

Reason

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State: WA
Region: Pilbara
Date Application Made: 15/06/98, 29/09/98, 30/03/99
Date Registration Test: 02/08/99
Decision made:
Decision: Accepted

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Brief history of the application

Information considered in making the decision

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

- .. The Working Files, Registration Test Files, Legal Services Files and Federal Court Application and Amendment Files for claims WC98/34 and WC98/71. These native title determination applications were lodged with the National Native Title Tribunal prior to 30/9/98.
- .. These applications were combined in the Federal Court on 31 March, 1999.
- .. Other tenure information acquired by the Tribunal in relation to the area covered by this application;
- .. Working files and related materials for native title applications that overlap the area of the Palyku application.
- .. The National Native Title Tribunal Geospatial Database;
- .. The Register of Native Title Claims;
- .. The Native Title Register;
- .. Determination of Representative ATSI Bodies: their gazetted boundaries;
- .. Submissions from the Western Australian State Government in relation to the application;

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

Summary of proceedings

The WC98/71 (Palyku People) native title determination application was lodged with the National Native Title Tribunal on 29 September, 1998. Pursuant to the Transitional Provisions, applications lodged prior to 30/9/1998 are taken to have been filed in the Federal Court. The Federal Court reference for this application is WAG 6287 of 1998.

When the application was lodged, the Applicants were Dudley Wabbie, Cheryl Yuline, Pixie Christian, Florrie Sam and Lindsay

Yuline. The area subject to claim is located in the Pilbara region, Western Australia. The Applicants are represented by the Pilbara Aboriginal Land Council.

There have been two amendments to the application since it was deemed to be filed in the Federal Court. The first amendments to the application were filed in the Federal Court on 18 January 1999 and went to a Directions Hearing on 22 January 1999, subsequently at the Directions Hearing, the matter was adjourned to 29 January, 1999.

Further amendments to the application were filed in the Federal Court on 10 March, 1999 and went to a Directions Hearing on 30 March 1999, at the Directions Hearing a further amended application was presented to the Court. Subsequently, the matter was adjourned to 31 March 1999, subsequently Orders were made to adjourn the matter to 6 April 1999 and be dealt with on the papers on that date. On the 6 April 1999, Orders were made to accept the amended application dated 30 March 1999, except that the map be replaced (by the map presented on 6 April 1999 and attached to the Orders) and that Attachment B dated 6 April 1999 be replaced (again attached to the Orders). The amended application was referred from the Federal Court to the National Native Title Tribunal on 21 April 1999.

A section 29 notice was issued on 11/11/98. Pursuant to the *Native Title Act* the application is to be considered for registration within 4 months of the s29 notice being issued or as soon as reasonably practicable afterwards. The four month period ended on 11 March 1999.

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

S190B(2) Identification of area subject to native title Met

190B(2)

Description of the areas claimed:

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

Reasons for the Decision

In applying this condition I have relied upon the information provided at Schedule B, Attachment B(a) & (b), the technical information of boundaries, and the map at Attachment C of the amended application.

External Boundaries:

The applicants have provided a map prepared by WALLIS Land Claims Mapping Unit dated 01/04/99. The map displays sufficient co-ordinates to enable the position of sites or localities within them to be identified. The map shows a scale allowing distances and areas to be ascertained and identifies towns, vacant Crown land, various roads and railways, and pastoral stations. The line indicating the external boundary is finely marked and easy to follow.

A locality diagram indicates generally the position of the claim within the Pilbara region of Western Australia, and forms part of the map provided.

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

In addition to the provision of a map defining the external boundaries of the claim, the applicants have provided a written technical description of the external boundaries together with a more general description.

Based on advice received from the Tribunal's Geospatial unit, and from advice provided to the applicants' from Land Claims Mapping Unit I am satisfied that the technical description of the external boundaries coincides with the map provided.

The description at Schedule B part a) of the amended application is more general in nature and is not as accurate as the technical description produced as Attachment B(a) of the application.

