

National Native Title Tribunal

REGISTRATION TEST REASONS FOR DECISION

DELEGATE	Malcolm O'Dell		
Application Name	Yued		
Names of Applicants	Martha BORINELLI, Michael EGAN, Arnold FRANKS, Diane MIPPY, Jenny MOGRIDGE, Edna RYDER, Joseph RYDER, Mal RYDER, Charmaine WALLEY, William WARRELL.		
Region	South West	NNTT No	WC97/71
Date Application Made	22 August 1997	Fed Court No	WAG 6192/98

Brief History of the application

This is an application lodged with the Tribunal on 22 August 1997. It is consequently caught by the transitional provisions of the NTAA 1998, that is, the requirement for the Registrar to allow the applicants the opportunity to supplement the application for testing under the provisions 190B and 190C of the amended NTA. Prior to commencement of the amended NTA, a number of amendments had been made to the application.

The applicants were advised on 1 October 1998 of the Registrar's intention to apply the registration test, informing them of the procedures to be adopted to allow the applicants to supply further information and to do things that may be required to prepare the application for the test. On 29 October 1998 the applicants were further notified that the Registrar would be using best endeavours to apply the test by 10 March 1999, as the claim area was now covered by a s29 notice published after the commencement of the amended NTA by the State Government of Western Australia (the "State").

The State supplied the Registrar with contentions and information relevant to the test on 1 December 1998, and this information was passed to the applicant on 7 December 1998. A copy of potentially adverse information about non – native title rights and interests in land (tenure) covered by the Yued application was passed to the applicant on 8 February 1999. Adverse information in the form of transcripts of Future Act objection hearings was passed to the applicants on 17 February 1999.

The applicants filed an amended application in the Federal Court on 18 February 1999. It was heard on 8 March 1999, where the Court ordered that the application be amended.

The applicants supplied additional information in the form of an affidavit [information deleted to address the cultural/customary concerns of the applicants or the privacy of an individual] to the Tribunal on 26 February. Further confidential 'additional information' in the form of an affidavit [information deleted to address the cultural/customary concerns of the applicants or the privacy of an individual] was supplied to the Tribunal on 30 April 1999. The applicants filed an affidavit [information deleted to address the cultural/customary concerns of the applicants or the privacy of an individual] on 14 June 1999. In each case the applicants requested that these documents be considered for the purpose of the registration test.

On the 10 June 1999, the applicants filed a further amended application with the Federal Court (folio 7, Legal Services file). This matter was heard in the Federal Court on 23 June 1999 and the further amendment resulting advised by the Federal Court on 25 June 1999. A re-engrossed application was provided to the Tribunal by the Federal Court on 7 July 1999.

All references to the 'amended application' in the present decision, unless otherwise stated, refer to the application as most recently amended on 23 June 1999.

Information considered when making the Decision

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

- The Working Files, Registration Test Files, Tenure Files, Future Act Files, Legal Services Files and the Case Management System.

WC97/71 Working file	1 volume of NNTT material since lodgement
WC97/71 Registration – Testing files	1 volume of NNTT material since 1 October 1999
WC97/71 Legal Services File	1 volume NNTT material since 19 February 1999. <ul style="list-style-type: none"> • Amended application 8 March 1999 (folio 3) • Further amended application 23 June 1999 (folios 9 & 10)
Future Act Files	Files identified as possibly relevant to WC97/71 as follows: WO96/113 and WO96/114 – Inquiry into objections to inclusion in an expedited procedure – Arnold Franks/State of WA/Mineral Sands Mining and Development Pty Ltd/Alistair Woodhams – CJ Sumner found, <i>inter alia</i> , that there was no evidence of active community life in the vicinity of the proposed tenements. WO96/106, WO96/113, WO96/114, WO97/414, WO97/440, WO97/445, WO97/497, WO97/565, WO97/566, WO97/577, WO98/85, WO98/93, WO98/118, WO98/429, WO98/636, WO98/637, WO98/872, WO98/918, WO98/996, WO98/998, WO98/1047, WO98/1106, WF98/245, WF98/251, WF98/257
WC97/71 Tenure	Details of Land Act leases, Land Act reserves, mining and petroleum tenements
Working files of overlapping applications: WC's numbered 96/63; 97/2; 95/86; 96/31; 96/39; 96/83; 96/91; 96/94; 96/102; 96/103; 97/72; 98/67.	Relevant information – tenure for WC96/63, WC96/31, WC96/94, WC96/102, WC96/103.

