

# Reason

Status: Publish on Web  
Date Published:  
Application Name: Dambimangari (Combined Application)  
Application (NNTT) No: WC96/3; WC96/74; WC99/7  
Application (Fed Crt) No: WAG6061/98; WAG6106/98; WAG6061/98  
State: WA  
Region: North West  
Date Application Made: 15/01/96, 24/06/96, 27/04/99  
Date Registration Test: 27/05/99  
Decision made:  
Decision: Accepted

**PDF**

**RTF**

## Brief history of the decision

The Kimberley Land Council, through solicitors Dwyer Durack, and on behalf of the applicants to 2 native title applications in the Kimberley Region of Western Australia, lodged amendments to existing native title determination applications on behalf of the applicants. An amended application seeking leave to amend the Dambimangari determination application was filed in the Federal Court on 9 April 1999. On 27 April 1999, the applicants filed in court a further amended application. District Registrar Jan made orders to combine the applications and amend the applications as requested by the applicants on 27 April 1999.

The Federal Court forwarded a letter and copy of an amended application for the combined claim to the Tribunal on 30 April 1999. That letter said that the Federal Court had made orders to combine applications and attached a copy of the 9 April 1999 application. On 13 May 1999 the Federal Court forwarded a letter to the Tribunal, and attached the 27 April 1999 amended application that was filed in court to District Registrar Jan.

On 19 May 1999 the Federal Court wrote to the Registrar and provided a further copy of the application and stated that the previous advice of 13 May 1999 that included a copy of the application did not include "Attachment B". The further copy of the application forwarded to the Registrar on 19 May 1999 does include this attachment. This is the copy of the application that I have considered in reaching my decision.

The two applications that have been combined are :

NNTT #.	Fed. Court #	Name	Date Lodged	Date Registered
WC96/3	WAG 6061/98	Dambimangari	15/1/96	15/1/96
WC96/74	WAG 6016/98	Kenny Oobagooma	24/6/96	24/6/96

## Information considered in making the decision

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

.. The Working Files, Registration Test Files and Federal Court Application and Amendment Files for claims WC96/3, WC96/74

.. Other tenure information acquired by the Tribunal in relation to the area covered by the this application;

.. Working files and related materials for native title applications that previously overlapped the area of the Dambimangari application.

- .. The National Native Title Tribunal Geospatial Database;
- .. The Register of Native Title Claims;
- .. The Native Title Register;
- .. Determination of Representative ATSI Bodies: their gazetted boundaries;
- .. Affidavits, State Government Submissions, Grantee Party Submissions, Applicant Statements of Contention, information by the Aboriginal Affairs Department and Determinations from Future Act Files where the future act matters related to any part of the area covered by this application;
- .. Submissions from the Western Australian State Government in relation to the two applications;
- .. Submissions from the Commonwealth Government in relation to the two applications
- .. Further submissions from the applicants representatives.

Note: Information and materials provided in the context of mediation have not been considered in making this decision due to the without prejudice nature of those conferences and the public interest in maintaining the inherently confidential nature of such conferences.

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

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

## Reasons for the Decision

### Map and External Boundaries

The application attaches a map (Attachment C) depicting the external boundaries of the claim area. The map has been prepared by the NN following a request for assistance from the KLC.

The map displays a list of co-ordinates to enable the position of sites or localities within them to be identified. In addition, it shows a scale allowing distances and areas to be ascertained and identifying pastoral leases and other tenure. A locality diagram, which indicates generally the position of the claim within Western Australia, forms part of the map provided. All the line work on the map is 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 provide a general description of the external boundary in Schedule B of the application together with a list of grid co-ordinate points at Attachment B.

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 15 April 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 are described at Schedule B(b). The description of the internal boundaries excludes a variety of classes of land tenure from the claim area, as set out below.

*Internal boundaries:*

(i) *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 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 s232.*

(ii) *The applicants exclude from the claim any areas in relation to which a previous exclusive possession act, as defined in section 23E 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 for that act as described in section 23E NTA 1993.*

(iii) *The applicants do not exclude from the claim Meda Location 15 (Commonwealth Military Training Area).*

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

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

*In particular the applicants exclude all:*

- (i) *acts for a public purpose;*
- (ii) *dedicated roads; and*
- (iii) *grants of unqualified freehold.*

(v) *The application is subject to the provisions of Sections 47, 47A and 47B of the Act as apply to any part of the area contained within the application, particulars of which will be provided prior to the hearing but which include such areas as listed in Schedule L.*

I consider that the statement at paragraph (iii) above indicates that the applicants are not seeking to exclude the area of Meda Location 15. The area of Meda Location 15 would otherwise have been excluded from the claim area as a result of the exclusion clause at paragraph (ii), paragraph (iii) confirms that the area is still under claim. However, I find that the exclusions listed at paragraph (iv) apply to the entire claim area, including Meda Location 15. In my view this is the most obvious interpretation of the applicants Schedule B.

