

National Native Title Tribunal

REGISTRATION TEST
REASONS FOR DECISION

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

DELEGATE	Malcolm O'Dell
CASE MANAGER	Tom Scutt
DATE	2 May 1999 (minor corrections made 7/5/99)

Application Name	Widi Mob		
Name of Applicant	Joan Margaret Martin		
Region	South West	NNTT No	WC97/72
Date Application Made	26 August 1997	Fed Court No	WAG6193/98

Brief history of the application

This is an application lodged with the Tribunal on 4 July 1997.

The application was amended in the Federal Court on 24 February 1999. The amended application essentially comprises two documents, the proposed amended application as filed in the Federal Court on 5 February 1999 and a re-engrossed application created pursuant to an order of Federal Court dated 24 February 1999 and filed in the court on 4 March 1999. For the purpose of this decision I intend reading the two documents together and all references to the 'amended application' in the present decision, unless otherwise stated, refer to these two documents.

All references to legislative sections refer to the *Native Title Act* unless otherwise specified.

Information considered when making the Decision

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

- The Working Files, Registration Test Files, Legal Services Files and Federal Court Application and Amendment Files for claims: WC97/72

- The 'Future Act' files relating to the following matters: WO97/0349, WO97/0350, WO97/0351, WO97/0352, WO97/0367, WO97/0368, WO97/0369, WO97/0370, WO97/0446, WO97/0447, WO97/0448, WO97/0449, WO97/0450, WO97/0451, WO97/0531, WO97/0532, WO97/0534, WO97/0535, WO97/0537, WO97/0655, WO97/0656, WO97/0657, WO97/0658, WO98/0115, WO98/0116, WO98/0317, WO98/0318, WO98/0319, WO98/0320, WO98/0321, WO98/0322, WO98/0323, WO98/0324, WO98/0325, WO98/0327, WO98/0328, WO98/0329, WO98/0330, WO98/0331, WO98/0332, WO98/0333, WO98/0334, WO98/0385, WO98/0496, WO98/0497, WO98/0498, WO98/0501, WO98/0502, WO98/0503, WO98/0504, WO98/0505, WO98/0509, WO98/0511, WO98/0646, WO98/0745, WO98/0746, WO98/0747, WO98/0757, WO98/0773, WO98/0921, WO98/0922, WO98/0923, WO98/0962, WO98/0963, WO98/0964, WO98/0966, WO98/0995, WO98/0997, WO98/1007, WO98/1009, WO98/1089, WO98/1267, WO98/1318
- Tenure information acquired by the Tribunal in relation to the area covered by this application
- The National Native Title Tribunal Geospatial Database
- The Register of Native Title Claims
- The Native Title Register
- Determination of Representative ATSI Bodies: their gazetted boundaries
- Submissions from the Western Australian State Government

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

A. Procedural Conditions



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

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

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

61(5)	<i>Application is in the prescribed form, lodged in the Federal Court, contain prescribed information, and accompanied by prescribed documents and fee</i>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. I note that ‘the amended application’ essentially comprises two documents, these are: <ol style="list-style-type: none"> a. the proposed amended application as filed in the Federal Court on 5/2/99 b. the re-engrossed application amended pursuant to 24/2/99 order of Federal Court and filed on 4/3/99. 2. Item b. above contains changes to item a. above as ordered by the Court on 24/2/99. However, the application and affidavits in item b. are not signed by the applicants. For the purpose of this decision I intend reading the two documents together. 3. The application is in the form prescribed by Regulation 5(1)(a) Native Title (Federal Court) Regulations 1998. 4. As required under section 61(5)(b), the amended application was filed in the Federal Court. 5. The application meets the requirements of section 61(5)(c) and contains all information as prescribed in section 62. See reasons for recommendation in relation to those sections. 6. The application is accompanied by: <ul style="list-style-type: none"> • Affidavits as prescribed by section 62(1)(a) (see reasons for decision in relation to section 62(1)(a)) • A map as prescribed by sections 62(1)(b) (see reasons for decision in relation to section 62(2)(b)) 7. The original application lodged with the Tribunal was fee exempt. 8. For the reasons outlined above, the requirements of s.61(5) are met. 	

