

## Reason

Status: Publish on Web  
Date Published:  
Application Name: Yaburara & Mardudhunera people  
Application (NNTT) No: WC96/89  
Application (Fed Crt) No: WAG127/97  
State: WA  
Region: Pilbara  
Date Application Made: 31/07/96  
Date Registration Test: 09/04/99  
Decision made:  
Decision: Accepted

**PDF**

**RTF**

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

**190B(2)**

**Description of the areas claimed:**

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

Reasons for the Decision

To meet this condition of the test, I 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.

### **Map and External Boundaries**

The application contains a map and additional written description at Attachment C and Attachment B.

The map has been produced by WALIS, Land Claims Mapping Unit (dated 23/10/98) and has the following features:

- i) a scale
- ii) a locality plan indicating the extent of the claim within the state of Western Australia;
- iii) latitude and longitude coordinates in both the bottom left hand corner and top right hand corner of the plan;
- iv) current land tenure (as at 23/10/98) including pastoral leases, special leases, reserves, Aboriginal reserves and vacant crown land;
- v) the external boundary of the area claimed;
- vi) "hatching" of the area claimed.

The line work identifying the external boundaries are finely drawn and easy to follow.

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

Additional information to the map, is provided at Attachment B, identifying the internal and external boundaries of the claim area.

The external boundaries are identified by Longitudinal and Latitudinal coordinates. The Tribunal's geospatial confirm that the written description and the spatial description of the external boundaries are consistent.

### **Internal boundaries:**

The internal boundaries have been identified by excluding by class areas not subject to claim within the external boundaries. The formula includes a general exclusion clause to cover acts that may extinguish native title, the formula used is as follows:

The internal boundaries of the original claim area are varied to the extent necessary to exclude from the claim:

A. 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 (NTA)*, as amended, or the *Titles Validation Act 1994*, as amended, at the time of the Registrar's consideration:

- (i) Category A past acts, as defined in the NTA S229;
- (ii) Category A intermediate period acts as defined in the NTA S232B.

B. areas to which exclusive possession act, as defined in section 23B of the NTA, was carried out and either the act was attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in section 23E in relation to the act:

C. areas in relation to which native title rights and interests have otherwise been extinguished, including areas subject to:

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

and, to avoid any uncertainty, the following tenures are excluded from the claim:

- (iii) an unqualified grant of an estate in fee simple;
- (iv) 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 –
- (v) a lease of a worker's dwelling under the *Worker's Homes Act 1911-1928*;
- (vi) a 999 year lease under the *Land Act 1898*;
- (vii) a lease of a town lot or a suburban lot pursuant to the *Land Act 1993 (WA)* s117; or
- (viii) a special lease under s117 of the *Land Act 1933(WA)*;
- (ix) a conditional purchase lease currently in force in the agricultural areas of the South West Division under clauses 46 and 437 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;
- (x) a conditional purchase lease of cultivable land currently in force under Part V Division (1) of the *Land Act 1933I (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.

S190B(3) Identification of native title claim groups Met

**190B(3)** Identification of the native title claim group:

*The Registrar must be satisfied that:*

*the persons in the native title claim group are named in the application; or*

*the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.*

Reasons for the Decision

To meet this condition of the test, I 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.

ascertained whether any

All the persons in the native title claim group are named in the application.

At Schedule A and Attachment A, the application provides a list of names of the native title claim group.

The Submission supplied by the State Government in relation to this condition was reviewed, but was considered to be of little value as it was based on the original application, prior to amendments being lodged.

I am satisfied that the application meets the requirements of paragraph (a) of s190B3.

S190B(4) Identification of claimed native title Met

**190B(4)** Identification of claimed native title

*The Registrar must be satisfied that the description contained in the application as required by paragraph 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.*

Reasons for the Decision

To meet this condition of the test, 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.

Attachment E of the application contains a description of the native title rights and interests claimed. These are described as the “right to possess, occupy, use and enjoy of the whole of the land and waters claimed”. These are then particularised to include a list of 11 separate native title rights and interests:

- (i) the right to possess the land and waters claimed;
- (ii) the right to occupy the land and waters claimed;
- (iii) the right to use and enjoy the land and waters claimed;
- (iv) the right to make decisions about the use and enjoyment of the land and waters claimed;
- (v) the right to free access of others to the land and waters claimed;
- (vi) the right to use and enjoy the resources of the land and waters claimed;
- (vii) the right to control the use and enjoyment of others of the resources of the land and waters claimed;
- (viii) the right to trade in the resources of the land and waters claimed;
- (ix) the right to receive a portion of any resources taken by others from the land or waters claimed.
- (x) the right to maintain and protect places of importance on the land and in the waters claimed;
- (xi) the right to maintain, protect and prevent misuse of cultural knowledge associated with the land and waters claimed.

