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| Status: | Publish on Web |
| Date Published: | |
| Application Name: | Malarngowem (Combined Application) |
| Application (NNTT) No: | WC97/59; WC97/67; WC98/30; WC99/28; WC99/44 |
| Application (Fed Crt) No: | WAG6182/98; WAG6190/98; WAG6246/98; WAG6028/99; WAG6182/98 |
| State: | WA |
| Region: | North West |
| Date Application Made: | 21/07/97, 04/08/97, 15/06/98, 24/09/99, 21/10/99 |
| Date Registration Test | 04/02/2000 |
| Decision made: | |
| Decision: | Accepted |

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Brief history of the application

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

- The Working Files, Registration Test Files, Legal Services Files and Federal Court Application and Amendment Files for the following native title applications:

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| WAG 6182 of 1998 (WC97/59) | Ramel Peters and Rusty Peters |
| WAG 6190 of 1998 (WC97/67) | Topsy Springvale and Others |
| WAG 6246 of 1998 (WC98/30) | Rusty and Ramel Peters |
| WAG 6206 of 1998 (WC99/28) | Maggie John |

- Other tenure information acquired by the Tribunal in relation to the area covered by this application;
- Working files and related materials for native title applications that overlap the area of the 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 in relation to the application;

I note submissions made by the Crown Solicitors Office in regard to applications WC97/59, WC97/67 and WC98/30 in letters dated 21 and 24 December 1998 to the Tribunal in relation to conditions of the test. The submissions were made prior to the applications being combined and amended.

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 the mediation process.

Summary of proceedings

The WC 97/59 (Rammel Peters and Rusty Peters) native title determination was lodged with the National Native Tribunal on 21 July 1997. At the time of lodging the Applicants were Rammel Peters and Rusty Peters. The Federal Court reference for this application is WAG 6182 of 1998.

The WC 97/67 (Topsy Springvale and Others) native title determination was lodged with the National Native Tribunal on 4 August 1997. At the time of lodging the Applicants were Topsy Springvale, Gordon Barney and Shirley Bray. The Federal Court reference for this application is WAG 6190 of 1998.

The WC 98/30 (Rusty and Ramel Peters) native title determination was lodged with the National Native Tribunal on 15 June 1998. At the time of lodging the Applicants were Rusty Peters and Ramel Peters. The Federal Court reference for this application is WAG 6246 of 1998.

The WC 99/28 (Maggie John) native title determination was filed with the Federal Court on 24 September 1999 and lodged with the National Native Tribunal on 28 September 1999. At the time of filing the Applicants were Maggie John, Patrick Mung, Chocolate Thomas, Pearl Gordon, Goody Barrett, Lena Nyadbi, Jacko Texas, Churchill Cann, Hector Chunda, Paddy McGinty, Bernard Stretch, Norman Thomas, Shriley Purdey, Phyllis Gallagher, Jack Britten, Ida Milkburria, Rusty Peters, Rammel Peters, Mabel Peters, Gordon Barney, Topsy Springvale, Mary Thomas, Shirley Bray and Queenie Malgil. The Federal Court reference for this application is WAG 6028 of 1999.

On 24 September 1999 a Notice of Motion for a new broad country application was filed in the Federal Court. WAG 6028 of 1999 was referred to the Tribunal on 28 September 1999 and given Tribunal reference number WC99/28. On 24 September 1999 a Notice of Motion to amend and combine WC99/28 with three other existing applications was filed in the Federal Court. The Federal Court ordered that the amendments be accepted in the proposed form of an application on 22 October 1999. The lead application was WC97/59.

These amendments resulted in a change to the Applicants. The Applicants are now Maggie John, Patrick Mung, Chocolate Thomas, Pearl Gordon, Goody Barrett, Lena Nyadbi, Jacko Texas, Churchill Cann, Hector Chunda, Paddy McGinty, Bernard Stretch, Norman Thomas, Shirley Purdey, Phyllis Gallagher, Jack Britten, Ida Milkburria, Rusty Peters, Rammel Peters, Mabel Peters, Gordon Barney, Topsy Springvale, Mary Thomas, Shirley Bray and Queenie Malgil.

The area subject to claim is located in the Kimberley region, Western Australia. The Kimberley Land Council represent the Applicants.

