

Reason

Status: Publish on Web
Date Published:
Application Name: Karajarri (Combined Application)
Application (NNTT) No: WC96/68; WC97/63; WC99/41; WC00/2
Application (Fed Crt) No: WAG6100/98; WAG6186/98; WAG6038/99; WAG6100/98
State: WA
Region: North West
Date Application Made: 13/06/96, 30/07/97, 22/11/99, 21/02/2000
Date Registration Test: 25/02/2000
Decision made:
Decision: Accepted

PDF

RTF

Brief history of the application

On 22 February 2000 leave to amend and combine existing Karajarri applications WAG6100/98 WAG6186/98 and W6038/99 was granted by Registrar Jan. Details of the three pre-combination applications are as follows:

NNTT #.	Fed. Court #	Name	Lodged	Accepted	Registered (s190A)
WC96/68	WAG 6100/98	Karajarri #2	13/06/96	13/06/96	12/10/99
WC97/63	WAG 6168/98	Karajarri #3	30/07/97	30/07/97	1/06/99
WC99/41	W 6038/99	Karajarri #4	22/11/99	N/A	21/12/99

A copy of the Karajarri combined application was forwarded to the Registrar under s63 of the Native Title Act (NTA) on 23 February 2000.

I note the following characteristics of the application before me for consideration:

- The application area is a combination of the three pre-combined Karajarri applications. No other applications have been combined to increase the area beyond the area arising from the combination of these three claims alone.
- The applicants for this application are the same as the applicants for each of the pre-combined Karajarri applications.
- The claim group description for this application is the same as the claim group description for each of the pre-combined Karajarri applications.
- The Native Title Rights and Interests claimed are the same as the rights and interests claimed in each of the pre-combined Karajarri applications.

In making this decision I have considered affidavit and other material provided directly to the Tribunal on 14 and 21 February 2000 for my consideration in application of the registration test, and in some instances relied on this material in making my decision.

On 22 February 2000, copies of this material were provided to the State and subsequently the State indicated that it did not intend to provide any comments in response to the contents of this material.

I have also considered information provided directly to the Tribunal in relation to the three pre-combination applications. This information was provided to the State on 8 and 17 December 1999 in relation to the Karajarri #4 application, and the State indicated at that time that it did not intend to provide any comments in response to the contents of this material.

All references to the 'application' in the present decision, unless otherwise stated, refer to the combined application.

Information considered when 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 Registration Test File, Legal Services File and Federal Court Application File for the Karajarri Combined claim (WAG 6100/98)
- The Registration Test Files, Legal Services Files and Federal Court Application Files for native title applications WAG 6100/98 (Karajarri #2), WAG 6186/98 (Karajarri #3) and W6038/99 (Karajarri #4)
- Working files and related materials for native title applications WAG 6100/98 (Karajarri #2), WAG 6186/98 (Karajarri #3) and W6038/99 (Karajarri #4), that have been made by the same claim group as the present application.
- The National Native Title Tribunal Geospatial Database;
- The Register of Native Title Claims and Schedule of Native Title Applications;
- The National Native Title Register;
- Determination of Representative ATSI Bodies: their gazetted boundaries.

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 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.

Reasons for the Decision

Map and External Boundary Description

Map

A map drawn by Land Claims Mapping Unit (Department of Land Administration WA) and dated 11 January 2000, is supplied with the application and included as Attachment "A".

The map supplied shows the external boundaries of the areas claimed and also identifies the relevant area by hatching all the land within the claim area.

The map displays a list of coordinates 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. The map also shows the location of pastoral leases and other tenures and landmarks in and around the claim area.

The map meets the requirements of s62 (2)(b) as the boundaries of the areas covered by the application can be identified.

External Boundary

A written description identifying the external boundary of the claim is supplied at Schedule B of the amended application. The external boundary is described by reference to various co-ordinate points and pastoral lease boundaries such that the boundary could be plotted with reasonable certainty.

The Tribunal's Geo-spatial Unit has plotted this information and concludes that the description is internally consistent, fully encloses the claim area and does not discernibly contradict the map accompanying the application.

Internal Boundary Description

Areas excluded from the application are described at Schedule B of the application. These excluded areas form the areas within the (external) boundary which are not covered by the application, that is, the internal boundary description.

