

Reason

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Application (NNTT) No: WC99/12; WC96/51; WC96/73
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Decision made:
Decision: Accepted

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Brief history of the amended application

On 26 March 1999 a notice of motion seeking leave to amend two native title determination applications was filed in the Perth Registry of the Federal Court by the Aboriginal Legal Service on behalf of the applicants.

On 16 April 1999 Deputy District Registrar Stanley made orders that application WAG 6090 of 1998 be amended and combined with application WAG 6105 of 1998 that the two applications be continued under application WAG 6090 of 1998.

Details of the two applications that have been combined to form the amended application under consideration are:

NNTT#	Fed Crt #	Name	Date Lodged	Date Registered
WC96/51	WAG6090/98	Kuruma People	13 May 1996	13 May 1996
WC96/73	WAG6105/98	Kuruma Marthudunera People	24 June 1996	24 June 1996

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

Information considered in making the decision

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

- .. The Working Files, Registration Test Files, Legal Services Files and Federal Court Application and Amendment Files for claims WC96/51 and WC96/73.
- .. Other tenure information acquired by the Tribunal in relation to the area covered by this application;
- .. Working files and related materials for native title applications that overlap the area of the application.
- .. The National Native Title Tribunal Geospatial Database;
- .. The Register of Native Title Claims;
- .. The Native Title Register;
- .. Determination of Representative ATSI Bodies - their gazetted boundaries;
- .. Submissions from the Western Australian State Government in relation to the application;

Note: I have not considered information and materials provided in the context of mediation due to the without prejudice nature of those conferences and the public interest in maintaining the confidential nature of such conferences.

Description of the areas claimed:

190B(2)

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

Reasons for the Decision

Map and External Boundaries:

A map is supplied at Attachment C of the amended application. The map shows the external boundaries of the area claimed.

The map displays coordinates sufficient to enable the position of sites or localities within the claim to be identified. The map shows a scale allowing distances and areas to be ascertained and identifies towns, various roads, river, railways, pastoral stations and other localities. All the line work on the map is finely marked and easy to follow.

The map meets the requirements of s62(2)(b) as the boundaries of the areas covered by the application can be identified.

Additional information about the external boundary of the claim is supplied at Schedule B of the amended application.

The Tribunal's Geospatial 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.

Based on advice received from the Tribunal's Geospatial unit, and from advice provided to the applicants' from Department of Land Administration (DOLA), I am satisfied that the technical description of the external boundaries coincides with the map provided.

Internal Boundaries

Areas excluded from the application are described at Schedule B(b) and Schedule B1 of the amended application. These excluded areas form the internal boundary description.

The areas excluded by the application are described in the following terms:

1. The applicants exclude from the claim any areas covered by valid acts on or before 23 December 1996 comprising such of the following as are included as extinguishing acts within the Native Title Act 1993, as amended, or Titles Validation Act 1994, as amended, at the time of the Registrar's consideration:

Category A past acts, as defined in NTA ss228 and 229;

Category A intermediate period acts as defined in NTA ss232A and 232B

2. The applicants exclude from the claim area any areas in relation to which a previous exclusive possession act, as defined in section 23B 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 23E in relation to the act.

3. The applicants exclude from the claim areas in relation to which native title rights and interests have otherwise been extinguished, including areas subject to:

a. An act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or

b. Actual use made by the holder of a tenure other than native title which is permanently inconsistent with the continued existence of native title.

4. Paragraphs (1) to (3) above are subject to such of the provisions of sections 47, 47A and 47B of the Act as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing but which include such areas as may be listed in Schedule L.

5. The applicants exclude from the claim any areas excluded in the original application.

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

Schedule B1

B1.1 An unqualified grant of an estate in fee simple.

B1.2 A Lease which is currently in force, in respect of an area not exceeding 5,000 square metres; upon which a dwelling, house, residence, building or work is constructed; and which comprises:

i. A Lease of a Worker's Dwelling under the Workers' Homes Act 1911-1928;

ii. A 999 Year Lease under the Land Act 1898;

iii. A Lease of a Town Lot or Suburban Lot pursuant to the Land Act 1933 (WA) s117; or

iv. A Special Lease under s117 of the Land Act 1933 (WA).

B1.3 A Conditional Purchase Lease currently in force in the Agricultural Areas of the South West Division under clauses 46 and 47 of the Land Regulations 1887 which includes a condition that the lessee reside on the area of the lease and upon which a residence has been constructed.

