National Native Title Tribunal

REASONS FOR DECISION COVER SHEET
REGISTRATION TEST

DECISION MAKER	Russell Trott

APPLICATION NAME	Badimia People

NAMES OF APPLICANTS	Dorothy Bandy, 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, Georgina Lawson, Wilma Lawson and Nancy Wallam

NNTT NO.	WC96/98
FEDERAL COURT NO.	WG6123/98

REGION	South Murchison area of WA

DATE APPLICATION MADE	4 October 1996

I have considered the application against each of the conditions contained in s190B and 190C of the *Native Title Act* 1993.

DECISION

The application is ACCEPTED for registration pursuant to s190A of the *Native Title Act* 1993 (as amended)("the Act").

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

20 July 2000

Russell Trott ***DATE***

Delegate of the Registrar pursuant to sections190, 190A, 190B, 190C, 190D.

Brief History of the application

The Badimia People's native title determination application was lodged with the National 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.

The re-amended application differs from the amended application in three respects. These amendments are as follows:

Schedule A - description of the native title claim group
Schedule H - other native title applications of which the applicants are aware
Schedule I - details of s29 notices issued since 30 September 1998

The application is located in the South Murchison area of Western Australia. The applicants are represented by the Yamatji Land and Sea Council.

Notes:

All references to the 'application' in the present decision, unless otherwise stated, refer to the application as most recently amended on 3 November 1999.

All legislative references, unless otherwise stated, are to the *Native Title Act* 1993 (the "Act").

Information considered when making the Decision

In determining this application, where applicable I have considered and reviewed all of the information and documents from the following files, databases and other sources (including information considered previously):

- The Application, Working File, Registration Test File, and Legal Services File for application: WC96/98 – Badimia People

- Applications, Registration Test Files, and Legal Services Files for overlapping claims: WC96/83 – Pandawn Descendants; WC96/86 – Widi Marra; WC97/72 – Widi Mob.

- Transcripts, Affidavits, State Government Submissions, Grantee Party Submissions, Applicant statement of contention, information by the Aboriginal Affairs Department and Determinations from Future Act files where the future act matters related to any part of the area covered by this application.

- Tenure information in relation to the area covered by this application

- The National Native Title Tribunal Geospatial Database

- The Register of Native Title Claims

- The Native Title Register
- Determination of Representative ATSI Bodies: their gazetted boundaries
- Submissions from the Western Australian State Government and the Commonwealth Government

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

A. Procedural Conditions

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

Reasons relating to this sub-section:

The names of eighteen applicants are provided in the application: Dorothy Bandy, 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, Georgina Lawson, Wilma Lawson and Nancy Wallam.

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 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 describes the native title claim group as being biologically descended from seventeen ancestors. Schedule A was re-amended on 3 November 1999.

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

For the reasons set out in my reasons for decision in relation to s190B(3) I am satisfied that the persons in the native title claim group are described sufficiently clearly in Schedule A 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).

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

Result: Requirements met

61(5) ***Application is in the prescribed form, lodged in the Federal Court, contain prescribed information, and accompanied by prescribed documents and fee***

Reasons relating to this sub-section:

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

As is required by s61(5)(b) the application was filed in the Federal Court on 27 October 1999.

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

As is required by s61(5)(d) the application is accompanied by affidavits as prescribed by s62(1)(a). I refer to my reasons for decision in relation to that section of the Act. The application is also accompanied by a map as prescribed by s62(1)(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.

For reasons outlined above, I am satisfied there has been compliance with the procedural requirements of s61(5).

Result: Requirements met

Details required in section 62(1)

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

Reasons relating to this sub-section:

Affidavits have been received from all 18 applicants. All of the affidavits have been affirmed before a competent witness. Nine of the affidavits were sworn/affirmed on 29 January 1999; three on 3 June 1999; one on 9 June 1999; three on 10 June 1999; one on 16 June 1999 and one on 19 June 1999. The affidavits were sworn for the purpose of amending the application. 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 convey the requirement 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.

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 s190C4(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 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. The application contains some details relating to 'traditional physical connection' at Schedule G.

Result: Provided

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

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

Reasons relating to this sub-section:

A description, sufficient for the area covered by the application to be identified, is referred to in Schedule B and provided at Attachment B of the application.

For the reasons given 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 met

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

Reasons relating to this sub-section:

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

For the reasons given 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)(ii).

2. *Result: Requirements met*

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

Reasons relating to this sub-section:

At Attachments C, C1, C2, C3, C4, C5 and C6 of the application are maps showing the external boundaries of the area covered by the application.