All references to the 'application' or the 'amended application' in the present decision, unless otherwise stated, refers to the application as most recently amended.

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| S190B(2) | Identification of area subject to native title | Met |
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Description of the areas claimed:

190B(2)

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

Reasons for the Decision

In applying this condition I have relied upon the information provided at Schedule B, Schedule B1, and the map attached to the amended application.

External Boundaries:

The applicants have provided a map titled: "Attachement C: Land Tenure as at 14/9/1999". This map was produced by the Land Claims Mapping Unit on 18/10/99. The map clearly shows the status of land within the area of the application. The map shows a scale allowing distances and areas to be ascertained and identifies unallocated crown land, reserve land, pastoral lease areas, special purpose lease areas, freehold and water land, various rivers and roads. The line indicating the external boundary is finely marked and easy to follow.

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

In addition to the provision of a map defining the external boundaries of the claim, the applicants have provided a written technical description of the external boundaries set out in Attachment "B".

I am satisfied that the physical description of the external boundaries meets the requirements of s62 (2)(a)(i). Geospatial have confirmed that the information contained in Attachment B matches the details of the map in Attachment C.

Internal boundaries:

The internal boundaries, described at Schedule B and B1 of the amended application, exclude a variety of tenure classes from the claim area in the manner indicated below:

(1) *The applicants exclude from the claim any areas covered by valid acts on or before 23 December 1996 comprising such of the following as are included as extinguishing acts within the NTA, 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 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 descriptions or tenures which have been validly granted, 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 Land 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

S190B(3)

Identification of native title claim groups

Met

190B(3)

Identification of the native title claim group:

The Registrar must be satisfied that:

- (a) the persons in the native title claim group are named in the application; or*
- (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.*

Reasons for the Decision

Schedule A to the amended application contains a description of the native title claim group. Schedule A states that the claim is brought behalf of those Aboriginal people who hold in common the body of traditional law and custom governing the area the subject of the cla Those people are –

- (a) descendants of the following people: **[23 names deleted]**

The question then, is whether the description of the claim group provided in the application is sufficiently clear so that it can be ascertain whether any particular person is a member of the claim group.

I am of the opinion that descendants of the people in Schedule A would be easily identified for it to be ascertained if any particular person a member. I am satisfied that the persons in the native title claim group are named, as required under s.190B(3)(a).

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

S190B(4)

Identification of claimed native title

Met

190B(4)

Identification of claimed native title

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

Reasons for the Decision

In applying this condition I have relied on the description of the native title rights and interests set out in Schedule E of the amended application.

The Applicants state at Schedule E that 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.*

Section 62(2)(d) of the *Native Title Act* states that the description of native title rights and interests claimed must not merely consist of a statement to the effect that native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished at law.

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

Conclusion

To meet the requirements of s.190B(4) I need only be satisfied that at least one of the rights and interests sought is sufficiently described so that it can be readily identified.

Where rights and interests do not extend to some areas, (as outlined at Schedule B and Attachment E), the areas are not identified specifically. The applicants have not identified all of the particular areas of land and waters where rights and interests are not claimed exclusively. Rather, they provide a formula for establishing where the rights and interests claimed are limited.

This formula could be objectively applied for the Registrar to be satisfied that the rights and interests claimed in relation to a particular land and waters are described in the application and identifiable.

I am satisfied that all the rights listed can be readily identified from the description provided.

I am satisfied the application meets the requirements of this condition and s62(2)(d).

S190B(5)

Factual basis for claimed native title

Met

190B(5)

Sufficient factual basis:

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

- (a) that the native title claim group have, and the predecessors of those persons had, an association with the area*
- (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests;*
- (c) that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.*

Reasons for the Decision

In applying this condition I have relied on the information provided at Schedule F and Schedule G in the amended application and following affidavits:

- affidavit of [name of claim group member A deleted], affirmed on 12 October 1999;
- affidavit of [name of claim group member B deleted], affirmed on 12 October 1999;
- affidavit of [name of claim group member C deleted], affirmed on 12 October 1999;
- affidavit of [name of claim group member D deleted], affirmed on 12 October 1999;
- affidavit of [name of claim group member E deleted], affirmed on 12 October 1999; and
- affidavit of [name of claim group member F deleted], affirmed on 12 October 1999.