The areas excluded from the application are described in the following terms:

1. The applicants exclude from the claim any areas covered by valid acts which occurred 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 ss. 228 and 229 of the Act;
 - Category A intermediate period acts as defined in ss. 232A s.232B of the Act
2. The applicants exclude from the claim any areas in relation to which a previous exclusive possession act, as defined in section 23B of the NTA, was done in relation to the 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. To avoid uncertainty, the Applicants exclude from the claim any of the areas contained within the following descriptions of tenures which have been validly granted:
 - (a) Any former or current unqualified grant of an estate in fee simple and all other freehold land.
 - (b) Any permanent public work and the land and waters on which a public work is constructed, established or situated within the meaning given to that phrase by s.251D of the Act.
 - (c) Any existing public road or street used by the public, or dedicated road.
4. Paragraphs (1), (2) and (3) above are subject to such provisions of sections 47,47A and 47B of the Act as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing but which include such areas as may be listed in Schedule L.
5. The Applicants exclude from the claim 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.
6. The Applicants exclude from the claim the areas excluded in the original applications in WAG6100 of 1998, WAG6186 of 1998 and WAG6038 of 1999, namely the following areas:
 - (a) Any current or former valid grants of estates in fee simple which, under the law of the Commonwealth, extinguish native title; and
 - (b) Any current or former valid grants of leasehold estates which, under the law of the Commonwealth, extinguish native title.
7. The applicants exclude the Repeater Station site (Reserve 40658) from the claim area.

I am satisfied that this information is sufficient for it to be said with reasonable certainty whether native title rights or interests are claimed in relation to particular areas of land or waters within the external boundaries of the claim area.

The applicants have detailed a series of land tenure types specifically and by reference to relevant legislative provisions that are excluded from the area of the application. Such class exclusions amount to information that enables the internal boundaries of the application area to be adequately identified. This may require considerable research of tenure data held by the State of Western Australia, but nevertheless it is reasonable to expect that the task can be done on the basis of the information provided by the applicants.

Paragraph 4 of Schedule B states that the exclusions are subject to the provisions of sections 47, 47A and 47B. Particulars allowing the claiming of the benefit of these sections are not provided. I consider that the description provided allows it to be shown objectively, upon the provision of such particulars, whether applicants may have benefit of these provisions and that this

is all that is required by this section.

Conclusion

For the reasons given above, I am satisfied that the information and map contained in the application as required by sections 62(2)(a) and (b) is sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

Result: Requirements met

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, the description of the claim group must be sufficiently clear so that it can be said with reasonable certainty whether any particular person is a member of the native title claim group.

An exhaustive list of the persons in the native title claim group has not been provided. Accordingly, the requirements of s.190B(3)(a) have not been met.

In the alternative, s.190B(3)(b) requires the Registrar to be 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.

Schedule A of the application states that:

“The claim is brought on behalf of those Aboriginal people who hold in common the body of traditional law and culture governing the area the subject of the claim and who are descended from the occupants of the area at the time of the assertion of British sovereignty, being the descendants of Nganara, Minyirr Palajangka, Ingala [2], Parawarrakara-ayiti and Yamadu ‘Mutpi’.”

Based on the information contained in the [name of confidential report deleted] by [name deleted] (anthropologist) [date deleted], it is clear that considerable work has been undertaken to prepare the genealogies of this native title claim group.

As the application provides a list of persons who are the occupants of the area at the time of sovereignty, it is possible to determine whether a particular person is a biological descendent of one of those occupants and is therefore a member of the claim group.

I am satisfied that the above-stated description constitutes an objective means of verifying the identity of members of the native title claim group such that it can be clearly ascertained whether any particular person is in the group.

Result: Requirements met

S190B(4) Identification of claimed native title Met

190B(4)

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

This condition requires me to be satisfied that the native title rights and interests claimed can be readily identified. 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'. 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.

The application at Schedule E lists the native title rights and interests claimed as follows:

"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 the resources of the area;
- f) the right to control the use and enjoyment of others of the 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 practices 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."

Schedule E then states that the rights and interests are subject to:

- i. "To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants.
- ii. 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 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 interest 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 Act, 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 law of that State has made provision as mentioned in section 23I in relation to the act;
- iv. Paragraph (iii) above is subject to such provisions of section 47,47A and 48B 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, the law of the State or a law of the Commonwealth."

In my view the native title rights and interests described at Schedule E are readily identifiable. 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'.

I am satisfied that the description in Schedule E allows the native title rights and interests claimed to be readily identified in compliance with s.190B(4).

Result: Requirements

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

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 E of the application is sufficient to support that assertion. In reaching this decision I must be satisfied that the factual basis supports the 3 criteria identified at s.190B5 (a) – (c).

