

National Native Title Tribunal

REGISTRATION TEST
REASONS FOR DECISION

DELEGATE	Malcolm O'Dell
DATE	23 April 1999

Application Name	Wagyl Kaip		
Name(s) of Applicant(s)	Alan Bolton, Hazel Brown, Glen Colbung, Ken Colbung, Rita Dempster, Kevin Miller, Sam Miller, Rose Pickett, Cedric Roberts, Mark Smith, Mingli Wanjuri-Nungala, Marlene Ware.		
Region	South West WA	NNTT No	WC 98/70
Date Application Made	29/09/98	Fed Court No	WAG 6286/98

Brief History of the application

This is an application lodged with the Tribunal on 29 September 1998.

The application was amended in the Federal Court on 9 March 1999.

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

All legislative references are to the Native Title Act unless otherwise specified.

Information considered when making the Decision

Under Table A schedule 5 of the Native Title Act [see specifically Part 4 – 11(8)], in determining this application 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: WC98/70 – Wagyl Kaip
- Tenure information in relation to the area covered by the this application
- The National Native Title Tribunal Geospatial Database
- The Register of Native Title Claims
- The Native Title Register
- Determination of Representative ATSI Bodies: their gazetted boundaries
- Submissions from the Western Australian State Government

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

A. Procedural Conditions

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

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

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

61(5)	<i>Application is in the prescribed form, lodged in the Federal Court, contain prescribed information, and accompanied by prescribed documents and fee</i>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. The application is in the form prescribed by Regulation 5(1)(a) Native Title (Federal Court) Regulations 1998. 2. As required under section 61(5)(b), the amended application was filed in the Federal Court. 3. The application meets the requirements of section 61(5)(c) and contains all information as prescribed in section 62. See reasons for recommendation in relation to those sections. 4. As required by section 61(5)(d) the application is accompanied by: <ul style="list-style-type: none"> • Affidavits as prescribed by section 62(1)(a) (see reasons for recommendation in relation to that section) • A map as prescribed by sections 62(1)(b) (see reasons for recommendation in relation to section 62(2)(b)) 5. No fees are payable pursuant to Regulation 8(a) Native Title (Federal Court) Regulations 1998. 6. For the reasons outlined above, the requirements of s.61(5) are met. 	

Details required in section 62(1)

62(1)(a)	<i>Affidavits address matters required by s62(1)(a)(i) – s62(1)(a)(v)</i>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. Affidavits in the prescribed form and addressing the matters required by s62(1)(a)(i) – s62(1)(a)(v) are supplied for each of the 12 applicants. 2. The requirements of s.62(1)(a) are met. 	

62(1)(c)	<i>Details of physical connection (information not mandatory)</i>
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Comment on details provided	
<ol style="list-style-type: none"> 1. The amended application contains details relating to physical connection at Schedule M. 	

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>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. A description, sufficient for the area covered by the application to be identified, is provided at Schedule B, Attachment B and a map supplied at Attachment C of the amended application. 2. For the reasons given at s.190B(2), this description satisfies s.62(2)(a)(i). 	

62(2)(a)(ii)	<i>Information identifying any areas within those boundaries which are not covered</i>
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Reasons relating to this sub-condition	Application passes the condition
<ol style="list-style-type: none"> 1. Information identifying the 'internal boundaries' of the application is given at Schedule B, and Attachment B of the amended application in the following terms: <ol style="list-style-type: none"> 2. <i>The applicants exclude from the claim any areas covered by valid acts on or before 23 December 1996 comprising such of the following as are included as extinguishing acts within the Native Title Act 1993, as amended, or the Titles Validation Act 1994, as amended, at the time of the Registrar's consideration:</i> <ol style="list-style-type: none"> a. <i>Category A past acts, as defined in NTA s.229;</i> b. <i>Category A intermediate period acts, as defined in NTA s.232B.</i> 2. <i>The applicants exclude from the claim any areas in relation to which a previous exclusive possession act, as defined in s.23B of the NTA, was done in relation to the area, and either the act was an act attributable to the Commonwealth, or the act was an act attributable to the State of Western Australia, and a law of that State has made provision as mentioned in s.23E in relation to the act at the time of the Registrar's consideration.</i> 3. <i>The applicants exclude from the claim areas in relation to which native title rights and interests have otherwise been extinguished, including areas subject to:</i> <ol style="list-style-type: none"> a. <i>an act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or</i> b. <i>actual use made by the holder of a tenure other than native [title] which is permanently inconsistent with the continued existence of native title.</i> <p>AND to avoid any uncertainty, the applicants exclude from the claim;</p> 	