I am satisfied that the physical description of the external boundaries meets the requirements of s62 (2)(a)(i).

Internal boundaries:

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

A. The internal boundaries of the claim area are varied to the extent necessary to exclude from the claim 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 1993-98 or Title Validation Act 1994 as amended and relevant to the time of the Registrar's consideration

- *Category A past acts, as defined in s228, s229 and any other relevant provisions of NTA 93-98*
- *Category A intermediate period acts, as defined in s232A, s232B and any other relevant provisions of NTA 93-98 and includes the following:-*

B. The applicants exclude from the claim areas in relation to which native title rights and interests have otherwise been extinguished, including but not limited to 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.*

C. To avoid any uncertainty, the applicants exclude from the claim areas the tenures set out below:

- 1. all unqualified grant of an estates in fee simple;*
- 2. all freehold estates;*
- 3. all residential leases;*
- 4. all permanent public work;*
- 5. all existing public roads or streets used by the public, or dedicated roads;*
- 6. leases which grant **exclusive possession** as stated and defined in the Native Title Act 1993-98, together with other areas of **exclusive possession** recognised under the common law, and statute law of the Commonwealth of Australia and the State of Western Australia; and*
- 7. **"Scheduled Interests"** expressly defined and identified under the Native Title Act 1993-98 (NTA 98), and only such **Scheduled Interests** as are stated in **Schedule 1** of the NTA 98 applicable at the time of this application to the State of Western Australia.*

I must be satisfied that the information required by paragraphs 62(2)(a) (ii) is sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

The applicants make it clear at Schedule B that the class exclusion clause is to operate in relation to valid previous exclusive possession acts. Upon the issue of the validity of previous exclusive possession acts within the claim area being resolved, and which cannot properly be resolved at this stage of the proceedings or by the Tribunal, Schedule B acts as a springing exclusion clause, removing those previous exclusive possession acts from the claim area. Given that the applicants have clearly raised the issue of the validity of previous exclusive possession

Conclusion:

I find that the information and map submitted with the application meet the requirements of s.62 (a) and (b).

I am satisfied that the information and the map provided by the Applicants are sufficient
For it to be said with reasonable certainty that native title rights and interests are claimed
In relation to the areas specified.

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

S190B(3) Identification of native title claim groups Met

190B(3) *Identification of the native title claim group:*
The Registrar must be satisfied that:
(a) the persons in the native title claim group are named in the application; or
(b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Reasons for the Decision

Attachment A to the amended application contains a list of 64 names of the persons comprising the native title claim group.

I note submissions made by the Crown Solicitors Office at page of a letter dated 8 December, 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

I am satisfied that the persons in the native title claim group are named, as required under s.190B(3)(a).

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

S190B(4) Identification of claimed native title Met

190B(4) *Identification of claimed native title*
The Registrar must be satisfied that the description contained in the application as required by paragraph 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.

Reasons for the Decision

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

The Applicants state at Schedule E that they “*claim rights and interests to following activities carried out in the past, and which are practised and performed without interruption to this day and time:*” and then particularise these in paragraphs (i) to (xii).

There are 12 separate native title rights and interests specified:

i. to ingress and exist, occupy, possess, use, enjoy and live upon the land of their ancestors upholding custom and Aboriginal law;

ii. to manage and maintain the fauna and flora together with the land and waters according to traditions and complying with Aboriginal law and culture which has been passed down from generation to generation to sustain existence and the environment upon their traditional land

iii. to forage for food, medicine and such other items used for customary practices including fauna and flora on or under the land and water and the right to protect them from degradation

iv. to participate at meetings for social and cultural gatherings within the group or with other groups to enforce customary laws and practice and hold traditional ceremonies, arrange marriages organise ceremonies, mediate and carry out punishments, barter for food, tools, materials, equipment, utensils, access to water, hunting and burial grounds on the land;

v. to lay away the dead upon their land and the right to bring the dead of the claim group for traditional ceremonies;