- 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

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.

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A. Procedural Conditions

190C2	<p>Information, etc, required by section 61 and section 62:</p> <p>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.</p>
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Details required in section 61

61(3)	Name and address for service of applicants
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. Names of applicants listed at attachment (i) of the amended application. 2. Address for service of applicants given at Part B. of the amended application. 3. This satisfies the requirements of s61(3). 	

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

61(5)	Application is in the prescribed form, lodged in the Federal Court, contain prescribed information, and accompanied by prescribed documents and fee
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. The amended application is in the Prescribed form: The application is in the form prescribed by Regulation 5(1)(a) Native Title (Federal Court) Regulations 1998. 2. The amended application contains all of the following prescribed information: <ul style="list-style-type: none"> • As required by s.62(2)(a), the application includes information about the boundaries of the area covered by the application at Schedule B and Attachment B of the amended application, and describes any areas within those boundaries that area not covered by the application at Attachment B (Internal Boundaries). • A map of the claim area is referred to in Schedule C and is provided at Attachment C, Annexure A of the amended application, as required by s.62(2)(b). • Details and results of searches are provided at schedule D and Attachment D, as required by s.62(2)(c). • Description of native title rights and interests claimed is provided at Schedule E and Attachment E, as required by s.62(2)(d). • Description of the factual basis is provided at Schedule F and Attachment F, as required by s.62(2)(e). • A statement about activities conducted by the claim group in relation to land and waters is provided at Schedule G and Attachment G, as required by s.62(2)(f). • Details of any other applications are provided in Schedule H and Attachment H, as required by s.62(2)(g). • Details of any notices under s29 are provided at Schedule I and Attachment I, as required by s.62(2)(h). 3. The application contains all the prescribed documents: <ul style="list-style-type: none"> • Affidavits in the prescribed form are supplied for each applicant. • A map as prescribed by sections 62(1)(b) (see reasons for decision in relation to section 62(2)(b)) 	

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| <p>4. The applicants are exempted from fees: No fees are payable pursuant to Regulation 8(b) Native Title (Tribunal) Regulations 1993.</p> <p>5. For the reasons outlined above, all requirements of s61(5) are met.</p> |
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Details required in section 62(1)

62(1)(a)	<i>Affidavits address matters required by s62(1)(a)(i) – s62(1)(a)(v)</i>
Reasons relating to this sub-condition	Application passes the condition
<p>1. Affidavits in the prescribed form and addressing the matters required by s62(1)(a)(i) - (v) are supplied for each of the 10 applicants</p> <p>2. The requirements of s62(1)(a) are met.</p>	
62(1)(c)	<i>Details of physical connection (information not mandatory)</i>
Comment on details provided	
<p>1. The amended application contains details relating to 'traditional physical connection' at Schedule M and 'prevention of access' at Schedule N.</p>	

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

62(2)(a)(i)	<i>Information identifying the boundaries of the area covered</i>
Reasons relating to this sub-condition	Application passes the condition
<p>1. A description, sufficient for the area covered by the application to be identified, is provided at Schedule B and Attachment B of the amended application. A map of the amended application is also supplied at Schedule C, Attachment C, Annexure A.</p> <p>2. For the reasons given at s.190B(2), this description satisfies s.62(2)(a)(i).</p>	