These native title rights and interests are then subject to a number of exclusions which can be found at Attachment B, paragraph (b).

The description provided in the application is a list of 12 individually identifiable rights and interests.

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

The Submission supplied by the State Government in relation to this condition was reviewed, but was considered to be of little value as it was based on the original application, prior to amendments being lodged.

I am satisfied that the application meets the requirements of s190B4.

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:*

*that the native title claim group have, and the predecessors of those persons had, an association with the area;*

*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;*

*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

To meet this condition of the test I 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.

Attachment F and Attachment G of the application provide information to support the factual basis on which it is asserted that native title rights and interests exist.

#### **190B(5)(a)**

Schedule F outlines an association of the native title claim group through their ancestors to the claim area since time immemorial. Paragraph states that:

*“The Aboriginal people who occupied the land and waters claimed since time immemorial and before European contact were the ancestors of the applicants, as indicated by historical and genealogical research and oral statements.”*

Attachment F lists some published works that make reference to the Mardudhunera and Yaburara people at the time of European arrival.

Reference is made to historical and genealogical research, which it is, stated support the claim that the native title claim group’s ancestors occupied the land and waters claimed since time immemorial.

Schedule F states that from the time of European contact through to the 1960’s many of the ancestors and the applicants themselves sustained their traditional physical connection with the land claimed.

Attachment G states that after the 1960’s although a number of the native title claim group moved to towns, they maintained the traditional connection to the land and waters claimed.

Attachments F and G both make statements asserting members of the native title claim group and their ancestors, have continuously carried out activities (which relate to their traditional laws and customs) on the land and waters within the area of the claim. The activities described relate to the native title rights and interests at Schedule E.

Attachment F names members of the native title claim group who were born and raised on **(name deleted)**, which is within the claimed area.

The information in the application supports the factual basis on which it is asserted the native title claim group has, and the predecessors have, an association with the claim area.

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

Attachment F states that *“the ancestors of the applicants were members of a sophisticated and organised society and lived on or used the claimed land and waters subject to a recognised system of traditional laws and customs”*.

Attachment F states that the native title claim group continues to acknowledge and observe those traditional laws and customs with the land in respect of which the claim is made.

Attachments F and G describe in general terms the laws and customs of the native title claim group and their ancestors.

Paragraph 14 of attachment F lists (although not exhaustively) the traditional laws and customs of the ancestors of the applicants.

Paragraph 3 of Attachment G states that *“the applicants continue to maintain a system of traditional laws that governs many aspects of their lives in relation to their traditional connection with the land.”* The paragraph then goes on to list activities that these laws govern.

Attachment F makes certain points which the applicants say identify them as an Aboriginal society, such as being recognised by others as being the traditional owners of the claimed land and waters and among other things that they maintain a system of traditional laws that govern the community and their connection with and use of the land.

Attachments F and G describe traditional activities the claim group continue to carry out in the claim area, including enforcement and regulation of the law by various members of the group, education of the young in the social, religious and cultural knowledge of the society. Conduct of ceremonies and rituals that relate to different stages of the life of the members of the group, conduct of ceremonies relating to th

S190B(6)

Prima facie case

Met

**190B(6)**

*Prima facie case:*

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

Reasons for the Decision

To meet this condition of the test I must consider that on the face of the information provided, at least some of the native title rights and interests claimed in the application can be established.

I have adopted the ordinary meaning of the phrase prima facie in my considerations –being that which appears at first sight, or on the face of it, without investigation.

Attachment E of the application contains a description of the native title rights and interests claimed. These are described as:

- (i) the right to possess, occupy, use and enjoy of the whole of the land and waters claimed;

These are then particularised to include a list of 11 separate native title rights and interests:

- (ii) the right to possess the land and waters claimed;
- (iii) the right to occupy the land and waters claimed;
- (iv) the right to use and enjoy the land and waters claimed;
- (v) the right to make decisions about the use and enjoyment of the land and waters claimed;
- (vi) the right to free access to the land and waters claimed;
- (vii) the right to use and enjoy the resources of the land and waters claimed;
- (viii) the right to control the use and enjoyment of others of the resources of the land and waters claimed;
- (ix) the right to trade in the resources of the land and waters claimed;
- (x) the right to receive a portion of any resources taken by others from the land or waters claimed.
- (xi) the right to maintain and protect places of importance on the land and in the waters claimed;
- (xii) the right to maintain, protect and prevent misuse of cultural knowledge associated with the land and waters claimed.