The applicants have not identified, parcel by parcel, the areas of land and waters that are excluded from the claim area. In my view that is required to satisfy this condition.

I find that the map and description of the external boundary, together with the description of areas within that boundary excluded from the application, 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.

The application meets the requirements of this condition

S190B(3)

Identification of native title claim groups

Met

**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**

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

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. In the alternative, according to s.190B(3)(b), the application must otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

Schedule A of the application (page 1) describes the native title claim group. Schedule A states that:

*The claimant group comprises those people who hold in common the body of laws and customs derived from beliefs about Wanjina/Wunggurr. Those people are:*

- (a) *the descendants of [names deleted];*
- (b) *together with [names deleted], all of whom were adopted into the native title claimant group, and their descendants.*

The claim group description states that the group comprises those people who hold in common the body of law and custom derived from beliefs about Wanjina/Wunggurr. The description goes further and outlines two limbs of the description that group members come under. The claim group is (a) the descendants of a list of named people and (b) listed individuals and their descendants who were adopted into the group.

- (a) Biological descendants

A list of names is provided. In some cases only a first name is provided, eg. *[name deleted]*. In other instances two names are provided separated by a slash.

A facsimile from the applicants representatives dated 23/4/99, confirms that names separated by a slash indicate one person known by different names. I find there to be sufficient information to identify the apical ancestors.

I consider that it is possible to ascertain whether a person is a descendant of one of those named persons. I am satisfied this limb of the description is sufficient.

- (b) Adoption

The application names three people who have been adopted and who together with their descendants are included in the claimant group. It matters not how the three named individuals were adopted into the group. I consider that these three are easily identifiable and with minim inquiry, it can be established whether a particular person is a descendant of one of these three persons.

I am satisfied therefore that the overall description of the claim group is sufficiently clear to ascertain whether any particular person is in the group. The requirements of this condition have been met.

S190B(4) Identification of claimed native title Met

**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**

The description contained at Schedule E, describes the native title rights and interests as:

*“The native title rights and interests claimed 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 in particular comprise:*

- a) rights and interests 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 maintain and protect places of importance under traditional laws, customs and practises in the area; and*
- j) the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area.”*

*Subject to the following:*

- (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 Commonwealth or the State of Western Australia, they are not claimed by the applicants.*
- (ii) To the extent that the native title rights and interests claimed may relate to waters in an offshore place, those rights and interests do not to the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under international law in relation to the whole or any part of the 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 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 for that act as described in section 23E NTA 1993;*
- (iv) 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.*
- (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.*

In accordance with the requirements of 62(2)(d) the rights and interests claimed are not merely a statement to the effect they are all those rights and interests that may exist or that have not been extinguished at law. Each of the native title rights and interests claimed is readily identifiable.

In addition, I note that the applicants have sought to limit the claimed native title rights and interests. Essentially, the limitation qualifies the applicants' claim to exclusive possession of the claim area where such a claim cannot be made. I find that these limitations extend to the whole of the claim area, including the area described as Meda Location 15. The effect of the limitation is that the claimed rights and interests are not inconsistent with the validly granted rights and interests of others with respect to the claim area.

I am satisfied that all of the claimed native title rights and interests listed can be readily identified from the description provided.

S190B(5)

Factual basis for claimed native title

Met

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**



The factual basis for the assertion that the native title rights and interests claimed exist is to be found in Schedule F of the amended application. I have already referred to this in my reasons for decision in relation to section 62 (2)(e) above. In considering the sufficiency of that factual basis under section 190B(5), I am entitled to look at further information provided by the applicant, and to consider any information adverse to that factual basis which is held by the Tribunal. Schedule F of the application is as follows :

*The factual basis of the claim is as follows:*

(a) *The native title rights and interests are those of and flowing from the right to possession, occupation, use and enjoyment of the land and waters pursuant to the traditional laws and customs of the claim group based upon the following facts:*

(i) *the native title claim group and their ancestors have, since the assertion of British sovereignty, as can be inferred from the combined living memory of the claimant group as to the fact that they have possessed, occupied, used and enjoyed the claim area; and*

(ii) *such possession, occupation, use and enjoyment has been pursuant to and under the laws and customs of the claim group, comprising rights and interests in land and waters which the traditional laws and customs vest in members of the native title claim group on the basis of*

a. *descent from ancestors connected to the area;*

b. *conception in the area;*

c. *birth in the area;*

d. *traditional religious knowledge of the area;*

e. *traditional knowledge of the geography of the area;*

f. *traditional knowledge of the resources of the area;*

g. *knowledge of traditional ceremonies of the area.*

(iii) *such traditional laws and customs have been passed by traditional teaching, through the generations preceding the present generations to the present generations of persons comprising the native title claim group;*

