

National Native Title Tribunal
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 REGISTRATION TEST
 REASONS FOR DECISION

DELEGATE	Malcolm O'Dell		
DATE	15 September 1999		
Application Name	Harris Family		
Name of Applicant	Minnie Van Leeuwen		
Region	South West WA	NNTT No	Federal Crt No
Date Application Made	WAG-6085/98	WC96/41	03/04/96

Brief History of the application

This application was lodged with the National Native Title Tribunal on 3 April 1996

The application was amended by order of the Federal Court on 19 August 1999.

All references to the 'amended application' in the present decision, unless otherwise stated, refer to the application as most recently amended.

All legislative references are to the Native Title Act unless otherwise specified.

Information considered when making the Decision

Under Table A schedule 5 of the Native Title Act [see specifically Part 4 – 11(8)], in determining this application, where applicable 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, Legal Services Files and Federal Court Application and Amendment Files for this claim WC96/41 – Harris Family and overlapping claims WC98/42- Isaacs, WC98/63 –South West Boojarah, WC98/58 - Gnaala Karla Booja.
- Tenure information in relation to the area covered by this 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
- Submissions from the Western Australian State Government

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.

A. Procedural Conditions

190C2	<p>Information, etc, required by section 61 and section 62:</p> <p><i>The Registrar must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.</i></p>
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Details required in section 61

61(3)	<i>Name and address for service of applicant</i>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. Name of the applicant given at page 1 of the amended application. 2. Address for service of the applicant given at Part B of the amended application. 3. This satisfies the requirements of s.61(3). 	

61(4)	<i>Names persons in native title claim group or otherwise describes the persons so that it can be ascertained whether any particular person is one of those persons</i>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. For the reasons given at s190B(3) the application satisfies this condition. 	

61(5)	<i>Application is in the prescribed form, lodged in the Federal Court, contain prescribed information, and accompanied by prescribed documents and fee</i>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. The application is in the form prescribed by Regulation 5(1)(a) Native Title (Federal Court) Regulations 1998. 2. As required under section 61(5)(b), the amended application was filed in the Federal Court. 3. The application meets the requirements of section 61(5)(c) and contains all information as prescribed in section 62. See reasons for decision in relation to those sections. 4. As required by section 61(5)(d) the application is accompanied by: <ul style="list-style-type: none"> • One affidavit as prescribed by section 62(1)(a) (see reasons for decision in relation to that section) • A map as prescribed by sections 62(1)(b) (see reasons for decision in relation to section 62(2)(b)) 5. The original application was fee exempt. 6. For the reasons outlined above, the requirements of s.61(5) are met. 	

Details required in section 62(1)

62(1)(a)	<i>Affidavits address matters required by s62(1)(a)(i) – s62(1)(a)(v)</i>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. The applicant has provided an affidavit in the prescribed form and addressing the matters required by s62(1)(a)(i) – s62(1)(a)(v). 2. The requirements of s.62(1)(a) are met. 	

62(1)(c)	<i>Details of physical connection (information not mandatory)</i>
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Comment on details provided	
<ol style="list-style-type: none"> 1. No specific details provided. 	

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

62(2)(a)(i)	<i>Information identifying the boundaries of the area covered</i>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. A technical description, sufficient for the area covered by the application to be identified, is provided at Schedule B, Attachment B2 of the amended application. 2. For the reasons given at s.190B(2), this description satisfies s.62(2)(a)(i). 	