vi. to camp, hunt, fish, gather traditional foods, and building materials, utensils, tools, equipment and weapons;

vii. to use, manage, maintain and care for the water resources on the land;

viii. to extract and collect flints, clays, salts, soils, sand gravel, stones, ochres and such other substances in, on or under the land for use or trade as it was done by their ancestors in title;

ix. to use such resources and materials (animate and inanimate) growing, living and occurring in on or under the land and waters together with the right to receive a portion of any such resources taken by others, as it was done by their ancestors in title, for use or barter;

x. to manage and protect their sites, their secret societies and lodges or fraternities to ensure that rituals of religious significance, mystery and solemnity relating to the Dreamtime can continue which gives authority to the survival instruction or activities that have evolved over centuries and will allow for the gathering of people to come together to carry out ceremonies and activities required under customary law and culture;

xi. to freely move upon their land to teach their young about their country, culture and traditions, how to look after the fauna and flora for their sustenance and to protect the land, waters, the environment and the natural habitat;

xii. to construct camps, dwellings and other structures;

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

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

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 it to be readily identified.

I am satisfied that all the rights listed can be readily identified from the description provided. The application therefore meets the requirements of this condition and s62(2)(d).

S190B(5)

Factual basis for claimed native title

Met

190B(5)

Sufficient factual basis:

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

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

Reasons for the Decision

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

· [Names of five deponents deleted]

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

1. 190B(5)(a)

Attachment F (a) of the amended application states "*that the factual basis on which the applicant claim group assert their native title, relate their ancestors. The claim group consists of members of a common language group known and identified as Palyku people. The ancestors the Palyku in time immemorial, having entered upon the area of land and waters covered by this application remained in it to the exclusion of all others...they gave clear title to their predecessors... this claim group were without dispute and disruption connected to and in association with the land and waters stated by traditional laws customs and beliefs. These customary laws confer the right to possess, occupy use and enjoy for activities stated before, the land and waters ... Even after foreign settlement, other indigenous language groups have through tacit consent and respect of customary law and traditions avoided intrusions upon the said land and waters*".

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

[Name Deleted] affidavit states that the Palyku native title claim group's claim is based [Deleted Due to Cultural and Customary Concerns] Details of the group's traditional laws and beliefs and how these are passed down through generations are provided. This is reiterated in affidavits by [Names Deleted].

Both [Names Deleted] affidavits sworn 9/03/1999 refers to them and their mother's birthplace in the claim area (para 4).

Both [Names Deleted] affidavits details [Deleted Due to Cultural and Customary Concerns].

Affidavits of [Names Deleted] of the Palyku people state that [Deleted Due to Cultural and Customary concerns]. [Names Deleted] are brothers, they speak the Palyku language. [Name Deleted] states that the Elders and his parents taught him about country and culture.

Affidavit of [Name Deleted] of another Aboriginal group of people in the Pilbara region, confirms that both [Names Deleted] are recognised Elders of the Palyku people and as such they are recognised as [Deleted Due to Cultural and Customary Concerns].

To be satisfied under this criterion it must be evident that association with the area is and was communal, that is, shared by a number of members of the native title claim group.

Details that the association with the area is and was communal are provided in the application and affidavits noted above.

I am satisfied that there has been a past and continuing communal association with the area sufficient to meet the requirements of s.190B(5)(a).

2. 190B(5)(b)

Attachment F of the amended application states that "*Aboriginal traditions and customs of the Pilbara Region forms part of the living culture of the Aboriginal People. Those customary laws confer the right to possess, occupy use and enjoy for activities stated before, the land and waters which constitutes the subject of this application ... traditions and customs continue and exist to this day ... and without recession These laws are observed and are practised both in relation to the land and waters and do equally relate to traditional art, crafts, socio-economic and other traditional matters*".

I note that Schedule F provides general assertions rather than specific details. The Applicants provide at Schedule G of the amended application details of activities that are currently carried out by the native title claim group. These activities are listed in general terms with specific detail. I have also relied on the affidavits detailed above as they provide specific details.