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

Reasons relating to this sub-condition	Application passes the condition
<p>1. Information identifying the 'internal boundaries' of the application is given at Schedule B, Attachment B (Internal boundaries) of the amended application as follows:</p> <p>1 <i>The applicants exclude from the claim any areas covered by valid acts on or before 23 December 1996 comprising such of the following as are included as extinguishing acts within the Native Title Act 1993, as amended, or the Titles Validation Act 1994, as amended, at the time of the Registrar's consideration:</i></p> <p>(a) <i>Category A past acts, as defined in NTA s.229;</i></p> <p>(b) <i>Category A intermediate period acts, as defined in NTA s.232B.</i></p> <p>2 <i>The applicants exclude from the claim any areas in relation to which a previous exclusive possession act, as defined in s.23B of the NTA, was done in relation to the area, and either the act was an act attributable to the Commonwealth, or the act was 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 at the time of the Registrar's consideration.</i></p> <p>3 <i>The applicants exclude from the claim any areas in relation to which native title rights and interests have otherwise been extinguished, including areas subject to:</i></p> <p>(a) <i>an act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or</i></p> <p>(b) <i>actual use made by the holder of a tenure other than native which is permanently inconsistent with the continued existence of native title.</i></p> <p>And, to avoid any uncertainty, the applicants exclude from the claim:</p> <p>(c) <i>an unqualified grant of an estate in fee simple; or</i></p> <p>(d) <i>a lease which is currently in force, in respect of an area not exceeding 5,000 square metres; upon which a dwelling, house, residence, building or work is constructed; and which comprises:</i></p> <p><i>i a lease of a worker's dwelling under the Workers' Homes Act 1911-1928;</i></p> <p><i>ii a 999 year lease under the Land Act 1898;</i></p> <p><i>iii a lease of a Town Lot or Suburban Lot pursuant to the Land Act 1933 (WA), s.117;</i></p> <p><i>iv a special lease under s.117 of the Land Act 1933 (WA); or</i></p> <p>(e) <i>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; or</i></p> <p>(f) <i>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; or</i></p> <p>(g) <i>a Perpetual Lease currently in force under the War Service Land Settlement Scheme Act 1954; or</i></p> <p>(h) <i>a permanent public work; or</i></p> <p>(i) <i>an existing public road or street used by the public.</i></p> <p><i>Paragraphs (1), (2) & (3) above are subject to such provisions of sections 47, 47A & 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></p>	<p>Application passes the condition</p> <p>2 For the reasons given at s190B(2) the application passes this condition.</p>

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

Reasons relating to this sub-condition	Application passes the condition
<p>1. A map is supplied with the amended application at Schedule C, Attachment C, Annexure A. This map shows the external boundaries of the area covered by the application.</p>	

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2. For the reasons given at s190B(2), the application passes this condition.

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

Application passes the condition

1. Schedule D and Attachment D of the re-engrossed amended application includes details/results of searches carried out by the State Government.
2. The application passes this condition.

62(2)(d)

Description of native title rights and interests claimed

Reasons relating to this sub-condition

Application passes the condition

1. The re-engrossed amended application at Schedule E contains a description of the native title rights and interests claimed in respect of the area claimed.
2. The native title rights and interests are described as follows:

The Qualifications

The applicants claim in relation to the claim area, including land and waters, the native title rights and interests set out below ("The Rights and Interests") subject to the following qualifications:

- 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 *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 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 Rights and Interests

Subject to the above qualifications, the rights and interests claimed in relation to the claim area, including land and waters, are:

- a. rights and interests to exclusively 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;

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<ul style="list-style-type: none"> 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 maintain and protect places of importance under traditional laws, customs and practices in the area; h. the right to maintain, protect and prevent misuse of cultural knowledge of the common law native title holders associated with the area; i. the right to rear and teach children in their country; j. the right to live on and erect residences and other infrastructure on the land; k. the right to trade in resources of the area; l. the right to receive a portion of any resources taken by others from the area; and m. the right to manage, conserve and look after the land, waters and resources, including locating and cleaning water sources and drinking water on the land. <p>3. This description satisfies s.62(2)(d)</p>

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

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

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

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

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62(2)(g)	<i>Details of any other applications to the High Court, Federal Court or a recognised State/Territory body the applicant is aware of (and where the application seeks a determination of native title or compensation)</i>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> Schedule H of the re-engrossed amended application contains the NNTT number of all other applications to the High Court, Federal Court, or a recognised State/territory body, in relation to the whole or part of the area covered by the application (including three applications which no longer overlap the application). The details supplied are sufficient to comply with s.62(2)(g). 	

