

## National Native Title Tribunal

### REGISTRATION TEST REASONS FOR DECISION

DELEGATE	Malcolm O'Dell		
Date	17 August 1999		
Application Name	The Malgana Shark Bay Peoples Application		
Names of Applicants	Anthony James Bellotti, Anthony Thomas Bellotti, Gail Bellotti, Laurence James Mitchell Bellotti, Rodney Bellotti, Roy Bellotti, Sandra Bellotti, Howard Cock, Nelly Cocks, Sylvia Drage, Ada Mary Fossa, Nora Fossa, Glenn William Hoult, Marika Kate Hoult, Harold Richard Hoult, Elizabeth Margot Mallard (Mitchell), Greg Edward Mallard, Phyllis Ugle McMahon, Allen Mitchell, Charles Mitchell, Rhonda Mitchell, Gavin Clyde Oakley, Jillian Georgina Oakley, Leslie John Craig Oakley, Marion Joyce Oakley, Mona Jessie Oakley, Revel Oakley, Richard Oakley, Francis Sharon Oxenham, Gavin Charles Poland, Maria Bernadette Poland, Thomas Charles Poland, Christine Maree Wear, Ralph Reginald Wear, Rosie Wear, Lorraine Whitby, Albert Darby Winder and John Winder, on behalf of all Malgana people		
Region	South West	NNTT No	WC98/17
Date Application Made	30 March 1998	Fed Court No	WAG6236/98

#### Brief History of the application

This is an application lodged with the Tribunal on 30 March 1998. It is consequently caught by the transitional provisions of the NTAA 1998 (Notes Table A, Schedule 5), 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 25 November the applicants were further notified that the Registrar would be using best endeavours to apply the test by 25 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 24 December 1998, and this information was passed to the applicant on 7 January 1999.

The applicants filed an amended application in the Federal Court on 26 March 1999. It was heard on 1 April 1999, where the Court ordered the amendment hearing be adjourned to 21 April 1999. At the hearing on 21 April 1999 the Court ordered that subject to the filing of an affidavit to be sworn by Mr TC Poland by no later than 12 May 1999 the application filed on 21 April stand as the amended application. Additional affidavits by Anthony James Bellotti and Mona J Oakley were filed with the Federal Court on 8 June 1999. The application was further amended at a hearing on 5 August 1999 in order to clarify the applicant group and area claimed.

The applicant supplied 'further information' to the Tribunal and asked that such information be taken into account in applying the test. This comprises materials in respect of certification and confidential affidavits.

All references to the 'amended application' in the present decision, unless otherwise stated, refer to the application as most recently amended on 5 August 1999, a complete copy of which was provided to the Tribunal on 9 August 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 I have considered and reviewed all of the information and documents from the following files, databases and other sources:

- The Working File, Registration Test Files and Legal Services File for this application – WC 98/17 (Malgana Shark Bay People)
- The Working Files, Registration Test Files and Legal Services Files for overlapping applications – WC 97/28 (Gnulli), WC 98/47 (Malgana 2), WC 98/61 (Malgana People)
- 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
- Submission 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

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

<b>61(3)</b>	<b><i>Name and address for service of applicant(s)</i></b>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> <li>Names of applicants given on first page of Amended Native Title Determination Application (Form 1).</li> <li>Address for service of applicants given at Part B. of the amended application.</li> <li>This satisfies the requirements of s61(3).</li> </ol>	

<b>61(4)</b>	<b><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></b>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> <li>For the reasons given at s190B(3) the application satisfies this condition.</li> </ol>	

<b>61(5)</b>	<b><i>Application is in the prescribed form, lodged in the Federal Court, contain prescribed information, and accompanied by prescribed documents and fee</i></b>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> <li>The application is in the form prescribed by Regulation 5(1)(a) Native (Federal Court) Regulations 1998.</li> <li>As required under section 61(5)(b), the amended application was filed in the Federal Court.</li> <li>The application meets the requirements of section 61(5)(c) and contains all information as prescribed in section 62.</li> <li>As required by section 61(5)(d) the application is accompanied by: <ul style="list-style-type: none"> <li>Affidavits as prescribed by section 62(1)(a)</li> <li>A map as prescribed by sections 62(1)(b)</li> </ul> </li> <li>No fees are payable pursuant to Regulation 8(b) Native Title (Tribunal) Regulations 1993.</li> <li>For the reasons outlined above, all requirements of s61(5) are met.</li> </ol>	

### Details required in section 62(1)

<b>62(1)(a)</b>	<b><i>Affidavits address matters required by s62(1)(a)(i) – s62(1)(a)(v)</i></b>
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Reasons relating to this sub-condition	Application passes the condition
1. The 38 applicants have each provided an affidavit in the prescribed form which substantially address the matters required by s62(1)(a)(i)-s62(1)(a)(v). 2. The requirements of s62(1)(a) are met.	