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

Result: Requirements met

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

Reasons relating to this sub-section:

Schedule D of the application notes that the details and results of searches are attached at Attachment D. Attachment D of the amended application comprises the results of three searches.

These are:

- search conducted by the Land Claims Mapping Unit at the request of the Tribunal in January 1997 (covering leases, licences, reserves, mineral and petroleum interests);
- the search conducted by the State Government and included in their submission to the NNTT of 23 December 1998 (covering leases, licences and reserves); and
- search conducted by the Commonwealth Government and included in their submission to the NNTT of 28 January 1999 (extracts from WA Govt Gazette and Certificate of Title).

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

I am satisfied that the application complies with the procedural requirements of s62(2)(c).

Result: Requirements met

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

Reasons relating to this sub-section:

A description of the native title rights and interests claimed is provided at Schedule E of the application. There are ten native title rights and interests specified. I have outlined these rights and interests in my reasons for decision in respect of s190B(4).

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

3. *Result: Requirements met*

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

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.

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

Result: Requirements met

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

Reasons relating to this sub-section:

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

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

Result: Requirements met

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

Reasons relating to this sub-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 continued to hold native title in accordance with traditional laws and customs.

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

Result: Requirements met

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

Reasons relating to this sub-section:

Schedule G specifies activities that members of the native title claim group have continuously carried out on land and waters within the area of the claim in accordance with custom and tradition.

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

Result: Requirements met

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

Reasons relating to this sub-section:

Schedule H of the application contains information on six 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 refers to these applications as:

WC95/82 (WG 6059/98) Sir Samual 2
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

The above list was checked against the list of overlapping applications for determination of native title on the Register of Native Title Claims (both those on the Register of Native Title Claims and those on the Schedule) sourced from the NNTT Geospatial database. In addition to the applications listed above, the Register indicates that there are two other applications which overlap WC96/98, namely WC95/1 and WC95/12. However, I note that these applications were combined into (and are enclosed by) the Koara claim WC99/5 in January 1999. They are only on the Register pending re-consideration of the combined Koara claim WC99/5 under s190A. The application seeking leave to re-amend the Badimia claim WC96/98 was lodged on 27 October 1999 which was prior to the decision of Carr J. *in State of Western Australia v Native Title Registrar & Ors* [1999] FCA 1591 – 1594 on 16 November 1999 setting aside the Tribunal's decision to accept the combined Koara claim WC99/5.

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 actual overlap with the Wutha claim WC99/10 is in fact merely technical and can be disregarded.

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).

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

Result: Requirements met

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

Reasons relating to this sub-section:

This condition requires that the applicants provide details of section 29 notices of which they are aware. Section 29 notices relating to whole or part of the area of the application issued between 30 September 1998 and 26 October 1999 are listed at Attachment I. The motion to re-amend the application was filed on 27 October 1999.

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

Reasons for the Decision

For the reasons identified above the amended application contains all details and other information, and is accompanied by the affidavits and other documents, required by s61 & s62.

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

Common claimants in overlapping claims:

190C3 ***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

For the application to comply with this requirement I must be satisfied that no person included in the native title claim group was a member of the native title claim group for any previous application if the circumstances set out in ss190C3 (a) to (c) of the Act apply.

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 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 of Native Title Applications and Register of Native Title Claims on 12 July 2000, revealed the following applications covering the whole or part of the area covered by the current application which were on the Register of Native Title Claims at the time that the current application (WC96/98) was made:

WC95/82 Sir Samuel 2
WC96/83 Pandawn Descendants
WC96/86 Widi Marra 2
WC97/72 Widi Mob
WC99/5 Koara (NB. inclusive of WC95/1 and WC95/12)

In respect of WC95/82 Sir Samuel 2, the overlap of the external boundaries is less than 0.1 square kilometre. The overlap is merely technical and can be disregarded.

I note that the entries relating to WC96/83 Pandawn Descendants, WC96/86 Widi Marra 2, and WC97/72 Widi Mob have all been removed from the Register following consideration under s190A.

The Koara application WC99/5 was placed on the Register 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 present status of the Koara application WC99/5 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 Koara claim WC99/5.

I am satisfied that s190C3 has no operation with respect to the current application.

Result: Requirements 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

An application complies with s190C(4)(a) if it is certified under section 203BE or was certified under repealed s202(4)(d).

On 15 July 1999 the previous delegate found that the application met the requirements of s190C(4)(a). To assist in giving my reasons in respect of this condition, I have reproduced below the reasons on which the previous delegate relied in reaching his decision.

