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

190B(2)

Description of the areas claimed:

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

Reasons for the Decision

In applying this condition I have relied upon the following:

- information provided at Schedule B;
- technical information of boundaries at Attachment B(a);
- internal boundaries at Attachment B(b); and
- the map at Attachment C.

External Boundaries:

A map is provided at Attachment C of the amended application. The map was prepared by Gerloff & Assoc. Pty Ltd and was produced on 12/4/98. The map uses a system of latitude and longitude coordinates, so that it is possible to identify the location of the areas claimed on the surface of the earth. The map shows a scale allowing distances and areas to be ascertained. A locality diagram, which indicates generally the position of the claim within Western Australia, forms part of the map provided. The line indicating the external boundary is finely marked and easy to follow.

In addition to the provision of a map defining the external boundaries of the claim, the Applicants have provided a written technical description of the external boundaries at Attachment B(a) of the amended application. [name deleted], a licensed surveyor, prepared the technical description. The Tribunal's geospatial unit has advised that the technical description of the external boundary is consistent with the map and digital data as sourced from the Land Claims Mapping Unit (folio 27 Registration Test file).

I am satisfied that the map and description are sufficient to identify the external boundaries of the claim area.

Internal Boundaries:

The areas excluded from the application are described at Schedule B(b) of the amended application. These excluded areas form the areas within the external boundary which are not covered by the application, that is, the internal boundary description.

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

A The internal boundaries of the claim area are varied to the extent necessary to exclude from the claim areas covered by valid acts on or before 23 December 1996 comprising such of the following as are included as extinguishing acts within the *Native Title Act 1993-98* or *Title Validation Act 1994* as amended and relevant to the time of the Registrar's consideration.

- Category A past acts, as defined in s.228, s.229 and any other relevant provisions of NTA 93-98
- Category A intermediate period acts as defined in s.232A, s.232B and any other relevant provisions of NTA 93-98 and includes the following:-

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

- a) an act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or
- b) actual use made by the holder of a tenure other than native title which is permanently inconsistent with the continued existence of native title.

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

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

I must be satisfied that the information and the 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.

The area covered by this application consists largely of pastoral lease, Aboriginal Reserve, vacant Crown land and includes an offshore area. The town of Port Hedland is within the area subject to claim.

The description of areas excluded from the claim area at Schedule B(b) paragraph A and B(a) refers to land where an act of a State or Commonwealth government has created interests that have been validated by the *Native Title Act*. These areas can be readily identified through searches of relevant Government registers. I note that at the time of making this decision, the State of Western Australia has not passed legislation in accordance with s.23E of the amended *Native Title Act*. Paragraph B(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 C (1 - 5) excludes areas of land using a class description. Paragraph C(6) excludes areas by reference to tenures that confer a

S190B(3) Identification of native title claim groups Met

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

The Registrar must be satisfied that:

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

Reasons for the Decision

Attachment A to the amended application contains a list of 78 names of persons comprising the native title claim group.

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

S190B(4) Identification of claimed native title Met

190B(4) *Identification of claimed native title:*

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

Reasons for the Decision

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

Under this limb, I must be satisfied that the native title rights and interests detailed can be readily identified. Section 62(2)(d) states that the description of the native title rights and interests claimed must not merely consist of a statement to the effect that the native title rights and interests are “all native title interests that may exist, or that have not been extinguished at law”.

The native title rights and interests are listed at Attachment E of the amended application in the following terms:

- i the right to ingress and exit, occupy, possess, use, enjoy and live upon the land of their ancestors upholding custom and Aboriginal law;
- ii the right to manage and maintain the fauna and flora together with the land and waters according to traditions and complying with Aboriginal law and culture which has been passed down from generation to generation to sustain existence and the environment upon their traditional lands;
- iii the right to forage for food, medicine and for such other items used for customary practices including fauna and flora on or under the land and waters, and the right to protect them from degradation
- iv the right to participate at meetings for social and cultural gatherings within the group or with other groups to enforce customary law and practices and hold traditional ceremonies, arrange marriages organise ceremonies, mediate and carry out punishments, barter for food tools, materials, equipment, utensils access to water, hunting and burial grounds on the land;
- v the right to lay away the dead upon their land and the right to bring the dead of the claim group for traditional ceremonies;
- vi the right to camp, hunt, fish, gather traditional foods, and building materials, utensils, tools, equipment and weapons;
- vii the right to use, manage, maintain and care for the water resources on the land;
- viii the right to extract and collect flints, clays, salts, soils, sand gravel, stones, ochres and such other substances in, on or under the land for use or trade as it was done by their ancestors in title;
- ix the right to use such resources and materials (animate and inanimate) growing, living and occurring in on or under the land and waters together with the right to receive a portion of any such resources taken by others, as it was done by their ancestors in title, for use or barter;