B1.4 A Conditional Purchase Lease of cultivable land currently in force under Part V, Division (1) of the Land Act 1933 (WA) in respect of which habitual residence by the lessee is a statutory condition in accordance with the Division and upon which a residence has been constructed.

B1.5 A Perpetual Lease currently in force under the War Service Land Settlement Scheme Act 1954

S190B(3) Identification of native title claim groups Met

190B(3) *Identification of the native title claim group:*

The Registrar must be satisfied that:

- (a) the persons in the native title claim group are named in the application; or*
- (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.*

Reasons for the Decision

The native title claim group is described at Schedule A of the amended application in the following terms:
The Kuruma and Marthudunera claim group are named as follows:

1. Alec, Charlie
2. Alex, Elliot
3. Alexander, Red
4. Alexander, Jack
5. Alexander, Donny
6. Alexander, Valerie
7. Bobby, Rhonda
8. Bobby, Rosie
9. Bobby, Naomi
10. Bobby, Sue
11. Bobby, Maureen
12. Bobby, Christine
13. Bobby, May
14. Bobby, Patrick
15. Bobby, Douglas
16. Bobby, Winston
17. Bobby, Georgina
18. Bobby, Roy
19. Bobby, Arnold
20. David, Ronald
21. Evans, Phyllis
22. Finlay, Neil
23. James, Elaine
24. Lockyer, Valerie
25. Lockyer, Geoffrey
26. Lockyer, Cyril
27. Lockyer, Marilyn
28. Lockyer, Tuesday
29. Lockyer, Sharon
30. Lockyer, May
31. Lockyer, Carol
32. Lockyer, Mark
33. Lockyer, Wallace
34. Lockyer, Gloria
35. Lockyer, Jean
36. Smith, Rodney
37. Smith, Anna
38. Wally, Anne

and their biological children and their children's biological children.

The Kuruma and Marthudunera claim group does not include the following people:

- (a) Those people included in the claim group of native title determination application WC96/89 being:

Margaret Boona
Robert Boona
Patricia Cooper
Colin Cosmos
Kevin Cosmos
Danny Cooper
Audrey Cosmos
Janice Cosmos
Mary Cosmos
Linda Delower
Valerie Holborow
Susan Mowarin
Barbara Sinclair
Gail Sinclair
Dorrie Wally

S190B(4)

Identification of claimed native title

Met

190B(4)

Identification of claimed native title

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

Reasons for the Decision

This condition requires that I am satisfied that the native title rights and interests claimed can be readily identified. To meet the requirement 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

Schedule E of the amended application lists the native title rights and interest claims as follows:

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

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

Subject to:

- (i) To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of 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 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 231 in relation to the act;
- (iv) Paragraph (iii) above is subject to such of the provisions of sections 47, 47A and 47B of the Act as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing.
- (v) The said native title rights and interests are not claimed to the exclusion of any other rights or interests validly created by or pursuant to the common law, the law of the State or a law of the Commonwealth.

The native title rights and interests described at Schedule E are readily identifiable on the basis that the rights and interests are listed separately, and are capable of being associated with activities that are said to be an exercise of those rights and interests.

The qualifications listed at items (i), (ii), (iii), (iv) and (v) are clear in their scope and intention, reciting general limitations to the operation of the listed rights and interests, where relevant.

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'.

I note submissions made by the Crown Solicitor's Office dated 21 December, 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

S190B(5)

Factual basis for claimed native title

Met

190B(5)

Sufficient factual basis:

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

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

Reasons for the Decision

The factual basis for the assertion that the native title rights and interests claimed exist is to be found in Schedule F of the amended application. I have already referred to this in my reasons for decision in relation to s62(2)(e) above. In considering the sufficiency of that factual basis under s190B(5) I am entitled to look at further information provided by the applicants, and to consider any information adverse to that factual basis which is held by the Tribunal.

In reaching this decision I must be satisfied that the factual basis supports the three criteria identified at ss190B5(a)-(c).