In addition to the information contained in the application, I have also considered affidavits by members of the claim group (listed below), affidavits of [name deleted] (anthropologist) sworn 15/3/99 and 17/8/99 and the [name of confidential report deleted] by [name deleted] [date deleted]. The first six affidavits listed below were provided in relation to the present application. The remainder were submitted in relation to the pre-combination applications – the total combined areas of which make up the present application. I note that the latter affidavits and [name of confidential report deleted] provide additional depth of information to that contained in the specific affidavits provided in support of this application. However I refer primarily to the six affidavits submitted in relation to this application in my reasons for decision.

- [Name of claim group member B deleted] sworn 9/02/00
- [Name of claim group member C deleted] sworn 9/02/00
- [Name of claim group member D deleted] sworn 9/02/00
- [Name of claim group member E deleted] sworn 10/02/00
- [Name of claim group member A deleted] sworn 10/02/00
- [Name of claim group member F deleted] sworn 27/01/00

- [Name of claim group member A deleted], affirmed 19/11/99;
- [Name of claim group member F deleted], affirmed 19/11/99
- [Name of claim group member A deleted], affirmed 25/11/99
- [Name of claim group member C deleted], affirmed 11/2/99, 22/3/99 and 25/11/99
- [Name of claim group member D deleted], affirmed 11/2/99 and 25/11/99
- [Name of claim group member E deleted], affirmed 19/11/99
- [Name of claim group member A deleted] sworn 11/2/99
- [Name of claim group member G deleted] affirmed 11/2/99
- [Name of claim group member B deleted] sworn 11/2/99
- [Name of claim group member H deleted] sworn 11/2/99 and 22/3/99

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

This criteria requires me to be satisfied that:

- the members of the native title claim group have an association with the area; *and*
- the predecessors in title or antecedents of the members of the native title claim group had an association with the area.

Schedule F and G of the application provide information that supports this sub condition. Schedule F, states that “[t]he native title claimant group and their ancestors have, since the assertion of British Sovereignty possessed, occupied, used and enjoyed the area the subject of the native title claim”.

It also records that traditional association with the area could be vested in seven specific ways, that traditional knowledge was “ passed by traditional teaching, through the generations preceding the present generations to the present generations of persons comprising the native title claim group” and that the native title claim group continues to acknowledge and observe these traditional laws and customs and by those laws and customs has a connection with the land.

Schedule G provides a brief summary of the activities continuously conducted by members of the native title claim group in the area. This information complements the affidavit material provided.

With reference to the six affidavits submitted in relation to the present application, these deponents describe the expanse of the claim area, including both land and sea as 'Karajarri country', the country of their predecessors and themselves, and of having the right to speak for the country ([Initials of claim group member B deleted] paras 1,2 & 11, [Initials of claim group member C deleted] paras 3 & 12, [Initials of claim group member E deleted] para 6).

[Name of claim group member E deleted] and [Name of claim group member D deleted] describe the country as [text deleted to protect the confidentiality of affidavit information and cultural and customary concerns. In summary, deponents E and D refer to a Karajarri word which conveys their strong sense of belonging to the land].

[Text deleted to protect the confidentiality of affidavit information and cultural and customary concerns. In summary, it constitutes information from deponents A, D and C about the presence of their ancestors when the 'whites' arrived in their country, and their experience of this contact].

All six deponents describe themselves and/or relatives being born in the claim area. They speak of their predecessors, themselves and their descendants living in, using the resources of, and practising traditional laws and customs in relation to the claim area ([Initials of claim group member B deleted] paras 6, 7, 11 & 12, [Initials of claim group member C deleted] paras 1, 2, 5, 6, 9, 10 & 12, [Initials of claim group member D deleted] paras 3, 4, 6, 8, 10, [Initials of claim group member E deleted] paras 2, 4, 5, 7 & 8, [Initials of claim group member A deleted] paras 1, 2, 5, 6 & 10, [Initials of claim group member F deleted] paras 1, 2, 3 & 5).

As well as referring to an association with land within the claim area, several of the deponents speak of having stories in relation to, and responsibility to look after, the sea and coastline within the claim area ([Initials of claim group member B deleted] paras 3 & 11, [Initials of claim group member C deleted] paras 2, 3 & 12, [Initials of claim group member D deleted] paras 9 & 11, [Initials of claim group member E deleted] paras 5, 7 & 8, [Initials of claim group member A deleted] paras 4, 9, 10, 12 & 16, [Initials of claim group member F deleted] para 7).