Details required in section 62(1)

62(1)(a)	<i>Affidavits address matters required by s62(1)(a)(i) – s62(1)(a)(v)</i>
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Reasons relating to this sub-condition	Application fails the condition
<ol style="list-style-type: none"> 1. An affidavit signed by the applicant accompanies the amended application. 2. The affidavit complies with s. 62(1)(a)(i) – 62(1)(a)(iii). 3. The affidavit does not comply with s.62(1)(a)(iv). Paragraph (d) of the affidavit states: <p style="margin-left: 40px;">that they are authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it...</p> <p>The wording of the affidavit does not indicate, as required by this section, that the ‘applicant’ is authorised by all the persons in the native title claim group. The wording instead appears to refer to persons other than the sole applicant as being authorised by the claim group.</p> 4. The affidavit does not comply with s.62(1)(a)(v). Paragraph (e) of the affidavit states: <p style="margin-left: 40px;">they are so authorised by their descendants in accordance with a traditional custom acknowledged by the members of the native title claim group of [remainder of sentence deleted for cultural reasons]</p> <p>The wording of the affidavit does not indicate, as required by this section, the basis on which the applicant is authorised by members of the native title claim group. Instead the applicant appears to be stating the basis on which persons other than herself are being authorised by</p> 	

the descendants of those persons rather than necessarily members of the native title claim group for this application.

5. The requirements of s.62(1)(a) are not met.

62(1)(c)

Details of physical connection (information not mandatory)

Comment on details provided

1. The amended application at Schedules F and G contains details relating to physical connection.

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

Application passes the condition

1. A description, sufficient for the area covered by the application to be identified, is provided at the annexure to schedule C of the amended application.
2. For the reasons given at s.190B(2), this description satisfies s.62(2)(a)(i).

62(2)(a)(ii)

Information identifying any areas within those boundaries which are not covered

Reasons relating to this sub-condition

Application passes the condition

1. Information identifying the 'internal boundaries' of the application is given at Schedule B and attachment B of the amended application in the following terms:
- 1 *The applicants exclude from the claim any areas covered by valid acts on or before 23 December 1996 comprising such of the following as are included as extinguishing acts within the Native Title Act 1993, as amended, or Titles Validation Act 1994, as amended, at the time of the Registrar's consideration:*
 - *Category A past acts, as defined in NTA s.228 and s.229;*
 - *Category A intermediate period acts, as defined in NTA s.232A and s.232B.*
 - 2 *The applicants exclude from the claim any areas in relation to which a previous exclusive possession act, as defined in s.23B of the NTA, was done in relation to the area, and either the act was an act attributable to the Commonwealth, or the act was an act attributable to the State of Western Australia and a law of that State has made provision as mentioned in s.23E in relation to the act.*
 - 3 *The applicants exclude from the claim areas in relation to which native title rights and interests have otherwise been extinguished, including areas subject to:*
 - a *an act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or*
 - b *actual use made by the holder of a tenure other than native title which is permanently inconsistent with the continued existence of native title.*

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

SCHEDULE B1

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

 - 1. a lease of a worker's dwelling under the Workers' Homes Act 1911-1928;*
 - 2. a 999 year lease under the Land Act 1898;*
 - 3. a lease of a Town Lot or Suburban Lot pursuant to the Land Act 1933 (WA), s.117; or*
 - 4. a special lease under s.117 of the Land Act 1933 (WA).**
- B1.3 A Conditional Purchase Lease currently in force in the agricultural areas of the South West Division under clauses 46 and 47 of the Land Regulations 1887, which includes a condition that the lessee reside on the area of the lease and upon which a residence has been constructed.*
- B1.4 A Conditional Purchase lease of cultivable land currently in force under Part V, Division 1 of the Land Act 1933 (WA) in respect of which habitual residence by the lessee is a statutory condition in accordance with the Division and upon which a residence has been constructed.*
- B1.5 A Perpetual Lease currently in force under the War Service Land Settlement Scheme Act 1954.*
- B1.6 A permanent public work.*
- B1.7 An existing public road or street used by the public.*
- 4. Paragraphs (1) to (3) above are subject to such of the provisions of sections 47, 47A and 47B of the NTA as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing.*