[Note: Each of these affidavits was provided to the Tribunal on a confidential basis for the purpose of the registration test quotes from the affidavits have been deleted from these reasons for decision to protect the confidentiality of the affidavit information. The deleted material has, however, been summarised.]

There are three criteria to consider in determining over all whether or not I am satisfied that there is a sufficient factual basis to support applicants' assertion about the existence of the native title rights and interests listed at Schedule E of this application.

1. 190B(5)(a)

Does the above material provide a sufficient factual basis to support the assertion that the native title rights and interests claimed exist particular that the native title claim group have, and the predecessor of those persons had, an association with the area?

Schedule F of the amended application states in part, *"The native title rights and interests are those of and flowing from the right to possession, occupation, use and enjoyment of the land to the exclusion of all others pursuant to the traditional laws and customs of the claim group based on the following facts:*

(1) The native title claim group and their ancestors have, since the assertion of British sovereignty possessed, occupied, used and enjoyed the claim area; and as far back as the combined memories of the Applicants go and the oral history known to the Applicants, the native title group and their predecessors have had an association with it".

I note that Schedule F provides general assertions rather than specific details. I have also relied on the affidavits detailed above which provide specific details.

In his affidavit [name of claim group member A deleted] states that he was [text deleted to protect the confidentiality of affidavit information].

In paragraph 1 and 2 of his affidavit [name of claim group member B deleted] states that he was [text deleted to protect the confidentiality of affidavit information].

In paragraph 1, 2 and 3 of his affidavit [name of claim group member C deleted] states [text deleted to protect the confidentiality of affidavit information].

In paragraph 4 of his affidavit [name of claim group member D deleted] states that [text deleted to protect the confidentiality of affidavit information].

In paragraph 3 of his affidavit [name of claim group member E deleted] states that [text deleted to protect the confidentiality of affidavit information].

In paragraph 1 and 2 of her affidavit [name of claim group member F deleted] states that [text deleted to protect the confidentiality of affidavit information].

[In summary, text deleted in this section contains evidence of the association of the deponents and their predecessors, to particular parts of the claim area. Information includes references to birth in the area, growing up there, speaking the language of the community and of ancestors being buried in the area].

I am satisfied that there is evidence to support the assertions that the native title claim group have and the predecessor of those persons had an association with the area.

2. 190B(5)(b)

Does the above material provide a sufficient factual basis to support the assertion that there exist traditional laws and customs that give rise to the claim to native title rights and interests?

S190B(6)

Prima facie case

Met

190B(6)

Prima facie case:

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

Reasons for the Decision

Can each native title right and interest be established on the basis of the relevant information?

In applying this condition I have relied on:

- affidavit of [name of claim group member A deleted], affirmed on 12 October 1999;
- affidavit of [name of claim group member B deleted], affirmed on 12 October 1999;
- affidavit of [name of claim group member C deleted], affirmed on 12 October 1999;
- affidavit of [name of claim group member D deleted], affirmed on 12 October 1999;
- affidavit of [name of claim group member E deleted], affirmed on 12 October 1999;
- affidavit of [name of claim group member F deleted], affirmed on 12 October 1999; and
- the information provided in the amended application.

(a) Rights and interests to possess, occupy, use and enjoy the area:

In my opinion there is evidence to support the contention that the Malarngowem people Note that the term 'Malarngowem people' was used by the Delegate to refer to the claim group; however it is not a term used by the claim group. have the right to possess the land, occupy, use and enjoy the area.

Amended Application

I also refer to the evidence provided in following points (b) to (j).

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

In my opinion there is evidence to support the contention that the Malarngowem people⁴ have a right to make decisions about the use and enjoyment of the area.

Amended Application

In [name of claim group member A deleted] affidavit point 2... [text deleted to protect the confidentiality of affidavit information summary, deponent identifies his birthplace and that of his predecessors.] He continues in point 4 [text deleted to protect confidentiality of affidavit information. In summary, deponent describes being taught about his traditional country.], and in point 5 [text deleted to protect confidentiality of affidavit information. In summary, deponent further describes the custom associated with determining the place where individuals 'belong'.]