These native title rights and interest are then subject to a number of exclusions which can be found at Attachment B, paragraph (b).

Information provided to support that these native title rights and interests can be established under the traditional laws and customs in relation to the area claimed is contained in Attachments F and G.

On the basis of the information provided the following native title rights and interests can be prima facie established (subject to those qualifications identified above):

### **1. the right to possess, occupy, use and enjoy of the whole of the land and waters claimed**

Schedule F of the application outlines the use and occupation of the land and waters claimed since time immemorial. Reference is made to historical and genealogical research, which it is, stated supports the claim that the native title claim group's ancestors occupied the land and waters claimed since time immemorial.

Attachment F states that from the time of European contact through to the 1960's many of the ancestors and the applicants themselves sustained their traditional physical connection with the land claimed.

Attachments F and G both make statements asserting members of the native title claim group and their ancestors, have continuously carried out activities (which relate to their traditional laws and customs) on the land and waters within the area of the claim. These include:

- Occupying and residing on the land;
- Travelling over the waters claimed;
- Hunting on the land;
- Fishing in the waters claimed; and
- Digging for orche on the land.

### **2. the right to possess the land and waters claimed**

The application makes various statements establishing the groups rights to use and enjoy the area in accordance with traditional laws and customs. In addition attachment F states that the ancestors of the applicants and many of the applicants maintained their traditional lifestyle and connection with the land by continuing to care and maintain the land claimed, and by continuing to assert ownership of the land and waters claimed as against members of other language groups.

### **3. the right to occupy the land and waters claimed**

Attachment F to the application outlines an association of the native title claim group through their ancestors to the claim area since time immemorial. Paragraph 2 states that:

*"The Aboriginal people who occupied the land and waters claimed since time immemorial and before European contact were the ancestors of the applicants, as indicated by historical and genealogical research and oral statements."*



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:*

*currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or*

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

*the Crown in any capacity; or*

*a statutory authority of the Crown in any capacity; or*

*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

To meet this condition I must be satisfied that at least one member of the native title claim group currently has or a traditional physical connection with any part of the land or waters covered by the application.

General information in relation to this condition is given at Attachments F and G to the application.

Attachment F states that the Aboriginal people who occupied the land and waters claimed since time immemorial and before European contact were the ancestors of the applicants.

Schedules F and G contain statements that the relationship between the claim area and the native title claim group is one of continuous connection.

Schedule G states that: “**(names deleted)** still live with the claim area and regularly visit and travel within and on the claimed land and fish from the claimed waters. **(name deleted)** provides advice to various parties with regard to sites of cultural and traditional significance with the claimed land and waters.”

Attachment G also states that **(name deleted)** continues to take her children to areas within the claim where they carry out certain activities including recounting the cultural and spiritual significance of various parts of the land.

Schedule G names several members of the native title claim group who were born and lived on **(name deleted)**, which is within the claim area. It is stated at Attachment G that many of these native title claim group members ancestors were born and raised on this station. Also that many of these claimants have taken their children back to this area to educate them about their heritage and cultural background.

Schedules F and G outline various activities that the native title claim group carries out which support traditional physical connection to the claim area.

The Submission supplied by the State Government in relation to this condition was reviewed, but was considered to be of little value as it was based on the original application, prior to amendments being lodged.

To meet this condition I must be satisfied that one member of the claim group has or previously had a traditional physical connection with any part of the land claimed. **(names deleted)** are all named in the native title claim group.

I am satisfied that all three currently have a traditional physical connection with the land or waters covered by the application.

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

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

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

Reasons for the Decision

To meet this condition of the test, neither the application nor the accompanying documents must disclose, and the Registrar must not otherwise be aware, that, because of s61A, the application should not have been made.