<p>c an unqualified grant of an estate in fee simple; or</p> <p>d a lease which is currently in force, in respect of an area not exceeding 5,000 square metres; upon which a dwelling, house, residence, building or work is constructed; and which comprises:</p> <p style="margin-left: 20px;">i. a lease of a worker's dwelling under the Workers' Homes Act 1911-1928; or</p> <p style="margin-left: 20px;">ii. a 999 year lease under the Land Act 1898; or</p> <p style="margin-left: 20px;">iii. a lease of a Town Lot or Suburban Lot pursuant to s.117 of the Land Act 1933 (WA), or</p> <p style="margin-left: 20px;">iv. a special lease under s.117 of the Land Act 1933 (WA); or</p> <p>e a Conditional Purchase Lease currently in force in the agricultural areas of the South West Division under clauses 46 and 47 of the Land Regulations 1887, which includes a condition that the lessee reside on the area of the lease and upon which a residence has been constructed; or</p> <p>f a Conditional Purchase lease of cultivable land currently in force under Part V, Division (1) of the Land Act 1933 (WA) in respect of which habitual residence by the lessee is a statutory condition in accordance with the Division and upon which a residence has been constructed; or</p> <p>g a Perpetual Lease currently in force under the War Service Land Settlement Scheme Act 1954; or</p> <p>h a permanent public work; or</p> <p>i an existing public road or street used by the public.</p> <p>4. Paragraphs (1), (2) and (3) above are subject to such of the provisions of sections 47, 47A and 47B of the NTA as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing but which include areas that are occupied by one or more of the native title claim group and may be listed in Schedule L at a later date.</p>	<p>1. For the reasons given at s.190B(2) the application passes this condition.</p>
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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	Recommend application passes the condition
<p>1. The amended application at attachment C includes a map showing the external boundaries of the area covered by the application.</p> <p>2. For the reasons given at s.190B(2), the application passes this condition.</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	Application passes the condition
<p>1. Schedule D and Attachment D of the amended application includes details/results of searches carried out by the NNTT and by the State Government.</p> <p>2. The application passes this condition.</p>	

62(2)(d)	Description of native title rights and interests claimed
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Reasons relating to this sub-condition	Application passes the condition
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<p>1. The amended application at Schedule E and Attachment E contains a description of the native title rights and interests claimed in respect of the area claimed.</p> <p>2. The native title rights and interests are described as follows:</p> <p style="text-align: center;">The Qualifications</p> <p>The applicants claim in relation to the claim area, including land and waters, the native title rights and interests set out below ("The Rights and Interests") subject to the following qualifications:</p> <p>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;</p> <p>ii. To the extent that the native title rights and interests claimed may relate to waters in an offshore place, those rights and interests are not to the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under international law in relation to the whole or any part of the offshore place;</p> <p>iii. The applicants do not make a claim to native title rights and interests which confer possession, occupation use and enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in section 23F of the <i>Native Title Act</i>, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia, and a law of that State has made provision as mentioned in section 23I in relation to the act.</p> <p>iv. Paragraph (iii) above is subject to such of the provisions of sections 47, 47A and 47B of the NTA as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing but which include such areas as may be listed in Schedule L.</p> <p>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.</p> <p style="text-align: center;">The Rights and Interests</p> <p>Subject to the above qualifications, the rights and interests claimed in relation to the claim area, including land and waters, are:</p> <p>a. rights and interests to exclusively possess, occupy, use and enjoy the area;</p> <p>b. the right to make decisions about the use and enjoyment of the area;</p> <p>c. the right of access to the area;</p> <p>d. the right to control the access of others to the area;</p> <p>e. the right to use and enjoy resources of the area;</p> <p>f. the right to control the use and enjoyment of others of resources of the area;</p> <p>g. the right to maintain and protect places of importance under traditional laws, customs and practices in the area;</p> <p>h. the right to maintain, protect and prevent misuse of cultural knowledge of the common law native title holders associated with the area;</p>	
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i.	the right to rear and teach children in their country;
j.	the right to live on and erect residences and other infrastructure on the land;
k.	the right to trade in resources of the area;
l.	the right to receive a portion of any resources taken by others from the area; and
m.	the right to manage, conserve and look after the land, waters and resources, including locating and cleaning water sources and drinking water on the land.
3. This description satisfies s.62(2)(d)	