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

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

62(2)(c)	<i>Details/results of searches carried out to determine the existence of any non-native title rights and interests</i>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. The requirements of s62(2)(c) can be read widely to include all searches conducted by any person or body. However, I am of the view that the application need only contain details/results of searches conducted by the applicant, in order that the application complies with this condition. It would be unreasonably onerous to expect applicants to have knowledge of, and obtain details about all searches carried out by every other person or body 2. The amended application does not include any details/results of searches carried out to determine the existence of any non-native title rights and interests. 3. It is not apparent that the applicant has conducted any search to determine the existence of any non-native title rights and interests. 4. The application passes this condition. 	

62(2)(d)	<i>Description of native title rights and interests claimed</i>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. The amended application at Schedule 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: <ul style="list-style-type: none"> <i>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 which may be shared with any others who establish that they are native title holders) of the area, and any right or interest included within the same; subject to the following:</i> <ol style="list-style-type: none"> <i>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</i> <i>ii. The claim does not include any offshore place.</i> <i>iii. The applicants do not make a claim for native title rights or interests which confer possession, occupation, use or enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in s.23F of the NTA, was done in relation to an area and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in s.23L of the NTA in relation to the act.</i> <i>iv. Paragraph (iii) above is subject to such of the provisions of s.47, s.47A and s.47B of the Act as apply to any part of the area contained within the application, particulars of which will be provided prior to the native title hearing.</i> 3. This description satisfies s.62(2)(d) 	

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 of the amended application. 2. This description satisfies s.62(2)(e)(i). 	

62(2)(e)(ii)	<i>Factual basis – traditional laws and customs exist that give rise to the claimed native title</i>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. A general description of the factual basis for the assertion that traditional laws and customs exist that give rise to the claimed native title is given at Schedule 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 has continued to hold native title in accordance with traditional laws and customs is given at Schedule 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 of the amended application. 2. These details satisfy s.62(2)(f). 	

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

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

Reasons for the Decision

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

<ol style="list-style-type: none"> 1. A check of the Register of Native Title Claims was conducted on 3 May 1999. 2. This check revealed that one 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. This application is WC96/93 – Mullewa Wadjari. 4. I am satisfied that no person included in the native title claim group for the current application WC97/72 – Widi Mob, is a member of the native title claim group for WC96/93 – Mullewa Wadjari. 5. 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

Information Considered

1. Additional information considered for the purpose of this condition of the registration test is as follows:
 - Statement by [name deleted for privacy reasons] (undated) supplied to the Tribunal by facsimile 9 March 1999.
 - Statement by [name deleted for privacy reasons] dated 5 March 1999.
 - Statement by [name deleted for privacy reasons] dated 4 March 1999.
 - Statement by [name deleted for privacy reasons] dated 4 March 1999.
 - Statement by [name deleted for privacy reasons] dated 5 March 1999.
 - Statement by [name deleted for privacy reasons] dated 5 March 1999.
 - Statement by [name deleted for privacy reasons] (on behalf of 8 others) dated 5 March 1999.
 - Statement by [name deleted for privacy reasons] dated 5 March 1999.
 - Statement by [name deleted for privacy reasons] dated 4 March 1999.
 - Statement (illegible) by [name deleted for privacy reasons] dated 4 March 1999.
 - Statement (illegible) by [name deleted for privacy reasons] dated 4 March 1999.
 - Statement (illegible) by [name deleted for privacy reasons] dated 5 March 1999.
 - Statement by [name deleted for privacy reasons] dated 9 March 1999.
 - Chart showing [remainder of sentence deleted for privacy reasons]
2. This condition requires me to be satisfied that the application is certified according to s.190C4(a) or authorised according to s.190C4(b).
3. The applicant has not supplied the certificate required under s.190C4(a) and must therefore rely on authorisation according to s.190C4(b).
4. When an application is authorised according to s.190C4(b) I cannot be satisfied that the application has been authorised unless the application fulfils the conditions identified in s.190C5(a) & (b). For the reasons identified in that section the application fulfils the requirements therein.
5. In my view, the two remaining questions to which I need to be satisfied in s.190B(4) are:
 - Is the applicant a member of the native title claim group?, and
 - Do all the current (that is, at the time of consideration of the Registration Test) persons in the native title claim group authorise the applicant to make the application and to deal with matters arising in relation to it?