62(2)(a)(ii)	<i>Information identifying any areas within those boundaries which are not covered</i>
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Reasons relating to this sub-condition	Application passes the condition
<p>Information identifying the 'internal boundaries' of the application is given at Schedule B, (c) 'Internal boundaries', of the amended application in the following terms:</p> <p>(c) Internal Boundaries:</p> <p>(1) The applicant excludes 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 the Titles Validation Act 1994, as amended, at the time of the Registrar's consideration:</p> <ul style="list-style-type: none"> • Category A past acts, as defined in s 228 and s229 of the Native Title Act 1993; • Category A intermediate period acts as defined in s 232A & s232B of the Native Title Act 1993. • Category A intermediate period acts as attributable to the State (s12A Titles Validation Amendment Act 1999(WA)). <p>(2) The applicant excludes from the claim any areas in relation to which a previous exclusive possession act, as defined in section 23B of the Native Title Act 1993, 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.</p>	

- (3) The applicant excludes 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 which is permanently inconsistent with the continued existence of native title,

To avoid any uncertainty, the applicant excludes from the claim areas the tenures set out in Attachment B3.
Attachment B3

B3.1 An unqualified grant of an estate in fee simple;

B3.2 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 Worker's 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 s. 117 of the Land Act 1933 (WA); or

B3.3 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.

B3.4 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;

B3.5 A Perpetual Lease currently in force under the War Service Land Settlement Scheme Act 1954;

B3.6 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 section 251D of the *Native Title Act 1993*.

B3.7 An existing public road or street used by the public including any dedicated roads.

- (4) Paragraphs (1) to (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.

2. For the reasons given at s.190B(2) the application passes this condition.

62(2)(b)	<i>A map showing the external boundaries of the area covered by the application</i>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. The amended application at Schedule C, Attachment B1, includes a map showing the external boundaries of the area covered by the application. 2. For the reasons given at s.190B(2), the application passes this condition. 	

62(2)(c)	<i>Details/results of searches carried out to determine the existence of any non-native title rights and interests</i>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. In Schedule D, the application states that the applicants are aware that searches have been carried out. 2. In Attachment D the applicants have supplied further information of searches carried out by the State and Commonwealth Governments which meet the requirements of this condition. 3. The application passes this condition. 	

62(2)(d)	Description of native title rights and interests claimed	
Reasons relating to this sub-condition	Application passes the condition	
	<p>1. The amended application at Schedule E contains a description of the native title rights and interests claimed in respect of the area claimed.</p> <p>2. The native title rights and interests claimed are the rights together with other Noongar people who are native title holders to the possession, occupation, use and enjoyment as against the whole world (subject to any shared right of exclusivity) of the area and any right or interest included within the same, and in particular, comprise:</p> <ul style="list-style-type: none"> (a) The right 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 live on and erect residences and other infrastructure on the land and gather material necessary for the same; (f) the right to hold meetings and ceremonies on and concerning the land, water and resources of the area; (g) the right to use and enjoy resources of the area; (h) the right to control the use and enjoyment of others of resources of the area (i) the right to maintain and protect places of importance under traditional laws, customs and practices in the area; (j) the right to rear and teach children on the area; and (k) the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area. <p>Subject to:</p> <ul style="list-style-type: none"> 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 applicant. ii. 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. iii. The applicant does 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: <ul style="list-style-type: none"> a) a previous non-exclusive possession act, as defined in section 23F of the Native Title Act 1993, 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 including the Titles Validation Act (WA) as amended by the Titles Validation Amendment Act (WA) 1999 has made provision as mentioned in section 231 in relation to the act; b) a valid non-exclusive tenure exists which at common law permanently affects the rights or interests of native title holders to possess, occupy, use or enjoy the area subject to that tenure to the exclusion of all others. 	

<p>iv. Paragraph (iii) above is subject to such of the provisions of sections 47, 47A and 47B of the NTA as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing;</p> <p>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 of the State or a law of the Commonwealth.</p>
<p>3. This description satisfies s.62(2)(d)</p>

62(2)(e)(i)	<i>Factual basis – claim group has, and their predecessors had, an association with the area</i>
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Reasons relating to this sub-condition	Application passes the condition
<p>1. A general description of the factual basis for the assertion that the claim group has, and their predecessors had, an association with the area is given at Schedule F, of the amended application.</p> <p>2. This description satisfies s.62(2)(e)(i)</p>	

