

National Native Title Tribunal

REGISTRATION TEST
REASONS FOR DECISION

DELEGATE: Russell Trott

Application Name: Nyamal #10
Names of Applicants: Peter Coppin
Teddy Allen
Doris Monaghan
Clara Geary
Alice Mitchell
Doris Eaton

Region: Pilbara area of WA **NNTT No:** WC 00/5
Date Application filed: 25 May 2000 **Fed Court No:** W 6003/00

DECISION – Nyamal#10 – WC00/5

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

DECISION

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

Written notice of the decision and the reasons for the decision are to be provided to the applicants.

.....

Russell Trott

Delegate of the Registrar pursuant to
sections.190, 190A, 190B, 190C, 190D

7 July 2000

Date of Decision

Brief History of the Application

The application was filed with the Federal Court on 25 May 2000 and received by the National Native Title Tribunal on 26 May 2000. The Tribunal name for the application is Nyamal People #10.

Information considered when making the Decision

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

- The Application, Registration Test File and Legal Services File for application WC00/05;
- Tenure information acquired by the Tribunal in relation to the area covered by this application;
- The National Native Title Tribunal's Working files and related materials for Native title application that overlap the area of this application (WC95/53 & WC95/61);
- The National Native Title Tribunal Geospatial Database;
- The Register of Native Title Claims;
- The Native Title Register;
- Determination of Representative ATSI Bodies: their gazetted boundaries.

On 16 November 1999, in the case of *State of Western Australia v Native Title Registrar & Ors* [1999] FCA 1591 - 1594 (16 November 1999), Justice Carr held that the Registrar was obliged to provide a copy (or a fair summary) of any Documents provided directly to the Registrar for the purposes of the Registration Test. Provision of the Documents is to give the state/territory the opportunity to comment or provide information to the Registrar relevant to the conditions set out in sections 190B and 190C of the *Native Title Act* 1993 (Cth). In his decision, Carr J said that the Registrar can impose confidentiality conditions upon the State for this purpose.

No additional material was supplied direct to the National Native Title Tribunal. The application and accompanying affidavits were all filed with the Federal Court on 25 May 2000.

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

All references to legislative sections refer to the *Native Title Act* 1993 unless otherwise specified.

A. Procedural Conditions

190C2

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

The Registrar must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.

Details required in section 61

61(3) Name and address for service of applicants

Reasons relating to this sub-condition

The application provides the names of six applicants, and provides the applicants' address for service. The application meets the requirement of this condition.

Result: Requirements met

61(4) Name 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 describes the native title claim group. For the reasons which led to my conclusion (below), that the requirements for s190B(3) have been met I am satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Result: Requirements met

61(5) Application is in the prescribed form, lodged in the Federal Court, contain prescribed information, and accompanied by prescribed documents and fee

Reasons relating to this sub-condition

The application is in the form prescribed by Regulation 5(1)(a) of the *Native Title (Federal Court) Regulations* 1998. The application was filed in the Federal Court as required under s61(5)(b) of the *Native Title Act* 1993 (the "Act").

The application meets the requirements of s61(5)(c) and contains all information prescribed in s62. I refer to my reasons in relation to those sections. As required by s61(5)(d) the application is accompanied by affidavits as prescribed by s62(1)(a) and a map as prescribed by s62(2)(b). I refer to my reasons in relation to those sections of the Act.

I note that s190C2 only requires me to consider details, other information and documents required by sections 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. For the reasons outlined above, it is my view that the requirements of s61(5) have been met.

Result: Requirements met

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

This application was accompanied by affidavits sworn by all 6 applicants.

Each of the affidavits comply with s62(1)(a)(i)-(iii).

The affidavits do not refer to the specific form of words that appear in s62(1)(a)(iv). Although it would be more straightforward if the wording of the affidavits contained the actual words of s62(1)(a)(iv) in my view it is unnecessary to do so if the affidavits, when read in their entirety, do indicate that the respective applicant is 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. In my opinion the material contained in each of the affidavits is sufficient for each to comply with s62(1)(a)(iv).

Each affidavit sets out the basis on which the respective applicant is authorised and as such complies with s62(1)(a)(v).

I am satisfied that the affidavits satisfactorily address the matters required by s62(1)(a)(i)-(v).

Result: Requirements met

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

Reasons relating to this sub-condition

Affidavits relating to this sub-condition were provided by [Name deleted] and [Name deleted]. The affidavits supplied formed part of the application filed in the Federal Court.

Result: Provided in application

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

For the reasons which led to my conclusion that the requirements of s190B(2) have been met, I am satisfied that the information contained in Schedule B(a); technical description and Annexure 1; map of the area, is sufficient to enable the area covered by the application to be identified with reasonable certainty.

Result: Requirements met

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

Reasons relating to this sub-condition

For the reasons which led to my conclusion that the requirements of s190B(2) have been met, I am satisfied that the information contained in the application in Schedule B(b), is sufficient to enable any areas within the external boundaries of the claim area which are not covered by the application to be identified.