Findings

6. The applicant is a member of the native title claim group.

7. The claim group, wholly comprises of at least some of the direct descendants of **[names deleted for privacy reasons]**. Therefore, the claim group is essentially **[interrelationship of claimant group deleted for privacy reasons]**.
8. The applicant has deposed an affidavit asserting that she is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it. Although I have previously identified problems with this affidavit (see reasons in s.61(1)(a) above), for the purpose of this condition I am satisfied that the applicant believes this to be so.
9. The applicant further deposes that the process of authorisation is pursuant to the traditional laws and customs of the claim group. This is consistent with the process identified in the definition of 'authorisation' at s.251B(a). As in paragraph '8' above I am satisfied that this is the process through which the applicant believes she is authorised.

Descendants of [names deleted for privacy reasons]

10. Thirteen of the named members of the native title claim group (identified in dot point form above), have provided signed statements demonstrating support for the application. Although the wording of these statements is somewhat ambiguous and in some cases largely non-legible, I am nevertheless satisfied that these thirteen members of the claim group authorise the applicant to 'make the application and to deal with matters arising in relation to it'.
11. In addition the statements of **[name deleted for privacy reasons]** and **[name deleted for privacy reasons]** claim to support the application on behalf of a total of ten other named members of the claim group. I have no information before me that refutes this and I am satisfied that those persons also authorise the applicant to 'make the application and to deal with matters arising in relation to it'.
12. Including the applicant, a total of 23 members of the claim group have either directly or through a representative authorised the applicant. In addition I am satisfied that the biological descendants of these people have, through their parents/grandparents, also authorised the applicants.

Descendants of [names deleted for privacy reasons]

13. There remains a total of 8 named members of the claim group who have not provided information regarding their authorisation of the applicant. Seven of these members are siblings and the children of **[name deleted for privacy reasons]**. There is no information provided, from any of these siblings or from any one else, that directly indicates that these seven persons have authorised the applicant. Therefore there is no evidence of authorisation from **[interrelationship of claimant group deleted for privacy reasons]**.
14. In addition there is no other direct information within the application or provided directly to the Registrar which supports the authorisation of the applicant by these members of the claim group. The applicant is claiming that a traditional authorisation process has been followed. That traditional process takes the form of "*custom and tradition, including a traditional custom within the native title claimant group of [remainder of sentence deleted for cultural reasons]*". Beyond this assertion (and others in similar terms) there is no further evidence supplied that such customs exist and how it would apply in this situation.
15. The applicant also claims that "*following a number of family meetings and personal communications, by which such agreement was reached, I am authorised by [interrelationship of claimant group deleted for privacy reasons], who comprise the native title claim group, to make this application and deal with the matters arising in relation to it.*" No further detail is provided as to the nature and content of these meetings and personal communications and in particular whether they specifically involved the 8 members of the claim group who have not directly authorised the applicant.

Conclusion

16. I am satisfied that the the applicant is a member of the native title claim group and that 23 of the 32 named members of the claim group and their biological descendants have authorised the applicant to make the application, and deal with matters arising in relation to it.
17. For the reasons given in paragraphs 13 – 16 above, I am unable to be satisfied that the remaining 8 named members of the claim group and their biological descendants have authorised the applicant.
18. The application fails this condition.

190C5	<p><i>Evidence of authorisation:</i></p> <p><i>If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:</i></p> <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 procedural condition requires the application to contain the matters referred to in s190C(4)(a) and (b).
2. The affidavit accompanying the amended application includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met. This in my view, complies with s.190C5(a).
3. The affidavit accompanying the amended application briefly sets out the grounds on which the Registrar should consider that it has been met. This in my view, complies with s.190C5(b).
4. For the reasons identified at s190C(4) I am not satisfied that these statements demonstrate that the applicant is authorised according to the requirements of that section. However, for the purpose of s190C(5) their inclusion in the affidavit is sufficient to satisfy this condition.