The [name of confidential report deleted] and other affidavits provide further information in support of this condition.

This information constitutes sufficient evidence to satisfy me that the claim group has, and the predecessors of those persons had, an association with the claim area.

Result: Requirements met

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

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

Schedule G and the affidavits of the above-named deponents refer to traditional laws and customs relating to the use and care of the land, and the passing on of information from the predecessors of the deponents to the deponents, and in turn, their descendants.

[Text deleted to protect the confidentiality of affidavit information and cultural and customary concerns. In summary, it refers to the deponents speaking of their involvement in law business, and deponents C, A and D referring to themselves as being senior people in the law].

[Text deleted to protect the confidentiality of affidavit information and cultural and customary concerns. In summary, it refers to the use by claim group members of traditional language] ([Initials of claim group member D deleted] para 10, [Initials of claim group member E deleted] para 1, [Initials of claim group member A deleted] para 1, [Initials of claim group member F deleted] paras 1 & 8).

[Text deleted to protect the confidentiality of affidavit information and cultural and customary concerns. In summary, the deponents speak of growing up in the claim area and being taught particular laws and customs in relation to the country] ([Initials of claim group member B deleted] paras 6, 8 & 11, [Initials of claim group member C deleted] paras 5,

Under s190B6 I must consider that, prima facie, at least some of the native title rights and interests claimed can be established.

“Native Title Rights and Interests” are defined at s.233 of the Act. This definition specifically attaches native title rights and interests to land and water, and in summary requires:

- the rights and interests to be linked to traditional laws and customs;
- those claiming rights and interests to have a connection with the relevant land and waters; and
- those rights and interests to be recognised under the common law of Australia.

The definition is closely aligned with all the issues I have already considered under s190B5. I will draw on the conclusions I made under that section in my consideration of s190B6.

Under s.190B(6) I must consider that, prima facie, at least some of the rights and interests claimed can be established. The term “prima facie” was considered in *North Ganalanja Aboriginal Corporation v Qld* 185 CLR 595 by their Honours Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, who noted:

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

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

In addition to the information contained within the application, I have considered information contained in the following affidavits submitted by members of the claim group in relation to the present application.

- [Name of claim group member B deleted] sworn 9/02/00
- [Name of claim group member C deleted] sworn 9/02/00
- [Name of claim group member D deleted] sworn 9/02/00
- [Name of claim group member E deleted] sworn 10/02/00
- [Name of claim group member A deleted] sworn 10/02/00
- [Name of claim group member F deleted] sworn 27/01/00

I have considered other information contained in the affidavits submitted in relation to the pre-combination applications and the [name of confidential report deleted] (referred to in my reasons for decision in relation to s.190B(5)), and this information supports that contained in these six affidavits.

I consider that the following native title rights and interests claimed in the application can be, prima facie, established for the reasons indicated.

1. rights and interests to possess, occupy, use and enjoy the area;

All six deponents referred to above speak of the claim area as being their country – ‘Karajarri country’ or [Karajarri word which conveys their strong sense of belonging to the land deleted to protect confidentiality of affidavit information and cultural and customary concerns] (defined in my reasons for decision in relation to s.190B(5)) ([Initials of claim group member B deleted] para 1, [Initials of claim group member C deleted] para 3, [Initials of claim group member D deleted] para 3, [Initials of claim group member E deleted] para 5, [Initials of claim group member A deleted] para 1, [Initials of claim group member F deleted] para 1). The deponents refer to the particular parts of the claim area with which they have a strong association ([Initials of claim group member B deleted] paras 1, 3 & 11, [Initials of claim group member C deleted] para 4, 5 & 12, [Initials of claim group member D deleted] paras 3, 9, 10 & 11, [Initials of claim group member E deleted] paras 4, 5, 6, 7, 8 & 9, [Initials of claim group member A deleted] 1, 2, 4, 5, 6, 7, 9 & 10, [Initials of claim group member F deleted] paras 1, 2, 3, 5 & 7).

