

National Native Title Tribunal
REASONS FOR DECISION COVER SHEET
REGISTRATION TEST

DELEGATE: Klim Gollan

APPLICATION NAME: Gnaala Karla Booja

NAME(S) OF APPLICANT(S): Lorraine Bellotti and Ors

NNTT NO: WC98/58 FEDERAL COURT NO: WAG-6274/98

REGION: SWWA

DATE APPLICATION MADE: 17/9/1998

The delegate of the Registrar has considered the application against each of the conditions contained in s190B and 190C of the *Native Title Act 1993*.

DECISION

The application IS ACCEPTED for registration pursuant to s190A of the *Native Title Act 1993*.

Delegate's signature:

Date of Decision:

National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION

DELEGATE	Klim Gollan		
CASE MANAGER	Gerry Putland		
DATE	3 March 1999		
Application Name	Gnaala Karla Booja		
Name(s) of Applicant(s)	Lorraine Bellotti and ors		
Region	SWWA	NNTT No	WC98/58
Date Application Made	17/9/98	Fed Court No	WAG-6274/98

Procedural fairness

This is an application lodged with the Tribunal on 17 September 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 applicant the opportunity to supplement the application for testing under the provisions 190B and 190C of the amended *NTA*.

The applicants and their representative (Noongar Land Council, "NLC") 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 applicant to supply further information and to do things that may be required to prepare the application for the test (folio 3, RT file). On 15 October the applicants and the NLC were further notified (folio 9, RT file) that the Registrar would be using best endeavours to apply the test by 14 February 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 each of the tests on 18 November 1998 (folio 16, RT file, and this information was passed to the NLC on 20 November 1998 (folio 19 RT file).

The applicant filed an amended application in the Federal Court on 18 January 1999 (folio 36(1), RT file). It was heard on 22 January 1999 and an order made for the filed application to stand as the amended application; the notice of the order was supplied to the Registrar on 29 January 1999 with a copy of the amended application (folio 39 RT file). A further amendment was filed by the applicant and was heard on 17 February 1999; notice of the order was supplied to the Registrar on 18 February 1999 together with the copy of the amended application (folio 50 RT file).

The applicant supplied further information on 16 February 1999 and asked that this be taken into account in applying the test (folio 49 RT file). It comprises affidavits from three of the applicants [Names deleted], and tabulated information relating to Schedule E and Schedule F of the application, and including information relating to [Name deleted] and [Name deleted] traditional physical connection to country (called Attachment M1 and M2).

The case manager has written to the applicants' representatives on a number of other occasions, eg approving an extension of time to submit information and/or amended applications (folio 21, 43 RT file), advice on the procedures (folio 23, 26 RT file), correspondence concerning the provision of a map of the claim area (folio 29 RT file). Advice was also supplied to the NLC (for the applicants) on the Tribunal's policy with respect to amending information (folio 32 RT file).

Taken as a whole, I believe this correspondence is within the policy guidelines for assistance to applicants (pursuant to s78). Further, I believe it has discharged my obligations to provide a reasonable opportunity for the applicant to provide further information or other things, or to have any things done in relation to the application (Notes Table A, Schedule 5, Part 4 s (8)).

It should be further noted that the application of the test has been delayed past the end of the four-month period. On the face of the evidence adduced above, the case manager, under my direction, has used his best endeavours to deliver to me a matter ready for testing, given also the constraints of the applicants' requests for delay and the clear evidence that an amended application was going through the Federal Court at the time the four month period ended.

Information to be taken into account.

The following table sets out in summary form information and documents that have been considered in the course of making the decision on each question in the registration test:

WC98/58 Registration test file ("RT file")	Original Application – Folio 1 Amended Application – Folio 36, and folio 50 Letter to the NLC advising of new s 29 notice – Folio 9 WA State Government submission about the registration testing of this application and an attachment containing tenure information – Folio 16 and correspondence to NLC providing same – Folio 19
WC98/58 Working file –	Volume 1
Additional information	Registration Test file-folio 49
Geospatial application overlaps	Registration Test file – folio 48
Overlapping claim files	Working files for Peel (WC96/100), Nyungah Petroleum (WC95/85), Ugle Noongar (WC 96/92)
Future Act files	WO 95/29 (WC95/81), WO95/29,32,36,37 (WC95/85)
Tenure information	Overlapping claim files
Legal Compliance file	Vol 1
Case Management System database	Register Extracts from overlapping claims

In the following listings of information some is required to be taken into account in the application of the conditions under s190B and 190C. This mandatory material is coded "M". Other information may be considered if it is relevant and appropriate to do so.

A. Procedural Conditions

190C2	<p>Information, etc, required by section 61 and section 62:</p> <p>The Registrar must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.</p>
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The following relevant documents have been extracted from the File Index(es) of material that has been reviewed for this application.

Fol	Date	Description	Cat	Probity, Weight
1	17/9/98	Original Application Form 1	M	High
16	18/11/98	State Submission	M	Low
41	9/2/99	Geospatial mapping confirmation	M	High
48	11/2/99	Geospatial application overlaps	M	High
49	15/2 /99	Additional information - Affidavits	M	High
50	22/2/99	Re-engrossed amended application-Form 1 with attachments	M	High

Details required in section 61

61(3)	Name and address for service of applicant(s)
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Reasons relating to this sub-condition	
<p>The amended application (folio 50, Part B RT file), provides the names of ten applicants, and shows the applicants' legal representative as the Noongar Land Council. The address of the Land Council is included.</p> <p>The application meets the requirement of this condition.</p>	

61(4)	Names persons in native title claim group or otherwise describes the persons so that it can be ascertained whether any particular person is one of those persons
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Reasons relating to this sub-condition	
<p>Schedule A, Attachment (i) and Attachment A (folio 50 RT file); the native title claim group is described by reference to the descendants of a named ancestral group. Reference is also made to membership by adoption. These details are referenced in the application of the condition set out in s190B (3).</p> <p>The application meets the requirements of this condition.</p>	

61(5)	Application is in the prescribed form, lodged in the Federal Court, contain prescribed information, and accompanied by prescribed documents and fee
Reasons relating to this sub-condition	
<p><u>1. The amended application is in the Prescribed form:</u> The amended application has been filed in the prescribed form; a Form 1 re-engrossed, with attachments. (folio 50, Rt file).</p> <p><u>2. The amended application contains all of the following prescribed information:</u></p> <ul style="list-style-type: none"> • Information – Schedule B, Attachment B • Map - Schedule C, Attachment C, Annexure A • Details and results of searches – Schedule D, Attachment D • Description of native title rights and interests – Schedule E, Attachment E • Description of factual basis - Schedule F,(a), (b), (c), Table F and Table G (in additional information) • Details of activities – Schedule G, Attachment G • Details of other applications – Schedule H, Attachment H • Details of any s29 notices- Schedule I, Attachment I <p><u>3. The application contains all the prescribed documents:</u></p> <ul style="list-style-type: none"> • Affidavit – The 10 named applicants supply affidavits and in the additional information supplied there are affidavits by three named applicants supplying further information relating to all the information on which the factual basis on which native title is asserted. • Map - Schedule C, Attachment C, Annexure A <p><u>4. The applicants are exempted from fees:</u> The application fee exemption evidence for the old act application has been verified 1/10/98 (folio 1, RT file)</p> <p>The application meets the requirements of this condition.</p>	