(iv) *the native title claim group continues to acknowledge and observe those traditional laws and customs;*

(iv) *the native title claim group by those laws and customs have a connection with the land in respect of which the claim is made;*

(vi) *the rights and interests are capable of being recognised by the common law of Australia*

The evidence that I have found to be probative in making my decision in relation to this condition is as follows :

.. Information contained in the amended application;

.. Affidavits from [names deleted]. Each of these affidavits were sworn on 29 March 1999, and witnessed by Peta R Smallshaw J.P.

I have also reviewed information provided by the State of Western Australia and others in future act matters concerning the area of the claim. However, this information was of little assistance.

Section 190B(5) requires that I be satisfied that there is sufficient factual basis to support three specific assertions.

**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(a)(i) of the amended application, the applicants state that the native title claim group and their ancestors have, since the assertion of British sovereignty possessed, occupied, used and enjoyed the claim area. The following members of the native title claim group provided evidence of both their association, and their predecessors association, with the area.

The affidavits of [names deleted] [sensitive and cultural information deleted].

The affidavit of [name deleted] [sensitive and cultural information deleted].

The affidavit of [names deleted],[sensitive and cultural information deleted].

The affidavit of [names deleted], [sensitive and cultural information deleted].

The affidavit of [name deleted], [sensitive and cultural information deleted]. The affidavit goes on to talk about his association to the country extensively

S190B(6)

Prima facie case

Met

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 s190B6 I must consider that, prima facie, at least some of the rights and interests claimed can be established. In deciding which native title rights and interests claimed can be prima facie established I have relied on the following information :

- .. Information contained in the amended application;
- .. Affidavits from [names deleted]. Each of these affidavits were sworn on 29 March 1999, and witnessed by [name deleted] J.P.

I have also reviewed information provided by the State of Western Australia and others in future act matters concerning the area of the claim. However, this information was of little assistance.

The native title rights and interests claimed are described at Schedule E of the application. I have quoted this description in my reasons for decision in relation to s.190B(4). I note that the applicants have limited the native title rights and interests claimed in respect of the valid rights and interests of others. This qualification is significant when considering the prima facie establishment of the claimed native title rights and interests.

I must decide whether or not in law and fact each of the particular native title rights and interests claimed in Schedule E of the amended application is *prima facie* capable of being established.

Each of the rights and interests claimed in Schedule E are known to the common law and are capable of proof by native title claimants. I note that item (a) uses similar terminology to that used in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, and that rights (b) to (j) appear to be adapted from the order of Justice Lee in *Ward v State of Western Australia* (1998) 159 ALR 483, at 639-670.

I consider that the following native title rights and interests claimed in the application can be prima facie established. I refer to examples of evidence that prima facie support the claimed native title rights and interests, [also note the evidence outlined in my reasons for decision at 190B(5) and (7)]:

**a) *Rights and interests to possess, occupy, use and enjoy the area***

[name deleted] outlines some of the past and current use and enjoyment of the area including hunting and camping. He provides details of living in the claim area and travelling around [sensitive and cultural information deleted]. The affidavits of each of the applicants support a prima facie right to possess, occupy, use and enjoy the claimed area. I also note that there are a number of Reserves for the Use and Benefit of Aborigines that are used by the applicant group. [name deleted] [sensitive and cultural information deleted]. In some areas, such as Meda Location 15, the rights and interests are subject to the rights and interests of others. Consequently, the rights to possess and occupy may apply to the entire area of the application. I am not required to identify the particular areas of the claim area where rights and interests have been limited.

**b) *the right to make decisions about the use and enjoyment of the area;*** Affidavits from the claim group establish a right to make decision about the use and enjoyment of the area in accordance with traditional law and custom. [name deleted] in paragraph 8 of [pronoun deleted] affidavit tells of [sensitive and cultural information deleted].

**c) *the right of access to the area;***

All of the affidavits refer to areas of the claim area that they regularly access. I also note that there are a number of Reserves for the Use and Benefit of Aborigines that are used by the applicant group. [name deleted] [sensitive and cultural information deleted]. I am satisfied that the affidavit material clearly sets out a prima facie right to access the area.

**d) *the right to control the access of others to the area;*** [name deleted] states that [sensitive and cultural information deleted]. I am satisfied on the basis of the information before me that the right to control the access of others to the area can be established. I note that it may be found (by the courts) that this right does not extend to all areas of the claim area.