62(2)(e)(ii)	<i>Factual basis – traditional laws and customs exist that give rise to the claimed native title</i>
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Reasons relating to this sub-condition	Application passes the condition
<p>1. A general description of the factual basis for the assertion that traditional laws and customs exist that give rise to the claimed native title is given at Schedule F of the amended application.</p> <p>2. This description satisfies s.62(2)(e)(ii)</p>	

62(2)(e)(iii)	<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	Application passes the condition
<p>1. A general description of the factual basis for the assertion that the claim group has continued to hold native title in accordance with traditional laws and customs is given at Schedule F of the amended application.</p> <p>2. This description satisfies s.62(2)(e)(iii)</p>	

62(2)(f)	<i>If native title claim group currently carry on any activities in relation to the area claimed, details of those activities</i>
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Reasons relating to this sub-condition	Application passes the condition
<p>1. Details of activities currently carried out by the claimant group in relation to the area claimed are included at Schedule G of the amended application.</p> <p>2. These details satisfy s.62(2)(f).</p>	

62(2)(g)	<i>Details of any other applications to the High Court, Federal Court or a recognised State/Territory body the applicant is aware of (and where the application seeks a determination of native title or compensation)</i>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. Schedule H and attachment H of the amended application contains the NNTT name and number of all other applications to the High Court, Federal Court or a recognised State/Territory body, in relation to the whole or a part of the area covered by the application. 2. The details supplied are sufficient to comply with s.62(2)(g). 	

62(2)(h)	<i>Details of any S29 Notices (or notices given under a corresponding State/Territory law) in relation to the area, and the applicant is aware of</i>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. The amended application at Schedule I states that 'The applicant is unaware of any such notices'. 2. The application passes this condition. 	

Reasons for the Decision

<ol style="list-style-type: none"> 1. For the reasons identified above the amended application contains all details and other information, and is accompanied by the affidavits and other documents, required by ss.61&62. 2. I am satisfied that the application meets the requirements of this condition. 	
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190C3	<p><i>Common claimants in overlapping claims:</i></p> <p><i>The Registrar must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:</i></p> <ul style="list-style-type: none"><i>(a) the previous application covered the whole or part of the area covered by the current application; and</i><i>(b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made; and</i><i>(c) the entry was made, or not removed, as a result of consideration of the previous application under section 190A.</i>
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Reasons for the Decision

1. A check of the Register of Native Title Claims was conducted on 15 September 1999. This check revealed that three overlapping native title applications are on the Register of Native Title Claims. These applications are WC 98/63- South West Boojarah, WC998/42 – Isaacs and WC98/58- Gnaala Karla Booja. None of the overlapping claims are previous applications.
2. I am satisfied that the requirements of s.190C3 are met.

<p>190C4(a)</p> <p style="text-align: center;">and</p> <p>190C4(b)</p>	<p><i>Certification and authorisation:</i></p> <p><i>The Registrar must be satisfied that either of the following is the case:</i></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 for the Decision

<p>1. <u>Information Considered.</u></p> <ul style="list-style-type: none"> • Affidavit of [Name deleted to address the cultural and /or customary concerns of the applicant or to protect the privacy of an individual.] • Affidavit of [Name deleted to address the cultural and /or customary concerns of the applicant or to protect the privacy of an individual.] • Affidavit of [Name deleted to address the cultural and /or customary concerns of the applicant or to protect the privacy of an individual.] • Affidavit of [Name deleted to address the cultural and /or customary concerns of the applicant or to protect the privacy of an individual.] <p>2. This condition requires me to be satisfied that the application is certified according to s.190C4(a) or authorised according to s.190C4(b).</p> <p>3. This application is not certified by a Native Title Representative Body.</p> <p>4. At Schedule R of the amended application the applicant has stated that ‘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 other persons in the native title claim group...’</p> <p>5. When an application purports to be authorised according to s.190C4(b) I cannot be satisfied that the application has been authorised unless the application fulfils the conditions identified in s.190C5(a) & (b). For the following reasons the application fulfils the requirements therein:</p> <ul style="list-style-type: none"> • Schedule R of the amended application, read together with Part A(2) of the amended application includes a statement to the effect that the requirement set out in paragraph s.190C(4)(b) has been met. This complies with s.190C5(a). • There are 4 affidavits from members of the claim group who swear to the validity of the authorisation process as described in Schedule R. Read together with Part A(2) of the amended application, it sets out the grounds on which the Registrar should consider that it has been met. This complies with s.190C5(b). <p>6. The two remaining questions to which I need to be satisfied in s.190B(4) are:</p> <ul style="list-style-type: none"> • Is the applicant a member of the native title claim group?, and • Do all the current (that is, at the time of consideration of the Registration Test) persons in the native title claim group authorise the applicant to make the application and to deal with matters arising in relation to it? <p><u>Findings</u></p> <p>6. The applicant is a member of the native title claim group.</p> <p>7. The claim group is essentially one extended family. The affidavits and information in the application at Schedule R show that the applicant, Minnie Van Leeuwin, 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. The information includes details of the basis of authorisation, who</p>

