

National Native Title Tribunal

REGISTRATION TEST
REASONS FOR DECISION

***EDITED VERSION FOR PUBLIC RELEASE VIA TRIBUNAL
WEBSITE***

DELEGATE				Malcolm O'Dell			
Application Name				Mullewa Wadjari			
Name(s) of Applicant(s)				Eric Papertalk, Kenneth Papertalk, Margaret Green, Dennis Comeagain			
Region		South West		NNTT No		WC96/93	
Date Application Made		19 August 1996		Fed Court No		WAG6119/98	

Brief History of the application

This is an application lodged with the Tribunal on 19 August 1996.

The applicants filed an amended application in the Federal Court on 7 January 1999. It was heard on 15 January 1999, where the Court for procedural reasons adjourned the matter until 22 January 1999, when the Court ordered that the application be further amended in accordance with the amended application filed at the hearing. The applicant filed a further amended application on 16 February 1999. This was heard on 3 March 1999, and the notice of the order was supplied to the Registrar on 5 March 1999 with a copy of the amended application.

The applicant is unrepresented. The applicant has been informally assisted by **[name and occupation deleted for privacy reasons]**.

All references to the 'amended application' in the present decision, unless otherwise stated, refer to the application as most recently amended on 3/3/99. However, it should be noted that some schedules, which were amended on 22/1/99, were not further amended on 3/3/99 and thus the application as amended on 22/1/99 may reflect the current state of the application for such schedules.

All references are to the *Native Title Act* unless otherwise indicated.

Information considered when making the Decision

Under Table A schedule 5 of the Native Title Act [see specifically Part 4 – 11(8)], in determining this application where applicable I have considered and reviewed all of the information and documents from the following files, databases and other sources:

- The Working Files, Registration Test Files, Legal Services Files and Federal Court Application and Amendment Files for claims:

WC96/93 Working files	2 volumes of NNTT material since lodgement
WC96/93 Tenure files	2 volumes of tenure information obtained 27/11/96
WC96/93 Form 6 File	File of Form 6 party applications
WC96/93 Registration – Testing files	2 volumes of NNTT material since 1/10/98
WC95/55 Working File	1 volume of NNTT material since lodgement

- The 'Future Act' files relating to the following matters:

Files held by Future Act Unit	Files identified as possibly relevant to WC96/93 as follows: WO97/0352, WO97/0370, WO97/0657, WO98/0115, WO98/0116, WO98/0307, WO98/0308, WO98/0321, WO98/0334, WO98/0385, WO98/0496, WO98/0498, WO98/0506, WO98/0757, WO98/1267 (see folio 53 Reg Test V2)
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- Other tenure information acquired by the Tribunal in relation to the area covered by the this application
- The National Native Title Tribunal Geospatial Database

- The Register of Native Title Claims
- The Native Title Register
- Determination of Representative ATSI Bodies: their gazetted boundaries
- Transcripts, Affidavits, State Government Submissions, Grantee Party Submissions, Applicant Statements of Contention, information by the Aboriginal Affairs Department and Determinations from Future Act Files where the future act matters related to any part of the area covered by this application;
- Submissions from the Western Australian State Government
- Submissions from the Commonwealth Government

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

A. Procedural Conditions

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

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

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

61(5)	<i>Application is in the prescribed form, lodged in the Federal Court, contain prescribed information, and accompanied by prescribed documents and fee</i>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. The application is in the form prescribed by Regulation 5(1)(a) Native Title (Federal Court) Regulations 1998. 2. As required under section 61(5)(b), the amended application was filed in the Federal Court. 3. The application meets the requirements of section 61(5)(c) and contains all information as prescribed in section 62. See reasons for recommendation in relation to those sections. 4. As required by section 61(5)(d) the application is accompanied by: <ul style="list-style-type: none"> • Affidavits as prescribed by section 62(1)(a) (see reasons for decision in relation to that section) • A map as prescribed by sections 62(1)(b) (see reasons for decision in relation to section 62(2)(b)) 5. The original application lodged with the Tribunal was fee exempt (exemption noted 17/9/96 - see RT File Folio 1). 6. For the reasons outlined above, the requirements of s.61(5) are met. 	

Details required in section 62(1)

62(1)(a)	<i>Affidavits address matters required by s62(1)(a)(i) – s62(1)(a)(v)</i>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. Affidavits in the prescribed form and addressing the matters required by s62(1)(a)(i) – s62(1)(a)(v) are supplied for each of the 4 applicants. 2. The requirements of s.62(1)(a) are met. 	