In applying this condition I have relied on the information provided at Schedule F and Schedule G in the amended application and on the following **(Information deleted)** and affidavits:

· [Information Deleted]

Schedule F of the application is as follows:

The factual basis of the claim is as follows:

- (a) The native title claimant group and their ancestors have, since the assertion of British Sovereignty possessed, occupied, used and enjoyed the area the subject of the native title claim.
- (b) The native title claim group's rights to such possession, occupation, use and enjoyment derive from and are currently held in accordance with Aboriginal traditional laws and customs, including a custom of title passing by descent.
- (c) The native title continues to be held in accordance with those traditional laws and customs by the native title claim group.

The native title rights and interests are those of and flowing from the right to possession occupation use and enjoyment of the land pursuant to the traditional laws and customs of the claim group based upon the following facts:

- (1) the native title claim group and their ancestors have, before and since the assertion of British sovereignty possessed, occupied, used and enjoyed the claim area; and
- (2) such possession, occupation, use and enjoyment has been pursuant to and possessed under the laws and customs of the claim group including traditional laws and customs that rights and interests in land and waters vest in members of the native title claim group on the basis of:
 - (a) descent from ancestors connected to the area
 - (b) conception in the area
 - (c) birth and/or burial in the area
 - (d) knowledge of the traditional laws of the area
 - (e) traditional knowledge of geography of the area
 - (f) traditional knowledge of the resources of the area
 - (g) knowledge of traditional ceremonies of the area
- (3) such traditional law and custom has been passed by traditional teaching, through the generations preceding the present generation; the present generations of persons comprising the native title claim group;
- (4) the native title claim group continues to acknowledge and observe those traditional laws and customs;
- (5) the native title claim group by those laws and customs have a connection with the land in respect of which the claim is made;
- (6) the rights and interests are capable of being recognised by the common law of Australia.

Schedule G of the application is as follows:

Members of the native title claim group have continuously carried out activities on the land and waters within the area of the claim. In particular, they have possessed, occupied, used and enjoyed the area, including by way of camping, hunting and gathering, fishing, travelling over the land and waters, performing ceremonies, visiting sites, exercising traditional responsibilities for the area, passing on the knowledge of the country and of the traditional law and custom, in accordance with custom and tradition.

S190B(6)

Prima facie case

Met

190B(6)

Prima facie case:

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

Reasons for the Decision

This condition requires me to be satisfied that *at least some* (one) of the native title rights and interest claimed can, *prima facie*, be established.

· [Information Deleted]

Native title rights and interests are defined at s223 of the *Native Title Act 1993*. 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.

I have outlined my reasons for decision at s190B(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 interest claimed.

[Information Deleted]

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

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

I could not find evidence which supports the following native title right and interest:

the right to receive a part of any resources taken by others from the area;

I note submissions made by the Crown Solicitor's Office dated 21 December, 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

Conclusion

The application passes this condition.

S190B(7)

Physical connection

Met

190B(7)

Traditional physical connection:

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

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

Reasons for the Decision

[Information Deleted]

This condition 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.

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.

[Information Deleted]

I note submissions made by the Crown Solicitor's Office in a letter dated 21 December, 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

The application passes this condition.

S190B(8)

No failure to comply with section 61A

Met

190B(8)

No failure to comply with s61A:

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

Reasons for the Decision

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

Schedule B of the amended application, at paragraph (b)(2) states:

The applicants exclude from the claim any areas in relation to which a previous exclusive possession act, as defined in section 23B of the NTA, was done in relation to an area, and, either the act attributable to the Commonwealth, or the act was attributable to the State of West Australia, and a law of that State has made provision as mentioned in section 23E in relation to the act.

Schedule B is set out in full in my reasons for decision in relation to 190(B)(2).

The Titles Validation Amendment Act 1999 (WA) amends the Titles Validation Act 1995 (WA) The TVA. by inserting three new parts. The amendments to the TVA became operative on 5 May 1999. The provisions relating to the validation of intermediate period acts mirror the Native Title Act (NTA).

Part 2B - PEPAs: The State regime differs from that found in the NTA. Only some of the interests defined as PEPAs under s23B of the NTA are confirmed as extinguishing native title under the amended TVA. A type of non-extinguishment principle applies to remainder of t s23B interests.