He continues in point 10... [text deleted to protect the confidentiality of affidavit information. In summary, deponent describes the work he undertakes to look after his country.]

In [name of claim group member C deleted] affidavit point 1... [text deleted to protect the confidentiality of affidavit information summary, deponent describes how he was named and the relationship of his name with a predecessor. He also identifies the group to which he belongs and the language he speaks.]

In [name of claim group member D deleted] affidavit point 6... [text deleted to protect the confidentiality of affidavit information summary, deponent describes how he has inherited responsibility for particular areas within the claim and the need for others to obtain his permission before entering areas within the claim.]

(c) the right of access to the area;

In my opinion there is evidence to support the Malarngowem people⁴ have right of access to the area.

Amended Application

In [name of claim group member E deleted] affidavit point 5. ...[text deleted to protect the confidentiality of affidavit information summary, deponent describes travelling within the claim area and identifies why she and others have access to the claim area.]

[Name of claim group member D deleted] affidavit discusses access to the area in point 3.... [text deleted to protect the confidentiality of affidavit information. In summary, deponent describes his access to the claim area and how he has maintained that access throughout his life.]

S190B(7)

Physical connection

Met

190B(7)

Traditional physical connection:

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

- (a) currently has or previously had a traditional physical connection with any part of the land or waters covered the application; or*
- (b) previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to land or waters) by:*
 - (i) the Crown in any capacity; or*
 - (ii) a statutory authority of the Crown in any capacity; or*
 - (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such holder of a lease.*

Reasons for the Decision

In applying this condition I have relied on:

- affidavit of [name of claim group member A deleted], affirmed on 12 October 1999;
- affidavit of [name of claim group member B deleted], affirmed on 12 October 1999;
- affidavit of [name of claim group member C deleted], affirmed on 12 October 1999;
- affidavit of [name of claim group member D deleted], affirmed on 12 October 1999;
- affidavit of [name of claim group member E deleted], affirmed on 12 October 1999;
- affidavit of [name of claim group member F deleted], affirmed on 12 October 1999; and
- the information provided in the amended application.

Under s.190B(7)(a) 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.

In his affidavit [name of claim group member A deleted] states that he was [text deleted to protect the confidentiality of affidavit information. In summary, deponent identifies his birthplace and that of his predecessors.] (paragraph 2). In paragraph 5 he continues [text deleted to protect confidentiality of affidavit information. In summary, deponent describes the custom associated with determining the place where individuals 'belong'.]

In paragraph 1, 2 and 3 of his affidavit [name of claim group member C deleted] states that his country is Binor [text deleted to protect the confidentiality of affidavit information. In summary, deponent identifies the group to which he belongs and the language he speaks. He also identifies the place where he was raised.]

In paragraph 4 of his affidavit [name of claim group member D deleted] states that [text deleted to protect the confidentiality of affidavit information. In summary, deponent identifies his birthplace, where he was raised and the places within the claim from which his parents came.]

In paragraph 3 of his affidavit [name of claim group member E deleted] states that he was [text deleted to protect the confidentiality of affidavit information. In summary, deponent identifies her birthplace and those of her parents. She also identifies where her predecessor is buried.]

In paragraph 1 and 2 of her affidavit [name of claim group member F deleted] states that [text deleted to protect the confidentiality of affidavit information. In summary, deponent identifies her birthplace, the group to which she belongs and the language she speaks.]

From this information and evidence I am satisfied that [names of claim group members A, B, C, D, E and F deleted] being members of the native title claim group, have maintained a traditional physical connection with the claim area.

Also in Schedule G of the application a statement is provided stating: *Members of the native title claim group have continuously carried out activities on the land and waters within the area of the claim and have possessed, occupied, used and enjoyed the area.* They then list the activities carried out by the native title group within the area.

Conclusion

I note submissions made by the Crown Solicitors Office at page 2 of a letter dated 21 December 1998 (WC97/59), page 2 of a letter dated 22 December 1998 (WC97/67), and page 2 of a letter dated 24 December 1998 (WC 98/30) in relation to this condition of the test. These submissions were made prior to the amended application and are no longer relevant to this application.

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

190B(8)

No failure to comply with s61A:

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Reasons for the Decision

The requirements of s.61A are reviewed in order below.