62(1)(c)	<i>Details of physical connection (information not mandatory)</i>
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Comment on details provided	
<ol style="list-style-type: none"> 1. The amended application contains details relating to physical connection at Schedule F and Attachment F, Schedule M, Schedule N, Schedule T, Attachment G (Letter from [name and occupation deleted for privacy reasons]). 	

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

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

62(2)(a)(ii)	Information identifying any areas within those boundaries which are not covered
Reasons relating to this sub-condition	Application passes the condition
	<p>1. Information identifying the 'internal boundaries' of the application is given at Schedule B of the amended application in the following terms:</p> <ol style="list-style-type: none"> 1. <i>The applicants exclude from the claim any areas covered by valid acts on or before 23 December 1996 comprising such of the following as are included as extinguishing acts within the Native Title Act 1993, as amended, or Titles Validation Act 1994, as amended, at the time of the Registrar's consideration:</i> <ul style="list-style-type: none"> • <i>Category A past acts, as defined in NTA s.228 and s.229;</i> • <i>Category A intermediate period acts, as defined in NTA s.232A and s.232B.</i> 2. <i>The applicants exclude from the claim any areas in relation to which a previous exclusive possession act, as defined in s.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 an act attributable to the State of Western Australia and a law of that State has made provision as mentioned in s.23E in relation to the act.</i> 3. <i>The applicants exclude from the claim areas in relation to which native title rights and interests have otherwise been extinguished, including areas subject to:</i> <ol style="list-style-type: none"> a <i>an act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or</i> b <i>actual use made by the holder of a tenure other than native title which is permanently inconsistent with the continued existence of native title.</i> <p><i>To avoid any uncertainty, the applicants exclude from the claim area the tenures set out in Schedule B1 below</i></p> <p><i>B1.1 An unqualified grant of an estate in fee simple.</i></p> <p><i>B1.2 A lease which is currently in force, in respect of an area not exceeding 5,000 square metres; upon which a dwelling, house, residence, building or work is constructed; and which comprises:</i></p> <ol style="list-style-type: none"> 1. <i>a lease of a worker's dwelling under the Workers' Homes Act 1911-1928;</i> 2. <i>a 999 year lease under the Land Act 1898;</i> 3. <i>a lease of a Town Lot or Suburban Lot pursuant to the Land Act 1933 (WA), s.117; or</i> 4. <i>a special lease under s.117 of the Land Act 1933 (WA).</i> <p><i>B1.3 A Conditional Purchase Lease currently in force in the agricultural areas of the South West Division under clauses 46 and 47 of the Land Regulations 1887, which includes a condition that the lessee reside on the area of the lease and upon which a residence has been constructed.</i></p> <p><i>B1.4 A Conditional Purchase lease of cultivable land currently in force under Part V, Division 1 of the Land Act 1933 (WA) in respect of which habitual residence by the lessee is a statutory condition in accordance with the Division and upon which a residence has been constructed.</i></p> <p><i>B1.5 A Perpetual Lease currently in force under the War Service Land Settlement Scheme Act 1954.</i></p> <p><i>B1.6 A permanent public work.</i></p> <p><i>B1.7 An existing public road or street used by the public.</i></p>

4. Paragraphs (1) to (3) above are subject to such of the provisions of sections 47, 47A and 47B of the NTA as apply to any part of the area contained within this application, particulars of which will be provided prior to the Mullewa Wadjari native title hearing.

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

62(2)(b)	<i>A map showing the external boundaries of the area covered by the application</i>
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Reasons relating to this sub-condition	Recommend application passes the condition
<p>1. The amended application at attachment C includes an A1 size map showing the external boundaries of the area covered by the application.</p> <p>2. For the reasons given at s.190B(2), the application passes this condition.</p>	

62(2)(c)	<i>Details/results of searches carried out to determine the existence of any non-native title rights and interests</i>
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Reasons relating to this sub-condition	Application passes the condition
<p>1. Schedule D of the amended application includes details/results of searches carried out by the NNTT and by the State Government.</p> <p>2. The application passes this condition.</p>	

