

REGISTRATION TEST  
REASONS FOR DECISION

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DELEGATE:                      Brendon Moore

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Application Name:              Yindjibarndi #1

Applicant:                      Ned Cheedy, Guinness Gilby, Kenny Jerrold, Thomas Jacob, Alum Cheedy, Michael Woodley, Edie Whalebone, Sylvia Allen, Mavis Pat, Aileen Sandy.

Region:                          Pilbara                              NNTT No.:                      WC03/3  
Date Application Made:      9 July 2003                      Federal Court No.:              WG6005/03

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The delegate has considered the application against each of the conditions contained in s.190B and s.190C of the *Native Title Act* 1993 (Cwlth).

**DECISION**

The application IS ACCEPTED for registration pursuant to s.190A of the *Native Title Act* 1993 (Cwlth).

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Brendon Moore

8 August 2003  
Date of Decision

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

## **Brief History of the Application**

The Yindjibarndi native title determination application #1 (WC03/3) is located in the Pilbara region of Western Australia. Centred around Mt Margaret in the Hamersley Ranges, it is approximately 70 km north of Tom Price, and currently represented by the Yamatji Barna Barba Maaja Aboriginal Corporation (Pilbara Native Title Service). It was filed in the Federal Court on 9 July 2003 as a single application. The National Native Title Tribunal received a copy of the application from the Federal Court on 10 July 2003 and it was allocated WC03/3 as an NNTT file number. (Federal Court claim number WG6005/03).

## **Information considered when making the Decision**

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

- The National Native Title Tribunal's administration files, legal service files and registration test files for WC03/3, as well as:
- WC03/4 Yindjibarndi #2 registration test file
- WC99/14 Ngaluma/Injibandi registration test file
- WC95/53 Kariyarra Yindjibarndi registration test file
- WC03/4 Yindjibarndi legal file
- WC99/14 Ngaluma/Injibandi legal file
- WC95/53 Kariyarra Yindjibarndi legal file
- The National Native Title Tribunal's Geospatial database.
- The Register of Native Title Claims and Schedule of Native Title Applications.
- The National Native Title Register.

All references to legislative sections refer to the *Native Title Act 1993* (Cth) unless otherwise specified. All references to "the current application" or "the present application" refer to the application filed on 9 July 2003, unless otherwise specified.

A. Procedural Conditions

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**s.190C(2)**

*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.*

**Details required in section 61**

*s.61(1) 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.*

**Reasons relating to this sub-condition**

Under s. 61(1) of the *NTA*, the Registrar or his delegate must be satisfied that the native title claim group for an application 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.” In *Risk* [2000] FCA 1589, O’Loughlin J commented that:

“A native title claim group is not established or recognised merely because a group of people (of whatever number) call themselves a native title claim group. It is incumbent on the delegate to satisfy herself that the claimants truly constitute such a group...[T]he tasks of the delegate included the task of examining and deciding who, in accordance with traditional law and customs, comprised the native title claim group.” - at paragraph 60.

In applying s. 61(1), the delegate must be satisfied that the composition of the native title group is not of recent origin but has common rights and interests in the claim area having regard to traditional laws and customs (cf: *Risk* [2000] FCA 1589, O’Loughlin J at paragraphs 30-31, 60; *Ward* (1998) 159 ALR 483 at 505 1-20, 545 35-45, 550 to 552). This requires me to be satisfied that the application is made on behalf of a native title claim group, constituted according to traditional laws and customs, with common rights and interests. In applying s. 61(1), I must also be satisfied that the native title claim group includes all of the persons who hold common or group rights and interests comprising the particular native title claimed.

The claim group description at Schedule A is given in these terms:

“The persons on whose behalf the application is made are:

Descendants of the following Yindjibarndi ancestors:

**[Names of 31 ancestors deleted]**

The Yindjibarndi #1, claim group description is based on a simple apical (apical = apex) ancestry model whereby it is said that the persons in the native title group are the descendants of certain named persons (ie the group’s apical ancestors).

On the balance of the information before me, I am satisfied that the persons in the native title claim group form a properly constituted native title claim group, as is required by s61(1).

**Result: Requirements met**

*s.61(3) Name and address for service of applicants*

**Reasons relating to this sub-condition**

The name of the applicant is provided on the first page of the application and the address for service is provided at Part B following Schedule R.

**Result: Requirements met**

*s.61(4) Names the persons in the native title claim group or otherwise describes the persons so that it can be ascertained whether any particular person is one of those persons*

**Reasons relating to this sub-condition**

Schedule A of the application describes the native title claim group. For the reasons that lead to my conclusions that the requirements for s.190B(3) have been met, I am satisfied that the persons in the native title claim group are described sufficiently clearly to ascertain whether any particular person is in that group.

**Result: Requirements met**

*s.61(5) Application is in the prescribed form, lodged with the Federal Court, contains prescribed information, and is accompanied by any prescribed documents*

**Reasons relating to this sub-condition**

**s.61(5)(a)**

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

**s.61(5)(b)**

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

**s.61(5)(c)**

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

**s.61(5)(d)**

As required by s.61(5)(d), the application is accompanied by ten supporting affidavits as prescribed by s.62(1)(a), and a map as prescribed by s.62(2)(b). I refer to my reasons 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 sections 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. For the reasons outlined above, it is my view that the requirements of s.61(5) have been met.

**Result: Requirements met**

**Details required in section 62(1)**

*s.62(1)(a) Affidavits address matters required by s.62(1)(a)(i) – s.62(1)(a)(v)*

**Reasons relating to this sub-condition**

There were ten affidavits filed with this application. Each affidavit was signed on either 7, 8, or 9 July 2003. Each is sworn by the respective applicant and witnessed by qualified witnesses. All of the affidavits address the requirements of s62(1)(a)(i) – (v).

I am satisfied there has been compliance with the procedural requirements of s62(1)(a).

**Result: Requirements met**  
*s.62(1)(c) Details of traditional physical connection (information not mandatory)*

**Result: Not provided**

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

*s.62(2)(a)(i) Information identifying the boundaries of the area covered*

**Reasons relating to this sub-condition**

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

**Result: Requirements met**

*s.62(2)(a)(ii) Information identifying any areas within those boundaries which are not covered by the application*

**Reasons relating to this sub-condition**

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

**Result: Requirements met**

*s.62(2)(b) A map showing the external boundaries of the area covered by the application*

**Reasons relating to this sub-condition**

For the reasons which led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the maps contained in the application show the external boundaries of the claim area.

**Result: Requirements met**

*s.62(2)(c) Details/results of searches carried out by the applicant to determine the existence of any non-native title rights and interests*

**Reasons relating to this sub-condition**

Details/results of searches not provided.

**Result: Requirements met**

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

**Reasons relating to this sub-condition**

An adequate description of native title rights and interests claimed is contained in the application at Attachment E. I have outlined these rights and interests claimed in my reasons for decision in relation to s.190B4.

**Result: Requirements met**

*s. 62(2)(e) The application contains a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that:*

- (i) the native title claim group have, and the predecessors of those persons had, an association with the area; and*
- (ii) there exist traditional laws and customs that give rise to the claimed native title; and*
- (iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.*

**Reasons relating to this sub-condition**

At Attachment F, the application includes a general description of the factual basis upon which it is asserted that the native title rights and interests claimed exist. It addresses each of the three particular requirements in s62(2)(e) (i), (ii) and (iii).

**Result: Requirements met**

s.62(2)(f) *If native title claim group currently carry on any activities in relation to the area claimed, details of those activities*

**Reasons relating to this sub-condition**

At Attachment G of the application, the applicants provide details of activities currently carried out by members of the native title claim group in the claim area.

**Result: Requirements met**

s.62(2)(g) *Details of any other application 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)*

**Reasons relating to this sub-condition**

At Schedule H, the applicants state that there are no other native title determination or compensation applications within the application area.

**Result: Requirements met**

s.62(2)(h) *Details of any s.29 notices given pursuant to the amended Act (or notices given under a corresponding State/Territory law) in relation to the area, which the applicant is aware of*

**Reasons relating to this sub-condition**

A statement concerning a s29 notice, of 9 April 2003, is found at Attachment I.

**Result: Requirements met**

**s.190C(2)**

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For the reasons outlined above, I consider that the application satisfies the conditions contained in s.190C(2).

**Aggregate Result: Requirements met**

**s.190C(3)**

***Common claimants in overlapping claims:***

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

- (a) the previous application covered the whole or part of the area covered by the current application; and***
- (b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made: and***
- (c) the entry was made, or not removed, as a result of consideration of the previous application under section 190A.***

**Reasons for the Decision**

In order for the application to comply with s190C(3), I must be satisfied that no person included in the application was a member of the native title claim group for any previous application in the circumstances set out in s190C(3).

A search of the Tribunal's Geospatial database indicates that there are no previous applications which cover whole, or part of the area, covered by the current application

***(a) Does the previous application cover the whole or a part of the area covered by the current application?***

Not applicable.

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

Not applicable

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

Not applicable

***(d) Are there common claimants between the current application and the application listed in paragraph (c)?***

Not applicable

I am satisfied, on the basis of the above information, that the application does not offend the provisions of s190C(3).

**Result:            Requirements met**



**s.190C(4)(a) or s.190C(4)(b)**

***Certification and authorisation:***

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

- (a) the application has been certified under section 203BE, or has been certified under the former 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***
- (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.***

*Note: s.190C(5) – Evidence of authorisation:*

*If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:*

- (a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and*
- (b) briefly set out the grounds on which the Registrar should consider that it has been met.*

**Reasons for the Decision**

The application has been certified pursuant to s.190C(4)(a) by the Yamatji Barna Barba Maaja Aboriginal Corporation (Pilbara Native Title Service). Consequently, I do not need to consider the authorisation requirements of s.190C(4)(b).

**Has the application has been certified under section 203BE?**

At Schedule R of the current application, the applicant has supplied a certificate by the Yamatji Barna Barba Maaja Aboriginal Corporation (Pilbara Native Title Service) that addresses s203BE (4)(a) and (b).

**Requirements met**

**Has s203BE (4)(a) been satisfied?**

There are the requisite statements - in the certificates supplied by the Corporation - to the effect that it is of the opinion that the requirements of s.203BE (2)(a) and (b) have been met.

**Requirements met**

**Has s203BE (4)(b) been satisfied?**

The Yamatji Barna Barba Maaja Aboriginal Corporation has set out its reasons for asserting that the requirements of s.203 BE (2)(a) and (b) have been met. These are that it is aware that extensive community consultation by its staff has taken place and that it has conducted a series of meetings of claimants from across the claim area. The staff have observed how decisions are made by the claimant group and taken instructions from that process. The Corporation has also declared that all reasonable efforts have been made to identify and consult with the Yindjibarndi native title claimant group. It has observed the named applicants for this application have the authority to make the application and to deal with all matters arising in relation to it under the NTA.

I am of the view that the requirements of S.203BE(4) have been met

### **Requirements met**

**Does any part of the application area fall within the boundaries of another native title representative body?**

No other application falls within the boundaries of any other native title representative body.

