National Native Title Tribunal

REASONS FOR DECISION COVER SHEET
REGISTRATION TEST

REGISTRAR'S DELEGATE	Graham Miner
APPLICATION NAME	Badimia People
NAMES OF APPLICANTS	Gloria Fogarty, Clara George, Ollie George, Percy George, Olive Gibson, Irene Harris, Albert Little, Hazel Little, Richard Little, Frank Walsh (Jnr), Frank Walsh (Snr), Des Thompson, John Ashwin, Des Little, Wilma Lawson and Nancy Wallam
NNTT NO.	WC 96/98
FEDERAL COURT NO.	WG 6123/98
NNTT REGION	South Murchison area of Western Australia
DATE APPLICATION MADE	4 October 1996

I have considered the application against each of the conditions contained in ss190B and 190C of the *Native Title Act* 1993.

DECISION

The application is **ACCEPTED** for registration pursuant to s190A of the *Native Title Act*.

Written notice of the decision and the reasons for the decision are to be provided to the applicants.

_____ _____

Graham Miner ***Date***
Delegate of the Registrar pursuant to
sections190, 190A, 190B, 190C, 190D.

Information considered when making the Decision

The Badimia People's native title determination application was lodged with the Native Title Tribunal on 4 October 1996. On 29 June 1999 leave to amend the application was granted by the Federal Court. Subsequently, the application was accepted for registration pursuant to s190A of the Native Title Act 1993 on 15 July 1999.

On 27 October 1999, the applicants sought leave to re-amend the application. Such leave was granted on 3 November 1999. A copy of the re-amended application was given to the Tribunal pursuant to s64(4) of the Native Title Act 1993. Sub-section 190A(1) of the Native Title Act 1993 provides that the re-amended application must again be considered in accordance with s190A. Subsequently, the application was again accepted for registration pursuant to s190A of the Native Title Act 1993 on 20 July 2000.

On 1 August 2001, the applicants again sought leave to further amend the application. Such leave was granted on 13 August 2001. A copy of the further amended application was again given to the Tribunal pursuant to s64(4) of the Native Title Act 1993.

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

- Registration Test File, Legal Services File, and Federal Court Application for native title claim WC 96/98;
- National Native Title Tribunal Geospatial Database;
- Register of Native Title Claims;
- Schedule of Native Title Claimant Applications;
- The Native Title Register;
- Determination of Representative ATSI Bodies: their gazetted boundaries;
- Additional information provided by the Applicants/Claimants/Representative Bodies;
- Affidavit material:
    - Affidavit of [NAME OMITTED] affirmed 3 June 1999;
    - Affidavit of [NAME OMITTED] affirmed/sworn 29 January 1999;
    - Affidavits of [NAME OMITTED] affirmed/sworn 29 January 1999 and 22 June 1999;
    - Affidavit of [NAME & OCCUPATION OMITTED] sworn 12 July 1999.

In accordance with the decision in *State of Western Australia v Native Title Registrar & Ors* [1999] FCA 1591 – 1594 any information provided directly to the Native Title Registrar by the applicants should be provided to the State. After receiving the State's written agreement to maintain confidentiality, this additional information was provided to the State on 1 February 2000.

On 11 February 2000, the State provided a written comment to the Tribunal in relation to this material. The main comment from the State concerned the Certificate provided by the Noongar Land Council. However, as Schedule K of the current application has been amended to remove the Noongar Land Council, the State's comment in this regard is no longer relevant. The State had no other comments to make in relation to the material provided to them on 1 February 2000.

As the material provided to the State on 1 February 2000 is the same material upon which the current decision is based, and the State has provided the Tribunal with their written comment in relation to this material (ie. 14 February 2000), I am of the view that the Tribunal's responsibility in relation to the decision in *State of Western Australia v Native Title Registrar & Ors* [1999] FCA 1591 – 1594 has been discharged.

Note:

1. All references to legislative sections refer to the *Native Title Act* 1993 unless otherwise specified.
2. Information considered relevant to the application of the registration test is identified under each condition or sub-condition in these Reasons for Decision.

A. Procedural Conditions

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

190C2 *The Registrar must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.*

Details required in section 61

61(1) The native title claim group includes all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.

Reasons relating to this sub-section:

In *Risk v Registrar, NNTR* [2000] FCA 1589, O'Loughlin J held that a delegate applying s190C(2) of the registration test must consider whether the people identified as the native title claim group are people whom, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title that is claimed in their application: ie., are they a properly constituted native title group? His Honour held that, when it is apparent to the delegate that the group bringing the application is only part of a larger group who hold common or group rights, it is impossible to accept the application for registration.

As was said in the *Risk* decision*:*

> "By operation of subs 190C(2) the Registrar must be satisfied in relation to all the requirements contained in s61. It follows that, when applying the registration test, the Registrar must consider whether (on the basis of the application and other relevant information) the application has been made on behalf of a 'native title claim group'.
>
> The [Native Title] Act now ensures that applications can only be lodged on behalf of properly constituted groups – not individuals or small sub-groups. This approach is consistent with the principle that native title is communally held… Subsection 61(1) imposes requirements not only in relation to the question of authorisation, but also in relation to the anterior question of whether the application has been made on behalf of a 'native title claim group'… An application which is not made on behalf of a 'native title claim group' cannot validly proceed…" - per O'Loughlin J at [30] – [31].
>
> "A native title claim group is not established or recognised merely because a group of people … call themselves a native title claim group. It is incumbent on the delegate to satisfy herself that the claimants truly constitute such a group...[T]he tasks of the delegate included the task of examining and deciding who, in accordance with traditional law and customs, comprised the native title claim group." – per O'Loughlin J at [60].

In making my decision, I have had particular regard to Schedule A of the application and to accompanying affidavits. Schedule A of the Badimia application states that:

> The claim is brought on behalf of those Aboriginal people biologically descended from the following deceased ancestors:
>
> Timothy Benjamin and Mary Assil; Frances (aka Mary) Bynder and John Bynder; Albert Nebrong and Dinah; Galena (aka Lena); Yilayajambin and Bilygwi; Ninghan Freddie; Ningham Billy; Polly Little; Lisa Martin; Topsy; Eva Renie [or Rene]; Old Julia; and Lizzy (aka Joonby);

The description does not purport to exclude any persons who hold in common the body of laws and customs concerning the claim area. I do not have any other information that indicates that the native title claim group does not include, or may not include, all the persons who may hold native

title in the area of the application. Based on the information before me, I have formed the view that the claim group, as described in the application, is a properly constituted group, according to the body of laws and customs concerning the claim area and who hold the common or group rights and interests comprising the particular native title that is claimed in the application.

As I am satisfied that the claimants truly constitute such a group I am also satisfied there has been compliance with the procedural requirements of s61(1).

Result: Requirements are met

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

Reasons relating to this sub-section:

Sixteen persons are named as applicants in the application: Gloria Fogarty, Clara George, Ollie George, Percy George, Olive Gibson, Irene Harris, Albert Little, Hazel Little, Richard Little, Frank Walsh (Jnr), Frank Walsh (Snr), Des Thompson, John Ashwin, Des Little, Wilma Lawson and Nancy Wallam (the applicants).

The address for service is provided at Part B of the application.

