

*National Native Title Tribunal*  
**REASONS FOR DECISION COVER SHEET**  
**REGISTRATION TEST**

DELEGATE:	Jo-Anne Franz
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APPLICATION NAME:	Purnululu
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NAME(S) OF APPLICANT(S):	Jack Britten, Hector Chunda, Shirley Drill, Bernard Stretch and Phyllis Gallagher.
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NNTT NO:	WC94/11
FEDERAL COURT NO:	WAG 6007/98

REGION	North-West
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Information considered in making the decision

The Delegate has considered all the information and documents in the following files, databases and other sources:

- The Working Files
- Registration Test Files
- Legal Services Files
- Federal Court Application
- Amendment Files for application WC94/11.

The Delegate considers that the aforementioned information is relevant to most, if not all, of the conditions or sub-conditions in the Reasons for Decision.

**A. Procedural Conditions**

<b>190C(2)</b>	<i>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.</i>
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**Details required in section 61**

<b>61(3)</b>	<i>Name and address for service of applicant(s)</i>
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Reasons relating to this sub-condition	
<p>Requirements are met.</p> <p>The names of five Applicants are provided in the amended application: Jack Britten, Hector Chunda, Shirley Drill, Bernard Stretch and Phyllis Gallagher.</p> <p>The address for service is provided at Part B of the amended application.</p> <p>I am satisfied there has been compliance with the procedural requirements of s.61(3).</p>	

<b>61(4)</b>	<i>Names of persons in native title claim group or otherwise describes the persons so that it can be ascertained whether any particular person is one of those persons</i>
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Reasons relating to this sub-condition	
<p>Requirements are met.</p> <p>Schedule A of the amended application describes the native title claim group. In my view the description of the claim group is sufficient for it to be ascertained whether any particular person is one of those persons. I have reached this view for the reasons contained in my decision at s.190B3.</p> <p>I am satisfied there has been compliance with the procedural requirements of s.61(4).</p>	

<b>61(5)</b>	<b><i>Application is in the prescribed form<sup>1</sup>; lodged in the Federal Court, contains prescribed information<sup>2</sup>, and accompanied by prescribed documents and fee</i></b>
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Reasons relating to this sub-condition	
<p>Requirements are met.</p> <p>The application was lodged with the National Native Title Tribunal on 21 December 1994 and subsequently amended in the Federal Court on 23 September 1999.</p> <p>The application contains the prescribed information and is accompanied by prescribed documents.</p> <p>I am satisfied there has been compliance with the procedural requirements of s.61(5).</p>	

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

<b>62(1)(a)</b>	<b><i>Affidavits address matters required by s62(1)(a)(i) – s62(1)(a)(v)</i></b>
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Reasons relating to this sub-condition	
<p>Requirements are met.</p> <p>A claimant application must be accompanied by an affidavit sworn by the applicant/s. Affidavits have been received from all five Applicants: Jack Britten, Hector Chunda, Shirley Drill, Bernard Stretch and Phyllis Gallagher. Competent witnesses have witnessed the affidavits.</p> <p>I note submissions made by the Crown Solicitors Office at page 3 of a letter dated 24 December 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.</p> <p>I am satisfied there has been compliance with the procedural requirements of s.62(1)(a).</p>	

<b>62(1)(c)</b>	<b><i>Details of traditional physical connection (information not mandatory)</i></b>
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Reasons relating to this sub-condition	
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<sup>1</sup> Note that in relation to pre 30.09.98 applications, the application does not need to be in the prescribed form as required by the amended *Act*. Note also that pre 30.09.98 applications are deemed to have been filed in the Federal Court.

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

Requirements are met.

Details of traditional physical connection has been provided in Affidavit form to the Tribunal.

I am satisfied there has been compliance with the procedural requirements of s.62(1)(c).

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

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

Reasons relating to this sub-condition

Requirements are met.

A written description of the external boundary of the area claimed is provided at Attachment B of the amended application.

I am satisfied there has been compliance with the procedural requirements of s62(2)(a)(i).

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

Reasons relating to this sub-condition

Requirements are met.