S.61A(1) - No Previous Determination of Native Title

In order to comply with s61A(1), there must be no previous approved determination of native title.

A search of the Register of Native Title Determinations reveals that no determination of native title for the area has been registered.

S.61(a)(2) - No Previous Exclusive Possession Acts

This subsection provides that the area must not have been subject to a previous exclusive possession act attributable to the Commonwealth or where this State legislation, attributable to the State.

a) In the application the applicants have sought to exclude any areas where there may have been a previous exclusive possession act attributable to the State or Commonwealth.

I am of the view that the statements provided comply with s.61A(2) and exclude previous possession Acts attributable to the Commonwealth or State.

S.61A(3) - No Claim to Exclusive Possession over Areas the Subject of Previous Non-Exclusive Possession Acts

Section 61A(3) provides that the application must not disclose, and I must not otherwise be aware, that the applicants claim exclusive possession of an area which has been the subject of a previous non exclusive possession act attributable to the Commonwealth or State.

The applicant has provided a general exclusion clause in regard to the above. This exclusion is found in Attachment E of the application, I have discussed it under s190B(2).

Application of s47, 47A and s47B

In Schedule B of the application the following information is provided:

“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 include such areas as may be listed in Schedule L.”

I note Justice French’s decision in *Strickland v Native Title Registrar* 1999 FCA 1530. When considering the question of the definition of areas subject to ss.47, 47A and 47B, French J said, at paragraph 55, that it was unrealistic to expect a concluded definition of these areas to be given in the application. How these sections apply to any given application area will be decided by the court as part of the hearing of the application.

I am of the view that I am not required to decide this question and note the applicants claim the benefit of ss.47A and 47B.

I note submissions made by the Crown Solicitors Office at page 2 of a letter dated 21 December 1998 (WC97/59), page 2 of a letter dated 22 December 1998 (WC97/67), and page 2 of a letter dated 24 December 1998 (WC 98/30) in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

I am satisfied that the applicants pass this section of the test.

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

190B(9)

(a)

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

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

Reasons for the Decision

In applying this condition I have relied on information provided at Schedule E of the application.

Paragraph (i) in Schedule E of the application states: “to the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants.”

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

Exclusive possession of an offshore place:

190B(9)

(b)

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

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

Reasons for the Decision

In applying this condition I have relied on the information at Schedule E of the application.

Paragraph (ii) of Schedule E states that the claim area does not include any offshore place.

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

Other extinguishment:

190B(9)

(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

Under the requirements of this section, I must consider whether there are any native title rights and interests claimed by the applicant that have been otherwise extinguished.

- ***Legislative extinguishment***

In Attachment B the application states:

The applicants exclude from the claim areas in relation to which native title rights and interest 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 uncertainty, Schedule B1 of the application also details some significant classes of tenure, which are to be excluded. The relevant tenure classes are detailed above in my S190B(2) reasons.

In *Ward v WA Lee J* found that certain acts extinguished native title at common law. These are freehold titles, permanent public works used for the purpose, dedicated roads, and areas subject to adverse dominion. The applicants have particularly excluded freehold land, public works and existing public roads or dedicated roads, and areas subject to adverse dominion. There is nothing before me to indicate the existence of any other extinguishing event in the claim area.

This general exclusion clause covers any areas that may otherwise have extinguished native title rights and interests, and yet have not been specifically excluded or otherwise removed from the claim area.

I am satisfied that there are no areas claimed which native title rights and interests have been extinguished.

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| S190C(2) | Information etc required by sections 61 & 62 | Met |
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Information, etc, required by section 61 and section 62:

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| 190C(2) | <i>The Registrar must be satisfied that the application contains all details and other information, and is accompanied any affidavit or other document, required by sections 61 and 62.</i> |
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Details required in section 61

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| 61(3) | Name and address for service of applicant(s) |
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Reasons relating to this sub-condition

The names of the Applicants are provided in the application.

The Applicants are Maggie John, Patrick Mung, Chocolate Thomas, Pearl Gordon, Goody Barrett, Lena Nyadbi, Jack Texas, Churchill Cann, Hector Chunda, Paddy McGinty, Bernard Stretch, Norman Thomas, Shirley Purdey, Phyllis Gallagher, Jack Britten, Ida Milkburria, Rusty Peters, Rammel Peters, Mabel Peters, Gordon Barney, Topsy Springvale, Mary Thomas, Shirley Bray and Queenie Malgil.