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

Result: Requirements are met

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

Reasons relating to this sub-section:

Schedule A of the Badimia application states that :

> The claim is brought on behalf of those Aboriginal people biologically descended from the following deceased ancestors:
>
> Timothy Benjamin and Mary Assil; Frances (aka Mary) Bynder and John Bynder; Albert Nebrong and Dinah; Galena (aka Lena); Yilayajambin and Bilygwi; Ninghan Freddie; Ningham Billy; Polly Little; Lisa Martin; Topsy; Eva Renie [or Rene]; Old Julia; and Lizzy (aka Joonby);

As an exhaustive list of names of the persons in the native title claim group has not been provided, the requirements of s61(4)(a) are not met.

However, for the reasons set out below in relation to my decision in respect of s190B(3), I am satisfied that the persons in the native title claim group are described sufficiently clearly in Schedule A of the application so that it can be ascertained whether any particular person is one of the persons in the claim group as is required by s61(4)(b).

Result: Requirements are met

61(5) Application is in the prescribed form[1], lodged in the Federal Court, contains prescribed information, and accompanied by prescribed documents[2]

Reasons relating to this sub-section:

The application meets the requirements of s61(5)(a) in that it is in the form prescribed by Regulation 5(1)(a) Native Title (Federal Court) Regulations 1998.

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

The application meets the requirements of s61(5)(c) in that it contains all information as prescribed in s62. I refer to my reasons for decision in relation to those sections.

As required by s61(5)(d), the application is accompanied by affidavits as prescribed by s62(1)(a).

The application is also accompanied by a map as prescribed by s62(2)(b). I refer to my reasons for decision in relation to s62(2)(b) of the Act.

I note that s190C(2) only requires me to consider details, other information, and documents required by s61 and s62. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court as set out in s61(5)(d).

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

Result: Requirements are met

Details required in section 62(1)

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

Reasons relating to this sub-section:

Affidavits have been received from all of the sixteen applicants. All of the affidavits have been affirmed before a competent witness. Nine of the affidavits were sworn/affirmed on 29 January 1999; two on 3 June 1999; three on 10 June 1999; one on 16 June 1999 and one on 19 June 1999.

Leave to amend the application was granted on 29 June 1999. Subsequently on 27 October 1999 the applicants sought leave to re-amend the application. The same affidavits were relied upon to support this. On 3 November 1999, the Court granted leave to re-amend and also ordered that:

> Any requirement to re-swear the affidavits of the respective applicants verifying the proposed amended Application be dispensed with.

Also, in *Drury and Ors v State of Western Australia [2000] FCA 132*, French J. considered that s62 does not require that fresh affidavits need to be filed every time an application is amended. His Honour held that s62A provides that applicants may deal with all matters arising in relation the application, and that, in His Honour's opinion, such matters included the amendment of the application from time to time. His Honour concluded that the specific cases in which amendments to an application did require the filing of fresh affidavits were ultimately within the discretion of the Court.

[1] Note that in relation to pre 30/9/98 applications, the application does not need to be in the prescribed form as required by the amended *Act.* Note also that pre 30/9/98 applications are deemed to have been filed in the Federal Court.

[2] Note that "prescribed information" is that which is required by s.62 as set out in the text of this reasons document under "Details required in section 62(1)".

As such, the aforementioned affidavits have again been relied upon when the Federal Court granted leave to re-amend the application on 13 August 2001.

All of the affidavits address the matters required by s62(1)(a)(i) – s62(1)(a)(v). The affidavits sworn/affirmed on 29 January 1999 do not contain an explicit statement, "that the applicant is authorised by all the persons in the native title claim group". In addressing s62(1)(a)(iv) the affidavits sworn/affirmed on 29 January 1999 all state:

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

I am of the opinion that the reference to the decision making process agreed to and adopted by the persons in the native title claim group in relation to authorising the application implies that the authorisation itself is by these persons. Further, I note at Schedule R that the applicants rely on certification of the application pursuant to s190C(4)(a). I am satisfied that the requirements of s62(1)(a)(iv) are met.

I am satisfied there has been compliance with the procedural requirements of s62(1)(a).

Result: Requirements are met

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

Reasons relating to this sub-section:

It is not a mandatory requirement that details of traditional physical connection be contained in the application. As such, Schedule M has been omitted from the application.

Result: Not provided in the application.

Details required in section 62(2) as per section 62(1)(b)

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

Reasons relating to this sub-section:

Schedule B of the application explains that the external boundaries of the claim are as set out in the map and description that are attached to the application.

For the reasons set out in my reasons for decision in relation to s190B(2), I am satisfied that the application complies with the procedural requirements of s62(2)(a)(i).

Result: Requirements are met

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

Reasons relating to this sub-section:

Schedule B/B1 contains a written description of the areas within the external boundary of the area claimed which are not covered by the application.

For the reasons set out in my reasons for decision in relation to s190B(2), I am satisfied that the information provided is sufficient to meet the procedural requirements of s62(2)(a)(ii).

Result: Requirements are met

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

Reasons relating to this sub-section:

Schedule C of the application refers to maps that are attached to the application (Attachments C, C1, C2, C3, C4, C5, and C6) that shows the external boundaries of the area covered by the application.

For the reasons set out in my reasons for decision in relation to s190B(2), I am satisfied that there has been compliance of the procedural requirements of s62(2)(b).

Result: Requirements are met

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

Reasons relating to this sub-section:

Schedule D of the application states that:

> The searches that the applicants are aware of that have been carried out to determine the existence of any non-native title rights and interests in relation to the land or waters in the area covered by the application are attached (Attachment D).

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

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

Result: Requirements are met

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

Reasons relating to this sub-section:

This sub-section requires a description of the native title rights and interests claimed in relation to particular land or waters, and any activities in the exercise of the rights and interests claimed. Further, this section requires that the description must not consist merely of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or have not been extinguished, at law.

A description of the native title rights and interests claimed is provided at Schedule E of the application. Information is also provided at Schedule B and B1 allowing the identification of areas in relation to which the particular rights and interests claimed are inconsistent with non-native title rights and interests.

Schedule G identifies an apparently non-exhaustive list of activities that members of the native title claim group have continuously carried out on the land and waters in the claim area (see my reasons for decision in relation to s62(2)(f)). These activities are activities in the exercise of one or more of the specific rights and interests identified in Schedule E. The activities described are in general terms and appear to not necessarily be an exhaustive list of all activities carried out in the claim area. However, I am of the view that the information supplied at Schedule G is sufficient to meet the requirements of this section.

I am satisfied there has been compliance with the procedural requirements of s62(2)(d). See also my reasons in relation to condition 190B(4).

Result: Requirements are met

62(2)(e) The application contains a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that:

- *(i) The native title claim group have, and the predecessors of those persons had, an association with the area; and*
- *(ii) There exist traditional laws and customs that give rise to the claimed native title; and*
- *(iii) The native title claim group have continued to hold the native title in accordance with those traditional laws and customs.*

Reasons relating to this sub-section:

The applicants have provided, at Schedule F of the application, 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. In *Western Australia v Strickland* (2000) 99 FCR 33 at [89], the Full Court of the Federal Court held (unanimously) that the Registrar was right to be satisfied with the general description provided in Schedule F of that application for the purposes of s 62(2)(e).

I consider that the information in Schedule F of the Badimia application meets the requirement of the registration test for the application to contain all of the information required in s62 (see *State of Queensland v Hutchison* [2001] FCA 416 and *Queensland v Shelley* [2001] FCA 416.)

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

Schedule F of the application provides a general description of the factual basis on which it is asserted that traditional laws and customs exist that give rise to the claimed native title.

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

Schedule F of the application provides 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.