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 claim to native title rights and interests.

[Name Deleted] affidavit sworn 9/03/99 details in paragraph 4 and following parts [Deleted Due to Cultural and Customary Concerns]. [Name Deleted] also refers in paragraph 4 [Deleted Due to Cultural and Customary Concerns]. [Name Deleted] says this inheritance is maintained by the lawmen and elders of the group.

S190B(6)

Prima facie case

Met

190B(6)

Prima facie case:

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

Reasons for the Decision

In applying this condition I have particularly relied on:

· [5 Names Deleted]

All these affidavits provide various details relating to one or more of the native title rights claimed. The affidavits of [Names Deleted] were the most detailed. The other affidavits corroborated the information provided in these.

Both [Names Deleted] in their affidavits sworn 9/3/99 provide specific details of how the Palyku people continue to practice the native title rights claimed. They both refer to:
[Deleted Due to Cultural and Customary Concerns].

The affidavits of [Names Deleted] also provide information about their ongoing use and enjoyment of the land on a regular basis.

The orders sought seek “exclusive possession as and where relevant.

Under s.190B6 I must consider that, prima facie, at least some of the rights and interests claimed can be established. The term prima facie was considered in *North Galanjanja Aboriginal Corporation v Qld* 185 CLR 595 by their Honours Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, who noted:

“The phrase can have various shades of meaning in particular statutory contexts but the ordinary meaning of the phrase “prima facie is: ‘first sight; on the face of it; as it appears at first sight without investigation.” [Citing the Oxford English Dictionary (2nd ed 1989)].

I have adopted the ordinary meaning referred to by their Honours when considering this application.

On the basis of the abovementioned affidavits, I have reached the conclusion that if each of the following native title rights and interests were to be taken in isolation, they could be established on a prima facie basis:

1. *to ingress and exist, occupy, possess, use, enjoy and live upon the land of their ancestors upholding custom and Aboriginal law*
2. *to manage and maintain the fauna and flora together with the land and waters according to traditions and complying with Aboriginal law and culture which has been passed down from generation to generation to sustain existence and the environment upon their traditional lands;*
3. *to forage for food, medicine and such other items used for customary practices including fauna and flora on or under the land and waters, and the right to protect them from degradation*
4. *to participate at meetings for social and cultural gatherings within the group or with other groups to enforce customary laws and practices and hold traditional ceremonies, arrange marriages organise ceremonies, mediate and carry out punishments, barter for food, tools, materials, equipment, utensils, access to water, hunting and burial grounds on the land;*
5. *to lay away the dead upon their land and the right to bring the dead of the claim group for traditional ceremonies;*
6. *to camp, hunt, fish, gather traditional foods, and building materials, utensils, tools, equipment and weapons;*
7. *to use, manage, maintain and care for the water resources on the land;*
8. *to extract and collect flints, clays, salts, soils, sand gravel, stones, ochres and such other substances in, on or under the land for use trade as it was done by their ancestors in title;*
9. *to manage and protect their sites, their secret societies and lodges or fraternities to ensure that rituals of religious significance, mystery and solemnity relating to the Dreamtime can continue which gives authority to the survival instruction or activities that have evolved over centuries and will allow for the gathering of people to come together to carry out ceremonies and activities required under customary law and culture;*
10. *to freely move upon their land to teach their young about their country, culture and traditions, how to look after the fauna and flora, both sustenance and to protect the land, waters, the environment and the natural habitat;*
11. *to construct camps, dwellings and other structures.*

I was unable to find evidence to support the following native title rights and interests:

S190B(7)

Physical connection

Met

190B(7)

Traditional physical connection:

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

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

Reasons for the Decision

In applying this condition I have relied on:

[4 Names Deleted]

At Schedule M, two persons are named as having continued and unbroken traditional connections with the land and waters: [Names Deleted]

Under s.190B(7)(a) I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.