62(2)(e)(i)	<i>Factual basis – claim group has, and their predecessors had, and association with the area</i>
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Reasons relating to this sub-condition	Application passes the condition
1. A general description of the factual basis for the assertion that the claim group has, and their predecessors had, an association with the area is given at Schedule F, Attachment F and Table F of the amended application.	
2. This description satisfies s.62(2)(e)(i)	

62(2)(e)(ii)	<i>Factual basis – traditional laws and customs exist that give rise to the claimed native title</i>
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Reasons relating to this sub-condition	Application passes the condition
1. A general description of the factual basis for the assertion that traditional laws and customs exist that give rise to the claimed native title is given at Schedule F, Attachment F and Table F of the amended application.	
2. This description satisfies s.62(2)(e)(ii)	

62(2)(e)(iii)	<i>Factual basis – claim group has continued to hold native title in accordance with traditional laws and customs</i>
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Reasons relating to this sub-condition	Application passes the condition
1. A general description of the factual basis for the assertion that the claim group has continued to hold native title in accordance with traditional laws and customs is given at Schedule F, Attachment F and Table F of the amended application.	
2. This description satisfies s.62(2)(e)(iii)	

62(2)(f)	<i>If native title claim group currently carry on any activities in relation to the area claimed, details of those activities</i>
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Reasons relating to this sub-condition	Application passes the condition
1. Details of activities currently carried out by the claimant group in relation to the area claimed are included at Schedule F, Attachment F, Table F, Schedule G and Attachment G of the amended application.	
2. These details satisfy s.62(2)(f).	

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

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

Reasons for the Decision

<ol style="list-style-type: none"> 1. For the reasons identified above the amended application contains all details and other information, and is accompanied by the affidavits and other documents, required by ss.61&62. 2. I am satisfied that the application meets the requirements of this condition. 	
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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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Reasons for the Decision

1. A check of the Register of Native Title Claims was conducted on 23 April 1999.
2. This check revealed that no overlapping native title claim is on the Register of Native Title Claims or has not been removed from the Register of Native Title Claims, as a result of consideration pursuant to s190A.
3. I am satisfied that the requirements of s.190C3 are met.

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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Reasons for the Decision

1. At Attachment R of the amended application the applicants have provided a certificate issued by a Native Title Representative Body pursuant to s.202(4)(d).
2. An inspection of the Native Title Representative Body gazetted boundaries establishes that the claim area is wholly within the Noongar Land Council gazetted area.
3. Section 190C(4)(a) requires certification by each representative Aboriginal/Torres Strait Islander body that could certify the application. Section 190C(6) qualifies this requirement, stating that certification is not required by all representative bodies if the application has been certified by a body whose area includes all of the area of land or waters to which the application relates. As indicated above, the Noongar Land Council is such a body.

Certification by the Noongar Land Council

4. There appears to be no legally required format for certification of a claimant application other than it must be in writing (s.202(4)(d)) and that it must contain the information required under s.202(7).

Compliance with s.202(7)

5. Section 202(7) of the Act sets out the statements to be included in certification of an application for determination of native title in the following terms:

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

- a *include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (5)(a) and (b) have been met; and*
- b *Briefly set out the body's reasons for being of that opinion; and*
- c *Where applicable, briefly set out what the representative body has done to meet the requirements of subsection (c)*

1. The certificate provide by the applicant is signed by Lynette Lund, Native Title Manager, Noongar Land council and dated 10 February 1999.
2. In my view the certificate provided by the applicant complies with s.202(7).

