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RTF

S190B(2)

Identification of area subject to native title

Met

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

To meet this condition of the test, I must be satisfied that the information and map contained in the application (as required by paragraphs 62(2)(a) and (b)) are sufficient, for it to be said with reasonable certainty, whether native title rights and interests are claimed in relation to particular land or waters.

Map and External Boundaries

The Applicants have provided a map prepared by the Aboriginal Legal Service of Western Australian dated 12/2/99 (at Annexure 1). The map uses a system of latitude and longitude coordinates, so that it is possible to identify from this map, the location of the areas claimed on the surface of the earth. The map shows a scale allowing distances and areas to be ascertained and identifies roads, tracks, creeks, rivers/lakes, pastoral leases, homesteads, mountains and peaks. The line indicating the external boundary is finely marked and easy to follow.

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

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

In addition to the provision of a map defining the external boundaries of the claim, the Applicants have provided a written technical description of the external boundaries at Schedule B of the application.

I am satisfied that the technical description of the external boundaries coincides with the map provided, based on advice received from the Tribunal's Geospatial Unit on 9 April 1999.

Internal Boundaries:

Areas excluded from the application are described at Schedule B(b) of the amended application in the following terms:

Any areas within the boundaries that are not covered by the Application

(1) Subject to paragraph (3), the areas within the external boundaries that are not covered by the application are areas affected by:-

- (i) valid category A Past Acts as defined in s.228 and s.229 Native Title Act 1993;
- (ii) valid category A Intermediate Acts as defined in s.232A and s.232B Native Title Act 1993;
- (iii) previous exclusive possession acts as defined in s.23B Native Title Act 1993 attributable to the Commonwealth;
- (iv) permanent public works attributable to the Commonwealth;
- (v) dedicated roads lawfully Gazetted;
- (vi) acts of adverse dominion; and
- (vii) previous exclusive possession acts as defined in s.23B Native Title Act 1993 attributable to the State of Western Australia where a law of that State has made provision for that act as described in s.23E Native Title Act 1993.
- (viii) freehold title granted by the State of WA prior to 1975.
- (ix) 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 or common law 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.

(2) Subject to paragraph (3), the areas within the external boundaries that are not covered by the application includes any area that is subject to a valid grant of freehold and the areas of roads that have been lawfully dedicated, gazetted and used as a permanent public work in the area and for the purposes for which they have been dedicated and gazetted.

(3) Paragraphs (1), (2) and (3) are subject to such of the provisions of s.47, 47A, 47B Native Title Act 1993 as apply to any part of the area within the external boundaries of this application, particulars of which will be provided to the hearing but which include such areas as may be listed in schedule L.

The application identifies areas within the claim area which are not covered by 'class' exclusion. The internal boundaries of the areas claim are therefore not marked on the maps or described by reference to particular parcels or lots of land. However information on historical tenures can be obtained, albeit not readily in some instances, and is available on the public record.

The description of areas excluded from the claim area at Schedule B(b) paragraphs 1(i-ix(a)) refer to land where an act of a State or Commonwealth government has created an interest. The excluded areas of land can be readily identified through searches of relevant Government registers and are therefore described with reasonable certainty.

S190B(3) Identification of native title claim groups Met

Identification of the native title claim group:

190B(3)

The Registrar must be satisfied that:

the persons in the native title claim group are named in the application; or

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

To meet this condition of the test, I 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.

The native title claim group is described at Schedule A of the amended application.

Each of the 17 members of the native title claim group are named.

The Submission supplied by the State Government in relation to this condition was reviewed, but was considered to be of little value as it was based on the original application, prior to amendments being lodged.

I am satisfied that the persons in the native title claim group are either clearly named or otherwise described sufficiently clearly to be able to ascertain whether any particular person is in that group.

The application meets the requirements of s190B(3).

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

To meet this condition of the test, I 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. It is insufficient to merely state that these native title rights and interests are 'all native title interests that may exist, or that have not been extinguished at law'.

I note that to meet the requirements of s190B (4), I need only be satisfied that at least one of the rights and interests sought is sufficiently described for it to be readily identified.