Result: Requirements met

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

Reasons relating to this sub-condition.

For the reasons which led to my conclusion that the requirements of s190B(2) have been met, I am satisfied that the maps provided by the applicant in Annexure 1, is sufficient to identify the boundaries of the claim area.

Result: Requirements met

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

The application at Schedule D contains the details/results of searches that the applicants are aware of, that have been carried out in the area.

Result: Requirements met

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

Reasons relating to this sub-condition

An adequate description of the native title rights and interests claimed by the applicant is contained in Schedule E of the application. I have outlined these rights and interests in my reasons for decision in respect of s190B(4).

Result: Requirements met

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

Reasons relating to this sub-condition

A general description of the factual basis for the assertion that the claim group has, and their predecessors had, an association with the area is contained at Schedule F of the application and in greater detail in the affidavits in Annexure 2.

Result: Requirements met

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 for the assertion that traditional laws and customs exist that give rise to the claimed native title is supplied in Schedule F of the application and in greater detail in the affidavits in Annexure 2.

Result: Requirements met

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 for the assertion that the claim group has continued to hold native title in accordance with traditional laws and customs is supplied in Schedule F of the application and in greater detail in the affidavits in Annexure 2.

Result: Requirements met

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

General details of the activities that the native title claim group carries out in relation to the area claimed are at schedule G of the application. It is my view that this description of activities is sufficient to comply with the requirements of s62(2)(f).

Result: Requirements met

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

In Schedule H of the application relevantly states:

The following native title determination applications have been made by the applicants (or one or a number of them) on behalf of the native title claim group:

[Name deleted], [Name deleted], [Name deleted] and [Name deleted] with other Nyamal people being named applicants in the native title determination application WC99/8 and Federal Court action WAG 6028/98, made a successful combined application being National Native Title Tribunal No. WC99/8 and Federal Court No. WAG 6028/98.

The applicants are also aware of the following native title determination applications in relation to the whole or part of the area in the National Native Title Tribunal and Federal Court seeking a determination of native title:

<i>NATIVE TITLE DETERMINATION APPLICATION</i>	<i>NATIONAL NATIVE TITLE TRIBUNAL</i>	<i>FEDERAL COURT</i>
<i>Kariyarra Yinjibarndi People</i>	<i>WC99/53</i>	<i>WAG 6045/98</i>
<i>Frank French & Ors on behalf of the Nomads Group</i>	<i>WC95/61 WC95/64</i>	<i>WAG 82/98</i>

The Tribunal's Geospatial Database reveals that there are 4 applications for determination of native title on the Register of Native Title Claims that overlap the external boundary of the current application. Those applications are: WC95/53 – Kariyarra Yinjibarndi, WC95/61 – Warrarn, WC99/8 – Nyamal and WC99/26 – Ngarla. For the reasons given under s190C3 WC99/8 (Nyamal) and WC99/26 (Ngarla) are not actual overlaps but are in fact technical overlaps of 0.002sq kms and 0.004 sq kms respectively and can be disregarded.

The applicants' reference to the Kariyarra Yinjibarndi application erroneously states the NNTT number as WC99/53 instead of WC95/53. This is clearly a typographical error. I note that the name and Federal Court file number are also mentioned so it is clear which application is included.

I also note that application WC95/64 was discontinued on 25 February 1999. As such its inclusion in Schedule H is of no consequence.

Therefore the actual applications which overlap with the area of this claim are WC95/53 (Kariyarra Yinjibarndi) and WC95/61 (Warrarn) both of which are identified as required.

Result: Requirements met

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

The application at Schedule I shows the s29 notices that were current and which the applicants were aware of at the time of filing.

Result: Requirements met

Reasons for the Decision

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

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

Aggregate Result: Requirements met

190C3

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:

- (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 190A.**

Reasons for the Decision

A check of the Geospatial Database and Register of Native Title Claims was conducted on 29 June 2000.

The Geospatial Database reveals that there are 4 applications for determination of native title on the Register of Native Title Claims that overlap the external boundary of the current application. Those applications are: WC95/53 – Kariyarra Yinjibarndi, WC95/61 – Warrarn, WC99/8 – Nyamal and WC99/26 – Ngarla. The Geospatial Unit of the Tribunal has confirmed that the overlaps with WC99/8 (Nyamal) and WC99/26 (Ngarla) are not actual overlaps but are in fact technical overlaps of 0.002sq kms and 0.004 sq kms respectively. These technical overlaps are caused by shifts in data used by DOLA and the Tribunal. Therefore the actual applications which overlap with the area of this claim are WC95/53 (Kariyarra Yinjibarndi) and WC95/61 (Warrarn). Both of these applications were lodged with the Tribunal prior to commencement of the amendments to the Act on 30 September 1998.

