

National Native Title Tribunal
REASONS FOR DECISION COVER SHEET
REGISTRATION TEST

DELEGATE:	Simon Nish
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APPLICATION NAME:	Antakirinja
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NAME(S) OF APPLICANT(S):	William Herbert Lennon Snr and others
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NNTT NO:	SC95/7
FEDERAL COURT NO:	SG6007/98
DATE APPLICATION MADE:	Lodged on 9/11/95; registered on 15/11/95

REGION:	SA
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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*.

.....
Simon Nish
Delegate of the Registrar

..... 1999
Date of Decision

A. Procedural Conditions

190C2	<p><i>Information, etc, required by section 61 and section 62:</i></p> <p><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></p>
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Details required in section 61

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

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
The application describes the native title claim group as comprising named or identified antecedents, their families, and those persons related by a traditional principle of descent to the antecedents. I have reached this view for the reasons contained in my decision at s.190B3.		

61(5)	<i>Application is in the prescribed form¹, lodged in the Federal Court, contain prescribed information², and accompanied by prescribed documents and fee</i>
Reasons relating to this sub-condition	Application passes the condition
<p>s.61(5)(a) The application is in the form prescribed by Regulation 5(1)(a) Native Title (Federal Court) Regulations 1998.</p> <p>s. 61(5)(b) As required under section 61(5)(b), the amended application was filed in the Federal Court.</p> <p>s.61(5)(c) The application meets the requirements of section 61(5)(c) and contains all information as prescribed in section 62. I refer to my reasons in relation to section 62 below.</p> <p>s.61(5)(d) As required by section 61(5)(d) the application is accompanied by the prescribed documents, being:</p> <ul style="list-style-type: none"> • affidavits, as prescribed by s. 62(1)(a), and • a map, as prescribed by s. 62(1)(b) <p>I refer to my reasons for decision in relation to s.62(1)(a) and (b) below. I note that section 190C(2) only requires me to consider details, other information, and documents required by section 61 and 62. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court.</p> <p>For the reasons outlined above, it is my view that the requirements of s.61(5) are met.</p>	

Details required in section 62(1)

62(1)(a)	<i>Affidavits address matters required by s62(1)(a)(i) – s62(1)(a)(v)</i>
Reasons relating to this sub-condition	Application passes the condition
Affidavits have been received from each applicant. Competent witnesses have witnessed these affidavits. I am satisfied that they address the matters required by s. 62(1)(a)(i) - (v). The Affidavits state the basis on which the applicants are authorised and are in the first person, as required by the Act.	

62(1)(c)	<i>Details of any traditional physical connection (information not mandatory)</i>
Comment on details provided	Application passes the condition
The applicants have provided details of traditional physical connection at Schedule M.	

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)”.

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

62(2)(a)(i)	Information identifying the boundaries of the area covered
Reasons relating to this sub-condition	Application passes the condition
At Schedule B and Attachment C the applicants have provided detailed information identifying the external boundary of the claimed area. See also my reasons for decision provided under s.190B (2).	

62(2)(a)(ii)	Information identifying any areas within those boundaries which are not covered
Reasons relating to this sub-condition	Application passes the condition
At Schedule B and Attachment B, the applicants have provided information identifying the internal boundaries of the claimed area, being all areas within the areas the subject of the external boundaries, excluding: <ul style="list-style-type: none"> • Category A past acts, as defined by s. 229 of the Native Title Act 1993 • Previous exclusive possession acts, as defined by s.23B of the Native Title Act 1993 • Areas over which native title has been extinguished by common law or statute, save for those areas over which prior extinguishment may be disregarded in accordance with the provisions of either s. 47, 47A or 47B of the Native Title Act 1993 <p>I am satisfied that the information provided in the application identifies the areas within the external boundary that are not covered by the application. See also my reasons for decision in relation to test conditions contained at 190B2.</p>	

62(2)(b)	A map showing the external boundaries of the area covered by the application
Reasons relating to this sub-condition	Application passes the condition
The applicants have provided a map at Attachment C. See also reasons provided under s190B2.	

62(2)(c)	Details/results of searches carried out to determine the existence of any non-native title rights and interests
Reasons relating to this sub-condition	Application passes the condition
The requirements of s62(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 applicant in order to be satisfied that the application complies with this condition. It would be unreasonably onerous to expect applicants to have knowledge of, and obtain details about all searches carried out by every other person or body. The application states at Schedule D the searches carried out by the applicants and provides the results of those searches at Attachment D.	