- x the right to manage and protect their sites, their secret societies and lodges or fraternities to ensure that rituals of religious significance, mystery and solemnity relating to the *Dreamtime* can continue which gives authority to the survival instruction or activities that have evolved over centuries and will allow for the gathering of people to come together to carry out ceremonies and activities required under customary law and culture;
- xi the right to freely move upon their land to teach their young about their country, culture and traditions, how to look after the fauna and flora for both sustenance and to protect the land, waters, the environment and the natural habitat;
- xii the right to construct camps, dwellings and other structures.

I am satisfied that the description of the native title rights and interests listed does not merely consist of a series of statements to the effect that the native title rights and interests are all those native title rights and interests that may exist or that have not been extinguished at law. The degree of specificity in the manner in which the application has been drafted means that the rights and interests claimed are readily identifiable.

To meet the requirements of s.190B(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.

I am satisfied that all the rights listed can be readily identified from the description provided. The application therefore meets the requirements of this sub-section and s.62(2)(d).

190B(5)

Sufficient factual basis:

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

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

Reasons for the Decision

In applying this condition I have relied on the information provided at Attachment E, Attachment F, Schedule G and on the following affidavits:

- affidavit of [name deleted], sworn 27 January 1999 (attachment F)
- affidavit of [name deleted] Roberts, sworn 27 January 1999 (attachment F)
- affidavit of [name deleted], sworn 28 January 1999 (attachment F and M)
- affidavits of [name deleted], sworn 27 January 1999 (attachment F and M)
- affidavit of [name deleted], sworn but not dated (attachment M)
- affidavit of [name deleted], sworn 25 March 1999.

I note that [name deleted] affidavit at attachment F has been witnessed by a Justice of the Peace whilst his affidavit at attachment M has not been witnessed. As both of the affidavits have been dated 28/1/99, I have regarded this omission as an oversight and have relied on [name deleted] unsigned affidavit at attachment M in applying this condition.

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

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

Schedule F of the amended application states: *“The factual basis on which the applicant claim group assert their native title, relate to their ancestors. The claim group consists of members of a common language group known and identified as Kariyarra People. The ancestors of the Kariyarra People in time immemorial, having entered upon the area of the land and waters covered by this application remained in it to exclusion of all others. These ancestors of the Kariyarra People gave clear title to their predecessors, namely this claim group. Through association, with the land and waters that chain of title remains unabated to this day. Through these ancestors, their predecessors in title, comes to the claim group the right native title rights and interests in the land and waters stated above.*

Throughout such period of time, this claim group were without dispute and disruption connection to and in association with the land and waters stated, by traditional laws, customs and beliefs. These customary laws confer the right to possess, occupy use and enjoy for activities stated before, the land and waters the subject of this application. The customary laws further enabled the claim group to exclude all others. Even after foreign settlement, other indigenous language groups have through tacit consent and respect of customary law and traditions avoided intrusions upon the said land and waters”.

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

[name deleted] affidavit states that the Kariyarra native title claim group's claim is based on “ancestral clan estate”. Details of the groups traditional laws and beliefs and

how these are passed down through generations are provided. [name deleted] states that he has lived in the vicinity of his homeland all his life, the land subject to the said claim. He states that his mother was born on this country, that he was born and raised on this country and that he always goes back to this country. He states that he, together with other members of the claim group, hunt and gather for bush tuck and medicine. He describes how food, medicines, trees, water and other resources are important to the Kariyarra People.

[name deleted] affidavit provides similar information to the affidavit of [name deleted]. At paragraph 4 of her affidavit, [name deleted] states that her mother was born on this country, that she was born and raised in this country and that she always goes back to this country

[name deleted] affidavit describes the Kariyarra Groups “ancestral clan estate”. [name deleted] states that he is [identifying information deleted] and that he still practices the law and teaches the law to the young people. In his affidavit at Attachment M of the amended application, [name deleted] states “I have always lived in my country, I know the sites, the stories, history and people ...”.

[name deleted], [name deleted] and [name deleted] provide brief information about their personal association with the area including their place of birth and work (attachment M). [name deleted] states that he was born in Kariyarra country in [identifying information deleted]. [name deleted] further states that he always goes bush for hunting and gathering, bush tucker and medicine, law business and meetings.