gave the authorisation, how it was given, and when and where it was given.

8. In my view the affidavits and information contained in the application provide sufficient information for me to be satisfied that the members of the native title claim group have authorised the applicants to make the application and to deal with matters arising in relation to it.

Conclusion

10. I am satisfied that 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.
11. The application passes this condition

B. Merits Conditions

190B2	<p><i>Description of the areas claimed:</i></p> <p><i>The Registrar must be satisfied that the information and map contained in the application as required by paragraphs 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.</i></p>
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Reasons for the Decision

Map and External Boundary Description

1. A map is supplied at Attachment B1 of the amended application.
2. The map supplied shows the external boundaries of the areas claimed.
3. The map displays co-ordinates to enable the position of sites or localities within the claim to be identified. In addition, it shows a scale allowing distances and areas to be ascertained. It identifies towns/localities in the area. 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 finely drawn and easy to follow.
4. The map meets the requirements of s62 (2)(b) as the boundaries of the areas covered by the application can be identified.
5. Additional information (a technical description) identifying the external boundary of the claim is supplied at Attachment B2 of the amended application.
6. The Tribunal's Geo-spatial Unit has plotted this information and concludes that this description is internally consistent, fully encloses the claim area and does not discernibly contradict the map accompanying the application.

Internal Boundary Description

- 7 Areas excluded from the application are described at Schedule B(c) of the amended application.
- 8 These exclusions form the areas within the (external) boundary which are not covered by the application, that is, the internal boundary description:
 - (c) Internal boundaries:
 - (1) The applicant excludes 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 s 228 and s 229 of the Native Title Act 1993.
 - Category A intermediate period acts as defined in s 232A & s 232B of the Native Title Act 1993.
 - Category A intermediate period acts as attributable to the State (s12A Titles Validation Amendment Act 1999 (WA)).
- (2) The applicant excludes from the claim any areas in relation to which a previous exclusive possession act, as defined in section 23B of the Native Title Act 1993, 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.
- (3) The applicant excludes 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 applicant excludes from the claim areas the tenures set out in Attachment B3.

Attachment B3.

- B3.1 An unqualified grant of an estate in fee simple.
- B3.2 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), s.117; or
 - (4) a Special Lease under s. 117 of the Land Act 1933 (WA).
- B3.3 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.
- B3.4 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.
- B3.5 A Perpetual Lease currently in force under the War Service Land Settlement Scheme Act 1954.

- B3.6 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 section 251D of the *Native Title Act 1993*.
- B3.7 An existing public road or street used by the public including any dedicated roads.
- (4) Paragraphs (1) to (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.