A certificate issued by a Native Title Representative Body pursuant to s.202(4)(d) does not form part of the amended application. However two such certificates have been supplied by the applicants direct to the Tribunal.
The applicants supplied such a certificate from the Yamatji Land and Sea Council on 3 June 1999. The applicants also supplied such a certificate from the Noongar Land Council on 23 June 1999.
An inspection of the Native Title Representative Body gazetted boundaries establishes that the claim area is predominantly within the Yamatji Land and Sea Council gazetted area, but that there is a substantial part of the application (3672 sq. km) which falls within the Noongar Land Council gazetted area. In addition, there appears to be a small overlap with the Goldfields Land Council gazetted area of 8.9 sq. km.
In respect of the apparent overlap with the Goldfields Land Council gazetted area, I am advised by the Tribunal's Geospatial Information Unit that this overlap arises from discrepancies between the shire boundary datasets held by the Native Title Representative Bodies and more recent data now used by the Land Claims Mapping Unit. The area is a strip of negligible width that extends down part of the eastern boundary of the application.
I am satisfied that for the purpose of s190C(4)(a), the 'overlap' with the Goldfields Land Council gazetted area can be disregarded.
Section 190C(4)(a) requires certification by each representative Aboriginal/Torres Strait Islander body that could certify the application. Section 190C(6)(a) qualifies this requirement, stating that certification is not required by all representative bodies if the application has been certified by 2 or more bodies whose areas, when combined, include all of the area of land or waters to which the application relates. As indicated at 3-5 above, the Yamatji Land and Sea Council and Noongar Land Council gazetted areas, when combined, cover all of the area of this application.

<u>Certification by the Yamatji Land and Sea Council and Noongar Land Council</u>

There appears to be no legally required format for certification of a claimant application other than it must be in writing (s.202(4)(d)) and that it must contain the information required under s.202(7).

<u>Compliance with s.202(7)</u>

Section 202(7) of the Act sets out the statements to be included in certification of an application for determination of native title in the following terms:

A certification of an application for a determination of native title by a representative body must:
include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (5)(a) and (b) have been met: and
Briefly set out the body's reasons for being of that opinion; and
Where applicable, briefly set out what the representative body has done to meet the requirements of subsection (6)

The first certificate provided by the applicants is signed by [Name and position details deleted for privacy reasons], Yamatji Land and Sea Council, and is dated 3 June 1999.

The second certificate provided by the applicants is signed by [Name and position details deleted for

privacy reasons], Noongar Land Council, and is dated 14 June 1999

In my view both certificates provided by the applicants comply with s.202(7).

Conclusion

As a result of the above considerations, I am satisfied that the application has been certified by both the Yamatji Land and Sea Council and the Noongar Land Council pursuant to s.202(4)(d) and in accordance with s.207(7).

This certification satisfies the requirements of s.190C(4)(a) of the Act.

The original application was lodged with the Tribunal on 4 October 1996. Immediately prior to amendment of the application for registration purposes, the registered claimants were:

> *Dorothy Bandy, Gloria Fogarty, Clara George, Ollie George, Percy George, Olive Gibson, Irene Harris, Albert Little, Hazel Little, Jean Little, Richard Little, Frank Walsh (Jnr), Frank Walsh (Snr), Des Thompson, John Ashwin, Des Little, Georgina Lawson, Wilma Lawson and Nacy Wallam on behalf of the Badimia people.*

On 29 June 1999 the application was amended for the general purpose of meeting registration requirements. Following amendment, the claimant group in Schedule "A" was described as:

> *The claim is brought on behalf of those people descended from and including Dorothy Bandy, 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, Georgina Lawson, Wilma Lawson, Nacy Wallam.*

On 3 November 1999, the application was re-amended. Schedules "A", "H" and "I" were replaced. Schedule "A", now describes the native title claim group as being biologically descended from seventeen ancestors. The re-amendment of Schedules "H" and "I" provided further necessary information as required under the Act. No other changes were made. It is apparent that the sole purpose of re-amending the application was to replace Schedule "A".