The application contains a list of native title rights and interest at schedule E. It reads as follows:

The applicants claim native title to the area covered by the application ("the area"). The native title rights and interests claimed which are derived from that native title are the following rights and interests:

- (a) except as stated in schedule P, the right to possess the land and waters claimed;
- (b) the right to be asked, and the enforceable right to say no, with respect to any proposed activity by any person not part of the native title claim group within or affecting the determination area;
- (c) except as stated in schedule P, the right to occupy the land and waters claimed;
- (d) except as stated in schedule P, the right to use and enjoy the land and waters claimed;
- (e) except as stated in schedule P, the right to make decisions about the use and enjoyment of the land and waters claimed;
- (f) except as stated in schedule P, the right of free access to the land and waters claimed;
- (g) except as stated in schedule P, the right to control the access of others to the land and waters claimed;
- (h) except as stated in schedule Q, the right to use and enjoy the resources of the land and waters claimed;
- (i) except as stated in schedule Q, the right to control the use and enjoyment of others of the resources of the land and waters claimed;
- (j) except as stated in schedule Q, the right to trade in the resources of the land and waters claimed;
- (k) except as stated in schedule Q, the right to receive a portion of any resources taken by others from the land or waters claimed;
- (l) the right to maintain and protect places of importance on the land and in the waters claimed;
- (m) the right to maintain, protect and prevent the misuse of cultural knowledge associated with the land and waters claimed; and
- (n) the right to decide on and regulate membership of the native title claim group
- (o) the right to carry out the activities set out in schedule G(a)-(e).

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'.

The description allows the native title rights and interests claimed to be readily identified in satisfaction of s.190B(4).

The Submission supplied by the State Government in relation to this condition was reviewed, but was considered to be of little value as it was based on the original application, prior to amendments being lodged.

I am satisfied that the application complies with the requirements of s 190B(4).

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:

that the native title claim group have, and the predecessors of those persons had, an association with the area;

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;

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

This condition requires that I be satisfied that the factual basis on which it is asserted that there exist native title rights and interests (listed Schedule E) is sufficient to support that assertion.

Schedule F and G of the application contains a series of assertions in support of this condition. (names and information removed due to cultural and customary concern)

(information removed due to cultural and customary concern)

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

This criteria requires me to be satisfied that:

- the members of the native title claim group have (that is currently have) an association with the area (under claim) *and*
- the predecessors in title or antecedents of the members of the native title claim group had an association with the area (under claim)

Schedule F of the amended application asserts that the native title claim group and their ancestors have, since the assertion of British sovereignty, possessed occupied, used and enjoyed the area subject to this application (see quote below).

I note that Schedule F provides general assertions rather than specific details and I have also relied on the “(information removed due to cultural and customary concerns) of (names removed) to support the assertion.

“(information removed due to cultural and customary concerns).”

I am satisfied that there has been a past and is a continuing communal association with the area sufficient to meet the requirements of s190B(5)(a).

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

This subsection requires that I am satisfied that:

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

Schedule F states:

“The applicants assert that:

(1) the native title claim group and their ancestors have, since the assertion of British sovereignty possessed, occupied used and enjoyed the claim area;

(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 interest 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 in the area*
- (d) traditional religious knowledge of the area*
- (e) traditional knowledge of the geography of the area*
- (f) traditional knowledge of the resources of the area*
- (g) knowledge of traditional ceremonies of the area”*

The truthfulness of this assertion is deposed in (information removed due to cultural and customary concerns)

I am satisfied that there exists traditional laws acknowledged by, and traditional customs observed by, the native title claim group and that requirements of s190B(5)(b) are met.

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

This criteria requires that I be satisfied that the native title claim group continues to hold native title in accordance with their traditional law and customs.

Schedule F outlines the traditional laws and customs that give rise to rights and interest in land and waters (see comments above) and states:
“(2) such traditional laws and customs has been passed by traditional teaching through the generations preceding the present generations

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

To meet this condition of the test I must consider that on the face of the information provided, at least some of the native title rights and interests claimed in the application can be established.

I have adopted the ordinary meaning of the phrase prima facie in my considerations –being that which appears at first sight, or on the face of it, without investigation.

Schedule E of the application contains a list of native title rights and interest claimed (subject to exclusions stated in the application). It reads as follows:

The applicants claim native title to the area covered by the application (“the area”). The native title rights and interests claimed which are derived from that native title are the following rights and interests:

- (a) except as stated in schedule P, the right to possess the land and waters claimed;
- (b) the right to be asked, and the enforceable right to say no, with respect to any proposed activity by any person not part of the native title claim group within or affecting the determination area;
- (c) except as stated in schedule P, the right to occupy the land and waters claimed;
- (d) except as stated in schedule P, the right to use and enjoy the land and waters claimed;
- (e) except as stated in schedule P, the right to make decisions about the use and enjoyment of the land and waters claimed;
- (f) except as stated in schedule P, the right of free access to the land and waters claimed;
- (g) except as stated in schedule P, the right to control the access of others to the land and waters claimed;
- (h) except as stated in schedule Q, the right to use and enjoy the resources of the land and waters claimed;
- (i) except as stated in schedule Q, the right to control the use and enjoyment of others of the resources of the land and waters claimed;
- (j) except as stated in schedule Q, the right to trade in the resources of the land and waters claimed;
- (k) except as stated in schedule Q, the right to receive a portion of any resources taken by others from the land or waters claimed;
- (l) the right to maintain and protect places of importance on the land and in the waters claimed;
- (m) the right to maintain, protect and prevent the misuse of cultural knowledge associated with the land and waters claimed; and
- (n) the right to decide on and regulate membership of the native title claim group
- (o) the right to carry out the activities set out in schedule G(a)-(e).

Information provided to support that these native title rights and interests can be established, under traditional laws and customs, in relation to the area claimed, is contained in Schedules F, G, and in the affidavits of (names removed)

“(information removed due to cultural and customary concerns)

Schedule G states that:

“The applicants assert that:

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, since the assertion of British sovereignty possessed, occupied used and enjoyed the claim area”

(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 interest 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 in the area*
- (d) traditional religious knowledge of the area*
- (e) traditional knowledge of the geography of the area*
- (f) traditional knowledge of the resources of the area*
- (g) knowledge of traditional ceremonies of the area*

(1) such traditional laws and customs has been passed by traditional teaching, through the generations preceding the present generation to the present generations of persons comprising the native title claim group;

(2) the native title claim group continues to acknowledge and observe those traditional laws and customs;

(3) the native title claim group by those laws and customs have a connection with the land in respect of which the claim is made;

(4) the rights and interests are capable of being recognised by the common law of Australia.”

Schedule G identifies activities the members of the claim group have continuously carried out on the land and waters within the claim area. These activities are:

“(a) residing on and travelling over the area;

(b) making use of the resources of the area, including, but not limited to, hunting, fishing, gathering bush tucker and bush medicine, camping, extracting ochre and other materials building dwellings and making ceremonial artefacts and implements;

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:

currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or

previously had and would reasonably have been expected currently to have a traditional physical connection with a part of the land or waters but for things done (other than the creation of an interest in relation to land or waters) by the Crown in any capacity; or

a statutory authority of the Crown in any capacity; or

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

To meet this condition I must be satisfied that at least one member of the native title claim group currently has or a traditional physical connection with any part of the land or waters covered by the application.

Some details of traditional physical connection are provided in the application at Schedule G and in the affidavits accompanying the application.

At Schedule G the application states:

“Members of the native title claim group have continuously carried out activities on the land and waters within the claim area. These activities are:

(a) residing and travelling over the area”

(information removed due to cultural and customary concerns).

The Submission supplied by the State Government in relation to this condition was reviewed, but was considered to be of little value as it was based on the original application, prior to amendments being lodged.

I am satisfied that there has been compliance with the requirements of s 190B(7).

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.

To meet this condition the application must not disclose, and I must not otherwise be aware, that there is any native title right or interest claimed in the application which consists of or includes a claim to ownership over minerals, petroleum or gas wholly owned by the Crown right of the Commonwealth, a State or Territory.

Schedule Q of the application reads:

O the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in rights of the Commonwealth the State of Western Australia, they are not claimed by the applicants.”

I am satisfied that the application complies with the requirements of s190B(9)(a).

- 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 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

To meet this condition I must not otherwise be aware that, 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.

Schedule P of the application states:

“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 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.”

I am satisfied that the application complies with the requirements of s190B(9)(b).

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

Reasons for the Decision

To meet this condition I 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 and accompanying documents do not disclose, and it is not otherwise apparent that the native title rights and interests claimed have otherwise been extinguished, including by:

- a break in traditional physical connection;
- non-existence of an identifiable native title claim group;
- the non-existence of a system of traditional laws and customs linking the group to the area
- an entry on the Register of Indigenous Land Use Agreements (Body Corporate Agreement or Area Agreement under which native title has been surrendered);
- common law extinguishment.

The amended application at schedule B(b)(ix) excludes all areas in relation to where native title rights and interests have otherwise been extinguished.

I am satisfied that the application complies with the requirements of s190B(9)(c).

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 any affidavit or other document, required by sections 61 and 62.*

Details required in section 61

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

Reasons relating to this sub-condition

Page 7 of the application identifies the named applicants and the address for service of the applicants is given at page of the application.

I am satisfied there has been compliance with the procedural requirements of s61(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-condition

Schedule A of the application lists the names of 17 persons in the native title claim group.

I am satisfied there has been compliance with the procedural requirements of s61 (4).