62(2)(d)	Description of native title rights and interests claimed
Reasons relating to this sub-condition	Application passes the condition
<p>1. The amended application at Schedule E contains a description of the native title rights and interests claimed in respect of the area claimed.</p> <p>2. The native title rights and interests are described as follows:</p> <p style="padding-left: 40px;"><i>The native title rights and interests claimed are the rights to the possession, use, occupation and enjoyment of the land and waters claimed, and in particular are comprised of:</i></p> <p>A. <i>the right to possess, use, occupy and enjoy the area claimed;</i></p> <p>B. <i>the right to make decisions about the use and enjoyment of the area;</i></p> <p>C. <i>the right of access to the area;</i></p> <p>D. <i>the right to control the access of others to the area;</i></p> <p>E. <i>the right to use and enjoy the resources of the area, subject to the exclusions of Schedules P and Q;</i></p> <p>F. <i>the right to control the use and enjoyment of others of the resources of the area, subject to the exclusions of Schedules P and Q;</i></p> <p>G. <i>the right to trade in resources of the area, subject to the exclusions of Schedules P and Q;</i></p> <p>H. <i>the right to receive a portion of any resources taken by others from the area, subject to the exclusions of Schedules P and Q;</i></p> <p>I. <i>the right to maintain and protect places of importance under traditional laws, practices and customs in the area;</i></p> <p>J. <i>the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area;</i></p> <p>K. <i>the right to hold meetings and traditional ceremonies on the land;</i></p> <p>L. <i>the right to manage and protect the sacred sites and spirituality of the land and to camp, hunt, fish, gather bush tucker, medicines and building materials according to the laws and customs of the Mullewa Wadjari people;</i></p> <p>M. <i>the right to gather materials to make tools, weapons and utensils to perform our traditional ceremonies;</i></p> <p>N. <i>the right to maintain and care for water resources (particularly springs) in significant areas of the land; and</i></p> <p>O. <i>the right to prevent others from fouling our sacred areas and water resources.</i></p> <p><i>Along with the exclusions of Schedules P and Q below, the above listed native title rights and interests are subject to the following:</i></p> <p>1) <i>The applicants do not make a claim for native title rights or interests which confer possession, occupation, use or 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 s.23F of the NTA, was done in relation to an area and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in s.23L of the NTA in relation to the act.</i></p> <p>2) <i>Paragraph (1) above is subject to such of the provisions of s.47, s.47A and s.47B of the Act as apply to any part of the area contained within the application, particulars of which will be provided prior to the native title hearing.</i></p> <p>3) <i>The said native title rights and interests are not claimed to the exclusion of any other rights and interests validly created by, or pursuant to, the common law, the law of the State or a law of the Commonwealth.</i></p> <p>3. This description satisfies s.62(2)(d).</p>	

62(2)(e)(i)	<i>Factual basis – claim group has, and their predecessors had, and association with the area</i>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. A general description of the factual basis for the assertion that the claim group has, and their predecessors had, an association with the area is given at Schedule F, Schedule L, and Schedule N of the amended application. 2. This description satisfies s.62(2)(e)(i). 	

62(2)(e)(ii)	<i>Factual basis – traditional laws and customs exist that give rise to the claimed native title</i>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. A general description of the factual basis for the assertion that traditional laws and customs exist that give rise to the claimed native title is given at A2, Schedule F, Schedule M, Schedule R(2) and Attachment R of the amended application. 2. This description satisfies s.62(2)(e)(ii). 	

62(2)(e)(iii)	<i>Factual basis – claim group has continued to hold native title in accordance with traditional laws and customs</i>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. A general description of the factual basis for the assertion that the claim group has continued to hold native title in accordance with traditional laws and customs is given at Schedule F, Schedule G, Attachment G, Schedule M, Schedule R(2), Attachment R and Schedule T of the amended application. 2. This description satisfies s.62(2)(e)(iii). 	

62(2)(f)	<i>If native title claim group currently carry on any activities in relation to the area claimed, details of those activities</i>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. Details of activities currently carried out by the claimant group in relation to the area claimed are included at Schedule F ((B) and (C)), Schedule G (by reference to Schedule F), Schedule M, Attachment R and Schedule T of the amended application. 2. These details satisfy s.62(2)(f). 	

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

62(2)(h)	<i>Details of any S29 Notices (or notices given under a corresponding State/Territory law) in relation to the area, and the applicant is aware of</i>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. The amended application at Schedule I and attachment I lists all s29s issued over any part of the application area since 30/9/98. 2. The application passes this condition. 	