Details required in section 62(1)

62(1)(a)	<i>Affidavits address matters required by s62(1)(a)(i) – s62(1)(a)(v)</i>
Reasons relating to this sub-condition	
<p>The ten named applicants have each supplied a separate sworn affidavit (folio 50 RT file).</p> <p><u>Witness status:</u> Witnesses with proper status appear on each affidavit.</p> <p><u>Content requirements:</u> The affidavits address all the matters required in s62(1)(a)(i) – (v)</p> <p><u>Optional information in s62(1)(c)(i):</u> Three of the named applicants [Names deleted] provide additional separate affidavits outlining in detail the optional matters required for s62 (1) (c) (i) related to traditional physical connection, attachment M1 and M2.</p> <p>The requirements of this condition are met</p>	

62(1)(c)	<i>Details of physical connection (information not mandatory)</i>
Comment on details provided	
<p>Table G, supplied as additional information (folio 49, RT file) outlines the traditional physical connection of three named applicants.</p> <p>The requirements of this condition are met.</p>	

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

62(2)(a)(i)	<i>Information identifying the boundaries of the area covered</i>
Reasons relating to this sub-condition	
<p>The information identifying the boundaries consists of two relevant sources of information: Schedule B, Attachment B <i>External boundary</i> (folio 50, RT file) and Schedule C Attachment C Annexure A (folio 50, RT file), a map.</p> <p>The requirements of this condition are met.</p>	

62(2)(a)(ii)	<i>Information identifying any areas within those boundaries which are not covered</i>
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Reasons relating to this sub-condition	
<p>Schedule B Attachment B <i>Internal boundaries</i> (folio 50, RT file) provides information of any areas within the external boundary that are not covered by the application.</p> <p>The requirements of this condition are met.</p>	

62(2)(b)	<i>A map showing the external boundaries of the area covered by the application</i>
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Reasons relating to this sub-condition	
<p>Attachment C, Annexure A, (folio 50, RT file) is a map showing the external boundary of the claim area, and boundaries of some of the excluded tenures within the claim area.</p> <p>The requirements of this condition are met.</p>	

62(2)(c)	<i>Details/results of searches carried out to determine the existence of any non-native title rights and interests</i>
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Reasons relating to this sub-condition	
<p>Schedule D, Attachment D (folio 50, RT file) of the amended application includes details of searches.</p> <p>The application also includes the <u>results</u> of such searches. They consist of: (In respect of search conducted by State Government as part of Submission received 22/10/98, (folio 16, RT file):</p> <ol style="list-style-type: none"> 1) Spreadsheet of Land Act leases within the claim area as at 22 October 1998 (2 pages); 2) Spreadsheet of Land Act Reserves within the claim area as at 22 October 1998 (76 pages) <p>The requirements of this condition are met.</p>	

62(2)(d)	<i>Description of native title rights and interests claimed</i>
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Reasons relating to this sub-condition	
<p>In Schedule E, Attachment E, the applicants provide a list of 13 native title rights and interests, described separately. Each is the subject of five qualifications</p> <p>The requirements of this condition are met.</p>	

62(2)(e)(i)	<i>Factual basis – claim group has, and their predecessors had, an association with the area</i>
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Reasons relating to this sub-condition	
<p>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 supplied in Schedule F. More information is supplied in Table F (folio 50 RT file), Schedule G Attachment G (folio 49 RT file), and in affidavits from three applicants (folio 49, RT file).</p> <p>The requirements of this condition are met.</p>	

62(2)(e)(ii)	<i>Factual basis – traditional laws and customs exist that give rise to the claimed native title</i>
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Reasons relating to this sub-condition	
<p>A general description of the factual basis for the assertion that traditional laws and customs exist that give rise to the claimed native title is supplied in Schedule F Attachment F and Table F (folio 50 RT file), Schedule G Attachment G (folio 49 RT file), and in affidavits from three applicants (folio 49, RT file).</p> <p>The requirements of this condition are met.</p>	

62(2)(e)(iii)	<i>Factual basis – claim group has continued to hold native title in accordance with traditional laws and customs</i>
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Reasons relating to this sub-condition	
<p>A general description of the factual basis for the assertion that the claim group has continued to hold native title in accordance with traditional laws and customs is supplied in Schedule F Attachment F and Table F (folio 50 RT file), Schedule G Attachment G (folio 49 RT file), and in affidavits from three applicants (folio 49, RT file)</p> <p>The requirements of this condition are met.</p>	

62(2)(f)	<i>If native title claim group currently carry on any activities in relation to the area claimed, details of those activities</i>
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Reasons relating to this sub-condition	
<p>Details of activities currently carried out by the claimant group in relation to the area claimed are included at: Schedule G, Attachment G (folio 49, Schedule G Attachment G, RT file) lists current activities, (a) to (m), carried out in the claimed area.</p> <p>The requirements of this condition are met.</p>	

62(2)(g)	<i>Details of any other applications to the High Court, Federal Court or a recognised State/Territory body the applicant is aware of (and where the application seeks a determination of native title or compensation) to whole or part of the claim area.</i>
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Reasons relating to this sub-condition	
<p>Schedule H, Attachment H (folio 50 RT file), of the application lists 11 other applications which overlap this application (source NNTT Geospatial Information System).</p> <p>The requirements of this condition are met.</p>	

62(2)(h)	<i>Details of any S29 Notices (or notices given under a corresponding State/Territory law) in relation to the area, and the applicant is aware of</i>
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Reasons relating to this sub-condition	
<p>Schedule I, Attachment I (folio 50, RT file) lists s29 notices relating to the claim area that the applicants are aware of.</p> <p>1.Cable Sands Pty Ltd Tenement Number: ML 70/900 and ML 70/901 Date notice received: 14/10/98</p> <p>2.Hedges Gold Pty Ltd Tenement Number: ML 70/2104 Date notice received: 20/11/98</p> <p>The requirements of this condition are met.</p>	

The application meets the condition as set out in s190C (2).

Reasons for the Recommendation

I find that each of the procedural requirements of the sub-conditions of s190C(2) have been met. Consequently, the condition of s190C (2) has been met.

190C3	<p><i>Common claimants in overlapping claims:</i></p> <p><i>The Registrar must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:</i></p> <p><i>(a) the previous application covered the whole or part of the area covered by the current application; and</i></p> <p><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></p> <p><i>(c) the entry was made, or not removed, as a result of consideration of the previous application under section 190A.</i></p>
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The following relevant documents have been extracted from the File Index(es) of material that has been reviewed for this application.

Fol	Date	Description	Cat	Probity, Weight
16	18/11/98	State Submission	M	Low
48	11/2/99	Geospatial Information Access database re: overlaps	M	High
50	22/2/99	Re-engrossed amended application	M	High

The application meets the condition contained in s190C (3).