[name deleted] states that he was born and grew up on [identifying information deleted] and that he and his family went bush all the time to hold ceremonies and meetings. He also states that he has worked on a lot of stations around the Pilbara region, including [names of stations deleted] Station.

[name deleted] states that her family is known and acknowledged by the Aboriginal people as [identifying information deleted] people. She makes the statement that the [identifying information deleted] people are part of the coastal Kariyarra people who lived on the coastal area of Kariyarra country. She states that the [identifying information deleted] have responsibility for sites on the coast, in the sea and on the adjacent islands.

S190B(6)

Prima facie case

Met

190B(6)

Prima facie case:

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

Reasons for the Decision

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

- affidavit of [name deleted], sworn 27 January 1999
- affidavit of [name deleted], sworn 27 January 1999
- affidavit of [name deleted], sworn 28 January 1999
- affidavits of [name deleted], sworn 27 January 1999.

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

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

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

On the basis of the abovementioned affidavits, I have reached the conclusion that each of the following native title rights and interests can be established on a prima facie basis:

- i. *to ingress and exist, occupy, possess, use, enjoy and live upon the land of their ancestors upholding custom and Aboriginal law;* [affidavits from [name deleted] (27/1/99) and [name deleted] s (27/1/99) outline the use and enjoyment of the area by members of the claim group, including hunting and gathering for bush tucker and medicine and holding traditional meetings and ceremonies.]
- ii. *to manage and maintain the fauna and flora together with the land and waters according to traditions and complying with Aboriginal law and culture which has been passed down from generation to generation to sustain existence and the environment upon their traditional land* [affidavits from [name deleted] (27/1/99) and [name deleted] (27/1/99) state that the Kariyarra people continue to maintain and manage natural resources by controlled hunting and gathering of bush tucker and medicine (paragraph viii).]
- iii. *to forage for food, medicine and such other items used for customary practices including fauna and flora on or under the land and water and the right to protect them from degradation* [affidavits from [name deleted] (27/1/99) and [name deleted] (27/1/99) state that they, together with other members of the claim group, continue to hunt and gather for bush tucker and medicine. An example is provided at paragraph iv) of their respective affidavits, wherein **[[deleted pursuant to s98A(3) of the Native Title Act]**. At paragraph ix) they describe how they look after springs, pools and soaks so that the quality of the water is protected.]
- iv. *to participate at meetings for social and cultural gatherings within the group or with other groups to enforce customary laws and traditions continue to be held (para. xi). Each make the statement that they hold traditional meetings to **[[deleted pursuant to s98A(3) of the Native Title Act]**. The deponents state at paragraph x) of their respective affidavits that they trade wood from other areas **[[deleted pursuant to s98A(3) of the Native Title Act]** (28/1/99) and [name deleted] ((27/1/99) state at paragraph 4 of their respective affidavits that the holders of their land are initiated lawmen who are responsible for the preservation, maintenance and celebration of ceremonies, traditions and customs.]*
- v. *to lay away the dead upon their land and the right to bring the dead of the claim group for traditional ceremonies;* [affidavits from [name deleted] (27/1/99) and [name deleted] (27/1/99) state at paragraph xii) of their respective affidavits that until Europeans came, they **[[deleted pursuant to s98A(3) of the Native Title Act]**.]
- vi. *to camp, hunt, fish, gather traditional foods, and building materials, utensils, tools, equipment and weapons;* [affidavits from [name deleted] (27/1/99) and [name deleted] (27/1/99) outline the use and enjoyment of the area by members of the claim group, including hunting and gathering for bush tucker and medicine and holding traditional meetings and ceremonies. At paragraph v) of their respective affidavits, [name deleted] and [name deleted] make the statement that they use rocks to build windbreaks for their camps. At paragraph vii) they describe how gravel, ochre, flint and clay are used.]
- vii. *to use, manage, maintain and care for the water resources on the land;* [affidavits from [name deleted] (27/1/99) and [name deleted] (27/1/99) outline at paragraph ix) of their respective affidavits the ways in which water is important. **[[deleted pursuant to s98A(3) of the Native Title Act]**.]
- viii. *to extract and collect flints, clays, salts, soils, sand gravel, stones, ochres and such other substances in, on or under the land for use or trade as it was done by their ancestors in title;* [affidavits from [name deleted] (27/1/99) and [name deleted] (27/1/99) describe how the claim group use gravel, ochre, flints salt etc (paras v – vii). At paragraph x) of their respective affidavits they state that wood is traded.]
- ix. *to use such resources and materials (animate and inanimate) growing, living and occurring in on or under the land and waters together with the right to receive a portion of any such resources taken by others, as it was done by their ancestors in title, for use or barter;* [affidavits from [name deleted] (27/1/99) and [name deleted] (27/1/99) state at paragraph xiv) of their respective affidavits that their inheritance