Arguably, re-amendment of the application in this way has increased the membership of the native title claim group, and if so, renewed certification of the application would be necessary. This issue was raised with the Yamatji Land and Sea Council, as representative of the applicants. By correspondence dated 19 July 2000, [Name and occupation details deleted for privacy reasons], Yamatji Land and Sea Council, advised that:

> *1) The initial amendments to the Badimia native title claim that were made to ensure that the claim complied with the registration conditions under the amended Native Title Act mistakenly described the Badimia native title claimant group as comprising the descendants of the Applicants. This was an administrative error as the Form 1 should have described the Badimia native title claim group as being comprised of the descendants of certain named apical ancestors.*
>
> *2) The certification that has previously been provided to the National Native Title Tribunal by the Yamatji Land and Sea Council was made by the [occupation details deleted for privacy reasons] on the basis that the Badimia native title claimant group consisted of the descendants of the said apical ancestors.*
>
> *3) The reamendments now being made to the Badimia native title claim are merely to remedy the intial error that was made in respect of the description of the Badimia native title claimant group. Thus, the pre-existing certification actually refers to the Badimia native title claimant group as it now stands, namely consisting of the descendants of the said named apical ancestors.*

The Tribunal was also supplied with a copy of the Affidavit in Support of Notice of Motion sworn on 27 October 1999 by [Name deleted for privacy reasons], of Dwyer Durack on behalf of the Yamatji Land and Sea Council. It is understood that this affidavit was filed in the Federal Court at the time re-amendment of the application was sought. At paragraph 6 of the affidavit, [Name deleted for privacy reasons] deposes to the reasons for seeking leave to re-amend the application and states that,

> *Since 29 June 1999, the Applicants have become aware that due to administrative oversight, the claim group in the Amended Application was mistakenly described as the descendants of the Applicants, rather than the descendants of a group of apical ancestors. The Applicants wish to amend their Application to correct this error and amend Schedule "A" so that it accurately describes the claim group on whose behalf the Application made.* (sic)

[Name deleted for privacy reasons] affidavit confirms that the purpose of re-amendments to the Badimia native title claim was merely to remedy the error made in respect of the description of the Badimia native title claimant group. Once this view is taken then it follows that the certification previously provided by the Yamatji Land and Sea Council was made on the basis that the Badimia native title claimant group consisted of the descendants of the said apical ancestors. The conclusion applies equally to certification provided by the Noongar land Council. I am of the opinion, therefore, based on the above information, that new certificates are not required. I agree with the previous delegate's reasons for deciding that both certificates provided comply with the (former) s202(7).

Accordingly I am satisfied the application complies with s190C(4).

Result: Requirements met

Evidence of authorisation:

190C5 ***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 Recommendation

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.

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

Map and External Boundary Description

A map is supplied at attachment C of the application and shows the external boundaries of the area claimed. In addition, the application also includes at Attachments C1 to C6 larger scale maps of townsites that fall within the external boundary of the application, namely Austin, Lennonville, Mt Magnet, Boogardie, Paynesville and Yoweragabbie. These additional Attachments do not assist in identifying the external boundary.

The map at Attachment C displays a list of coordinates to enable the position of sites or localities within the boundary to be identified. In addition, it shows a scale allowing distances and areas to be ascertained and identifies pastoral leases and other tenure. A locality diagram, which indicates generally the position of the claim within Western Australia, forms part of the map provided. All the line work on the map is finely drawn and easy to follow.

Additional information identifying the external boundary of the claim is supplied at Attachment B of the amended application.

The Tribunal's Geospatial Unit has plotted this information and conclude that the description is internally consistent, fully encloses the claim area and does not discernibly contradict the map accompanying the application. I am satisfied, based on this advice, that the technical description of the external boundaries coincides with the map provided.

Internal Boundary Description

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

The applicants exclude from the claim any areas covered by valid acts on or before 23 December 1996 comprising such of the following as are included as extinguishing acts within the Native Title Act 1993, as amended, or Titles Validation Act 1994, as amended, at the time of the Registrar's consideration:
Category A past acts, as defined in NTA s.228 and s.229;
Category A intermediate period acts, as defined in NTA s.232A and s.232B.

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

The Applicants exclude from the claim areas in relation to which native title rights and interests have otherwise been extinguished, including areas subject to:-
an act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or
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 descriptions or tenures which have been validly granted, set out in 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-
a Lease of a Worker's Dwelling under the Workers' Homes Act 1911-1928;
a 999 Year Lease under the Land Act 1898;
a Lease of a Town Lot or Suburban Lot pursuant to the Land Act 1933 (WA), s.117; or
a Special Lease under s.117 of the Land Act 1933 (WA).

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

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

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

B1.6 A Permanent public work and "the 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.

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

I must be satisfied that the information required by s62(2)(a) is sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to the particular land and waters.

The description of areas excluded from the claim area at Schedule B, paragraphs 1, and 3(a) refer to land where an act of a State or Commonwealth government has created an interest. The excluded areas of land can be readily identified through searches of relevant Government registers and are therefore described with reasonable certainty.