Reasons for the Recommendation

The procedural requirement of s190C (3) is that no person included in the native title claim group in this application was a member of a native title claim group in a previous application, where; there is an area overlap, where the previous applications are on the Register of Native Title Claims, or not removed, as a result of being considered under s190A of the NTA, and where the previous application was registered when the current application was made. All these criteria must apply if there is to be a failure to meet this procedural condition.

There are two applications (WC 96/92- Ugle Noongar and WC95/85 - Nyungar Petroleum) that have an external boundary overlap (and by reasonable inference, an overlap in areas) with the application under consideration, who have members in common with the current application's claim group (folio 50 Schedule H, RT file). The members in common are the descendants of [Name deleted] and [Name deleted] who appear in each application's native title claim group.

Both of these previous applications have been considered under s190A of the NTA, and having failed to meet the requirements, have been removed from the Register of Native Title Claims (on 18 February 1999; folio 34 WC95/36 RT file, and folio 32 WC96/92 RT file).

Having regard to the application and the information available in related, overlapping applications, I find that one of the conditions, for example, that the overlapping previous applications should be on the Register of Native Title Claims, or not removed, as a result of the Registrar considering them under s190A of the NTA, is not met.

I conclude that this application meets the requirements of s190C (3).

190C4(a) and 190C4(b)	<p><i>Certification and authorisation:</i></p> <p><i>The Registrar must be satisfied that either of the following is the case:</i></p> <p>(a) <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></p> <p>(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></p>
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The following relevant documents have been extracted from the File Index(es) of material that has been reviewed for this application.

Fol	Date	Description	Cat	Probity, Weight
36	29/1/99	Reg Test File- Amended application - form 1- Attachment R	M	High

The application meets the conditions contained in s190C (4) (a).

Reasons for the Decision

The amended application is certified by John Hoare, the Executive Director of the Noongar Land Council at Attachment R (folio 50, RT file), pursuant to s.202(4)(d) of the NTA. The areas of land and waters the subject of this application lie wholly within the area of which the NLC is the representative body. I am able to make this finding on the basis of a WALIS map (Native Title Claims South West Region, produced 11/2/99) which shows the boundaries of the application area and those of the NLC.

For this reason, the application need only be certified by the Noongar Land Council. An original copy of the certificate has been provided.

Attachment R (folio 50 RT file) states that the criteria for certifying applications as set out in s.202 (5) (a) and (b) have been met, namely that the applicants are authorised to make the application and that all reasonable efforts have been made to describe all other persons in the claim group. Attachment R also briefly sets out the basis of the NLC's belief that the above criteria have been met, according to s.202 (7) (b). The research conducted in the area by the NLC demonstrates that some effort has been made to ensure the application sufficiently describes the persons in the claim group. Attachment R states that the NLC have attended meetings of the Gnaala Karla Booja claim group and observed the group's mode of decision making.

Attachment R also addresses s.202 (7) (c) in which the NLC attest to the implementation of a comprehensive strategy in an attempt to minimise the number of (overlapping) applications and reach agreement about native title.

Given that s190C (4) (a) has been adequately met, I am not required to consider the condition relating to authorisation of the application (s190C (4) (b)).

I conclude that the application meets the condition of s190C (4) (a).

190C5	<p>Evidence of authorisation:</p> <p><i>If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:</i></p> <p><i>(a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and</i></p> <p><i>(b) briefly sets out the grounds on which the Registrar should consider that it has been met.</i></p>
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The following relevant documents have been extracted from the File Index(es) of material that has been reviewed for this application.

Fol	Date	Description	Cat	Probity, Weight
-	-	-	-	-

This condition is not required to be considered.

Reasons for the Recommendation

This condition is not applicable, as this application has been certified according to the conditions of s190C (4) (a)

B. Merits Conditions

190B2	<p>Identification of area subject to native title:</p> <p><i>The Registrar must be satisfied that the information and map contained in the application as required by paragraphs 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.</i></p>
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The following relevant documents have been extracted from the File Index(es) of material that has been reviewed for this application.

Fol	Date	Description	Cat	Probity, Weight
16	18/11/98	State Submission	M	High
41	9/2/99	Geospatial mapping confirmation	M	High
50	22/2/99	Reg Test File- Amended form 1	M	High

The application meets the condition contained in s190B (2).

Reasons for the Decision

The application (as amended) contains information and a map (folio 50, Attachment C RT file) that particularises the land and waters the subject of the claimed native title rights and interests. The information comprises a description of an external boundary and secondarily, a description of classes of land and water that are excluded from the area claimed. A map is provided that explicitly shows an external boundary of land over which the native title rights and interests are claimed. In the following reasons I will have regard for the requirements of s62 (a) and (b), and whether the information as set out (that is, external boundary, internal exclusions) meets the substantive requirements for reasonable certainty as to the particular lands and waters over which native title rights and interests are claimed (pursuant to 190B (2)).

External boundary information

The application contains a description (folio 50, Schedule B Attachment B RT file) of an external boundary, which I interpret in the following terms; starting at an origin point at the northern most point of Garden Island (high water mark), and then by arcs through specific geo-coordinates to a southerly point on the south coast of Western Australia (near the town of Capel), and then extending along the low water mark to Cape Peron, then northerly along (the low water mark of) the coast to a point on the mainland below the south western point of Garden Island where it traverses the stretch of water to the high water mark of the south western point of Garden Island and then along the high water mark to the origin.

The State has commented on the unamended application (folio 1 RT file), pointing to an unsatisfactory uncertainty in the description the boundary (folio 16 RT file). The application has since been amended, specifically to change the description. For this reason it is not necessary to have regard to the specifics of the State's contention, other than to say I am, in any case, having regard to the question of reasonable certainty.

I find the applicants' approach to be generally satisfactory as to specifying the boundary

of the area subject of claim. I am assisted by the provision of a map, which shows the area generally, and the boundary, at scale of a little more than 1:1 million. I find that the degree of certainty of the boundary on its inland sections is high, because I accept, by inspection, that the geo-coordinates validly identify the northern, eastern and southern arms of the closed figure depicted in the map. I would accept (if it had been put to me) that there is a practical difficulty in defining the western (sea) boundary by reference to a sea shore (littoral) feature (the high water mark, or low water mark) which may vary over time, but in my view it is acceptable to do so for the purposes of ascertaining at any particular time the location of the boundary.

This description satisfies the requirements of s 62 (a) (i), and I am satisfied that the information supplied is sufficient for it to be said with reasonable certainty that it particularises the external boundary of the land and waters of the application area.

The map

The map contained in the application (folio 50; Schedule B, Attachment C, annexure A, RT file) is a recent (13 January 1999) production by the WALIS Land Claim Mapping Unit. I understand that it is a digitally captured map that can be reproduced on demand at a specified scale. The Tribunal's Geospatial Unit (folio 41 RT file) has advised me that there is no discrepancy between the description of the external boundary and the map as submitted, insofar as that can be ascertained by inspection.

The State has submitted that the map in the unamended application (folio 1 RT file) is of poor quality, and does not provide certainty as to the extent of the claim, nor whether certain towns are within the claim area. The applicants have amended the map that the State has commented on. I am therefore not constrained to have regard to the specifics of the State's submission, although I note that the particular contention as to uncertainty of inclusion of some towns is addressed satisfactorily in the amended map and description by the implied accuracy of the boundary specification.