PEPAs attributable to the State which extinguish native title are limited to:

- a) Freehold or leasehold grants which extinguish native title other than as a result of the application of the amended TVA e.g. grants that extinguish at common law; Refer s 12I(1)(a) of the amended TVA (s 7 of the VAA). This may also include vestings under s 23B(3).
- b) Public works. It appears that extinguishment is confirmed only in relation to the land on which the work is situated. If this is so, the extended definition of "public work" found in section 251D of the NTA does not apply to the amended TVA;

If the following leases do not extinguish at common law, In which case, paragraph a) above would apply, then the amended TVA will operate to extinguish native title so long as the lease was in force on 23 December 1996: Refer s 12I(1)(b) of the amended TVA (s 7 of the VAA).

- c) Commercial leases;
- d) Exclusive agricultural and pastoral leases;
- e) Residential leases;
- f) Dissected mining leases;
- g) Any other lease that confers a right of exclusive possession (other than a mining lease);
- h) Conditional purchase leases granted under: clauses 46 and 47 of the Land Regulations 1887; Part V of the Land Act 1898; or Part V Division (1) of the Land Act 1933;
- i) Perpetual leases under the War Service Land Settlement Scheme Act 1954. The leases mentioned in h) and i) are the only interest from the Schedule which the VAA picks up as extinguishing acts.

The State act includes a "non-extinguishment principle" Refer s 12I(1)(c) of the amended TVA (s 7 of the VAA): "In any other case, the non-native title interests prevail ...but do not extinguish [inconsistent native title rights and interests]...". which applies to all other interests mentioned in s 23B. So, unless native title is extinguished as a result of the operation of common law or otherwise, native title is not extinguished over:

- community purpose leases;
- all Scheduled interests other than those set out in sub-paragraphs h) and i) above (unless they fall into one of the categories of lease listed in paragraphs c) to g) above);
- land vested under legislation which grants exclusive possession to the vestee (see s23B(3) of the NTA) where, at common law, such vesting does not extinguish native title.

PNEPAs: The TVA provisions mirror the NTA provisions. As with the NTA, if an act can be characterised as either a PNEPA or a category A Past Act, then the Past Act provisions prevail.

The exclusion clauses at Schedule B of the amended application adequately exclude by class all tenure to which a previous exclusive possession act applies as was recognised as being allowable under the Native Title Act by Nicholson J in Daniels & Ors v State of WA & (Ngaluma Injibandi) WAG 6017/96 (unreported decision, Federal Court, 21 May 1999).

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

The applicants have invoked the provisions of ss47, 47A or 47B of the Native Title Act.

S190B(9)

No extinguishment etc. of claimed native title

Met

190B(9)

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

(a)

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

(a) to the extent that the native title rights and interests claimed consist or include ownership of minerals, petroleum or gas - the Crown in right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas;

Reasons for the Decision

Native title rights and interests are described at Schedule E of the amended application. Schedule E is set out in full in my reasons for s190B4.

None of the native title rights described in Schedule E claim ownership of resources including minerals, petroleum or gas.

In any event, at Schedule Q in the amended application the following statement is made:

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 Australia, they are not claimed by the applicants.

Consequently, the application and accompanying documents do not disclose, and I am not otherwise aware, that the applicants claim ownership of minerals, petroleum or gas that is wholly owned by the Crown.

I note submissions made by the Crown Solicitor's Office in a letter dated 21 December 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

The application passes this condition.

190B(9)

Exclusive possession of an offshore place:

(b)

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

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

Reasons for the Decision

Native title rights and interests are described at Schedule E of the amended application. Schedule E is set out in full in my reasons for s190B4.

None of the native title rights described in Schedule E claim ownership of resources including minerals, petroleum or gas.

In any event, at Schedule P in the amended application the following statement is made:

To the extent that the native title rights and interests claimed may relate to waters in a 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.

Consequently, the application and accompanying documents do not disclose, and I am not otherwise aware, that the applicants claim rights and interests which purport to exclude all other rights and interests in relation to the whole or part of the offshore place.

I note submissions made by the Crown Solicitors Office in a letter dated 21 December, 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

The application passes this condition.

Other extinguishment:

190B(9)

(c)

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

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

Reasons for the Decision

Native title rights and interests are described at Schedule E of the amended application. Schedule E is set out in full in my reasons for s190B4.

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.

In any event the amended application at Schedule B(b)(3) the following statement is made:

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.

The application also details, to avoid uncertainty, some of the significant classes of tenure which are excluded. The relevant tenure classes are detailed in my reasons for s190B2.

Because native title rights and interests must relate to land and waters (see definition s223 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.

I am satisfied that the application meets this condition.