**Overall Result: Requirements met**

## **B. Merits Conditions**

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### **s.190B(2)**

*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 and waters.*

### **Reasons for the Decision**

#### **Written Description and Map of External Boundaries**

##### **Description**

Schedule B refers to the map attached (at Attachment C) and the document entitled "Description of the boundaries of the area of land and waters covered by the application" which is annexed at Attachment B for the external boundary description of the application area. That document describes the external boundary of the application referencing adjoining native title applications and the northern boundary of Karijini National Park. Schedule B also lists general exclusions.

A map of the claim area, prepared by Geospatial Analysis & Mapping Branch, NNTT dated 04 July 2003 is contained in Attachment C. Attachment C is a monochrome copy of a map entitled "Yindjibarndi #1".

The area covered by the application is depicted on the map by a bold outline. The map includes:

- adjoining native title applications depicted and referenced;
- land tenure and surrounding cadastre;
- scale bar, north point, coordinate grid, locality map and tenure legend; and
- notes relating to datum and the source and, date of data used to prepare the map.

The assessment prepared by the Tribunal's Geospatial Unit, dated 21 July 2003, concluded that the written description and map are consistent and identify the application area with reasonable certainty. On 6 August 2003, the Geospatial unit advised there had been no change in that assessment since 21 July.

For the reasons discussed above, I am satisfied that the requirements of s.190B(2) are met in relation to the external boundaries of the claim area. It follows that I am also satisfied that the physical description of the external boundaries meets the requirements of s.62(2)(a)(i) and that the map shows the boundaries of the claim area in compliance with the requirements of s.62(2)(b).

### **Internal Boundaries**

The internal boundaries are described at Schedule B of the application. The external boundary of the area of land and waters covered by the application is set out in a map at Attachment C and the internal boundaries of the claimed area identified by way of a formula that excludes a variety of tenure classes from the claim area.

Areas that are excluded from the claim area are set out in paragraphs (1), (2) and (3) of Schedule B as follows:

“ (1) Subject to (4), the Applicant excludes from the area of land and waters covered by the application any areas that are covered by any of the following acts as these are defined in either the Native Title Act 1993 (Cth), as amended (where the act in question is attributable to the Commonwealth), or Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA), as amended, (where the act in question is attributable to the State of Western Australia) at the time of the Registrar's consideration:

- (a) Category A past acts;
- (b) Category A intermediate period acts;
- (c) Category B past acts that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests;
- (d) Category B intermediate period acts that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests.

(2) Subject to (4), the Applicant excludes from the area of land and waters covered by the application any areas in relation to which:

- (a) a "previous exclusive possession act", as defined in section 23B of the NTA, was done and the act was an act attributable to the Commonwealth; or
- (b) a "relevant act" as that term is defined in section 121 of the Titles (Validation) and Native Title (Effect of Past Acts) Act 1995(WA) was done and the act is attributable to State of Western Australia; or
- (c) a previous exclusive possession act under a section s. 23B(7) of the NTA was done in relation to the area and the act was attributable to the State of Western Australia.

(3) Subject to (4), the Applicant also excludes from the area of land and waters covered by the application areas in relation to which native title rights and interest have otherwise been wholly extinguished.

(4) The area of land and waters covered by the application includes any area in relation to which the non-extinguishment principle (as defined in section 238 of the Native Title Act 1993) applies, including any area to which sections 47, 47A and 47B of the NTA apply - particulars of which will be provided prior to the hearing - but which include such areas as may be listed in Schedule L.”

Any omissions in reference to exclusion of other lands described by tenure are addressed by the general exclusion clause at paragraph (3) above, which excludes “areas in relation to which native title rights and interest have otherwise been wholly extinguished”.

The applicants have thus chosen to define the internal boundaries of their claim by what are known as class or formula exclusions. *Daniel v Western Australia* [1999] FCA 686 [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/1999/686.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/1999/686.html) (“*Daniel*”) is authority for the proposition that the acceptability of class or formula exclusions will depend largely upon the state of knowledge of the claimants of the tenure in the claim area at the date the application is made. In *Dieri v South Australia* [2000] FCA 1327 [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2003/187.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2003/187.html) the Court said that if tenure information might reasonably have been used to exclude areas from an application, then reliance cannot be placed on class or formula exclusions. The applicants do not include a copy of any tenure searches at Schedule D of the application.

I also note the following comments of Nicholson J in *Daniel*:

“The Act recognizes the need to provide certainty for people with interests as to whether it is subject of a claim. The class formula approach proposed by the applicants to the definition of exclusion does, if otherwise appropriate, give certainty for respondent interest holders in that they know their interest is subject to claim unless specifically excluded. The determination of whether particular interests meet the definition referred to in that section will often have to await the determination of the application.” [38].

In light of the above comments, I am satisfied that the class exclusion clauses used by the applicants at Schedule B amount to information that enables the internal boundaries of the application area to be identified with reasonable certainty.

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

**Result: Requirements met**

### **s.190B(3)**

#### ***Identification of the native title claim group:***

***The Registrar must be satisfied that:***

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

#### **Reasons for the Decision**

An exhaustive list of names of the persons in the native title claim group has not been provided, and so the requirements of s.190B(3)(a) are not met. It is therefore necessary to consider if the application meets the requirements of s.190B(3)(b).

Attachment A provides a claim group description by which persons may be identified as being a part of the Yindjibarndi #1 native title claim group. The description is based on a simple apical (apical = apex) ancestry model whereby it is said that the persons in the native title group are the descendants of certain named persons (ie the group’s apical ancestors).

In *State of Western Australia v Native Title Registrar* [1999] FCA 1591-1594 [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/1999/1591.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/1999/1591.html), Carr J said that “[i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently....The Act is clearly remedial in character and should be construed beneficially.”

I note that a description of the native title claim group, in terms of named apical ancestors, is acceptable under s.190B(3)(b), even though the descendants are not named, and some factual inquiry would need to be made in these instances to determine if any one person is a member of the group. It is not for me to inquire into the circumstances giving rise to the composition of the claim group, whether they be historical or current. The description is clear and has been verified in the ten S.61 affidavits and the certification by the representative body indicates its acceptance of the authorization process. I am satisfied that it is capable of certain application.

In *Ward v Native Title Registrar* [1999]FCA 1732 [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/1999/1732.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/1999/1732.html), Carr J remarked [at 67] that: “It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently.”

By referencing the identification of members of the native title claim group as descendants of named ancestors, it is possible to objectively verify the identity of members of the native title claim group such that it can be clearly ascertained whether any particular person is in the group. The requirements of s.190B(3)(b) are satisfied.

**Result: Requirements met**

#### **s.190B(4)**

##### ***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**

##### **Rights and Interests claimed**

In relation to the claiming of rights and interests, the application includes a list of definitions by which the lands the subject of the application are described in three distinct classes, according to the ‘degree’ of extinguishment of native title which may have occurred – Area A, Area B and Area C.

Schedule E sets out the native title rights and interests claimed in each of these areas.

The definition of Area A is given in the following terms:

“Area A means land within [sic] area that is landward of the high water mark and which comprise:

- (i) areas of unallocated Crown land that have not been previously subject to any grant by the Crown,
- (ii) areas to which section 47 of the Native Title Act 1993 applies,
- (iii) areas to which section 47A of the Native Title Act 1993 applies,
- (iv) areas to which section 47B of the Native Title Act 1993 applies, and
- (v) other areas to which the non-extinguishment principle, set out in section 238 of the Native Title Act, applies and in relation to which to [sic] there has not been any prior extinguishment of native title.”

This is effectively a claim to exclusive possession over lands so described

The definition of Area B is given in the following terms:

“Area B means land and waters within the application that are not within Area A and which comprise:

- (i) land and waters which are subject to a non-exclusive pastoral lease;
- (ii) areas of Crown Land that have been set aside as Crown reserves, but are not vested in a person or body to be held in trust, or otherwise, for a specified purpose pursuant to section 33 of the Land Act 1933 (WA) other than those described in Area C
- (iii) land and waters which are subject to a mining lease as defined in s. 245 of the Native Title Act 1993 (Cth);
- (iv) any area which at the time of the application, is
  - (a) not covered by a freehold estate or a lease, but
  - (b) covered by a reservation, proclamation, dedication, condition, permission, or authority, made or conferred by the Crown in any capacity, or by the making, amendment repeal of legislation of the Commonwealth or a Territory, under which the whole or a part of the land or waters in the area is to be used for a public purpose or for a particular purpose; or
  - (c ) subject to a resumption process (as defined in s47B(5)(b) of the Native Title Act); and
- (v) any area which, at the time of the application, is:
  - (a) not covered by a freehold estate or a lease, but
  - (b) not covered by a reservation, proclamation, dedication, condition, permission, or authority, made or conferred by the Crown in any capacity, or by the making, amendment repeal of legislation of the Commonwealth or a Territory, under which the whole or a part of the land or waters in the area is to be used for a public purpose or for a particular purpose; or
  - (c) not subject to a resumption process (as defined in s47B(5)(b) of the Native Title Act); and
  - (d) no member of the native title claim group occupies the area when this application is made.”

This amounts to a claim for non-exclusive possession.

Area C’s definition is as follows:

“Area C means land and waters within the application area that are not within Area A and that comprise land and waters which are a “nature reserve” or “wildlife sanctuary” (as

those terms are defined in the Wildlife Conservation Act 1950 (WA) created before 31 October 1975.”

Schedule E of the application sets out the native title rights and interests claimed in the following terms:

“The native title rights and interests claimed in this application are subject to and exercisable in accordance with;

1. the common law, the laws of the State of Western Australia and the Commonwealth of Australia;
2. valid interests conferred under those laws, and
3. the body of traditional laws and customs of the Aboriginal society under which rights and interests are possessed and by which native title claim group have a connection to the area of land and waters the subject of this application.