I find that the attached map (Schedule B, Attachment C, annexure A, A3, colour version) has been produced to an acceptable physical production quality, with acceptable cartographic conventions (eg. the provision of scale, geo-coordinates for the corners, shaded tenures, roads and town names and boundaries), at an appropriate scale, so as to provide me with reasonable certainty as to the external boundary of the particular lands and waters contained within the claim.

The map does not show pictorially the boundaries of all of the classes of excluded areas. Some tenures are depicted but there is no explicit association between these and the classes of exclusions as set out in the application. I can see from the map, and by inference from an inspection of tenure information provided with the application (folio 50, RT file), that the application area as a whole contains a complex pattern of land tenure (for example, it covers the major urban areas of Mandurah and Bunbury). Based on this complexity, I find that it would be an unreasonable requirement for the applicants to particularise, pictorially, the parcels of land to be excluded. The limited representation of tenures on the attached map is useful, but I do not, nor am I required (s 62 (2) (a) (i) and 62 (2) (b)) to find (for compliance with the test in s 190B (2)) that it is the complete pictorial statement of the exclusions areas.

In summary, I find this map satisfies the requirements of s62 (2) (b).

Definition of the internal boundaries (the 'exclusion areas')

The application has supplied a definition of areas to be excluded; by reference to classes of tenures to be excluded; by reference to excluding previous exclusive

possession act areas; by reference to excluding areas over which native title rights and interests have otherwise been extinguished, including acts generally that demonstrate permanent adverse dominion or of actual use made by a tenure holder that is inconsistent with the continued existence of native title. In addition, and (the applicants say) to avoid uncertainty, there is exclusion of a range of specific tenure types (folio 50, Schedule B, Attachment B, *Internal boundaries*, RT file).

I am required to decide whether this satisfies s 62 (2) (a) (ii) and whether it is sufficient to provide reasonable certainty as to whether native title rights and interests are claimed in relation to particular land and waters (pursuant to s190B (2)).

The State has said of the unamended application (folio 16, RT file) that '(the applicants) have excluded certain types of land parcels within the claim area ie "All freehold and leasehold" but have not specifically identified those parcels in a manner that would allow them to be readily identified'. The amended application makes it unnecessary to deal with the example as stated, although I intend to deal with the State's contention on the question of parcel by parcel exclusions.

It is my understanding of the State's position that the question is one of sufficiency of certainty. It is not claimed by the State that it is not possible to ascertain all parcels of land that are covered by a class definition of the sort used in the amended application, merely that it is not possible to readily identify what they are. I acknowledge the State's contention that there is certainty in a parcel by parcel identification of excluded land. Nonetheless, I adopt the position that acknowledges the practical difficulty for the applicants of achieving that level of particularity, and that, for the purposes of this administrative test, sufficient certainty is provided by a clear and unambiguous statement of exclusion classes, that are coherent, and that are appropriate for the complexity of the underlying tenure situation.

The applicants exclude some areas from the application under three paragraphs (subject to the effects of the saving provisions of s47, 47A and 47B in paragraph 4);

1. Areas affected by Category A past acts (s229) and Category A intermediate period acts (s232B) (folio 50 Schedule B, Attachment B *Internal boundaries* par 1, RT file). I find this is a clear statement of the particular lands and waters that are to be excluded.

2. Any areas in relation to which a previous exclusive possession act (s23B) was done, either attributable to the Commonwealth or the State of Western Australia when it has made provision for that under s23E NTA (folio 50 Schedule B, Attachment B *Internal boundaries* par 2, RT file). It is noted that this is an ambulatory definition of the area to be excluded; that is, further areas will be excluded when, and if, the State of Western Australia enacts its laws under s23E. I nonetheless find this is a clear statement of the particular lands and waters that are to be excluded, and that there is sufficient certainty as to what lands will be brought into the definition of the excluded tenures, even if that time is at present unknown.

3. Any areas in relation to which native title rights and interests have otherwise been extinguished, including; an act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title, and, actual use by the holder of a tenure (other than native title) which is permanently inconsistent with the continued existence of native title (folio 50 Schedule B, Attachment B, *Internal boundaries*, par 3, RT file). I find that this is a clear statement of the particular lands and waters to be excluded, notwithstanding that a significant inquiry will be required to establish each parcel falling within this definition.

In addition, the applicants exclude a range of specific tenure types or areas over which there have been specific infrastructure developments (that is, permanent public works and existing public roads);

An unqualified grant of an estate in fee simple, or

A lease (less than 5000sq m) on which a dwelling house, residence, building or work is constructed, which comprises a lease of a worker's dwelling under *Worker's Home Act* 1911-1928, or, a 999 year lease under *Land Act* 1898, lease of a Town or Suburban Lot (s117) *Land Act* 1933(WA), or Special Lease (s117) under *Land Act* 1933(WA), or;

Conditional Purchase Lease in Agricultural Areas of the SW Division (cl 46, 47) Regulations 1898, which requires the lessee reside on the area of the lease and on which a residence has been constructed, or;

Perpetual lease, current, under *War Service Land Settlement Scheme Act* 1954, or;

A permanent public work, or;

An existing public road or street used by the public.

I am interpreting the use of 'or' between the classes to mean that the effect is that they are to be taken as the combination of the areas defined by these types.

I find that these are clear statements of particular lands or waters to be excluded from the claim area. This finding is made, notwithstanding the practical difficulty of applying this definition in order to identify each parcel of land or area of water.

In summary, I find the exclusion clauses as set out in paragraphs 1 to 3, taken together with the boundary description information, satisfy the requirements of s 62 (2) (a).

The applicants apply the provisions of s47, 47A and 47B to each of the exclusion classes as set out above, that is, to the land and waters as a whole that are the subject of classes of exclusions (folio 50, Schedule B, Attachment B, *Internal boundaries*, par 4, RT file). The applicants say they will supply further particulars to identify the areas that are the subject of these provisions. I take this ambulatory particularisation of the land to be a practical necessity for the applicants. I do not find that this creates an unreasonable uncertainty as to particularity of the land and waters the subject of these saving provisions.

Finally, there is a question whether, taken together, these classes of exclusions involve definitions that are contradictory between themselves. This is a question that can be answered from first principles, from the sequential structure of the excluding classes. I interpret the paragraphed exclusion instructions as a cumulative removal of parcels (unless they are saved by the s47, 47A and 47B provisions). Where there is exclusion under more than one class I do not believe there is uncertainty. For example, a parcel excluded as, say, a Category A past act, and which is also excluded under the tenure type of estate in fee simple, is merely identified for exclusion/removal twice. Insofar as this process is not strictly and exclusively a cumulative removal of parcels (because the s47 47A and 47B saving provisions are applied sequentially through the exclusion process) I am not aware that the saving provisions are capable of creating a contradiction between the exclusion classes. For the reasons outlined above, I am satisfied that if further information is provided to specify the areas over which the

provisions of s47, 47A and 47B are to apply, there is sufficient reasonable certainty of the particular land and waters that will be excluded as a result of the application of the exclusion clauses set out above.

