreting this phrase to mean that physical connection should be in accordance with the particular traditional laws and customs relevant to the claim group.

The affidavits of [Claimant 2] and [Claimant 1], members of the native title claim group, the Anthropological Report (provided in QC99/3) and Schedules F, G and M of the application satisfy me that a number of members of the native title claim group currently have and have had a traditional physical connection to parts of the claim area. In respect of the affidavits provided I refer specifically to:

- [Claimant 2], paras 6 – 8, 11;
- [Claimant 1], paras 8 – 9, 11.

The application **passes** the condition

190B8	<p>No failure to comply with s61A:</p> <p>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that, because of s61A (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.</p>
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Reasons for the Decision

For the reasons that follow I have formed the conclusion that there has been

compliance with s61A and that the provisions of this section are met.

s61A(1) – Native Title Determination

A search of the Native Title Register revealed that there is no approved determination of native title in relation to the area claimed in this application.

S61A(2) – Previous Exclusive Possession Acts

In Attachment B to the application, parts 2 and 3, any area which is covered by a previous exclusive possession act, as defined in s23B of the Native Title Act, is excluded from the claim area save for those areas relevant to the provisions of either ss.23B(9),(9A), (9B), and (10) or ss.47, 47A and 47B.

S61A(3) – Previous Non-Exclusive Possession Acts

Attachment E to the application states that the native title claim group does not claim possession, occupation, use or enjoyment to the exclusion of all others of any area that is covered by a previous non-exclusive possession act, as defined by the *Native Title Act* 1993(Cth).

S61A(4) – s47, 47A, 47B

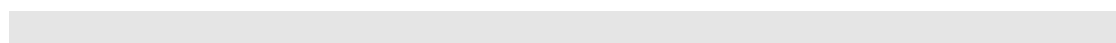
The application does not claim the benefit of these sections. The applicants state in Schedule L:

“The native title claim group is not aware of any such area within the area covered by the application.”

Conclusion

I am required to ascertain whether this is an application that should not have been made because of the provisions of s61A. There is nothing before me to indicate that this application could not be made. I am satisfied the applicants’ statements with respect to the provisions of that section are sufficient to meet the requirements of s 190B(8).

The application **passes** the condition.



190B9 (a)	<i>Ownership of minerals, petroleum or gas wholly owned by the Crown:</i> <i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i> <i>(a) to the extent that the native title rights and interests claimed consist or include ownership of minerals, petroleum or gas - the Crown in right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas;</i>
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Reasons for the Decision

At Schedule Q of the application, the applicants state that the native title claim group

does not claim ownership of minerals, petroleum or gas where they are wholly owned by the Crown.

Further, at Attachment E to the application, the applicants state that the native title claimed does not operate exclusive of the Crown's valid ownership of any minerals, petroleum or gas.

I am satisfied that these statement ensure that the application complies with the requirements of s.190B(9)(a).

The application **passes** the condition.



190B9 (b)	<p><i>Exclusive possession of an offshore place:</i> <i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i></p> <p><i>(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;</i></p>
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Reasons for the Decision

At Schedule P, the applicants state that the native title claim group does not claim exclusive possession of any offshore places.

The application **passes** the condition.



190B9 (c)	<p><i>Other extinguishment:</i> <i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i></p> <p><i>(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)).</i></p>
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Reasons for the Decision

Under the requirements of this section, I must consider whether there are any native title rights and interests claimed by the applicants that have been otherwise extinguished.

In addition to the areas excluded from the claim area as considered in s190B(8), I have listed, in my reasons for decision in relation to s190B(4), the qualifications to the native title rights and interests claimed at Attachment E of the application.

The application does not disclose, and I am not otherwise aware of, any additional

extinguishment of native title rights and interests in the area claimed.

The application meets the requirements of s190B(9)(c).

The application **passes** the condition.

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