<b>62(1)(c)</b>	<b><i>Details of physical connection (information not mandatory)</i></b>
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Comment on details provided	
1. The amended application contains details relating to physical connection at Schedule G.	

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

<b>62(2)(a)(i)</b>	<b><i>Information identifying the boundaries of the area covered</i></b>
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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 Schedule B and Attachment B of the amended application. A map of the amended application is also supplied at Attachment C. 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
<p>1. Information identifying the 'internal boundaries' of the application is given at Schedule B of the amended application in the following terms:</p> <p>Internal Boundaries:</p> <p>(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 the Titles Validation Act 1994, as amended, at the time of the Registrar's consideration;</p> <p style="padding-left: 40px;">Category A past acts, as defined in NTA s.228 and s.229;</p> <p style="padding-left: 40px;">Category A intermediate period acts, as defined in NTA s.232A and s.232B.</p> <p>(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 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.</p> <p>(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:</p> <p style="padding-left: 40px;">(a) an act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or</p> <p style="padding-left: 40px;">(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.</p> <p>To avoid any uncertainty, the Applicants exclude from the claim the tenures set out in Schedule B1.</p> <p>Schedule B1</p> <p>B1.1 an unqualified grant of an estate in fee simple;</p> <p>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:</p> <p style="padding-left: 40px;">(1) a Lease of a Worker's Dwelling under the Workers' Homes Act 1911-1928;</p> <p style="padding-left: 40px;">(2) a 999 Year Lease under the Land Act 1898;</p> <p style="padding-left: 40px;">(3) a Lease of a Town Lot or Suburban Lot pursuant to the Land Act 1933 (WA), s.117;</p> <p style="padding-left: 40px;">(4) a Special Lease under s.117 of the Land Act 1933 (WA);</p> <p>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.</p> <p>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</p>	

	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.
B1.6	an existing public road or street used by the public.
For the reasons given at s.190B(2) the application passes this condition.	

<b>62(2)(b)</b>	<b><i>A map showing the external boundaries of the area covered by the application</i></b>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> <li>1. The amended re-engrossed application at Schedule C refers to a map showing the external boundaries of the area covered by the application annexed as Attachment C.</li> <li>2. For the reasons given at s190B(2), the application passes this condition.</li> </ol>	

<b>62(2)(c)</b>	<b><i>Details/results of searches carried out to determine the existence of any non-native title rights and interests</i></b>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> <li>1. Schedule D of the amended application states that any searches of any non-native title rights and interests in relation to the land covered by the application are provided at Attachment D</li> <li>2. The application passes this condition.</li> </ol>	

62(2)(d)	Description of native title rights and interests claimed
Reasons relating to this sub-condition	Application passes the condition
<p>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.</p> <p>2. The native title rights and interests are described as follows:</p> <p>The native title rights and interests claimed are rights to the possession, occupation, use and enjoyment as against the whole world (subject to any native title rights and interests which may be shared with any others who establish that they are native title holders) of the area, and in particular comprise:</p> <ul style="list-style-type: none"> <li>a. rights and interests to possess, occupy, use and enjoy the area;</li> <li>b. the right to make decisions about the use and enjoyment of the area;</li> <li>c. the right of access to the area;</li> <li>d. the right to control the access of others to the area;</li> <li>e. the right to use and enjoy resources of the area;</li> <li>f. the right to control the use and enjoyment of others of resources of the area;</li> <li>g. the right to trade in resources of the area;</li> <li>h. the right to receive a portion of any resources taken by others from the area;</li> <li>i. the right to maintain and protect places of importance under traditional laws, customs and practices in the area; and</li> <li>j. the right to maintain, protect and prevent misuse of cultural knowledge of the common law holders associated with the area.</li> </ul> <p>Subject to</p> <ul style="list-style-type: none"> <li>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.</li> <li>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.</li> <li>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 <i>NTA</i>, 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;</li> <li>iv. Paragraph (iii) above is subject to such of the provisions of sections 47, 47A and 47B of the Act as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing.</li> <li>v. The said native title rights and interests are not claimed to the exclusion of any other rights or interests validly created by or pursuant to the common law, the law of the State or a law of the Commonwealth.</li> </ul> <p>3. This description satisfies s.62(2)(d)</p>	