Section 61A provides that :

- An application must not be made if there is an approved determination of native title in relation to an area;
- An application must not be made if a previous exclusive possession act was done, attributable to the Commonwealth or a State or Territory (by s.23E) in relation to the area.
- An application must not be made in which any of the rights and interests claimed confer possession, occupation, use and enjoyment of any of the area to the exclusion of others, if a previous non-exclusive possession act (23F) was done in relation to the area by the Commonwealth or the State Governments (by 23I).

I will deal with each of these in turn:

#### **Approved Determination of Native Title**

A search of the Register of Native Title Claims conducted 3 March 1999 indicates that there has not been a previous approved determination of native title in the claim area.

#### **Previous exclusive possession acts**

Attachment B, paragraph (b) identifies exclusions from the claim area. Such exclusions include:

“areas to which exclusive possession act, as defined in section 23B of the NTA, was carried out and either the act was attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in section 23E in relation to the act”

This exclusion clause meets the requirement of this subsection.

#### **Previous Non-Exclusive Possession Acts**

Attachment B, paragraph (b) identifies exclusions from the claim area. Such exclusions include:

The applicants acknowledge that, in respect to areas in relation to which a previous non-exclusive possession act, as defined in section 23F of the *Native Title Act* was carried out, and either:

- (i) the act was an act attributable to the Commonwealth; or
- (ii) 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 that act,

the native title rights of the applicants in relation to such areas are impaired to the extent of their inconsistency with such an act.”

#### **S 47, 47A, 47B**

The application makes statements in relation to being subject to the provisions of ss 47, 47A and 47B

From the information reviewed, it is not evident that the applicants are claiming rights and interests in respect of areas contrary to the limitations outlined at 61A.

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

- 190B(9)**
- Ownership of minerals, petroleum or gas wholly owned by the Crown:*
- (a) *The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, 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

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

The native title rights and interest are set out at Attachment E of the application.

A statement at Attachment E states that the claimed native title rights and interests are subject 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 the application complies with the requirements of S190B(9)(a).

- 190B(9)**
- Exclusive possession of an offshore place:*
- (b) *The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, 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

To meet this condition I must not otherwise be aware that, 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.

The native title rights and interest are set out at Attachment E of the application.

A statement at Attachment E states: “*to the extent that the native title rights and interests claimed may relate to water in an offshore place, those rights and interests are not claimed to the exclusion of other rights and interests in relation to the whole or part of the offshore place.*”

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

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

#### Reasons for the Decision

To meet this condition I must not otherwise be aware that the native title rights and interests claimed have otherwise been extinguished (except to the extent that the extinguishment is required to be disregarded under subsection 47(2), 47A(2) or 47B(2)).

There is no evidence that native title has been extinguished by loss of connection. The native title claim group claims a continuous connection to the claim area. The native title claim group still exists. There appears to be traditional laws and customs, which link the native title claim group to the claim area.

There is no evidence that native title has been extinguished by surrender or by agreement to any of the claim area.

The claim area does include towns, which may indicate some native title rights and interests may have otherwise been extinguished.

The applicants have used a formula exclusion to exclude Category A past acts, and areas in relation to which native title rights and interests have otherwise been extinguished, including areas subject to:

- (i) An act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title;
- (ii) An unqualified grant of an estate in fee simple;
- (iii) a permanent public work;
- (iv) an existing public road or street used by the public.
- (v) Freehold land; and
- (vi) Public roads.

The State of Western Australia did not make a submission to the Registrar on this point.

The State of Western Australia has not passed legislation in accordance with s.23E or s23I of the NTA.

It is not otherwise apparent that the application or accompanying documents disclose that the native title rights and interests claimed has otherwise been extinguished.

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 any affidavit or other document, required by sections 61 and 62.*

#### Details required in section 61

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

Reasons relating to this sub-section

Page 1 of the application identifies the three named applicants and the address for service is detailed on page 14 of the application.

I am satisfied there has been compliance with the procedural requirements of s61(3).

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

Reasons relating to this subsection

The application lists the names of the persons in the native title claim group at page 2.

I am satisfied there has been compliance with the procedural requirements of s61(4).

**61(5) Application is in the prescribed form; lodged in the Federal Court, contains prescribed information Note also that “prescribed information” is that which is required by s62 as set out in the text of this reasons document under “Details required in section 62(1)”, and is accompanied by any prescribed documents**

Reasons relating to this sub-section

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

As required by s61(5)(b), the application was filed in the Federal Court.

The application meets the requirements of section 61(5)(c) and contains all information as prescribed in section 62.