At Schedule B and B1 of the amended application the Applicants have provided a written description of the areas within the external boundary of the area claimed which are not covered by the application

I am satisfied there has been compliance with the procedural requirements of s.62(2)(a)(ii).

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

Reasons relating to this sub-condition

Requirements are met.

A map showing the external boundaries of the area covered by the application is provided at Attachment "C" of the amended application.

I am satisfied that there has been compliance of the procedural requirements of s.62(2)(b).

<b>62(2)(c)</b>	<b><i>Details/results of searches carried out to determine the existence of any non-native title rights and interests</i></b>
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Reasons relating to this sub-condition	
<p>Requirements are met.</p> <p>Schedule D of the amended application includes an index of tenure in the possession of the National Native Title Tribunal in relation to the claim area.</p> <p>I am satisfied there has been compliance with the procedural requirements of s.62(2)(c).</p>	

<b>62(2)(d)</b>	<b><i>Description of native title rights and interests claimed</i></b>
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Reasons relating to this sub-condition	
<p>Requirements are met.</p> <p>A description of native title rights and interests claimed is provided at Schedule E of the amended application. There are 12 native title rights and interests specified.</p> <p>I am satisfied there has been compliance with the procedural requirements of s.62(2)(d).</p>	

<b>62(2)(e)(i)</b>	<b><i>Factual basis – claim group has, and their predecessors had, an association with the area</i></b>
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Reasons relating to this sub-condition	
<p>Requirements are met.</p> <p>The Applicants have provided a general description of the factual basis on which it is asserted that the claim group has, and their predecessors had, an association with the area at Schedule F of the amended application.</p> <p>I am satisfied there has been compliance with the procedural requirements of s.62(2)(e)(i).</p>	

<b>62(2)(e)(ii)</b> )	<b><i>Factual basis – traditional laws and customs exist that give rise to the claimed native title</i></b>
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Reasons relating to this sub-condition	
<p>Requirements are met.</p> <p>The Applicants have provided a general description of the factual basis on which it is asserted that there exists traditional laws and customs that give rise to the claimed native title at Schedule F of the amended application.</p> <p>I am satisfied there has been compliance with the procedural requirements of s.62(2)(e)(ii).</p>	

<b>62(2)(e)(ii i)</b>	<i>Factual basis – claim group has continued to hold native title in accordance with traditional laws and customs</i>
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Reasons relating to this sub-condition	
<p>Requirements are met.</p> <p>The Applicants have provided a general description of the factual basis on which it is asserted that the claim group has continued to hold native title in accordance with traditional laws and customs at Schedule F of the amended application.</p> <p>I am satisfied there has been compliance with the procedural requirements of s.62(2)(e)(iii).</p>	

<b>62(2)(f)</b>	<b><i>If native title claim group currently carry on any activities in relation to the area claimed, details of those activities</i></b>
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Reasons relating to this sub-condition	
<p>Requirements are met.</p> <p>Schedule G of the amended application provides details of activities in relation to the land or waters currently being carried out by the native title claim group.</p> <p>I note submissions made by the Crown Solicitors Office at page 3 of a letter dated 24 December 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.</p> <p>I am satisfied there has been compliance with the procedural requirements of s.62(2)(f).</p>	

<b>62(2)(g)</b>	<b><i>Details of any other applications to the High Court, Federal Court or a recognised State/Territory body the applicant is aware of (and where the application seeks a determination of native title or compensation)</i></b>
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Reasons relating to this sub-condition	
<p>Requirements are met.</p> <p>The Applicants provide details at Attachment H of the amended application of 1 native title determination application that has been made in relation to the whole or a part of the area covered by the application. This application is the Jiddngarri (WC 97/9) Native Title Claimant Application.</p> <p>I am satisfied there has been compliance with the procedural requirements of s.62(2)(g).</p>	

<b>62(2)(h)</b>	<b><i>Details of any S29 Notices (or notices given under a corresponding State/Territory law) in relation to the area, which the applicant is aware of</i></b>
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Reasons relating to this sub-condition	
<p>At Schedule I of the amended application the applicants state that they are aware of the following notices under section 29 of the Act, issued since 30 September 1996:</p> <p style="padding-left: 40px;">E80/2413 and E80/2414 (Fodina Minerals Pty Ltd), issued on 28/07/99.</p> <p>I am satisfied there has been compliance with the procedural requirements of s.62(2)(h).</p>	

## Reasons

I have set out above the reasoning in respect of each of the relevant sub-sections of sections 61 and 62 of the *Native Title Act*, and on the basis of the application and accompanying documents, I am satisfied that the application meets the requirements of this condition.