Findings

- 9 The description of areas excluded from the claim area at paragraphs 1, and 3(a) refer to land where an act of a State or Commonwealth government has created an interest. The excluded areas of land can be readily identified through searches of relevant Government registers and are therefore described with reasonable certainty
- 10 The description of areas excluded from the claim at paragraph 2 refers to areas in relation to which a previous exclusive possession act, as defined in s.23B of the NTA 1993, was done in relation to the area, and either the act was an act attributable to the Commonwealth, or the act was an act attributable to the State of Western Australia and a law of that State has made provision for that act as described in s.23E NTA. Exclusive possession acts attributable to the Commonwealth can be readily identified through searches of the relevant register and are therefore described with reasonable certainty. Exclusive possession acts attributable to the State of Western Australia under legislation of the type described in s.23E are likewise readily identified by reference to that legislation and thereafter searches of the relevant registers.
- 11 Paragraph 3(b) excludes areas of land where actual use by the holder of a tenure is permanently inconsistent with continued existence of native title. Attachment B3 gives further information on specific areas of land excluded from the claim area, which may fall into this category. The description in paragraph 3(b) read together with Attachment B3 is sufficient for me to be satisfied that the areas excluded from the application are identified with reasonable certainty.
- 12 The applicants seek the protection of ss.47, 47A and 47B by stating at paragraph 4 that any areas excluded from the claim area are subject to these legislative provisions. Details of areas included are contained in Schedule L.
- 13 The description at paragraph 4 allows it to be shown objectively, upon the provision of such particulars, whether applicants may have benefit of these provisions.

Conclusion

- 14 For the reasons given above, I am 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.

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

1. The native title claim group is described at Schedule A in the following terms:

The claim is brought on behalf of :

Minnie Van Leeuwen,
Norman Harris,
Carrie Harris, and
Dorothy Blurton,
and their children as listed;
Wendy Harris,
Susan Peaker,
Stephen van Leeuwen,
Elizabeth Embry,
Joanne Downey,
Norman Harris,
Geary Harris,
Keith Harris,
Mathew Harris,
Timothy Harris,
Reiner Harris,
Wayne Blurton,
Mark Blurton,
Jenny Maher,
Delarna Harris,
and the biological descendants of their children.

Findings

2. As Schedule A relies on a description other than naming the persons in the claim group, the application does not satisfy s.190B(3)(a). Consequently, the applicants must rely on satisfying s.190B(3)(b).
3. In my view, the description provides an objectively verifiable mechanism for ascertaining whether any particular person is in the claim group. For example, it would be possible to ascertain whether any particular person is in the native claim group by reference to genealogical information.
4. I am therefore satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.
5. The description satisfies the requirements of s.190B(3)(b).

190B4

Identification of the native title rights and interests:
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

- 1 This condition requires me to be satisfied that the native title rights and interests claimed can be readily identified.
- 2 It is insufficient to merely state that these native title rights and interests are 'all native title interests that may exist, or that have not been extinguished at law'.
- 3 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.
- 4 The amended application at Schedule E lists the native title rights and interests claimed as follows:

The native title rights and interests claimed are the rights together with other Noongar people who are native title holders to the possession, occupation, use and enjoyment as against the whole world (subject to any shared right of exclusivity) of the area and any right or interest included within the same, and in particular, comprise:

- (a) the right 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 live on and erect residences and other infrastructure on the land and gather material necessary for the same;
- (f) the right to hold meetings and ceremonies on and concerning the land, water and resources of the area;
- (g) the right to use and enjoy resources of the area;
- (h) the right to control the use and enjoyment of others of resources of the area;
- (i) the right to maintain and protect places of importance under traditional laws, customs and practices in the area;
- (j) the right to rear and teach children on the area; and
- (k) the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area.

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 right of the Commonwealth or the State of Western Australia, they are not claimed by the applicant.
- (ii) 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.

- (iii) The applicant does 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) a previous non-exclusive possession act, as defined in section 23F of the Native Title Act 1993, 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 including the Titles Validation Act (WA) as amended by the Titles Validation Amendment Act (WA) 1999 has made provision as mentioned in section 23I in relation to the act ;
 - (b) a valid non-exclusive tenure exists which at common law permanently affects the rights or interests of native title holders to possess, occupy, use, or enjoy the area subject to that tenure to the exclusion of all others.
- (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;
- (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 of the State or a law of the Commonwealth.