Conclusion

8. As a result of the above considerations, I am satisfied that the application has been certified by the Noongar Land Council pursuant to s.202(4)(d) and in accordance with s.207(7).
9. This certification satisfies the requirements of s.190C(4) of the Act.

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190C5

Evidence of authorisation:

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:

- (a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and**
- (b) briefly sets out the grounds on which the Registrar should consider that it has been met.**

Reasons for the Recommendation

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| 1. This requirement is not applicable. See reasons for 190C4. |
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B. Merits Conditions

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

<p><u>Map and External Boundary Description</u></p> <ol style="list-style-type: none">1. A map is supplied at Attachment C of the amended application.2. The map supplied shows the external boundaries of the areas claimed3. The map displays co-ordinates to enable the position of sites or localities within the claim to be identified. In addition, it shows a scale allowing distances and areas to be ascertained. It identifies pastoral leases, State forest, un-allocated Crown Land, Freehold roads and water, Reserves and other tenure. A locality diagram, which indicates generally the position of the claim within Western Australia, forms part of the map provided. All the line work on the map is finely drawn and easy to follow.4. The map meets the requirements of s62 (2)(b) as the boundaries of the areas covered by the application can be identified.5. Additional information identifying the external boundary of the claim is supplied at Attachment B of the amended application.6. The Tribunal's Geo-spacial Unit has plotted this information and concludes that the description is internally consistent, fully encloses the claim area and does not discernibly contradict the map accompanying the application. <p><u>Internal Boundary Description</u></p> <ol style="list-style-type: none">7. Areas excluded from the application are described at Schedule B(b) of the amended

application.

8 These excluded areas form the areas within the (external) boundary which are not covered by the application, that is, the internal boundary description.

9 The areas excluded from the application are described in the following terms:

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

AND to avoid any uncertainty, the applicants exclude from the claim;

- c. *an unqualified grant of an estate in fee simple; or*
 - d. *a lease which is currently in force, in respect of an area not exceeding 5,000 square metres; upon which a dwelling, house, residence, building or work is constructed; and which comprises:*
 - i. *a lease of a worker's dwelling under the Workers' Homes Act 1911-1928; or*
 - ii. *a 999 year lease under the Land Act 1898; or*
 - iii. *a lease of a Town Lot or Suburban Lot pursuant to s.117 of the Land Act 1933 (WA), or*
 - iv. *a special lease under s.117 of the Land Act 1933 (WA);*
or
 - e. *a Conditional Purchase Lease currently in force in the agricultural areas of the South West Division under clauses 46 and 47 of the Land Regulations 1887, which includes a condition that the lessee reside on the area of the lease and upon which a residence has been constructed; or*
 - f. *a Conditional Purchase lease of cultivable land currently in force under Part V, Division (1) of the Land Act 1933 (WA) in respect of which habitual residence by the lessee is a statutory condition in accordance with the Division and upon which a residence has been constructed; or*
 - g. *a Perpetual Lease currently in force under the War Service Land Settlement Scheme Act 1954; or*
 - h. *a permanent public work; or*
 - i. *an existing public road or street used by the public.*
4. *Paragraphs (1), (2) and (3) above are subject to such of the provisions of sections 47, 47A and 47B of the NTA as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing but which include areas that are occupied by one or more of the native title claim group and may be listed in Schedule L at a later date.*

10 The description of areas excluded from the claim area at Attachment B(b) paragraphs 1, 2, and 3(a) refer to land where an act of a State or Commonwealth government has created an interest. The excluded areas of land can be readily identified through searches of relevant

Government registers and are therefore described with reasonable certainty. (Note: at the time of making this decision, the State of Western Australia has not passed legislation referred to at s.23E of the amended Act.)