[Name Deleted] in his affidavit sworn 9/03/99 refers to [Deleted Due to Cultural and Customary Concerns]. His affidavit states [Deleted Due to Cultural and Customary Concerns] (para6). [Name Deleted] also refers in this affidavit to [Deleted Due to Cultural and Customary Concerns].

[Name Deleted] affidavit sworn 9/03/99 also [Deleted Due to Cultural and Customary Concerns] (para 2), and at paragraph 5 refers [Deleted Due to Cultural and Customary Concerns]. [Name Deleted] states that [Deleted Due to Cultural and Customary Concerns] (para 10). In his affidavit sworn 9/3/99 [Name Deleted] refers to [Deleted Due to Cultural and Customary Concerns]. Both [Names Deleted] make reference to [Deleted Due to Cultural and Customary Concerns].

The supporting affidavit from [Name Deleted] corroborates the evidence of [Names Deleted] [Name Deleted] states [Names Deleted] [Deleted Due to Cultural and Customary Concerns] (paras 2, 3, 4 5, 6 and 7).

From this information and evidence I am satisfied that [Name Deleted] being a member of the native title claim group, has maintained a traditional physical connection with Palyku country.

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

S190B(8)

No failure to comply with section 61A

Met

- 190B(8)** *No failure to comply with s61A:*
- The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, the 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

After reviewing the amended application, accompanying documents and other material before me I have formed the conclusion that there has been compliance with s61A.

S61A(1) – Native Title Determination

A search of the Native Title Register has revealed that there is no approved determination of native title in relation to the area claimed in the application.

S61A(2) – Previous Exclusive Possession Acts

In Attachment Bb of the amended application, the Applicants exclude areas in relation to which native title rights and interests have otherwise been extinguished from the application. The applicants exclude by formula as outlined under 190B (2) previous exclusive possession acts.

I am of the view that statements made in Attachment B effect compliance with s.61A(2) in excluding previous possession acts attributable to the law of the State of Western Australia and an act attributable to the Commonwealth.

S61A(3) – Previous Non-Exclusive Possession Acts

There is no information in the application indicating that there are Commonwealth or State previous non-exclusive possession acts within the area the subject of the claim.

There is nothing in the application before me to indicate that the applicants are seeking exclusive possession of any of the area claimed. The orders sought seek “exclusive possession as and where relevant”. I am therefore of the view that the Applicants have not contravened s.61A(3).

S61A(4) – s47,s47A, s47B

At Schedule L of the amended application the applicants indicate these sections are not relevant to the application.

I note submissions made by the Crown Solicitors Office at page 2 of a letter dated 8 December, 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

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

S190B(9) No extinguishment etc. of claimed native title Met

- 190B(9)** *Ownership of minerals, petroleum or gas wholly owned by the Crown:*
- (a) *The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, the*
- (a) *to the extent that the native title rights and interests claimed consist or include ownership of minerals, petroleum or gas - the Crown in right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas;*

Reasons for the Decision

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

Schedule Q of the amended application states: “*To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in right of the Commonwealth or State of Western Australia, these are not claimed by the native title claim group*”.

There is no decision in Western Australia that holds that the Crown, in right of the State, wholly owns minerals, petroleum or gas. The application does not make claim to offshore places.

I note submissions made by the Crown Solicitors Office at page 2 of a letter dated 8 December, 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

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

Exclusive possession of an offshore place:

190B9

(b)

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

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

Reasons for the Decision

The amended application makes no claim to offshore places, therefore the criterion set out in s.190B(9)(b) does not apply to this application and it is not necessary for me to consider this section further.

Other extinguishment:

190B9

(c)

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

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

Reasons for the Decision

In applying this condition, I have relied upon the information provided at Attachment Bb and Attachment D of the amended application.

Section 190B(9)(c) states that the Registrar must not otherwise be aware that 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).

The applicants state clearly in the following paragraph that the claim excludes any area where native title rights and interests have otherwise been extinguished.