#### Area A rights

The native title rights and interests in relation to Area A comprise:

- (1) The right to possess, occupy, use and enjoy the area as against the world;
- (2) A right to occupy the area;
- (3) A right to use the area;
- (4) A right to enjoy the area;
- (5) A right to be present on or within the area;
- (6) A right to be present on or within the area in connection with the society's economic life;
- (7) A right to be present on or within the area in connection with the society's religious life;
- (8) A right to be present on or within the area in connection with the society's cultural life;
- (9) A right to hunt in the area;
- (10) A right to fish in the area;
- (11) A right to make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;
- (12) A right to make decisions about the use of the area by persons who are not members of the Aboriginal society to which the native title claim group belong;
- (13) A right to make decisions about the enjoyment of the area by members of the Aboriginal society to which the native title claim group belong;
- (14) A right to make decisions about the enjoyment of the area by persons who are not members of the Aboriginal society to which the native title claim group belong;
- (15) A right of access to the area;
- (16) A right to live within the area;
- (17) A right to reside in the area;
- (18) A right to erect shelters upon or within the area;
- (19) A right to camp upon or within the area;
- (20) A right to move about the area;
- (21) A right to engage in cultural activities within the area;

- (22) A right to conduct ceremonies within the area;
- (23) A right to participate in ceremonies within the area;
- (24) A right to hold meetings within the area;
- (25) A right to participate in meetings within the area;
- (26) A right to teach as to the physical attributes of the area;
- (27) A right to teach as to the significant attributes of the area;
- (28) A right to teach upon the area as to the significant attributes of the area;
- (29) A right to teach as to the significant attributes within the area of the Aboriginal society connected to the area in accordance with its laws and customs;
- (30) A right to control access of others to the area.
- (31) A right to control access of others to the area except such person [sic] as may be exercising a right accorded by the common law, statute law of the Commonwealth or the State of Western Australia or a lawful grant by the British sovereign or its successor;
- (32) A right to take resources, other than minerals and petroleum, used for sustenance from the area;
- (33) A right take resources, other than minerals and petroleum, used for sustenance within the area;
- (34) A right to gather resources, other than minerals and petroleum, used for sustenance within the area;
- (35) A right to use and/or enjoy resources, other than minerals and petroleum, for sustenance within the area;
- (36) A right to use and/or enjoy resources, other than minerals and petroleum, for food, on, in or within the area;
- (37) A right to use and/or enjoy resources, other than minerals and petroleum, for shelter, on, in or within the area;
- (38) A right to use and/or enjoy resources, other than minerals and petroleum, for healing on, in or within the area;
- (39) A right to use and/or enjoy resources, other than minerals and petroleum, for decoration on, in or within the area;
- (40) A right to use and/or enjoy resources, other than minerals and petroleum, for social purposes on, in or within the area;
- (41) A right to use and/or enjoy resources, other than minerals and petroleum. for cultural, religious, spiritual, ceremonial and/or ritual purposes on, in or within the area;
- (42) A right to take fauna;
- (43) A right to take flora (including timber);
- (44) A right to take soil;
- (45) A right to take sand;
- (46) A right to take stone and/or flint;
- (47) A right to take clay;
- (48) A right to take gravel;
- (49) A right to take ochre;



(50) A right to take water;

(51) A right to control the taking, use and enjoyment by others of the resources of the area, including for the said purposes (set out at sub-paragraphs (32) - (41) above) and/or in the said form (set out at sub-paragraphs (42) - (50) above), other than minerals and petroleum and any resource taken in exercise of a statutory right or common law right, including the public right to fish;

(52) A right to manufacture from and trade in the said resources of the area, upon or within the area, other than minerals and petroleum including the manufacture of objects, materials or goods for sustenance, and/or food, shelter, healing, decoration, social, cultural, religious, spiritual, ceremonial, and/or ritual purposes and/or including objects, materials or goods in the form of tools, weapons, clothing, shelter and/or decoration;

(53) A right to receive a portion of the said resources (other than minerals and petroleum) taken by other persons who are members of the Aboriginal society from the area;

(54) A right to receive a portion of the said resources (other than minerals and petroleum) taken by other persons other than those who are members of the Aboriginal society from the area;

(55) A right, in relation to any activity occurring on the area, to

- i. maintain,
- ii. conserve; and/or
- iii. protect

significant places and objects located within the area, by preventing, by all reasonable lawful means, any activity which may injure, desecrate, damage, destroy, alter or misuse any such place or object;

(56) A right, in relation to any activity occurring on the area, to -

- i. maintain
- ii. conserve; and/or
- iii. protect

significant ceremonies, artworks, song cycles, narratives, beliefs or practices by preventing, by all reasonable lawful means any activity occurring on the area which may injure, desecrate, damage, destroy, alter or misuse any such ceremony, artwork, song cycle, narrative, belief or practice;

(57) A right, in relation to a use of the area or an activity within the area, to:

- (i) prevent any use or activity which is unauthorised in accordance with traditional laws and customs
- (ii) prevent any use or activity which is inappropriate in accordance with traditional laws and customs

in relation to significant places and objects within the area or ceremonies, artworks, song cycles, narratives, beliefs or practices carried out within the area by all reasonable lawful means, including by the native title holders providing all relevant persons by all reasonable means with information as to such uses and activities, provided that such persons are able to comply with the requirements of those traditional laws and customs while engaging in reasonable use of the area and are not thereby prevented from exercising any statutory or common law rights to which that person may be entitled;

(58) A right to enjoy all the features, benefits and advantages inherent in the environment of the area;

(59) A right of individual members of the native title holding group or groups to be identified and acknowledged, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area; and

(60) A right of the group or groups who hold common or group native title rights and interests to identify and acknowledge individual members of the native title holding group, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area.

#### Area B rights

The native title rights and interests which are claimed in relation to Area B are all the rights claimed above in relation to Area A, except the right to possess, occupy, use and enjoy the area as against the world and the rights set out at paragraph (12), (14), (30), (31) and (51).

#### Area C rights

The native title rights and interests which are claimed in relation to Area C are all the rights claimed above in relation to Area A, except the right to possess, occupy, use and enjoy the area as against the world and the rights set out at paragraphs (12), (14), (30), (31) and (51) and the right to hunt, gather or take fauna, in so far as such right is contained within paragraphs (3), (4), (9), (10), (21), (32)-(42), (52) and (53)."

In the list of definitions included in the application the word "Significant" as used in Schedule E is said to have the following meaning:

"having social, cultural, religious, spiritual, ceremonial, ritual, or cosmological importance or significance to the common law native title holders connected to the area under traditional laws, customs and practices of the Aboriginal society to which they belong".

The applicants claim a set of 60 rights and interests in relation to Area A of the application which is a claim to vacant crown land over which there has not been any extinguishment, or areas which attract the benefit of section 47, 47A and 47B of the *NTA*. This is a claim to exclusive possession where it can be established.

The applicants claim the same set of rights and interests in relation to Area B as claimed in Area A, except the right to possess, occupy, use and enjoy the area as against the world and excepting also specific rights set out at nominated paragraphs which are inconsistent with a non-exclusive claim.

The applicants claim the same set of rights and interests in relation to Area C as claimed in Area A, except the right to possess, occupy, use and enjoy the area as against the world and excepting also specific rights set out at nominated paragraphs which are inconsistent with a claim to non-exclusive possession over lands comprising 'nature reserves' or 'wildlife sanctuaries' subject to the Wildlife Conservation Act 1950 (W.A.)

All the rights and interests claimed are qualified at Schedule E by making them subject to a series of exclusions in legal circumstances that prohibit or limit native title rights where other rights or interests have been created by State or Commonwealth legislation or by the common law.

#### **The requirements of the Act**

Section 190B(4) requires the Registrar or his delegate to be satisfied that the description contained in the application of the claimed native title rights and interests is sufficient to allow the

rights and interests to be readily identified. For the purposes of the condition, then, only the description contained in the application can be considered.<sup>1</sup>

Section 62(2)(d) requires that the application contain “a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests) but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.” This terminology suggests that Parliament intended to screen out applications which describe native title rights and interests in a manner which is vague, or unclear.

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

Section 223(1) reads as follows:

‘The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia’.

In *Ward*, the majority of the High Court confirmed that the right to control the use of cultural knowledge that goes beyond the right to control access to lands and waters is not a readily identifiable native title right and interest: [19], [57] to [60]. While a majority of the court in *Ward* acknowledged that these sorts of native rights and interests may exist *as a matter of fact* among a native title group, they found that these were not rights and interests of a kind that the *Native Title Act* could recognise *as a matter of law*. Their Honours stated:

“... , it is apparent that what is asserted goes beyond [a right to control access] to something approaching an incorporeal right akin to a new species of intellectual property... the recognition of this right would extend beyond denial of right of access to land held under native title... ” at [59].

Other rights which are not readily identifiable include the right to control access to lands and waters,<sup>2</sup> rights to minerals and petroleum under relevant State legislation,<sup>3</sup> an exclusive right to fish offshore or in tidal waters, and any native title right to exclusive possession offshore or in tidal waters.<sup>4</sup>

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<sup>1</sup> *Queensland v Hutchinson* (2001) 108 FCR 575.

<sup>2</sup> *Western Australia v Ward* (2002) 191 ALR 1, para [59]

<sup>3</sup> *Western Australia v Ward*, paras [383] and [384]; *Wik v Queensland* (1996) 63 FCR 450 at 501-504; 134 ALR 637 at 686-688.

<sup>4</sup> *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 144-145.

### ***Area A Identifiable Claimed Native Title Rights and Interests***

At Schedule E paragraph (56) the applicants claim on behalf of the Yindjibarndi native title group for Areas A, B and C

“A right, in relation to any activity occurring on the area, to

- i. maintain;
- ii. conserve; and/or
- iii. protect

significant ceremonies, artworks, song cycles, narratives, beliefs or practices by preventing, by all reasonable lawful means any activity occurring on the area which may injure, desecrate, damage, destroy, alter or misuse any such ceremony, artwork, song cycle, narrative, belief or practice;”

In the decision of the Court in *Ward*, (at [19] and [57 ]-[60] ) “ceremony, song cycles, narratives, belief or practices” are deemed “cultural knowledge” and the Court found that a right to “control” the use of cultural knowledge in that context was not readily identifiable, as such a right went beyond the right to control access to land.

The rights claimed here are drafted similarly to those claimed in Daniel but with some differences which could be of significance depending on the evidence adduced to support them. In Daniel ([http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2003/666.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2003/666.html)) at paragraph 139 the Court observed that:

“The reference to the `traditional laws acknowledged, and the traditional customs observed' is to be understood as follows: [omitting sub-paragraphs a) to f)]

g) Sixthly, demonstrating the content of traditional law and custom may well present difficult problems of proof and much will turn on the evidence led: *Yorta Yorta* at 561.”

Further, at paragraphs 252 to 257, the Court considered the importance of the evidence in establishing whether and what rights existed.

In particular, reference is made to paragraphs (55), (56), and (57) at Attachment E of the application, as these claimed rights may not be readily identifiable for the purposes of s. 190B(4), especially where the words ‘maintain’ and ‘conserve’ are used. However, any conclusion as to that will be dependant upon evidence of the practices referred to and the manner of their execution and, in particular, whether the actions are in the nature of rights or duties and obligations.

In the present case, it is the view of the delegate that rights asserted in paragraphs (56), (57) and (58), are rights which are referenced to activity on the land rather than to the component of cultural knowledge and as such are recognizable when exclusive possession can be found.

***Area B Identifiable Claimed Native Title Rights and Interests***

In Area B, apart from those rights discussed in Area A, the only right and interest which may not at first glance be ‘readily identifiable’ is found at paragraph (13), namely:

(13) ‘The right to make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;’

In the High Court’s majority judgment in *Ward*, it is made clear that where native title rights do not include a right to exclusive possession, occupation, use and enjoyment to the exclusion of all others, the native title holders *do not* have a right to control access to the relevant area (*Western Australia v Ward* [(2002) 191 ALR 1] paragraphs 192, 222). The test may be shortly stated as being whether the degree of control as against the whole world which is implied in the asserted right is such that it is not consistent with non-exclusive (or shared) possession.

In the present case however, the right asserted is inter se rather than as against the whole world. That is, they seek only to control the rights and behaviours within the native title claim group which holds those rights, of course, communally. As this right may be held on a non-exclusive basis, I find that the right claimed at paragraph (13) is readily identifiable.

***Area C Identifiable Claimed Native Title Rights and Interests***

In Area C, apart from those rights discussed in relation to Area A, and similarly in relation to Area B, I have considered the description of native title rights and interests in the present application in light of previous judicial findings in *Ward* and elsewhere, and find that the rights and interests claimed in Area C fall within the scope of S.223 and are readily identifiable as native title rights and interests.

I am satisfied that the rights and interests claimed in Schedule E are readily identifiable for the purposes of s.190B(4).