62(2)(d)	Description of native title rights and interests claimed
Reasons relating to this sub-condition	Application passes the condition
The native title rights and interests claimed by the applicants are particularised at	

Schedule E. In accordance with section 62(2)(d), the rights and interests claimed do not merely consist of a statement to the effect that the native title rights and interests that may exist or that have not been extinguished at common law. The description is a list of individually identifiable rights and interests.

I have outlined these rights and interests claimed in my reasons for decision in relation to s.190B4.

62(2)(e)(i)	<i>Factual basis – claim group has, and their predecessors had, and association with the area</i>
Reasons relating to this sub-condition Application passes the condition	
<p>The applicants assert at Schedule F in the application that they have, and their predecessors had, an association with the area. A factual basis for this assertion is provided at Attachment A and Schedules E, F, G and M of the application.</p> <p>For an assessment of the sufficiency of the factual basis provided by the applicants, refer to my reasons in relation to s. 190B(5)(a).</p>	

62(2)(e)(ii)	<i>Factual basis – traditional laws and customs exist that give rise to the claimed native title</i>
Reasons relating to this sub-condition Application passes the condition	
<p>The applicants assert at Schedule F of the application that there exist traditional laws and customs that give rise to the claimed native title. A factual basis for this assertion is provided at Attachment A and Schedules E, F, G and M of the application. For an assessment of the sufficiency of the factual basis provided by the applicants, refer to my reasons in relation to s. 190B(5)(b).</p>	

62(2)(e)(iii)	<i>Factual basis – claim group has continued to hold native title in accordance with traditional laws and customs</i>
Reasons relating to this sub-condition Application passes the condition	
<p>The applicants assert at Schedule F of the application that the native title claim group has continued to hold the native title in accordance with traditional laws and customs. A factual basis for this assertion is provided at Schedules A, E, F, G and M of the application.</p> <p>For an assessment of the sufficiency of the factual basis provided by the applicants, refer to my reasons in relation to s. 190B(5)(c).</p>	

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	
<p>At Schedule G the application provides (general) details of activities that the native title claim group carries out in relation to the area claimed.</p> <p>In my view the description of activities is sufficient to comply with the requirements of 62(2)(f).</p>	

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>
Reasons relating to this sub-condition Application passes the condition	
Details of any other relevant applications are provided at Schedule H.	

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	
The applicants have set out details of section 63M notices at Schedule I.	

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> <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

The current application overlaps with other applications set out in Schedule H. Only two of those applications were lodged and registered prior to the current application (SC6004/98 – Kuyani #2 and SC 6005/98 – Edward Roberts). These previous two applications were not on the Register as a result of consideration under s. 190A.
The application passes this condition.

190C4(a) and 190C4(b)	<p><i>Certification and authorisation:</i> <i>The Registrar must be satisfied that either of the following is the case:</i></p> <ul style="list-style-type: none"> <i>(a) 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> <i>(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.</i>
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Reasons for the Decision

The relevant representative Aboriginal/Torres Strait Islander body has certified the application. I note that the certificate has been signed by **[name deleted]**, Director of the Aboriginal Legal Rights Movement, who would have the proper authority to sign such a document. I am satisfied that the certification fulfils the requirements of s.190C (4) of the Act.

The application **passes** this condition.

190C5	<p><i>Evidence of authorisation:</i> <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> <p><i>(a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and</i></p> <p><i>(b) briefly sets out the grounds on which the Registrar should consider that it has been met.</i></p>
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Reasons for the Decision

For the reasons set out at 190C(4) above, I note that I am not required to consider the application against this condition.

B. Merits Conditions

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

Map and External Boundaries

The application at Attachment C provides a map depicting the external boundaries of the claim area that has a locality diagram and clearly marked grid references.

I am satisfied that the map submitted with the application meets the requirements of s62 (2)(b) as the boundaries of the areas covered by the application can be identified.

Written description

In addition to the provision of a map defining the external boundaries of the claim, the applicants at Schedule B have provided a written description of the external boundary. While the description of the external boundary is at the less exacting end of the spectrum, I am satisfied that the reliance in the description upon known cadastres or boundaries that can be identified with some exactitude from the State land tenure system, and taking into account that the description is to be read in conjunction with the map provided, that the applicants have provided a sufficient description of the external boundaries.