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

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

Details required in section 61

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

Reasons relating to this sub-section

The names of five applicants, Mrs Jean Lockyer, Mr Red Alexander, Mr Neil Finlay, Mr Mark Lockyer and Ms Gloria Lockyer, are provided in the amended application.

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

- 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**

Reasons relating to this sub-section

A list of 38 names and a formula further describing the native title claim group is provided at Schedule A of the amended application. A list of names describing those people who are excluded from the native title claim group is also provided at Schedule A.

For the reasons set out in relation to s 190B(3) I am satisfied that the description of the native title claim group is sufficient for it to be ascertained whether any particular person is one of those persons.

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

Reasons relating to this sub-section

The application is in the form prescribed by Regulation 5(1)(a) Native Title (Federal Court) Regulations 1998.

As required under s61(5)(b), the amended application was filed in the Federal Court. The application is a combination of applications each of which was given to the Native Title Registrar as mentioned in s61 of the Act prior to the commencement of amendments on 30 September 1999, and taken to have been made to the Federal Court in accordance with *Native Title Amendment Act 1998* (Application, Saving or Transitional Provisions) Schedule 5, Part 3, item 6 case

The application meets the requirements of s61(5)(c). The application contains all information as prescribed in s62. See reasons for my decision in relation to those sections.

As required by s61(5)(d) the application is accompanied by affidavits as prescribed by s62(1)(a) and a map as prescribed by s62(2)(b). See reasons for my decision in relation to those sections.

Section 190C(2) only requires me to consider details, other information and documents required by ss61 and 62. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court.

I am satisfied that the application meets the requirements of this section.

Details required in section 62(1)

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

Reasons relating to this sub-section

Affidavits in the prescribed form and addressing the matters required by s62(1)(a)(i) - s62(2)(a)(v) are supplied for each of the five applicants. The applicants' affidavits are witnessed by a Justice of the Peace.

I refer to submissions made by the Crown Solicitor's Office dated 21 December 1998 in relation to this section but note that these submissions were made prior to the filing of the amended application and accompanying affidavits and therefore are not relevant.

I am satisfied that the application meets the requirements of this section.

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

Comment on details provided

The amended application contains details of traditional physical connection at Schedule F and G and by way of **(Information deleted)** by **[Name Deleted]** and **[Name Deleted]**.

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

62(2)(a)(i) Information identifying the boundaries of the area covered

Reasons relating to this sub-section

A written description sufficient for the area covered by the application to be identified is provided at Schedule B and map referred to in Schedule C is supplied at Attachment A of the amended application.

I am satisfied that the boundaries are sufficiently identified by these documents. See also my reasons for decision in relation to s190B(2).

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

Reasons relating to this sub-section

Schedule B of the amended application sets out at paragraph (b) a written description of the areas within the external boundary of the area claimed which are not covered by the application.

I am satisfied that areas not covered by the application are sufficiently identified. See also my reasons for decision in relation to s190B(2).

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

Reasons relating to this sub-section

The amended application attaches a map at Attachment A showing the external boundaries of the area covered by the application.

I am satisfied that the map shows external boundaries of the area covered by the application. See also my reasons for decision in relation to s190B(2).

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

Reasons relating to this sub-section

The applicants have provided details of searches undertaken on their behalf at Schedule D of the amended application. The results of these searches are provided at Attachment B.

I refer to submissions made by the Crown Solicitor's Office dated 21 December 1998 in relation to this section but note that these submissions were made prior to the filing of the amended application and therefore are not relevant.

I am satisfied that the application meets the requirements of this section.

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

Reasons relating to this sub-section

Schedule E of the amended application identifies ten native title rights and interests claimed by the applicants. The rights and interests claimed have been outlined in my reasons for decisions in relation to section 190B(4).

I am satisfied that the application meets the requirements of this section.

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

Reasons relating to this sub-section

The applicants assert at Schedule F in the amended application that they have, and their predecessors had, an association with the area. The applicants' affidavits provide further information in relation to their association with the claimed area.

I am satisfied that the application meets the requirements of this section.

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

Reasons relating to this sub-section

The applicants provide a general description at Schedule F of the amended application of the factual basis for the assertion that traditional laws and customs exist that give rise to the claimed native title.

I am satisfied that the application meets the requirements of this section.

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

Reasons relating to this sub-section

The applicants provide a general description at Schedule F of the amended application of the factual basis for the assertion that the claim group has continued to hold native title in accordance with traditional laws and customs.