B. Merits Conditions

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

<p><u>Map and External Boundary Description</u></p> <ol style="list-style-type: none"> 1. A map is supplied at attachment C of the amended application. 2. The map supplied shows the external boundaries of the area claimed. 3. The map displays a list of co-ordinates to enable the position of sites or localities within the area to be identified. In addition, it shows a scale allowing distances and areas to be ascertained, and identifies pastoral leases and other tenure. A locality diagram, which indicates generally the position of the claim within Western Australia, forms part of the map provided. All the line work on the map is finely drawn and easy to follow. 4. The map meets the requirements of s62 (2)(b) as the boundaries of the areas covered by the application can be identified. 5. Additional information identifying the external boundary of the claim is supplied at Attachment B of the amended application. 6. The Tribunal's Geospatial Unit has plotted this information and conclude that the description is internally consistent, fully encloses the claim area and does not discernibly contradict the map accompanying the application. <p><u>Internal Boundary Description</u></p> <ol style="list-style-type: none"> 7. Areas excluded from the application are described at Schedule B(b) of the amended application. 8. These excluded areas form the areas within the (external) boundary which are not covered by the application, that is, the internal boundary description. 9. The areas excluded from the application are described in the following terms: <ol style="list-style-type: none"> 1. <i>The applicants exclude from the claim any areas covered by valid acts on or before 23 December 1996 comprising such of the following as are included as extinguishing acts within the Native Title Act 1993, as amended, or Titles Validation Act 1994, as amended, at the time of the Registrar's consideration:</i> <ul style="list-style-type: none"> • <i>Category A past acts, as defined in NTA s.228 and s.229;</i> • <i>Category A intermediate period acts, as defined in NTA s.232A and s.232B.</i> 2. <i>The applicants exclude from the claim any areas in relation to which a previous exclusive possession act, as defined in s.23B of the NTA, was done in relation to the area, and either the act was an act attributable to the Commonwealth, or the act was an act attributable to the State of Western Australia and a law of that State has made provision as mentioned in s.23E in relation to the act.</i> 3. <i>The applicants exclude from the claim areas in relation to which native title</i>

rights and interests have otherwise been extinguished, including areas subject to:

- a an act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or
- b actual use made by the holder of a tenure other than native title which is permanently inconsistent with the continued existence of native title.

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

- B1.1 An unqualified grant of an estate in fee simple.
- B1.2 A lease which is currently in force, in respect of an area not exceeding 5,000 square metres; upon which a dwelling, house, residence, building or work is constructed; and which comprises:
 - 1. a lease of a worker's dwelling under the Workers' Homes Act 1911-1928;
 - 2. a 999 year lease under the Land Act 1898;
 - 3. a lease of a Town Lot or Suburban Lot pursuant to the Land Act 1933 (WA), s.117; or
 - 4. a special lease under s.117 of the Land Act 1933 (WA).
- B1.3 A Conditional Purchase Lease currently in force in the agricultural areas of the South West Division under clauses 46 and 47 of the Land Regulations 1887, which includes a condition that the lessee reside on the area of the lease and upon which a residence has been constructed.
- B1.4 A Conditional Purchase lease of cultivable land currently in force under Part V, Division 1 of the Land Act 1933 (WA) in respect of which habitual residence by the lessee is a statutory condition in accordance with the Division and upon which a residence has been constructed.
- B1.5 A Perpetual Lease currently in force under the War Service Land Settlement Scheme Act 1954.
- B1.6 A permanent public work.
- B1.7 An existing public road or street used by the public.

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

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

particulars, whether applicants may have benefit of these provisions.

Conclusion

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

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

1. As Schedule A of the amended application relies on a description other than naming all the persons in the claim group, the application does not satisfy s.190B3(a). Consequently, the applicants must rely on satisfying s.190B3(b).
2. I must therefore be 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.