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

Result: Requirements are met

62(2)(f) If native title claim group currently carry on any activities in relation to the area claimed, details of those activities

Reasons relating to this sub-section:

Schedule G of the application provides details of activities in relation to the land or waters that are carried out by the native title claim group.

This section requires details of current activities. I do not regard this as requiring an exhaustive description of activities. Rather, I am of the opinion that a general description that traditional law business and customary activities are carried out, together with the (non-exhaustive) particulars of these activities, constitutes sufficient detail.

The identified activities of the group in relation to the claim area are described in Schedule G of the application.

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

Result: Requirements are met

62(2)(g) Details of any other applications to the High Court, Federal Court or a recognised State/Territory body the applicant is aware of (and where the application seeks a determination of native title or compensation)

Reasons relating to this sub-section:

Schedule H of the application contains information on five 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. Schedule H lists those applications as:

> WC96/83 (WG 43/98) Pandawn Descendants
> WC96/86 (WG 44/98) Widi Marra 2
> WC97/72 (WG 6193/98) Widi Mob
> WC99/005 (WG 6008/98) Koara
> WC99/101 (WG6064/98; WG6071/98) Wutha

Schedule S of the application, at 2, states that:

> WC 95/082 Sir Samuel 2 has been removed, as it no longer overlaps the application.

The above list was checked against the list of overlapping applications for a determination of native title on the Register and Schedule of native title claims, sourced from the NNTT geospatial database. The results of this comparison revealed some discrepancies in the information provided by the applicants.

For example, the Sir Samuel #2 application is still listed in the Tribunal's geospatial database as overlapping the current application by 0.044 sq.km. However, even if this overlap is 'real' and not 'technical' in nature, the extent of the overlap is so small that, in my opinion, it can be regarded as *de minimus* and consequently ignored.

The Tribunal's geospatial database also indicates that there are two other applications which overlap the current application. These are WC 95/1 and WC 95/12. However, I note that these applications were combined into (and are enclosed by) the Koara claim (WC 99/5) in January 1999. They are only on the Register pending re-consideration of the combined Koara claim (WC 99/5) under s190A. On 16 November 1999, the decision of Carr J. in *State of Western Australia v Native Title Registrar & Ors* [1999] FCA 1591 – 1594 set aside the Tribunal's decision to accept

the combined Koara claim (WC 99/5). To date, the combined Koara application (WC 99/5) has not been reconsidered under s190A of the NTA.

The applicants' reference to the Wutha claim erroneously states the NNTT number as WC99/101, instead of WC99/10. This is clearly a typographical error. However, the Tribunal's geospatial database currently does not indicate the existence of an overlap between the current application and the Wutha claim.

It should be noted that the aforementioned information regarding overlapping applications was included in the previous registration test decision which was provided to the applicants' representative in July 2000.

Schedule H of the current applicant also does not include WC 00/14 (W 6011/00), the Ngalia Kutjangkatja application, which overlaps the current application by 14.068 sq.km. The Ngalia Kutjangkatja application was filed in the Federal Court on 12 December 2000. However, notice of this application was not given to the general public until 12 December 2001, which is after the date on which the current application was further amended in the Federal Court (ie. 13 August 2001). Therefore, I cannot reasonably expect the applicants or their representative to be aware of the Ngalia Kutjangkatja application prior to notice being given to the general public.

This section only requires that the applicants provide details of any other applications to the High Court, Federal Court or a recognised State/Territory body *that the applicant is aware of* (emphasis added).

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

Result: Requirements are met

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

Reasons relating to this sub-section:

This condition requires the application to contain the details of any notices given under s29 (or State law equivalent) of which the applicants are aware.

Schedule I and Attachment I of the application provides details of s29 notices in relation to the area of their application of which the applicants are aware.

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

Result: Requirements are met

Reasons for the Decision

I refer to the individual reasons for decision in relation to sections 61 and 62, set out above. For the reasons outlined above, I find that the procedural requirements of sections 61 and 62 have been met. Accordingly, the application meets the requirements of s190C(2).

Aggregate Result: Requirements are met

190C3

Common claimants in overlapping claims:

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

(a) The previous application covered the whole or part of the area covered by the current application; and

(b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made; and

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

Reasons for the Decision

In order for the application to comply with s190C(3), I must be satisfied that no person included in the Badimia application native title claim group was a member of the native title claim group for any previous application in the circumstances set out in s190C(3).

The operation of s190C(3) was considered in *Western Australia v Strickland* [2000] FCA 652. It was held that an application lodged prior to 30 September 1998 is to be regarded as having been "made" on the date it was lodged with the National Native Title Tribunal. I note that the current application was lodged with the National Native Title Tribunal on 4 October 1996 and this is the relevant date when considering the application for the purposes of s190C(3)(b).

A search of the Schedule and Register of Native Title Claims on 18 March 2002 revealed that eight applications overlap with the current Badimia application. These applications are:

Claimant: Register of Native Title Claims

Two (2) claimant applications as per the Register of Native Title Claims fall within the external boundary of this application as at 18 March 2002.

NNTT No	FC Number	Name	Application Area (sq km)	Overlap Area (sq km)	Overlap
WC95/001	WG6008/98	Koara People	39660.06	625.823	Part
WC95/012	WG6015/98	Koara No.2	6293.22	119.546	Part

Claimant: Schedule of Applications – Federal Court

Six (6) claimant applications as per the Schedule of Applications – Federal Court fall within the external boundary of this application as at 18 March 2002.

NNTT No	FC Number	Name	Application Area (sq km)	Overlap Area (sq km)	Overlap
WC95/082	WG6059/98	Sir Samuel Number 2	5369.11	0.044	Part
WC96/083	WG0043/98	Pandawn Descendants	107329.00	36110.200	Part
WC96/086	WG0044/98	Widi Marra	386.36	386.357	Whole
WC97/072	WG6193/98	Widi Mob	52948.41	14413.660	Part
WC99/005	WG6008/98	Koara People	46730.14	745.370	Part
WC00/014	W6011/00	Ngalia Kutjungkatja	65406.95	14.068	Part

It was noted in Schedule S of the application that Sir Samuel #2 (WC 95/82) has been removed from Schedule H, as it no longer overlaps this application. The Tribunal's Geospatial Unit has no record of this application having been amended to remove any overlap. However, as the overlap with the Sir Samuel #2 application is very small, it can be regarded as *de minimus*. I note that in

his decision of 20 July 2000, the previous Delegate, in relation to this overlap, found that, 'The overlap is merely technical and can be disregarded.' I concur with the findings of the previous Delegate on this issue.

I also note that the entries relating to the Pandawn Descendants (WC 96/83), the Widi Marra (WC 96/86), and the Widi Mob (WC 97/72) have all been removed from the Register following consideration under s190A.

The combined Koara application (WC 99/5) was placed on the Register of Native Title Applications following a decision to accept the application pursuant to s190A. However, on 16 November 1999 Carr J. in *Western Australia v Native Title Registrar* [1999] FCA 1591 – 1594 set this decision aside. The pre-combined applications, namely the Koara People (WC 95/1) and Koara #2 (WC 95/12), were then re-instated on the Register pending reconsideration of the combined Koara application (WC 99/5). The pre-combined applications have not been considered under s190A of the NTA. The present status of the combined Koara application (WC 99/5) is that it is yet to be re-considered under s190A. Therefore, s190C3(c) is not applicable and I need not further consider the overlap between the current application and the combined Koara claim (WC 99/5).