The description of areas excluded from the claim at schedule B paragraph 2 refers to areas in relation to which a previous exclusive possession act, as defined in s23B of the NTA 1993, was done in relation to the area, and either the act was an act attributable to the Commonwealth, or the act was an act attributable to the State of Western Australia and a law of that State has made provision for that act as described in s23E NTA. Exclusive possession acts attributable to the Commonwealth can be readily identified through searches of the relevant register and are therefore described with reasonable certainty. Exclusive possession acts attributable to the State of Western Australia under legislation of the type described in s23E are likewise readily identified by reference to that legislation and thereafter searches of the relevant registers.

Paragraph 3(b) of Schedule B excludes areas of land where actual use by the holder of a tenure is permanently inconsistent with continued existence of native title. Schedule B1 provides further information on specific areas of land excluded from the claim which may fall into this category. The description in paragraph 3(b) read together with Schedule B1 is sufficient for me to be satisfied that the areas excluded from the application are identified with reasonable certainty.

Both the applicants and the State of Western Australia were invited to make submissions on the effect of the majority decision in Ward in respect of the current application. No submission was received from the applicants. Comments were received from the State by way of a general response. The State commented that paragraph 3(a) and (b) of Schedule B constitutes reference to a test formulated by Lee J. at first instance which the majority in the Full Court appeal decision found to be inconsistent with the development of Australian jurisprudence.

I note that leave to amend the application in the above terms was granted before the decision of the Full Court in Ward was handed down. The reference in paragraph 3 to the test formulated by Lee J reflects the applicants' awareness of the prevailing state of the law at the time that leave to amend the application was sought. Notwithstanding this, the wording of paragraph 3 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 3(a) and 3(b). As such the listed information in 3(a) and (b) is clearly not intended to be exhaustive. Although not expressly stated it follows that the applicants exclude, for example, any areas covered by pastoral leases or portions thereof that are enclosed or improved where such enclosure or improvement extinguishes native title. Similarly, although again not expressly stated, it follows that the applicants exclude any areas covered by mining or general purpose leases where such leases extinguish native title.

The applicants seek the protection of ss47, 47A and 47B at paragraph 4 of Schedule B. Details of what, if any, areas enjoy this legislative protection are not provided.

The qualifications to the native title rights and interests claimed at Attachment E invoke the provisions of sections 47, 47A and 47B of the NTA as apply to any part of the area contained within the application. The rights and interests claimed are not claimed exclusively in respect of any areas in relation to which a previous non-exclusive possession act as defined by section 23F of the NTA was done in relation to the area. Paragraph (iii) of Attachment E is also 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 the application. The statements at Attachment B2, and Attachment E (iv) read together allow it to be shown objectively, upon the provision of further particulars, whether applicants may have the benefit of sections 47,47A and 47B of the Act.

Conclusion

For the reasons given above, I am satisfied that the information and map contained in the application as required by s62(2)(a) and (b) is sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

The application complies with s190B(2).

Result: Requirements met

Identification of the native title claim group:

190B3

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.

The native title claim group has been amended and is described at Schedule A of the application in the following terms:

> *The claim is brought on behalf of those Aboriginal people biologically descended from the following deceased ancestors:*
> *[Name deleted for privacy reasons].*

As the description of the claim group relies on a description other 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).

The persons in the native title claim group are described as the biological descendants of the seventeen above listed persons. In my view, this description provides an objectively verifiable mechanism for ascertaining whether any particular person is in the native title claim group by reference to genealogical information.

I am therefore satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

The application complies with s190B(3)(b).

Result: Requirements 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. It is insufficient to merely state that these native title rights and interests are 'all native title interests that may exist, or that have not been extinguished at law'. To meet the requirements of s190B (4), I need only be satisfied that at least one of the rights and interests sought is sufficiently described for it to be readily identified

Schedule E of the application describes the native title rights and interests claimed as follows:

The native title rights and interests claimed are the rights to the possession, occupation, use, and enjoyment as against the whole world (subject to any native title rights and interests which may be shared with any others who establish that they are native title holders) of the area, and in particular comprise:

rights to possess, occupy, use and enjoy the area;
the right to make decisions about the use and enjoyment of the area;
the right of access to the area;
the right to control the access of others to the area;
the right to use and enjoy resources of the area;
the right to control the use and enjoyment of others of resources of the area;
the right to trade in resources of the area;
the right to receive a portion of any resources taken by others from the area;
the right to maintain and protect places of importance under traditional laws, customs and practices in the area; and
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 s.23F of the NTA, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in s.23I 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 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 at items i, ii, iii, and v are clear in their scope and intention, reciting general limitations to the operation of the listed rights and interests, where relevant.
In addition, the qualification in item iv, the saving of exclusive possession rights and interests in areas of previous non-exclusive possession acts where the acts are in favour of native title claimants, is capable of qualifying item iii, and consequently of providing clearly identifiable

specific rights and interests.