<b>190C(3)</b>	<p><i>Common claimants in overlapping claims:</i></p> <p><i>The Registrar must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:</i></p> <ul style="list-style-type: none"><li><i>(a) The previous application covered the whole or part of the area covered by the current application; and</i></li><li><i>(b) An entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made; and</i></li><li><i>(c) The entry was made, or not removed, as a result of consideration of the previous application under section 190A.</i></li></ul>
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## Reasons

A search of the Register of Native Title Claims undertaken on 18 August 1999, reveals that Native title determination application WC 97/9 (Jiddngarri) overlaps this application. On 23 August 1999 WC 97/9 (Jiddngarri) failed the registration test as a result this condition has no operation for this application.

## Conclusion

I note that in submissions made by the Crown Solicitors Office at page 3 and 4 of a letter dated 24 December, 1998, it was argued that the literal interpretation of s190C(3) would “produce anomalous results” and to avoid such anomalies “all claims made by claimant groups including persons listed in more than one claimant group, should be denied registration”. In my opinion, this submission has no substance at law.

The submissions were made prior to the amended application and are no longer relevant to the application.

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

<p><b>190C(4)(a)</b> ) <b>and</b> <b>190C(4)(b)</b> )</p>	<p><b><i>Certification and authorisation:</i></b></p> <p><b><i>The Registrar must be satisfied that either of the following is the case:</i></b></p> <p>(a) <i>The application has been certified under paragraph 202(4)(d) by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part; or</i></p> <p>(b) <i>The applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.</i></p>
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### **Reasons**

This application was certified by Peter Yu, Executive Director of the KLC, on 20 September 1999.

Section 202(7)(c) requires that, where applicable, the representative body set out in the certificate what has been done to meet the requirements of s202(6). In s202(6) there is a requirement that, if the representative body is aware of any overlap, the representative body make all reasonable efforts to achieve agreement between the overlapping claim groups. The sub-section also provides that a failure by the representative body to comply with the subsection does not invalidate any certificate given by the representative body.

As required by s202(7) the Certificate provides reasons for the opinion. The opinion is based on the KLC's involvement with:

*research and community consultation in the preparation of the present application for a determination of native title, with a view to ensuring that the application describes or otherwise identifies all the other persons in the native title claim group.*

The certificate states further that:

*The KLC through its staff and contracted consultants has attended a series of community meetings with claimants from across the claim area the subject of the present application and has observed that the Applicants are authorised by the claim group.*

I note submissions made by the Crown Solicitors Office at page 4 of a letter dated 24 December 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

For reasons provided at s.190C(5) I am satisfied that the Applicants are members of the native title claim group and are authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

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

<b>190C(5)</b>	<p><b><i>Evidence of authorisation:</i></b></p> <p><b><i>If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:</i></b></p> <p><b><i>(a) Includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and</i></b></p> <p><b><i>(b) Briefly sets out the grounds on which the Registrar should consider that it has been met.</i></b></p>
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**Reasons**

The section has no operation as the application has been certified by the Kimberley Land Council.

## B. Merits Conditions

<b>190B(2)</b>	<p><b><i>Description of the areas claimed:</i></b></p> <p><b><i>The Registrar must be satisfied that the information and map contained in the application as required by paragraphs 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.</i></b></p>
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### **Reasons**

In applying this condition I have relied upon the information provided at Schedule B, Schedule B1, and the map attached to the amended application.

#### **External Boundaries:**

The applicants have provided a map titled: "Attachment C: Purnululu Native Title Claim WAG6007/98 (WC94/11)" showing the boundaries of the area covered by the application. The map was produced by the Land Claim Mapping Unit. The map clearly shows the status of land within the area of the application. The map shows a scale allowing distances and areas to be ascertained and identifies unallocated crown land, a national park area, reserve land, various rivers and creek, roads, pastoral leases and special purpose leases. The line indicating the external boundary is finely marked and easy to follow.