**Result: Requirements met**

**s.190B(5)**

***Sufficient factual basis:***

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

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

## Reasons for the Decision

For satisfaction of s.190B(5), the Registrar (or his delegate) is not limited to consideration of statements contained in the application (as for s.62(2)(e)) but may refer to additional material supplied to the Registrar under this condition: *Martin v Native Title Registrar* [2001] FCA 16 [23]. Regard will be had to the application as a whole; and, subject to s.190A(3), regard will also be had to relevant information that is not contained in the application.

This section requires that the delegate must be satisfied that the factual basis provided in support of the assertion that the claimed native title rights and interests exist is sufficient to support that assertion. In particular, the factual basis must be sufficient to support the assertions set out in subparagraphs (a), (b) and (c). This requires that the applicants provide a sufficient factual basis for a continuing acknowledgement and observance of traditional laws and customs and a continuing connection with the land.

In *Queensland v Hutchinson* (2001) 108 FCR 575, Kiefel J said that “[s]ection 190B(5) may require more than [s62(2)(e)], for the Registrar is required to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to assert a wider consideration of the evidence itself, and not of some summary of it.” For each native title right or interest claimed, there should be some factual material that demonstrates the existence of the traditional law and custom of the native title claim group that gives rise to the right or interest.<sup>5</sup>

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

There is information within the application which goes to the factual basis of this claim at Schedules F and G (which is verified by the s.62(1) affidavits), and affidavits by **[Applicant 1]** (8 July 2003) and **[Applicant 2]** (8 July 2003) which accompanied the application.

At Schedule F, the applicants assert that

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<sup>5</sup> See *Ward* at [382].

- (i) the native title group have an association with the area based on traditional laws which they acknowledged and traditional customs which they observe;
- (ii) the predecessors of the native title claim group had an association with the area from a time prior to the assertion of British sovereignty in relation to the area;
- (iii) the native title rights and interests are possessed under a body of traditional laws acknowledged and traditional customs observed by the native title claim group and their predecessors; and
- (iv) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs, including laws and customs which vest land and waters in the native title claim group on the basis of
  - (a) descent from ancestors connected with the area;
  - (b) conception in the area;
  - (c) birth in the area;
  - (d) traditional religious knowledge of the area
  - (e) traditional knowledge of the creation and geography of the area;
  - (f) traditional knowledge of the resources of the area;
  - (g) knowledge of and participation in traditional ceremonies and rituals associated with the area.

Schedule G of the application outlines a number of activities in relation to the land and waters:

- (i) hunting, gathering and fishing;
- (ii) moving about, living, residing, erecting shelters and camping;
- (iii) conducting and engaging in cultural activities, ceremonies, rituals, meetings and teaching of , maintaining, conserving and protecting the significant and physical attributes of the area and places, works and objects within the area;
- (iv) taking resources from the area, including fauna, flora, soil, sand, stone, flint, clay, gravel, ochre water for use and consumption for food, shelter, healing, decoration, cultural, religious, ceremonial, and ritual purposes and for manufacture and trade of objects, materials and goods, in the form of tools, weapons, clothing , shelter and decoration.

Aside from information contained in the application, additional affidavit material was supplied direct to the Tribunal to provide evidence in support of the assertions made in various parts of the application. The Registrar is in receipt of the following documents:

1. Affidavit of [**Applicant 9**] dated 1 August 2003 (3 pages)
2. Affidavit of [**Applicant 6**] dated 1 August 2003 (2 pages)
3. Affidavit of [**Anthropologist 1**] dated 1 August 2003 (4 pages)
4. Affidavit of [**Applicant 1**] dated 1 August 2003 (6 pages)
5. Affidavits of [**Claimant 1**] dated 1 August 2003 (3 pages)

These affidavits have been supplied to the State on a confidential basis and the State has no comment to make.

Section 190B(5) requires that the Registrar (or his delegate) must be satisfied that the application contains a sufficient factual basis to support the assertion that the rights and interests claimed in the application exist. In particular, I must be satisfied that the factual basis provided to support the following assertions is sufficient to support those assertions: that the native title claim group have, and their predecessors had, an association with the area claimed, that the traditional laws and customs, acknowledged and observed by the native title group exist, and that the native title claim group continue to hold native title in accordance with those traditional laws and customs.

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

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

At Schedule F, the applicants assert the following:

“the native title group have an association with the area based on traditional laws which they acknowledged and traditional customs which they observe...” paragraph (i)

“the predecessors of the native title claim group had an association with the area from a time prior to the assertion of British sovereignty in relation to the area...” paragraph (ii)  
In addition [**Anthropologist 1 – name deleted**], who is employed as an anthropologist with the Pilbara Native Title Service in her affidavit dated 1/8/03 and provided as additional material, makes statements in relation to Yindjibarndi and their association with the claim area and the claiming of ownership through descent from people who were also living within the claim area. Refer:

- Affidavit of [**Anthropologist 1 – name deleted**] (1/8/03) at [8]

The factual basis provided in the affidavits of [**Applicant 6**], [**Applicant 1**], [**Applicant 3**], [**Claimant 1**] and [**Applicant 9**] is sufficient to support the above assertions made at paragraphs (i) and (ii) at Schedule F. The deponents provide examples of their association and the association of family both living and deceased and other Yindjibarndi people within the area claimed. Refer:

- Affidavit of [**Applicant 6**] (1/8/03) at [2], [3], [5]
- Affidavit of [**Applicant 1**] (1/8/03) at [1], [4], [8], [9], [11], [12], [16], [18], [21], [23]
- Affidavit of [**Applicant 3**] (8/7/03) at [2], [3], [5], [6] [7][11],[12],[13]
- Affidavit of [**Claimant 1**] (1/8/03) at [7]
- Affidavit of [**Applicant 9**] (1/8/03) at [6], [7], [15]

At Schedule G of the application appears a list of a number of activities in relation to the land and waters which it is claimed the members of the native title group *currently* carry out. These are:



- (i) hunting, gathering and fishing;
- (ii) moving about, living, residing, erecting shelters and camping;
- (iii) conducting and engaging in cultural activities, ceremonies, rituals, meetings and teaching of , maintaining, conserving and protecting the significant and physical attributes of the area and places, works and objects within the area;
- (iv) taking resources from the area, including fauna, flora, soil, sand, stone, flint, clay, gravel, ochre water for use and consumption for food, shelter, healing, decoration, cultural, religious, ceremonial, and ritual purposes and for manufacture and trade of objects, materials and goods, in the form of tools, weapons, clothing , shelter and decoration.

Information in the affidavits supplied as additional information also provides evidence to support the assertion that these activities currently occur on the claim area.

I accept the evidence contained in those affidavits and statements made at Attachments F and G.

Having regard to the information contained in the application and the additional material referred to above, I am satisfied that there is a sufficient factual basis to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the area subject to this application.

The requirements of s.190B5(a) are therefore met.

**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.**

At paragraph (iii) of Schedule F of the application, it is asserted:

“...the native title rights and interests are possessed under a body of traditional laws acknowledged and traditional customs observed by the native title clam group and their predecessors...”

In addition, in the affidavit of [**Anthropologist 1 - name deleted**] (1/8/03) it is stated:

“It is my opinion that traditional law and custom is enmeshed in the everyday practices of Yindjibarndi people, including practice of traditional laws and customs on Yindjibarndi country within the claim areas. (At paragraph 8)

She properly gives in that affidavit a short account of the research undertaken by her and the basis for the formation of her views and I accept those views as expert opinion and able to be relied upon.

The factual basis provided in the affidavits of [**Applicant 1**], [**Claimant 1**], [**Applicant 6**] and [**Applicant 3**] is sufficient to support the assertions made in paragraph (iii) at Schedule F.

Refer:

- Affidavit of [**Applicant 1**] (1/8/03) at [4], [9], [10], [15], [21], [23], [24]
- Affidavit of [**Claimant 1**] (1/8/03) at [5], [6], [7], [10], [12]
- Affidavit of [**Applicant 9**] (1/8/03) at [6], [7], [8], [10], [14]

- Affidavit of [Applicant 6] (1/8/03) at [5]
- Affidavit of [Applicant 3] (8/7/03) at [5], [9], [10], [11], [12]

Schedule G lists activities concerning traditional usage of their country. These activities include:

- (i) hunting, gathering and fishing;
- (ii) moving about, living, residing, erecting shelters and camping;
- (iii) conducting and engaging in cultural activities, ceremonies, rituals, meetings and teaching of, maintaining, conserving and protecting the significant and physical attributes of the area and places, works and objects within the area;
- (iv) taking resources from the area, including fauna, flora, soil, sand, stone, flint, clay, gravel, ochre water for use and consumption for food, shelter, healing, decoration, cultural, religious, ceremonial, and ritual purposes and for manufacture and trade of objects, materials and goods, in the form of tools, weapons, clothing, shelter and decoration.

It must be remembered that the registration test is an administrative one and that this section is framed as requiring “a factual basis” which is “sufficient” to support the assertions. I do not read that as requiring proof of each and every aspect of each right or interest: that level of enquiry would be judicial in nature.

The information outlined above provides a sufficient factual basis to support the assertion that traditional laws and customs exist, that those laws and customs are acknowledged and observed by the native title claim group, and that those laws and customs give rise to the claimed native title rights and interests.

The requirements of s.190B5(b) are therefore met.

**s. 190B(5)(c) the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.**

At paragraph (iv) of Schedule F it is stated:

“the native title claim group have continued to hold the native title in accordance with those traditional laws and customs, including laws and customs which vest land and waters in the native title claim group on the basis of

- (a) descent from ancestors connected with the area;
- (b) conception in the area;
- (c) birth in the area;
- (d) traditional religious knowledge of the area;
- (e) traditional knowledge of the creation and geography of the area;
- (f) traditional knowledge of the resources of the area;
- (g) knowledge of and participation in traditional ceremonies and rituals associated with the area.”

The factual basis provided in the affidavits of [Applicant 1], [Claimant 1], Applicant 9, [Applicant 6] and is sufficient to support the assertions made in paragraph (iv) at Schedule F of the application.

In these affidavits the claimants demonstrate that they maintain the traditional law and custom that applies to the claim area and that binds members of the claimant group through their topographic, cultural, ecological and religious knowledge related to the claim area.

Refer:

- Affidavit of [Applicant 1] (1/8/03) at [1], [6], [8], [9], [10], [11], [15], [17] [19] [21] [22] [24]
- Affidavit of [Claimant 1] (1/8/03) at [1], [3], [5], [6], [7] [9] [10] [11] [12]
- Affidavit of Applicant 9 (1/8/03) at [6], [7], [8], [9], [10] [12] [14]
- Affidavit of [Applicant 6] (1/8/03) at [1] [2] [3] [5]
- Affidavit of [Applicant 3] (8/7/03) at [1], [5], [7], [9], [10] [11] [12]

I also refer here to, and accept, the expert opinions of [Anthropologist 1] in her affidavit of 1<sup>st</sup> August 2003 and in particular at para 8 (op cit).

I am satisfied that there is a sufficient factual basis to support an assertion that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

### **Conclusion**

As a result, I am satisfied that the factual basis provided sufficiently supports all of the assertions outlined in s.190B(5).