- 11 Paragraph 3(b) of Attachment B(b) excludes areas of land where actual use by the holder of a tenure is permanently inconsistent with continued existence of native title. Paragraphs 3(c) – (i) gives further information on specific areas of land excluded from the claim which may fall into this category. The description in paragraph 3(b) read together with Paragraph 3(c) – (i) is sufficient for me to be satisfied that the areas excluded from the application, are identified with reasonable certainty.
- 12 The applicants seek the protection of ss.47, 47A and 47B by stating at paragraph 4 of Attachment B(b) that any areas excluded from the claim area are subject to these legislative provisions. Details of what, if any, areas are subject to this legislative protection are not provided.
- 13 The description at paragraph 4 allows it to be shown objectively, upon the provision of such particulars, whether applicants may have the benefit of these provisions.

Conclusion

- 14 For the reasons given above, I am satisfied that the information and map contained in the application as required by paragraphs 62(2)(a) and (b) 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.

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

1. The native title claim group is described at Schedule A and Attachment A of the amended application in the following terms:

The claimants comprise those Aboriginal people who are:

1. the biological descendants of unions between:-
 - Billy Colbung + Clara Brockman + Nina Bayla Brockman;
 - Helen Williams + Bill Woods;
 - Sarah Yettung James + Jack Woods;
 - Sammy 'Jimmy' Miller + Polly, from Gnowangerup;
 - Alice Davidson + Alice Williams + Henry Woods;
 - Charles or Peter Eades + Lucy Coyne;
 - William Hayward + Minnie Knapp;
 - Emily Coyne + William 'Peg' Farmer;

- Fred Coyne + Margaret Davidson;
- Johnny Penny + Margaret 'Maggie' Piggott (Starlight);
- Charles Williams + Ellen Nelly Foot;
- Elijah Quartermaine + Mary 'Wartum';
- Ah-Lee + Mary Bateman;
- Peerup Roberts + Monkey + Emily (Mudah) D'Abb;
- Edward Smith + Sarah Punch;
- Ernie or George Moir or Muir + Aboriginal woman named Karlbyirt.

1. Those persons adopted by the individuals named in (1) above and those persons adopted by the biological descendants of the unions between the individuals names in (1) above.
2. Those persons that are the biological descendants of the adopted persons included in (2) above.

Adoption occurs in the following manner: if a man dies and his brother or cousin marries the widow, any of the widow's children are adopted as the children of the new husband.

Specifically excluded from being claimants are the persons listed in attachment A(1).
[Attachment A(1) deleted to protect the privacy of individuals]

2. On 1 April 1999 the applicants provided clarification of those persons excluded from the claim in the following terms:

"On attachment A1 to this Application there is a list of names which are excluded from the native title claimant group. We wish to clarify the following references on pages 19.5 and 19.6:

[names deleted for privacy purposes]

The references to "family members" or references to "and family members" means in all cases only the direct biological descendants of the persons named eg the natural children and grandchildren of [name deleted]. This has always been our understanding and we provide this additional information to clarify this issue."

1. I find that the persons in the native title claim group are those aboriginal people who are:
 - The biological descendants of the unions between the 16 named ancestral pairs of people.
 - Persons adopted by named ancestors or their descendants
 - Biological descendants of the adopted persons.
 - Excluded from the claim group are the people listed at attachment A1 of the amended application.
1. As Schedule A relies on a description other than naming the persons in the claim group, the application does not satisfy s.190B3(a). Consequently, the applicants must rely on satisfying s.190B3(b).
2. In my view the description of the members of the claim group at schedule A provides an objectively verifiable mechanism for ascertaining whether any particular person is in the claim group. The people included are referenced by their relationship to named ancestors. Also, notwithstanding that the list of people excluded from the application at attachment A1 appears to duplicate the names of certain persons, this list read together with the letter of 1 April 1999 which clarifies parts of the description, in my view allows those people excluded from the claim group to be objectively ascertained.

3. I am therefore satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.
4. The description satisfies the requirements of s.190B(3)(b).