- 5 In my view the native title rights and interests described at Attachment E are readily identifiable. I have based this conclusion on the fact that the rights and interests are listed separately and are capable of being associated with activities that are said to be an exercise of those rights and interests.
- 6 In my view, the qualifications listed at items (i) to (v), are clear in their scope and intention, reciting general limitations to the operation of the listed rights and interests, where relevant.
- 7 In addition, the qualification in item (iv), the saving of exclusive possession rights and interests in areas of previous non-exclusive possession acts where the acts are in favour of native title claimants, is capable of qualifying item (iii), and consequently of providing clearly identifiable specific rights and interests.
- 8 The description is more than a statement that native title rights and interests are 'all native title interests that may exist, or that have not been extinguished at law'.
- 9 I am satisfied that the description in schedule E allows the native title rights and interests claimed too be readily identified in compliance with s.190B(4).

190B5	<p>Sufficient factual basis: <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 for the Decision

<p>1. This condition requires me to be satisfied that the factual basis on which it is asserted that there exist native title rights and interests described at schedule F of the amended application, is sufficient to support that assertion.</p> <p>2. In reaching this decision I must be satisfied that the factual basis supports the 3 criteria identified at s.190B5 (a) – (c).</p> <p><u>Information supplied by the applicants in support of this condition.</u></p> <p>3.</p> <ul style="list-style-type: none"> • Affidavit of [Name deleted to address the cultural and /or customary concerns of the applicant or to protect the privacy of an individual.] • Affidavit of [Name deleted to address the cultural and /or customary concerns of the applicant or to protect the privacy of an individual.] • Affidavit of [Name deleted to address the cultural and /or customary concerns of the applicant or to protect the privacy of an individual.] <p><u>190B(5)(a) - that the native title claim group have, and the predecessors of those persons had, an association with the area</u></p> <p>4. This criteria requires me to be satisfied that:</p> <ul style="list-style-type: none"> • the members of the native title claim group currently have an association with the area (under claim) <i>and</i> • the predecessors of the members of the native title claim group had an association with the area (under claim) <p>5. The word ‘association’ is not defined in the Act. In my view, the nature of the association required to be demonstrated by the applicant is governed by the nature of the native title rights and interests claimed. In this case the applicant claims the rights and interests identified at schedule E of the amended application.</p> <p>6. In addition, as native title rights and interests are defined as being related to land and waters (s.223 of the Act), in my view the information about the association of members of the native title claim group must relate to the area of land and waters where the particular native title rights and interests are claimed. In this case the extent of land and waters claimed is identified at schedule B of the amended application. I must therefore be satisfied that the members of the native title claim group are, and that their predecessors were, broadly associated with the particular land and waters claimed. I note that in this case that the external boundary of the claim encloses a land area of 2,837 square kilometres</p> <p>7. Attachment F of the amended application asserts that the native title claim group and their ancestors have, since the assertion of British sovereignty, possessed occupied, used and</p>

enjoyed the area subject to this application. The truthfulness of this assertion is deposed in the accompanying affidavits by the applicant and other claimants.

8. [Paragraph deleted to address the cultural and /or customary concerns of the applicant or to protect the privacy of an individual.]
9. [Paragraph deleted to address the cultural and /or customary concerns of the applicant or to protect the privacy of an individual.]
10. [Paragraph deleted to address the cultural and /or customary concerns of the applicant or to protect the privacy of an individual.]
- 11 I am satisfied that the information provided is sufficient to support the assertion that the native title claim group have, and the predecessors of those persons had, an association with the area where the applicant claims native title rights and interests.
- 12 The application satisfies this sub-condition.