62(2)(h)	<i>Details of any S29 Notices (or notices given under a corresponding State/Territory law) in relation to the area, and the applicant is aware of</i>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> The amended application at Schedule I and Attachment I lists all s29 notices in relation to the area since 30/9/98. The application passes this condition. 	

Reasons for the Decision

<ol style="list-style-type: none"> For the reasons identified above the amended application contains all details and other information, and is accompanied by the affidavits and other documents, required by ss.61&62. I am satisfied that the application meets the requirements of this condition.

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190C3	<p>Common claimants in overlapping claims:</p> <p>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:</p> <ul style="list-style-type: none">(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.
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Reasons for the Decision

1. A check on the Register of Native Title Claims was conducted on 20 July 1999.
2. This check revealed that no overlapping native title application is on the Register of Native Title Claims or has not been removed from the Register of Native Title Claims as a result of consideration pursuant to s190A.
3. I am satisfied that the requirements of s.190C3 are met.

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190C4(a) and 190C4(b)	<p>Certification and authorisation:</p> <p>The Registrar must be satisfied that either of the following is the case:</p> <p>(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</p> <p>(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.</p>
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Reasons for the Decision

<ol style="list-style-type: none"> 1. At Attachment R of the amended application the applicants have provided a certificate issued by a Native Title Representative Body pursuant to s.202(4)(d). 2. An inspection of the Native Title Representative Body gazetted boundaries establishes that the claim area is wholly within the Noongar Land Council gazetted area. 3. Section 190C(4)(a) requires certification by each representative Aboriginal/Torres Strait Islander body that could certify the application. Section 190C(6) qualifies this requirement, stating that certification is not required by all representative bodies if the application has been certified by a body whose area includes all of the area of land or waters to which the application relates. As indicated above, the Noongar Land Council is such a body. <p><u>Certification by the Noongar Land Council</u></p> <ol style="list-style-type: none"> 4. There appears to be no legally required format for certification of a claimant application other than it must be in writing (s.202(4)(d)) and that it must contain the information required under s.202(7). <p><u>Compliance with s.202(7)</u></p> <ol style="list-style-type: none"> 5. 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: <ul style="list-style-type: none"> <i>A certification of an application for a determination of native title by a representative body must:</i> <ol style="list-style-type: none"> a. <i>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</i> b. <i>Briefly set out the body's reasons for being of that opinion; and</i> c. <i>Where applicable, briefly set out what the representative body has done to meet the requirements of subsection (6)</i> 6. The certificate provided by the applicant is signed by [information deleted to address the cultural/customary concerns of the applicants or the privacy of an individual], Native Title Manager, Noongar Land Council and dated 7 July 1999. 7. In my view the certificate provided by the applicant complies with s.202(7). <p><u>Conclusion</u></p> <ol style="list-style-type: none"> 8. As a result of the above considerations, I am satisfied that the application has been certified by the Noongar Land Council pursuant to s.202(4)(d) and in accordance with s.207(7). 9. This certification satisfies the requirements of s.190C(4)(a) of the Act.
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190C5	<p>Evidence of authorisation:</p> <p><i>If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:</i></p> <p><i>(a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and</i></p> <p><i>(b) briefly sets out the grounds on which the Registrar should consider that it has been met.</i></p>
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Reasons for the Recommendation

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

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B. Merits Conditions

190B2	<p>Description of the areas claimed:</p> <p>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.</p>
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Reasons for the Decision