In order for the application to comply with s190C(3), I must be satisfied that no person included in the application was a member of the native title claim group for any previous application in the circumstances set out in s190C(3). The current application (Nyamal#10) native title claim group consists of the 6 named applicants. WC95/61 (Warrarn) description of the native title claim group consists of a list of names and their biological descendants. A comparison of the names of both groups does not identify any common native title claim group members between these two applications.

WC95/53 (Kariyarra Yinjibarndi) is not presently on the Register or has not been removed as a result of consideration under s190A of the NTA. Therefore s190C3(c) has no present application for the purpose of decision under this section.

In any event, Schedule O of the application, states that: ‘No applicant or member of the native title claim group is a member of any other native title claim group for any other application that has been made in relation to the whole or part of the area covered by this application’.

Result: Requirements met

190C4(a) or 190C4(b)

Certification and authorisation:

The Registrar must be satisfied that either of the following is the case:

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

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.

Note: s.190C(5) – Evidence of authorisation:

If the application has not been certified as mentioned in paragraph 4(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:

includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and

briefly set out the grounds on which the Registrar should consider that it has been met.

Reasons for the Decision

Information Considered In addition to the material previously identified, the following information was considered for the purpose of this condition of the registration test:

1. Affidavits of [Name deleted] sworn 18 April 2000 and 29 January 1999.
2. Affidavits of [Name deleted] sworn 4 April 2000 and 29 January 1999.
3. Affidavit of [Name deleted] sworn 8 May 2000 1999.
4. Affidavit of [Name deleted] sworn 23 March 2000.
5. Affidavit of [Name deleted] sworn 23 March 2000.
6. Affidavit of [Name deleted] sworn 4 April 2000.

This condition requires me to be satisfied that the application is certified according to s190C4(a) or authorised according to s190C4(b).

The applicants have not supplied the certificate required under s190C4(a) and must therefore rely on authorisation according to s190C4(b).

1. When an application is authorised according to s190C4(b) I cannot be satisfied that the application has been authorised unless the application fulfils the conditions identified in s190C5(a) & (b). For the following reasons I am of the opinion that the application fulfils the requirements therein:
 - Schedule R of the application includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met. This in my view complies with s190C5(a).
 - Affidavits (at Annexure 2) of each of the six applicants (who also make up the whole of the native title claim group), refer to a meeting held on 22 March 2000 whereby Nyamal people chose the named applicants to represent all Nyamal people. The affidavits also refer to a decision making process which relies on traditional laws and customs of the group. Considering the native title claim group consists of the 6 named applicants only, the application in my view complies with s190C5(b).

Findings

The applicants are members of the native title claim group

The 6 applicants have each deposed 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.

- There is additional support provided by [Name deleted] (who also make up the entire native title claim group) in affidavits at Annexure 2 of the application:

That there was a meeting in South Hedland on 22 March 2000 at which the applicants were given authorisation by the claim group.

In my view the affidavits provide sufficient information for me to be satisfied that the members of the native title claim group have authorised the applicants to make the application and to deal with matters arising in relation to it.

Conclusion

I am satisfied that the 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.

Result: Requirements met

B. Merits Conditions

190B2

Description of the areas claimed:

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

Reasons for the Decision

Map and External Boundary Description

A map is supplied at Annexure 1 of the application.

The map supplied shows the external boundaries of the area claimed.

The map was compiled by the Aboriginal Legal Service of Western Australia on 17 January 2000. It displays coordinates to enable the position of sites or localities within the claim to be identified. In addition, it shows a scale and legend 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. All the line work on the map is finely drawn and easy to follow.

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

Additional information, technically identifying the external boundary of the claim is supplied at Schedule B(a) of the application.

The Tribunal's Geospatial Unit plotted the technical description and initially identified discrepancies in the written description. After further investigation the Tribunal's Geospatial Unit advised that the discrepancies occurred due to a change in datum since the application was written. The written description of the area and the map were consistent at the time the application was filed. The area at the time the application was filed and as at the date of this decision remains the same; the change of datum only changes the words used to describe the area and has no effect on the actual area of the application. Therefore, in spite of the change of datum, the description is internally consistent, fully encloses the claim area and is consistent with the map accompanying the application.

Internal Boundary Description

Areas excluded from the application are described in the application at Schedule B(b).

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

(b) 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 area are areas affected by:-
 - i. Valid category A Past Acts as defined in s228 and s229 Native Title Act 1993;
 - ii. Valid category A Intermediate Acts as defined in s232A and s232B Native title Act 1993;
 - iii. Previous exclusive possession acts as defined in s23B 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;
 - vii. previous exclusive possession acts as defined in s23B 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 s232E Native Title Act 1993;
 - viii. freehold title granted by the State of WA prior to 1975; and

- 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 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 exercise 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 areas 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 Section 47, 47A and 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 prior to the hearing but which include such areas as may be listed in Schedule L.