**e) *the right to use and enjoy resources of the area;*** many references are made to use of resources in the area, including fishing stingray dugong and turtle, hunting crocodile and kangaroo and gathering yam, sugarbag and turtle eggs. [name deleted] [sensitive and cultural information deleted].

**f) *the right to control the use and enjoyment of others of resources of the area;*** In my view this right can be established on a prima facie basis, for the reasons described above concerning the rights to control access of others to the area and the right to make decisions about the use and enjoyment of the area. I have also considered the affidavit of [name deleted], [sensitive and cultural information deleted]. I am satisfied on the basis of the information before me that the right to control the use and enjoyment of others of resources of the area can be established on a prima facie level. I note that it may be found (by the courts) that this right does not extend to all areas of the claim area.

**g) *the right to trade in resources of the area,*** [name deleted] [sensitive and cultural information deleted]. I consider this information to be sufficient for me to be satisfied that this right can be established on a prima facie level.

S190B(7) Physical connection Met

**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 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 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 holder of a lease.*

### Reasons for the Decision

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

The Registration Test Statement from the applicants at paragraph 6 states:

*“[names deleted] who are members of the native title claim group, during their lifetime have had a traditional physical connection with the area the subject of the application.*

As indicated in my reasons above, I have read the affidavit evidence of these people. As I must only be satisfied that one member of the claim group has or previously had a traditional physical connection with any part of the land claimed, I will only make a finding in relation one of those people identified, *[name deleted]*. I am also satisfied that *[names deleted]*, also have a traditional physical connection to the claim area. However as I need only be satisfied that one person in the claim group holds the requisite connection, I will only set out my reasons in relation to *[name deleted]*, as an example.

The affidavit of *[name deleted]*, states that *[pronoun deleted]* lives at *[sensitive and cultural information deleted]*.

In his affidavit *[name deleted]* *[sensitive and cultural information deleted]*.

Based on the affidavit before me, I am satisfied that *[name deleted]* currently has and previously had a traditional physical connection with part of the claim area. The application meets this test condition.

S190B(8) No failure to comply with section 61A Met

**190B(8)** *No failure to comply with s61A:*

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

**Reasons for the Decision**

In order to satisfy this condition of the registration test, the applicants must not make claim to areas of land that are forbidden by s.61A.

**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 the application.

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

In Schedule B of the application, at paragraph (b)(ii):

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 for that act as described in section 23E NTA 1993.

A full reproduction of Schedule B of the application is contained in my reasons for decision in relation to 190(B)(2).

The State Government made submissions on 21 December 1998, in relation to the pre combination applications (WC96/3 and WC96/74). In the submission for WC96/3 the State says that the numerous reserves within the claim area have most likely been subject to exclusive possession acts such as public works. I am satisfied that the exclusions contained at Schedule B of the application have removed from the application any areas that contain previous exclusive possession acts attributable to the State or the Commonwealth.

However, one part of the claim area requires special consideration in relation to this condition, Meda Location 15. The application specifically seeks to include this area in the claim boundaries, Schedule B of the application, at paragraph (b)(iii):

(iii) The applicants do not exclude from the claim Meda Location 15 (Commonwealth Military Training Area).

Tenure information that was provided to the Tribunal by the Western Australian State Government of 21 December 1998, indicates that the land tenure of Meda Location 15 is Freehold vested in the Commonwealth of Australia.

A submission from the Australian Government Solicitor on behalf of the Commonwealth of Australia, of 29 January 1999, outlines the Commonwealth's view that any native title in relation to the land subject to CT1545/970 would have been validly extinguished by the compulsory acquisition. The Commonwealth's view is that the compulsory acquisition was valid and the past act provisions of the NTA not apply. The Commonwealth states that :

*“On publication in the Gazette of the declaration of acquisition the land was vested in the Commonwealth free from all other interests (section 10(4) of the 1955 Act [Lands Acquisition Act 1955]). All other interests encompass both native title and non-native title interests in relation to the claim.”*

I note that the Commonwealth's submission refers to Meda Location 15 and then refers to the area as CT1545/970.

On 1 February 1996, in a Statement of Contentions in relation to future act matter WO96/9, the State of Western Australia stated that Meda Location 15 was freehold land owned by the Commonwealth and contended that native title rights and interests have been extinguished. The State Government's submission does not outline any reasons for its contention.