61(5) Application is in the prescribed form, 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.

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); and,
- a map as prescribed by sections 62(1)(b).

No fees are payable pursuant to Regulation 8(a) Native Title (Federal Court) Regulations 1998.

I am satisfied there has been compliance with the procedural requirements of s61 (5).

Details required in section 62(1)

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

Reasons relating to this sub-condition

Affidavits in the prescribed form and addressing the matters required by s62(1)(a)(i) – s62(1)(a)(v) are supplied for each applicant and accompany the application at annexure 3.

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

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

Some details of traditional physical connection are provided in the application at Schedule G and in the affidavits accompanying the application.

At Schedule G the application states:

“Members of the native title claim group have continuously carried out activities on the land and waters within the claim area. These activities are:

- (a) residing and travelling over the area”*

In addition both the affidavit’s (at annexure 3) (names removed) state:

“Today I live on Nyamal land at Petermarer Creek near Port Headland within the Federal Court claim WAG6174/98. I continue to use the area where I live in traditional ways as talked about earlier.”(at paras 24 and 31 respectively)

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

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

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

Reasons relating to this sub-condition

A technical written description of the external area subject to claim is provided at Schedule B, part a (including a listing of coordinates as appendices), of the application.

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

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

Reasons relating to this sub-condition

At Schedule B, part b, of the application there is a description of the internal boundaries of the application. The applicants have excluded certain types of land tenure from the claim area.

I have outlined the contents of the Schedule in my reasons for decision in relation to test condition 190B(2).

I am satisfied that the information identifies any areas within the external boundaries of the application area that are not covered by the application.

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

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

Reasons relating to this sub-condition

A map showing the external boundaries of the area covered by the application is supplied at Annexure 1 of the amended application.

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

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

Reasons relating to this sub-condition

Schedule D of the application states that the searches that the applicants are aware of that have been carried out to determine the existence of any non-native title rights and interests in relation to the land or waters in the area covered the application are annexed at Annexure 2.

Annexure 2 contains information summarising and detailing the results of searches carried out to determine the existence of any non-native title rights and interests and includes:

- spreadsheets summarising various tenure information;
- copies of certain leases;
- maps which show land tenure and various submissions by the State of Western Australia to Future Act hearings which detail certain land tenures.

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

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

Reasons relating to this sub-condition

A description of the native title rights and interests claimed is provided at Schedule E of the application.

In accordance with section 62(2)(d), the native title rights and interests claimed in the application do not merely consist of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist or that have not been extinguished at law.

Schedule E states “[t]he Applicants claim native title to the area covered by the application (“the area”). The native title rights and interest claimed are derived from the native title area, the following rights and interests:” The description then particularises a list of 15 individually identifiable rights and interests.

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

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

Reasons relating to this sub-condition

A general description of the factual basis on which it is asserted that the claim group has, and their predecessors had, association with the area is provided at Schedule F to the application.

Schedule F states:

“The applicants assert that:

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, since the assertion of British sovereignty possessed, occupied 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 interest 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 in the area*
 - (d) traditional religious knowledge of the area*
 - (e) traditional knowledge of the geography of the area*
 - (f) traditional knowledge of the resources of the area*
 - (g) knowledge of traditional ceremonies of the area”*

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

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

Reasons relating to this sub-condition

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 is provided at Schedule F to the application.

Schedule F states:

“The applicants assert that:

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, since the assertion of British sovereignty possessed, occupied 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 interest 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 in the area*
 - (d) traditional religious knowledge of the area*
 - (e) traditional knowledge of the geography of the area*
 - (f) traditional knowledge of the resources of the area*
 - (g) knowledge of traditional ceremonies of the area”*

I am satisfied that 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 customs

Reasons relating to this sub-condition

A general description of the factual basis on which it is asserted that the claim group has continued to hold native title accordance with traditional laws and customs is provided at Schedule F and Schedule G to the application.

Schedule F outlines the traditional laws and customs that give rise to rights and interest in land and waters (see comments above) and states:

“(3) such traditional laws and customs has been passed by traditional teaching, through the generations preceding the present generations to 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”

Schedule G then outlines activities on the land and waters within the claim area that members of the native title claim group have continuously carried out.

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

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

Reasons relating to this sub-condition

Schedule G of the application contains details of activities currently carried out by the native title claim group in relation to the area claimed.