<p><u>Map and External Boundary Description</u></p> <ol style="list-style-type: none"> 1. A map is supplied at Schedule C, Attachment C, Annexure A of the amended application. 2. The map supplied shows the external boundaries of the areas claimed. 3. The borders of the map display lines of longitude and latitude to enable the position of sites or localities within them to be identified. In addition, it shows a scale allowing distances and areas to be ascertained and it 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. 4. The map meets the requirements of s62 (2)(b) as the boundaries of the areas covered by the application can be identified. 5. A written description identifying the external boundary of the claim is supplied at Attachment B of the amended application. 6. The Tribunal's Geo-spatial Unit has plotted this information and concludes that the description is internally consistent, fully encloses the claim area and does not discernibly contradict the map accompanying the application. <p><u>Internal Boundary Description</u></p> <ol style="list-style-type: none"> 7. Areas excluded from the application are described at Schedule B, Attachment B (Internal Boundaries) of the amended application. 8. These excluded areas form the areas within the (external) boundary which are not covered by the application, that is, the internal boundary description. 9. The areas excluded from the application are described in the following terms: <ol style="list-style-type: none"> 1 <i>The applicants exclude from the claim any areas covered by valid acts on or before 23 December 1996 comprising such of the following as are included as extinguishing acts within the Native Title Act 1993, as amended, or the Titles Validation Act 1994, as amended, at the time of the Registrar's consideration:</i> <ol style="list-style-type: none"> (a) <i>Category A past acts, as defined in NTA s.229;</i> (b) <i>Category A intermediate period acts, as defined in NTA s.232B.</i> 2 <i>The applicants exclude from the claim any areas in relation to which a previous exclusive possession act, as defined in s.23B of the NTA, was done in relation to the area, and either the act was an act attributable to the Commonwealth, or the act was 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 at the time of the Registrar's consideration.</i> 3 <i>The applicants exclude from the claim any areas in relation to which native title rights and interests have otherwise been extinguished, including areas subject to:</i> <ol style="list-style-type: none"> (a) <i>an act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or</i> (b) <i>actual use made by the holder of a tenure other than native which is permanently inconsistent with the continued existence of native title.</i>
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And, to avoid any uncertainty, the applicants exclude from the claim:

- (c) *an unqualified grant of an estate in fee simple; or*
- (d) *a lease which is currently in force, in respect of an area not exceeding 5,000 square metres; upon which a dwelling, house, residence, building or work is constructed; and which comprises:*
 - i a lease of a worker's dwelling under the Workers' Homes Act 1911-1928;*
 - ii a 999 year lease under the Land Act 1898;*
 - iii a lease of a Town Lot or Suburban Lot pursuant to the Land Act 1933 (WA), s.117;*
 - iv a special lease under s.117 of the Land Act 1933 (WA); or*
- (e) *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; or*
- (f) *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; or*
- (g) *a Perpetual Lease currently in force under the War Service Land Settlement Scheme Act 1954; or*
- (h) *a permanent public work; or*
- (i) *an existing public road or street used by the public.*

4 Paragraphs (1), (2) & (3) above are subject to such provisions of sections 47, 47A & 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.

- 10 The description of areas excluded from the claim area at paragraphs 1 and 3(a) of the Internal Description 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.
- 11 The description of areas excluded from the claim at paragraph 2 refers to areas in relation to which a previous exclusive possession act, as defined in s.23B 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 s.23E 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 s.23E are likewise readily identified by reference to that legislation and thereafter searches of the relevant registers.
- 12 Paragraph 3(b) of the Internal Boundaries description excludes areas of land where actual use by the holder of a tenure is permanently inconsistent with continued existence of native title. Paragraph 3 (c) – (h) gives further information on specific areas of land excluded from the claim, which may fall into this category. The description in paragraph 3(b) read together with (c) – (h) of the same paragraph is sufficient for me to be satisfied that the areas excluded from the application, are identified with reasonable certainty.
- 13 The applicants seek the protection of ss.47, 47A and 47B by stating at paragraph 4 of the Internal Boundaries description that any areas excluded from the claim area are subject to these legislative provisions, particulars of which will be provided prior to the hearing but which include such areas as may be listed in Schedule L. No details are provided at Schedule L. The description at paragraph 4 allows it to be shown objectively, upon the provision of such particulars, whether applicants may have benefit of these provisions.