Submissions were made on behalf of the applicants with respect of Meda Location 15 on 21 April 1999, 23 April 1999, and 7 May 1999. The key arguments that the applicants submissions make appear in the following extracts :

*21 April 1999, para 7 “The compulsory acquisition being unlawful, for the reasons set out above, is invalid, but would have been valid if native title did not exist. It therefore, comes within the definition of a past act under the Native Title Act 1993(Cth), s.228(2)(a)(ii) and (b). It is not within the definitions of category a past act, Category B past Act or Category C past act. It, therefore falls into the definition of a Category D past act (Native Title Act 1993 (Cth), ss 229, 230, 231 and 232). The non extinguishment principle applies to a Category D past act (NTA s15(1)(d)). The effect of the non extinguishment principle is that –*

*(a) though the compulsory acquisition may affect native title it is not extinguished and the native title claim group continue to hold that native title (NTA s238(2) and (5));*

*(b) the rights and interests of the native title have no effect to the extent of the inconsistency of their enjoyment or exercise of rights consistent with the compulsory acquisition.(NTA s.238(4)).*

*In the instant case the acquisition for occasional use as a military training base is consistent with the continued exercise and enjoyment of native title rights and interests at times when, and places where, it does not interfere with a co-existing use for military training purposes. The addendum to the Environmental Impact Statement of the Department of Defence (August 1976) (“Addendum”) at par 1.1.b. and 1.2 acknowledges that “continued access to the training area by aborigines” is a possibility worthy of “continued consultation with the aboriginal people concerned” “*

S190B(9)

No extinguishment etc. of claimed native title

Met

190B(9)

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

(a)

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

*(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;*

#### Reasons for the Recommendation

Schedule E, paragraph (i) of the application states: "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 this statement ensures that the application complies with the requirements of S190B(9)(a). I am not otherwise aware of any intention to claim ownership of minerals, petroleum or gas wholly owned by the Crown.

190B(9)

*Exclusive possession of an offshore place:*

(b)

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

*(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

The application covers areas of waters that might be considered to be an offshore place.

Schedule E, paragraph (ii) of the application states: "To the extent that the native title rights and interests claimed may relate to waters in an offshore place, those rights and interests are not to the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under international law in relation to the whole or any part of the offshore place."

I am satisfied that this statement ensures that the application complies with the requirements of S190B(9)(b). I am not otherwise aware of any intention of the applicants to claim native title rights and interests to the exclusion of other validly created rights and interests in any offshore place.

- 190B(9)**
- Other extinguishment:*
- (c) *The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that 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

At Schedule B, paragraph (b)(iv) the application states:

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

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

In particular the applicants exclude all :

- (i) Acts for a public purpose;
- (ii) Dedicated roads; and
- (iii) Grants of unqualified freehold

This general exclusion clause covers any areas that may otherwise have extinguished native title rights and interests, and yet have not been specifically excluded or otherwise removed from the claim area.

The applicants have stated at paragraph (b)(iii) of Schedule B, that the area of Meda Location 15 is included in the claim area. I note that tenure information provided by the State Government indicates that this area is freehold. The applicant's submissions argue [refer to my reasons for decision in respect of condition 190(B)(8)] that the native title rights and interests have not been extinguished generally in the area by the acquisition and grant of Meda Location 15. I am satisfied that the area of Meda Location 15 is not an area where native title rights and interests have been extinguished. My reasons for being so satisfied are contained at my reasons for decision in relation to s.190B(8).

There may be areas within the external boundary of Meda Location 15, and the application boundaries generally, where on certain portions land native title rights and interests have otherwise been extinguished. It appears that even if areas of the type prohibited by this section (s190B(9)(c)) are located within the external boundary of the area of the amended application, such areas have been excluded from the claim area by virtue of Schedule B paragraph (b)(iv).

I am satisfied that the application meets the requirements of section 190B(9)(c).

S190C(2) Information etc required by sections 61 & 62 Met

*Information, etc, required by section 61 and section 62:*

- 190C(2)** *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**

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

Reasons relating to this sub-condition

Page 1 of the amended application identifies the names of the 7 applicants and the address for service is detailed at page 10 of the amended application.

Application passes the condition.

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

Reasons relating to this sub-condition

The amended application describes the native title claim group at Schedule A. 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.

Application passes the condition.

**61(5) Application is in the prescribed form** 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, **lodged in the Federal Court, contain prescribed information** 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)", **and accompanied by prescribed documents and fee**

Reasons relating to this sub-condition

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

As required under section 61(5)(b), the amended application was filed in the Federal Court. As detailed above, the application is a combination of 2 applications. Each of the pre-combination applications is taken to have been made to the Federal Court in accordance with Schedule 5, Part 3, item 6, case 3.

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

As required by section 61(5)(d) the application is accompanied by affidavits as prescribed by section 62(1)(a). I refer to my reasons for recommendation in relation to that section of the Act; and a map as prescribed by sections 62(1)(b). I refer to my reasons for recommendation in relation to section 62(2)(b) of the Act.

I note that section 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) are met.