<b>62(2)(e)(i)</b>	<b><i>Factual basis – claim group has, and their predecessors had, and association with the area</i></b>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> <li>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.</li> <li>2. This description satisfies s.62(2)(e)(i).</li> </ol>	

<b>62(2)(e)(ii)</b>	<b><i>Factual basis – traditional laws and customs exist that give rise to the claimed native title</i></b>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> <li>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 of the amended application.</li> <li>2. This description satisfies s.62(2)(e)(ii).</li> </ol>	

<b>62(2)(e)(iii)</b>	<b><i>Factual basis – claim group has continued to hold native title in accordance with traditional laws and customs</i></b>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> <li>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 of the amended application.</li> <li>2. This description satisfies s.62(2)(e)(iii).</li> </ol>	

<b>62(2)(f)</b>	<b><i>If native title claim group currently carry on any activities in relation to the area claimed, details of those activities</i></b>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> <li>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.</li> <li>2. These details satisfy s.62(2)(f).</li> </ol>	

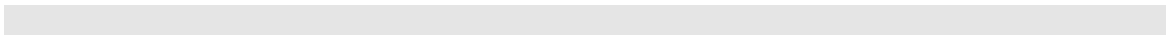


<b>62(2)(g)</b>	<b><i>Details of any other applications to the High Court, Federal Court or a recognised State/Territory body the applicant is aware of (and where the application seeks a determination of native title or compensation)</i></b>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> <li>Schedule H of the re-engrossed amended application contains information on 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.</li> <li>The details supplied are sufficient to comply with s.62(2)(g).</li> </ol>	

<b>62(2)(h)</b>	<b><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></b>
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Reasons relating to this sub-condition	Recommend application passes the condition
<ol style="list-style-type: none"> <li>The amended application at Schedule I lists all s29 notices in relation to the area since 30/9/98.</li> <li>The application passes this condition.</li> </ol>	



## Reasons for the Decision

<ol style="list-style-type: none"> <li>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&amp;62.</li> <li>The above analysis addresses the submission made by the State of Western Australia in a letter dated 24 December 1998.</li> <li>I am satisfied that the application meets the requirements of this condition.</li> </ol>	
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<b>190C3</b>	<p><b><i>Common claimants in overlapping claims:</i></b></p> <p><b><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></b></p> <ul style="list-style-type: none"> <li><b><i>(a) the previous application covered the whole or part of the area covered by the current application; and</i></b></li> <li><b><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></b></li> <li><b><i>(c) the entry was made, or not removed, as a result of consideration of the previous application under section 190A.</i></b></li> </ul>
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## Reasons for the Decision

1. A check on the Register of Native Title Claims was conducted on 17 August 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 overlapping application is WC 97/28 (Gnulli). Furthermore, WC 97/28 (Gnulli) was on the Register of Native Title Claims when the current application (WC 98/17 – Malgana) was made.
4. Having considered the description of the respective claim groups, the question of common claimants could not be answered definitively from the descriptions alone. Both WC 97/28 (Gnulli) and the application under consideration (WC 98/17 – Malgana) describe members of the group by reference to apical ancestors. It is conceivable that there are members in common
5. In a letter to the Tribunal dated 28 July 1999, the applicants' representative, Dwyer Durack, confirmed on the basis of advice from Yamatji Land and Sea Council's Principal Legal Officer, that there are no members of the Malgana claim group who are also members of the Gnulli (WC 97/28) native title claim group.
6. On clarification from the applicants' representative, I am satisfied that the requirements of s.190C3 have been met.

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

1. The applicants have provided to the Tribunal a copy of 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 Yamatji Land and Sea 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 Yamatji Land and Sea Council is such a body.

### Certification by the Yamatji Land and Sea Council

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).