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

In addition to the provision of a map defining the external boundaries of the claim, the applicants have provided a written technical description of the external boundaries.

I am satisfied that the technical description of the external boundaries coincides with the map provided, based on advice received from the Tribunal's Geospatial unit on 27 July 1999.

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

#### **Internal boundaries:**

The internal boundaries, described at Schedule B of the amended application, exclude a variety of tenure classes from the claim area in the manner indicated below:

- (1) The applicants exclude from the claim any areas covered by valid acts on or before 23 December 1996 comprising such of the following as are included as extinguishing acts within the Native Title Act 1993, as amended, or Titles Validation Act 1994, as amended, at the time of the Registrar's consideration:*

- *Category A past acts, as defined in NTA s228 and s229;*
- *Category A intermediate period acts, as defined in NTA s232A and s232B.*

(2) *The applicants exclude from the claim any areas in relation to which a previous exclusive possession act, as defined in section 23B of the NTA, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in section 23E in relation to the act (to the extent only that that law confirms or effects extinguishment of native title rights and interests).*

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

- (a) *An act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or*
- (b) *Actual use made by the holder of a tenure other than native title which is permanently inconsistent with the continued existence of native title.*

*To avoid any uncertainty, the Applicants exclude from the claim area any of the areas contained within the following descriptions or tenures which have been validly granted, set out in Schedule B1.*

(4) *Paragraphs (1) and (3) above are subject to such of the provisions of sections 47, 47A and 47B of the Act as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing but which include such areas as may be listed in Schedule L.*

(5) *The Applicants exclude from the claim area the areas excluded in the original application, namely the following areas:*

*All land and waters within the Great Northern Highway road reserve.*

#### *Schedule B1*

*B1.1 Any unqualified grant of an estate in fee simple currently in force.*

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

- (1) *a Lease of a Worker's Dwelling under the Workers' Homes Act 1911-1928;*
- (2) *a 999 Year Lease under the Land Act 1898;*
- (3) *a Lease of a Town Lot or Suburban Lot pursuant to the Land Act 1933 (WA), s117; or*
- (4) *a Special Lease under s117 of the Land Act 1933 (WA)*

*B1.3 A Conditional Purchase Lease currently in force in the Agricultural Areas of the South West Division under clauses 46 and 47 of the Land Regulations 1887 which includes a condition that the lessee reside on the area of the lease and upon which a residence has been constructed.*

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

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

*B1.6 A Permanent public work and the land or waters on which a public work is constructed, established or situated within the meaning given to that phrase by the Native Title Act 1993(Cth) s251D.*

*B1.7 A public road.*

I must be satisfied that the information required by paragraphs 62(2)(a) (ii) is sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

The applicants make it clear at Schedule B that the class exclusion clause is to operate in relation to valid previous exclusive possession acts. Upon the issue of the validity of previous exclusive possession acts within the claim area being resolved, and which cannot properly be resolved at this stage of the proceedings or by the Tribunal, Schedule B acts as a springing exclusion clause, removing those previous exclusive possession acts from the claim area. Given that the applicants have clearly raised the issue of the validity of previous exclusive possession acts in the application, I am satisfied that they have adequately defined the internal boundaries of the claim area.

I find the above mentioned class exclusions of tenure clear statements of particular lands and waters to be excluded from the claim area. This finding is made notwithstanding the practical difficulty of applying this definition in order to identify each parcel of land or area of water.

In summary I am satisfied that the exclusion clauses set out in paragraphs above, taken together with the boundary description information, satisfy the requirements of s.62(2)(a).

### **Conclusion**

I find that the information and map submitted with the application meet the requirements of s.62 (2)(a) and (b).

I am satisfied that the information and the map provided by the Applicants are sufficient for it to be said with reasonable certainty that native title rights and interests are claimed in relation to the areas specified.