Findings

The applicants have detailed a series of land tenure types that are excluded from the area of the application as outlined above. The description of areas excluded from the claim area at Schedule B(b) paragraph (1) refers to land where an act of a State or Commonwealth government has created interests. Paragraph (1)(ix) makes it plain that the applicants exclude from the claim area any areas in relation to which native title rights and interests have otherwise been extinguished. The description of areas excluded from the claim area is expressed as “including” the areas subject to what is set out in (1)(ix)(a) and (b). As such the listed information in (1)(ix)(a) and (b) is clearly not intended to be exhaustive. Although not expressly stated it follows that the applicants exclude, for example, any areas covered by pastoral leases or portions thereof that are enclosed or improved where such enclosure or improvement extinguishes native title. Similarly, although again not expressly stated, it follows that the applicants exclude any areas covered by mining or general purpose leases where such leases extinguish native title. Paragraph (1)(ix)(b) of Schedule B(b) excludes areas of land where actual use by the holder of a tenure is permanently inconsistent with continued existence of native title. Paragraph (2) provides particular examples of types of tenures that are excluded from the application. This is sufficient for me to be satisfied that the areas excluded from the application, are identified with reasonable certainty. I also consider that excluded areas of land can be readily identified through searches of relevant Government registers.

Paragraph (3) of Schedule B(b) states that the exclusions are subject to the provisions of section 47, 47A and 47B. Some particulars allowing the claiming of the benefit of these sections are provided in Schedule L of the application. I consider that the description provided allows it to be shown objectively, upon the provision of further particulars, whether applicants may have benefit of these provisions and that this is all that is required by this section.

Conclusion

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

Result: Requirements met

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

To meet this condition, the description of the claim group must be sufficiently clear so that it can be said with reasonable certainty whether any particular person is a member of the native title claim group.

Schedule A of the application states:

‘The native title claim group consists of all the named applicants being [Name deleted], [Name deleted], [Name deleted], [Name deleted], [Name deleted] and [Name deleted]’.

The persons in the native title claim group are clearly named in the application.

Result: Requirements met

190B4

Identification of the native title rights and interests:

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

Reasons for the Decision

This condition requires me to be satisfied that the native title rights and interests claimed can be readily identified. 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.

Schedule E of the application states:

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 include, but are not limited to, 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 0or 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 protect the environment in the land and waters claimed including water;
- o) the right to decide on and regulate membership of the native title claim group;
- p) the right to carry out the activities set out in Schedule G(a)-(e) and
- q) the right to hold traditional ceremonies in the land and waters claimed.

Schedule P 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 the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under International Law in relation to the whole or any part of the offshore place”.

Schedule Q states:

“To 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 or the State of Western Australia, they are not claimed by the applicants”.

By particularising the rights and interests claimed into a list of seventeen specific rights and interests which are comprehensible, I consider the rights and interests identified by the applicants to be clearly defined and therefore readily identifiable.

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.

All the rights listed are can be readily identified from the description provided. I am satisfied that the application therefore meets the requirements of this sub-section and s62(2)d.

Result: Requirements met

190B5

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

This condition requires me to be satisfied that the factual basis on which it is asserted that there exist native title rights and interests described in the application is sufficient to support that assertion.

In reaching this decision I must be satisfied that the factual basis supports the 3 criteria identified at s190B5 (a) – (c).

In applying this condition I have relied on the information provided:

1. at Schedule F and Schedule G
2. Affidavits of [Name deleted] sworn 18 April 2000 and 29 January 1999.
3. Affidavits of [Name deleted] sworn 4 April 2000 and 29 January 1999.
4. Statutory Declaration of [Name deleted] declared 3 March 1999.
5. Affidavit of [Name deleted] sworn 8 May 2000.
6. Affidavit of [Name deleted] sworn 23 March 2000.
7. Affidavit of [Name deleted] sworn 23 March 2000.
8. Affidavit of [Name deleted] sworn 4 April 2000.

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

This sub-section 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 of the members of the native title claim group had an association with the area (under claim).

The affidavits listed above supply information to support this condition.

In the affidavit of [Name deleted], he states his [pro-noun deleted] was born on Strelley Station (within the claim area) he was born in Nyamal country on Yarrie Station on the banks of the De Grey River. He said he grew up at Warralong Station (within the claim area). [Name deleted] states that he is an elder of the Nyamal people and learnt about Nyamal law and custom from members of the Nyamal group. His affidavit states that the old fellas taught him that he has an association with Nyamal land since Dreamtime, which he says is when time began.

His affidavit states that he takes many walks over Nyamal country as part of his traditional law, with other Nyamal people. He describes one long walk, which went from Warralong to the other side of the Nullagine River. [Name deleted] Statutory Declaration states that he is a Nyamal elder responsible for the land covered by this application. He states that his parents taught him about this part of Nyamal country. He states that he learnt about the water holes, pools and other

significant sites. He states these places are important because they contain men's business as well as general Nyamal business.