I am satisfied that the physical description of the external boundaries meets the requirements of s62 (2)(a)(i).

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, being all areas within the claim area, excluding:

- Category A past acts, as defined by s. 229 of the Native Title Act 1993
- Valid previous exclusive possession acts, as defined by s.23B of the Native Title Act 1993
- Areas over which native title has been extinguished by common law or statute, **save** for those areas over which prior extinguishment may be disregarded in accordance with the provisions of either s. 47, 47A or 47B of the Native Title Act 1993. (Note: see Attachment B (2) for a full description of the exclusions).

The description of areas excluded can be objectively applied to establish whether any particular area of land or waters within the external boundary of the application is within the claim area or not. This may require considerable research of tenure data held by the particular custodian of that data, but nevertheless it is reasonable to expect that the task can be done on the basis of the information provided by the applicant. I consider that the description provides a reasonable level of certainty.

I note that at Attachment D the applicants provide the results of their tenure searches, including at Attachment D6 a list of freehold tenures within the external boundaries. I also note that in its letter of 8 February 1999 the Commonwealth Government Solicitor identifies specific freehold lots within the external boundaries. The applicants make it clear at Attachment B that the class exclusion clause is to operate in relation to valid previous exclusive possession acts. Upon the issue of the validity of previous exclusive possession acts within the claim area being resolved, and which cannot properly be resolved at this stage of the proceedings or by the Tribunal, Schedule B acts as a springing exclusion clause, removing those previous exclusive possession acts from the claim area. Given that the applicants have clearly raised the issue of the validity of previous exclusive possession acts in the application, I am satisfied that they have adequately defined the internal boundaries of the claim area.

I note that the applicant makes exceptions to the particular exclusions cited in the application by claiming the benefit of s47, s47A and s47 of the *Act* as they apply to any part of the area contained within the application. At Schedule L the applicants provide details of such areas as they presently are aware of. I take it that the applicants are

relying upon s47, s47A and s47 of the *Act* as they apply to the areas identified in Schedule L by reference to class tenures. Consistent with the reasoning set out above in respect of identifying areas excluded from the claim, I am of the view that identifying the areas so excepted from the exclusions in the manner done by the applicant, does allow specific geographic location subject to tenure research.

The application **passes** this condition.



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

To meet this condition of the registration test the description of the group must be sufficiently clear so that it can be ascertained whether any particular person is a member of the native title claim group.

Attachment A defines the claim group as comprising:

- Named or identified apical ancestors,
- Their families, and
- Their descendants, with descent being not limited to biological descent.

The Attachment also sets out the principles of incorporation into the group according to traditional law and custom.

In my view the description of the claim group is sufficiently precise so that it can be ascertained whether any particular person is a member of the native title claim group. Further, I am satisfied that there is a set of rules, embodied in the traditional laws and customs of the native title claim group, that can be objectively referred to in order to determine whether a person has been incorporated into the native title claim group. Document 4 provides clarification as to definitions.

The application **passes** this condition.

190B4	<p>Identification of claimed native title</p> <p><i>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.</i></p>
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Reasons for the Decision

190B4	<p>Schedule E of application particularises twelve title rights and interests claimed by the applicants.</p> <p>These rights and interests are subject to all non- native title rights and interests, and laws of South Australia made in accordance with sections 19, 22F, 23F, 23E or 123 of the Native Title Act 1993.</p> <p>At Schedule Q the rights and interests claimed are further qualified: no claim is being made to any native title rights and interests consisting of or including ownership of minerals, petroleum or gas owned by the Crown under valid laws of the Commonwealth, or State.</p> <p>By particularising the rights and interests claimed into a list of specific rights and interests which are comprehensible, I consider that this condition has been met.</p> <p>The application passes the condition.</p>
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190B5	<p>Sufficient factual basis:</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"> (a) <i>that the native title claim group have, and the predecessors of those persons had, an association with the area;</i> (b) <i>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> (c) <i>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