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

- 13 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 native title rights and interest claimed
- 14 The information referred to above reveals the following about the laws and customs observed by the native title claim group:

[Paragraph deleted to address the cultural and /or customary concerns of the applicant or to protect the privacy of an individual.]
- 15 The information in the affidavits enables me to be satisfied that there exists a body of traditional law and custom, which governs the behaviour of members of the native title claim group. I am further satisfied that the existence of these traditional laws and customs gives rise to native title rights and interests over the area claimed.
- 16 I am satisfied that criteria identified in this sub section is met.

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

- 17 For the reasons identified in s190B(5)(a) and (b) above, the application complies with this subsection.

Conclusion for s.190B(5)

- 18 I am satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion.
- 19 The application satisfies this condition.

190B6

Prima facie case:

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

Reasons for the Decision

Information considered

1.

- Affidavit of [Name deleted to address the cultural and /or customary concerns of the applicant or to protect the privacy of an individual.]
- Affidavit of [Name deleted to address the cultural and /or customary concerns of the applicant or to protect the privacy of an individual.]
- Affidavit of [Name deleted to address the cultural and /or customary concerns of the applicant or to protect the privacy of an individual.]

Findings

2. This condition of the Registration Test requires me to be satisfied that at least *some* (one) of the Native Title rights and interests claimed can, *prima facie*, be established.
3. It is necessary however to consider whether a *prima facie* case is established against each of the Native Title rights and interests identified as the right to negotiate only attaches to those identified interests against which a *prima facie* case has been established.
4. Native title rights and interests are defined at s.223 of the Native Title Act. This definition attaches native title rights and interests to land and water and requires that:
 - the rights and interests must be possessed under traditional laws and customs;
 - those people claiming the rights and interests by those laws and customs must have a connection with the relevant land and waters; and
 - those rights and interests to be recognised under the common law of Australia.
5. I have already outlined in my reasons at s.190B(5) that I am satisfied that the members of the native title claim group continue to adhere to traditional laws and customs that support the factual basis for the native title rights and interests claimed.
6. On the evidence provided I am satisfied that the native title rights and interests listed below can, *prima facie* be made out, subject to the qualifiers listed:

The native title rights and interests claimed are the rights together with other Noongar people who are native title holders to the possession, occupation, use and enjoyment as against the whole world (subject to any shared right of exclusivity) of the area and any right or interest included within the same, and in particular, comprise:

- (a) The right 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 live on and erect residences and other infrastructure on the land and gather material necessary for the same;
- (f) the right to hold meetings and ceremonies on and concerning the land, water and resources

of the area;

- (g) the right to use and enjoy resources of the area;
- (h) the right to control the use and enjoyment of others of resources of the area
- (l) the right to maintain and protect places of importance under traditional laws, customs and practices in the area;
- j) the right to rear and teach children on the area; and
- (k) the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area.

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 applicant.
- ii. 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.
- iii. The applicant does 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) a previous non-exclusive possession act, as defined in section 23F of the Native Title Act 1993, 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 including the Titles Validation Act (WA) as amended by the Titles Validation Amendment Act (WA) 1999 has made provision as mentioned in section 23I in relation to the act;
 - b) a valid non-exclusive tenure exists which at common law permanently affects the rights or interests of native title holders to possess, occupy, use or enjoy the area subject to that tenure to the exclusion of all others.
- iv. Paragraph (iii) above is subject to such of the provisions of sections 47, 47A and 47B of the NTA as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing;
- 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 of the State or a law of the Commonwealth.

Conclusion

7. The application passes this condition.

190B7	<p>Traditional physical connection: The Registrar must be satisfied that at least one member of the native title claim group:</p> <p>(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or</p> <p>(b) previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to land or waters) by:</p> <p>(i) the Crown in any capacity; or</p> <p>(ii) a statutory authority of the Crown in any capacity; or</p> <p>(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.</p>
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Reasons for the Decision