Bb:

B. The applicants exclude from the claim areas in relation to which native title rights and interests have otherwise been extinguished, including but not limited to 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.*

The application also details, to avoid uncertainty, some of the significant classes of tenure which are excluded. The relevant tenure classes are detailed above in my S190B(2) reasons.

I am satisfied that this claim does not cover areas where native title rights and interests have otherwise been extinguished.

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

S190C(2) Information etc required by sections 61 & 62 Met

Information, etc, required by section 61 and section 62:

190C(2) *The Registrar must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.*

Details required in section 61

61(3) Name and address for service of applicant(s)

Reasons relating to this sub-condition

Requirements are met.

The names of four Applicants are provided in the amended application: Mr Dudley Wabbie, Mrs Cheryl Yuline (Part B), Mr Pixie Christian and Mrs Florrie Sam. Mrs Yuline has indicated her Aboriginal name.

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

I am satisfied there has been compliance with the procedural requirements of s.61(3).

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

Reasons relating to this sub-condition

Requirements are met.

A list of 64 names comprising the native title claim group is provided at Attachment A of the amended application.

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

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

Reasons relating to this sub-condition

Requirements are met.

The application was lodged with the National Native Title Tribunal on 29/09/98. Applications lodged prior to 30/9/98 are taken to have been filed in the Federal Court.

The application contains the prescribed information and is accompanied by prescribed documents.

I am satisfied there has been compliance with the procedural requirements of s.61(5).

Details required in section 62(1)

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

Reasons relating to this sub-condition

Requirements are met.

A claimant application must be accompanied by an affidavit sworn by the applicant/s. Affidavits have been received from all four Applicants: Mr Dudley Wabbie, Mrs Cheryl Yuline (Paru), Mr Pixie Christian and Mrs Florrie Sam. These affidavits have been witnessed by competent witnesses.

I note submissions made by the Crown Solicitors Office at page 2 of a letter dated 8 December, 1998 in relation to the condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

I am satisfied there has been compliance with the procedural requirements of s62(1)(a).

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

Reasons relating to this sub-condition

Requirements are met.

Details of traditional physical connection is provided by way of affidavit material at Attachment M of the amended application.

I am satisfied there has been compliance with the procedural requirements of s.62(1)(c).

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

Requirements are met.

A written description of the external boundary of the area claimed is provided at Attachment B of the amended application.

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

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

Reasons relating to this sub-condition

Requirements are met.

At Attachment B(b) of the amended application the Applicants have provided a written description of the areas with the external boundary of the area claimed which are not covered by the application

I am satisfied there has been compliance with the procedural requirements of s.62(2)(a)(ii).

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

Reasons relating to this sub-condition

Requirements are met.

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

I am satisfied that there has been compliance of the procedural requirements of s.62(2)(b).

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

Reasons relating to this sub-condition

Requirements are met.

Attachment D to the amended application consists of a detailed index of tenure compiled by the Land Claims Mapping Unit in relation to the claim area.

I am satisfied there has been compliance with the procedural requirements of s.62(2)(c).

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

Reasons relating to this sub-condition

Requirements are met.

A description of native title rights and interests claimed is provided at Attachment E of the amended application. There are 12 native title rights and interests specified.

I am satisfied there has been compliance with the procedural requirements of s.62(2)(d).

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

Reasons relating to this sub-condition

Requirements are met.

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

I am satisfied there has been compliance with the procedural requirements of s.62(2)(e)(i).

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

Reasons relating to this sub-condition

Requirements are met.

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

I am satisfied there has been compliance with the procedural requirements of s.62(2)(e)(ii).

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

Reasons relating to this sub-condition

Requirements are met.

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

I am satisfied there has been compliance with the procedural requirements of s.62(2)(e)(iii).

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

Reasons relating to this sub-condition

Requirements are met.

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

I am satisfied there has been compliance with the procedural requirements of s.62(2)(f).

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

Reasons relating to this sub-condition

Requirements are met.