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

##### **62(1)(a) Affidavits address matters required by s62(1)(a)(i) – s62(1)(a)(v)**

Reasons relating to this sub-condition

Each of the seven applicants has affirmed an affidavit, identical in content, in order to address the matters required by s62(1)(a)(i) – s62(1)(a)(v). The seven affidavits are appended to the application.

The affidavits of [names deleted] were signed on 30 March 1999 at Derby. All seven affidavits were witnessed by a Justice of the Peace.

The affidavits meet the requirements of s62(1)(a)(i) to s62(1)(a)(iii), at paragraphs 1, 2, 3 of the affidavits respectively.

Paragraph 4 of the various affidavits state :

*“I am authorised to make and deal with matters arising in relation to the application pursuant to the process of decision making that the persons in the native title claim group have also agreed to and adopted in relation to authorising making of the application and dealing with matters and in relation to doing things of that kind.”*

The above statement does not mirror the words required by s.61(1)(a)(iv), in that it does not say explicitly say that: *applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it.* However, I find that the combination of words at the beginning of paragraph 4, that the applicants are authorised, and the words further on referring to the persons in the native title claim group, are sufficient to satisfy the condition.

In view of the fact that paragraph 4 concurs with the definitions specified in s251B(b) concerning what is required in order to be ‘authorised by all the persons in the native title claim group’, subparagraph s62(1)(a)(v) is also satisfied.

The application complies with the requirements of this subsection.

**62(1)(c) Details of any traditional physical connection (information not mandatory)**

Comment on details provided

Some details of traditional physical connection are provided in the application at Schedule G, which identifies some of the activities that members of the native title claim group carry out.

There is also additional information provided by way of affidavits by six of the applicants, which outlines the traditional physical connection of those individuals.

Paragraph 6 of the applicants' registration test statement regarding physical connection states:

*[names deleted] who are members of the native title claim group, during their lifetime have had a traditional physical connection with the area the subject of the application. Affidavits of those claimants to that effect are annexed.*

I have referred to this information in more detail in my reasons for decision in relation to test conditions 190B5, 190B6 and 190B7.

Although it is not mandatory for the applicants to meet this condition, I am satisfied that on the basis of the information provided the condition is met.

**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

Schedule B identifies the boundaries of the application. The external boundaries of the application are described in the following ways :

1. A written description is provided at Schedule B(a). The written description provides a narrative description of the external boundary including various grid reference points.
2. The written description at Schedule B(a) refers to geographic coordinates of the claim area which the applicants says are set out at Attachment B.
3. The written description at Schedule B(a) refers to a map attached to the application at Attachment C. The map includes a scale, bearings, recognised land marks such as bays, islands, towns, rivers, pastoral leases and tenure. All the line work on the map is finely drawn and easy to follow. The bottom right hand corner of the map shows the general locality of the claim area within Western Australia. The map was produced by NNTT on 14 April 1998 as assistance applicants pursuant to s.78 of the NTA.

The written description at Schedule B, the geographic coordinates, and the map at Attachment C are each consistent and describe the area of the application with certainty. Refer to my reasons for decision in relation to s.190B(2). I am satisfied that the information provided in the application identifies the boundaries of the area covered by the applicants.

The application meets the requirements of this condition. See also my reasons for decision provided under s190B(2).

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

Reasons relating to this sub-condition

At Schedule B(b) of the application (page 2) there is a description of the internal boundaries of the application. The applicants have excluded certain types of land tenure from the claim area. I have outlined the content of Schedule B of the application in my reasons for decision in relation to test condition 190B(2).

The applicants have not identified, parcel by parcel, the areas of land and waters that are excluded from the claim area. In my view this is not required to satisfy this condition.

The internal boundaries are described by way of identifying classes of land tenure that are not covered by the application. The description of areas excluded can be objectively applied to establish whether any particular area of land or waters within the external boundary of the application is within the claim area or not.

I am satisfied that the information provided in the application identifies the areas within the external boundary that are not covered by the application, for the reasons contained in my reasons for decision in respect of registration test condition 190B(2).

At Schedule B(b) of the application (page 2) there is a description of the internal boundaries of the application. The applicants have excluded certain types of land tenure from the claim area. I have outlined the content of Schedule B of the application in my reasons for decision in relation to test condition 190B(2).

The applicants have not identified, parcel by parcel, the areas of land and waters that are excluded from the claim area. In my view this is not required to satisfy this condition.

The internal boundaries are described by way of identifying classes of land tenure that are not covered by the application. The description of areas excluded can be objectively applied to establish whether any particular area of land or waters within the external boundary of the application is within the claim area or not.