Reasons for the Decision

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

<ol style="list-style-type: none"> 1. A check of the Register of Native Title Claims was conducted on 28 April 1999. 2. This check revealed that no overlapping native title application is on the Register of Native Title Claims or has not been removed from the Register of Native Title Claims, as a result of consideration pursuant to s190A. 3. I am satisfied that the requirements of s.190C3 are met. 	
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190C4(a) and 190C4(b)	<p><i>Certification and authorisation:</i></p> <p><i>The Registrar must be satisfied that either of the following is the case:</i></p> <p>(a) <i>the application has been certified under paragraph 202(4)(d) by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part; or</i></p> <p>(b) <i>the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.</i></p>
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Reasons for the Decision

<p>1. At schedule R of the amended application the applicants have indicated an intention not to provide a certificate issued by a Native Title Representative Body pursuant to s.202(4)(d), but to proceed by authorisation in accordance with s190C(4)(b).</p> <p>2. The applicants have however provided documents purporting to be a certificate by a representative Aboriginal/Torres Strait Islander body in compliance with s.190C(4)(a).</p> <p>3. In my view the applicants have therefore indicated an intention in this application and accompanying material to establish both certification of the application and authorisation of the applicants.</p> <p>4. Under this section, I am only required to be satisfied of one of these. I have therefore limited my consideration to compliance with s190C(4)(a) – certification by a representative Aboriginal/Torres Strait Islander body.</p> <p>5. An inspection of the Native Title Representative Body gazetted boundaries establishes that the claim area is wholly within the Yamatji Barna Baba Maaja Aboriginal Corporation (Yamatji Land and Sea Council – YLSC) and Aboriginal Legal Service of Western Australia gazetted areas.</p> <p>6. Section 190C(4)(a) requires certification by each representative Aboriginal/Torres Strait Islander body that could certify the application. Section 190C(6) qualifies this requirement, stating that certification is not required by all representative bodies if the application has been certified by a body whose area includes all of the area of land or waters to which the application relates. As indicated above, the Yamatji Barna Baba Maaja Aboriginal Corporation (Yamatji Land and Sea Council – YLSC) is such a body.</p> <p><u>Certification by the Yamatji Land and Sea Council (YLSC)</u></p> <p>7. There appears to be no legally required format for certification of a claimant application other than it must be in writing (s.202(4)(d)) and that it must contain the information required under s.202(7).</p> <p><u>Compliance with s.202(7)</u></p> <p>8. Section 202(7) of the Act sets out the statements to be included in certification of an application for determination of native title in the following terms:</p> <p style="padding-left: 40px;"><i>A certification of an application for a determination of native title by a representative body must:</i></p>

- a *Include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (5)(a) and (b) have been met; and*
 - b *Briefly set out the body's reasons for being of that opinion; and*
 - c *Where applicable, briefly set out what the representative body has done to meet the requirements of subsection (c)*
9. The certificate provided by the applicant consists of two letters on YLSC letterhead and signed by the Chairman **[name deleted for privacy reasons]**.
10. In my view the certificate provided by the applicant complies with s.202(7).
11. As a result of the above considerations, I am satisfied that the application has been certified by the Yamatji Land and Sea Council pursuant to s.202(4)(d) and in accordance with s.207(7).
12. This certification satisfies the requirements of s.190C(4) of the Act.

190C5	<p><i>Evidence of authorisation:</i></p> <p><i>If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:</i></p> <ul style="list-style-type: none"> <i>(a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and</i> <i>(b) briefly sets out the grounds on which the Registrar should consider that it has been met.</i>
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Reasons for the Recommendation

1. This requirement is not applicable. See reasons for 190C4.

B. Merits Conditions

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

- Map and External Boundary Description
1. A map is supplied at attachment C of the amended application.
 2. The map supplied shows the external boundaries of the areas claimed.

3. The map displays a list of co-ordinates to enable the position of sites or localities within them to be identified. In addition, it shows a scale allowing distances and areas to be ascertained and identifying certain leases and other tenure. A locality diagram, which indicates generally the position of the claim within Western Australia, forms part of the map provided. All the line work on the map is finely drawn and easy to follow.
4. The map meets the requirements of s62 (2)(b) as the boundaries of the areas covered by the application can be identified.
5. Additional information identifying the external boundary of the claim is supplied at Attachment B of the amended application.
6. The Tribunal's Geospatial Unit has plotted this information and conclude that the description is internally consistent, fully encloses the claim area and does not discernibly contradict the map accompanying the application.

