

National Native Title Tribunal

**REASONS FOR DECISION COVER SHEET  
REGISTRATION TEST**

<b>REGISTRAR'S DELEGATE</b>	Jo-Anne Franz
<b>APPLICATION NAME</b>	WA Mirning
<b>NAMES OF APPLICANTS</b>	Arthur Dimer, Jean McKenzie, John Graham, Les Tucker, Wendy Lawrie, Clem Lawrie, Robert Lawrie, David Hirschausen.
<b>NNTT NO.</b>	WC 01/1
<b>FEDERAL COURT NO.</b>	W 6001/01
<b>NNTT REGION</b>	Goldfields, Western Australia
<b>DATE APPLICATION MADE</b>	27 February 2001

I have considered the application against each of the conditions contained in ss190B and 190C of the *Native Title Act* 1993.

**DECISION**

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

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

\_\_\_\_\_  
**Jo-Anne Franz**

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

14 September 2001  
**Date**

## Information considered when making the Decision

The WA Mirning application was filed in the Federal Court on 27 February 2001.

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

- Registration Test File, Legal Services File and Federal Court Application and original application for native title claim WC01/1.
- National Native Title Tribunal Geospatial Database
- Register of Native Title Claims
- Schedule of Native Title Claimant Applications
- The Native Title Register
- Determination of Representative ATSI Bodies: their gazetted boundaries
- Additional information provided by the Applicants/Claimants/Representative Bodies
- Affidavit material:
  - Affidavit of [NAME OMITTED] sworn 21 June 2000.
  - Affidavit of [NAME OMITTED] sworn 5 June 2000.
  - Affidavit of [NAME OMITTED] sworn 9 February 2000.
  - Affidavit of [NAME OMITTED] sworn 6 June 2001.

In accordance with the decision in *State of Western Australia v Native Title Registrar & Ors* [1999] FCA 1591 – 1594 information provided directly to the Native Title Registrar by the applicants was provided to the State. After receiving the State's written agreement to maintain confidentiality, this additional information was provided to the State on 12 September 2001. On 14 September 2001 the State advised that it had no comments to make in relation to the additional material.<sup>1</sup>

Note:

1. All references to legislative sections refer to the *Native Title Act 1993* unless otherwise specified.
2. Information considered relevant to the application of the registration test is identified under each condition or sub-condition in these Reasons for Decision.

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<sup>1</sup> On 14 September 2001, the Tribunal case manager for the application telephoned Mr. Jeff O'Halloran of the Crown Solicitor's Office and inquired if the State had any comment to make in relation to the material which had been provided to the Tribunal Registrar in relation to this matter. Mr. O'Halloran commented that in keeping with its current practise, the State rarely commented in relation to registration test matters.

## A. Procedural Conditions

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

### 190C2

***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(1) The native title claim group includes all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.***

*Reasons relating to this sub-section:*

In *Risk v Registrar*, NNTR [2000] FCA 1589, O’Loughlin J held that a delegate applying s190C(2) of the registration test must consider whether the people identified as the native title claim group are people who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title that is claimed in their application (ie. are they a properly constituted native title group?) His Honour held that, when it is apparent to the delegate that the group bringing the application are only part of a larger group who hold common or group rights, it is impossible to accept the application for registration.

As was said in the Risk decision:

“By operation of subs 190C(2) the Registrar must be satisfied in relation to all the requirements contained in s61. It follows that, when applying the registration test, the Registrar must consider whether (on the basis of the application and other relevant information) the application has been made on behalf of a ‘native title claim group’.

The [Native Title] Act now ensure that applications can only be lodged on behalf of properly constituted groups – not individuals or small sub-groups. This approach is consistent with the principle that native title is communally held... Subsection 61(1) imposes requirements not only in relation to the question of authorisation, but also in relation to the anterior question of whether the application has been made on behalf of a ‘native title claim group’... An application which is not made on behalf of a ‘native title claim group’ cannot validly proceed...” - per O’Loughlin J at [30] – [31].

“A native title claim group is not established or recognised merely because a group of people ... call themselves a native title claim group. It is incumbent on the delegate to satisfy herself that the claimants truly constitute such a group...[T]he tasks of the delegate included the task of examining and deciding who, in accordance with traditional law and customs, comprised the native title claim group.” – per O’Loughlin J at [60].

In making my decision, I have had particular regard to Schedule A and Attachment A of the application, accompanying affidavits and to affidavits provided directly to the Registrar for the purpose of the registration testing of this application. Schedule A and Attachment A of the amended WA Mirning application states that the claim is brought on behalf of, ‘The Mirning people, being those persons (including the applicants) who are 1) the biological descendant of... (a list of named ancestors is then provided) and 2) those persons adopted by the biological descendants, in accordance with Mirning tradition and custom (an explanation of adoption under Mirning tradition and custom is then provided)’.