[Name deleted] affidavit refers to being put through the law at Warralong Station (within the claim area) and being involved in aboriginal law meetings at Warralong over the years, most recently from December 1999 to January 2000. [Name deleted] states that he is a custodian of Nyamal traditional law and custom. [Name deleted] states that he learnt about Nyamal law and custom from other members of the Nyamal group. He said he was initiated into the law by [Name deleted]. He said he was taught that he had an association with Nyamal land since dreamtime, which he states is when time began.

Both [Name deleted] and [Name deleted] affidavits demonstrate they have had and maintain an association with this area they call Nyamal country. Both are elders of the Nyamal people and talk about being put through the law by other Nyamal elders. They talk about continuing to attend law business within the area of the claim. They have provided evidence of sufficient weight to satisfy me that each, along with family, has an association with the area.

They provide evidence of association that is communal in nature, for example there is a Nyamal traditional decision making processes regarding use of country. They visit places of spiritual significance and pass on traditional knowledge to young members of the group (they both state in their affidavits that they have the responsibility and right to teach younger Nyamal people about Nyamal law and custom) as it was passed on to them by their forebears.

I am satisfied that the evidence provided is sufficient to support the assertion that native title claim group have, and the predecessors of those persons had, an association with the area. I am satisfied that the application meets the requirements of s190B(5)(a).

Result: Requirements met

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 sub-section requires me to be satisfied that:

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

The application contains a variety of information regarding Nyamal traditional laws and customs in the affidavits provided. Information is provided relating to:

- Nyamal cultural practices such as law meetings held within the claim area
- Traditional hunting and gathering.
- Use of bush medicines
- Importance of adherence to laws and customs.
- Use of traditional body decorations and artefacts for dancing.
- Knowledge of special places.
- Transfer of cultural knowledge.
- Dreamtime spirituality
- Ceremonial practices
- Traditional decision making
- Walks over Nyamal as part of traditional law.
- Nyamal song for Nyamal land.
- Sites of significance.
- The importance of passing the law on to the young people.

- Men's and Women's business.

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

I am satisfied that the application meets the requirements of s190B(5)(b).

Result: Requirements 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 sub-section requires me to be satisfied that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

The evidence of traditional laws and customs described in the previous two sub-sections (which give rise to native title), are set out as a continuing way of life for Nyamal people, and for the members of the claim group who have provided information. The applicants have provided information in the application about the factual basis of native title and in particular the role of elders in the continuation of the group's traditional laws and customs.

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

I am satisfied that the application meets the requirements of s190B(5)(c).

Result : Requirements met

Summary

In summary, each applicant has sworn to the truth of the statements contained in the application, which contain certain assertions that support the factual basis of their native title.

The accompanying information tells a 'story' about the claim group's association with the claim area and a life governed by traditional laws and custom which in turn give rise to the native title rights and interests claimed.

Statements are made and information is provided connecting members of the claim group and their predecessors to the area of the claim and to their adherence to traditional laws and customs.

There is evidence of hunting, gathering for food and medicinal purposes, camping and visiting and protecting sites (in accordance with traditional laws and customs taught by their predecessors). There is evidence that members of the claim group continue to pass on custodianship of the land and the associated traditional dreaming stories. There is also evidence that they continue to observe traditional law and protocol in respect of this information, for example, rights to speak about certain parts of the country.

Conclusion:

There is evidence to support the factual basis in each of the 3 criteria identified at s190B5(a)-(c).

I am satisfied that there is sufficient information and statements provided by the applicants that there is a factual basis for the native title rights and interests asserted.

Aggregate Result: Requirements met

190B6

Prima facie case:

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

Reasons for the Decision

This section requires that *prima facie* at least some of the native title rights and interests claimed can be established. For the reasons given below, I am of the view that some but not all of the rights and interests claimed can be established.

It is necessary to have regard to both what rights and interests may be claimed at law and what rights and interests 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: “At first sight, on the face of it; as 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.

Native title rights and interests are defined at s.223 of the Native Title Act. This definition attaches native title rights and interests to land and water and requires:

- the rights and interests must be possessed under traditional laws and customs;
- those people claiming the rights and interests by those laws and customs must have a connection with the relevant land and waters; and
- those rights and interests to be recognised under the common law of Australia.

In *Western Australia v Ward* [2000] FCA 191 & FAC 611, Beaumont and von Doussa JJ, by majority, held that some of the rights and interests included in the determination of native title made by Lee J at first instance are incapable of being recognised at common law. Their Honours held that rights and interests that involve a physical presence on the land or that are associated with traditional, social and cultural practices are capable of recognition under common law but that those involving religious or spiritual relationships with land are not. See *Ward* at [104]. However their Honours also found that where s47 and 47A applied, the applicants in *Ward* were entitled to possession, occupation, use and enjoyment of the area concerned as against the whole world.

I have already outlined in my reasons at s190B(5) that I am satisfied that the members of the native title claim group have an association with the relevant land and waters and continue to adhere to traditional laws and customs that support the factual basis for the native title rights and interests claimed. I refer to my reasons in relation to that section.