These activities are:

“(a) residing on and travelling over the area;

(a) making use of the resources of the area, including, but not limited to, hunting, fishing, gathering bush tucker and bush medicine, camping, extracting ochre and other materials building dwellings and making ceremonial artefacts and implements;

(b) exercising the responsibility for looking after the area in accordance with their traditional laws and customs, including exercising native title rights;

(c) passing on knowledge of the area”

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

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

Reasons relating to this sub-condition

Details of other applications are contained in the amended application at Schedule H.

The details supplied contain the NNTT name and number together with the Federal Court number of all other applications to the High Court, Federal Court or a recognised State/Territory body, in relation to the whole or a part of the area covered by the application.

I am satisfied that there has been compliance with the 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-condition

Details of notices under s.29 issued prior to and subsequent to 30/9/98 are supplied Schedule I.

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

Reasons for the Recommendation

The application contains all details and other information, and is accompanied by the affidavits and other documents, required by ss.61 & 62.

The Submission supplied by the State Government in relation to this condition was reviewed, but was considered to be of little value as it was based on the original application, prior to amendments being lodged.

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

S190C(3)	No previous overlapping claim groups	Met
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190C(3)

Common claimants in overlapping claims:

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:

the previous application covered the whole or part of the area covered by the current application; and

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

the entry was made, or not removed, as a result of consideration of the previous application under section 190A.

Reasons for the Decision

To meet this condition of the test I must not be aware, when considering this application, that it overlaps with a previous application that has already passed the registration test and which was on the Register of Native Title Claims when this application was made, and which has common native title claim group members.

A check of the Register of Native Title Claims was conducted on 3 June 1999 and revealed that two overlapping native title applications are on the Register of Native Title Claims as a result of consideration pursuant to s190A. These applications are WC99/3 Kariyarra and WC99 Niyaparli.

The members of the Kariyarra People native title claim group are readily identifiable by reference to a list of names attached to their native title determination application. I have compared this list of names with those listed as members of the native title claim group in this application. There is no named person in common between the two groups.

The members of the Niyaparli People native title claim group are readily identifiable by reference to a list of names attached to their native title determination application. I have compared this list of names with those listed as members of the native title claim group in this application. There is no named person in common between the two groups.

I note that in submissions made by the Crown Solicitors Office at page 3 of a letter dated 17 December, 1998 it was argued that the literal interpretation of s190C(3) would “produce anomalous results” and to avoid such anomalies “all claims made by claimant groups including persons listed in more than one claimant group, should be denied registration.

I am not swayed by this submission. Section 190C(3)(c) makes it clear that I need not have regard to whether or not there are any common claimants between this application and those that have yet to be considered under s190A.

I conclude that the applicants meet the requirements of this section.

S190C(4)	Identity of claimed native title holders	Met
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190C(4)(a)	Certification and authorisation:
and	<i>The Registrar must be satisfied that either of the following is the case:</i>
190C(4)(b)	<i>the application has been certified under paragraph 202(4)(d) by each representative Aboriginal/Torres Strait Island body that could certify the application in performing its functions under that Part; or</i>
	<i>the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.</i>

Reasons for the Decision

To meet this condition of the test, I must be satisfied that either of the following is the case:

- (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.

The applicants have provided a certification by a representative Aboriginal/Torres Strait Islander body in compliance with s.190C(4)(a).

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 (ALS) gazetted area.

Section 190C(4)(a) requires certification by each representative Aboriginal/Torres Strait Islander body that could certify the application. Section 190C(6) qualifies this requirement, stating that certification is not required by all representative bodies if the application has been certified by a body whose area includes all of the area of land or waters to which the application relates. As indicated above, the ALS is such a body.

There is no prescribed form of certification other than it must be in writing (s.202(4)(d)) and that it must comply with s.202(7).

Compliance with s.202(7)

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

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

- include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (5)(a) and (b) (s.202) have been met

The certificate states:

“The applicants have authority 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 persons in the native title claim group.”

- briefly set out the body’s reasons for being of that opinion

The certificate states the reasons as follows:

“This certification is provided on the basis of knowledge and information held by the representative body gained through numerous meetings and discussion held with the native title claim group and other Aboriginal groups in the course of having acted as the legal representative of the native title claim group since 1995.”

- where applicable, briefly set out what the representative body has done to meet the requirements of subsection 202 (6)

The certification states that:

“In relation to s 202 (6), the ALS has endeavoured to facilitate meetings with overlapping claimant groups represented by the Pilbara Aboriginal Land Council, however, this has not resulted in a resolution of overlapping claim boundaries.”

The Submission supplied by the State Government in relation to this condition was reviewed, but was considered to be of little value as it was based on the original application, prior to amendments being lodged.

I am satisfied there has been compliance with s190 C (4)(a).