Findings

3. The native title claim group is described at Schedule A of the amended in the following terms:
The claim is brought on behalf of **[32 names deleted for privacy reasons]** and their biological descendants.
4. I find that the persons in the native title claim group are the 32 people listed at schedule A and their biological descendants.
5. 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).
6. In my view the description at Schedule A provides an objectively verifiable mechanism for ascertaining whether any particular person is in the claim group.
7. 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.

Conclusion

8. The description satisfies the requirements of s.190B(3)(b).

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.

Findings

4. The amended application at Schedule E lists the native title rights and interests claimed in the following terms:

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 which may be shared with any others who establish that they are native title holders) of the area, and any right or interest included within the same; subject to the following:

- i. To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants*
- ii. The claim does not include any offshore place.*
- iii. The applicants do not make a claim for native title rights or interests which confer possession, occupation, use or enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in s.23F of the NTA, was done in relation to an area and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in s.23L of the NTA in relation to the act.*
- iv. Paragraph (iii) above is subject to such of the provisions of s.47, s.47A and s.47B of the Act as apply to any part of the area contained within the application, particulars of which will be provided prior to the native title hearing.*

Conclusion

5. In my view the native title rights and interests described at schedule E are readily identifiable and 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'.
6. I am satisfied that the description in schedule E allows the native title rights and interests claimed to be readily identified in compliance with s.190B(4).

190B5	<p>Sufficient factual basis:</p> <p>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).
3. The applicants representative, **[name deleted for privacy reasons]**, provided a submission to the Registrar in a letter dated 24 February 1999, outlining his view on the interpretation of this section in the following terms:

Section 190B(5) requires that the assertion of a claim to native title rights and interests be supported by fact. Section 190B(5) particularises in subparagraphs (a) (b) and (c) what is required in order for an assertion to be made out that native title rights and interests exist. Section 190B(5) does not require anything more than an assertion of the facts upon which the native title rights and interests are based. Such an assertion of those facts is to be found in paragraph 4 of the Registration Statement and Schedule F of the Amended Application. Section 190 B(5) does not require evidence supporting or “stories” illustrating the assertion or statement of the facts, deposed to on affidavit in each case which are set out therein.

The facts deposed to include:

- **[sentence deleted for privacy and cultural reasons]**
- **[sentence deleted for privacy and cultural reasons]**
- **[sentence deleted for privacy and cultural reasons]**
- **[sentence deleted for privacy and cultural reasons]**

The correctness of this interpretation of s190B(5), is confirmed by the mirror provision in section 62 (2) (e) which more explicitly requires “a general description of the factual basis” of the assertion of the existence of native title rights and interests. The Parliament did not intend by these provisions to require the provision of evidence confirming the facts stated.

4. I respectfully disagree with this interpretation. In my view I am required to be satisfied that there exists sufficient factual basis on the totality of the information which, under s.190A(3) I must or may have regard to. In my view s. 190B(5) may require more than an assertion of the facts upon which the native title rights and interests are based for me to be satisfied on the elements of this condition.

Information considered

5. Schedule F of the amended application contains a series of assertions in support of this condition.

6. Also specifically considered under this condition are:

- Determinations and Objector Contentions for matters WO97/368 and WO97/446
- Statements from four members of the claim group: **[four names deleted for privacy reasons]**
- Original Application lodged 4 July 1997.

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

7. This criteria requires me to be satisfied that:

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

8. The word 'association' is not defined in the Act. In my view, the nature of the association required to be demonstrated by the applicants is governed by the nature of the native title rights and interests claimed. In this case the applicants claim the rights and interests identified at schedule E of the amended application.

9. In addition, as native title rights and interests are defined as being related to land and waters (s.223 of the Act), in my view the information about the association of members of the native title claim group must relate to the area of land and waters where the particular native title rights and interests are claimed. In this case the extent of land and waters claimed is identified at schedule B of the amended application. I must therefore be satisfied that the members of the native title claim group are and that their predecessors were, broadly associated with the particular land and waters claimed. I note in this case that the external boundary of the claim encloses an area of 52,948 square kilometres.