The native title rights and interests claimed are those set out at Schedule E of the application. I have already outlined the native title rights and interests claimed in my reasons at s190B(5) and I refer to my reasons in relation to that section.

Schedule E does not state whether or not the rights and interests claimed are claimed to the exclusion of all others. Schedule J however outlines the terms of any draft determination that the applicants will seek if the application is unopposed. Paragraph 5 of Schedule J relevantly provides:

The relationship between the native title rights and interests...is as follows:

The native title rights and interests...and the other(validly created Crown) interests... are concurrent rights and interests in relation to that part of the determination area to which the other interests relate, but by operation legislation or by reason of the nature and extent of the other interests created by the

Crown, the exercise of some of those concurrent rights, including native title rights and interests, may be regulated, controlled, curtailed, restricted, suspended or postponed.

In my opinion Schedule E when read with Schedule J makes it plain that intention of the applicants is to limit the native title rights and interests claimed subject to the valid rights and interests of others where it is practical to do so; in summary recognising that native title rights and interests are extinguished to the extent of any inconsistency with other valid acts. Paragraph 3 of schedule B of the application also makes it plain that the area claimed is subject to the provisions of s47, 47A or 47B of the Act as they apply to any area within the external boundaries but does not state whether certain rights and interests are asserted exclusively in relation to such areas.

The area claimed is located entirely on land and does not relate to waters in any offshore place. Therefore I am of the opinion that Schedule P of the application is of no relevance.

Information considered

In applying this condition I have relied on the information provided at:

1. Schedule E, Schedule F and Schedule G
2. Affidavits of [Name deleted] sworn 18 April 2000 and 29 January 1999.
3. Affidavits of [Name deleted] sworn 4 April 2000 and 29 January 1999.
4. Statutory Declaration of [Name deleted] declared 3 March 1999.
5. Affidavit of [Name deleted] sworn 8 May 2000.
6. Affidavit of [Name deleted] sworn 23 March 2000.
7. Affidavit of [Name deleted] sworn 23 March 2000.
8. Affidavit of [Name deleted] sworn 4 April 2000.

I will not detail information in these reasons or detail every document containing information about the specific condition considered pertinent to establishing the right or interest claimed.

The 17 rights and interests sought, together with my reasons, follow:

(a) *except as stated in schedule P, the right to possess the land and waters claimed;*

In *Ward*, the broader right to possess, occupy, use and enjoy the determination area was recognised by their Honours. It follows (consistent with the majority decision) that the right to possess the land and waters claimed is capable of recognition as a non-exclusive right, except where s47, 47A or 47B of the Act apply, in which case the right is capable of being recognised as an exclusive right. The information provided supports this general principal right and interest.

I am satisfied that this right can be prima facie established as a non-exclusive right, except where s47, 47A or 47B of the Act apply, in which case the right is capable of being recognised as an exclusive right.

(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;*

In my opinion the right being claimed is akin to the right to control the access and activities of others on the claim area. In *Ward*, this right was not recognised except in relation to areas where s47 or 47A applied. In my opinion this right is expressed in broad terms and without further qualification is unable to be read down as only applying to areas where any of s47, 47A or 47B of the Act may apply.

I am **not** satisfied that this right can be prima facie established.

(c) *except as stated in schedule P, the right to occupy the land and waters claimed;*

In *Ward*, the broader right to possess, occupy, use and enjoy the determination area was recognised by their Honours. It follows (consistent with the majority decision) that the right to occupy the land and waters claimed is capable of recognition as a non-exclusive right, except where s47, 47A or 47B of the Act apply, in which case the right is capable of being recognised as an exclusive right. The information provided supports this general principal right and interest.

I am satisfied that this right can be prima facie established as a non-exclusive right, except where s47, 47A or 47B of the Act apply, in which case the right is capable of being recognised as an exclusive right.

(d) except as stated in schedule P, the right to use and enjoy the land and waters claimed;

In *Ward*, the broader right to possess, occupy, use and enjoy the determination area was recognised by their Honours. It follows (consistent with the majority decision) that the right to use and enjoy the land and waters claimed is capable of recognition as a non-exclusive right, except where s47, 47A or 47B of the Act apply, in which case the right is capable of being recognised as an exclusive right. The information provided supports this general principal right and interest.

I am satisfied that this right can be prima facie established as a non-exclusive right, except where s47, 47A or 47B of the Act apply, in which case the right is capable of being recognised as an exclusive right.

(e) except as stated in schedule P, the right to make decisions about the use and enjoyment of the land and waters claimed;

In *Ward*, this right was able to be made out. The information provided supports this right and interest.

I am satisfied that this right can be prima facie established as a non-exclusive right, except where s47, 47A or 47B of the Act apply, in which case the right is capable of being recognised as an exclusive right.