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

Requirements are met.

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

Reasons relating to this sub-condition

Schedule A of the amended application describes the native title claim group. In my view the description of the claim group is sufficient for it to be ascertained whether any particular person is one of those persons. I have reached this view for the reasons contained in my decision at s.190B3.

I am satisfied there has been compliance with the procedural requirements of s.61(4).

Requirements are met.

61(5) *Application is in the prescribed form* Note that in relation to pre 30.09.98 applications, the application does not need to be in the prescribed form as required by the amended Act. Note also that pre 30.09.98 applications are deemed to have been filed in the Federal Court.; lodged in the Federal Court, contains prescribed information Note also that “prescribed information” is that which is required by s62 as set out in the text of this reasons document under “Details required in section 62(1)”, and accompanied by prescribed documents and fee

Reasons relating to this sub-condition

The application is in the form prescribed by Regulation 5(1)(a) of the Native Title (Federal Court) Regulations 1998. The application was filed in the Federal Court as required pursuant to s.61(5)(b) of the Act.

The application meets the requirements of s.61(5)(c) and contains all information prescribed in s.62. I refer to my reasons in relation to those sections.

As required by s.61(5)(d) the application is accompanied by an affidavit prescribed by s.62(1)(a) and a map prescribed by s.62(2)(b). I refer to my reasons in relation to those sections of the Act.

I note that s.190C2 only requires me to consider details, other information and documents required by sections 61 and 62. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court.

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-condition

The application is accompanied by affidavits sworn or affirmed by the applicants. The Affidavits comply with the content requirements set out in section 62(1). The Applicants state:

- That the native title rights and interests claimed by the native title group have in this application have not been extinguished in relation to any part of the area covered by the application. (s.62(1)(a)(i)).
- That none of the area covered by this application is also covered by an entry in the National Native Title Register. (s.62(1)(a)(ii)).
- That all statements made in the application are true. (s.62(1)(a)(iii)).
- The application is authorised by all the persons in the native title claim group to make the application and deal with all matters arising in relation to the application pursuant to the process of decision making. (s.62(1)(a)(iv))
- (a) under the traditional laws and customs of the persons in the native title claim group, must be complied with in relation to authorising things of that kind; and
- (b) the persons in the native title claim group have (also) 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. (s.62(1)(a)(v)).

The affidavits are witnessed by Justices of the Peace and sworn or affirmed by the applicants.

The application complies with the requirements of this subsection.

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

Reasons relating to this sub-condition

It is not a mandatory requirement that details of traditional physical connection are contained in the application for purposes of s.62(1)(c), however, details of physical connection have been provided in the form of additional information provided to the Tribunal.

The adequacy of the information provided in relation to traditional physical connection is assessed at s.190B(7).

Requirements are met.

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

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

Reasons relating to this sub-condition

The application provides information by description in Attachment B and also a map, enabling the internal and external boundaries to be identified.

The application meets the requirements of this condition. See also my reasons for decision provided under s.190B2.

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

Reasons relating to this sub-condition

At Schedule B and B1 of the amended application the Applicants have provided a written description of the areas within the external boundary of the area claimed which are not covered by the application. Information is also provided in Schedule E.

I am satisfied that the information provided in the application identifies the areas within the external boundary that are not covered by the application. See also my reasons for decision in relation to test conditions contained at 190B2.

Requirements are met.

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

Reasons relating to this sub-condition

A map showing the external boundaries of the area covered by the application is provided as Attachment C of the application.

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-condition

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

Attachment D provides details of searches carried out by the applicants and the representative body. Details are also provided in Attachment L.

Requirements are met.

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

Reasons relating to this sub-condition

Section 62(2)(d), requires the applicants to provide: a description of the native title rights and interests claimed relation to particular land or waters (including any activities in exercise of those rights and interests), but not mer consisting of a statement to the effect that the native title rights and interests are all native title rights and interests t may exist, or that have not been extinguished, at law.

I have outlined the rights and interests claimed in my decision in relation to s.190B4. The description contains statement that the rights and interests claimed are subject to a number of uses or events, these are also outlined in decision in relation to s.190B4.