I am satisfied that the information provided in the application identifies the areas within the external boundary that are not covered by the application, for the reasons contained in my reasons for decision in respect of registration test condition 190B(2).

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

Reasons relating to this sub-condition

A map is attached to the application at Attachment C. See reasons provided under s190B2.

Application passes the condition.

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

Reasons relating to this sub-condition

The requirements of s62(2)(c) can be read widely to include all searches conducted by any person or body. However, it is my view that I need only be informed of searches conducted by the applicant, in order to be satisfied that the application complies with this condition. It would be unreasonably onerous to expect applicants to have knowledge of and obtain details about all searches carried out by every other person or body.

The application states at Schedule D, that Attachment D contains all details and results of all searches. Attachment D contains a copy of tenure information which appears identical to the tenure information provided by the State Government. Copies of leases are also provided.

I consider that the applicants have provided all details of searches that they are aware of in relation to the area of the application. The application complies with this condition.

**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 Schedule E (page I have outlined these rights and interests claimed in my reasons for decision in relation to s.190B(4).

Application passes the condition.

**62(2)(e)(i) Factual basis – claim group has, and their predecessors had, and association with the area**

Reasons relating to this sub-condition

The application outlines the factual basis for the assertion that the native title claim group has and their predecessors had, an association with the area, at Schedule F, (page 5 and 6) of the application. Affidavits of the applicants supply further detailed information in relation to their association with the claim area.

I am satisfied that the application sets out a general description of the factual basis on which the asserted native title rights and interests claimed exist. This matter is tested further in relation to s.190B5.

The application complies with this condition.

**62(2)(e)(ii) Factual basis – traditional laws and customs exist that give rise to the claimed native title**

Reasons relating to this sub-condition

The application outlines the factual basis for the assertion that traditional laws and customs exist that give rise to the claimed native title, at Schedule F, (page 5 and 6) of the application. Affidavits of the applicants supply further information in relation to the existence of traditional laws and customs.

I am satisfied that the application sets out a general description of the factual basis on which the asserted native title rights and interests claimed exist. This matter is tested further in relation to s.190B5.

The application complies with this condition.

**62(2)(e)(iii) Factual basis – claim group has continued to hold native title in accordance with traditional laws and custom**

Reasons relating to this sub-condition

The application outlines the factual basis for the assertion that the native title claim group has continued to hold native title in accordance with traditional laws and customs, at Schedule F, (page 5 and 6) of the application. Affidavits of the applicants supply further detailed information in relation to the existence of traditional laws and customs that give rise to the claimed native title.

I am satisfied that the application sets out a general description of the factual basis on which the asserted native title rights and interests claimed exist. This matter is tested further in relation to s.190B5.

The application complies with this condition.

**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

The application provides general details of activities that the native title claim group carries out in relation to the area claimed, at Schedule G (page 6).

I consider that the activities that the group carries out in the claim area are described by Schedule G. In my view the description of activities is sufficient to comply with the requirements of 62(2)(f).

Application passes the condition.

**62(2)(g) 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)**

Reasons relating to this sub-condition

Schedule H (page 7) of the amended application states:

*The applicants are not aware of the details of any other applications to the High Court, Federal Court or recognised State/Territory body that have been made in relation to the whole or a part of any area covered by this application and that seek a determination of native title or compensation in relation to native title.*

I am satisfied that there are no native title applications that overlap the area of this amended application. See my reasons in relation to test condition s.190C(3). The application complies with this condition.

Application passes the condition.

**62(2)(h) Details of any S29 Notices (or notices given under a corresponding State/Territory law) in relation to the area and the applicant is aware of**

Reasons relating to this sub-condition

Schedule I of the amended application lists the s29 notices that were advertised in the West Australian on 9 December 1998 that triggered the registration test for this application.

I am aware of two s.29 notices that the applicant may be aware of that were not included in the list at Schedule I. These are s.29 notices associated with future act matters WO96/8 and WO96/9. Both of these future act objection applications were made on behalf of [name deleted] and others. [name deleted] is one of the applicants to this application. As WO96/8 relates to an area within Meda Location 15, I am aware that the area of the future act notice is within the amended claim area.

The intention of s.62(2)(h), I believe, is to identify s.29 notices lodged post commencement of the amended NTA. In order to meet this condition it is necessary for the applicants to supply details of s.29 notices since 30 September 1996. As the applicants have provided all known s.29 notices since 30 September 1998, the application complies with this condition.

If I am wrong and the condition requires the applicants to provide details of all known s.29 notices since the commencement of the NTA, then I would need to consider whether the applicants have a knowledge of the s.29 notice associated with the objection applications that were lodged on 12 January 1996. Both matters were withdrawn by the KLC in April 1996. It is not possible for me to know for certain whether the objecting applicant, [name deleted], is currently aware of these s.29 notices, taking account of the time since the objection applications were lodged and the seemingly minimal impact the applications had.