The description is more than a statement that native title rights and interests are 'all native title interests that may exist, or that have not been extinguished at law'.

I am satisfied that the description in schedule E is sufficient to allow the native title rights and interests claimed to be readily identified.

The application complies with s190B(4).

Result: Requirements met

Sufficient factual basis:

190B5 ***The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:***

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

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

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

Reasons for the Decision

This condition requires me to be satisfied that the factual basis on which it is asserted that there exist native title rights and interests described at schedule E of the amended application is sufficient to support that assertion.

In reaching this decision I must be satisfied that the factual basis supports the 3 criteria identified at s190B5 (a) – (c).

In his original decision under s190A on 15 July 1999, the previous delegate was satisfied that the application met the conditions referred to in s190B5. To assist in giving my reasons in respect of this condition, I have reproduced the previous delegate's reasons in full (italicised).

Submitted by the applicants for my consideration are:

Affidavit of [Name deleted for privacy reasons] (applicant) sworn 22 June 1999;
Affidavit of [Name deleted for privacy reasons] (applicant) affirmed 3 June 1999;
Affidavit of [Name deleted for privacy reasons] (claim group member) sworn 29 January 1999;
Affidavit of [Name and occupation details deleted for privacy reasons] 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 deleted for privacy reasons] on 28 May 1998 (submitted to NNTT 9/6/98) - a Report on Aboriginal Heritage Herald resources survey leases M57/68 and M57/1 by [Name deleted for privacy reasons]. 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 Survey for Aboriginal Sites at the Windimurra Project Area, Mt Magnet, prepared by Quartermaine Consultants 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 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 deleted for privacy reasons].

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

The document Report on Aboriginal Heritage Herald resources survey leases M57/68 and M57/1, by [Name deleted for privacy reasons] 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 deleted for privacy reasons].

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 subsection requires me to be satisfied that:

- *traditional laws and customs exist;*
- *that those laws and customs are respectively acknowledged and observed by the native title claim group, and*

- *that those laws and customs give rise to the native title rights and interest claimed*

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 on Aboriginal Heritage Herald resources survey leases M57/68 and M57/1, by [Name deleted for privacy reasons] 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 and occupation details deleted for privacy reasons].

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 continue 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 deleted for privacy reasons].

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

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).

Result: Requirements 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

Under s190B6 I must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established. To meet this condition only some of these rights and interests need to be able to be prima facie established, but I will consider all of the rights and interests claimed as this will determine which of these rights and interests are entered on the Register of Native Title Claims. For the reasons given below, I am of the view that some but not all of the rights and interests claimed can be established.

"Native Title Rights and Interests" are defined at s233 of the Act. This definition specifically attaches native title rights and interests to land and water, and in summary requires:

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

The definition is closely aligned with all the issues I have already considered under s190B5. I will draw on the conclusions I made under that section in my consideration of s190B6. I have already outlined at s190B(5) that I am satisfied that the members of the native title claim group have an association with the relevant land and waters and continue to adhere to traditional laws and customs that support the factual basis for the native title rights and interests claimed. I refer to my reasons in relation to that section.

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

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

The principal barrier at law to a claim for native title rights and interests is that they should not be made over tenures that have been the subject of exclusive possession acts, nor should they involve a claim for exclusive possession over non-exclusive possession act areas (s61A of the Act). For the reasons given at s190B(8) and s190B(9)(c) the applicants have clearly and unambiguously excluded any area over which an impermissible claim could be made.

In *Western Australia v Ward* [2000] FCA 191, Beaumont and von Doussa JJ, by majority, held that some of the rights and interests included in the determination of native title made by Lee J. at first instance are incapable of being recognised at common law, including;

- the right to maintain and prevent misuse of cultural knowledge,
- the right to receive a portion of any resources taken by others from the area
- the right to control the use and enjoyment of others of resources
- the right to control access of others

- the right to trade in resources in the area (but do have a non-exclusive right to use and enjoy traditional resources).

Their Honours held that rights and interests that involve a physical presence on the land or 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]. However their Honours also found that where s47 and 47A applied, the applicants in Ward were entitled to possession, occupation, use and enjoyment of the area concerned as against the whole world.