The Ngalia Kutjungkatja application was filed in the Federal Court on 12 December 2000. It was subsequently not accepted for registration on 3 August 2001. However, as the Ngalia Kutjungkatja application is later in time than the Badimia claim, it has no effect on the current application.

Accordingly, I am of the opinion that s190C(3) has no operation in relation to the application.

I am satisfied that the application complies with the requirements of s190C(3).

Result: Requirements are met

Certification and authorisation:

190C4(a) and 190C4(b)

The Registrar must be satisfied that either of the following is the case:

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

Note: An application can be certified under section 203BE, or may have been certified under the former paragraph 202(4)(d).

(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

Reasons for the Decision

This condition requires me to be satisfied that the application is certified pursuant to s190C(4)(a) or authorised pursuant to s190C(4)(b) of the Act. An application complies with s190C(4)(a) of the Act if it is certified under s203BE or was certified under repealed s202(4)(d). This application has been certified pursuant to s190C(4)(a) and therefore will not be considered under 190C(4)(b).

Schedule R of the Badimia application states:

> The application is certified and the certification is supplied to the National Native Title Tribunal as further information.

The application was certified by the Yamatji Land and Sea Council (YLSC) under s202(4)(d). The Certification is dated 3 June 1999 and is signed by the Chairperson of YLSC.

The certificate expresses the opinion that:

- The Applicants have the authority to make the application and to deal with all matters arising in relation to it under the NTA; and
- All reasonable efforts have been made to ensure the application describes or otherwise identifies all other persons in the native title claim group.

The certificate thus complies with requirements s202(7).

This is a convenient point to note that the Tribunal has been advised that two of the applicants mentioned in the Certificate, Dorothy Bandy and Georgina Lawson, are deceased. The amended application removes their names as applicants.

As required by s202(7)(b), the Certificate provides reasons for the opinion. These reasons state that the YLSC (Yamatji Land and Sea Council):

- has provided in-house anthropological and legal services to the Badimia people;
- is aware that extensive community consultation has been undertaken by both its staff and by the staff of Dwyer Durack, lawyers, who have been instructed to represent the Badimia WC 96/98 native title claimants;
- is aware that a series of approximately twenty meetings of claimants from across the claim area the subject of the present application have been held and the staff of the YLSC have observed how decisions are made by the Badimia people;
- staff and consultants have taken instructions from the Badimia people and have observed how such instructions are given;
- staff and consultants have performed historical, anthropological and genealogical research in relation to the Badimia people, and

- for this work, all reasonable efforts have been made to identify and consult with the Badimia people and the YLSC has observed that the above named applicants for this application have the authority to make the application and to deal with all matters arising in relation to it under the NTA.

In s202(6) there is a requirement that, if the representative body is aware of any overlap, the representative body make all reasonable efforts to achieve agreement between the overlapping claim groups. The sub-section also provides that a failure by the representative body to comply with the subsection does not invalidate any certificate given by the representative body. The aforementioned Certificate does not state what efforts have been or are currently being made to address the overlap issue. This does not invalidate the certification.

I also note that a Certificate has been provided by the Noongar Land Council. Schedule S of the current application states that Schedule K 'has been amended to remove the Noongar Land Council and the Aboriginal Legal Service as they are not representative Aboriginal/Torres Strait Islander bodies for the area covered by the application'. As the Noongar Land Council is no longer a representative body for all or part of the area covered by the current application I will disregard that Certificate.

I also note the Delegate's Reasons for Decision of 20 July 2000 in relation to this section of the registration test. As an edited version of these reasons has been widely available to the general public via the NNTT's homepage on the Internet for some time now, I will not repeat them here.

I am satisfied that the Certificate provided by the YLSC substantially and sufficiently complies with the requirements of s190C(4)(a).

Result: Requirements are met

190C5

Evidence of authorisation:

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:

(a) Includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and

(b) briefly sets out the grounds on which the Registrar should consider that it has been met.

Reasons for the Decision

This requirement is not applicable as the application meets the requirements of s190C(4)(a). I refer to my reasons in relation to s190C(4) above.

Result: Not applicable

B. Merits Conditions

Description of the areas claimed:

190B2 *The Registrar must be satisfied that the information and map contained in the application as required by paragraphs 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.*

Reasons for the Decision

In order for the application to meet the requirements of this section, I must be satisfied that the information and map contained in the application, as required by s62(2)(a) and s62(2)(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.

In applying this condition, I have relied upon the information provided at Schedule B together with the seven maps, included as Attachments C to C6, and the written description of the external boundary, included as Attachment B, of the application together with advice from the Tribunal's Geospatial Unit dated 18 March 2002.

External Boundaries
The applicants have provided seven maps prepared by WALIS, Land Claims Mapping Unit, based on land tenure dated between November and December 1996. The maps display sufficient co-ordinates to enable the position of sites or localities within them to be identified. The maps depict a scale, allowing distances and areas to be ascertained, and also identify pastoral leases, reserves, rivers and roads. Lines indicating the external boundary are finely marked and easy to follow.

A locality diagram indicates generally the position of the claim within the Murchison region of Western Australia, and forms part of the maps provided.

The one deficiency with the maps is that they do not contain a 'datum'. If the application is to be further amended in the future I recommend that this information be included within the maps.

In spite of the aforementioned deficiency, I am satisfied that the maps submitted with the application meets the requirements of s62(2)(b) as the boundaries of the areas covered by the application can be identified.

In addition to the provision of maps defining the external boundaries of the claim, the applicants have provided a written technical description of the external boundaries of the application at Attachment B of the application.

Based on advice received from the Tribunal's Geospatial Unit, I am satisfied that the technical description of the external boundary coincides with the map provided.

I am satisfied that the physical description of the external boundary meets the requirements of s62(2)(a)(i).

Internal boundaries
The internal boundaries, described at Schedule B and B1 of the application, exclude a variety of tenure classes from the claim area in written form. The written description of the internal boundaries is as follows:

(1) The applicants exclude from the claim 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, and relevant to the time of the Registrar's consideration:

Category A past acts, as defined in NTA s228 and s229;
Category A intermediate period acts, as defined in NTA s232A and s232B.

(2) The applicants exclude from the claim any areas in relation to which a previous exclusive possession act, as defined in section 23B of the NTA, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in section 23E in relation to the act.

(3) The 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 any of the areas contained within the following description of tenures, set out in Schedule B1.

Schedule B1

B1.1 Any former or current unqualified grant of an estate in fee simple and all other freehold land.

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), s117; or
(4) a Special Lease under s117 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 and "land or waters on which a public work is constructed, established or situated" within the meaning given to that phrase by the Native Title Act 1993 (Cth) s251D.

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

(4) Paragraphs (1) to (3) above are subject to such of the provisions of sections 47, 47A and 47B of the Act as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing but which exclude such areas as may be listed in Schedule L.

Section 62(2)(a)(ii) requires that I must be satisfied that this information is sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

The applicants have not identified, parcel by parcel, the areas of land and waters that are excluded from the claim area. In my view, they are not required to do so in order to satisfy the requirements of s62(2)(a)(ii) and s190B(2). The internal boundaries are described by way of identifying classes of land tenure that are not covered by the application. Such class exclusions amount to information that enables the internal boundaries of the application area to be adequately identified. This may require research by the State of Western Australia and other custodians, but nevertheless it is reasonable to expect that the task could be done on the basis of the information provided by the applicants.