Also Attachment G identifies some of the activities members of the native title claim group carry out and states t members of the claim group have continuously carried out activities on the land and waters within the area of the claim

Additional material supplied to the Tribunal by way of affidavits by six of the applicants identifies some of t activities members of the native title claim group carry out.

The rights and interests identified are claimed in respect of “the area” which I interpret as the whole of the claim area, described at Attachment B. In my view the rights and interests identified by the applicants are defined in a sufficien clear manner and the application meets the requirements of s.61(2)(d).

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

Reasons relating to this sub-condition

The Applicants have provided a general description of the factual basis on which it is asserted that the claim group h and their predecessors had, an association with the area at Schedule F of the amended application.

Additional information is also provided in the form of affidavits by six applicants.

Requirements are met.

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

Reasons relating to this sub-condition

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

Additional information is also provided in the form of affidavits by six applicants.

Requirements are met.

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

Reasons relating to this sub-condition

The Applicants have provided a general description of the factual basis on which it is asserted that the claim group continued to hold native title in accordance with traditional laws and customs at Schedule F of the application.

Additional information is also provided in the form of affidavits by six applicants.

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-condition

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

Additional information is also provided in the form of affidavits by six applicants.

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-condition

The Applicants state at Schedule H of the application that they are aware of the following other applications to High Court, Federal Court or recognised State/Territory body that have been made in relation to the whole or a part of the area covered by the application: WAG6190 of 1998 (WC97/67), WAG 6246 of 1998 (WC98/30) and the Native Title Determination Application of M. John, filed on 24 September 1999.

However, one application was not listed in this Schedule. That application is WC95/59 (WAG6182/98), however, this application is the lead application for the combined claim, the applicants may be of the opinion that these details should not be included in this Schedule.

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 which the applicant is aware of

Reasons relating to this sub-condition

Section 62(2)(h) requires that the application must contain the details of any notices under section 29 that the applicants are aware of. I am satisfied that attachment I contains details of s.29 notices that the applicants are aware of.

Schedule I of the amended application states that the applicants are aware of the following section 29 notices issued since 30 September 1998:

Requirements are met.

Reasons for the Decision

I have set out above the reasoning in respect of each of the relevant sub-sections of sections 61 and 62 of the *Native Title Act*, and on the basis of the application and accompanying documents, I am satisfied that the application meets the requirements of this condition.

S190C(3)

No previous overlapping claim groups

Met

Common claimants in overlapping claims:

190C(3)

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 190.*

Reasons for the Decision

Reasons for the Decision

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

When was the current application made?

The current application is a combination of four applications, and in order to determine when it was “made” for the purposes of this section 190C(3) it is necessary to examine its history.

The pre-combination applications were:

WAG 6182/98 (WC97/59)

WAG 6190/98 (WC97/67)

WAG 6246/98 (WC98/30)

WAG 6028/99 (WC99/28)

The first three listed applications were polygon claims lodged on 21 July 1997, 4 August 1997, and 15 June 1998 respectively. Application WC99/28, lodged on 24 September 1999, was a larger country claim incorporating all the area of the other three applications as well as previously unclaimed country.

In *Strickland v Native Title Registrar* [1999] FCA 1530, His Honour Justice French discussed the issue of determining the date on which the combination application was ‘made’. He determined that applications filed directly with the Tribunal on or before 29 September 1998 and applications made in the Federal Court on 30 September 1998. Following his Honour’s reasoning, for the purpose of this section, the three polygon applications were ‘made’ on 30 September 1998.

Where the application under consideration is a combined application, it is necessary to determine which is the “lead” application as the date the lead will be the date on which the combined application was made.

In this case the Federal Court ordered, on 22 October 1999, that each of the four applications was amended “so that henceforth it is combined with and includes [the other three applications]”. In each matter the Court also ordered that “WAG 6182 of 1998 be the lead application”.

Justice French suggested in *Strickland* that in cases where a country application is combined with polygon applications, “the date upon which the country application was filed in the Federal Court ... is the date it was ‘made’ for the purposes of s 190C(3)”. However, in this case there is an order of the Court that the lead application is one of the polygon applications.