### **Overall Result: Requirements met**

### **s.190B(6)**

#### *Prima facie case:*

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

### **Reasons for the Decision**

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

The term “prima facie” was considered in *North Ganalanja Aboriginal Corporation v Qld* (1996) 185 CLR 595. In that case, the majority of the court (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ) noted:

“The phrase can have various shades of meaning in particular statutory contexts but the ordinary meaning of the phrase “prima facie” is: “At first sight; on the face of it; as it

appears at first sight without investigation.” [citing *Oxford English Dictionary* (2<sup>nd</sup> ed) 1989].”

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

### **Rights and Interests claimed**

The current application defines three different areas (A, B and C) of land and waters under claim and in Schedule E sets out the native title rights and interests claimed in each of these areas. The definition of areas A, B and C are set out above under the reasons for decision in relation to s.190B (4). The applicants claim exclusive possession, where it can be made out, in Area A and non-exclusive possession in Areas B and C.

The applicants claim a set of 60 rights and interests in relation to Area A of the application. Area A contains all land where there is a claim to vacant crown land over which there has not been any extinguishment, or areas which attract the benefit of section 47, 47A and 47B of the *NTA*. This is a claim to exclusive possession where it can be established. The claim to exclusive possession where it can be made out will be dependent on whether there has been any extinguishment or any areas which attract the benefit of section 47, 47A and 47B. At Schedule L it is stated that the applicant does not have any details of:

- (a) any area for which a pastoral lease is held by or on behalf of the members of the native title claim group; and
- (b) any area leased, held or reserved for the benefit of Aboriginal peoples or Torres Strait Islanders and occupied by or on behalf of the members of the native title claim group; and
- (c) any vacant crown land occupied by the members of the native title claim group; and
- (d) any area mentioned in paragraph (a) (b) or (c) over which the extinguishment of native title is required by section 47, 47 A or 47 B or the Act to be disregarded.

The applicants claim the same set of rights and interests in relation to Area B as claimed in Area A, except the right to possess, occupy, use and enjoy the area as against the world and specific rights set out at nominated paragraphs.

The applicants claim the same set of rights and interests in relation to Area C as claimed in Area A, except the right to possess, occupy, use and enjoy the area as against the world and specific rights set out at nominated paragraphs.

All the rights and interests claimed are qualified at Schedule E by making them subject to a series of exclusions in legal circumstances that prohibit or limit native title rights where other rights or interests have been created by State or Commonwealth legislation or by the common law.

Over areas where a claim to exclusive possession cannot be sustained, the majority in *Ward* (Gleeson CJ, Gaudron, Gummow and Hayne JJ) questioned the appropriateness of claims to control access to and use of the land: “without a right of possession of that kind [i.e., an exclusive right], it may be greatly doubted that there is any right to control access to land or make binding decisions about the use to which it is put” - at [52]. *Ward* is authority for the proposition that rights which amount to a right to control access to the land or a right to control the use made of the land, are not capable of registration where a claim to exclusive possession cannot be maintained. I am satisfied from the express wording in Schedule E (2), (c) and (f), where

exclusive possession is not asserted, that the applicants are not claiming to control access to others but 'binding only on those governed by traditional laws and customs of the Yindjibarndi Claim Group'.

In considering this condition I have had regard to information in Schedules F, and G and the affidavits accompanying the application and supplied as additional information direct to the Registrar. I have also had regard to the decisions of the Full Court of the Federal Court and the High Court of Australia in the *Ward* cases.

I will now consider each right and interest claimed in Areas A, B and C in relation to whether *each* can be established on a prima facie basis on the basis of the relevant information.

For convenience, I will consider firstly the particular rights claimed over Area B and then area C where a right to possession, occupation, use, and enjoyment to the exclusion of all others cannot be found. My findings in relation to these particular rights will later be useful in considering the claimed exclusive right of possession occupation use and enjoyment over Area A.

### **AREA B RIGHTS**

The native title rights and interests which are claimed in relation to Area B are all the rights claimed in relation to Area A, except the right to possess, occupy, use and enjoy the area as against the world and the rights set out at Schedule E paragraphs (12), (14), (30), (31) and (51). That is, they are non-exclusive rights.

The claimed rights for Area B are listed below omitting those rights claimed in Area A which have not been claimed in Area B. My comments on establishment or otherwise follow each right. Although for the sake of time and convenience it will not be cited against each right below, I refer also to the affidavit of [**Anthropologist 1 – name deleted**] as supporting what follows.

(2) A right to occupy the area;

**Established**– The applicants have provided material which goes to establish that the native title claim group occupy the subject area, and use and enjoy the claim area. See, for example, the affidavit of [**Applicant 1**] (1/8/03) describing his and his family's association with Cheedy Station, and the claim area including living, working and using its resources in traditional ways.

(3) A right to use the area;

(4) A right to enjoy the area;

**Both established**– The applicants have provided material which goes to establish that the native title claim group occupy the subject area and use and enjoy the claim area. See, for example, the affidavit of [**Applicant 3**] (8/7/03) describing her and her family's association with Mt Florence within the claim area, including living, working and using its resources in traditional ways.

(5) A right to be present on or within the area;

**Established** - The applicants have provided material which goes to establish that the native title claim group are present on the claim area and use and enjoy the claim area. See, for example, the affidavits of [**Applicant 1**], [**Claimant 1**], [**Applicant 6**], [**Applicant 9**] (all dated 1/8/03) and

[**Applicant 3**] (8/7/03) describing their association with the claim area and the various pastoral stations within it.

- (6) A right to be present on or within the area in connection with the society's economic life;
- (7) A right to be present on or within the area in connection with the society's religious life;
- (8) A right to be present on or within the area in connection with the society's cultural life;

**All three rights above established** - The applicants have provided material which goes to establish that the native title claim group are present on the claim area and conduct various activities in association with the group's economic, religious and cultural life. See, for example, the affidavits of [**Applicant 1**], [**Claimant 1**], [**Applicant 6**], [**Applicant 9**] (all dated 1/8/03) and [**Applicant 3**] (8/7/03) describing their activities within the claim area.

- (9) A right to hunt in the area;
- (10) A right to fish in the area;

**Both established** - The applicants have provided material which goes to establish that the native title claim group are hunt and fish on the claim. See, for example, the affidavits of [**Applicant 1**], [**Claimant 1**], [**Applicant 6**], [**Applicant 9**] (all dated 1/8/03) describing their activities within the claim area.

- (11) A right to make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;

**Established**— Evidence in the affidavits supplied indicates that the members of the Aboriginal society to which the claim group belongs abide by traditional laws and customs which involve including and excluding members from ceremony. For instance see the affidavits of [**Applicant 1**] (1/8/03) at paragraph 23 regarding who attend meetings and [**Applicant 9**] at paragraph 12 in regarding who can collect ochre. I am satisfied that this material provides a prima facie case that this right is established.

- (12) Not claimed

- (13) A right to make decisions about the enjoyment of the area by members of the Aboriginal society to which the native title claim group belong;

**Established** - The applicants have provided material which goes to establish that the native title claim group use and enjoy the claim area. It can be assumed in the process of carrying out such activities they would make certain decisions. See, for example, the affidavits of [**Applicant 1**], [**Claimant 1**], [**Applicant 6**], [**Applicant 9**] (all dated 1/8/03) describing their activities within the claim area. In addition Schedule G lists a variety of activities such as conducting and engaging in ceremonies, cultural activities, meetings and rituals

- (14) Not claimed

- (15) A right of access to the area;
- (16) A right to live within the area;
- (17) A right to reside in the area;

**All three rights above established-** For reasons discussed in relation to rights (2) (3) (4) (5) (6) (7) and (8) above.

- (18) A right to erect shelters upon or within the area;

**Established**— A question which is raised here is whether the right to erect shelters upon or within the area *necessarily* amounts to a right to control access to and use of the claim area. To the extent that it would do so, such a right is not *prima facie* capable of being established.

In *Ward*, the majority of the High Court considered the terms of a pastoral lease pursuant to Northern Territory legislation, and the way the provisions of this lease interacted with native title. At para. [182], their Honours asked: “Did the grant of a pastoral lease over Crown land prohibit the continued use or occupation of that land, in accordance with native title rights and interests by the holders of those rights?...[183] That would be so *only* if a pastoral lease gave the holder the right, either absolutely or contingently upon the taking of certain steps...to exclude native title holders from the land. Pastoral leases granted under the statutes and Land Regulations in issue in these matters did not grant that right.”

As McHugh J noted in his separate judgment, the term ‘occupation’ can convey a range of meanings, and can connote anything from ‘residence’ to ‘possession’ itself [519]: “In *Wik*, the majority Justices thought that the known presence of Aboriginals on pastoral leases was inconsistent with the grant of exclusive possession. But with great respect this was to confuse occupation with possession.” And at [522] McHugh J concludes: “The occupation of the land by Aboriginals is no more inconsistent with the legal possession of the land being in the pastoral lessee than the sole occupation of a room by a lodger is inconsistent with legal possession of the room being in the owner of the boarding house.”

In light of the judicial statements noted above, I am of the opinion that this right does not amount to a right to control access to or use of the claim area, at least at an administrative decision level. That said, there is sufficient information in the application, accompanying and additional material to satisfy me that this right can be established *prima facie*. In this regard the evidence of **[Applicant 1]** and other material provided in the application, indicate that members of the native title claim group currently live on the claim area, and in the past, occupied a temporary camp, on various pastoral properties in the claim area.

- (19) A right to camp upon or within the area;
- (20) A right to move about the area;
- (21) A right to engage in cultural activities within the area;

**All three established**— There is ample evidence of camping, moving about the claim area and cultural activities in the affidavit of **[Applicant 1]**, **[Claimant 1]**, **[Applicant 9]** and **[Applicant 6]** (all dated 1/8/03) and **[Applicant 3]** (8/7/03),

- (22) A right to conduct ceremonies within the area;
- (23) A right to participate in ceremonies within the area;

**Both established** – There is evidence of law ceremonies in the affidavit of [Applicant 1] (1/8/03).

- (24) A right to hold meetings within the area;
- (25) A right to participate in meetings within the area;

**Both established**– There is evidence in the affidavit of [Applicant 1], (1/8/03) of meetings (see paragraph 23).

- (26) A right to teach as to the physical attributes of the area;
- (27) A right to teach as to the significant attributes of the area;
- (28) A right to teach upon the area as to the significant attributes of the area;
- (29) A right to teach as to the significant attributes within the area of the Aboriginal society connected to the area in accordance with its laws and customs;

**All four rights established**– There is evidence in the affidavit of [Applicant 1] (1/8/03) that he teaches his children and grandchildren about the country – “hill, rivers, and things like that..” (See paragraph 24). Also in paragraphs 8 and 9 of [Claimant 1’s] affidavit (1/8/03) there is reference to teaching about country.

- (30) Not claimed
- (31) Not claimed

- (32) A right to take resources, other than minerals and petroleum, used for sustenance from the area;

**Established**– See the affidavit by [Applicant 1] and [Applicant 9] (1/8/03) describing their life on the claim area, including the use of its resources via hunting and gathering of traditional foods.