In summary, I find that the exclusion clauses, taken with the other parts of the information, are sufficient to say with reasonable certainty that particular lands and waters are subject to native title rights and interests claimed.

Conclusion

I find that the information and maps submitted with the application meet the requirements of s62. In accordance with s62 (2) (b) the areas covered by the application can be identified from the map. The class exclusions, and provisions under s47, 47A and 47B, also permit any areas within the external boundary that are not covered by the application to be identified, which satisfies the requirements of s 62 (2) (a).

I am satisfied that, taken together, the information and the map provided by the applicant are sufficient for it to be said with reasonable certainty that particular land and waters are the subject native title rights and interests claimed, and that as a consequence, I am satisfied that the criteria set out in s190B (2) are met by the application.

190B3	<p>Identification of the native title claim group:</p> <p>The Registrar must be satisfied that:</p> <p>(a) <i>the persons in the native title claim group are named in the application; or</i></p> <p>(b) <i>the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.</i></p>
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The following relevant documents have been extracted from the File Index(es) of material that has been reviewed for this application.

Fol	Date	Description	Cat	Probity, Weight
50	22/ 2/99	Reg Test file- Amended application form 1	M	High

The application meets the condition as set out in s190B (3).

Reasons for the Decision

An exhaustive list of names of the persons in the native title, claim group has not been provided and so the requirements of s 190B (3) (a) are not met.

In the alternative, s190B (3) (b) requires the Registrar to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

The State has provided contentions on the unamended application (folio 1 RT file), but these are specific to that application, which has been substantially revised. On the wording of the new application, I am not able to draw any useful benefit from the State's contention.

The application provides (folio 50, Schedule A, Attachment A, RT file) a description of the claim group that relies on a (decision) rule that has three parts. The claimants comprise those Aboriginal people, who are;

- the biological descendants of the unions between 21 named ancestral pairs of people.
- persons adopted by named ancestors or their descendants
- biological descendants of the adopted persons.

A rule is also provided for specifying how adoption works; '...if a man dies and his brother or cousin marries the widow, any of the widow's children are adopted as the children of the new husband'.

In applying the condition in this sub-section I am satisfied that the condition is met if there is a clear rule for deciding who is included, and equally who is not included, in the claim group. The rule must be at a level of specificity so that it can be ascertained that particular people are, or are not, members of the group. Following the structure of this three part rule, I ask whether in the application of each rule, a particular person can be ascertained to be within or out of the claim group on the basis of that rule.

As a preliminary point, I note that the first line of the description of the claim group includes a qualifier, 'those Aboriginal people who are etc'. I take this to be providing no further independent test than is provided in the three subtending decision criteria. I take the role of the qualifier 'Aboriginal people' to be to verify that the people who are the descendants of the ancestral unions are Aboriginal people by virtue of the descendant line.

The first rule specifies the apical point of 21 family trees and includes all their biological descendants. Whether each tree has living descendants is immaterial. It is in principle possible for any person to provide proof as to their biological relationship to the apical ancestors named. It is not necessary for me to inquire whether the ancestral people existed, nor whether they are Aboriginal, because I am not required to go beyond the existence of a rule that is capable of clear and certain application. I am satisfied that the first rule provides the first component of the claim group, that is, those who are direct biological descendants of the named ancestors.

The second rule will include in the claim group, adopted persons of the apical ancestors, and adopted persons of the biological descendants of the apical ancestors. I am not required to inquire whether this rule was acknowledged under traditional law and customs observed. I am aware of the possibility that a person may be eligible to claim membership of the claim group under more than one of the decision rule branches. This is because of the way the adoption rule is couched. The widow's children are presumptively the biological descendants of the deceased father, who's

biologically related brother/cousin 'adopts' them. They 'get in' either as biological descendants or as adopted persons. There will be, however, recruitment of some non-biologically related persons, if the widow had children by another (non-biologically related) father. Indeed, on its face, this is a very 'inclusive' rule, but it is a matter for the applicants as to how the group is defined. As it stands I find that the adoption rule is capable of certain application, and does not introduce unfettered inclusion of persons into the claim group selected under this rule. Consequently, I find that the membership of the claim group 'by adoption' is described sufficiently clearly so that it can be ascertained whether any person recruited by this rule is in the group.

The third rule includes the biological descendants of adopted persons mentioned in rule 2. This allows for the inclusion of the descendants of those who, in the previous group, were not biologically related at the time of their adoption. I find this rule is capable of certain application so as to describe sufficiently clearly any particular person who is recruited by it to the group.

I am not aware of any submission to the Registrar by a third party, nor any information held on file, that suggests there is insufficient clarity in this definition of the native title claim group.

Taken together the three rules for defining the native title claim group satisfy me that the persons in the claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group. The condition as set out in s 190B (3) (b) is satisfied, and therefore the condition for s 190B (3) is satisfied.

190B4	<p>Identification of claimed native title:</p> <p><i>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.</i></p>
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The following relevant documents have been extracted from the File Index(es) of material that has been reviewed for this application.

Fol	Date	Description	Cat	Probity, Weight
50	22/2/99	Reg test file- Amended application form 1	M	High

The application meets the condition as set out in s190B 4.

Reasons for the Decision

The amended application includes a list of native title rights and interests that are subject to five qualifying paragraphs (folio 50, Schedule E, Attachment E, RT file). The listed rights and interests substantially amend the original application. The amended application includes further information as to the activities undertaken by the claimant group in the exercise of the rights and interests (folio 50, Schedule G Attachment G, RT file).

The State has supplied contentions that go to the particulars of the original application. I have not considered it in forming my decision on this sub-section of the test, as there is no useful correspondence between the wordings of the original and amended applications. No other submissions have been received from third parties on the amended application.

I am considering the formal compliance of the application as set out in s 62 (2) (d) and then considering the question of whether the native title rights and interests claimed can be readily identified.

I am satisfied that the native title rights and interests have been claimed in relation to particular land and waters (see the discussion in s 190B (2)), and that their description has been made in a way that is not merely 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. I have based this conclusion on the fact that the rights and interests are listed separately, and secondly are capable of being associated with activities that are said to be an exercise of those rights and interests. The activities in the exercise of the rights and interests are set out in the application (Schedule G Attachment G, RT file). For this reason I am satisfied that the description in Schedule E of the application is a description of native title rights and interests in the correct form as required by paragraph s 62 (2) (d).

The application states that the rights and interests claimed are in relation '...to the claim area, including land and waters' (folio 1, Schedule E, Attachment E RT file). This is a general term that connects the particular rights and interests with the particular land and waters (of the claim). The application then lists thirteen specific rights and interests, each of which, I am satisfied, is appropriately identified as relating to land or waters.

The rights and interests are:

- (a) The right and interests to exclusively possess, occupy, use and enjoy the area.
- (b) The right to make decisions about the use and enjoyment of the area
- (c) The right of access to the area.
- (d) The right to control the access of others to area.
- (e) The right to use and enjoy resources of the area.
- (f) The right to control the use and enjoyment of others of resources of the area.
- (g) The right to maintain and protect places of importance under traditional laws, customs and practices in the area.
- (h) The right to maintain, protect, and prevent the misuse of cultural knowledge of the

common law native title holders associated with the area.