S190B(7)

Physical connection

Met

190B(7)

Traditional physical connection:

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

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

Reasons for the Decision

In applying this condition I have relied on the information provided at Attachment F, Schedule G and on the following affidavits:

- affidavit of [name deleted], sworn 27 January 1999 (attachment F)
- affidavit of [name deleted], sworn 28 January 1999 (attachment F and M)
- affidavits of [name deleted], sworn 27 January 1999 (attachment F and M)
- affidavit of [name deleted], sworn but not dated (attachment M)
- affidavit of [name deleted], sworn 25 March 1999.

At Schedule M, three persons are named as having continued and unbroken traditional connections with the land and waters: [name deleted], [name deleted] and [name deleted]. Affidavit material from each of these three persons is provided at Attachment M. [name deleted] provided further information by way of an affidavit. [name deleted] and [name deleted] have provided affidavits corroborating the information provided in the affidavits of [name deleted], [name deleted] and [name deleted].

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

[name deleted] states that he was born in Kariyarra country in [identifying information deleted] makes the statement that his grandmother's name on his mother's side was [identifying information deleted] and she was a Kariyarra woman. [name deleted] s mother's name was [identifying information deleted] and she was also a Kariyarra woman. [name deleted] states that he grew up [identifying information deleted] and moved all around Kariyarra country, "*I always go bush for hunting and gathering, for bush tucker and medicine, law business and meetings*". [name deleted] also states that he went to school in [identifying information deleted] and worked on stations in the Port Hedland area. He makes the statement that he has lived all his life in Kariyarra country and had traditional physical connection with the land and waters of the Kariyarra country. He states that this connection has never been severed.

[name deleted] states that he was born [identifying information deleted], which is located in Kariyarra country. He fathers name was [identifying information deleted] and his mother's name was [identifying information deleted]. He makes the statement that he was raised on [identifying information deleted] and that they "*went bush all the time and had our meetings and ceremonies*". [name deleted] states that he has worked on a lot of stations around the Pilbara.

[name deleted] states that he was born [identifying information deleted] and that his grandfather, [identifying information deleted] was born in Kariyarra country. [name deleted] states that his father's name was [identifying information deleted] and he was a Kariyarra El and Lawman. He makes the statement that he grew up in country and has always lived in Kariyarra country. He states that he "*knows the sites, the stories history and people and I am now the boss for my country which my father handed down to me*".

[name deleted] states that her father and grandfather were Kariyarra people and that they lived all their lives on their traditional lands. Her father's Aboriginal name was [identifying information deleted] and all her family is known and acknowledged by the Aboriginal people as [identifying information deleted].

The supporting affidavits from [name deleted] and [name deleted] corroborate the evidence of the above deponents.

I note the State's view expressed in the submission of 23 November 1998 that the use of the terms "our people", "elders" or "young people" in the application does not sufficiently identify any member(s) of the native title claim group that had or has any traditional physical connection with the claim area and that the application fails to satisfy this sub-section of the registration test. However the State's submission was made prior to the amended application and the provision of [name deleted] affidavit and is therefore superseded.

I take the statements of [name deleted], [name deleted], [name deleted] and [name deleted] as evidence that they, being members of the native title claim group, have maintained a traditional physical connection with Kariyarra country.

This is sufficient for me to be satisfied that the requirements of this sub-section have been met.

190B(8) *No failure to comply with s61A:*

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

Reasons for the Decision

After reviewing the amended application, accompanying documents and other material before me I have formed the conclusion that there has been compliance with s.61A.

s61A(1) – Native Title Determination

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

s61A(2) – Previous Exclusive Possession Acts

In Attachment Bb of the amended application, the Applicants exclude areas in relation to which native title rights and interests have otherwise been extinguished from the application. This would include all previous exclusive possession Acts.

At the time of making this decision, the State of Western Australia has not passed legislation in accordance with section 23 E of the *Native Title Act*. Without such legislation there are no previous exclusive possession acts attributable to the State. I am of the view that above statement effects compliance with s.61A(2) in excluding previous possession acts attributable to the Commonwealth.