Accordingly, I have proceeded on the basis that the combined application was ‘made’ (for the purposes of this section) on 30 September 1998.

Were there any overlapping claims?

Information from the Geospatial data reveals that the current combined application is overlapped by:

| | |
|-----------------------|---|
| WC94/11 (Purnululu) | 1.156 sq.km. |
| WC96/75 (Ngarrawanji) | 0.236 sq.km. |
| WC97/79 (Jiddngarru) | failed registration test 23 August 1999 |

Purnululu

The Tribunal’s Geospatial Unit advise that the overlap with Purnululu is a *technical* overlap, and according to the external descriptions of the two applications, there should be no overlap as both descriptions follow the same boundaries where the overlaps occur.

Ngarrawanji

I am of the opinion that the overlap with Ngarrawanji can be disregarded due to its size.

Jiddngarru

This application failed the registration test on 23 August 1999 and therefore does not need to be considered.

I have therefore formed the opinion that there are no relevant overlaps.

Had I considered the Purnululu and Ngarrawanji overlaps relevant, they would still not have posed any threat to the current combined application.

S190C(4)

Identity of claimed native title holders

Met

Certification and authorisation:

190C(4)(a)

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

and

(a) The application has been certified under paragraph 202(4)(d) by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part; or

190C(4)(b)

(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

In order to meet this condition I must be satisfied that the application has been certified by each representative body that could certify the application, or be satisfied that the applicants have been authorised, the test of which is outlined at s190C(5).

Certification

The application to the Court contains details of certification under Schedule R. It states ... “The application has been certified by the Kimberley Land Council and the Certificate will be forwarded to the National Native Title Tribunal.”

A certificate pursuant to s202(7)(a) of the NTA, signed by Peter Yu on 4 November 1999, Executive Director of the Kimberley Land Council (KLC), was provided to the Tribunal on 4 November 1999.

As required by s.202(7)(a) the Certificate includes a statement to the effect that s.202 (5)(a) and (b) of the NTA have been met. Details are provided in point 1 of the Certification.

As required by s202(7)(b) the Certificate provides reasons for the opinion. The Certificate states:

“The Kimberley Land Council through its staff and contracted consultants has undertaken extensive research and community consultation in the preparation of the present application for a determination of native title, with a view to ensuring that the application describes or otherwise identifies all the other persons in the native title claim group.”

The Certificate states further that:

“The KLC through its staff and contracted consultants has attended a series of community meetings with claimants from across the claim area, the subject of the present application and has observed that the Applicants are authorised by the claim group.”

There are two Native Title Representative Bodies, gazetted 30 December 1993, that cover part of the area of this application. The Aboriginal Legal Service (ALS) is the representative body for “the whole of the State of Western Australia”; and

1. The Kimberley Land Council is a determined representative body for “The area bounded on the east by the Western Australian/Northern Territory border (longitude 129 East) on the South by Latitude 22 South and on the West and North by the Western Australian coastline, and known as the Kimberley region.”

To be certified, it is necessary that both the KLC and ALS certify the application pursuant to s.190C(4)(a). In this instance only a certificate from the KLC has been received, and no certificate from ALS has been provided.

Where there are overlapping representative body boundaries, s.190C(6) allows certification by only one of those representative bodies in certain circumstances. For the application to meet this limb of the condition, a certificate from ALS would not be required if :

- the KLC has certified the application; and
- the KLC area includes all of the land or waters, to which the application relates, that is within the ALS’ area.

Information from Geospatial dated 14 January 2000 advise that the total area of the application is 7623.604 sq. km. However, the area covered by Aboriginal Legal Service and the Kimberley Land Council is 7618.578 sq.km.

I sought to clarify this with Geospatial and the following opinion has been provided. The opinion states: “The anomaly between the area WC97/59 and the area of overlap with the NTRB and ASTIC boundaries are as a result of the very generalised definition of the boundaries in the NTRB and ATSIC data sets, as opposed to the higher accuracy of the data sets used by LCMU to construct the application boundary.

I am therefore satisfied that the application can be certified by the Kimberley Land Council due to the fact that area includes all of the area of land (or waters) to which the application relates, that is within the first-mentioned body’s area.

I find that the application does meet the requirements of s190C(4)(a).