As required by s61(5)(d) the application is accompanied by affidavits as prescribed by s62(1)(a); and a map as prescribed by s62(1)(b).

I note that section 190C(2) only requires me to consider details, other information, and documents required by section 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.

I am satisfied there has been compliance with the procedural requirements of s61(5).

**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-section

A claimant application must be accompanied by an affidavit(s) sworn by the applicant(s).

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

The affidavit of **(name deleted)** was signed on 5 March 1999. The affidavit of **(name deleted)** was signed on 4 March 1999. The affidavit of **(name deleted)** was signed on 10 March 1999.

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

Points 4, 5 and 6 of the affidavits state that the basis of the applicants' authorisation, and consequently the requirements of s62(1)(a)(iv) and (v) are satisfied.

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

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

Comment on details provided

Some details of traditional physical connection are provided in the application at Attachment F which gives a general description of Native Title Rights and Interests claimed, and Attachment G which identifies some of the activities members of the native title claim group carry out.

Schedules F and G outline various activities that members of the native title claim group carries out which support traditional physical connection to the claim area. Schedule G states that:

*“(names deleted) still live with the claim area and regularly visit and travel within and on the claimed land and fish from the claimed waters. (name deleted) provides advice to various parties with regard to sites of cultural and traditional significance within the claimed land and waters.”*

I am satisfied there has been procedural compliance with s 61(1)(c).

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

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

Reasons relating to this sub-section

A written description of the external area subject to claim is provided at Attachment B of the application. The external boundaries are identified by longitudinal and latitudinal coordinates.

I am satisfied there has been procedural compliance with s 61(2)(a)(i)

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

Reasons relating to this sub-section

At Attachment B of the application there is a description of the internal boundaries of the application. The applicants have excluded certain types of land tenure from the claim area at paragraph (b).

I have outlined the contents of the Attachment in my reasons for decision in relation to test condition 190B2.

The description of areas excluded can be objectively applied to establish whether any particular area of land or waters within the external boundary of the application is within the claim area or not. I am satisfied they have identified any area within the boundaries that are not covered by the application.

I am satisfied there has been compliance with the procedural requirements of s61(2)(a)(ii).

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

Reasons relating to this sub-section

A map showing the external boundaries of the area covered by the application is attached to the application at Attachment C.

The map has been produced by WALIS, Land Claims Mapping Unit (dated 23/10/98) and has the following features:

- i) a scale
  - ii) a locality plan indicating the extent of the claim within the state of Western Australia;
  - iii) latitude and longitude coordinates in both the bottom left hand corner and top right hand corner of the plan;
  - iv) current land tenure (as at 23/10/98) including pastoral leases, special leases, reserves, Aboriginal reserves and vacant crown land;
  - v) the external boundary of the area claimed;
- “hatching” of the area claimed.

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

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

Reasons relating to this sub-section

Details of searches carried out to determine the existence of any non-native title rights and interests are provided at attachment D to the application.

Attachment D consists of :

- Copies of land tenure documents provided to the applicants by the NNTT;
- Copies of land tenure documents provided to the applicant by CSO.

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



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

Reasons relating to this sub-section

A description of the native title rights and interests claimed is provided at Attachment E to the application.

In accordance with section 62(2)(d), the native title rights and interests claimed in the application do not merely consist of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist or that have not been extinguished at law.

Attachment E of the application contains a description of the native title rights and interests claimed. These are described as the “right to the possess, occupy, use and enjoy of the whole of the land and waters claimed”. These are then particularised to include a list of 11 separate native title rights and interests.

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

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

Reasons relating to this sub-section

A general description of the factual basis on which it is asserted that the claim group has, and their predecessors had, an association with the area is provided at attachment F to the application.

Paragraph 2 states that:

*“The Aboriginal people who occupied the land and waters claimed since time immemorial and before European contact were the ancestors of the applicants, as indicated by historical and genealogical research and oral statements.”*

References to secondary material documenting occupation of the area by the Mardudhunera and Yaburara people at the time of European arrival are also provided.

Paragraph 8 states that:

*“The applicants were told by their immediate ancestors and subsequently knew that their ancestors had been in occupation of the claimed area when initial and early contact was made and sustained with Europeans and that such contact had been made and sustained.”*

Attachments F and G both make statements asserting members of the native title claim group and their ancestors, have continuously carried out activities (which relate to their traditional laws and customs) on the land and waters within the area of the claim. The activities described relate to the native title rights and interests at Schedule E.