- (i) The right to rear and teach children in their country.
- (j) The right to live on and erect residences and other infrastructure on the land.
- (k) The rights to trade in resources of the area
- (l) The right to receive a portion of any resources taken by others from the area, and
- (m) The right to manage, conserve, and look after the land, waters and resources, including locating and cleaning water sources and drinking water on the land.

I noted above that the rights and interests, as listed, are qualified by five paragraphs. The remaining questions for decision are; whether the rights and interests are readily identifiable and; secondly, whether the rights and interests after qualification, remain readily identifiable.

The qualifications are (in paraphrase);

1. No claim to minerals, petroleum or gas within the claim area that are wholly owned by the Crown in right of the Commonwealth or the State of Western Australia.
2. No claim of rights and interest in an offshore place to the exclusion of validly granted rights and interests by a law of the Commonwealth or the State, or accorded under international law.
3. No claim of exclusive rights and interests to possession use and enjoyment in areas in relation to which a previous non-exclusive possession act was done (defined s23F NTA), and the act has been attributable to the Commonwealth or the State (where that law has been enacted as set out in s 23 I NTA).
4. The qualification in item 3 is subject to any such provisions of s47, 47A and 47B NTA, as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing, but which include such areas as may be listed in Schedule L.
5. Native title rights and interests are subject to any valid rights created under the common law or law of the State or Commonwealth.

I find that items 1, 2, 3 and 5 are clear in their scope and intention, reciting general limitations to the operation of the listed rights and interests, where relevant. In my view the qualification in item 4, 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 3, and consequently of providing clearly identifiable specific rights and interests. As discussed in the previous condition, s 190B (3), in my view, the absence of particulars of the land subject to s47, 47A and 47B provisions does not invalidate the qualification. The qualification in item 5 has a general application, making each native title right and interest subject to validly created rights under common law or the law of the State or Commonwealth. In my view this does not produce a conflict with the other qualifications (leading to, for example, indeterminacy of outcome) nor unidentifiable qualified specific rights and interests.

Conclusion

For these reasons I am 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 to be readily identified.

190B5	<p>Sufficient factual basis:</p> <p>The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:</p> <p>(a) that the native title claim group have, and the predecessors of those persons had, an association with the area;</p> <p>(b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests;</p> <p>(c) that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.</p>
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The following relevant documents have been extracted from the File Index(es) of material that has been reviewed for this application.

Fol	Date	Description	Cat	Probity, Weight
49	15/2/99	Additional information – affidavits	M	High
P255	14/3/96	Hearing into Objection into expedited procedure [reference deleted to protect the privacy of an individual]	M	High
50	22/2 /99	Reg Test file - Amended application form 1	M	High

The application meets the conditions as set out in s190B (5)

Reasons for the Decision

The applicants have provided three primary sources of information as part of the application, which are in support of the contention that this criterion concerning the factual basis for claimed native title, has been satisfied (Schedule E, Attachment E; Schedule F Attachment F, Table F; Schedule G Attachment G). I have had regard to information supplied to the Registrar under the transitional provisions (Notes Table A Part 4 11 ((8)), that is (folio 50, Schedule G, Table G, RT file) which sets out as an affidavit, personal information from three of the applicants; [Names deleted]. I have had further regard to the transcript of evidence given by [Name deleted] in an Inquiry into an Objection to Expedited Procedure [sentence deleted to address the cultural and/or customary concerns of the applicants]. I have applied each of these sources, where relevant, to assist me to decide whether the three sub-conditions of s190B (5) have been met.

The State has provided a brief statement to the effect that there is no factual basis in the application for the claimed native title rights and interests. This was based on the unamended application. It is clear that the amendments have markedly changed the material adduced for this condition. Consequently I have not regarded the State's contention as useful in relation to the application now being considered.

The factual context for the claimed rights and interest is set out as a broad assertion of the claimants possession of rights and interests since the assertion of British sovereignty, based on traditional laws and customs that have been handed down by traditional teaching. The claimants assert that the native title claim group continues to acknowledge the laws and customs, that it has, by those laws, connection with the land over which the claim is made, and that the rights and interests are capable of being recognised by the common law of Australia (folio 50, Schedule F, Attachment F, RT file). I am required to be satisfied that there is a factual basis for these general assertions, and in particular, that the assertions relating to the three sub-conditions of s190B (5), are supported.

190B (5) (a)

The applicants have addressed the first condition (that the claim group, and the predecessors of those persons, had an association with the area) by setting out a tabulated description of their connection, including reference to the importance of Noongar families and their rights to 'speak for' country (Table F, column F(a)) . This is further supported by the affidavits from three applicants, [Names deleted], and again set out in tabular, and itemised form (folio 49, Table G, RT file). These are men, who attest they are elders of the claim group, who by their named forbears can show connection to the area, who have lived in the area for most of their lives, and who by activities that are related to the exercise of native title rights and interests, have provided evidence of sufficient weight to satisfy me that each has an association with the area. They give evidence of association that is communal in nature, for example by conducting funerals, visiting places of spiritual significance to care or them, participating in heritage studies on behalf of the group, and passing on traditional knowledge to the young, (folio 49, Table G, RT File). I have been impressed with the scope of the activities that evidences association, and the evidence they adduce that they are persons who have a long and communally recognised role as people who speak for the country that comprises the claim.

For these reasons I am satisfied that the conditions of s190B (5) have been met.

190B (5) (b)

This condition, that there exist traditional laws and customs acknowledged or observed by the claim group that give rise to the claimed native title, requires a factual basis for the existence of the laws and customs as well as a basis for inferring that these give rise to the native title rights and interests.

The application (folio 50 Table F, RT file) contains information about a 'set of inter-related laws and customs that create what the *Noongar* people refer to as '*Noongar Way*', including custodianship of sites, the recognition of the importance of elders in speaking for country, and family custodianship of country. Communal rights to sharing and caring for land are referenced as 'dictates of Noongar life'. Affidavits from [Names deleted] (cited above) set out in tabular and itemised form their understanding of the *Noongar Way*, their role in it as elders, and some specific activities that evidence the existence and acknowledgment of traditional laws and customs. The evidence of the claim group's acknowledgment of [Name deleted] role as custodian of certain sites, for example, satisfies me that the claim group acknowledges one element of traditional law and custom. (Sentence deleted to address cultural/customary concerns of an individual]

The applicants have linked (folio 49, Table G, RT file) [Name deleted] acknowledged role as custodian of sites with particular native title rights and interests, for example, that of the right of access to the country and the right to make decisions about the use and enjoyment of the area. A similar link is made between [Name deleted] and the law's recognition of his right to speak for country and the native title right to control the access of others to the area. For this condition, 190B (5) (b) I am not required to consider evidence covering all laws and customs, and all rights and interest that flow from those laws. It is enough for me to be satisfied that there is a factual basis for traditional laws and customs giving rise to specific native title rights and interests.