<p><u>Information considered</u></p> <ul style="list-style-type: none">• Affidavit of [Name deleted to address the cultural and /or customary concerns of the applicant or to protect the privacy of an individual.]• Affidavit of [Name deleted to address the cultural and /or customary concerns of the applicant or to protect the privacy of an individual.]• Affidavit of [Name deleted to address the cultural and /or customary concerns of the applicant or to protect the privacy of an individual.] <p><u>Findings</u></p> <p>3 This section requires me to be satisfied that at least one member of the native title claim group currently has a traditional physical connection with any part of the land or waters covered by the application.</p> <p>4 Traditional physical connection is not defined in the Native Title Act. I am interpreting this phrase to mean that physical connection should be in accordance with the particular traditional laws and customs relevant to the claim group.</p> <p>5 For the reasons given in s.190B(5) I am satisfied that there exist traditional laws acknowledged by and customs observed by the claim group over at least part of the claim area.</p> <p>6 [Paragraph deleted to address the cultural and /or customary concerns of the applicant or to protect the privacy of an individual.]</p> <p>Conclusion</p> <p>3 I am satisfied that [Names deleted to address the cultural and /or customary concerns of the applicant or to protect the privacy of an individual.] are members of the native title claim group who previously and currently have a traditional physical connection with part of the land or waters covered by the application.</p> <p>7 The application meets the condition of 190B7 (a).</p>

190B8	<p>No failure to comply with s61A:</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 for the Decision

<p><u>s61A(1) – Native Title Determination</u></p> <p>A search of the Native Title Register conducted on 15 September 1999, has revealed that there is no approved determination of native title in relation to the area claimed in this application</p> <p><u>S61A(2) – Previous Exclusive Possession Acts</u></p> <p>The claim has not been made over tenure to which a previous exclusive possession act, as defined in s23B, applies. [see schedule B]</p> <p><u>S61A(3) – Previous Non-Exclusive Possession Acts</u></p> <p>The applicant is not seeking exclusive possession over areas the subject of previous non-exclusive possession acts.</p> <p><u>S61A(4) – s47, 47A, 47B</u></p> <p>The applicant has sought to invoke the provisions of s47, 47A or 47B of the Native Title Act.</p> <p><u>Conclusion</u></p> <p>For the reasons identified above the application and accompanying documents do not disclose and is not otherwise apparent that because of Section 61A the application should not have been made.</p> <p>The application passes this condition.</p>
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190B9(a)	<p><i>Ownership of minerals, petroleum or gas wholly owned by the Crown:</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>(a) to the extent that the native title rights and interests claimed consist or include ownership of minerals, petroleum or gas - the Crown in right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas;</i></p>
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Reasons for the Decision

<p>1 The amended application qualifies the native title rights identified at Schedule E by making them subject to paragraph (ii) which states:</p> <p style="padding-left: 40px;">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 applicant.</p> <p>2 The application passes this condition.</p>

190B9(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 for the Decision

<p>3 The amended application qualifies the native title rights identified at Schedule E by making them subject to paragraph (ii) which states:</p> <p style="padding-left: 40px;">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.</p> <p>4 The application passes this condition.</p>
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190B9(c)	<p><i>Other extinguishment:</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>(c) in any case - the native title rights and interests claimed have otherwise been extinguished (except to the extent that the extinguishment is required to be disregarded under subsection 47(2), 47A(2) or 47B(2)).</i></p>
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Reasons for the Decision

1. The application and accompanying documents do not disclose, and it is not otherwise apparent that the native title rights and interests claimed have otherwise been extinguished by any mechanism, including:
 - a break in traditional physical connection;
 - non-existence of an identifiable native title claim group;
 - by the non-existence of a system of traditional laws and customs linking the group to the area
 - an entry on the Register of Indigenous Land Use Agreements.
 - Legislative extinguishment
2. In any event, the amended application at Schedule B(3) excludes all areas in relation to where native title rights and interests have otherwise been extinguished. I am satisfied that because native title rights and interests must relate to land and waters (see definition s.223 of the Native Title Act) the exclusion of particular land and waters is an exclusion of native title rights and interests over those lands and waters.
3. For the above reasons I am satisfied that the application meets this condition.

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