Internal Boundary Description

- 7 Areas excluded from the application are described at Schedule B(b) of the amended application.
- 8 These excluded areas form the areas within the (external) boundary which are not covered by the application, that is, the internal boundary description.
- 9 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 on or before 23 December 1996 comprising such of the following as are included as extinguishing acts within the Native Title Act 1993, as amended, or Titles Validation Act 1994, as amended, at the time of the Registrar's consideration:*
 - *Category A past acts, as defined in NTA s.228 and s.229;*
 - *Category A intermediate period acts, as defined in NTA s.232A and s.232B.*
 2. *The applicants exclude from the claim any areas in relation to which a previous exclusive possession act, as defined in s.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 an act attributable to the State of Western Australia and a law of that State has made provision as mentioned in s.23E in relation to the act.*
 3. *The applicants exclude from the claim areas in relation to which native title rights and interests have otherwise been extinguished, including areas subject to:*
 - a *an act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or*
 - b *actual use made by the holder of a tenure other than native title which is permanently inconsistent with the continued existence of native title.*

To avoid any uncertainty, the applicants exclude from the claim area the tenures set out in Schedule B1 below

- B1.1 An unqualified grant of an estate in fee simple.*
- B1.2 A lease which is currently in force, in respect of an area not exceeding 5,000 square metres; upon which a dwelling, house, residence, building or work is constructed; and which comprises:*
1. *a lease of a worker's dwelling under the Workers' Homes Act*

1911-1928;

2. a 999 year lease under the Land Act 1898;
3. a lease of a Town Lot or Suburban Lot pursuant to the Land Act 1933 (WA), s.117; or
4. a special lease under s.117 of the Land Act 1933 (WA).

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

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

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

B1.6 A permanent public work.

B1.7 An existing public road or street used by the public.

4. Paragraphs (1) to (3) above are subject to such of the provisions of sections 47, 47A and 47B of the NTA as apply to any part of the area contained within this application, particulars of which will be provided prior to the Mullewa Wadjari native title hearing.

- 10 The description of areas excluded from the claim area at Schedule B(b) paragraphs 1, 2, and 3(a) refer to land where an act of a State or Commonwealth government has created an interest. The excluded areas of land can be readily identified through searches of relevant Government registers and are therefore described with reasonable certainty. (Note: at the time of making this decision, the State of Western Australia has not passed legislation referred to at s.23E of the amended Act.)
- 11 Paragraph 3(b) of Schedule B(b) excludes areas of land where actual use by the holder of a tenure is permanently inconsistent with continued existence of native title. Schedule B1 of Schedule B(b) gives further information on specific areas of land excluded from the claim which may fall into this category. The description in paragraph 3(b) read together with Schedule B1 is sufficient for me to be satisfied that the areas excluded from the application, are identified with reasonable certainty.
- 12 The applicants seek the protection of ss.47, 47A and 47B by stating at paragraph 4 of Schedule B(b) that any areas excluded from the claim area are subject to these legislative provisions. Details of what, if any, areas enjoy this legislative protection are not provided.
- 13 The description at paragraph 4 allows it to be shown objectively, upon the provision of such particulars, whether applicants may have benefit of these provisions.
- 14 The above analysis addresses the submission made by the State of Western Australia in a letter dated 19 November 1998.

Conclusion

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

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

<ol style="list-style-type: none">1. The native title claim group is described at Schedule A of the amended application in the following terms: <p style="margin-left: 40px;"><i>“The Mullewa Wadjari Native Title claims [sic] are members of the [ten surnames deleted for privacy reasons] families, whose adult members are hereunder listed in their entirety. Therefore, the Native Title Claim Group is those people listed, and their biological descendants. [68 names listed]”</i></p>2. I find that the persons in the native title claim group are the 68 people listed at Schedule A plus their biological descendants.3. As Schedule A relies on a description other than naming the persons in the claim group, the application does not satisfy s.190B(3)(a). Consequently, the applicants must rely on satisfying s.190B(3)(b).4. In my view the description at Schedule A provides an objectively verifiable mechanism for ascertaining whether any particular person is in the claim group.5. I am therefore satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.6. The description satisfies the requirements of s.190B(3)(b).
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190B4	<p>Identification of the native title rights and interests:</p> <p>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.</p>
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Reasons for the Decision

<ol style="list-style-type: none">1 This condition requires me to be satisfied that the native title rights and interests claimed can be readily identified.2 It is insufficient to merely state that these native title rights and interests are ‘all native title interests that may exist, or that have not been extinguished at law’.3 To meet the requirements of s190B (4), I need only be satisfied that at least one of the rights and interests sought is sufficiently described for it to be readily identified.4 The amended application at Schedule E lists the native title rights and interests claimed as

follows:

The native title rights and interests claimed are the rights to the possession, use, occupation and enjoyment of the land and waters claimed, and in particular are comprised of:

- A. *the right to possess, use, occupy and enjoy the area claimed;*
- 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, subject to the exclusions of Schedules P and Q;*
- F. *the right to control the use and enjoyment of others of the resources of the area, subject to the exclusions of Schedules P and Q;*
- G. *the right to trade in resources of the area, subject to the exclusions of Schedules P and Q;*
- H. *the right to receive a portion of any resources taken by others from the area, subject to the exclusions of Schedules P and Q;*
- I. *the right to maintain and protect places of importance under traditional laws, practices and customs in the area;*
- J. *the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area;*
- K. *the right to hold meetings and traditional ceremonies on the land;*
- L. *the right to manage and protect the sacred sites and spirituality of the land and to camp, hunt, fish, gather bush tucker, medicines and building materials according to the laws and customs of the Mullewa Wadjari people;*
- M. *the right to gather materials to make tools, weapons and utensils to perform our traditional ceremonies;*
- N. *the right to maintain and care for water resources (particularly springs) in significant areas of the land; and*
- O. *the right to prevent others from fouling our sacred areas and water resources.*

Along with the exclusions of Schedules P and Q below, the above listed native title rights and interests are subject to the following:

- i. *The applicants do not make a claim for native title rights or interests which confer possession, occupation, use or 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 s.23F of the NTA, was done in relation to an area and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in s.23L of the NTA in relation to the act.*
- ii. *Paragraph (1) above is subject to such of the provisions of s.47, s.47A and s.47B of the Act as apply to any part of the area contained within the application, particulars of which will be provided prior to the native title hearing.*
- iii. *The said native title rights and interests are not claimed to the exclusion of any other rights and interests validly created by, or pursuant to, the common law, the law of the State or a law of the Commonwealth.*

- 5 In my view the native title rights and interests described at schedule E are readily identifiable.
- 6 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'.
- 7 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).

190B5	<p>Sufficient factual basis:</p> <p><i>The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:</i></p> <p>(a) <i>that the native title claim group have, and the predecessors of those persons had, an association with the area;</i></p> <p>(b) <i>that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests;</i></p> <p>(c) <i>that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.</i></p>
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Reasons for the Decision

<p>1 This condition requires me to be satisfied that the factual basis on which it is asserted that there exist native title rights and interests described at schedule E of the amended application is sufficient to support that assertion.</p> <p>2 In reaching this decision I must be satisfied that the factual basis supports the 3 criteria identified at s.190B5 (a) – (c).</p> <p><u>Evidence</u></p> <p>3 Schedule F of the amended application contains a series of assertions in support of this condition.</p> <p>4 Also submitted by the applicants for my consideration are:</p> <ul style="list-style-type: none"> • Affidavits by [two names deleted for privacy reasons]. • A paper entitled [title and details of paper (3 sentences) deleted for privacy reasons] • A letter from [name and occupation deleted for privacy reasons] • An affidavit from [name deleted for privacy reasons] dated 11 March 1999. <p>5 Other information considered is as follows:</p> <ul style="list-style-type: none"> • Form 6 Party Application by [two names deleted for privacy reasons]. <p>6 The State of Western Australia in their submission to the Registrar dated 19 November 1998 does not address this condition of the Registration Test.</p> <p><u>190B(5)(a) - that the native title claim group have, and the predecessors of those persons had, an association with the area</u></p> <p>7 This criteria requires me to be satisfied that:</p> <ul style="list-style-type: none"> • the members of the native title claim group (collectively, communally or individually) have (that is currently have) an association with the area (under claim) <i>and</i> • the predecessors in title or antecedents of the members of the native title claim group had an association with the area (under claim) <p>8 The word ‘association’ is not defined in the Act. In my view, the nature of the association required to be demonstrated by the applicants is governed by the nature of the native title rights and interests claimed. In this case the applicants claim the rights and interests</p>

identified at schedule E of the amended application. These rights and interests are, broadly, both physical and cultural in nature and therefore in my view the nature of the association required to be demonstrated needs to be both physical and cultural. Cultural association in turn may, in my view, be spiritual in nature.

- 9 In addition, as native title rights and interests are defined as being related to land and waters (s.223 of the Act), in my view the information about the association of members of the native title claim group must relate to the area of land and waters where the particular native title rights and interests are claimed. In this case the extent of land and waters claimed is identified at schedule B of the amended application. I must therefore be satisfied that the members of the native title claim group are and that their predecessors were, broadly associated with the particular land and waters claimed. I note in this case that the external boundary of the claim encloses an area of 52,246 square kilometres.
- 10 Schedule F of the amended application asserts that the native title claim group and their ancestors have, since the assertion of British sovereignty, possessed occupied, used and enjoyed the area subject to this application. The truthfulness of this assertion is deposed in the accompanying affidavits of each applicant.
- 11 The information provided links members of the claim group to **[area deleted for privacy reasons]**. **[Type of place deleted for cultural reasons]** places are mentioned which all relate to the area of the claim, together with activities conducted on stations and other areas within the claim are by members of the claim group.
- 12 Based on this information I am satisfied that current members of the claim group have an association with the area.
- 13 A **[details of document deleted for privacy reasons]** is submitted which identifies a link between current members of the native title claim group and **[genealogical details deleted for privacy reasons]**.
- 14 The affidavits of both **[two names deleted for privacy reasons]** depose that **[detail of deposition (1 sentence) deleted for privacy reasons]**. This information links the ancestors of members of the claim group to the area of the claim.
- 15 I am satisfied that the evidence provided is sufficient to support the assertion that native title claim group have, and the predecessors of those persons had, in association with the area.