### Compliance with s.202(7)

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:

*A certification of an application for a determination of native title by a representative body must:*

- a) *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*
- b) *Briefly set out the body's reasons for being of that opinion; and*
- c) *Where applicable, briefly set out what the representative body has done to meet the requirements of subsection (c)*

2. The certificate provided by the applicant is signed by [name deleted], Director, Yamatji Land and Sea Council, and dated 19 April 1999. The certificate contains certain typographical errors which were clarified in a letter to the Tribunal dated 17 August 1999.
3. In my view the certificate provided by the applicant complies with s.202(7).

### Conclusion

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

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



<b>190C5</b>	<p><b><i>Evidence of authorisation:</i></b></p> <p><b><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></b></p> <p><b><i>(a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and</i></b></p> <p><b><i>(b) briefly sets out the grounds on which the Registrar should consider that it has been met.</i></b></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

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

#### Map and External Boundary Description

1. A map is supplied at Attachment C of the amended application.
2. The map supplied shows the external boundaries of the areas claimed. The map was produced by WALIS Land Claims Mapping Unit on 26 November 1998.
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 and technical description identifying the external boundary of the claim is supplied at Attachment B of the amended application.
6. The Tribunal's Geospatial Unit provided assistance in the preparation of the written and technical descriptions. As a result the description of the external boundary is confirmed to be internally consistent, fully encloses the claim area and does not discernibly contradict the map accompanying the application.

#### Internal Boundary Description

- 7 Areas excluded from the application are described at Schedule 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:
  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 ss.228 and 229;*
    - *Category A intermediate period acts, as defined in NTA ss.232A and 232B.*
  1. *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.*

1. 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 areas the tenures set out in 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. The description of areas excluded from the claim area at Schedule B, paragraphs 1, and 3(a) refer to land where an act of a State or Commonwealth government has created an interest. The excluded areas of land can be readily identified through searches of relevant Government registers and are therefore described with reasonable certainty.
5. The description of areas excluded from the claim at schedule B paragraph 2 refers to areas in relation to which a previous exclusive possession act, as defined in 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 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.
6. Paragraph 3(b) of Schedule B excludes areas of land where actual use by the holder of a tenure is permanently inconsistent with continued existence of native title. Schedule B1 of 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 reasonably certainty.
7. At Schedule E (iv) the applicants seek the protection of ss.47, 47A and 47B of the Act as apply to any part of the area contained within the application. Details of what areas are subject to this legislative protection are not provided. At Schedule L it is stated that the applicants do not have details of:
  - a. Any area for which a pastoral lease is held by or on behalf of the members of the native title claim group; and

- b. Any area leased, held or reserved for the benefit of Aboriginal peoples or Torres Strait Islanders that is occupied by or on behalf of the members of the native title claim group; and*
- c. Any vacant crown land occupied by members of the native title claim group; and*
- d. Any areas mentioned in paragraph (a), (b) or (c) over which the extinguishment of native title is required by section 47, 47A or 47B of the Act to be disregarded.*

11. The statements at Schedule E (iv) and Schedule L read together allows it to be shown objectively, upon the provision of further particulars, whether applicants may have the benefit of these provisions.

#### Conclusion

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) 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.



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

<ol style="list-style-type: none"><li>1. The native title claim group is described at Schedule A of the amended application in the following terms: <i>"The claimant group is comprised of the biological descendants of [names deleted]."</i></li><li>2. 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).</li><li>3. The description at schedule A names eight apical ancestors, the descendants of whom comprise the native title claim group. Seven of the eight names are sufficiently individualised to provide an objectively verifiable mechanism for ascertaining whether any particular person is in the claim group.</li><li>4. The Applicant's representative has provided further statement in relation to the ancestor [name deleted]. It was confirmed that the biological descendants of [name deleted] are identifiable from the genealogical research of the Malgana claim group carried out by staff at the Yamatji Land and Sea Council.</li><li>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.</li><li>6. The description satisfies the requirements of s.190B(3)(b).</li></ol>
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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 native title rights and interests claimed are the rights to the possession, use, occupation and enjoyment as against the whole world (subject to any native title rights and interests which may be shared with any others who establish that they are native title holders) of the area, and in particular comprise:*