- (33) A right to take resources, other than minerals and petroleum, used for sustenance within the area;

**Established**- For the same reasons set out for the right at paragraph (32) above.

- (34) A right to gather resources, other than minerals and petroleum, used for sustenance within the area;
- (35) A right to use and/or enjoy resources, other than minerals and petroleum, for sustenance within the area;



(36) A right to use and/or enjoy resources, other than minerals and petroleum, for food, on, in or within the area;

(37) A right to use and/or enjoy resources, other than minerals and petroleum, for shelter, on, in or within the area;

**All four rights above established**– The affidavits accompanying the application and provided as additional material offer evidence of gathering, using and enjoying resources for sustenance – such as flora and fauna as well as using and enjoying resources for food and shelter.

(38) A right to use and/or enjoy resources, other than minerals and petroleum, for healing on, in or within the area;

**Established**– See [**Applicant 1's**] affidavit (1/8/03) in relation to bush medicine at paragraph 17.

(39) A right to use and/or enjoy resources, other than minerals and petroleum, for decoration on, in or within the area;

**Established** - See the affidavit by [**Applicant 9**] (1/8/03) describing a number of uses of the claim area's ochre for decorative purposes.

(40) A right to use and/or enjoy resources, other than minerals and petroleum, for social purposes on, in or within the area;

(41) A right to use and/or enjoy resources, other than minerals and petroleum for cultural, religious, spiritual, ceremonial and/or ritual purposes on, in or within the area;

**Both established** - There is considerable evidence in the affidavits accompanying the application or provided as additional material in relation to the use and enjoyment of resources, other than mineral and petroleum, for decorative, social, cultural, religious, spiritual, ceremonial and / or ritual purposes. See numerous examples in Applicant 9's affidavit of 1/8/03

(42) A right to take fauna;

(43) A right to take flora (including timber);

(44) A right to take soil;

(45) A right to take sand;

(46) A right to take stone and/or flint;

(47) A right to take clay;

(48) A right to take gravel;

(49) A right to take ochre;

(50) A right to take water;

**All nine rights above established**– There is ample evidence in the material accompanying the application or provided additionally of the taking of the above mentioned natural resources for various traditional activities. See the affidavit of [**Applicant 9**] (1/8/03). This finding must be qualified however by acknowledging that the substances referred to in (44) – (48) may alternatively be correctly characterised as ‘minerals and petroleum’ in which case they could not be found. Such a finding would be a matter for evidence judicially considered.

(51) Not claimed

(52) A right to manufacture from and trade in the said resources of the area, upon or within the area, other than minerals and petroleum including the manufacture of objects, materials or goods for sustenance, and/or food, shelter, healing, decoration, social, cultural, religious, spiritual, ceremonial, and/or ritual purposes and/or including objects, materials or goods in the form of tools, weapons, clothing, shelter and/or decoration;

**Not established** - In *Yarmirr*, Olney J considered the ‘right to engage in the trade and exchange of estate resources’ of senior *yuwurrumu* members of the Croker Island region. Ultimately, Olney J found that “[t]he so-called ‘right to trade’ was not a right or interest in relation to the waters or land” [para. 120], and was, therefore, not capable of being claimed as a native title right and interest under s. 223 of the Act.

On appeal, the Full Federal Court spoke of this right in these terms: “It may well be right, as the argument runs, and as seems logical, to view the right to trade as ‘an integral part,’ or integral aspect of a right to exclusive possession.” The Full Court noted that Olney J had not considered the right to trade as a right in relation to land and water within the meaning of s.223 of the *NTA*, but made no finding on the issue. The issue was not raised before the High Court.

Based on these comments, it appears that the Full Court accepted that this right was a native title right or interest in relation to land and water (i.e., that the right to trade is readily identifiable for the purposes of s. 190B(4)) and that the right to derive economic benefit from and to trade in the traditional resources of the claim area is properly seen as co-extensive with a claim to exclusive possession, occupation, use and enjoyment of lands and waters. It follows that I am not satisfied that the right can be established *prima facie* where a claim to exclusive possession is not made out.

(53) A right to receive a portion of the said resources (other than minerals and petroleum) taken by other persons who are members of the Aboriginal society from the area;

**Established**– The affidavit of [**Applicant 1**] (1/8/03) refers to the sharing of meat after others (examples given are Banyjima, Marthudunia, Ngarluma) have hunted on the claim area after receiving permission to hunt from [**Applicant 1**]. (See paragraph 22 of affidavit).

(54) A right to receive a portion of the said resources (other than minerals and petroleum) taken by other persons other than those who are members of the Aboriginal society from the area;

**Not established** - There is no evidence in the affidavits accompanying the application or provided as additional material to the Tribunal to suggest that this right can be established prima facie.

(55) A right, in relation to any activity occurring on the area, to

- i. maintain,
- ii. conserve; and/or
- iii. protect

significant places and objects located within the area, by preventing, by all reasonable lawful means, any activity which may injure, desecrate, damage, destroy, alter or misuse any such place or object;

**Established** – Whilst there is a view that the use of the words “maintain’ and ‘protect’ imply a degree of control consistent only with exclusive possession, there has in my view been no definitive ruling by the courts on the question and I am of the view that such activities could also, depending upon the evidence adduced at trial as to the exact nature and manner of exercise of this asserted right, be consistent with non-exclusive possession and given that this is an administrative procedure and given also the beneficial nature of the Act I believe that it is a proper exercise of my discretion to regard these rights as able to be established on a non-exclusive basis

There is evidence in the affidavit of [Applicant 9] (1/8/03) that that Yindjibarndi people preserve and protect culturally significant places as well as songs, stories and objects in the claim area as something that only Yindjibarndi people can do. (See paragraph 14).

In [Claimant 1’s] affidavit (1/8/03) there is reference to protecting a burial place. (See paragraph 7). In [Applicant 3]’s affidavit (8/7/03) accompanying the present application there is general reference to looking after country (paragraph 6) which may be read as incorporating this particular right. Further at Schedule G in the application there is reference to activities of “conserving and protecting the significant and physical attributes of the area and places, works and objects within the area...”

I am satisfied this right given the material before me can be established prima facie.

(56) A right, in relation to any activity occurring on the area, to -

- i. maintain
- ii. conserve; and/or
- iii. protect

significant ceremonies, artworks, song cycles, narratives, beliefs or practices by preventing, by all reasonable lawful means any activity occurring on the area which may injure, desecrate, damage, destroy, alter or misuse any such ceremony, artwork, song cycle, narrative, belief or practice;

**Established**– In [Applicant 1’s] affidavit (1/8/03) there is information concerning the protection of [deleted for cultural and customary reasons]. (See paragraph 21). In [Claimant 1’s] affidavit (1/8/03) there is reference to protecting burial sites. Further at Schedule G in the application there is reference to activities of “conserving and protecting the significant and physical attributes of the area and places, works and objects within the area...”

In particular, see my comments above at (55) in relation to the words 'maintain' and 'protect'

(57) A right, in relation to a use of the area or an activity within the area, to:

- (i) prevent any use or activity which is unauthorised in accordance with traditional laws and customs
- (ii) prevent any use or activity which is inappropriate in accordance with traditional laws and customs

in relation to significant places and objects within the area or ceremonies, artworks, song cycles, narratives, beliefs or practices carried out within the area by all reasonable lawful means, including by the native title holders providing all relevant persons by all reasonable means with information as to such uses and activities, provided that such persons are able to comply with the requirements of those traditional laws and customs while engaging in reasonable use of the area and are not thereby prevented from exercising any statutory or common law rights to which that person may be entitled;

**Not established** –The use of the word 'prevent' implies a degree of control only consistent with exclusive possession.

(58) A right to enjoy all the features, benefits and advantages inherent in the environment of the area;

**Not established** - Although there is evidence of enjoyment of many of the features, benefits and advantages inherent in the environment of the area I am unable to find that the evidence could encompass the use of the word 'all' in this right

(59) A right of individual members of the native title holding group or groups to be identified and acknowledged, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area;

**Established** - [Applicant 1] in his affidavit (1/8/03) talks of people visiting Yindjibarndi country and asking the old people if they can come into this country and asking if they can hunt or fish and also visitors sharing food from hunting. (See paragraph 22). [Applicant 9] in his affidavit (1/8/03) speaks of Yindjibarndi people lighting a fire and cooking in the claim area without asking anyone else. (See paragraph 8) and others having to share food from hunts (paragraph 9).

I accept this as evidence that on a prima facie basis the individual members of the native title holding group or groups are identified and acknowledged, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area.

(60) A right of the group or groups who hold common or group native title rights and interests to identify and acknowledge individual members of the native title holding group, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area.

**Established** – [Applicant 1] in his affidavit (1/8/03) talks of not everyone being allowed to speak about Yindjibarndi country. (See paragraph 24) and [Applicant 9] speaks of [deleted for cultural and customary reasons]. (See paragraph 12). I accept this as material that goes to establishing prima facie that the group or groups who hold common or group native title rights and interests has the right to identify and acknowledge individual members of the native title holding group *in accordance* with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area.

### **AREA C RIGHTS**

The native title rights and interests which are claimed in relation to Area C are all the rights claimed in relation to Area A, except the right to possess, occupy, use and enjoy the area as against the world and the rights set out at paragraphs (12), (14), (30), (31) and (51) and the right to hunt, gather or take fauna, in so far as such right is contained within paragraphs (3), (4), (9), (10), (21), (32)-(42), (52) and (53).”

These rights are listed below with my comments on establishment or otherwise.

(2) A right to occupy the area;

**Established**- For reasons given in relation to the same right claimed in Area B.

(3) A right to use the area;

(4) A right to enjoy the area;

**Established**- For reasons given in relation to the same rights claimed in Area B. However this does not include the right to hunt, gather or take fauna, in so far as such right is contained within paragraphs (3) and (4).

(5) A right to be present on or within the area;

**Established**- For reasons given in relation to the same rights claimed in Area B.

(6) A right to be present on or within the area in connection with the society's economic life;

(7) A right to be present on or within the area in connection with the society's religious life;

(8) A right to be present on or within the area in connection with the society's cultural life;

**Established** - For reasons given in relation to the same rights claimed in Area B.

(9) A right to hunt in the area

**Not established** - This right is not claimed as it is excluded under a general clause applying to Area C rights. See above.

(10) A right to fish in the area

**Not established** - This right is not claimed as it is excluded under a general clause applying to Area C rights. See above.

(11) A right to make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;

**Established** - For reasons given in relation to the same rights claimed in Area B

(12) Not claimed

(13) A right to make decisions about the enjoyment of the area by members of the Aboriginal society to which the native title claim group belong;

**Established** - For reasons given in relation to the same rights claimed in Area B.

(14) Not claimed

(15) A right of access to the area;

(16) A right to live within the area;

(17) A right to reside in the area;

**All three rights above established**- For reasons discussed in relation to rights (2) (5) (7) and (8) claimed in area B above.