Application passes the condition

## Reasons for the Decision

The application meets the requirements of s 190C(2), for the reasons detailed above.

S190C(3) No previous overlapping claim groups

*Common claimants in overlapping claims:*

**190C(3)** *The Registrar must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:*

- (a) the previous application covered the whole or part of the area covered by the current application; and*
- (b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made; and*
- (c) the entry was made, or not removed, as a result of consideration of the previous application under section 190C(3).*

## Reasons for the Decision



A search of the Tribunal's Geospatial database which incorporates the recent amendments to applications in the Federal Court reveals that there are no overlapping applications for the Dambimangari application.

Prior to recent amendments in the Federal Court there were 2 applications identified as overlapping the Dambimangari application Ngariny and Mayala.

1. Ngarinyin (WC95/23) was amended on April 1999. The amended boundary of Ngarinya was reduced in size and consequently it no longer overlaps the amended Dambimangari application.
2. Mayala (WC98/39). The recent amendments to the Dambimangari application (27 April 1999), moved the western boundary of the Dambimangari application so that the application is reduced in size and no longer overlaps the Mayala claim.

I note that in the submission made by the Crown Solicitors Office dated 21 December, 1998 the State says that at 25 November 1998 there were two overlapping claims, being WC95/23 and WC98/39. The Crown Solicitors Office wrote again on 6 May 1999. That letter says that the State has noted that [name deleted] is included in the claim group for WC96/3 and also WC98/39. Further the State understands that there is an overlap of the respective claim application areas for WC96/3 and WC98/39.

However, given the amendments referred to above, I am satisfied that the Dambimangari combined application is not overlapped by any of the native title determination applications, including WC98/39. Therefore, I am not required to consider this condition further.

This condition is met.

S190C(4)      Identity of claimed native title holders      Met

*Certification and authorisation:*

**190C(4)(a)**      *The Registrar must be satisfied that either of the following is the case:*

**and**      *(a) the application has been certified under paragraph 202(4)(d) by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part; or*

**190C(4)(b)**      *(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.*

**Reasons for the Decision**

In order to meet this condition I must be satisfied that the application has been certified by each representative body that could certify the application, or be satisfied that the applicants have been authorised, the test of which is outlined at s190C(5).

### **Certification**

The Kimberley Land Council (KLC) forwarded the Tribunal a certificate pursuant to s.202(7)(a) of the NTA on 1 April 1999.

There are two Native Title Representative Bodies, gazetted 30 December 1993, that cover part of the area of this application.

1. The Aboriginal Legal Service (ALS) is the representative body for “the whole of the State of Western Australia”; and
2. the KLC is a determined representative body for “The area bounded on the east by the Western Australian/Northern Territory border (longitude 129 East) on the South by Latitude 22 South and on the West and North by the Western Australian coastline, and known as the Kimberley region.”

To be certified, it is necessary that both the KLC and ALS certify the application pursuant to s.190C(4)(a). In this instance only a certificate from the KLC has been received, and no certificate from ALS has been provided.

Where there are overlapping representative body boundaries, s.190C(6) allows certification by only one of those representative bodies in certain circumstances. For the application to meet this limb of the condition, a certificate from ALS would not be required if :

- .. the KLC has certified the application; and
- .. the KLC area includes all of the land or waters, to which the application relates, that is within the ALS’ area.

The map of the Dambimangari application clearly shows that the application extends into the Indian Ocean at some points. The KLC boundary extends only to the Western Australian coastline, whereas the ALS boundary extends to the whole of the State of Western Australia. The boundary of the State is the low water mark, but includes internal waters seaward of the coastline. Whereas the KLC boundary, being the coastline, does not include those internal waters. An example is the waters of Doubtful Bay, which appear to be included within the ALS’ determined boundary as it is likely to be internal waters of the State, yet those waters are likely to be outside the KLC boundary as they are West of the coastline of Western Australia.

I consider that the ALS boundary covers a larger portion of the claim area than the KLC boundary. Consequently, it is not possible for the KLC to certify the application pursuant to s.190C(4)(a) and s.190C(6) without a certificate provided by the ALS. I find that the application does not meet the requirements of s.190C(4)(a).

### **Authorisation**

In the alternative, the application may satisfy s.190C(4), by meeting the requirements of s.190C(4)(b). In order for s.190C(4)(b) to be met must be satisfied that the application satisfies s.190C(5).

I am satisfied that the applicants are all 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 members of the native title claim group. My reasons for reaching this finding, are contained in my reasons for decision in relation to s.190C(5).

The application meets this condition.