The native title rights and interests claimed are those set out in at Schedule E of the application. I note that the native title rights and interests claimed at Schedule E are claimed *subject to any native title rights and interests which may be shared with any others who establish that they are native title holders*. The claim to exclusive possession is further qualified in terms of the five paragraphs set out in Schedule E which state that the claimed native title rights and interests are subject to other validly granted rights and interests.

Information considered

The information, in addition to that within the application, that I have considered in relation to this section follows:

- Affidavit of [Name deleted for privacy reasons] (applicant) sworn 22 June 1999;
- Affidavit of [Name deleted for privacy reasons] (applicant) affirmed 3 June 1999;
- Affidavit of [Name deleted for privacy reasons] (claim group member) sworn 29 January 1999;
- Affidavit of [Name and occupation details deleted for privacy reasons] sworn 12 July 1999

In some instances, I will only refer to one of the relevant paragraph or page number of the document containing information that I considered pertinent to establishing the prima facie claim. I will not detail information in these reasons or detail every document containing information with information about the specific condition.

The rights and interests claimed by the native title claim group are set forth in Schedule E of the application. There is one principal native title right and interest expressed, being:

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.

The ten other rights and interests sought flow from this principal right. As a consequence, the information provided to establish the secondary rights of itself also supports the principal right and interest. On the evidence provided I am satisfied that the native title rights and interests listed below involve a physical presence on the land or are an expression of traditional social or cultural practices and, prima facie, they can be established (subject to the following limitations as referred to in Schedule E):

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

ii. To the extent that the native title rights and interests claimed may relate to waters in an offshore place, those rights and interests are not to the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under international law in relation to the whole or any part of the offshore place;

iii. The 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 *Native Title Act*, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia, and a law of that State has made provision as mentioned in section 23I in relation to the act.

iv. Paragraph (iii) above is subject to such of the provisions of sections 47, 47A and 47B of the NTA as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing but which include such areas as may be listed in Schedule L.

v. The native title rights and interests claimed are subject to any valid rights created under the common law or a law of the State or the Commonwealth.

The ten subordinate rights and interests sought, together with my reasons, follow:

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

In *State of Western Australia v Ward* [2000] FCA 611, this right formed part of the determination made by the their Honours. The information provided supports this general principal right and interest. I note that the rights are not claimed to the exclusion of all others.

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

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

In *State of Western Australia v Ward* [2000] FCA 611, this right formed part of the determination made by their Honours. [Name deleted for privacy reasons] points out in his affidavit (29-01-99) at paragraph 9 that "My father had a special responsibility for the area at Mt Gibson, which is part of Badimia country. There is a sacred site in that area. Now I and my older brother, [Name deleted for privacy reasons], are responsible for that site. If anyone wants to use that area they should talk to me or to [Name deleted for privacy reasons] because we are responsible for it. I would be very upset if it was damaged."

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

(c) the right of access to the area;

In *State of Western Australia v Ward* [2000] FCA 611, this right formed part of the determination made by their Honours. 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 deleted for privacy reasons]. I further note that this right is not claimed to the exclusion of all others.

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

(d) the right to control the access of others to the area;

In *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 the right was not included in the draft 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 para [207] of the decision.

[Name deleted for privacy reasons] 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 in Schedule E. However in my opinion this does not limit the right 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 the 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. The further affidavits of [Name deleted for privacy reasons] and [Name deleted for privacy reasons] provide examples

of Badimia People using and enjoying what may be categorised as "traditional" resources of the area (see para 8 of [Name deleted for privacy reasons] affidavit and para 10 of [Name deleted for privacy reasons] affidavit). 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.

I am satisfied that, prima facie, the right to use and enjoy traditional resources can be established.

(f) the right to control the use and enjoyment of others of resources of the area;
In *State of Western Australia v Ward* [2000] FCA 191, the majority declined to include this right in the determination of native title in relation to areas where native title was found to have been partially extinguished. As noted above there was no discussion as to why the right was not included in the draft determination.

The right claimed is supported by [Name deleted for privacy reasons] affidavit at para 19. The right is claimed subject to the qualifications set out in Schedule E. However in my opinion this does not limit the right to areas in which s47A (or indeed s47B) may apply (see above).

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

(g) the right to trade in resources of the area;
In *State of Western Australia v Ward* [2000] FCA 191, the majority declined to include the right to trade in the resources of the claim area in the determination of native title. This raises the question of whether this right is recognisable under the common law.