The description does not purport to exclude any persons who hold in common the body of laws and customs concerning the claim area. I do not have any other information that indicates that the native title claim group does not include, or may not include, all the persons who may hold native title in the area of the application. Based on the information before me, I have formed the view

that the claim group, as defined in the application, is a properly constituted group, according to the body of laws and customs concerning the claim area and who hold the common or group rights and interests comprising the particular native title that is claimed in the application.

I am satisfied that the claimants truly constitute such a group. I am also satisfied there has been compliance with the procedural requirements of s61(1).

**Result: Requirements are met**

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

*Reasons relating to this sub-section:*

Eight persons are named as applicants in the application: Arthur Dimer, Jean McKenzie, John Graham, Les Tucker, Wendy Lawrie, Clem Lawrie, Robert Lawrie, and David Hirschhausen.

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

I am satisfied there has been compliance with the procedural requirements of s61(3).

**Result: Requirements are met**

**61(4) Names persons in native title claim group or otherwise describes the persons so that it can be ascertained whether any particular person is one of those persons**

*Reasons relating to this sub-section:*

Schedule A and Attachment A of the WA Mirning application states that the claim is brought on behalf of, ‘The Mirning people, being those persons (including the applicants) who are 1) the biological descendant of... (a list of named ancestors is then provided) and 2) those persons adopted by the biological descendants, in accordance with Mirning tradition and custom (an explanation of adoption under Mirning tradition and custom is then provided)’.. An exhaustive list of names of the persons in the native title claim group has not been provided so the requirements of s61(4)(a) are not met.

For the reasons set out in my reasons for decision in relation to s190B(3), I am satisfied that the persons in the native title claim group are described sufficiently clearly in Schedule A and Attachment A of the application so that it can be ascertained whether any particular person is one of the persons in the claim group as is required by s61(4)(b).

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

**Result: Requirements are met**

**61(5) Application is in the prescribed form<sup>2</sup>, lodged in the Federal Court, contains prescribed information, and accompanied by prescribed documents<sup>3</sup>**

*Reasons relating to this sub-section:*

The application meets the requirements of s61(5)(a) in that it is in the form prescribed by Regulation 5(1)(a) Native Title (Federal Court) Regulations 1998.

As required under s61(5)(b), the application was filed in the Federal Court.

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

As required by s61(5)(d), the application is accompanied by affidavits as prescribed by s62(1)(a). I refer to my reasons for decision in relation to that section of the Act. The application is also accompanied by a map as prescribed by s62(2)(b). I refer to my reasons for decision in relation to s62(2)(b) of the Act.

I note that s190C(2) only requires me to consider details, other information, and documents required by s61 and s62. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court.

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

**Result: Requirements are 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-section:*

Affidavits have been received from all eight applicants. All of the affidavits were affirmed/sworn before a Justice of the Peace or a Commissioner of the Supreme Court of Western Australia for the Taking of Affidavits on. The affidavits were sworn/affirmed on the following days: one on 9 February 2000, one on 7 January 2000, one on 11 January 2000, one on 14 January 2000, and four on 10 December 1999.

The affidavits were sworn for the purpose of filing a new native title determination application in the Federal Court.

All of the affidavits address the matters required by s62(1)(a)(i) – s62(1)(a)(v).

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

**Result: Requirements are met**

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<sup>2</sup> Note that in relation to pre 30.09.98 applications, the application does not need to be in the prescribed form as required by the amended *Act*. Note also that pre 30.09.98 applications are deemed to have been filed in the Federal Court.

<sup>3</sup> Note that “prescribed information” is that which is required by s.62 as set out in the text of this reasons document under “Details required in section 62(1)”

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

*Reasons relating to this sub-section:*

It is not a mandatory requirement that details of traditional physical connection be contained in the application. Schedule M has been omitted from the application.

**Result: Not Provided in the 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-section:*

Schedule B of the application states that the external boundaries of the claim are as set out in the map and description that are attached to the application.

For the reasons set out in my reasons for decision in relation to s190B(2), I am satisfied that the application complies with the procedural requirements of s62(2)(a)(i).

**Result: Requirements are met**

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

*Reasons relating to this sub-section:*

Schedule B of the application refers to Attachment B3 which contains a written description of the areas within the external boundary of the area claimed which are not covered by the application.

For the reasons set out in my reasons for decision in relation to s190B(2), I am satisfied that the information provided is sufficient to meet the procedural requirements of s62(2)(a)(ii).

**Result: Requirements are met**

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

*Reasons relating to this sub-section:*

Schedule C of the application refers to a map that is attached to the application (Attachment B1) that shows the external boundaries of the area covered by the application.

For the reasons set out in my reasons for decision in relation to s190B(2), I am satisfied that there has been compliance of the procedural requirements of s62(2)(b).