The affidavits provide specific examples of current use and occupation by themselves, and other members of the claim group, such as cultural activities involving possession, occupation, use and enjoyment of various parts of the claim area ([Initials of claim group member B deleted] paras 3, 7, 8 & 11, [Initials of claim group member C deleted] paras 5, 10 & 12, [Initials of claim group member D deleted] paras 6, 8, 9 & 11, [Initials of claim group member E deleted] paras 7, 8 & 9, [Initials of claim group member A deleted] paras 4, 5, 6, 9, 10, 11, 12, 13, 14, 15 & 16, [Initials of claim group member F deleted] paras 1, 3, 4, 5, 7 & 8). There are numerous references to communal or group activities ([Initials of claim group member B

deleted] paras 10 & 11, **[Initials of claim group member C deleted]** paras 2, 6, 10, 13, **[Initials of claim group member D deleted]** paras 4, 6, 8, 9 & 12, **[Initials of claim group member E deleted]** paras 8 & 9, **[Initials of claim group member A deleted]** paras 4, 5, 6, 10, 11, 12, 13 & 16, **[Initials of claim group member F deleted]** paras 5, 6 & 8).

I am of the view that the rights and interests mentioned below constitute a subset of the right to possess, occupy, use and enjoy the area. Thus the evidence I rely upon with respect to the prima facie establishment of the following rights and interests applies equally to the establishment of this right.

2. The right to make decisions about the use and enjoyment of the area;

Each of the six deponents refers to their inherited responsibility to look after the claim area. **[Text deleted to protect the confidentiality of affidavit information and cultural and customary concerns. In summary, the deponents speak of Indigenous and non-Indigenous people beyond the claim group being required to seek their permission and observe protocols when accessing their country]** (**[Initials of claim group member B deleted]** paras 3 & 11, **[Initials of claim group member C deleted]** paras 2, 3, 10 & 13, **[Initials of claim group member D deleted]** paras 9, 11 & 12, **[Initials of claim group member E deleted]** paras 5, 8 & 9, **[Initials of claim group member A deleted]** paras 4, 5, 7, 9, 10, 11, 13, 15, 16 & 17, **[Initials of claim group member F deleted]** paras 5, 6 & 7).

I am of the view that evidence considered in relation to all of the following rights is also prima facie evidence of this right.

3. The right of access to the area;

Three of the deponents refer to their predecessors as being in the claim area when the 'white people' arrived, and all six deponents provide information that their direct predecessors belonged to and lived in the claim area. In turn, all deponents speak of themselves and others in the claim group, including their descendants, as continuing to belong to and live in the claim area (**[Initials of claim group member B deleted]** paras 1, 2 & 3, **[Initials of claim group member C deleted]** paras 1, 2, 4, 6, 7 & 12, **[Initials of claim group member D deleted]** paras 1, 2, 3, 4 & 5 **[Initials of claim group member E deleted]** paras 2, 3, 4, 5 & 9, **[Initials of claim group member A deleted]** paras 1, 2, 5, 7, 10 & 13, **[Initials of claim group member F deleted]** paras 1, 2, 3 & 7).

4. The right to control the access of others to the area;

As referred to in relation to 2. above, the deponents speak of outsiders having to seek their permission to access the claim area (**[Initials of claim group member C deleted]** para 13, **[Initials of claim group member D deleted]** para 12, **[Initials of claim group member A deleted]** paras 11 & 17, **[Initials of claim group member F deleted]** para 6). **[Text deleted to protect the confidentiality of affidavit information. In summary, the deponents C, F and A refer to protocols in relation to the introduction of outsiders to the claim area].**

5. The right to use and enjoy resources of the area;

[Text deleted to protect the confidentiality of affidavit information and cultural and customary concerns. In summary, the deponents speak of being taught particular laws and customs in relation to the country relating to accessing the resources of the country. Specific examples of use of a variety of resources are given] (**[Initials of claim group member B deleted]** paras 7 & 8, **[Initials of claim group member C deleted]** paras 2, 5 & 10, **[Initials of claim group member D deleted]** paras 6, 8 & 11, **[Initials of claim group member E deleted]** paras 5, 8 & 9, **[Initials of claim group member A deleted]** paras 2, 4, 9, 10, 11, 12, 14 & 16, **[Initials of claim group member F deleted]** paras 2, 5 & 8).

6. the right to control the use and enjoyment of others of resources of the area;

I refer to the information referred to in 2. and 4. above, and 7. and 8. below. **[Text deleted to protect the confidentiality of affidavit information and cultural and customary concerns. In summary, deponents C, D and A speak of the requirement that others seek permission from the Karajarri people before accessing particular resources].**

7. the right to trade in resources of the area;

One of the deponents refers to specific items being traded with other groups by their predecessors, and three of the deponents specifically refer to continuing trade practices – **[reference to the specifics of these practices deleted to protect the confidentiality of affidavit information, and cultural and customary concerns]** (**[Initials of claim group member C deleted]** para 13, **[Initials of claim group member D deleted]** para 12 & **[Initials of claim group member A deleted]** para 16).