(18) A right to erect shelters upon or within the area;

**Established** - For reasons given in relation to the same rights claimed in Area B.

(19) A right to camp upon or within the area;

(20) A right to move about the area;

**Both established** - For reasons given in relation to the same rights claimed in Area B.

(21) Not claimed

- (22) A right to conduct ceremonies within the area;
- (23) A right to participate in ceremonies within the area;

**Both established**–For reasons given in relation to the same rights claimed in Area B.

- (24) A right to hold meetings within the area;
- (25) A right to participate in meetings within the area;

**Both established**–For reasons given in relation to the same rights claimed in Area B.

- (26) A right to teach as to the physical attributes of the area;
- (27) A right to teach as to the significant attributes of the area;
- (28) A right to teach upon the area as to the significant attributes of the area;
- (29) A right to teach as to the significant attributes within the area of the Aboriginal society connected to the area in accordance with its laws and customs;

**All four rights above established**– For the reasons set out in relation to the same rights claimed in Area B.

- (32) A right to take resources, other than minerals and petroleum, used for sustenance from the area;

**Established**– See the affidavit by [**Applicant 1**] and [**Applicant 9**] (1/8/03) describing their life on the claim area, including the use of its resources via hunting and gathering of traditional foods. However this right excludes the right to take fauna, in so far as such right is contained within this paragraph.

- (33) A right to take resources, other than minerals and petroleum, used for sustenance within the area;

**Established**– See the affidavit by [**Applicant 1**] and [**Applicant 9**] (1/8/03) describing their life on the claim area, including the use of its resources via hunting and gathering of traditional foods. However, this right excludes the right to take fauna, in so far as such right is contained within this paragraph.

- (34) A right to gather resources, other than minerals and petroleum, used for sustenance within the area;
- (35) A right to use and/or enjoy resources, other than minerals and petroleum, for sustenance within the area;
- (36) A right to use and/or enjoy resources, other than minerals and petroleum, for food, on, in or within the area;

(37) A right to use and/or enjoy resources, other than minerals and petroleum, for shelter, on, in or within the area;

**All four rights above established**– The affidavits accompanying the application and provided as additional material offer evidence of gathering, using and enjoying resources for sustenance – such as flora and fauna as well as using and enjoying resources for food and shelter. However these four rights exclude the right to hunt, gather or take fauna, in so far as such right is contained within paragraphs (34), (35), (36) and (37).

(38) A right to use and/or enjoy resources, other than minerals and petroleum, for healing on, in or within the area;

**Established**– See [**Applicant 1’s**] affidavit (1/8/03) in relation to bush medicine at paragraph 17. However this right excludes the right to hunt, gather or take fauna, in so far as such right is contained within paragraph (38).

(39) A right to use and/or enjoy resources, other than minerals and petroleum, for decoration on, in or within the area;

**Established** - See the affidavit by [**Applicant 9**] (1/8/03) describing the use of ochre found in the claim area for decorative purposes. However this right excludes the right to hunt, gather or take fauna, in so far as such right is contained within paragraph (39).

(40) A right to use and/or enjoy resources, other than minerals and petroleum, for social purposes on, in or within the area;

(41) A right to use and/or enjoy resources, other than minerals and petroleum for cultural, religious, spiritual, ceremonial and/or ritual purposes on, in or within the area;

**Both established** - There is considerable evidence in the affidavits accompanying the application or provided as additional material in relation to the use and enjoyment of resources, other than mineral and petroleum, for decorative, social, cultural, religious, spiritual, ceremonial and / or ritual purposes. See numerous examples in Applicant 9’s affidavit of 1/8/03. However these rights exclude the right to hunt, gather or take fauna, in so far as such right is contained within paragraph (40) and (41).

(42) A right to take fauna;

**Not established.** - This right is not claimed as it is excluded under a general clause applying to Area C rights. See above.

(43) A right to take flora (including timber);

(44) A right to take soil;

(45) A right to take sand;



- (46) A right to take stone and/or flint;
- (47) A right to take clay;
- (48) A right to take gravel;
- (49) A right to take ochre;
- (50) A right to take water;

**All nine rights established** – For the reasons set out in relation to the same rights claimed in Area B but with the same qualifications relating to (44) to (48)

(51) Not claimed

(52) A right to manufacture from and trade in the said resources of the area, upon or within the area, other than minerals and petroleum including the manufacture of objects, materials or goods for sustenance, and/or food, shelter, healing, decoration, social, cultural, religious, spiritual, ceremonial, and/or ritual purposes and/or including objects, materials or goods in the form of tools, weapons, clothing, shelter and/or decoration

**Not established** – For the reasons set out above in relation to the same right claimed for Area B

(53) A right to receive a portion of the said resources (other than minerals and petroleum) taken by other persons who are members of the Aboriginal society from the area;

**Established** - For the reasons set out above in relation to the same right claimed for Area B

(54) A right to receive a portion of the said resources (other than minerals and petroleum) taken by other persons other than those who are members of the Aboriginal society from the area;

**Not established** - For the reasons set out above in relation to the same right claimed for Area B. That is there is no evidence in the affidavits accompanying the application or provided as additional material to the Tribunal to suggest that this right can be established prima facie

- (55) A right, in relation to any activity occurring on the area, to
- i. maintain,
  - ii. conserve; and/or
  - iii. protect

significant places and objects located within the area, by preventing, by all reasonable lawful means, any activity which may injure, desecrate, damage, destroy, alter or misuse any such place or object;

**Established** - For the reasons and upon the same basis as set out above in relation to the same right claimed for Area B.

(56) A right, in relation to any activity occurring on the area, to -

- i. maintain
- ii. conserve; and/or
- iii. protect

significant ceremonies, artworks, song cycles, narratives, beliefs or practices by preventing, by all reasonable lawful means any activity occurring on the area which may injure, desecrate, damage, destroy, alter or misuse any such ceremony, artwork, song cycle, narrative, belief or practice;

**Established** - For the reasons and upon the same basis as set out above in relation to the same right claimed for Area B.

(57) A right, in relation to a use of the area or an activity within the area, to:

- (i) prevent any use or activity which is unauthorised in accordance with traditional laws and customs
- (ii) prevent any use or activity which is inappropriate in accordance with traditional laws and customs

in relation to significant places and objects within the area or ceremonies, artworks, song cycles, narratives, beliefs or practices carried out within the area by all reasonable lawful means, including by the native title holders providing all relevant persons by all reasonable means with information as to such uses and activities, provided that such persons are able to comply with the requirements of those traditional laws and customs while engaging in reasonable use of the area and are not thereby prevented from exercising any statutory or common law rights to which that person may be entitled;

**Not established** - For the reasons and upon the same basis as set out above in relation to the same right claimed for Area B

(58) A right to enjoy all the features, benefits and advantages inherent in the environment of the area;

**Not established**-For the reasons and upon the same basis as set out above in relation to the same right claimed for Area B.

(59) A right of individual members of the native title holding group or groups to be identified and acknowledged, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area;

**Established** - For the reasons set out above in relation to the same right claimed for Area B

(60) A right of the group or groups who hold common or group native title rights and interests to identify and acknowledge individual members of the native title holding group, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area.

**Established** - For the reasons set out above in relation to the same right claimed for Area B

## **AREA A RIGHTS**

I now turn to consider the 60 rights set out in Schedule E in relation to Area A.

(1) The right to possess, occupy, use and enjoy the area as against the world.

**Established** - This native title right amounts to exclusive possession and can only be registered over those areas covered by the application where such a claim can be made out (e.g., where there has been no prior extinguishment of such rights or interests, or any extinguishment must be disregarded under ss.47, 47A or 47B of the NTA). The application claims rights in Area A where this qualification is applicable.

The material I have referred to above in relation to the particular rights over certain areas B and C where possession occupation use and enjoyment to the exclusion of all others cannot be established provides ample evidence for this right.

The evidence of the applicants *prima facie* establishes that members of the group:

- live on country in traditional ways
- know the stories for the places on their country, which have been passed down the generations
- regard themselves as the owners of the land under traditional laws and customs
- hunt, fish and gather in traditional ways
- make traditional weapons and tools for hunting and gathering
- visit, walk over their country and observe ritual practices when entering story places
- look after the land and are responsible for the land according to traditional laws and customs.

Based on this information, I am satisfied that the right to possess, occupy, use and enjoy the area as against the world in Area A is established *prima facie*.

- (2) A right to occupy the area;
- (3) A right to use the area;
- (4) A right to enjoy the area;
- (5) A right to be present on or within the area;
- (6) A right to be present on or within the area in connection with the society's economic life;
- (7) A right to be present on or within the area in connection with the society's religious life;
- (8) A right to be present on or within the area in connection with the society's cultural life;

- (9) A right to hunt in the area;
- (10) A right to fish in the area;
- (11) A right to make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;

**All ten rights established** - For reasons set out in relation to the same rights claimed in Area B

- (12) A right to make decisions about the use of the area by persons who are not members of the Aboriginal society to which the native title claim group belong;

**Established** - For reasons set out in relation to the same right claimed in Area B and C above.

- (13) A right to make decisions about the enjoyment of the area by members of the Aboriginal society to which the native title claim group belong;

**Established** – For reasons set out in relation to the same right claimed in Area B.

- (14) A right to make decisions about the enjoyment of the area by persons who are not members of the Aboriginal society to which the native title claim group belong;

**Established** - For reasons set out in relation to the same rights claimed in Area B.

- (15) A right of access to the area;
- (16) A right to live within the area;
- (17) A right to reside in the area;
- (18) A right to erect shelters upon or within the area;
- (19) A right to camp upon or within the area;
- (20) A right to move about the area;
- (21) A right to engage in cultural activities within the area;
- (22) A right to conduct ceremonies within the area;
- (23) A right to participate in ceremonies within the area;
- (24) A right to hold meetings within the area;
- (25) A right to participate in meetings within the area;
- (26) A right to teach as to the physical attributes of the area;
- (27) A right to teach as to the significant attributes of the area;
- (28) A right to teach upon the area as to the significant attributes of the area;
- (29) A right to teach as to the significant attributes within the area of the Aboriginal society connected to the area in accordance with its laws and customs;

**All fifteen rights above established**– For reasons set out in relation to the same rights claimed in Area B.

(30) A right to control access of others to the area.

**Established**– There is evidence in the affidavit of [**Applicant 1**] (1/8/03) that others must ask him to enter Yindjibarndi country.

(31) A right to control access of others to the area except such person [sic] as may be exercising a right accorded by the common law, statute law of the Commonwealth or the State of Western Australia or a lawful grant by the British sovereign or its successor;

**Not established** -There is insufficient evidence to support this right.

(32) A right to take resources, other than minerals and petroleum, used for sustenance from the area;

**Established**–See the affidavit by [**Applicant 1**] and [**Applicant 9**] (1/8/03) describing their life on the claim area, including the use of its resources via hunting and gathering of traditional foods.

(33) A right to take resources, other than minerals and petroleum, used for sustenance within the area;

**Established**– See the affidavit by [**Applicant 1**] and [**Applicant 9**] (1/8/03) describing their life on the claim area, including the use of its resources via hunting and gathering of traditional foods.

(34) A right to gather resources, other than minerals and petroleum, used for sustenance within the area;

(35) A right to use and/or enjoy resources, other than minerals and petroleum, for sustenance within the area;

(36) A right to use and/or enjoy resources, other than minerals and petroleum, for food, on, in or within the area;

(37) A right to use and/or enjoy resources, other than minerals and petroleum, for shelter, on, in or within the area;

**All four rights established** – The affidavits accompanying the application and provided as additional material offer evidence of gathering, using and enjoying resources for sustenance – such as flora and fauna as well as using and enjoying resources for food and shelter.