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

<b>190B(3)</b>	<p><b><i>Identification of the native title claim group:</i></b></p> <p><b><i>The Registrar must be satisfied that:</i></b></p> <p>(a) <b><i>the persons in the native title claim group are named in the application; or</i></b></p> <p>(b) <b><i>the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.</i></b></p>
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### **Reasons**

Schedule A of the amended application contains a description of the native title claim group. This description is as follows:

*“The native title claim group comprises those persons (including the applicants) who are:*

*1. the biological descendants of:*

*Kemintul, deceased female;*  
*Turrukpany and his siblings, all deceased;*  
*Nyitparriyal and her siblings, all deceased;*  
*Charlie Luriji, and his siblings, all deceased;*  
*Putawuny and his siblings, all deceased;*  
*Thalyawarraji, deceased male;*  
*Tirrnguwwul, deceased female;*  
*Jaatanyji and his wife, Jirrinyngininil, both deceased;*  
*Wilirany and his sibling(s), all deceased;*  
*Putparriyal, deceased female;*  
*Violet Malgil and her sibling(s), all deceased;*  
*Kirrniany, deceased male;*

*2. those persons adopted by the individuals named in 1. above and those persons adopted by the biological descendants of the individuals named in 1. above.*

*3. those persons that are biological descendants of the adopted persons included in 2. Above;*

*4. Ms Leanne Bradshaw and her biological descendants.*

*Adoption as referred to in this claim occurs in any of the following circumstances:*

- where a woman marries (including through a defacto relationship) a descendant of a named apical ancestor, the woman’s existing children are adopted as the children of the new husband;*
- where a child is “grown up” either by a relative or by someone not biologically*

*related (“adoptive parent”) and that child had been “gifted” to the adoptive parent by a biological parent (or left by a biological parent in the care of the adoptive parent because the biological parents were not in a position to care for the child), that child has been adopted by the adoptive parents;*

- *where a child is formally adopted under the non-Aboriginal legal system.*

*If it is taken that this description of the claim group includes Tanba Banks, then by this paragraph it should be understood that she is excluded.”*

I note submissions made by the Crown Solicitors Office at page 1 of a letter dated 24 December 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

I am satisfied that the persons in the native title claim group are named, as required under s.190B(3)(a). Based on the description of the apical ancestors, I infer “those persons” to mean “those Aboriginal persons.”

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

<b>190B(4)</b>	<p><b><i>Identification of claimed native title</i></b></p> <p><b><i>The Registrar must be satisfied that the description contained in the application as required by paragraph 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.</i></b></p>
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### **Reasons**

In applying this condition I have relied on the description of the native title rights and interests set out in Schedule E of the amended application.

The Applicants state at Schedule E that the “*native title rights and interests in relation to the claim area are the rights to the possession, occupation, use and enjoyment as against the whole world (subject to any native title rights and interests which may be shared with any others who establish that they are native title holders) of the area, and comprise:*”

- a. rights to possess, occupy, use and enjoy the area;*
- b. the right to make decisions about the use and enjoyment of the area;*
- c. the right of access to the area;*
- d. the right to control the access of others to the area;*
- e. the right to use and enjoy resources of the area;*
- f. the right to control the use and enjoyment of others of resources of the area;*
- g. the right to trade in resources of the area;*
- h. the right to receive a portion of any resources taken by others from the area;*
- i. the right to own and control information comprising and concerning the traditional laws and customs of the native title holders in relation to the land, waters and resources;*
- j. the right to bestow and/or reveal place names of the land and waters;*
- k. the right to maintain and protect places of importance under traditional laws, customs and practices in the area; and*
- l. the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area.*

Section 62(2)(d) of the *Native Title Act* states that the description of native title rights and interests claimed must not merely consist of a statement to the effect that native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished at law.

By particularising the rights and interests claimed into a list specific rights and interests which are comprehensible, I consider the rights and interests identified by the applicants to be clearly defined and therefore readily identifiable.

### **Conclusion**

To meet the requirements of s190B (4) I need only be satisfied that at least one of the rights and interests sought is sufficiently described for it to be readily identified.

I note submissions made by the Crown Solicitors Office at page 2 of a letter dated 24 December 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

I am satisfied that all the rights listed can be readily identified from the description provided.

I am satisfied the application meets the requirements of this condition and s62(2)(d).