On the findings above, I am satisfied that the condition of s190B (5) (b) is met.

190B (5) (c)

This condition requires that the native title claim group have continued to hold native title in accordance with those traditional laws and customs.

The evidence of traditional laws and customs adduced in the previous two sub-sections (which give rise to native title), are set out as a continuing way of life for *Noongar* people, and for the three applicants, [Names deleted]. I have had regard to the tabulated factual basis for continuity. I am impressed with the evidence of continuing traditions, specifically amongst the elders, who are relevantly important to the holding of native title, including the teaching of the younger generation in specific cases of proper behaviour in relation to named sites and in relation to the natural resources of the country.

For this reason, the applicants have provided me with sufficient evidence, that comprises a factual basis, that the native title claim group have continued to hold native title in accordance with their traditional laws and customs.

I am satisfied that the conditions of s190B (5) (c) are met.

Conclusion.

I have been satisfied that there is a factual basis to support the assertion that native

title rights and interests exist. I find in particular, that there is sufficient factual basis to meet the three sub-conditions, concerning the claim group and their predecessors' association with the area, that traditional laws and customs exist to support native title claimed, and that native title has continued to be held in accordance with traditional laws acknowledged or customs observed. As a consequence the condition set out in s190B (5) is met.

190B6	<p><i>Prima facie case:</i></p> <p><i>The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.</i></p>
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The following relevant documents have been extracted from the File Index(es) of material that has been reviewed for this application.

Fol	Date	Description	Cat	Probity, Weight
49	15/2/99	Additional information -Affidavits	M	High
50	22/2/99	Reg Test file- Amended application form 1	M	High
P255	14/3/96	Hearing into Objection into expedited procedure for [reference deleted to protect the privacy of an individual]	M	High

The application meets the conditions as set out in s190B (6)

Reasons for the Decision

In considering, that prima facie, at least some of the native title rights and interests claimed can be established, I had regard for both what is permitted by law to be claimed, and what, on the facts adduced by the applicants, can be established prima facie.

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 (vide s61A NTA). In considering these matters under condition set out in s 190B (2) I found that the applicants had clearly and unambiguously excluded any area over which an impermissible claim could be made (folio 50, Schedule B, Attachment B, RT file). In addition, in relation to s190B (4), I found that the applicants, in setting out the rights and interests (folio 50, Schedule E Attachment E, RT file) have qualified the claimed native title rights and interests to make them subject to other validly granted rights and interests. In my view, taken together, these limitations on the claim area and the scope of the native title rights and interests satisfies the first arm of the prima facie test.

In considering the second arm, I note that the State, in relation to the unamended application, has submitted that in view of its position on the identification of the rights and interests and the factual basis, it submits that '...there is no prima facie case that any of the rights and interests can be supported'. I have noted earlier that this position is no longer useful in relation to the amended application, which has made substantial changes to relevant parts of the application.

I have considered the factual material supplied in the application (folio 50, Schedule E, and F, Attachments E, F, and G and Table F, and further information supplied, Table G, and the transcript of evidence in the Inquiry into an Objection to Expedited Procedure [reference deleted to protect the privacy of an individual]).

I consider that, prima facie the following rights and interests claimed in the application can be established;

- (a) The right and interests to exclusively possess, occupy, use and enjoy the area.
- (b) The right to make decisions about the use and enjoyment of the area
- (c) The right of access to the area.
- (d) The right to control the access of others to area.
- (e) The right to use and enjoy resources of the area.
- (f) The right to control the use and enjoyment of others of resources of the area.
- (g) The right to maintain and protect places of importance under traditional laws, customs and practices in the area.
- (h) The right to maintain, protect, and prevent the misuse of cultural knowledge of the common law native title holders associated with the area.
- (i) The right to rear and teach children in their country.
- (m) The right to manage, conserve, and look after the land, waters and resources, including locating and cleaning water sources and drinking water on the land.

In reaching this conclusion I have been persuaded by the information set out in Table G and the accompanying affidavits from [Names deleted]. In each case where the applicants adduce evidence of their exercise of the specific rights or interest, or the communal recognition of their possession of the right or interest, and that these rights and interests have been possessed since the assertion of British sovereignty, I find the prima facie case is established.

Equally in each case where there is no supporting information (namely items (j), (k), (l) in Schedule E Attachment E), I find the prima facie case is not established. In reaching this conclusion, I have had regard for the itemised activities (folio 50, Schedule G Attachment G RT file) that the applicants say members of the native title claim group have carried out (in relation to the native title rights and interests), but I do not find this is sufficient to establish the prima facie case in the rights and interests, (j), (k), and (l). I find the insufficiency to be related to the lack of specificity in Attachment G as to who has undertaken these activities and under what authority and circumstances.

In summary, the rights and interests for which further information will be provided, that is; (j) the right to live on and erect residences and other infrastructure on the land; (k) the right to trade in resources in the land; (l) the right to receive a portion of any resources taken by others from the area, are native title rights and interests that cannot be established prima facie on the basis of the application or information supplied.

190B7	<p><i>Traditional physical connection:</i></p> <p><i>The Registrar must be satisfied that at least one member of the native title claim group:</i></p> <p><i>(a) currently has or previously had a traditional physical connection with any part</i></p>
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	<p><i>of the land or waters covered by the application; or</i></p> <p>(b) previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to land or waters) by:</p> <p>(i) the Crown in any capacity; or</p> <p>(ii) a statutory authority of the Crown in any capacity; or</p> <p>(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such holder of a lease.</p>
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The following relevant documents have been extracted from the File Index(es) of material that has been reviewed for this application.

Fol	Date	Description	Cat	Probity, Weight
49	15/2/99	Reg Test file -Additional information: Affidavits, Attachment M1 and M2	M	High
50	22/2/99	Reg test file- Amended application	M	High
P255	14/3/96	Hearing into Objection into expedited procedure for [reference deleted to protect the privacy of an individual]	M	High

The application meets the conditions as set out in s190B (7).

Reasons for the Decision

I am satisfied that some members of the native title claim group currently have or previously had a traditional physical connection with part of the land or waters covered by the application.

The applicants assert that members of the claim group (folio 50, Schedule F, Table F RT file) exercise traditional law and custom on the claim area, namely, *the Noongar Way*, which includes, visiting sites, hunting and gathering, and the teaching of the younger generation about the *Noongar Way* on the country. I accept that [Name deleted] including a detailed statement of traditional physical connection with the land and waters covered by the application (folio 49, Attachment M1), taken together with his evidence in the inquiry referred to earlier (Inquiry into Objection to Expedited Procedure [reference deleted to protect the privacy of an individual] , demonstrates his traditional physical connection to the claim area. [Paragraph deleted to address the cultural concerns of the applicant]

I further accept that [Name deleted] affidavit, including a detailed statement of traditional physical connection with the land and waters covered by the application (folio 49, Attachment M2) demonstrates the required traditional physical connection to the application area. Specifically, he has lived most of his life in the claim area. He was taught the traditional activities of hunting and gathering, and the importance of caring for the land both physically and spiritually. [sentence deleted to address the cultural concerns of the applicant]

The State' contention on this condition relates to the unamended application and is not useful in my consideration of the amended application, which has specifically addressed this condition.