**Result: Requirements are 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-section:*

Schedule D of the application refers to Attachment D, which provides details of the searches that the applicants are aware of, consisting of reserves and pastoral leases.

The requirements of s62(2)(c) can be read widely to include all searches conducted by any person or body. However, I am of the view that I need only be informed of searches conducted by the applicants, and other searches of which the applicants are aware, in order to be satisfied that the application complies with this condition. It would be unreasonably onerous to expect applicants to

have knowledge of, and obtain details about, all searches carried out by every other body or person.

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

**Result: Requirements are met**

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

*Reasons relating to this sub-section:*

This section requires a description of the native title rights and interests claimed in relation to particular land or waters, and any activities in the exercise of the rights and interests claimed. Further, this section requires that the description must not consist merely of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or have not been extinguished, at law.

A description of the native title rights and interests claimed is provided at Schedule E of the application. Information is also provided at Schedule E allowing the identification of areas in relation to which the particularised rights and interests claimed are impaired to the extent of inconsistency with non-native title rights and interests.

Schedule G identifies an apparently non-exhaustive list of activities that members of the native title claim group have continuously carried out on the land and waters in the claim area (see my reasons for decision in relation to s62(2)(f)). These activities are activities in the exercise of one or more of the specific rights and interests identified in Schedule E. The activities described are in general terms and, are not necessarily an exhaustive list of all activities carried out in the claim area. However, I am of the view that the information supplied at Schedule G is sufficient to meet the requirements of this section.

I am satisfied there has been compliance with the procedural requirements of s62(2)(d). See also my reasons in relation to condition 190B(4).

**Result: Requirements are met**

**62(2)(e) The application contains a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that:**

- (i) The native title claim group have, and the predecessors of those persons had, an association with the area; and**
- (ii) There exist traditional laws and customs that give rise to the claimed native title; and**
- (iii) The native title claim group have continued to hold the native title in accordance with those traditional laws and customs.**

*Reasons relating to this sub-section:*

The applicants have provided at Schedule F of the application a general description of the factual basis on which it is asserted that the claim group has, and their predecessors had, an association with the area. In *Western Australia v Strickland* (2000) 99 FCR 33 at [89], the Full Court of the Federal Court held (unanimously) that the Registrar was right to be satisfied with the general description provided in Schedule F of that application for the purposes of s 62(2)(e). The Schedule F referred to in the aforementioned *Strickland* Decision exactly matches the Schedule F of the amended WA Mirning application.

I consider that the information in Schedule F meets the requirement of the registration test for the application to contain all of the information required in s 62 (see *State of Queensland v Hutchison* [2001] FCA 416 and *Queensland v Shelley* [2001] FCA 416.)

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

Schedule F of the application provides a general description of the factual basis on which it is asserted that traditional laws and customs exist that give rise to the claimed native title.

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

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

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

**Result: Requirements are 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-section:*

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

This section requires details of current activities. I do not regard this as requiring an exhaustive description of activities. Rather, I am of the opinion that a general description that traditional law business and customary activities are carried out, together with the (non-exhaustive) particulars of these activities, constitutes sufficient detail.

The identified activities of the group in relation to the claim area are described in Schedule G.

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

**Result: Requirements are 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-section:*

Schedule H states the applicants re unaware of any other current applications made in relation to the whole or part of the area covered by the application.

The Tribunal's Geospatial unit indicated that an overlap may exist between the current application and WC 95/13 (Mirning People). However, on 05 October 2000, WC 95/13 was amended in the Federal Court to remove this overlap. Therefore, the information contained within Schedule H of the WA Mirning application (WC 01/1) is consistent with that held by the Tribunal

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

**Result: Requirements are 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-section:*

This condition requires the application to contain the details of any notices given under s29 (or State law equivalent) of which the applicants are aware.

Schedule I of the application states that the applicants are unaware of the publication since 30 September 1998 of any section 29 notices that relate to the whole or part of the area covered by the application. Tribunal records indicate that one s29 notice, E69/1551 with a Notification date of 13/12/2000, intersects with the application. The omission of this s29 notice from Schedule I of the application and the resultant implications of this omission were discussed with the applicants' representative who indicated that they were unaware of the issuing of this notice.

As the applicants were unaware of the aforementioned s29 notice and their failure to detail it in Schedule I of the application was unintentional, I am satisfied there has been compliance with the procedural requirements of s62(2)(h).

**Result: Requirements are met**

**Reasons for the Decision**

I refer to the individual reasons for decision in relation to sections 61 and 62, set out above. For the reasons outlined above, I find that the procedural requirements of sections 61 and 62 have been met. Accordingly, the application meets the requirements of s190C(2).