190B4	<i>Identification of the native title rights and interests:</i> <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>
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Reasons for the Decision

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

The Qualifications

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

- i. To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants;
- ii. To the extent that the native title rights and interests claimed may relate to waters in an offshore place, those rights and interests are not to the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under international law in relation to the whole or any part of the offshore place;
- iii. The applicants do not make a claim to native title rights and interests which confer possession, occupation use and enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in section 23F of the *Native Title Act*, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia, and a law of that State has made provision as mentioned in section 23I in relation to the act.
- iv. Paragraph (iii) above is subject to such of the provisions of sections 47, 47A and 47B of the NTA as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing but which include such areas as may be listed in Schedule L.
- v. The native title rights and interests claimed are subject to any valid rights created under the common law or a law of the State or the Commonwealth.

The Rights and Interests

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

- a. rights and interests to exclusively possess, occupy, use and enjoy the area;
- b. the right to make decisions about the use and enjoyment of the area;
- c. the right of access to the area;
- d. the right to control the access of others to the area;
- e. the right to use and enjoy resources of the area;
- f. the right to control the use and enjoyment of others of resources of the area;
- g. the right to maintain and protect places of importance under traditional laws, customs and practices in the area;
- h. the right to maintain, protect and prevent misuse of cultural knowledge of the common law native title holders associated with the area;
- i. the right to rear and teach children in their country;
- j. the right to live on and erect residences and other infrastructure on the land;
- k. the right to trade in resources of the area;
- l. the right to receive a portion of any resources taken by others from the area; and
- m. the right to manage, conserve and look after the land, waters and resources, including locating and cleaning water sources and drinking water on the land.

- 1 In my view the native title rights and interests described at schedule E are readily identifiable. 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.
- 2 In my view, the qualifications listed at 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.
- 3 In addition, 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.
- 4 The description is more than a statement that native title rights and interests are 'all native title interests that may exist, or that have not been extinguished at law'.
- 5 I am satisfied that the description in schedule E allows the native title rights and interests claimed too be readily identified in compliance with s.190B(4).

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

<p>1. This condition requires me to be satisfied that the factual basis on which it is asserted that there exist native title rights and interests described at schedule E of the amended application, is sufficient to support that assertion.</p> <p>2. In reaching this decision I must be satisfied that the factual basis supports the 3 criteria identified at s.190B5 (a) – (c).</p> <p><u>Evidence</u></p> <p>3. Schedule E and Attachment E, Schedule F, Attachment F and Table F, Schedule G and Attachment G of the amended application contains information in support of this condition.</p> <p>4. Also submitted by the applicants for my consideration are:</p> <ul style="list-style-type: none">• Affidavits and other information submitted by [names deleted].• Affidavit of [name deleted] dated, 21 April 1999 <p><u>190B(5)(a) - that the native title claim group have, and the predecessors of those persons had, an association with the area</u></p> <p>1. This criteria requires me to be satisfied that:</p> <ul style="list-style-type: none">• the members of the native title claim group currently have an association with the area (under claim) <i>and</i>• the predecessors in title or antecedents of the members of the native title claim group had an association with the area (under claim) <p>7 The word 'association' is not defined in the Act. In my view, the nature of the association required to be demonstrated by the applicants is governed by the nature of the native title rights and interests claimed. In this case the applicants claim the rights and interests identified at schedule E of the amended application. These rights and interests are, broadly, both physical and cultural in nature and therefore in my view the nature of the association required to be demonstrated needs to be both physical and cultural. Cultural association in turn may, in my view, be spiritual in nature.</p> <p>8 In addition, as native title rights and interests are defined as being related to land and waters (s.223 of the Act), in my view the information about the association of members of the native title claim group must relate to the area of land and waters where the particular</p>

native title rights and interests are claimed. In this case the extent of land and waters claimed is identified at schedule B of the amended application. I must therefore be satisfied that the members of the native title claim group are and that their predecessors were, broadly associated with the particular land and waters claimed. I note in this case that the external boundary of the claim encloses an area of 52,246 square kilometres.

9 Table F of the amended application provides information that supports this sub condition. It sets out a tabulated description about descent, and the continuing connection of the relevant families to the claim area.

10 This is further supported by the additional affidavits provided [names deleted]

11 The affidavit of [name deleted], corroborates the information provided by [names deleted] and the information provided in Table F and additionally provides further information on the association to the area covered by the application by members of the native title claim group and their predecessors.