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

Fol	Date	Description	Cat	Probity, Weight
50	22/ 2/99	Reg test file-Amended application –Form1	M	High

The application meets the conditions as set out in s190B (8).

Reasons for the Decision

I have reviewed the application and accompanying documents and other material and I have reached the conclusion that on each of the conditions set out in s61A there has been compliance.

s61A(1)

The Register of Native Title Determinations does not contain an approved determination of native title relating to the whole or part of the claim area. This is compliance of the requirements of s61A (1).

s61A(2)

The application and accompanying documents (folio 50, Schedule B, Attachment B, *Internal boundaries*, RT file) show that previous exclusive possession act areas (s23B) of the Commonwealth have been excluded from the claim area, and those attributable to the State when it has made provision for that under s23E NTA. This is a formal compliance of the requirement in s61A (2).

s61A(3)

The application and accompanying documents (folio 50, Schedule E Attachment E, RT file) show that 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 s23F NTA was done in relation to an area, and either the act was 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 s23 I.

I note that in the period between the present time and the enactment of the State law, there is a possible imputation that the application covers non-exclusive possession act areas, for example, pastoral leases issued by the State of Western Australia. The application discloses, however, in clause (v) of Attachment E, an intention to make the claimed native title rights subject to any valid rights created under common law or a law of the State or Commonwealth. On this basis I conclude the application complies with s 61A (3).

s61A(4)

The application discloses (folio 50, Attachment B, *Internal boundaries*, paragraph 4, RT file) an intention on the part of the applicants to make exclusions in paragraphs 1 to 3 subject to the provisions of s47, s47A and s47B of the *NTA*. This intention has not been given effect in respect to s47B because the evidence of occupation of the areas is yet to be provided.

I took the view in the condition for s190B (2) (relating to the identification of the area of the claim) that the absence of the specificity in the areas over which s47, 47A and 47B would apply, did not make uncertain the identification of the areas of the claim. I take the same position with respect to the evidence of occupation required if the applicants do establish at some time in the future, an area over which s47B is to apply. It is clear, of course, that the provision of further information relating s47B occupation may amount to an amendment of the application, and a re-submission of the application to the registration test.

For these reasons I am satisfied that the application and its accompanying documents, and other materials do not reveal a failure to comply with s61A (4).

Conclusion.

On review of the application and accompanying documents and of other materials I have formed the view that there has been compliance with s61A, and as a result I conclude that no impermissible application has been made.

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

190B9 (a)	<p><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i></p> <p><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></p>
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The following relevant documents have been extracted from the File Index(es) of material that has been reviewed for this application.

Fol	Date	Description	Cat	Probity, Weight
50	22/2/99	Reg test file-Amended application- form1	M	High

The application meets the conditions as set out in s190B (9) (a).

Reasons for the Decision

The application acknowledges at Schedule Q that;

- (i) To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants.

Having reviewed the native title rights and interests as set out in Schedule E (folio 50, Schedule E, RT file) and having regard to other material available to me, I find there is no disclosure that this stated position limiting the applicants' native title rights and interests is abrogated or negated in the specifics of the rights claimed elsewhere. I note for example, that the rights and interest claimed include at item (e) the right to use and enjoy resources of the area, and at item (k), the right to trade in resources of the area. I find that these rights are validly the subject of limitation as set out in Schedule Q, leaving whatever resource rights are to be enjoyed under native title, as not including those resources (minerals, petroleum, or gas) wholly within the ownership of the Crown.

190B9 (b)	<p><i>Exclusive possession of an offshore place:</i></p> <p><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i></p> <p><i>(b) to the extent that the native title rights and interests claimed relate to waters in an offshore place - those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place;</i></p>
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The following relevant documents have been extracted from the File Index(es) of material that has been reviewed for this application.

Fol	Date	Description	Cat	Probity, Weight
50	22/2/99	Reg test file-Amended application-file 1	M	High

The application meets the conditions as set out in s190B (9) (b).

Reasons for the Decision

The application acknowledges in Attachment E, (folio 50, Schedule E, Attachment E, The qualifications, paragraph (ii), RT file), that the native title rights and interests claimed are subject to the following qualification;

‘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.’

Having regard to this limitation on claimed rights and interests, it is not necessary for me to find whether there is any offshore place within the claim area to which it may refer.

The application and accompanying documents do not disclose, and I am otherwise not aware that the limitation expressed in paragraph (ii) has been abrogated or negated in the specifics of the native title rights and interests claimed.

For this reason, I conclude that the condition as set out in s 190B (9) (b) is satisfied.

190B9 (c)	<p>Other extinguishment:</p> <p>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</p> <p>(c) in any case - the native title rights and interests claimed have otherwise been extinguished (except to the extent that the extinguishment is required to be disregarded under subsection 47(2), 47A(2) or 47B(2)).</p>
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The following relevant documents have been extracted from the File Index(es) of material that has been reviewed for this application.

Fol	Date	Description	Cat	Probity, Weight
50	22/2/99	Reg Test file-Amended Application-Form 1	M	High

The application meets the conditions as set out in s190B (9) (c).

Reasons for the Decision

The condition in s190B (9) (c) relates to any other case where native title rights and interests claimed, have otherwise been extinguished (subject to the s 47, 47A and 47B provisions).

The application discloses two approaches to this broad requirement for limiting claimed native title rights and interests where they have otherwise been extinguished; the first by acknowledging the subservience of the claimed rights to other validly granted rights and the second, by the exclusion generally of areas over which native title rights have been otherwise extinguished.

The application states in Attachment E paragraph (v);
'The native title rights and interests claimed are subject to any valid rights created under the common law or a law of the State or the Commonwealth'.

Secondly the application states in relation to the area of the claim (folio 50, Schedule B, Attachment B, *Internal boundaries* paragraph 3, RT file);

The applicants exclude from the claim area any areas in relation to which native title has 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,
- (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 applicants say (folio 50, Schedule B Attachment B, *Internal boundaries*, RT file) that for additional clarity, they exclude; unqualified grant of an estate in fee simple, (and a range of other tenures, as listed and discussed elsewhere, eg s190B (2)).

A question arises whether the acknowledgment of the subservience of the native title rights to other validly granted rights and interests, can be read as the absence of a claim to native title rights and interests where they have otherwise been extinguished. I do read it in that way; 'subject to' includes 'extinguishment of' rights and interests.

A second question arises as to whether the exclusion of areas over which native title rights and interests have otherwise been extinguished (including by legislative action, adverse dominion, or actual use by a tenure holder that is inconsistent with the existence of native title) can be read as an absence of a claim to native title rights and interests where they have otherwise been extinguished. I am satisfied that because native title rights and interests are given expression in relation to an area of land or waters, exclusion of particular land or waters is an exclusion of a 'claim for native title rights and interests' over those lands and waters.

Having had regard to the application and its accompanying documents and to other sources available to me, I conclude that they do not disclose that the native title rights and interests claimed are otherwise extinguished. I conclude that the condition set out in s190B (9) (c) is met.

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