The wording of paragraph (3) above makes it plain that the applicants exclude from the claim area any areas in relation to which native title rights and interests have otherwise been extinguished. The description of areas excluded from the claim area is expressed as "including" the areas subject to what is set out in sub-paragraphs (3)(a) and (3)(b). As such the tenures identified in sub-paragraphs (3)(a) and (3)(b) are clearly not intended to be exhaustive even though specific tenures are then listed. This follows clauses excluding areas subject to Category A and B past acts and PEPAs. However, following the findings in *WA v Ward* [2000] 170 ALR 159; 99 FCR 316, there is no specific mention of areas where mining leases under the 1978 mining legislation and general purpose leases have been granted or where a pastoral lease was enclosed and/or improved (as the case may be). Although not expressly stated it follows that the applicants exclude, for example, any areas covered by mining or general purpose leases where such leases extinguish native title.

I find that the information enables the boundaries of any areas within the external boundaries of the application that are not covered by the application to be identified.

I am therefore satisfied that the exclusion clauses set out in the paragraphs above are sufficient to meet the requirements of s62(2)(a)(ii).

Conclusion

I find that the information and maps submitted with the application meet the requirements of s62 (a) and (b). I am satisfied that the information and maps provided by the applicants are sufficient for it to be said with reasonable certainty that native title rights and interests are claimed in relation to the areas specified. The criteria set out in s190B(2) are met.

I am satisfied that the application complies with s190B(2).

Result: Requirements are met

190B3

Identification of the native title claim group:

The Registrar must be satisfied that:

(a) the persons in the native title claim group are named in the application; or

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

Reasons for the Decision

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

Schedule A of the Badimia application states:

> The claim is brought on behalf of those Aboriginal people biologically descended from the following deceased ancestors:
>
> Timothy Benjamin and Mary Assil; Frances (aka Mary) Bynder and John Bynder; Albert Nebrong and Dinah; Galena (aka Lena); Yilayajambin and Bilygwi; Ninghan Freddie; Ningham Billy; Polly Little; Lisa Martin; Topsy; Eva Renie [or Rene]; Old Julia; and Lizzy (aka Joonby);

As Schedule A relies on a description rather than naming the persons in the claim group, the application does not satisfy s190B(3)(a). Consequently, the applicants must rely on satisfying s190B(3)(b), and therefore the application must otherwise describe the persons in the native title claim group *sufficiently clearly* so that it can be ascertained whether any particular person is one of those persons.

In my opinion, the description provides a sufficient means of identifying whether or not any particular person belongs to the claim group and is sufficiently clear so that it can be ascertained whether any particular person is in the group. The description, therefore, meets the requirements of s190B(3)(b).

I am satisfied that the application complies with s190B(3).

Result: Requirements are met

Identification of the native title rights and interests:

190B4 *The Registrar must be satisfied that the description contained in the application as required by paragraph 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.*

Reasons for the Decision

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

Schedule E of the application contains a description of native title rights and interests claimed as follows:

> The native title rights and interests claimed are the rights to the possession, occupation, use and enjoyment as against the whole world (subject to any native title rights and interests which may be shared with any others who establish that they are native title holders) of the area, and in particular comprise:
>
> (a) right to possess, occupy, use and enjoy the area;
> (b) the right to make decisions about the use and enjoyment of the area;
> (c) the right of access to the area;
> (d) the right to control the access of others to the area;
> (e) the right to use and enjoy resources of the area;
> (f) the right to control the use and enjoyment of others of resources of the area;
> (g) the right to trade in resources of the area;
> (h) the right to receive a portion of any resources taken by others from the area;
> (i) the right to maintain and protect places of importance under traditional laws, customs and practices in the area; and
> (j) the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area.
>
> Subject to:
>
> (i) to the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants.
> (ii) The claim area does not include any offshore place.
> (iii) The applicants do not make a claim to native title rights and interests which confer possession, occupation, use and enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in section 23F of the NTA, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia, and a law of that State has made provision as mentioned in section 231 in relation to the act;
> (iv) Paragraph (iii) above is subject to such of the provisions of sections 47, 47A and 47B of the Act as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing.
> (v) The said native title rights and interests claimed are not claimed to the exclusion of any other rights or interests validly created by or pursuant to the common law, a law of the State or a law of the Commonwealth.

In my view the native title rights and interests described at Schedule E are readily identifiable. Also, the qualifications listed are clear in their scope and intention, reciting general limitations to the operation of the listed rights and interests, where relevant.

I am satisfied that the description in Schedule E allows the native title rights and interests claimed to be readily identified. I am satisfied the application complies with s190B(4).

Result: Requirements are met

190B5

Sufficient factual basis:

The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

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

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

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

Reasons for the Decision

This condition requires me to be satisfied that the factual basis on which it is asserted that there exist native title rights and interests is sufficient to support that assertion.

In reaching this decision I must be satisfied that the factual basis supports the 3 criteria identified at s190B(5) (a) – (c).

In assessing this condition, I am required to examine any assertions made, and information supplied, in the application and any further material provided in support of those assertions. As seen in *Strickland v Native Title Registrar* (1999) ALR 242, 261, per French J, p. 4, the Registrar or his Delegate may have regard to additional material when considering s190B(5). In *Martin v Native Title Registrar* (2001) FCA 16, French J noted that the provision of material disclosing a factual basis for the purposes of registration is, ultimately, the responsibility of the applicant. The Registrar is not required to undertake a search for such material – see [23].

In the original decision under s190A on 15 July 1999, and again in the second decision under s190A on 20 July 2000, the previous Delegates were satisfied that the application met the conditions referred to in s190B(5). To assist in giving my reasons in respect of this condition, I have reproduced the previous Delegate's reasons in full (indented).

> Submitted by the applicants for my consideration are:
>
> - Affidavit of [NAME OMITTED] sworn 22 June 1999;
> - Affidavit of [NAME OMITTED] affirmed 3 June 1999;
> - Affidavit of [NAME OMITTED] sworn 29 January 1999;
> - Affidavit of [NAME & OCCUPATION OMITTED] sworn 12 July 1999
>
> Also considered is information in overlapping applications WC96/83 – Pandawn, WC96/86 – Widi Marra, WC99/5 - Koara.
>
> Also considered is material from relevant Future Act files, notably:
>
> - From WO98/114 – material submitted by native title party including – as an attachment to an affidavit sworn by [NAME OMITTED] on 28 May 1998 (submitted to NNTT 9/6/98) - a Report on [TITLE OF REPORT OMITTED] survey leases [TENEMENT NUMBER OMITTED] and [TENEMENT NUMBER OMITTED] by [NAME OMITTED]. Although these tenements were slightly outside the area of this application (to the east), the general anthropological information about the wider area is of relevance.

- Also from WO98/114 – material submitted by grantee party including (Extracts from) Report on the [TITLE OF REPORT OMITTED], prepared by [COMPANY NAME OMITTED] in February 1992, submitted 20/5/98 as annexure to the Statement of Contention by the grantee party that the expedited procedure should apply.

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

This criteria requires me to be satisfied that:

- the members of the native title claim group have an association with the area (under claim) and
- the predecessors of the members of the native title claim group had an association with the area (under claim)

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 identified at schedule E of the amended application.

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 36,129 square kilometres.

Schedule F of the current application provides details of the association with the application area. Further, Schedule G provides details of activities members of the native title claim group currently carry out in relation to the land and waters subject of the claim including camping, hunting, gathering, visiting sites of significance, etc. The applicants attest to the truthfulness of these assertions in the affidavits accompanying the application.