8. the right to receive a portion of any resources taken by others from the area;

Several of the deponents refer to the requirement that if others take resources from their claim area, they (the claimants) must give them something of it – must share with them (**[Initials of claim group member C deleted]** para 13, **[Initials of claim group**

member D deleted] para 12, [Initials of claim group member A deleted] para 17).

9. The right to maintain and protect places of importance under traditional laws, customs and practices of the area; All of the deponents speak of a responsibility to protect places of importance in the claim area, [text deleted to protect the confidentiality of affidavit information, and cultural and customary concerns. In summary, deponents A and D give details of the sacred associations that exist in relation to important places. Deponents D, C, E and A speak of responsibilities that exist in relation to these places, including teaching their descendants protocol in relation to access].

10. The right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area.

[Text deleted to protect the confidentiality of affidavit information and cultural and customary concerns. In summary, all of the deponents speak about law places, practices and responsibilities, including the passing on of this knowledge to their descendants].

In finding that each of the native title rights and interests claimed by the applicants can be established on a prima facie basis, I note that Schedule E of the application contains a number of provisions limiting the rights claimed :

- (a) Schedule E (i) states that there is no claim made for ownership of minerals, petroleum or gas wholly owned by the Crown;
- (b) Schedule E (ii) states that no claim is made for exclusive possession of an offshore place;
- (c) Schedule E of the application also states that:

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 relation to which a previous non-exclusive possession act, as defined in section 23F of the Act, 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 23I in relation to the act.

iv) Paragraph (iii) above is subject to such provisions of section 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, the law of the State or a law of the Commonwealth.

Result: Requirements met

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 by the application; or*
- (b) *previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to 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

In addition to the information in the application, I have also considered the affidavits and [name of confidential report deleted] to which I referred and upon which I relied in my reasons for decision in relation to s.190B(5) and s.190B(6).

This section requires me to 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.

S190B(9) No extinguishment etc. of claimed native title Met

190B(9) (a)

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

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

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

Reasons for the Decision

Schedule E (i) in the application makes the statement that:

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

I am satisfied that this statement ensures that the application complies with the requirements of s.190B(9)(a).

Result: Requirements met

190B(9) (b)

Exclusive possession of an offshore place:

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

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

Reasons for the Decision

Schedule E (ii) of the application makes the statement that:

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 s.190B(9)(b).

Result: Requirements met

190B(9) (c)

Other extinguishment:

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

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

Reasons for the Decision

The application does not disclose, and I am not otherwise aware of, any area where an extinguishing act has occurred and yet the application seeks native title rights and interests over such an area. I am satisfied that the requirements of this section have been met.

Result: Requirements met

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

190C(2)

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

The Registrar must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.

Details required in section 61

61(3) Name and address for service of applicants

Reasons relating to this sub-condition

The names of the applicants and their address for service is detailed at Part B of the application.

Result: Requirements met

61(4) Name 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

Schedule A of the application describes the native title claim group. For the reasons which led to my conclusion that the requirements for s.190B(3) have been met, I am satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Result: Requirements met

61(5) Application is in the prescribed form, lodged in the Federal Court, contain prescribed information, 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) of the *Native Title (Federal Court) Regulations 1998*. The application was filed in the Federal Court as required pursuant to s.61(5)(b) of the Act.

The application meets the requirements of s.61(5)(c) and contains all information prescribed in s.62. I refer to my reasons in relation to those sections. As required by s.61(5)(d) the application is accompanied by affidavits as prescribed by s.62(1)(a) and a map as prescribed by s.62(2)(b). I refer to my reasons in relation to those sections of the Act.

I note that s.190C2 only requires me to consider details, other information and documents required by sections 61 and 62. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court. For the reasons outlined above, it is my view that the requirements of s.61(5) have been met.

Result: Requirements met

Details required in section 62(1)

62(1)(a) Affidavits address matters required by s62(1)(a)(I) – s62(1)(a)(v)

Reasons relating to this sub-condition

The sixteen applicants have each provided an affidavit, paragraph 4 of which sets out the basis upon which the applicant is authorised. I note that twelve of these affidavits are undated. However, a letter from the Kimberley Land Council (KLC), representatives of the applicants, dated 21 February 2000, provides the dates on which these twelve undated affidavits were sworn. In summary, one affidavit was sworn on 20 January 2000, two were sworn on 27 January 2000, one was sworn on 1 February 2000, five were sworn on 9 February 2000, five were sworn on 10 February 2000 and two were sworn on 11 February 2000. I am satisfied that the affidavits satisfactorily address the matters required by s.62(1)(a)(i)-(v).