12 I am satisfied that the information provided is sufficient to support the assertion that native title claim group have, and the predecessors of those persons had, in association with the area.

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

13 This subsection requires me to be satisfied that:

- traditional laws and customs exist;
- that those laws and customs are respectively acknowledged and observed by the native title claim group, and
- that those laws and customs give rise to the native title rights and interest claimed

13 Table F of the amended application contains information [sentence deleted due to cultural/customary concerns].

14 The affidavits [sentence deleted due to cultural/customary concerns].

15 This information supports the notion that this body of traditional law and custom governs the behaviour of members of the native title claim group and that this gives rise to the claimed native title rights and interests.

16 I am satisfied that this criterion is met.

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

17 This criterion requires me to be satisfied that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

18 Table F (c) of the amended application provides information about the transmission of knowledge by which the Noongar Way is passed from generation to generation. [sentence deleted due to cultural/customary concerns].

19 Statements made by [names deleted] further support this information.

20 In my view the applicants have provided sufficient evidence to demonstrate that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

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

Summary

- 13 In summary, each applicant has sworn to the truth of the statements contained in the amended application, which contain certain assertions that support the factual basis.
- 14 The accompanying information tells a 'story' [sentence deleted due to cultural/customary concerns].
- 15 Statements are made and corroborated information is provided connecting members of the claim group and their predecessors to the area of the claim and to their adherence to traditional laws and customs.
- 16 [Paragraph deleted due to cultural/customary concerns].

Conclusion

- 17 There is evidence to support the factual basis in each of the 3 criteria identified at s.190B5 (a) – (c). This evidence in turn is sufficient for me to be satisfied that the factual basis on which the assertion of the existence of the native title rights and interests claimed is sufficient to support the assertion.

190B6

Prima facie case:

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

Reasons for the Decision

Information considered

1. In addition to material previously identified, submitted by the applicants for my consideration are:
 - Affidavits provided by [names deleted], both dated 25 February 1999.
 - Affidavit of [name deleted], dated 21 April 1999.

Findings

1. This condition of the Registration Test requires me to be satisfied that at least *some* (one) of the Native Title rights and interests claimed can, *prima facie*, be established.
2. It is necessary however to consider whether a *prima facie* case is established against each of the Native Title rights and interests identified as the right to negotiate only attaches to those identified interests against which a *prima facie* case has been established.
3. Native title rights and interests are defined at s.223 of the Native Title Act. This definition attaches native title rights and interests to land and water and requires that:
 - the rights and interests must be possessed under traditional laws and customs;
 - those people claiming the rights and interests by those laws and customs must have a connection with the relevant land and waters; and
 - those rights and interests to be recognised under the common law of Australia.
5. I have already outlined in my reasons at s.190B(5) that I am satisfied that the members of the native title claim group continue to adhere to traditional laws and customs that support the factual basis for the native title rights and interests claimed.
6. On the evidence provided I am satisfied that the native title rights and interests listed below can, *prima facie* be made out, subject to the following:
 1. To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants.
 2. To the extent that the native title rights and interests claimed may relate to waters in an offshore place, those rights and interests are not to the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under international law in relation to the whole or any part of the offshore place.
 3. The applicants do not make a claim to native title rights and interests which confer possession, occupation use and enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in section 23F of the *NTA*, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia, and a law of that State has made provision as mentioned in section 23I in relation to the act.
 4. The native title rights and interests claimed are subject to any valid rights created

under the common law or a law of the State or the Commonwealth.

- a. rights and interests to exclusively possess, occupy, use and enjoy the area;
 - b. the right to make decisions about the use and enjoyment of the area;
 - c. the right of access to the area;
 - d. the right to control the access of others to the area;
 - e. the right to use and enjoy resources of the area;
 - f. the right to control the use and enjoyment of others of resources of the area;
 - g. the right to maintain and protect places of importance under traditional laws, customs and practices in the area;
 - h. the right to rear and teach children in their country;
 - i. the right to receive a portion of any resources taken by others from the area; and
 - j. the right to manage, conserve and look after the land, waters and resources, including locating and cleaning water sources and drinking water on the land.
7. The applicants did not provide information to support the following rights and interests:
- h. the right to maintain, protect and prevent misuse of cultural knowledge of the common law native title holders associated with the area
 - j. the right to live on and erect residences and other infrastructure on the land
 - k. the right to trade in resources of the area