On the face of it, I have reason to believe that the evidence before me is sufficient to support the information in Schedules F and G. As such, I am satisfied that this requirement has been met. Below is a consideration of the evidence before me.

In *Martin v Native Title Registrar* (2001) FCA 16, in relation to s190B(5)(a), his Honour upheld the delegate's finding that, whilst the factual basis supporting the assertion in relation to ancestral association was sufficient, this was not the case in relation to the factual basis for a connection between the members of the group and all of the area under claim. For example, in the *Martin* case, there was no evidence of association with some of the coastal areas claimed and no information was provided regarding association with the northern and eastern part of the claim area. French J found that the delegate had considered the relevant material and concluded, rightly in His Honour's view, that there was a lack of material to support an association, physical or spiritual, with the entire area claimed. The delegate was not obliged to accept very broad statements about association which had no geographical particularity.

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. At point (v) of Schedule F it is asserted that the claim group have a connection with the land according to traditional law and customs. The truthfulness of these assertions is deposed in the accompanying affidavits of each applicant.

Further information provided in the affidavits of the three elder members of the native title claim group link members of the claim group to a number of places within the claim area, from Mt Magnet in the north of the claim area to Mt Gibson station in the south. The affidavits refer to numerous stations and sites throughout the claim area. The evidence provided for association is particularly strong for the

central and southern portion of the application area. In addition, the Future Act materials detail connection of members of the claimant group with the north-eastern area.

This information is corroborated by the affidavit of [NAME OMITTED].

Based on this information I am satisfied that current members of the claim group have an association with the area.

The document Report [TITLE OF REPORT OMITTED] survey leases [TENEMENT NUMBER OMITTED] and [TENEMENT NUMBER OMITTED], by [NAME OMITTED] includes general anthropological material about the region of the application, including material linking Badimia people to the region back to "traditional (ie pre-European contact) times". There is evidence, albeit limited, which connects these persons to the current members of the claim group. This is supported by the affidavit of [NAME OMITTED].

I am satisfied from this material that the predecessors of the claim group had an association with the area.

I am satisfied that the evidence provided is sufficient to support the assertion that the native title claim group have, and the predecessors of those persons had, an association with the area.

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

This sub-section 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

I have considered information contained within files relating to overlapping claims WC96/83 – Pandawn, WC96/86 – Widi Marra, and WC99/5 - Koara. I am satisfied that there is no relevant information that would aid consideration of this condition within applications WC96/83 – Pandawn and WC96/86 – Widi Marra.

Overlapping claim WC99/5 – Koara has previously been considered for registration under s.190A of the Native Title Act and was accepted for registration on 23 March 1999. WC99/5 – Koara overlaps this current application by 745 square kilometres. The applicants in WC99/5 – Koara appear to identify a system of traditional laws and customs which give rise to their particular native title rights and interests that are different of those identified in the current application (see paragraphs 20 - 25 below for details of the laws and customs identified in the current application).

In my view, the identification by the applicants in WC99/5 – Koara of a different system of laws and customs over part of the current application is not, in this particular situation, adverse to the applicants in the current application. I have based this view on the following:

- The relatively small size of the overlap
- The native title rights and interests identified at schedule E of the current application are specifically made subject to the rights and interest of other who may hold native title.

The document Report [TITLE OF REPORT OMITTED] survey leases [TENEMENT NUMBER OMITTED] and [TENEMENT NUMBER OMITTED], by [NAME OMITTED] includes general anthropological material which suggests possible shared rights - in the region of the overlap - between Badimia and Koara people. I take this to mean that the configuration of boundaries of each claim and the consequent overlap is consistent with the laws and customs of the respective groups.
The amended application at Schedule F asserts that the native title rights and interests claimed by the applicants are pursuant to and possessed under the laws and customs of the claim group. The traditional

laws and customs which give rise to rights and interests in land and waters are vested in members of the native title claim group on the basis of:

- Descent from ancestors connected to the area
- Conception in the area
- Birth in the area
- Traditional religious knowledge of the area
- Traditional knowledge of the geography of the area
- Traditional knowledge of resources of the area
- Knowledge of traditional ceremonies of the area

To be satisfied that those laws and customs are respectively acknowledged and observed by the native title claim group, I have examined the affidavits provided by the three elder members of the claim group in terms of the above. Information about descent, knowledge (religious, geographical, of resources and their use) and activities, which can be linked to each of the above criteria are provided in the affidavits. In my view, such examples substantiate the assertion of the factual basis that traditional laws and customs are observed by the group.

Furthermore, it is stated at Schedule F that such traditional law and custom has been passed by traditional teaching, through the generations preceding the present generations to the contemporary generations of persons comprising the native title claim group.

The information provided supports the notion that there exists a body of traditional laws acknowledged by and tradition customs observed by the native title claim group and that these laws and customs give rise to the claimed native title rights and interests.

This is supported by the affidavit of [NAME & OCCUPATION OMITTED].

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.

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.

The assertions at schedule F together with consideration of the other information detailed above supports the notion that the native title claim group continues to hold native title in accordance with traditional laws and customs. Furthermore, the assertion that the claim group continue to hold native title in accordance with traditional law and custom is deposed in the affidavits accompanying the amended application.

This information is corroborated by the affidavit of [NAME OMITTED].

I am satisfied this condition is met.

Summary

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

Supporting information provided in the affidavits of three elder members of the claim group - and corroborated by the affidavit of [NAME OMITTED]- gives clear examples of 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.

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.

There is evidence of hunting, gathering for food and medicinal purposes, camping, and visiting and protecting sites (in accordance with traditional laws and customs taught by their predecessors). There is evidence that members of the claim group continue to hold traditional knowledge associated with the religious and the economic significance of the country. There is evidence that the laws and customs practiced by the claim group give rise to the native title rights and interests claimed.

Conclusion

There is evidence to support the factual basis in each of the three 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.

I have considered the same information as the previous delegate and find myself in agreement with his reasons. I am therefore satisfied that there is sufficient factual basis to support the assertion that the native title rights and interests claimed exist. I am also satisfied that the factual basis supports the assertions as referred to in s190B5(a) – (c).

The application complies with s190B(5).

I have considered and concur with the findings of the previous Delegates. I am therefore satisfied that there is sufficient factual basis to support the assertion that the native title rights and interests claimed exist. I am also satisfied that the factual basis supports the assertions as referred to in s190B(5)(a) – (c).

Result: Requirements are met

Prima facie case:

190B6 *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

For the application to meet the requirements of this condition I must consider that, prima facie, at least some of the rights and interests claimed can be established.

I have already decided pursuant to s190B(4) that the native title rights and interests claimed, at Schedule E are readily identifiable. To meet the current condition, only some of these rights and interests, prima facie, need to be able to be established.

The term 'prima facie' was considered in *North Ganalanja Aboriginal Corporation v Qld* (1996) 185 CLR 595 by their Honours Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, who noted: *"The phrase can have various shades of meaning in particular statutory contexts but the ordinary meaning of the phrase "prima facie" is: 'At first sight, on the face of it; as appears at first sight without investigation."* [Citing the *Oxford English Dictionary* (2nd ed. 1989)].

I have adopted the ordinary meaning referred to by their Honours when considering this application.

'Native title rights and interests' are defined at s223 of the Act. This definition specifically attaches native title rights and interests to land and water, and in summary requires:

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

This definition is closely aligned with all the issues I have already considered in relation to s190B(5), and I refer to my reasons in relation to that section. I have found that there is sufficient factual basis for the claimed native title rights and interests.