<b>190B(5)</b>	<p><i>Sufficient factual basis:</i></p> <p><i>The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:</i></p> <p>(a) <i>that the native title claim group have, and the predecessors of those persons had, an association with the area;</i></p> <p>(b) <i>that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests;</i></p> <p>(c) <i>that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.</i></p>
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**Reasons**

In applying this condition I have relied on the information provided at Schedule F and Schedule G in the amended application and on the following affidavit:

- affidavit of (name omitted), sworn on (date omitted);

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

**1. 190B(5)(a)**

Schedule F of the amended application states in part, “*The native title rights and interests are those of and flowing from the right to possession, occupation, use and enjoyment of the land to the exclusion of all others pursuant to the traditional laws and customs of the claim group based upon the following facts: (1) The native title claim group and their ancestors have, since the assertion of British sovereignty possessed, occupied, used and enjoyed the claim area; and as far back as the combined memories of the Applicants go and the oral history known to the Applicants, the native title claim group and their predecessors have had an association with the area*”.

I note that Schedule F provides general assertions rather than specific details. I have also relied on the affidavit detailed above which provides specific details.

In (details omitted) affidavit of (date and name omitted) states that (details omitted) (paragraph 3). (details omitted) (paragraph 7).

In paragraph 8 (details omitted).

In paragraphs 9 to 13 (details omitted).

In paragraph 13 of (details omitted) affidavit (details omitted).

To be satisfied under this criterion it must be evident that association with the area is and was communal, that is, shared by a number of members of the native title claim group. Details that the association with the area is and was communal are provided in the application and affidavit noted above.

I am satisfied that there has been a past and continuing communal association with the area sufficient to meet the requirements of s.190B(5)(a).

## **2. 190B(5)(b)**

Schedule F (b) of the amended application states that *“Such possessions, occupation, use and enjoyment has been pursuant to and in accordance with the laws and customs of the claim group, including rights and interest in land and waters which the traditional laws and customs vest in members of the native title claim group on the basis.....descent from ancestors connected to the area.”*

I note that Schedule F provides general assertions rather than specific details. The Applicants provide at Schedule G of the amended application details of activities that are currently carried out by the native title claim group. These activities are listed in general terms without specific detail. I have also relied on the affidavit detailed above as it provides specific details.

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

(name omitted) affidavit details in paragraphs 9 through to 26 (details omitted).

For example, in paragraph 10 (details omitted).

In paragraphs 11 and 12 (details omitted).

In paragraphs 14 through to 17 of (details omitted) affidavit (name omitted) states that (details omitted). In paragraph 14 (details omitted). In paragraph 15 (name omitted) states (details omitted). Furthermore, in paragraph 16 (name omitted) states (details omitted).

The information provided includes factual support for the existence of traditional laws and customs that give rise to the native title rights and interests listed in Schedule E. I am satisfied that these traditional laws and customs continue to be observed by the native title claim group and that the requirements of s.190B(5)(b) are met.

## **3. 190B(5)(c)**

Schedule F of the amended application states that the native title claim group continues

to acknowledge and observe those traditional laws and customs, the native title claim group by those laws and customs have a continuing connection with the land in respect of which the claim is made. Schedule G of the amended application identifies some of the activities that members of the native title claim group carry out, and states that members of the claim group “*have continuously carried out activities on the land and waters within the area of the claim and have possessed, occupied, used and enjoyed the area....*”

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

I have already referred in 190B(5)(b) above to information in (name omitted) affidavit which also provides factual information about the ongoing observation of traditional laws and customs.

In addition, (name omitted) describes the continued observance of traditional protocols for coming onto country. In paragraph 23 (details omitted).

In paragraph 24 of (name omitted) affidavit (details omitted).

In paragraphs 25 and 26 (details omitted).

Use of country in the claim area by the native title claim group continues, in my view, to be governed by a system of rights founded on these traditional laws and customs. I am satisfied that the information provided is sufficient to demonstrate that the native title claim group have continued to hold native title in accordance with their traditional laws and customs.

### **Conclusion**

I note submissions made by the Crown Solicitors Office at page 2 of a letter dated 24 December 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

The three particular strands of the test in this sub-section relate to the overall test of the Registrar needing to 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. The cumulative effect of my conclusions regarding the three specific limbs of this section is that the application meets the requirements of this condition.