Findings

10. Schedule F of the amended application asserts that the native title claim group and their ancestors have, since the assertion of British sovereignty, possessed occupied, used and enjoyed the area subject to this application. The truthfulness of this assertion is deposed in the accompanying affidavit of the applicant.

11. The applicant has deposed that: **[three sentences deleted for privacy and cultural reasons]**

12. The applicant has provided a genealogical chart. Read in conjunction with the statements of claim group members, it appears that descent is traced through **[seven sentences deleted for privacy reasons]**.

13. **[Paragraph of seven sentences deleted for privacy reasons]**

14. Material is also provided in the original application. This comprises of a page describing the areas associated with a group entitled Widi and a copy of a map with an area marked Widi upon it. It is apparent that both these documents are taken from Tindale's "Aboriginal Tribes of Australia". The Tindale boundary was used to provide the external boundary for the original application. However, I note that on 15/10/97 the applicants amended the boundary to take in an additional area being that between the original area and the coast.

15. Assertions are made by the claim group that there is a correlation between their ancestors and the Widi people as identified by Tindale. The applicant makes numerous references to ancestors as Widi. **[Three sentences deleted for privacy and cultural reasons]**

16. I am satisfied that the factual basis supports the claim that predecessors of the current claim group had an association with at least part of the current claim area. Given the oral nature of the history of Aboriginal society, in my view it would be too onerous to require the applicant to demonstrate the association of predecessors with the entirety of the land and waters claimed. I am able to infer from the totality of the information provided that the association of the predecessors of the claim group broadly covered the area claimed.
17. With regard to association by current members of the claim group, a number of the group members have asserted association with certain areas. Such assertions are contained within the statements identified above and the affidavit of the applicant.
18. The places referred to are concentrated around the centre of the claim area. Other, more outlying areas (eg. **[five place names deleted for cultural reasons]**) are areas cited by the applicant as places of significance for Widi people or **[remainder of sentence deleted for cultural reasons]**.
19. I also note that the only place referred to within the additional area added to the claim area in October 1997 is **[place name deleted for privacy reasons]**, the birthplace of **[name deleted for privacy reasons]**. Overwhelmingly the places mentioned in the statements are those surrounding the towns of **[three place names deleted for privacy reasons]**.
20. No evidence is provided of association with the coastal areas claimed around Dongara, particularly relevant as the original claim was expanded to include this area. The very limited anthropological references likewise do not refer this area.
21. Additionally, no information is provided regarding association with broadly the northern and eastern part of the claim.
22. I am satisfied that the current claim group has a factually based association with at least parts of the claim area. There is, however, generally a paucity of information provided about current association and I am unable to infer from the material provided that association includes all of the area of land and waters where the particular native title rights and interests are claimed.

Conclusion

23. On the information before me, I am unable to be satisfied that members of the native title claim group have, an association with the particular land and waters under claim that is sufficient to support the assertion of the existence of the native title rights and interests claimed.
24. The application fails to comply with this subsection.

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

25. 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.

Findings

26. As with the preceding subsection evidence in the various forms identified above is presented by the applicants for consideration in this sub-section.

27. The amended application at Schedule F asserts that:

such possession, occupation, use and enjoyment has been pursuant to and possessed under the laws and customs of the claim group, including traditional laws and customs that rights and interests in land and waters vest in members of the native title claim group on the basis of:

- a. **[sentence deleted for cultural reasons]**
- b. **[sentence deleted for cultural reasons]**
- c. **[sentence deleted for cultural reasons]**
- d. **[sentence deleted for cultural reasons]**
- e. **[sentence deleted for cultural reasons]**
- f. **[sentence deleted for cultural reasons]**
- g. **[sentence deleted for cultural reasons]**

such traditional law and custom has been passed by traditional teaching, through the generations preceding the present generations to the present generations of persons comprising the native title claim Group;
the native title claim group continues to acknowledge and observe those traditional laws and customs;

28. There is some evidence provided by the applicant in support of the assertion identified above.

29. The Statement of Reasons and Decision by Kim Wilson in WO97/368 quotes an affidavit of **[name deleted for privacy reasons]** that contains relevant statements, including: **[21 paragraphs from affidavit deleted for privacy and cultural reasons]**

30. The Objector's Contentions from future act matter WO97/368 detail **[remainder of sentence deleted for cultural reasons]**

31. In his statement, **[name deleted for privacy reasons]** notes that **[two sentences deleted for privacy and cultural reasons]**. I note that both **[two place names deleted for privacy reasons]** lie outside the claim area.