In relation to the requirement that the rights and interests be recognised under the common law of Australia, I note that Schedule E (v) of the application explains that the 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, a law of the State or a law of the Commonwealth.

Information considered:

I note that there is information included in the application at Schedules E and G that contains a list of activities, described in general terms. I have also considered the following affidavit material in relation to this section:

- Affidavits of [NAME OMITTED] sworn 29 January 1999 and 22 June 1999;
- Affidavit of [NAME OMITTED] affirmed 3 June 1999;
- Affidavit of [NAME OMITTED] sworn 29 January 1999;
- Affidavit of [NAME & OCCUPATION OMITTED] sworn 12 July 1999.

Schedule E of the application contains a description of native title rights and interests claimed as follows:

> The native title rights and interests claimed are the rights to the possession, occupation, use and enjoyment as against the whole world (subject to any native title rights and interests which may be shared with any others who establish that they are native title holders) of the area, and in particular comprise
>
> (a) rights to possess, occupy, use and enjoy the area;
> (b) the right to make decisions about the use and enjoyment of the area;
> (c) the right of access to the area;
> (d) the right to control the access of others to the area;
> (e) the right to use and enjoy resources of the area;
> (f) the right to control the use and enjoyment of others of resources of the area;
> (g) the right to trade in resources of the area;
> (h) the right to receive a portion of any resources taken by others from the area;
> (i) the right to maintain and protect places of importance under traditional laws, customs and practices in the area; and
> (j) the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area.
>
> Subject to:
>
> (i) to the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants.
> (ii) The claim area does not include any offshore place.
> (iii) The applicants do not make a claim to native title rights and interests which confer possession, occupation, use and enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in section 23F of the NTA, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia, and a law of that State has made provision as mentioned in section 231 in relation to the act;
> (iv) Paragraph (iii) above is subject to such of the provisions of sections 47, 47A and 47B of the Act as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing.
> (v) The said native title rights and interests claimed are not claimed to the exclusion of any other rights or interests validly created by or pursuant to the common law, a law of the State or a law of the Commonwealth.

The findings of extinguishment in *WA v Ward* [2000] 170 ALR; 99 FCR 316 must be considered in relation to the aforementioned native title rights and interests. In *Ward* , the majority, held that some of the rights and interests included in the determination of native title made by Lee J at first instance may not be recognisable at common law. Their Honours held that rights and interests that involve a physical presence on the land or activities on the land that are associated with traditional, social and cultural practices are capable of recognition under common law but that those involving (only) religious or spiritual relationships with land are not (see *Ward* at [104]). The majority thus held that a determination of native title under the Act must also be confined to those types of rights and interests. Their Honours, however, also found that where ss47 and 47A applied the applicants were entitled to possession, occupation, use and enjoyment of the area concerned as against the whole world.

In relation to the list of specific rights and interests, which are indicated in Schedule E at paragraph (a)-(j), the following questions, which pertain to the aforementioned *Ward* decision, need to be considered:

- Can it be said that these are rights and interests that involve physical presence on the area claimed? or
- Do they entail activities on the area claimed associated with traditional social and cultural practices; or
- Are the rights and interests claimed of a purely spiritual or religious affiliation with the land, divorced from actual physical use and enjoyment of the land?

If the rights and interests claimed are of a purely spiritual or religious affiliation with the land, divorced from actual physical use and enjoyment of the land, then because of the *Ward* decision, those rights and interests cannot be registered.

In relation to the requirements of this section, I have considered the information contained within the application as well as any additional or affidavit material provided by the applicants/claimants. I have had particular regard to the affidavit material provided by the applicants/claimants and the anthropologist. I have found that the material contained within the aforementioned affidavits supports the rights and interests that are listed below.

The rights and interests claimed include:

a) rights to possess, occupy, use and enjoy the area;

In the *State of Western Australia v Ward* [2000] FCA 611, this right formed part of the determination made by their Honours. The information contained within the current application as well as the affidavit material referred to above provided by the applicants/claimants supports this native title right/interest.

I am satisfied on the basis of the information in the application and in the above affidavits above that this right can be prima facie established.

b) the right to make decisions about the use and enjoyment of the area;

In the *State of Western Australia v Ward* [2000] FCA 611, this right formed part of the determination made by their Honours. The information contained within the application as well as additional and affidavit material provided by the applicants/claimants supports this native title right/interest.

[NAME OMITTED] deposes in his affidavit (29/1/99) at paragraph 9 that:

> My father had a special responsibility for the area at [LOCATION OMITTED], which is part of Badimia country. There is a sacred site in that area. Now I and my older brother, [NAME OMITTED], are responsible for that site. If anyone wants to use that area they should talk to me or to [NAME OMITTED] because we are responsible for it. I would be very upset if it was damaged.

[NAME OMITTED] deposes in his affidavit at para 5 in respect of his brother [NAME OMITTED] that:

> [NAME OMITTED] is the head boss for this country because he was initiated there. If people want to do something to this area they should ask [NAME OMITTED] because he is the boss for that place.

[NAME OMITTED] at paras 10 –11 of her affidavit deposes that the Badimia people have a responsibility and obligation to maintain and protect country which is recognised by neighbouring groups.

I am satisfied that this right can be prima facie established.

c) the right of access to the area.

In the *State of Western Australia v Ward* [2000] FCA 611, this right formed part of the determination made by their Honours. The information contained within the application as well as additional affidavit material provided by the applicants/claimants supports this native title right/interest.

Schedule G of the amended application gives examples of the Badimia people's right of access to the area, to camp, to live and build structures, and to move freely about. This is supported by the information about camping on country provided in the affidavit of [NAME OMITTED] and about activities in the area in the affidavits of [NAME OMITTED].

I am satisfied that this right can be prima facie established.

d) the right to control the access of others to the area.

In the *State of Western Australia v Ward* [2000] FCA 191, the majority declined to include this right in any determination of native title in relation to areas where native title was found to have been partially extinguished. There was no discussion as to why this right was not included in the determination. The application of s47A in that case resulted in the applicants having the right of use, occupation, possession and enjoyment as against the whole world to certain areas. The majority found this would give rise to rights similar to those available under freehold title, including the right to control the access of other to areas where s47A applies – see *Ward* at [207].

In her affidavit, [NAME OMITTED] provides examples of ritual sites where access was controlled and restricted to certain persons (para 6). The right is claimed subject to the qualifications set out Schedules B/B1, and E. However, in my opinion the claim in respect of this right is not limited to areas in which s47A (or indeed s47B) may apply.

I am <u>not</u> satisfied that, prima facie, this right can be established.

e) the right to use and enjoy resources of the area.

The absence of the word 'traditional' could imply that the applicants are claiming a larger right – to use and enjoy both traditional and non-traditional resources in the area. However, the affidavits of [NAME OMITTED] and [NAME OMITTED] provide examples of Badimia People using and enjoying what may be categorised as 'traditional' resources of the area (see para 8 of [NAME OMITTED]'s affidavit and paras 10 - 16 of [NAME OMITTED]'s affidavit of 29 January 1999). There is no evidence before me to support the right of the claim group to use and enjoy other than traditional resources of the area. When read with the limitations referred to in Schedule E of the application it is clear, in my opinion, that the right claimed is the right to use and enjoy traditional resources.

In the *State of Western Australia v Ward* [2000] FCA 611, this right formed part of the determination made by their Honours. The information contained within the application as well as any additional or affidavit material provided by the applicants/claimants supports this native title right/interest.