S61A(3) – Previous Non-Exclusive Possession Acts

The State of Western Australia has not passed legislation in accordance with section 23I of the *Native Title Act*. There is no information in application indicating that there are Commonwealth previous non-exclusive possession acts within the area the subject of the claim.

There is nothing in the application before me to indicate that the Applicants are seeking exclusive possession of any of the area claimed.

S61A(4) – s47, 47A, 47B

The applicants have not sought to invoke the provisions of s47, 47A or 47B of the Native Title Act.

In summary, I am of the view that the requirements of s.190B(8) are met.

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

190B(9) *Ownership of minerals, petroleum or gas wholly owned by the Crown:*

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

Reasons for the Decision

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

Schedule Q states “*Unless otherwise allowed under the law, the claim group does not make claim to the ownership of minerals, petroleum or gas wholly owned by the Crown*”.

Attachment E states:

- *(viii) the right to extract and collect flints, clays, salts, soils, sand gravel, stones, ochres and such other substances in, or under the land for the use of trade as it was done by their ancestors in title;*
- *(ix) the right to use such resources and materials (animate and inanimate) growing, living and occurring in or under the land and waters together with the right to receive a portion of any such resources taken by others, as it was done by their ancestors in title, for the use or barter.*

I have read the proviso at Schedule Q “*unless otherwise allowed under the law*” to mean that the Applicants are not claiming ownership of minerals, petroleum or gas wholly owned by the Crown in right of the Commonwealth, a State or Territory unless authorised to do so by law.

I have read the native title rights claimed at Attachment E as rights not claiming ownership of the respective resources, but rather use or extraction of those resources.

I conclude that the provisions of this section have been met.

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

Reasons for the Decision

Schedule P states that no claim is made by the claim group for exclusive possession of all or part of an offshore place. Therefore the criteria set out in s.190B(9)(b) does not apply to this application and it is not necessary for me to consider this section further.

- 190B(9)**
- Other extinguishment:*
- (c) *The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that*
- (c) *in any case - the native title rights and interests claimed have otherwise been extinguished (except to the extent that the extinguishment is required to be disregarded under subsection 47(2), 47A(2) or 47B(2)).*

Reasons for the Decision

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

Section 190B(9)(c) states that the Registrar must not otherwise be aware that the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under subsection 47(2), 47A(2) or 47B(2).

The Application states at Attachment B(b)

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

- (a) an act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or
- (b) actual use made by the holder of a tenure other than native title which is permanently inconsistent with the continued existence of native title.

I am satisfied that this claim does not cover areas where native title rights and interests have otherwise been extinguished. For these reasons I conclude that the provisions of this sub-section have been met.

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

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

190C(2) *The Registrar must be satisfied that the application contains all details and other information, and is accompanied by 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 are provided in the amended application: Mr Teddy Roberts; Mr Cyril Gordon; Mr Donny Wilson; Mr Bridie Alec and Mr Kerry Robinson.

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

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

61(4) Names 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 78 names comprising the native title claim group is provided at Attachment A of the amended application.

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

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

The application is in the form prescribed by Regulation 5(1)(a) Native Title (Federal Court) Regulations 1998. The application was lodged with the National Native Title Tribunal on 30 May 1997. Applications lodged prior to 30/9/97 are taken to have been filed in the Federal Court.

As required under section 61(5)(b), the amended application was filed in the Federal Court.

The application meets the requirements of section 61(5)(c) and contains all information as prescribed in section 62.

As required by section 61(5)(d) the application is accompanied by:

- Affidavits as prescribed by section 62(1)(a) (see reasons for recommendation in relation to that section);
- A map as prescribed by sections 62(2)(b) (see reasons for recommendation in relation to section 62(2)(b)).

I note that section 190C(2) only requires me to consider details, other information, and documents required by section 61 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 there has been compliance with the procedural requirements of s.61(5).

Details required in section 62(1)

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

Reasons relating to this sub-section

Affidavits have been received from all five Applicants. All affidavits are in the prescribed form and address the matters required by s.62(1)(a)(i)-(v). They have been witnessed by a competent witness.

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

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

Comment on details provided

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

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 of the external area subject to claim is provided at Schedule B and Attachment B(a) of the amended application. A memorandum from the Tribunal's Geospatial Unit verifies that the description allows the boundary to be identified (folio 27 of Kariyarra Registration Test file).