(f) except as stated in schedule P, the right of free access to the land and waters claimed;

In *Ward*, the right of access was able to be made out. I interpret the use of the word ‘free’ to mean the right being claimed is that of unfettered access. Consistent with *Ward*, this right is capable of recognition as a non-exclusive right, except where s47, 47A or 47B of the Act apply, in which case the right is capable of being recognised as an exclusive right. The information provided supports this right and interest.

I am satisfied that this right can be prima facie established as a non-exclusive right, except where s47, 47A or 47B of the Act apply, in which case the right is capable of being recognised as an exclusive right.

(g) except as stated in schedule P, the right to control the access of others to the land and waters claimed;

In *Ward*, the majority declined to include this right in any determination of native title in relation to areas where native title was found to have been partially extinguished. There was no discussion as to why the right was not included in the draft determination (see *State of Western Australia v Ward* [2000] FCA 191). The application of s47A in that case resulted in the applicants having the right of use, occupation, possession and enjoyment as against the whole world. The majority found this would give rise to rights similar to those available under freehold title, including the right to control the access of others to areas where s47A applies. See para [207] of the decision.

In my opinion this right is expressed in broad terms and without further qualification is unable to be read down as only applying to areas where any of s47, 47A or 47B of the Act may apply.

I am **not** satisfied that this right can be prima facie established.

(h) except as stated in Schedule Q, the right to use and enjoy the resources of the land and waters claimed;

The affidavits provided by [Name deleted] and [Name deleted] cite examples of Njamal People using and enjoying what may be categorised as “traditional” resources of the area. When read with Schedule Q it is clear in my view that the applicants are not claiming the right to use and enjoy other than traditional resources in the area.

In *Ward* the majority recognised a non-exclusive right to use traditional resources.

I am satisfied that this right can be prima facie established as a non-exclusive right, except where s47, 47A or 47B of the Act apply, in which case the right is capable of being recognised as an exclusive right.

(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;

In *Ward*, the majority declined to include this right in the determination of native title in relation to areas where native title was found to have been partially extinguished. There was no discussion as to why the right was not included in the draft determination.

In my opinion this right is expressed in broad terms and without further qualification is unable to be read down as only applying to areas where any of s47, 47A or 47B of the Act may apply.

I am **not** satisfied that this right can be prima facie established.

(j) except as stated in Schedule Q, the right to trade in the resources of the land and waters claimed;

In *Ward* the majority recognised a non-exclusive right to trade in traditional resources. Schedule Q limits what is being claimed so that minerals, petroleum or gas wholly owned by the Crown are not claimed. In my opinion however this limitation does not exclude the right to trade in other “non-traditional” resources. This raises the question whether such a right is recognisable under common law.

I am **not** satisfied that this right can be prima facie established.

(k) except as stated in Schedule Q, the right to receive a portion of any resources taken by others from the land and waters claimed;

I note that in *Yarmirr v Northern Territory* [1998] 82 FCR 533 Olney J found that this right was not a right that could form part of a determination of native title. In *Ward v State of Western Australia* [1998] 159 ALR 483 Lee J differed from Olney J with respect to this finding. However, Lee J.’s determination was overturned by a majority of the Full Court in *State of Western Australia v Ward* [2000] FCA 191. In my opinion I am bound to follow the finding by Olney J and I conclude that this right is not recognised under the common law of Australia.

I am **not** satisfied that this right can be prima facie established.

(l) the right to maintain and protect places of importance on the land and in waters claimed;

In *Ward*, this right was able to be made out. The information provided supports this right and interest.

I am satisfied that this right can be prima facie established as a non-exclusive right, except where s47, 47A or 47B of the Act apply, in which case the right is capable of being recognised as an exclusive right.

(m) the right to maintain, protect and prevent the misuse of cultural knowledge associated with the land and waters claimed;

I note that in *Ward* it was found that this right was not “a right in relation to land of the kind that can be the subject of a determination of native title” at para [666].

In *Hayes v Northern Territory of Australia* [2000] FCA 671, Olney J included “the right to manage the spiritual forces and to safeguard the cultural knowledge associated with the land and waters of their respective estates within the determination area” in the formal determination recognising the existence of native title.

This right differs somewhat from that claimed in the present case. In my view I am bound to follow the majority decision in *Ward*. The right being claimed in the current application is expressed in similar terms to that considered by their Honours and found not to be a right that can be the subject of a determination of native title.

I am **not** satisfied that this right can be prima facie established.

(n) the right to protect the environment in the land and waters claimed including water;

The information provided supports this general principal right and interest.

I am satisfied that this right can be prima facie established as a non-exclusive right, except where s47, 47A or 47B of the Act apply, in which case the right is capable of being recognised as an exclusive right.

(o) the right to decide on and regulate membership of the native title claim group;

All of the members of the native title claim group are also applicants and there is nothing before me to suggest otherwise. The information provided by the applicants supports this right and interest.

I am satisfied that this right can be prima facie established.

(p) the right to carry out the activities set out in Schedule G(a)-(e); and

The information provided supports this right and interest. The activities specified may be categorised as traditional activities and are not inconsistent with the general principal right to possess, use, occupy and enjoy the area.