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

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

Reasons relating to this sub-section

A general description of the factual basis on which it is asserted that there exists traditional laws and customs that give rise to the claimed native title is provided at attachment F and attachment g to the application.

Paragraph 14 of attachment F lists (although not exhaustively) the traditional laws and customs of the ancestors of the applicants.

Paragraph 3 of attachment G states that:

*“the applicants continue to maintain a system of traditional laws that governs many aspects of their lives in relation to their traditional connection with the land.”*

The attachment then lists the activities that these laws govern.

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

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

Reasons relating to this sub-section

A general description of the factual basis on which it is asserted that the claim group has continued to hold native title in accordance with traditional laws and customs is provided at attachment F to the application.

Paragraph 17 lists the ways in which the ancestors of the applicants, and many of the applicants, maintained their traditional lifestyle and connection with the land.

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

**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-section

Attachment G of the application provides general details of a number of activities in relation to the land or waters currently being carried out by the native title group.

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

**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-section

Details of other applications to the High Court, Federal Court or a recognised State/Territory body are provided at Schedule H (page 7) of the application.

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

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

Reasons relating to this sub-section

Details of notices under s 29 are provided at attachment I of the application.

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

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:*

*the previous application covered the whole or part of the area covered by the current application; and*

*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*

*the entry was made, or not removed, as a result of consideration of the previous application under section 190A.*

Reasons for the Decision

To meet this condition of the test I must not be aware, when considering this application, that it overlaps with a previous application that has already passed the registration test and which was on the Register of Native Title Claims when this application was made, and which has common native title claim group members.

A search of the Tribunal's Geospatial Information Access database revealed 5 overlapping applications. These are:

WC94/5,

WC95/3,

WC96/51,

WC96/73 and

WC98/40.

None of the overlapping applications are on the register as a result of complying with s190A.

The information supplied by the State Government in relation to this condition was reviewed, but was considered to be of little value in forming the recommendation, as it did not recognise that none of the overlapping applications were on the register as a result of complying with s190A.

I am satisfied that there has been compliance with s190C3.

27/08/200220Reason - Yaburara & Mardudhunera people

S190C(4)

Identity of claimed native title holders

Met

**Certification and authorisation:**

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

**and**

**190C(4)(b)** *the application has been certified under paragraph 202(4)(d) by each representative Aboriginal/Torres Strait Island body that could certify the application in performing its functions under that Part; or*

*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.*

**Commentary on S190C(5)**

Reasons for the Decision

To meet this condition of the test to be satisfied, the application of the following is the case:

- (a) that the application of the applicant is a member of paragraph 202(4)(b) of the Regulations is with Aboriginal or Torres Strait Islander status, and that the applicant is a member of the native title claim group; and,
- (b) that the applicant is a member of the native title claim group, and that the Registrar should consider that it can be made the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

The application at Part A (2) contains a statement that the applicants are authorised by the native title claim group to make the application. No evidence of identification of the applicant as a member of the native title claim group has been provided in the application. The application does not therefore meet part (a) as above. The applicants must rely on meeting part (b) to pass this condition.

Attachment AA is a statement from all of the 16 native title claim group members naming the 3 applicants as being authorised by all of the members of the native title claim group at part A (2), Attachment AA, and in affidavits accompanying the application.

The applicants' affidavits from the members of the native title claim group as set out in Attachment AA provide information that relates to the steps that were taken in the process of authorisation.

The application at Part A (2) contains a statement that the applicants are authorised by the native title claim group to make the application. The application has not been approved by the native title claim group.

The applicants' affidavits state that since the lodgement of the original claim the claimant group have met on a regular basis and all members of the claim group specifically authorise each of the applicants. This statement does not appear to describe a decision-making process under traditional laws and customs but rather infers the agreed adoption of a decision making process under s251B(b), that the group have relied on since lodging the initial claim.

Attachment AA is a statement from all of the 16 native title claim group members naming the 3 applicants as being authorised by all of the members of the native title claim group.

The applicants' affidavits describe a process of discussions that took place prior to lodging the initial claim on 1 August 1996. The affidavits also describe another meeting that took place on 27 March, 1997 in Karratha at which all of the members of the native title claim group were present and authorised the applicants to act on behalf of the claimant group.

I am satisfied that each of the applicants are properly authorised to make the application and to deal with matters arising in relation to it.