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

(h) the right to receive a portion of any resources taken by others from the area;
I note that 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 by Olney J. and conclude that this right is not recognised under the common law of Australia.

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

(i) the right to maintain and protect places of importance under traditional laws, customs and practices in the area; and
In *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 deleted for privacy reasons] (para 9) refer to and support the exercise of this right.

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

(j) the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area.
I note that in *State of Western Australia v Ward* [2000] FCA 191 it was found that this right was not "a right in relation to land of the kind that can be the subject of a determination of native title" at para [666]. 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".
In *Hayes v Northern Territory of Australia* [2000] FCA 671,Olney J held "the right to manage the spiritual forces and to safeguard the cultural knowledge associated with the land and waters of their respective estates within the determination area" in the formal determination made.

This right differs slightly from that claimed in the present case. Therefore in my view I am bound to follow the majority decision in *State of Western Australia v Ward* [2000] FCA 191, as the right being claimed is expressed precisely as a right which was found not to be a right that can be the subject of a determination of native title. I therefore conclude that this right it is not recognised under the common law of Australia.

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

Conclusion

I am satisfied that, prima facie, the following rights and interests are capable of being made out, (subject to the qualifications as set out in Schedule E of the amended application):

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;
e) the right to use and enjoy the traditional resources of the area;
i) the right to maintain and protect places of importance under traditional laws, customs and practices in 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. *To the extent that the native title rights and interests claimed may relate to waters in an offshore place, those rights and interests are not to the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under international law in relation to the whole or any part of the offshore place.*

iii. *The applicants do not make a claim for native title rights or 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 s.23F of the NTA, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in s.23I of the NTA 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 the application, particulars of which will be provided prior to the native title hearing.*

v. *The said native title rights and interests are not claimed to the exclusion of any other rights and interests validly created by, or pursuant to, the common law, the law of the State or a law of the Commonwealth.*

I am not so satisfied with respect to the rights and interests claimed above at (d) (f) (g) (h) and (j).

The application complies with s190B(6).

Result: Requirements met

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

Information considered

This section requires me to be satisfied that at least one member of the native title claim group currently has, or previously had, a traditional physical connection with any part of the land or waters covered by the application. Traditional physical connection is not defined in the Act. 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.

The applicants submitted the following documents for consideration:

- Affidavit of [Name deleted for privacy reasons] (applicant) sworn 22 June 1999;
- Affidavit of [Name deleted for privacy reasons] (applicant) affirmed 3 June 1999;
- Affidavit of [Name deleted for privacy reasons] (claim group member) sworn 29 January 1999;
- Affidavit of [Name deleted for privacy reasons] (anthropologist) sworn 12 July 1999

For the reasons given at 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 am further satisfied from the information supplied, that [Name deleted for privacy reasons] currently has a traditional physical connection with the land or waters covered by the application.

I am therefore 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.

The application complies with s190B(7).

Result: Requirements 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

s61A(1) – Native Title Determination

A search of the Native Title Register conducted on 3 July 2000 revealed that there is no approved determination of native title in relation to the area claimed in this application.

S61A(2) – Previous Exclusive Possession Acts

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

S61A(3) – Previous Non-Exclusive Possession Acts

The applicants are not seeking exclusive possession over areas the subject of previous non-exclusive possession acts. [See schedule E (iii)]

S61A(4) – s47, 47A, 47B

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

Conclusion

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

The application complies with s190B(8).

Result: Requirements 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

The native title rights and interests are described at Schedule E of the application. Schedule E (I) in the application makes the statement that:

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

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 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

The application does not include any offshore place – the area of the application is, at its closest point to the coast, approximately 180 kilometres inland from the coast.

Accordingly the native title rights and interests claimed do not relate to waters in an offshore place.

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

Result: Requirements met

Other extinguishment:

190B9 (c)

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

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

Reasons for the Decision

The application and accompanying documents do not disclose, and it is not otherwise apparent that the native title rights and interests claimed have otherwise been extinguished by any mechanism, including by:

- a break in traditional physical connection;
- non-existence of an identifiable native title claim group;
- non-existence of a system of traditional laws and customs linking the group to the area;
- an entry on the Register of Indigenous Land Use Agreements;
- legislative extinguishment.

In any event, the application at Schedule B(3) excludes all areas where native title rights and interests have otherwise been extinguished. I am satisfied that because native title rights and interests must relate to land and waters (refer s223 of the Act) the exclusion of particular land and waters is an exclusion of native title rights and interests over those lands and waters.

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

Result: Requirements met

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