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

Conclusion

8. The application passes this condition.

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

<p><u>Information considered</u></p> <ol style="list-style-type: none">1. In addition to the amended application the following material was submitted by the applicants for consideration in this condition;<ul style="list-style-type: none">• Affidavits by [names deleted].1. This section requires me to be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.2. Traditional physical connection is not defined in the Native Title Act. I am interpreting this phrase to mean that physical connection should be in accordance with the particular traditional laws and customs relevant to the claim group.3. For the reasons given at s.190B(5), the claim group I am satisfied that there exist traditional laws acknowledged by and customs observed by the claim group sufficient to support traditional physical connection.4. I am further satisfied from the information supplied and identified previously that [names deleted] currently have a traditional physical connection with the land or waters covered by the application.5. The application passes this condition.
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190B8	<p>No failure to comply with s61A:</p> <p><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that, because of s61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.</i></p>
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Reasons for the Decision

<p><u>s61A(1) – Native Title Determination</u></p> <p>A search of the Native Title Register conducted on 23 April 1999, has revealed that there is no approved determination of native title in relation to the area claimed in this application</p> <p><u>S61A(2) – Previous Exclusive Possession Acts</u></p> <p>In attachment B(b) of the application, certain tenures are excluded from the claim area. For reasons provided above at s190B(2) these exclusions are sufficiently clear to provide reasonable certainty about all the tenure excluded.</p> <p>The claim has not been made over tenure to which a previous exclusive possession act, as defined in s23B, applies.</p> <p><u>S61A(3) – Previous Non-Exclusive Possession Acts</u></p> <p>The applicants are not seeking exclusive possession over areas the subject of previous non-exclusive possession acts. [See Attachment E (iii)]</p> <p><u>S61A(4) – s47, 47A, 47B</u></p> <p>The applicants have sought to invoke the provisions of s47, 47A or 47B of the Native Title Act.</p> <p><u>Conclusion</u></p> <p>For the reasons identified above the application and accompanying documents do not disclose and is not otherwise apparent that because of Section 61A the application should not have been made.</p> <p>The application passes this condition.</p>
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190B9 (a)	<p><i>Ownership of minerals, petroleum or gas wholly owned by the Crown:</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>(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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Reasons for the Decision

<ol style="list-style-type: none">1. Native title rights and interests are described at Schedule E of the amended application.2. None of the native title rights described in Schedule E claim ownership of resources including minerals, petroleum or gas.3. In any event, Schedule Q in the amended application makes the statement that: <p style="margin-left: 40px;">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.</p>4. Consequently, the application and accompanying documents do not disclose, and I am not otherwise aware that the applicant claims ownership of minerals, petroleum or gas that is wholly owned by the Crown.5. The application passes this condition.

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

<ol style="list-style-type: none">1. The application does not appear to claim any offshore place.2. In any event the application qualifies the native title rights identified at Schedule E by making them conditional on Schedule P which qualifies the native title rights in the following manner: <p style="margin-left: 40px;">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.</p>3. The application passes this condition.

190B9 (c)	Other extinguishment: 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)).
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Reasons for the Decision

1. The application and accompanying documents do not disclose, and it is not otherwise apparent that the native title rights and interests claimed have otherwise been extinguished by any mechanism, including:
 - a break in traditional physical connection;
 - non-existence of an identifiable native title claim group;
 - by the non-existence of a system of traditional laws and customs linking the group to the area
 - an entry on the Register of Indigenous Land Use Agreements.
2. In any event, the amended application at Schedule B(3) excludes all areas in relation to where native title rights and interests have otherwise been extinguished. I am satisfied that because native title rights and interests must relate to land and waters (see definition s.223 of the Native Title Act) the exclusion of particular land and waters is an exclusion of native title rights and interests over those lands and waters.
3. For the above reasons I am satisfied that the application meets this condition.

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