Conclusion

For the reasons given above, I am satisfied that the information and map contained in the

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application as required by paragraphs 62(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.



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

<p>1. The native title claim group is described at Schedule A, Attachment A of the amended application in the following terms:</p> <p style="padding-left: 2em;">“The claimants group comprise those Aboriginal people who are:</p> <ol style="list-style-type: none"> 1. the biological descendants of the unions between: - <ul style="list-style-type: none"> ▪ Sarah Bundaran of Wyenning + white settler John Ryder ▪ Mary Ellen/Helen Tainan + Patrick Yappo ▪ William ‘Bill’ Warel + Delores ‘Olly’ Nettle ▪ Johnny Pickett + Joanna Indich 2. Those persons adopted by the individuals named in 1. above and those persons adopted by the biological descendants of the unions between the individuals named in 1. above. 3. Those persons who are the biological descendants of the adopted persons included in 2. above. 4. Arnold Franks. <p style="padding-left: 2em;">Adoption occurs in the following manner: if a man dies and his brother or cousin marries the widow, any of the widow’s children are adopted as the children of the new husband.”</p> <p>2. I find that the persons in the native title claim group are those people who are biological descendants of the unions listed at Schedule A, including those adopted in accordance with the formula set out in this Schedule, and Arnold Franks.</p> <p>3. As Schedule A relies on a description other than naming the persons in the claim group, the application does not satisfy s.190B(3)(a). Consequently, the applicants must rely on satisfying s.190B(3)(b).</p> <p>4. In my view the description at schedule A provides an objectively verifiable mechanism for ascertaining whether any particular person is in the claim group.</p> <p>5. I am therefore satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.</p> <p>6. The description satisfies the requirements of s.190B(3)(b).</p>

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190B4**Identification of the native title rights and interests:**

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

- 1 This condition requires me to be satisfied that the native title rights and interests claimed can be readily identified.
- 2 It is insufficient to merely state that these native title rights and interests are 'all native title interests that may exist, or that have not been extinguished at law'.
- 3 To meet the requirements of s190B (4), I need only be satisfied that at least one of the rights and interests sought is sufficiently described for it to be readily identified
- 4 The amended application at Schedule E lists the native title rights and interests claimed as follows:

The Qualifications

The applicants claim in relation to the claim area, including land and waters, the native title rights and interests set out below ("The Rights and Interests") subject to the following qualifications:

- 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 Rights and Interests

Subject to the above qualifications, the rights and interests claimed in relation to the claim area, including land and waters, are:

- a. rights and interests to exclusively 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;

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- g. the right to maintain and protect places of importance under traditional laws, customs and practices in the area;
- h. the right to maintain, protect and prevent misuse of cultural knowledge of the common law native title holders associated with the area;
- i. the right to rear and teach children in their country;
- j. the right to live on and erect residences and other infrastructure on the land;
- k. the right to trade in resources of the area;
- l. the right to receive a portion of any resources taken by others from the area; and
- m. the right to manage, conserve and look after the land, waters and resources, including locating and cleaning water sources and drinking water on the land.

5 In my view the native title rights and interests described at schedule E are readily identifiable.

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

7 I am satisfied that the description in schedule E allows the native title rights and interests claimed to be readily identified in compliance with s.190B(4).

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190B5	<p>Sufficient factual basis:</p> <p>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:</p> <p>(a) that the native title claim group have, and the predecessors of those persons had, an association with the area;</p> <p>(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;</p> <p>(c) that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.</p>
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Reasons for the Decision

1. This condition requires me to be satisfied that the factual basis on which it is asserted that there exist native title rights and interests described at schedule E of the amended application is sufficient to support that assertion.
2. In reaching this decision I must be satisfied that the factual basis supports the 3 criteria identified at s.190B5 (a) – (c).

Information supplied by the applicants in support of this condition.