I am satisfied that the application meets the requirements of this section.

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

Reasons relating to this sub-section

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

I refer to submissions made by the Crown Solicitor's Office dated 21 December 1998 in relation to this section but note that these submissions were made prior to the filing of the amended application and therefore are not relevant.

I am satisfied that the application meets the requirements of this section.

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

Reasons relating to this sub-section

Schedule H of the amended application contains details of four native title determination applications that have been made in relation to the whole or a part of the area covered by the amended application.

I am satisfied that the application meets the requirements of this section.

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

Reasons relating to this sub-section

Schedule I of the amended application contains details of one s29 notice, dated 13 January, 1999, given in relation to the area covered by the amended application.

These details satisfy s62(2)(h).

Reasons for the Decision

The application meets the requirements of s190C(2) for the reasons detailed above.

S190C(3) No previous overlapping claim groups Met

Common claimants in overlapping claims:

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

- (a) the previous application covered the whole or part of the area covered by the current application; and*
- (b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made; and*
- (c) the entry was made, or not removed, as a result of consideration of the previous application under section 190C(2).*

Reasons for the Decision

A search of the Register of Native Title Claims undertaken on 25 March 1999 showed that the following applications for determination of native title overlap the area covered by the amended application:

WC94/5 Ngaluma/Injinbandi
WC96/82 Thalanyji #2
WC96/89 Yaburara/Mardudhunera
WC97/89 Eastern Guruma
WC98/40 Wong-goo-tt-oo

The overlap area for WC94/5 Ngaluma/Injinbandi is insignificant (0.004km) and is the result of an error in mapping. I am satisfied that this is not an overlapping application.

Thalanyji #2, has not yet been considered under s190A. As a result of statutory timeframes imposed by the issuing of s29 notices it falls to be considered after the current application. I am satisfied that no entry in relation to this application was on the Register when the current application was made.

The three remaining applications, WC96/89 Yaburara/Mardudhunera, WC97/89 Eastern Guruma and WC98/40 Wong-goo-tt-oo, have been considered under s190A and an entry has been made on the Register of Native Title Claims as a result of that consideration. It is therefore only in relation to these applications that there may be a need to make the inquiry required by ss190C(b) and (c).

Schedule A of the amended application states that it excludes the people included in the claim groups of WC96/89 Yaburara/Mardudhunera, WC97/89 Eastern Guruma and WC98/40 Wong-goo-tt-oo and identifies, by a list of names, the people who comprise the native title claim group for each application. On the basis of this statement and description I am satisfied that no member of the native title claim group included in the current application was a member of the native title claim group for any previous application.

I note submissions made by the Crown Solicitor's Office at page 4 of a letter dated 21 December 1998 in relation to this condition of the application. The submissions were made prior to the amended application and are no longer relevant to this application.

I am satisfied that the application meets the requirements of this section.

S190C(4) Identity of claimed native title holders Met

Certification and authorisation:

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

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

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

Reasons for the Decision

At Attachment C of the amended application the applications have provided a certificate issued by a Native Title Representative Body pursuant to s202(4)(d).

An inspection of the Native Title Representative Body gazetted boundaries establishes that the claim area is wholly within the Aboriginal Legal Service of Western Australia.

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 the area of land or waters to which the application relates. As indicated above the Aboriginal Legal Service of Western Australia (ALS) is such a body.

There appears to be no legally required format for certification of a claimant application other than that it must be in writing [s202(4)(d)] and must contain the information required under s202(7).

In accordance with s202(7)(a) the ALS certificate states that:

The applicants are authorised to make the application and deal with matters arising in relation to it, on behalf of all the other persons in the native title claim group and that all reasonable steps have been made to ensure that the application describes or otherwise identifies all the other person in the native title claim group.

The certificate also contains statements that satisfy ss202(7)(b) and (c). The certificate is signed by **(name deleted)** the Chief Executive Officer of the ALS.

I note submissions made by the Crown Solicitors Office at page 4 of letters dated 21 December, 1998 in relation to this condition of the test for both of the pre-combination applications. The submissions were made prior to the amended application and are no longer relevant to the application.

As a result of the above considerations, I am satisfied that the application has been certified by the Aboriginal Legal Service of Western Australia pursuant to s202(4)(d) and in accordance with s202(7).