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.

- 16 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
- 17 The amended application at Schedule F asserts that the native title rights and interests claimed by the applicants derive from, and are currently held in accordance with, Aboriginal traditional laws and customs including the custom of passing title by descent. The truthfulness of this assertion is deposed in the accompanying affidavits of each applicant.
- 18 Other evidence is supplied that directly supports this condition and in particular I am able to conclude from the affidavit of **[name deleted for privacy reasons]**, together with the **[detail**

of document deleted for privacy reasons] supplied by **[name deleted for privacy reasons]** that there exists a body of traditional law and custom which is passed through the generations. The evidence supports the notion that this body of traditional law and custom governs the behaviour of members of the native title claim group and that this gives rise to the claimed native title rights and interests.

19 Evidence is also provided on the existence of sites of significance and other **[nature of sites deleted for cultural reasons]**.

20 I am satisfied that this criterion is met.

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

21 This criteria requires me to be satisfied that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

22 The assertions at schedule F together with consideration of the other information detailed above supports the notion that the native title claim group continue to hold native title in accordance with traditional laws and customs.

23 I am satisfied this condition is met.

Summary

24 In summary, each applicant has sworn to the truth of the statements contained in the amended application, which contain certain assertions that support the factual basis.

25 The accompanying information tells a 'story' about the claim group's association with the claim area and a life governed by traditional laws and custom which in turn give rise to the native title rights and interests claimed.

26 Statements are made and information is provided connecting members of the claim group and their predecessors to the area of the claim and to their adherence to traditional laws and customs.

27 There is evidence of **[details of activities and traditional laws and customs deleted for cultural reasons]**.

Conclusion

28 There is evidence to support the factual basis in each of the 3 criteria identified at s.190B5 (a) – (c). This evidence in turn is sufficient for me to be satisfied that the factual basis on which the assertion of the existence of the native title rights and interests claimed is sufficient to support the assertion.

190B6

Prima facie case:

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

Reasons for the Decision

Information considered

Submitted by the applicants for my consideration are:

- Affidavits by [two names deleted for privacy reasons].
- A paper entitled [title and details of paper (3 sentences) deleted for privacy reasons]
- A letter from [name and occupation deleted for privacy reasons]
- An affidavit from [name deleted for privacy reasons] dated 11 March 1999.

This condition of the Registration Test requires that the Registrar be satisfied that at least *some* (one) of the Native Title rights and interests claimed can, *prima facie*, be established.

It is necessary however to consider whether a *prima facie* case is established against each of the Native Title rights and interests identified as the right to negotiate only attaches to those identified interests against which a *prima facie* case has been established.

Native title rights and interests are defined at s.223 of the Native Title Act. This definition attaches native title rights and interests to land and water requires:

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

Findings

I have already outlined in my reasons at s.190B(5) that I am satisfied that the members of the native title claim group continue to adhere to traditional laws and customs that support the factual basis for the native title rights and interests claimed.

On the evidence provided I am satisfied that the native title rights and interests listed below can, *prima facie* be made out, subject to the following:

1. The applicants do not make a claim for native title rights or interests which confer possession, occupation, use or 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 s.23F of the NTA, was done in relation to an area and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in s.23L of the NTA in relation to the act. (except as provided in paragraph 5 below)
2. The said native title rights and interests are not claimed to the exclusion of any other rights and interests validly created by, or pursuant to, the common law, the law of the State or a law of the Commonwealth. (except as provided in paragraph 5 below)
3. To the extent that the native title rights and interests claimed may relate to an offshore place those rights and interests are not to the exclusion of other rights and interests validly created by the Commonwealth or the State of Western Australia, or accorded under International Law in

relation to the whole or the part of the offshore place".