Result: Requirements met

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

The application contains some details relating to 'traditional physical connection' at Schedule G.

Result: Provided

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

For the reasons which led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the information and map provided by the applicants are sufficient to enable the area covered by the application to be identified with reasonable certainty.

Result: Requirements met

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

Reasons relating to this sub-condition

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

Result: Requirements met

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

Reasons relating to this sub-condition.

For the reasons which led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the map provided by the applicants sufficiently identifies the boundaries of the claim area.

Result: Requirements met

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 s.62(2)(c) can be read widely to include all searches conducted by any person or body. However, I am of the view that I need only be informed of searches conducted by the applicants in order to be satisfied that the application complies with this condition. It would be unreasonably onerous to expect the applicants to have knowledge of, and obtain details about all searches carried out by every other person or body.

Schedule D states that there have been no new searches conducted by the applicants. The Schedule then includes all details of searches that were referred to in each of the pre-combination applications WG6100/98, WG6186/98 and W6038/99. There is no information before me to suggest that the applicants have conducted any other searches to determine the existence of any non-native title rights and interests.

Result: Requirements met

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

Reasons relating to this sub-condition

An adequate description of the native title rights and interests claimed by the applicants are contained in Schedule E of the application. I have outlined these rights and interests in my reasons for decision in respect of s.190B(4).

Result: Requirements met

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

Reasons relating to this sub-condition

This information is contained at Schedule F of the application and various affidavits provided directly to the Tribunal. For the reasons which led to my conclusion that the requirements of s.190B(5)(a) have been met, I am satisfied that there is sufficient factual basis to support the assertion that the native title claim group have, and the predecessors of those persons had, an association with the area.

Result: Requirements met

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

This information is contained at Schedule F of the application and various affidavits provided directly to the Tribunal. For the reasons which led to my conclusion that the requirements of s.190B(5)(b) have been met, I am satisfied that there is sufficient factual basis to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the native title rights and interests claimed.

Result: Requirements met

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

Reasons relating to this sub-condition

This information is contained at Schedule F of the application and various affidavits provided directly to the Tribunal. For the reasons which led to my conclusion that the requirements of s.190B(5)(c) have been met, I am satisfied that there is sufficient factual basis to support the assertion that the native title claim group have continued to hold the native title in accordance with their traditional laws and customs.

Result: Requirements met

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 the activities which the native title claim group carries out in relation to the area claimed at Schedule G of the application. It is my view that this description of activities is sufficient to comply with the requirements of s.62(2)(f).

Result: Requirements met

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 of the application lists one application, namely, WC98/65 Nyangumarta, as covering a part of the area covered by the application. A search of the Tribunal's geospatial data confirms that the area of overlap is 75.782 sq km.

The Tribunal's geospatial database also indicates that the application overlaps native title determination application WC99/23 (Rubibi). The area of overlap is 0.044 sq km.

I refer to my reasons under s190C(3) in relation to overlapping applications.

This condition requires that the applicants provide details of applications *of which the applicants are aware*. There is no information before me to suggest that the applicants are aware of the overlap with WC99/23.

I am therefore satisfied that the application complies with the requirements of s 62(2)(g).

Result: Requirements met

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

The application at Schedule I contains details of three section s29 notices that have been issued in relation to the area since 30/9/98. A search of the Tribunal's geospatial data confirms that these are the only three s29 notices that have been issued in relation to the area since 30/9/98.

Result: Requirements met

Reasons for the Decision

For the reasons identified above the application contains all details and other information, and is accompanied by the affidavits and other documents, required by ss.61& 62.

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

Aggregate Result: Requirements met

S190C(3) No previous overlapping claim groups Met

190C(3)

Common claimants in overlapping claims:

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

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

Reasons for the Decision

190C(3) requires identification of those claims that were on the Register of Native Title Claims after consideration under s190A at the time the current application was made, and have not subsequently been removed from that Register.

The certificate states that:

- (a) the applicants have the authority to make the application and deal with all matters arising in relation to it, and that
- (b) all reasonable efforts have been made to ensure the application describes or otherwise identifies all other persons in the native title claim group.

It also states that the KLC has performed anthropological and genealogical research, observed meetings prior to and after the claim was lodged and as a consequence the KLC staff and consultants have observed the authorisation of the applicants.