The Applicants provide details at Attachment H of the amended application of 4 native title determination applications that have been made in relation to the whole or a part of the area covered by the application.

I am satisfied there has been compliance with the procedural requirements of s.62(2)(g).

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

Reasons relating to this sub-condition

Details are provided at Schedule I of the amended application of one exploration lease and two mining leases the subject of section 29 notices.

I am satisfied there has been compliance with the procedural requirements of s.62(2)(h).

Reasons for the Decision

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

S190C(3) No previous overlapping claim groups Met

Common claimants in overlapping claims:

190C(3) *The Registrar must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:*

- (a) The previous application covered the whole or part of the area covered by the current application; and*
- (b) An entry relating to the claim in the previous application was on the Register*

of Native Title Claims when the current application was made; and

- (c) The entry was made, or not removed, as a result of consideration of the previous application under section 190.*

Reasons for the Decision

A search of the Register of Native Title Claims undertaken on 20 July 1999, reveals that five overlapping applications, WC95/52 Woodsto Abydos, WC95/53 Kariyarra Yinjibarndi, WC95/31 Njamal #1, WC98/34 Douglas and Lindsay Yuline and WC98/62 Martu Idja Banyjima were lodged prior to the Palyku application.

However, there has been no entry on the Register of Native Title Claims for any of these overlapping claims, nor have any of these claims been removed from the Register of Native Title Claims, as a result of consideration pursuant to s190A.

The Palyku claim falls to be considered for registration testing before Woodstock Abydos, Kariyarra Yinjibarndi, and Martu Idja Banyjima as a result of statutory timeframes imposed by the issuing of section 29 notices.

WC95/31 Njamal #1 has been considered pursuant to s190A and consequently met the conditions of the registration test on 3 June 1999. 1 native title claim group member in the Njamal claim is also a member of the Palyku native title claim group.

Consent was given in the Federal Court on 31 March 1999 to combine WC98/34 Douglas and Lindsay Yuline with the application currently under consideration.

As a consequence, 190C has no operation with respect to the application under consideration.

I note submissions made by the Crown Solicitors Office at page 2 and 3 of a letter dated 8 December, 1998 in relation to this condition of test. The submissions were made prior to the amended application and are no longer relevant to this application.

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

S190C(4) Identity of claimed native title holders Met

Certification and authorisation:

190C(4)(a) *The Registrar must be satisfied that either of the following is the case:*

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

190C(4)(b) (b) *The applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.*

Reasons for the Decision

At Schedule R of the amended application it is stated that certification by a representative Aboriginal/Torres Strait Islander body “*does not apply to this application*”.

For reasons provided at s.190C(5) I am satisfied that the Applicants are members of the native title claim group and are 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 am satisfied the application meets the requirements of this condition.

Commentary on S190C(5)

Under s.190C(5) if the application has not been certified I cannot be satisfied that the condition in s.190C(4) has been satisfied unless the application includes a statement to the effect that the requirement set out in s.190C (4)(b) has been met and briefly sets out the grounds on which I should consider that it has been met.

Section 190C(4)(b) requires that the applicant be a member of the native title claim group and be 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.

At Attachment A of the amended application the four Applicants are identified as members of the native title claim group.

At Part A 2 of the amended application the Applicants state that they make this claimant application for determination of native title on behalf of the claim group identified as the Palyku People and that they "have the authorisation from the Palyku People, pursuant to the provisions of s.251B(b) of the *Native Title Act*".

Each of the Applicants' affidavits state that "*I to the best of my knowledge, believe that I am authorised by all the persons in the native title claim group to make this application and to deal with matters arising in relation to it*".

Section 190C(5)(b) requires that the application briefly set out the grounds on which I should consider that the application has been authorised.

At Schedule R part b) of the amended application, the Applicants state that the grounds on which evidence of authorisation has been met is that the statement at Schedule R part a) is made under oath and that the statement is supported by affidavits attached to the amended application.