[information deleted to address the cultural/customary concerns of the applicants or the privacy of an individual]

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

- 3 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 in title or antecedents of the members of the native title claim group had an association with the area (under claim)
- 4 Attachment F and Table F of the amended application provides information that supports this sub condition. Attachment F asserts traditional association with the area based on descent from ancestors and the acquiring of traditional knowledge and practice from preceding generations to present generations. Table F sets out a tabulated description about descent, the continuing connection of the relevant families to the claim area and activities they undertake within the claim area as taught to them by their forbears. Table F also outlines the manner of biological descent (cognatic) and the importance of the connection of the claimant group and their forbears to particular places within the claim area.
- 5 This is further supported by the affidavits provided by [information deleted to address the cultural/customary concerns of the applicants or the privacy of an individual]
- 6 I am satisfied that the evidence provided is sufficient to support the assertion that native title claim group have, and the predecessors of those persons had, in association with the area.

190B(5)(b) – that there exist traditional laws acknowledged by, and traditional customs observed

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by, the native title claim group that give rise to the claim to native title rights and interests.

- 7 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
- 8 Attachment F and Table F of the amended application provides information that supports this sub condition. Attachment F contains information about a 'set of inter-related laws and customs that create what is described as the 'Noongar Way'. This includes information about custodianship of sites, the recognition of the importance of elders in speaking for country, and recognition of traditional rights to country. Communal rights to sharing and caring for land are referenced as 'dictates of Noongar life'.
- 9 I am satisfied that the [information deleted to address the cultural/customary concerns of the applicants or the privacy of an individual]
- 10 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.

- 11 This subsection requires the Registrar to be satisfied that the native title claim group continues to hold native title in accordance with their traditional laws and customs.
- 12 At Attachment F and Table F of the amended application provides information about the transmission of knowledge by which the Noongar Way is passed from generation to generation. This traditional knowledge is specifically related to religious, geographic and resource knowledge as well as to traditional practice. Table F, at (c), explains the transmission of knowledge from generation to generation through story telling, visits to country, and the teaching of customs by elders to young people. Statements made by [information deleted to address the cultural/customary concerns of the applicants or the privacy of an individual] also support this information by reference to specific activities they engage in to teach their knowledge to young people.
- 13 Attachment G of the amended application provides information about specific activities that are undertaken by members of the claim group, relating those to the claimed rights and interests. The applicants have provided evidence of [information deleted to address the cultural/customary concerns of the applicants or the privacy of an individual]
- 14 In my view the applicants have provided sufficient evidence to demonstrate that the native title claim group continues to hold native title in accordance with their traditional laws and customs
- 15 I am satisfied this condition is met.

Summary

- 16 In summary, each applicant has sworn to the truth of the statements contained in the amended application, which contain certain assertions that support the factual basis.
- 17 The accompanying affidavits of [information deleted to address the cultural/customary concerns of the applicants or the privacy of an individual]
18. Information in these affidavits is corroborated by the affidavit of [information deleted to address the cultural/customary concerns of the applicants or the privacy of an individual]
19. There is evidence of [information deleted to address the cultural/customary concerns of the applicants or the privacy of an individual]

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Conclusion

20 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.



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190B6***Prima facie case:******The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.*****Reasons for the Decision**Information considered

1. Submitted by the applicants for my consideration are:
 - [information deleted to address the cultural/customary concerns of the applicants or the privacy of an individual]
2. This condition of the Registration Test requires that the Registrar be satisfied that at least *some* (one) of the Native Title rights and interests claimed can, *prima facie*, be established.
3. It is necessary however to consider whether a *prima facie* case is established against each of the Native Title rights and interests identified as the right to negotiate only attaches to those identified interests against which a *prima facie* case has been established.
4. Native title rights and interests are defined at s.223 of the Native Title Act. This definition attaches native title rights and interests to land and water requires:
 - the rights and interests must be possessed under traditional laws and customs;
 - those people claiming the rights and interests by those laws and customs must have a connection with the relevant land and waters; and
 - those rights and interests to be recognised under the common law of Australia.