I am satisfied that this right can be prima facie established.

f) the right to control the use and enjoyment of others of resources of the area.

In the *State of Western Australia v Ward* [2000] FCA 191, the majority declined to include this right in any determination of native title in relation to areas where native title was found to be non exclusive. There was no discussion as to why this right was not included in the determination. The application of s47A in that case resulted in the applicants having the right of use, occupation, possession and enjoyment as against the whole world. The majority found this would give rise to rights similar to those available under freehold title, including the right to control the access of others to areas where s47A applies – see *Ward* at [207].

The right claimed is supported by [NAME OMITTED]'s affidavit at para 19. I note that the right is claimed subject to the qualifications set out Schedules B/B1, and E. However, in my opinion this claimed right is not limited to areas to which s47A (or indeed s47B) may apply.

I am not satisfied that, prima facie, this right can be established.

g) the right to trade in resources of the area;

In Ward's Case the majority of the Court declined to include the right to trade in the resources of the area in the Determination.

Further, I am not satisfied that there is sufficient information provided in regard to this right to make it capable to being established. Schedule G merely recites the right claimed as an activity, ie *disposing of products of the land and waters or manufactured from the products of the land by trade or exchange.* No further information has been provided to support the existence of this right.

I am not satisfied that this right can be prima facie established.

h) the right to receive a portion of any resources taken by others from the area;

In *Yarmirr v Northern Territory* [1998] 82 FCR 533, Olney J found that this right was not a right that could form part of a determination of native title. In *Ward v State of Western Australia* [1998] 159 ALR 483, Lee J differed from Olney J with respect to this finding. However, Lee J's determination was overturned by a majority of the Full Court in *State of Western Australia v Ward* [2000] FCA 191. I therefore follow the finding of Olney J and conclude that this right is not recognised under the common law of Australia.

I am not satisfied that this right can be prima facie established.

i) the right to maintain and protect places of importance under traditional laws, customs and practices in the area.

In the *State of Western Australia v Ward* [2000] FCA 611, this right formed part of the determination made by their Honours.

Schedule G of the application and the affidavit of [NAME OMITTED] (para 9) and [NAME OMITTED] (paras 7-11) refers to and supports the existence of this right.

I am satisfied that this right can be prima facie established.

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

At paragraph 666 of *Ward*, it was found that a right of this nature is not right in relation to land of the kind that can be the subject of a determination of native title. I further note the submission by the State of Western Australia on 14 April 2000 that "such a right cannot therefore be included on the Register of Native Title Claims and should be excluded from any application in which it is included in Schedule E". I find that I must follow the decision in *Ward.*

I am consequently not satisfied that this right can be prima facie established.

Conclusion

The following rights and interests can be established prima facie:

- Rights and interests listed at (a), (b), (c), (e), and (i) can be prima facie established.

The following rights and interests *cannot* be established prima facie:

- Right and interests listed at (d), (f), (g), (h) and (j) cannot be prima facie established.

I am satisfied that the application complies with s190B(6).

Result: Requirements are met in part as outlined above.

Traditional physical connection:

190B7 *The Registrar must be satisfied that at least one member of the native title claim group:*

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

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

(i) the Crown in any capacity; or

(ii) a statutory authority of the Crown in any capacity; or

(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such holder of a lease.

Reasons for the Decision

The requirements of this section are such that I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.

Traditional physical connection is not defined in the 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.

In applying this condition, I have therefore relied upon the following material:

- Affidavit of [NAME OMITTED] sworn 22 June 1999;
- Affidavit of [NAME OMITTED] affirmed 3 June 1999;
- Affidavit of [NAME OMITTED] sworn 29 January 1999;
- Affidavit of [NAME & OCCUPATION OMITTED] sworn 12 July 1999.

For the reasons given in relation to s190B(5), I am satisfied that there exist traditional laws acknowledged by and customs observed by the claim group sufficient to support traditional physical connection.

I find that the information provided in the above affidavits is sufficient to satisfy me that the above three applicants/claimants have the requisite connection with the claim area to satisfy the requirements of this section.

I am satisfied that the application complies with s190B(7).

Result: Requirements are met.

No failure to comply with s61A:

190B8 *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

For the reasons that follow I have reached the conclusion that there has been compliance with s61A and that the requirements of this condition are met.

s61A(1) – Native Title Determination

A search of the Native Title Register reveals that there is no approved determination of native title in relation to the area claimed in this application.

s61A(2) – Previous Exclusive Possession Acts

At Schedule B of the application, the applicants exclude areas in relation to which the State of Western Australia or the Commonwealth has done previous exclusive possession acts. Therefore, the application complies with s61A(2).

s61A(3) – Previous Non-Exclusive Possession Acts

The exclusion clause at paragraph (iii) of Schedule E of the application states that the applicants do not make a claim to exclusive native title rights and interests in relation to areas where a previous non-exclusive possession act has been done by either the State of Western Australia or the Commonwealth. Therefore, the application complies with s61A(3).

s61A(4) – s47, s47A, s47B

The applicants claim the benefit of ss47, 47A and 47B at Schedules B, E, and L. Whether or not the applicants have provided sufficient information to bring any area of land and waters covered by the application within the ambit of sections 47, 47A and 47B is a matter to be settled in another forum. The outcome of such an inquiry is immaterial here, as I have already found that the application does not offend s61A.

Conclusion

The application complies with s190B(8).

Result: Requirements are met.

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

190B9

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

(a)

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

Reasons for the Decision

In applying this condition I have relied upon information contained at Schedule E paragraph (i) of the application, which states:

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

The limitation of the claim contained in the application, as set out in Schedule E paragraph (i), is not contradicted by any other information or other documents.

Consequently the application and accompanying documents do not disclose, and I am not otherwise aware, that the applicants claim ownership of minerals, petroleum or gas that are wholly owned by the Crown.

The application complies with s190B(9)(a).

Result: Requirements are met

	Exclusive possession of an offshore place:
190B9	*The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:*
(b)	*(b) to the extent that the native title rights and interests claimed relate to waters in an offshore place - those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place;*

Reasons for the Decision

In applying this condition, I have relied upon information contained at Schedule E paragraph (ii) of the application which states, *'The claim area does not include any offshore place'*.

The limitation of the claim contained in the application, as set out in Schedule E paragraph (ii), is not contradicted by any other information or other documents.

The application complies with s190B(9)(b).

Result: Requirements are met.

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

Reasons for the Decision

Section 190B(9)(c) states that the Registrar 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).

The application contains exclusion clauses at Schedules B and E.

As previously stated (refer to s190B(2)), following the findings in *WA v Ward* [2000] 170 ALR 159; 99 FCR 316, there is no specific mention of areas where mining leases under the 1978 mining legislation and general purpose leases have been granted or where a pastoral lease was enclosed and/or improved (as the case may be). Although not expressly stated it follows from the following statement at Attachment B(3): "*The applicants exclude from the claim areas in relation to which native title rights and interest [sic] have otherwise been extinguished…*", that the applicants exclude, for example, any areas covered by mining or general purpose leases where such leases extinguish native title.

I am satisfied that these general exclusion clauses effectively exclude any areas where native title has been extinguished, but where the application has not otherwise excluded them.

Even if areas of the type prohibited by s190B(9)(c) are located within the external boundary of the area of the application, such areas are excluded by virtue of the clauses contained in the application.

The application complies with s190B(9)(c).

Result: Requirements are met

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