Schedule R part a) states that "*Please see - affidavit submitted for s62(1)(a). Further, supporting affidavits by a person of the claim group and a member of the Pilbara Aboriginal Land Council are provided*".

Two affidavits were initially provided in support of authorisation from [Names Deleted]

I have placed greater weight on the evidence provided by [Name Deleted] as a member of the claim group. I have not relied upon the affidavits from [Names Deleted] in making my decision. It is not clear from [Name Deleted] affidavit how he became aware of who was authorised to represent the claim group, as it is not clear whether he attended the meetings. I note that the native title Representative Body of which [Name Deleted] is not certifying this application under s190C(4)(a). As [Name Deleted] is an applicant I do not think it suitable to rely on his evidence to support his authorisation.

[Name Deleted] affidavit, 29/3/99, outlines details of a meeting, which was held on 11 December 1998 to decide the named applicants and to authorise those applicants. [Name Deleted] names the four applicants as those authorised to make the claim.

[Name Deleted] affidavit states that "*to the best of my knowledge, I believe that the person were authorised by all person of the native title claim group to make the application and to deal with matters arising in relation to it*".

[Information Deleted Due to Cultural and Customary Concerns].

[Name Deleted] affidavit describes a decision making process as described in s251B(a) of the NTA 1993. He states that the decision of the Palyku people was made under traditional customary laws and customs, and in accordance with that process the elders and the people nominated the applicants and authorised the applicants.

I note submissions made by the Crown Solicitors Office at page 3 and 4 of a letter dated 8 December, 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

I am satisfied there has been compliance with s.190C(5)(a) as required by s.190C(4)(b).

It is my view that the above statements effect compliance with s.190C(5)(b) and that the requirements of s.190C(5) have been met.

Commentary on S190C(5)

Under s.190C(5) if the application has not been certified I cannot be satisfied that the condition in s.190C(4) has been satisfied unless the application includes a statement to the effect that the requirement set out in s.190C (4)(b) has been met and briefly sets out the grounds on which I should consider that it has been met.

Section 190C(4)(b) requires that the applicant be a member of the native title claim group and be 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.

At Attachment A of the amended application the four Applicants are identified as members of the native title claim group.

At Part A 2 of the amended application the Applicants state that they make this claimant application for determination of native title on behalf of the claim group identified as the Palyku People and that they "have the authorisation from the Palyku People, pursuant to the provisions of s.251B(b) of the *Native Title Act*".

Each of the Applicants' affidavits state that "*I to the best of my knowledge, believe that I am authorised by all the persons in the native title claim group to make this application and to deal with matters arising in relation to it*".

Section 190C(5)(b) requires that the application briefly set out the grounds on which I should consider that the application has been authorised.

At Schedule R part b) of the amended application, the Applicants state that the grounds on which evidence of authorisation has been met is that the statement at Schedule R part a) is made under oath and that the statement is supported by affidavits attached to the amended application.

Schedule R part a) states that "*Please see - affidavit submitted for s62(1)(a). Further, supporting affidavits by a person of the claim group and a member of the Pilbara Aboriginal Land Council are provided*".

Two affidavits were initially provided in support of authorisation from [Names Deleted]

I have placed greater weight on the evidence provided by [Name Deleted] as a member of the claim group. I have not relied upon the affidavits from [Names Deleted] in making my decision. It is not clear from [Name Deleted] affidavit how he became aware of who was authorised by the claim group, as it is not clear whether he attended the meetings. I note that the native title Representative Body of which [Name Deleted] is not certifying this application under s190C(4)(a). As [Name Deleted] is an applicant I do not think it suitable to rely on his evidence to support his authorisation.

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I note submissions made by the Crown Solicitors Office at page 3 and 4 of a letter dated 8 December, 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

I am satisfied there has been compliance with s.190C(5)(a) as required by s.190C(4)(b).

It is my view that the above statements effect compliance with s.190C(5)(b) and that the requirements of s.190C(5) have been met.