190B5	<p>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 F of this application.</p> <p>(a) An association with the area;</p> <p>To be satisfied under this criterion, it must be evident that the association with the area is shared by a number of members of the native title claim group and was shared by their predecessors.</p>
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In considering this condition, I have had regard to the affidavits of **[name deleted]**, **[name deleted]** and **[name deleted]**, three of the applicants, and **[name deleted]**, a member of the native title claim group. On the basis of the affidavits and the genealogical material provided in Attachment A1 it is clear that these people have an association with the claim area and are the descendants of some members of the native title claim antecedent group who also had an association with the claim area:

[name deleted] (*Affidavit 1*): paras 2 – 17

[name deleted] (*Affidavit 2*): paras 3-8

[name deleted] (*Affidavit 3*): paras 2, 3, 6, 7, 8, 9 & 10

[name deleted] (*Affidavit 4*): paras 2 – 15

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

This subsection requires me to be satisfied that traditional laws and customs exist; that those laws and customs are respectively acknowledged and observed by the native title claim group, and that those laws and customs give rise to the claim to native title rights and interests.

I have had regard to the affidavits of three of the applicants: **[name deleted]** (dated 7/5/99), **[name deleted]** (dated 6/5/99) and **[name deleted]** (dated 6/5/99); and a member of the native title claim group **[name deleted]** (dated 6/5/99). On the basis of the affidavits 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.

See:

[name deleted] (*Affidavit 1*): paras 6 – 58

[name deleted] (*Affidavit 2*): paras 5 – 27

[name deleted] (*Affidavit 3*): paras 6 – 25

[name deleted] (*Affidavit 4*): paras 1 – 54

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

Under this criterion, I must be satisfied that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

For the reasons set out in 190B(5)(b) and having regard to the same affidavit material 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.

The application **passes** this 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

In considering this condition I have had particular regard to the affidavits of three of the applicants: **[name deleted]** (dated 7/5/99), **[name deleted]** (dated 6/5/99) and **[name deleted]** (dated 6/5/99); and a member of the native title claim group **[name deleted]** (dated 6/5/99).

Those affidavits provide sufficient material and information to satisfy me on a prima facie basis that each of the native title rights and interests claimed by the applicants at Schedule E of the application can be established except the asserted right “to receive a portion of any resources taken by others from the area”.

The application **passes** the condition.

190B7	<p>Traditional physical connection: The Registrar must be satisfied that at least one member of the native title claim group:</p> <p>(a) Currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or</p> <p>(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 land or waters) by:</p> <ul style="list-style-type: none">(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 holder of a lease.
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Reasons for the Decision

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.

The affidavit material provided by the applicants satisfies me that a number of members of the native title claim group currently have and have had traditional physical connection to parts of the claim area. I refer specifically to :

[name deleted] (Affidavit 1): paras 22- 40

[name deleted] (Affidavit 2): paras 5 – 7,10, 16, 20, 21 – 22 & 24

[name deleted] (Affidavit 4): paras 8- 15 & 23

The application **passes** this condition

190B8	<p>No failure to comply with s61A: 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 has 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

Attachment B confirms that the application does not include any lands subject to a Category A past act (as defined in s.229) or a previous exclusive possession act as defined under s.23B of the Act save where the Act allows those lands to be part of a native title determination application.

This exclusion clause meets the requirement of this subsection.

S61A(3) – Previous Non-Exclusive Possession Acts

Schedule E confirms that native title rights and interests claimed are also subject to the effect of:

- All existing non – native title rights and interests
- All laws in South Australia made in accordance with sections 19, 22F, 23E or 23I of the Native Title Act 1993

The application **passes** this condition.



190B9 (a)	<p><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></p> <p><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></p>
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Reasons for the Decision

At Schedule E of the application the applicants have asserted a right to natural resources – including the right to use and enjoy the resources of the area and the right to control and use and enjoyment of others of (sic) resources of the area.

However, at Schedule Q of the application, the applicants state that no claim is being made to any native title rights and interests consisting of or including ownership of minerals, petroleum or gas wholly owned by the under the valid laws of the Commonwealth or State.

The application **passes** this condition.

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

The area claimed does not include any offshore area. It is therefore not necessary for me to consider this section further as it is not relevant.

The application passes this condition

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

The application and accompanying documents do not disclose, nor am I otherwise aware, that the application contravenes the criteria set out in s.190B (9)(c).

I refer to my reasons in relation to 190 B (2) and Attachment B that provides, inter alia, that the application excludes any areas “over which native title has been extinguished at Common law or by statute...”.

The application **passes** this condition.

End of Document