(38) A right to use and/or enjoy resources, other than minerals and petroleum, for healing on, in or within the area;

**Established**– see [**Applicant 1's**] affidavit (1/8/03) in relation to bush medicine at paragraph 17.

(39) A right to use and/or enjoy resources, other than minerals and petroleum, for decoration on, in or within the area;

**Established** - See the affidavit by [Applicant 9] (1/8/03) describing a number of uses of the claim area's ochre for decorative purposes.

(40) A right to use and/or enjoy resources, other than minerals and petroleum, for social purposes on, in or within the area;

(41) A right to use and/or enjoy resources, other than minerals and petroleum. for cultural, religious, spiritual, ceremonial and/or ritual purposes on, in or within the area;

**Both rights established** - there is considerable evidence in the affidavits accompanying the application or provided as additional material in relation to the use and enjoyment of resources, other than mineral and petroleum, for decorative, social, cultural, religious, spiritual, ceremonial and / or ritual purposes. See numerous examples in Applicant 9's affidavit of 1/8/03

(42) A right to take fauna;

(43) A right to take flora (including timber);

(44) A right to take soil;

(45) A right to take sand;

(46) A right to take stone and/or flint;

(47) A right to take clay;

(48) A right to take gravel;

(49) A right to take ochre;

(50) A right to take water;

**All nine rights established** – For the reasons set out above in relation to the same rights claimed in Area B but also subject to the same qualification, namely, that I take these substances referred to in (44) to (48) as intended to be to be other than 'minerals and petroleum in my reading of these descriptions..

(51) A right to control the taking, use and enjoyment by others of the resources of the area, including for the said purposes (set out at sub-paragraphs (32) - (41) above) and/or in the said form (set out at sub-paragraphs (42) - (50) above), other than minerals and petroleum and any resource taken in exercise of a statutory right or common law right, including the public right to fish;

**Established** - For the reasons set out above and on the same interpretative basis.

(52) A right to manufacture from and trade in the said resources of the area, upon or within the area, other than minerals and petroleum including the manufacture of objects, materials or goods

for sustenance, and/or food, shelter, healing, decoration, social, cultural, religious, spiritual, ceremonial, and/or ritual purposes and/or including objects, materials or goods in the form of tools, weapons, clothing, shelter and/or decoration;

**Not established** - There is insufficient evidence to support this 'omnibus' right even though some of its component parts might be unobjectionable

(53) A right to receive a portion of the said resources (other than minerals and petroleum) taken by other persons who are members of the Aboriginal society from the area;

**Established**—For the reasons set out above in relation to the same rights claimed in Area B.

(54) A right to receive a portion of the said resources (other than minerals and petroleum) taken by other persons other than those who are members of the Aboriginal society from the area;

**Not established**—There is insufficient evidence to establish this right

(55) A right, in relation to any activity occurring on the area, to

- i. maintain,
- ii. conserve; and/or
- iii. protect

significant places and objects located within the area, by preventing, by all reasonable lawful means, any activity which may injure, desecrate, damage, destroy, alter or misuse any such place or object;

(56) A right, in relation to any activity occurring on the area, to -

- i. maintain
- ii. conserve; and/or
- iii. protect

significant ceremonies, artworks, song cycles, narratives, beliefs or practices by preventing, by all reasonable lawful means any activity occurring on the area which may injure, desecrate, damage, destroy, alter or misuse any such ceremony, artwork, song cycle, narrative, belief or practice;

(57) A right, in relation to a use of the area or an activity within the area, to:

- (i) prevent any use or activity which is unauthorised in accordance with traditional laws and customs
- (ii) prevent any use or activity which is inappropriate in accordance with traditional laws and customs

in relation to significant places and objects within the area or ceremonies, artworks, song cycles, narratives, beliefs or practices carried out within the area by all reasonable lawful means, including by the native title holders providing all relevant persons by all reasonable means with information as to such uses and activities, provided that such persons are able to comply with the

requirements of those traditional laws and customs while engaging in reasonable use of the area and are not thereby prevented from exercising any statutory or common law rights to which that person may be entitled;

**All three rights established**– For reasons set out above in relation to the same rights claimed for Area B as to (55) and (56).

(58) A right to enjoy all the features, benefits and advantages inherent in the environment of the area;

**Not established**- There is insufficient evidence to establish this ‘omnibus’ right

(59) A right of individual members of the native title holding group or groups to be identified and acknowledged, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area;

(60) A right of the group or groups who hold common or group native title rights and interests to identify and acknowledge individual members of the native title holding group, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area.

**Both rights established** - For reasons set out above in relation to the same rights claimed for Area B

As some of the native title rights and interests described in Schedule E of the application have been *prima facie* established, I am satisfied that the requirements of s. 190B(6) are met.

**Result: Requirements met**

s.190B(7)

*Traditional physical connection:*

*The Registrar must be satisfied that at least one member of the native title claim group:*

- (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or*
- (b) previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:*
  - (i) the Crown in any capacity; or*
  - (ii) a statutory authority of the Crown in any capacity; or*
  - (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.*





## Reasons for the Decision

The requirements of this section are such that 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.

'Traditional physical connection' is not defined in the 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 explanatory memorandum to the *Native Title Act 1993* explains that this "connection must amount to more than a transitory access or intermittent non-native title access" (para 29.19 of the 1997 EM on page 304).

The s. 62 (1) affidavits by the ten named applicants establish that they are members of the Yindjibarndi native title claim group. The material in the affidavits (dated 1/8/03) provided as additional information is discussed extensively in my reasons under s. 190B(5). For the requirements of this section, I provide the following summary of the evidence that points to their traditional physical connection with the claim area:

- [Applicant 1] talks of growing up and travelling around the area of the claim; of traditional hunting and food collection on lands and waters within the claim area, of camping in the claim area; of being able to make decision about who enters the area.
- [Claimant 1] talks of growing up and travelling around the area of the claim; of traditional hunting on lands and waters within the claim area; of camping in the claim area; of getting the country from her grandmother's brother; of traditional customs of sharing food of having primary responsibility for looking after country; of teaching young people about country.

Based on the evidence contained in these two affidavits as well as information in Attachments F, and G and upon the material and expert opinion provided by [Anthropologist 1 – name deleted] (1/8/03) I am satisfied that both [Applicant 1] and [Claimant 1], together with other members of the claim group previously had and currently have a traditional physical connection with the area covered by the application.

**Result: Requirements met**

**s.190B(8)**

*No failure to comply with s.61A:*

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

**Reasons for the Decision**

**s61A(1) – Native Title Determination**

A search of the Native Title Register conducted on 21 July 2003 reveals 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 Schedule B of the application, certain tenures are excluded from the claim area. For reasons provided above at s190B2 these exclusions are sufficiently clear to provide reasonable certainty about all the tenure excluded and include all previous exclusive possession acts.

#### **S61A(3) – Previous Non-Exclusive Possession Acts**

The applicants are not seeking exclusive possession over areas the subject of previous non-exclusive possession acts.

#### **S61A(4) – s47, 47A, 47B**

The applicants have sought to invoke the provision s of ss.47, 47A or 47B of the NTA as apply to any area within the application. The details of any areas to which the provisions may apply have not been provided in the application.

#### **Conclusion**

For the reasons identified above the application and accompanying documents do not disclose and it is not otherwise apparent that because of Section 61A the application should not have been made.

**Result: Requirements met**

#### **s.190B(9)(a)**

***Ownership of minerals, petroleum or gas wholly owned by the Crown:***

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

- (a) to the extent that the native title rights and interests claimed consist or include ownership of minerals, petroleum or gas – the Crown in the right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas***

#### **Reasons for the Decision**

This section clearly states the application must not disclose, and I must not otherwise be aware, that there is any native title right or interest claimed in this amended application which either consists of or includes a claim to ownership over minerals, petroleum or gas wholly owned by the Crown in right of the Commonwealth, a State or Territory.

At Schedule E of the application there are a number of rights claimed which involve taking , gathering, using, enjoying, manufacturing from or trading in resources in the area but that exclude minerals and petroleum. These claimed rights read as follows:

- (32) A right to take resources, other than minerals and petroleum, used for sustenance from the area;
- (33) A right to take resources, other than minerals and petroleum, used for sustenance within the area;
- (34) A right to gather resources, other than minerals and petroleum, used for sustenance within the area;
- (35) A right to use and/or enjoy resources, other than minerals and petroleum, for sustenance within the area;
- (36) A right to use and/or enjoy resources, other than minerals and petroleum, for food, on, in or within the area;
- (37) A right to use and/or enjoy resources, other than minerals and petroleum, for shelter, on, in or within the area;
- (38) A right to use and/or enjoy resources, other than minerals and petroleum, for healing on, in or within the area;
- (39) A right to use and/or enjoy resources, other than minerals and petroleum, for decoration on, in or within the area;
- (40) A right to use and/or enjoy resources, other than minerals and petroleum, for social purposes on, in or within the area;
- (41) A right to use and/or enjoy resources, other than minerals and petroleum, for cultural, religious, spiritual ceremonial and/or ritual purposes on, in or within the area;
- (51) A right to control the taking, use and enjoyment by others of the resources of the area, including for the said purposes (set out at sub-paragraphs (32) - (41) above) and/or in the said form (set out at sub-paragraphs (42) - (50) above), other than minerals and petroleum and any resource taken in exercise of a statutory right or common law right, including the public right to fish;
- (52) A right to manufacture from and trade in the said resources of the area, upon or within the area, other than minerals and petroleum including the manufacture of objects, materials or goods for sustenance, and/or food, shelter, healing, decoration, social, cultural, religious, spiritual, ceremonial, and/or ritual purposes and/or including objects, materials or goods in the form of tools, weapons, clothing, shelter and/or decoration;
- (53) A right to receive a portion of the said resources (other than minerals and petroleum) taken by other persons who are members of the Aboriginal society from the area;
- (54) A right to receive a portion of the said resources (other than minerals and petroleum) taken by other persons other than those who are members of the Aboriginal society from the area;

I have also taken the view that the expressions in (44) to (48) are not intended as claiming minerals and on that basis I am of the view that they do not offend against these provisions

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

I am satisfied that the application complies with the requirements of S190B(9)(a).

**Result: Requirements met**

**s.190B(9)(b)**

*Exclusive possession of an offshore place:*

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

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

#### **Reasons for the Decision**

This section clearly states the application must not disclose, and I must not otherwise be aware, that if there is any native title right or interest claimed in this application which relates to waters on an offshore place, that those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place.

This application does not include any offshore areas.

#### **Result: Requirements met**

#### **s.190B(9)(c)**

#### *Other extinguishment:*

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

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

#### **Reasons for the Decision**

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

- a break in traditional physical connection;
- non-existence of an identifiable native title claim group;
- by the non-existence of a system of traditional laws and customs linking the group to the area
- an entry on the Register of Indigenous Land Use Agreements.
- Legislative extinguishment, in any event, Schedule B (3) of the application excludes all areas where native title rights and interests have otherwise been wholly extinguished.

I am satisfied that because native title rights and interests must relate to land and waters (as per definition in s223 of the Act) the exclusion of particular land and waters is an exclusion of native title rights and interests over those lands and waters. I am satisfied that the application meets the requirements of this condition.

#### **Result: Requirements are met**

**End of Document**