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

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

Reasons relating to this sub-section

Areas excluded from the application are described at Schedule B(b) of the amended application. These excluded areas form the areas within the external boundary which are not covered by the application, that is, the internal boundary description. The internal boundaries are described by way of identifying classes of land tenure that are not covered by the application.

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

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

Reasons relating to this sub-section

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

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

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

Reasons relating to this sub-section

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

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

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

Reasons relating to this sub-section

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

This description is more than 'a mere statement to the effect that the native title rights and interests are all native title rights and interests that may or that have not been extinguished, at law' and is consistent with the requirements of s.62(2)(d).

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

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

Reasons relating to this sub- section

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

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

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

Reasons relating to this sub- section

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

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

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

Reasons relating to this sub- section

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

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

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

Reasons relating to this sub- section

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

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

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

Reasons relating to this sub- section

Details of other applications are provided at Attachment H of the amended application. The details supplied contain the NNTT name and number together with either:

- a statement as to whether the Applicants believe there is an overlap between the Kariyarra application and other named applications; or
- a brief summary of the outcomes of mediation meetings which have been held to resolve the overlaps.

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

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

Reasons relating to this sub- section

Details of notices under s.29 are provided at Attachment I of the amended application.

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

Reasons for the Decision

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

S190C(3) No previous overlapping claim groups Met

Common claimants in overlapping claims:

- 190C(3) *The Registrar must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:*
- (a) the previous application covered the whole or part of the area covered by the current application; and*
 - (b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made; and*
 - (c) the entry was made, or not removed, as a result of consideration of the previous application under section 190C(3).*

Reasons for the Decision

A search of the Register of Native Title Claims on 23 March 1999 revealed that there were no other overlapping applications on the Register of Native Title Claims as a result of consideration under s.190A of the amended *Native Title Act*. I am therefore of the view that s.190C3 has no operation.

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

Reasons for the Decision

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

For reasons provided at s.190C(5) I am satisfied that the Applicants are members of the native title claim group and are authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

Commentary on S190C(5)

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

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

At attachment A of the amended application, the five Applicants are named as members of the native title claim group.

At Part A paragraph 2 the amended application states that “the aforementioned five (5) applicants make this application for determination of native title on behalf of the *claim group* identified as the Kariyarra People and known and called from time immemorial as Kariyarra People according to traditional laws and custom of the Aboriginal people in the Pilbara Region. These applicants have the authorisation from the Kariyarra People, pursuant to the provisions of s.251B(a) of the *Native Title Act* 1993-98 (NTA93-98) make this application”.

The Applicants all depose in their affidavits that they are authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it. The Applicants all depose in their affidavits that they are authorised on the grounds that “*by the persons in the native title claim group to make this application and to deal with matters arising in relation to it;*”

I am satisfied that the above effects compliance with s.190C(4)(b) as required by s.190C(5)(a).

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

Affidavits deposed by **[name deleted]** (member of the native title claim group), sworn 26/3/99 and **[name and identifying information deleted]**, sworn 29/5/99, are provided at Attachment Part A2 of the application.

[name deleted] states that the Kariyarra People held a meeting on 1 December 1998 and all persons of the claim group reaffirmed the authorisation of Teddy Roberts, Cyril Gordon, Donny Wilson, Bridie Alec and Kerry Robinson as registered claimants in the application. Under the unamended *Native Title Act* the definition of a ‘registered native title claimant’ was a person whose name appeared in an entry on the Register of Native Title Claims as the person who is taken to be the claimant in relation to the land or waters.

The amended *Native Title Act* uses the word applicant, which has a meaning affected by s.61(2) of the Act. The term registered native title claimant is not used in the amended *Native Title Act*. However, for the purpose of applying the registration test, I have taken the words ‘registered claimants’ to mean the applicant.

[name deleted] describes the process of decision making for the Kariyarra people, stating that everyone who needs to be at the meeting is contacted and the purpose of the meeting is explained. She states that certain things may have to be discussed by men, the elders or women that such discussions may take place at home, gatherings, cultural meetings, funerals or whilst they are hunting and fishing. **[name deleted]** states that the decisions cannot be made without consultation with the elders and other people who may not have been able to attend certain meetings.

[name deleted] affidavit, dated 29/3/99, states that at a meeting of 1 December 1998 all the claim group reaffirmed the authorisation of the Teddy Roberts, Cyril Gordon, Donny Wilson, Bridie Alec and Kerry Robinson as registered applicants in the application.

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