- (a) *Rights and interests to possess, occupy, use and enjoy the area;*
- (b) *the right to make decisions about the use and enjoyment of the area;*
- (c) *the right of access to the area;*
- (d) *the right to control the access of others to the area;*
- (e) *the right to use and enjoy the resources of the area,*
- (f) *the right to control the use and enjoyment of others of the resources of the area;*
- (g) *the right to trade in resources of the area;*
- (h) *the right to receive a portion of any resources taken by others from the area;*
- (i) *the right to maintain and protect places of importance under traditional laws, customs and practices in the area; and*
- (j) *the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area;*

*Subject to:*

- (i) *To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants.*
- (ii) *To the extent that the native title rights and interests claimed may relate to waters in an offshore place, those rights and interests are not to the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under international law in relation to the whole or any part of the offshore place.*

(iii) *The applicants do not make a claim for native title rights or interests which confer possession, occupation, use and enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in s.23F of the NTA, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in s.23I of the NTA in relation to the act.*

(iv) *Paragraph (iii) above is subject to such of the provisions of sections 47, 47A and 47B of the Act as apply to any part of the area contained within the application, particulars of which will be provided prior to the native title hearing.*

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

- 1 In my view the native title rights and interests described at schedule E are readily identifiable.
- 2 Also, the qualifications listed at items i, ii, iii, and v are clear in their scope and intention, reciting general limitations to the operation of the listed rights and interests, where relevant.
- 3 In addition, the qualification in item iv, the saving of exclusive possession rights and interests in areas of previous non-exclusive possession acts where the acts are in favour of native title claimants, is capable of qualifying item iii, and consequently of providing clearly identifiable specific rights and interests.
- 4 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'.
- 5 I am satisfied that the description in schedule E allows the native title rights and interests claimed too be readily identified in compliance with s.190B(4).

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

3. Also submitted by the applicants for my consideration is:
  - An affidavit by [name deleted for privacy purposes], sworn 2 June 1999 (folio 97, RT file).
  - An affidavit by [name deleted for privacy purposes], sworn 24 June 1999 (folio 105 RT File)
  - An affidavit by [name deleted for privacy purposes], sworn 12 July 1999 (folio 109 RT File)
  - An affidavit by [name deleted for privacy purposes], sworn 26 July 1999 (folio 109 RT File)

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

4. This criteria requires me to be satisfied that:
  - the members of the native title claim group (collectively, communally or individually) have (that is currently 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)
5. 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.
6. In addition, as native title rights and interests are defined as being related to land and waters (s.223 of the Act), in my view the information about the association of members of the native title claim group must relate to the area of land and waters where the particular native title rights and interests are claimed. In this case the extent of land and waters claimed is

identified at schedule B of the amended application. I must therefore be satisfied that the members of the native title claim group are and that their predecessors were, broadly associated with the particular land and waters claimed. I note in this case that the external boundary of the claim encloses an area of 36,111 square kilometres, comprising both land and waters.

7. 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 affidavits of each applicant.
8. The affidavits of [reference deleted] contain information which links members of the claim group to a number of places within the claim area. [Sentences deleted due to cultural concerns.]
9. Further information supporting the assertion that members of the claim group have an association with the area is provided in the affidavits of [names deleted].
10. Based on this information, I am satisfied that current members of the claim group have an association with the area.
11. [Sentence deleted for reasons of privacy]. [Word deleted for privacy reasons] provide information about practices and places within the Malgana claim area passed onto them from parents, uncles and grandparents.
12. This information is corroborated by the affidavits of [names deleted].
13. I am satisfied that the evidence provided is sufficient to support the assertion that the native title claim group have, and the predecessors of those persons had, an association with the area.

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

14. 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
15. I have considered information contained within files relating to overlapping claims WC97/28 – Gnulli, WC98/47 – Malgana 2, and WC98/61 – Malanga 3. I am satisfied that there is no relevant information that would aid consideration of this condition within applications WC98/47 – Malanga 2 and WC98/61 – Malanga 3.
16. The certificate for the current application issued by Yamatji Land and Sea Council states that an Indigenous Cooperation Agreement has been signed between the applicants of the current application and the applicants for WC98/47 – Malanga 2 and WC98/61 – Malanga 3.
17. Overlapping claim WC97/28 – Gnulli has previously been considered for registration under s.190A of the *Native Title Act* and was accepted for registration on 19 July 1999. WC97/28 – Gnulli overlaps this current application by 4,780 square kilometres. The applicants in WC97/28 – Gnulli appear to identify a system of traditional laws and customs which give rise to their particular native title rights and interests that are different of those identified in the current application (see paragraph 19 – 20 below for details of the laws and customs identified in the current application).
18. In my view, the identification by the applicants in WC97/28 – Gnulli of a different system of laws and customs over part of the current application is not, in this particular situation, adverse to the applicants in the current application. I have based this view on the following:

- The Yamatji Land and Sea Council have issued certificates for both applications pursuant to s.190C(4)(a) of the *Native Title Act*. The Aboriginal Legal Service also provided a certificate in respect of WC 97/28 – Gnulli.
- Information contained within the certificate issued on the current application indicates, at paragraph 5, that ‘YLSC staff and consultants have performed anthropological and genealogical research in relation to the Malgana people’. Certification of both claims by Yamatji Land and Sea Council in my view indicates that there is an historical and anthropological basis for the overlap.
- The native title rights and interests identified at schedule E of the current application are specifically made subject to the rights and interest of other who may hold native title.

19. The amended application at Schedule F asserts that the native title rights and interests claimed by the applicants “are those of and flowing from the right to possession, occupation and use and enjoyment of the land pursuant to the traditional laws and customs of the claim group”. At schedule F the applicants also assert that “such traditional law has been passed by traditional teaching, through the generations preceding the present generations to the present generations of the persons comprising the native title claim group”. The truthfulness of these assertions is deposed in the accompanying affidavits of each applicant.
20. I am also able to conclude from the affidavits provided [words deleted for privacy reasons] that there exist traditional laws and customs that are acknowledged and observed by the claimant group. The evidence supports the notion that a body of traditional laws and customs gives rise to the claimed native title rights and interests.
21. 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.

22. 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.
23. At Schedule F, the applicants assert that the native title claim group continues to acknowledge and observe the traditional laws and customs from which the native title rights and interests flow. [Sentence deleted due to customary concerns]. As such, both the assertions at Schedule F and the affidavits provided as further information support the notion that the native title claim group continues to hold native title in accordance with traditional laws and customs.
24. This information is corroborated by the affidavits of [reference deleted for privacy purposes].
25. I am satisfied this condition is met.

#### Summary

26. 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.
27. Supporting information provided in affidavits sworn by [names deleted] and corroborated by the affidavits of [names deleted] give clear examples of the claim group’s association with the area and the traditional laws and customs.
28. Statements are made and information is provided connecting members of the claim group and their predecessors to the area of the claim and to their knowledge and observance of traditional laws and customs which in turn give rise to the native title rights and interests claimed.

29. There is evidence that members of the claim group maintain tradition knowledge in respect to fishing, gathering food and medicines, religious practice and beliefs, and the rights and responsibilities entailed in protecting country within the claim area. There is evidence that members of the claim group continue to hold and pass on to younger members of the claim group traditional knowledge associated with the religious and the economic significance of the country.

**Conclusion**

30. 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.

**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:
  - An affidavit by [name deleted for privacy purposes], sworn 2 June 1999 (folio 97, RT file).
  - An affidavit by [name deleted for privacy purposes], sworn 24 June 1999 (folio 105 RT File)
  - An affidavit by [name deleted for privacy purposes], sworn 12 July 1999 (folio 109 RT File)
  - An affidavit by [name deleted for privacy purposes], sworn 26 July 1999 (folio 109 RT File)
2. I have previously noted in these reasons that the native title rights and interests claimed at Schedule E of the amended application are readily identifiable. While to meet the current condition, only some of these rights and interests need to be able to be prima facie established, all of the rights and interests claimed need to be considered as this will determine which of these rights and interests are entered on the Register of Native Title Claims.
3. In considering, that prima facie, at least some of the native title rights and interests claimed can be established, it is necessary to have regard to both what is permitted by law to be claimed, and what, on the facts adduced by the applicants, can be established *prima facie*.
4. The principal barrier at law to a claim for native title rights and interests is that they should not be made over tenures that have been the subject of exclusive possession acts, nor should they involve a claim for exclusive possession over non-exclusive possession act areas (s61A NTA). For the reasons given at s.190B(8) and s190B(9)(c) the applicants have clearly and unambiguously excluded any area over which an impermissible claim could be made.
5. I note that the native title rights and interests claimed at Schedule E are claimed *subject to any native title rights and interests which may be shared with any others who establish that they are native title holders*. The claim to exclusive possession is further qualified in terms of the five paragraphs set out in Schedule E which state that the claimed native title rights and interests are subject to other validly granted rights and interests. Taken together, these limitations on the claim area and the scope of the native title rights and interests satisfies the first limb of the prima facie test.
6. 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 and 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.
2. I have already outlined 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.