Findings

- 5 I have already outlined in my reasons at s.190B(5) that I am satisfied that the members of the native title claim group continue to adhere to traditional laws and customs that support the factual basis for the native title rights and interests claimed.
- 6 On the information provided I am satisfied that the native title rights and interests listed below can, *prima facie* be made out, subject to the following:
 1. 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.
 2. 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.
 3. The applicants do not make a claim to native title rights and interests which confer possession, occupation use and enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in section 23F of the *NTA*, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia, and a law of that State has made provision as mentioned in section 231 in relation to the act.
 4. 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.
 - a. rights and interests to exclusively possess, occupy, use and enjoy the area;

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- 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 maintain and protect places of importance under traditional laws, customs and practices in the area;
- i. the right to rear and teach children in their country; and
- m. the right to manage, conserve and look after the land, waters and resources, including locating and cleaning water sources and drinking water on the land.

7. The applicants did not provide information to support the following rights and interests:

- h. the right to maintain, protect and prevent misuse of cultural knowledge of the common law native title holders associated with the area
- j. the right to live on and erect residences and other infrastructure on the land
- k. the right to trade in resources of the area
- l. the right to receive a portion of any resources taken by others from the area

Consequently the applicants have not established a prima facie case for these four rights and interests.

Conclusion

8. The application passes this condition.

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190B7	<p>Traditional physical connection:</p> <p>The Registrar must be satisfied that at least one member of the native title claim group:</p> <p>(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or</p> <p>(b) previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to land or waters) by:</p> <p style="padding-left: 20px;">(i) the Crown in any capacity; or</p> <p style="padding-left: 20px;">(ii) a statutory authority of the Crown in any capacity; or</p> <p style="padding-left: 20px;">(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such holder of a lease.</p>
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Reasons for the Decision

<p><u>Information considered</u></p> <ol style="list-style-type: none"> 1. In addition to the amended application the following material was submitted by the applicants for consideration in this condition; <ul style="list-style-type: none"> • [information deleted to address the cultural/customary concerns of the applicants or the privacy of an individual] 2. This section requires me to be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application. 3. Traditional physical connection is not defined in the Native Title Act. I am interpreting this phrase to mean that physical connection should be in accordance with the particular traditional laws and customs relevant to the claim group 4. For the reasons given at s.190B(5), I am satisfied that there exist traditional laws acknowledged by and customs observed by the claim group sufficient to support traditional physical connection. 5. I am further satisfied from the information supplied and identified previously that [information deleted to address the cultural/customary concerns of the applicants or the privacy of an individual] currently have a traditional physical connection with the land or waters covered by the application. 6. The application passes this condition.

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

s61A(1) – Native Title Determination

A search of the Native Title Register conducted on 19 July 1999, has revealed that there is no approved determination of native title in relation to the area claimed in this application

S61A(2) – Previous Exclusive Possession Acts

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

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

S61A(3) – Previous Non-Exclusive Possession Acts

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

S61A(4) – s47, 47A, 47B

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

Conclusion

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

The application passes this condition.

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190B9 (a)	<p>Ownership of minerals, petroleum or gas wholly owned by the Crown:</p> <p>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</p> <p>(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;</p>
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Reasons for the Decision

1. Native title rights and interests are described at schedule E of the amended application.
2. None of the claimed native title rights described in schedule E claim ownership of resources including minerals, petroleum or gas.
3. In any event, Schedule Q in the amended application makes the statement that:

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
4. Consequently, the application and accompanying documents do not disclose, and I am not otherwise aware that the applicant claims ownership of minerals, petroleum or gas that is wholly owned by the Crown.
5. The application passes this condition.

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

1. Schedule E of the amended application makes a qualified claim for exclusive possession of an offshore place.
2. The qualification is detailed at paragraph (ii) of schedule E and again at schedule P in the following terms:

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

3. The application passes this condition.

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190B9 (c)	<p>Other extinguishment:</p> <p>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</p> <p>(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)).</p>
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Reasons for the Decision

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

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