<b>190B(6)</b>	<p><i>Prima facie case:</i></p> <p><i>The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.</i></p>
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### **Reasons**

In applying this condition I have particularly relied on:

- affidavit of (name omitted), sworn on (date omitted); and
- the information provided in the amended application

This affidavit provides various details relating to one or more of the native title rights claimed to continue to be practiced. (name omitted) refers to:

- (details omitted) (paragraphs 3, 5, 6 and 7);
- (details omitted) (paragraph 17);
- (details omitted) (paragraphs 11, 13 and 14);
- (details omitted) (paragraph 11 and 12);
- (details omitted)(paragraphs 10, 11, 12, 13 and 16);
- (details omitted) (paragraph 20, 21 and 22);
- (details omitted) (paragraph 23); and
- (details omitted) (paragraphs 15, 16 and 17).

The applicants have claimed their native title rights and interests subject to:

- (i) To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants.
- (ii) The claim area does not include any offshore place.
- (iii) The applicants do not make a claim to native title rights and interests which confer possession, occupation, use and enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in section 23F of the NTA, was done in relation to an area, and, either the act was attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in section 231 in relation to the act.
- (iv) Paragraph (iii) above is subject to such of the provisions of sections 47, 47A and 47B of the Act as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing, but they include such areas as may be listed in Schedule L.
- (v) The said native title rights and interests are not claimed to the exclusion of any other rights or interests validly created by or pursuant to the common law, a law of the State or a law of the Commonwealth.

Under s.190B6 I must consider that, prima facie, at least some of the rights and interests claimed can be established. The term prima facie was considered in *North Galanjanja Aboriginal Corporation v Qld* 185 CLR 595 by their Honours Brennan CJ, Dawson,

Toohey, Gaudron and Gummow JJ, who noted:

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

I have adopted the ordinary meaning referred to by their Honours when considering this application.

On the basis of the above mentioned affidavit, I have reached the conclusion that if each of the following native title rights and interests were to be taken in isolation, they could be established on a prima facie basis:

- (a) rights to possess, occupy, use and enjoy the area;*
- (b) the right to make decisions about the use and enjoyment of the area;*
- (c) the right of access to the area;*
- (d) the right to control the access of others to the area;*
- (e) the right to use and enjoy resources of the area;*
- (f) the right to control the use and enjoyment of others of resources of the area;*
- (g) the right to trade in resources of the area;*
- (h) the right to receive a portion of any resources taken by others from the area;*
- (i) the right to own and control information comprising and concerning the traditional laws and customs of the native title holders in relation to the land, waters and resources;*
- (j) the right to bestow and/or reveal place names of the land and waters;*
- (k) the right to maintain and protect places of importance under traditional laws, customs and practices in the area; and*
- (l) the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area.*

### **Conclusion**

I note submissions made by the Crown Solicitors Office at page 2 of a letter dated 24 December 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

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

<b>190B(7)</b>	<p><b><i>Traditional physical connection:</i></b></p> <p><b><i>The Registrar must be satisfied that at least one member of the native title claim group:</i></b></p> <p><b><i>(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or</i></b></p> <p><b><i>(b) previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to land or waters) by:</i></b></p> <p style="padding-left: 20px;"><b><i>(i) the Crown in any capacity; or</i></b></p> <p style="padding-left: 20px;"><b><i>(ii) a statutory authority of the Crown in any capacity; or</i></b></p> <p style="padding-left: 20px;"><b><i>(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such holder of a lease.</i></b></p>
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**Reasons**

In applying this condition I have relied on:

- affidavit of (name omitted), sworn on (date omitted);
- the information provided in the amended application

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

(name omitted) affidavit refers to (details omitted) (paragraphs 9 through to 26). At paragraph 3 (details omitted) (paragraph 4).

(name omitted) affidavit refers to (name omitted). At paragraph 13 (details omitted).

At paragraph 7 (name omitted) talks about how (details omitted).

At paragraphs 14, 15 and 16 of (details omitted) affidavit (name omitted) refers to how (details omitted). At paragraph 16 (details omitted).