3. Having considered the information provided in the affidavits previously identified, I am satisfied that the following native title rights and interests can be established:

- a rights to possess, occupy, use and enjoy the area;
- b the right to make decisions about the use and enjoyment of the area;
- c the right of access to the area;
- d the right to control the access of others to the area;
- e the right to use and enjoy resources of the area;
- f the right to control the use and enjoyment of others of resources of the area;
- g the right to trade in resources of the area;
- h the right to maintain and protect places of importance under traditional laws, customs and practices in the area; and
- i the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area.

9. I could not find prima facie evidence to establish the following native title right or interest:

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

### **Conclusion**

9. 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 for native title rights or interests which confer possession, occupation, use and enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in s.23F of the NTA, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in s.23I of the NTA in relation to the act.*
- iv. *Paragraph (iii) above is subject to such of the provisions of sections 47, 47A and 47B of the Act as apply to any part of the area contained within the application, particulars of which will be provided prior to the native title hearing.*
- v. *The said native title rights and interests are not claimed to the exclusion of any other rights and interests validly created by, or pursuant to, the common law, the law of the State or a law of the Commonwealth.*

The applicants have established prima facie, the following native title rights and interests:

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

- a rights and interests to possess, occupy, use and enjoy the area;
- b the right to make decisions about the use and enjoyment of the area;
- c the right of access to the area;

- |   |   |
|---|---|
| d | the right to control the access of others to the area;  |
| e | the right to use and enjoy resources of the area;   |
| f | the right to control the use and enjoyment of others of resources of the area;  |
| g | the right to trade in resources of the area;  |
| h | the right to maintain and protect places of importance under traditional laws, customs and practices in the area; and           |
| i | the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area. |

11 The application passes this condition of the test.

<p><b>190B7</b></p>	<p><b><i>Traditional physical connection:</i></b></p> <p><b><i>The Registrar must be satisfied that at least one member of the native title claim group:</i></b></p> <p><b><i>(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or</i></b></p> <p><b><i>(b) previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to land or waters) by:</i></b></p> <p><b><i>(i) the Crown in any capacity; or</i></b></p> <p><b><i>(ii) a statutory authority of the Crown in any capacity; or</i></b></p> <p><b><i>(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.</i></b></p>
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## Reasons for the Decision

### Information considered

1. The amended application at Schedule G states that members of the native title claim group, including [names deleted] have continuously carried out activities on the land and waters within the claim area.
2. In addition to the statement at Schedule G of the amended application the following material was submitted by the applicants for consideration in this condition;
  - An affidavit by [name deleted] (folio 97, RT file).
  - An affidavit by [name deleted] (folio 105 RT File)
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.
2. 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.
3. 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.
4. I am satisfied from the information supplied and identified above that [names deleted] currently have a traditional physical connection with the land or waters covered by the application.
5. The application passes this condition.

**190B8**

**No failure to comply with s61A:**

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

**Reasons for the Decision**

s61A(1) – Native Title Determination

A search of the Native Title Register conducted on 17 August 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.

<b>190B9</b> <b>(a)</b>	<b><i>Ownership of minerals, petroleum or gas wholly owned by the Crown:</i></b> <b><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i></b> <b><i>(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;</i></b>
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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 specifically claim ownership of resources including minerals, petroleum or gas.
3. In any event, paragraph (i) of Schedule E 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.

<b>190B9</b> <b>(b)</b>	<b><i>Exclusive possession of an offshore place:</i></b> <b><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i></b>  <b><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></b>
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## Reasons for the Decision

- 1 The amended application qualifies the native title rights identified at Schedule E by making them subject to paragraph (ii) which states:

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.

- 2 The application passes this condition.

<b>190B9</b> <b>(c)</b>	<p><b><i>Other extinguishment:</i></b></p> <p><b><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i></b></p> <p><b><i>(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)).</i></b></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
  - Legislative extinguishment.
2. In any event, 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.
3. For the above reasons I am satisfied that the application meets this condition.

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