32. On balance on the evidence provided, I am not satisfied that there exist traditional laws acknowledged by, and traditional customs observed by the members of the claim group which give rise to the native title rights and interests claimed by the claim group.

33. While information is provided about a community from which the claimant group and their predecessors derive their rights and interests – the Widi people – there is little information about the relationship of the claim group and the predecessors of the claim group to the 'Widi People'. It is not apparent, for example, whether the claim group comprises the entire group identified as Widi or whether they are a subgroup of a wider Widi group.

34. It follows that the applicant has not detailed how the traditional laws acknowledged by, and traditional customs observed by the Widi group give rise to the native title rights and interests claimed by this particular claim group.

35. Similarly, from the information provided it is unclear as to whether the laws and customs referred to relate to the land and waters where native title rights and interests are claimed for this particular application. For example, **[three sentences deleted for privacy and cultural reasons]**. **[Place name deleted for privacy reasons]** lies outside the current claim area.

36. In summary, the applicant has not provided information demonstrating the existence of laws and customs acknowledged and observed by a community of people which in turn entitles this particular claim group to claim the native title rights and interests identified in this application and in relation to the particular land and waters claimed in this application.

Conclusion

37. On the information before me I am not satisfied that the conditions of this subsection are satisfied.

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

38. For the reasons identified in paragraphs 26 - 36, I am not satisfied that the conditions of this subsection are met by the application.

Conclusion for s.190B(5)

39. I am not 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.

40. The application does not satisfy this condition.

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

1. This condition of the Registration Test requires me to be satisfied that at least some of the Native Title rights and interests claimed can, *prima facie*, be established.
2. 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 that:
 - 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.

Conclusion

3. For the reasons given in s.190B(5) I am not satisfied that there exist traditional laws acknowledged by and customs observed by the claim group. In the absence of a system of traditional laws and customs, native title rights and interests as defined in the *Native Title Act* cannot be made out.
4. The applicant is therefore unable to *prima facie* establish any of the native title rights and interests identified.

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

<p>1. 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.</p> <p>2. Traditional physical connection is not defined in the <i>Native Title Act</i>. 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.</p> <p><u>Conclusion</u></p> <p>3. For the reasons given in s.190B(5) I am not satisfied that there exist traditional laws acknowledged by and customs observed by the claim group. In the absence of a system of traditional laws and customs, traditional physical connection cannot be made out.</p> <p>4. Consequently, I am not satisfied that the applicant has complied with this condition.</p>

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

s61A(1) – Native Title Determination

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

S61A(2) – Previous Exclusive Possession Acts

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

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

S61A(3) – Previous Non-Exclusive Possession Acts

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

S61A(4) – s47, 47A, 47B

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

Conclusion

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

The application passes this condition.

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

<ol style="list-style-type: none"> 1. Native title rights and interests are described at schedule E of the amended application. 2. None of the claimed native title rights described in schedule E claims ownership of resources including minerals, petroleum or gas. 3. In any event, Schedule Q in the amended application makes the statement that: <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</i> 4. 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>Exclusive possession of an offshore place: The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</p> <p>(b) <i>to the extent that the native title rights and interests claimed relate to waters in an offshore place - those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place;</i></p>
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Reasons for the Decision

<ol style="list-style-type: none"> 1. There is no offshore place included within the application. 2. The application passes this condition.

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

1. The amended application at schedule B(3) excludes all areas in relation to where native title rights and interests have otherwise been extinguished. I am satisfied that because native title rights and interests must relate to land and waters (see definition s.223 of the Native Title Act) the exclusion of particular land and waters is an exclusion of native title rights and interests over those lands and waters.
2. The application passes this condition.

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