From this information and evidence I am satisfied that (name omitted), being a member of the native title claim group, has maintained a traditional physical connection with the claim area.

**Conclusion**

I note submissions made by the Crown Solicitors Office at page 2 of a letter dated 24 December 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

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

<b>190B(8)</b>	<p><i>No failure to comply with s61A:</i></p> <p><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that, because of s61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.</i></p>
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**Reasons**

After reviewing the amended application, accompanying documents and other material before me I have formed the conclusion that there has been compliance with s61A.

**S61A(1) – Native Title Determination**

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

**S61A(2) – Previous Exclusive Possession Acts**

At Schedule B of the amended application, the Applicants exclude areas in relation to which native title rights and interests have otherwise been extinguished from the application. The applicants exclude by formula as outlined under 190B (2) previous exclusive possession acts. I am of the view that statements made in Schedule B effect compliance with s.61A(2) in excluding previous possession acts attributable to the law of the State of Western Australia and an act attributable to the Commonwealth.

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

There is nothing in the application before me to indicate that the applicants are seeking exclusive possession of any areas in relation to which a previous non-exclusive possession act was done. The application states at Schedule E that the applicants:

*do not make a claim to native title rights and interests which confer possession, occupation, use and enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in section 23F of the NTA, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in section 231 in relation to the act.*

I am therefore of the view that the Applicants have not contravened s.61A(3).

**S61A(4) – s47, s47A, s47B**

At Schedule L of the amended application the applicants state:

*“(i) The area identified as Vacant Crown Land in the attached map and referred*

*to in Schedule B is occupied by members of the native title claim group in accordance with their laws and customs and any extinguishment of native title in relation to that land (which is denied) is to be disregarded by virtue of section 47B.*

*(ii) The applicants are not presently aware of any other land or waters within the claim area which conforms with sections 47(1)(b), 47A(1)(b) and (c) or 47B(1)(b) and (c). If any such area exists, the applicants assert that prior extinguishment of native title in relation to it should be disregarded.”*

I note submissions made by the Crown Solicitors Office at page 2 and 3 of a letter dated 24 December 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

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

<p><b>190B(9)</b> <b>(a)</b></p>	<p><b><i>Ownership of minerals, petroleum or gas wholly owned by the Crown:</i></b>  <b><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i></b></p> <p><b><i>(a) to the extent that the native title rights and interests claimed consist or include ownership of minerals, petroleum or gas - the Crown in right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas;</i></b></p>
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**Reasons**

In applying this condition I have relied on information provided at Schedule E of the amended application.

Schedule E of the amended application states: *“to the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants.”*

There is no decision in Western Australia that holds that the Crown, in right of the State, wholly owns minerals, petroleum or gas.

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

<b>190B(9)</b> <b>(b)</b>	<p><i>Exclusive possession of an offshore place:</i></p> <p><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i></p> <p><i>(b) to the extent that the native title rights and interests claimed relate to waters in an offshore place – those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place;</i></p>
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**Reasons**

In applying this condition I have relied on the information at Schedule E of the application.

Schedule E states that the claim area does not include any offshore place.

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

<p><b>190B(9)</b> <b>(c)</b></p>	<p><b><i>Other extinguishment:</i></b></p> <p><b><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i></b></p> <p><b><i>(c) in any case – the native title rights and interests claimed have otherwise been extinguished (except to the extent that the extinguishment is required to be disregarded under subsection 47(2), 47A(2) or 47B(2)).</i></b></p>
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**Reasons**

In applying this condition, I have relied upon the information provided at Schedule B and Schedule D of the amended application.

Section 190B(9)(c) states that the Registrar must not otherwise be aware that 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).

The applicants state clearly in the following paragraph from Schedule B, that the claim excludes any area where native title rights and interests have otherwise been extinguished.

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

- (a) an act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or*
- (b) actual use made by the holder of a tenure other than native title which is permanently inconsistent with the continued existence of native title.*

To avoid uncertainty, the application also details some significant classes of tenure, which are to be excluded. The relevant tenure classes are detailed above in my S190B(2) reasons.

I am satisfied that this claim does not cover areas where native title rights and interests have otherwise been extinguished.

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

*End of Document*