I am satisfied that this right can be prima facie established as a non-exclusive right, except where s47, 47A or 47B of the Act apply, in which case the right is capable of being recognised as an exclusive right.

(q) the right to hold traditional ceremonies in the land and waters claimed.

In *Ward*, the broader right to possess, occupy, use and enjoy the determination area was recognised by their Honours. It follows (consistent with the majority decision) that the right to hold ceremonies in the land and waters claimed is capable of recognition as a non-exclusive right, except where s47, 47A or 47B of the Act apply, in which case the right is capable of being

recognised as an exclusive right. The information provided supports this general principal right and interest.

I am satisfied that this right can be prima facie established as a non-exclusive right, except where s47, 47A or 47B of the Act apply, in which case the right is capable of being recognised as an exclusive right.

Conclusions

I am satisfied the rights and interests claimed above at (o) are, prima facie, capable of being made out.

Subject to the limitation, where relevant, referred to in Schedules P and Q, I am satisfied the rights and interests claimed above at (a) (c) (d) (e) (f) (h) (l) (n) (p) and (q) are, prima facie, capable of being made out, as non-exclusive rights, except where s47, 47A or 47B of the Act apply, in which case the right is capable of being recognised as an exclusive right.

I am not so satisfied with respect to the rights and interests claimed above at (b) (g) (i) (j) and (m) and (j).

I note that s190(3A)(c) allows the applicants the opportunity to provide the Registrar with further information relating to any native title rights and interests that were claimed in the application but whose details were not included in the Register.

Result: Requirements met in part as outlined above.

Result: Requirements met

190B7

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 by the application; or***

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

- (i) the Crown in any capacity; or**
- (ii) a statutory authority of the Crown in any capacity; or**
- (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such holder of a lease.**

Reasons for the Decision

Information considered

In applying this condition I have relied on the information provided at :

1. Affidavits of [Name deleted] sworn 18 April 2000 and 29 January 1999.
2. Affidavits of [Name deleted] sworn 4 April 2000 and 29 January 1999.
3. Statutory Declaration of [Name deleted] declared 3 March 1999.
4. Affidavit of [Name deleted] sworn 8 May 2000.
5. Affidavit of [Name deleted] sworn 23 March 2000.
6. Affidavit of [Name deleted] sworn 23 March 2000.
7. Affidavit of [Name deleted] sworn 4 April 2000.

Findings

This section requires me to be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.

Traditional physical connection is not defined in the Native Title Act. I am interpreting this phrase to mean that physical connection should be in accordance with the particular traditional laws and customs relevant to the claim group

For the reasons given at s190B(5), I am satisfied that there exist traditional laws acknowledged by and customs observed by the claim group sufficient to support traditional physical connection.

I am further satisfied from the information supplied and identified previously that [Name deleted] and [Name deleted] have a traditional physical connection with the land or waters covered by the application.

Result: Requirements met

190B8

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 determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Reasons for the Decision

s61A(1) – Native Title Determination

A search of the Native Title Register conducted on 30 June 2000, reveals that there is no approved determination of native title in relation to the area claimed in this application

S61A(2) – Previous Exclusive Possession Acts

In Schedule B(b) of the application, certain tenures are excluded from the claim area. For reasons provided above at s190B2 these exclusions are sufficiently clear to provide reasonable certainty about all the tenure excluded and include all previous exclusive possession acts.

S61A(3) – Previous Non-Exclusive Possession Acts

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

S61A(4) – s47, 47A, 47B

The applicants have sought to invoke the provisions of ss.47, 47A or 47B of the NTA as apply to any area within the application. Some details are provided in Schedule L of the application.

Conclusion

For the reasons identified above the application and accompanying documents do not disclose and it is not otherwise apparent that because of Section 61A the application should not have been made.

Result: Requirements met

190B9 (a)

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

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

- (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

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

Schedule E of the application claims native title rights and interests except as stated in Schedule Q. Schedule Q states:

“To 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 or the State of Western Australia, they are not claimed by the applicants.”

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

Result: Requirements met

190B9 (b)

Exclusive possession of an offshore place:

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

The area claimed does not include any offshore area. It is therefore not necessary for me to consider this section further as it is not relevant.

In any event 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 the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under International Law in relation to the whole or any part of the offshore place.’

Result: Requirements met

190B9 (c)***Other extinguishment:***

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

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

Reasons for the Decision

At Schedule B(b), paragraph (ix) the application states:

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

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

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 areas and for the purposes for which they have been dedicated and gazetted.

This general exclusion clause covers any areas that may otherwise have extinguished native title rights and interests, and yet have not been specifically excluded or otherwise removed from the claim area as a result of being listed at Schedule B(b).

With regard to areas claimed under s47, 47A, 47B, the application in Schedule L provides some information.

For the above reasons I am satisfied that the application meets this condition.

Result: Requirements met

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