4. To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants.
5. The provisions of s. 47, 47A and 47B of the Native Title Act as apply to any part of the area contained within this application.
 - A. *the right to possess, use, occupy and enjoy the area claimed*
 - 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, practices and customs in the area*
 - J. *the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area*
 - K. *the right to hold meetings and traditional ceremonies on the land*
 - L. *the right to manage and protect the sacred sites and spirituality of the land and to camp, hunt, fish, gather bush tucker, medicines and building materials according to the laws and customs of the Mullewa Wadjari people*
 - M. *the right to gather materials to make tools, weapons and utensils to perform our traditional ceremonies*
 - N. *the right to maintain and care for water resources (particularly springs) in significant areas of the land*
 - O. *the right to prevent others from fouling our sacred areas and water resources.*

Conclusion

The application passes this condition.

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

<p><u>Information considered</u></p> <ol style="list-style-type: none">1. In addition to the amended application the following material was submitted by the applicants for consideration in this condition;<ul style="list-style-type: none">• Affidavits by [two names deleted for privacy reasons].• A paper entitled [title and details of paper (3 sentences) deleted for privacy reasons]• A letter from [name and occupation deleted for privacy reasons]• An affidavit from [name deleted for privacy reasons] dated 11 March 1999.2. 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.3. Traditional physical connection is not defined in the Native Title Act. I am interpreting this phrase to mean that physical connection should be in accordance with the particular traditional laws and customs relevant to the claim group.4. For the reasons given at s.190B(5), I am satisfied that there exist traditional laws acknowledged by and customs observed by the claim group sufficient to support traditional physical connection.5. I am further satisfied from the information supplied and identified previously that [name of member of native title claim group deleted for privacy reasons] currently has a traditional physical connection with the land or waters covered by the application.6. The application passes this condition.

190B8	<p>No failure to comply with s61A:</p> <p><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that, because of s61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.</i></p>
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Reasons for the Decision

s61A(1) – Native Title Determination

A search of the Native Title Register conducted on 29 March 1999, has revealed that there is no approved determination of native title in relation to the area claimed in this application.

S61A(2) – Previous Exclusive Possession Acts

In attachment B(b) of the application, certain tenures are excluded from the claim area. For reasons provided above at s190B(2) these exclusions are sufficiently clear to provide reasonable certainty about all the tenure excluded.

The claim has not been made over tenure to which a previous exclusive possession act, as defined in s23B, applies.

S61A(3) – Previous Non-Exclusive Possession Acts

The applicants are not seeking exclusive possession over areas the subject of previous non-exclusive possession acts.

S61A(4) – s47, 47A, 47B

The applicants have sought to invoke the provisions of s47, 47A or 47B of the Native Title Act.

Conclusion

For the reasons identified above the application and accompanying documents do not disclose and is not otherwise apparent that because of Section 61A the application should not have been made.

The application passes this condition.

190B9 (a)	<p><i>Ownership of minerals, petroleum or gas wholly owned by the Crown:</i></p> <p><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i></p> <p><i>(a) to the extent that the native title rights and interests claimed consist or include ownership of minerals, petroleum or gas - the Crown in right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas;</i></p>
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Reasons for the Decision

<ol style="list-style-type: none">1. Native title rights and interests are described at schedule E of the amended application.2. None of the claimed native title rights described in schedule E claim ownership of resources including minerals, petroleum or gas.3. In any event, Schedule Q in the amended application makes the statement that: <p style="margin-left: 40px;">To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants</p>4. Consequently, the application and accompanying documents do not disclose, and I am not otherwise aware that the applicant claims ownership of minerals, petroleum or gas that is wholly owned by the Crown.5. The application passes this condition.
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190B9 (b)	<p><i>Exclusive possession of an offshore place:</i></p> <p><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i></p> <p><i>(b) to the extent that the native title rights and interests claimed relate to waters in an offshore place - those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place;</i></p>
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Reasons for the Decision

<ol style="list-style-type: none">1. Schedule E of the amended application does not make a claim for exclusive possession of an offshore place.2. In any event the application qualifies the native title rights identified at schedule E by making them conditional on Schedule P which dictates that native title rights: <p style="margin-left: 40px;">To the extent that the native title rights and interests claimed may relate to waters in an offshore place, those rights and interests are not to the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under international law in relation to the whole or any part of the offshore place.</p>3. The application passes this condition.

190B9 (c)	<p><i>Other extinguishment:</i></p> <p><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i></p> <p><i>(c) in any case - the native title rights and interests claimed have otherwise been extinguished (except to the extent that the extinguishment is required to be disregarded under subsection 47(2), 47A(2) or 47B(2)).</i></p>
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Reasons for the Decision

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

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