However, as the KLC is not gazetted for the whole area covered by the application I cannot rely on the certificate to satisfy the requirements of this section. In my view the applicants are only able to rely on the second limb of this section.

Under s190C4(b) I must be satisfied that the applicants are members of the native title claim group and 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.

Are the applicants members of the native title claim group?

Based on the material referred to more fully in my reasons under s190B(5), including the further affidavits supplied by the applicants for the purposes of the registration test for the application and, in particular, the **[name and date of confidential report deleted]** which identifies the applicants as **[text deleted to protect the confidentiality of the information contained in the report, and cultural and customary concerns. In summary, the applicants are identified as some of the most senior law people in the claim group]** (page 6), I am satisfied that the applicants are members of the native title claim group.

Are the applicants 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?

Each of the applicants have sworn an affidavit under s.62(1)(a) stating that:

- the applicant is authorised to make and deal with matters arising in relation to the application; and
- the basis on which the applicant is authorised is “the process of decision making that the persons in the native title claim group have also agreed to and adopted with matters and in relation to doing things of that kind.

The Act, at s251B, recognises that applicants may be authorised using a decision making process that is either:

- (a) under traditional laws and customs of the group; or
- (b) agreed to and adopted by the native title claim group.

At Schedule R the applicants indicate at paragraph (6) that the process that group agreed to and adopted is in fact “a process of decision making recognised under the applicants traditional laws and customs”. As a consequence I am treating the authorisation as having been carried out under s251B(a).

In *Moran v Minister for Land & Water Conservation for the State of NSW [1999] FCA 1637* His Honour Justice Wilcox made some general comments about factors that it may be relevant to consider in order to be satisfied that the applicants have been authorised. When considering a process under traditional laws and customs of the group His Honour suggested that:

“a representative or collective body needs to prove that such a body exists under customary law recognised by the members of the group, the nature and extent of the body’s authority to make decisions binding the members of the group and that the body has authorised the making of the application” (para 34).

Do the applicants constitute a representative or collective body under customary law recognised by members of the claim group and, if so, does the body have the authority to make decisions binding the members of the group?

Schedule R of the application states at paragraph (6) that “the named applicants represent the senior traditional elders of the Karajarri people, who are empowered under traditional law and custom to make decisions for the group. **[Name of claim group member A deleted]** is the most senior of these traditional elders. Authorisation has been in accordance with a process of decision making recognised under the applicants traditional laws and customs”.

Similarly, in relation to pre-combination application W6038/99 (Karajarri #4), the project development officer at the KLC swore an affidavit referring to a meeting on 19 May 1999 where it was decided that the named applicants for WG6100/98 (Karajarri #2) and WG6186/98 (Karajarri #3) should also be the named applicants for Karajarri #4. He stated that “This decision was made

because those named applicants are recognised as the senior traditional elders of Karajarri people, and they are empowered in accordance with traditional law and custom to make decisions in relation to land, law and custom” (affidavit of **[name deleted]** sworn 15th December, 1999). I note that the same applicants are also the named applicants on the present application.

It is noteworthy that those chosen in 1996 and 1997 for WG6100/98 (Karajarri #2) and WG6186/98 (Karajarri #3) as the applicants representing this same native title claim group remain the applicants for this application. Clearly these applicants continue to be supported by the members of the group. This is further supported in Schedule R of the application which provides details of the Karajarri native title claim group and community meetings held in 1999 to authorise the named applicants to make the combined application and deal with all matters arising in relation to it.

The **[name of confidential report deleted]** by **[name deleted]** **[date deleted]** also supports the finding that the named applicants are a representative body of the claim group with authority to act on behalf of the claim group.

The report notes that in 1995 the members of the group agreed that **[text deleted to protect the confidentiality of the information contained in the report. In summary, the members of the group agreed that the people who would best represent the Karajarri people were men and women senior in traditional law]** (page 6).

The report then lists the names of the ‘Principal Claimants’ all of whom are applicants (except for one senior man).

All of this information suggests that the named applicants are a representative body of the nature referred to by his Honour in *Moran v Minister for Land & Water Conservation for the State of NSW [1999] FCA 1637* and that the applicants, as the representative body for the group, have the authority to make and deal with the application on their behalf.

Finally, I note that by certifying the area within which the KLC is gazetted to operate, the KLC has clearly indicated that it considers that proper authorisation has been carried out by the native title claim group.

On the basis of this information, I am satisfied the applicants have been properly authorised through a process of traditional decisions making, to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

Result: Requirements met