**Aggregate Result: Requirements are met**

**Common claimants in overlapping claims:**

**190C3**

**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**

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 operation of s190C(3) was considered in *Western Australia v Strickland* [2000] FCA 652. It was held that an application lodged prior to 30 September 1998 is to be regarded as having been “made” on the date it was lodged with the National Native Title Tribunal. I note that the current application was lodged with the Federal Court on 27 February 2001 and this is the relevant date when considering the application for the purposes of s190C(3)(b).

A search of the Schedule of Native Title Claims as at the date of this decision reveals that there are no applications covering all or part of the area covered by the current application. A search of the Register of Native Title Claims reveals that an overlap may exist with one application, namely WC 95/13 (Mirning People). However, WC 95/13 (Mirning People), which was lodged with the Tribunal on 16 June 1995, was amended to remove the overlap with the current application.

On 5 October 2000, O’Loughlin J made the following orders in relation to the Mirning application (WC 95/13) (in part):

1. The application for a determination of native title as filed in these proceedings be amended by removing from the area over which the claim for determination was made that portion of the area that is covered by the application which is located within the boundaries of the State of Western Australia.

The result of the above order was the removal of the overlap between the WA Mirning application (WC 01/1) and the Mirning People (WC 95/13) applications. However, the Mirning People (WC 95/13) application will remain on the Register in its previous form until it has been tested under section 190A of the *Native Title Act* (ie. registration tested).

Accordingly, I am of the opinion that s190C(3) has no operation in relation to the current application.

I am satisfied that the application complies with the requirements of s190C3.

**Result: Requirements are met**

**Certification and authorisation:**

**190C4(a)** *The Registrar must be satisfied that either of the following is the case:*

**and**

**190C4(b)**

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

*Note: An application can be certified under section 203BE, or may have been certified under the former paragraph 202(4)(d).*

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

**Reasons for the Decision**

This condition requires me to be satisfied that the application is certified pursuant to s190C4(a) or authorised pursuant to s190C4(b) of the Act. An application complies with s190C4(a) of the Act if it is certified under s203BE or was certified under repealed s202(4)(d). This application has not been certified pursuant to s190C4(a) and therefore will be considered under 190C4(b). Section 190C5(b) requires that the application briefly set out the grounds on which the Registrar should consider this condition has been met.

In *Risk v NNTT* [2000] FCA 1589, 10 November 2000 per O’Loughlin J., his Honour noted that the applicant does not have to be individually authorised by each member of the claimant group. It will be enough that the applicant has been recognised under the traditional laws and customs of the claimant group: citing Wilcox J in *Moran v Minister for Land and Water Conservation for the State of New South Wales* [1999] FCA 1637. Wilcox J specifically refers to s251B and makes the point that authorisation is a fundamental requirement of the NTA. He states that authorisation is ‘fundamental to the legitimacy of native title determination applications... It is not a condition to be met by formulaic statements’ (p.25).

Schedule R of the WA Mirning application states:

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 other persons in the native title claim group, pursuant to a process of decision making that:

- (a) under the traditional laws and customs of the persons in the native title claim group, must be complied with in relation to authorising things of that kind; and
- (b) the persons in the native title claim group have also agreed to and adopted in relation to authorising the making of the application and dealing with matters in relation to doing things of that kind.

**PARTICULARS**

Pursuant to the above process of decision making, the native title claim group authorised the Applicants to act on behalf of all the members of the native title claim group by consensus decision of the native title claim group at a number of meetings of the native title claim group including a meeting held at Norseman on 7<sup>th</sup> and 8<sup>th</sup> August 1999, a meeting held at Kalgoorlie on 16<sup>th</sup> September 1999 and a meeting held at Ceduna on 10<sup>th</sup> December 1999.

The authorisation process detailed above is slightly ambiguous and lacks sufficient detail. Have the applicants been authorised under the traditional laws and customs of the persons in the native title claim group and have they been authorised to make and deal with matters arising in relation to the application pursuant to the process of decision making that the persons in the native title claim group have agreed to and adopted in relation to authorising the making of the application?

Section 251(B)(a) of the *Native Title Act 1993* states that where there is a process of decision making, under the traditional laws and customs of the persons in the native title claim group, must be complied with in relation to authorising things of that kind – the persons in the native title claim group authorise the person or persons to make the application and to deal with the matters in accordance with that process. Section 251(B)(b) states that where a non-traditional decision making process is adopted, the persons in the native title claim group must authorise the applicants to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted by the persons in the native title claim group, in relation to the authorising the making of the application and dealing matters, or in relation to doing things of that kind.

The eight applicants have each sworn/affirmed affidavits, that were filed with the amended application, which each attest to the fact that all statements in the application are true and that each applicant is:

authorised by all the persons in the native title claim group to make and deal with matters arising in relation to the application pursuant to a process of decision making that:

- (a) under the traditional laws and customs of the persons in the native title claim group, must be complied with in relation to authorising things of that kind; and
- (b) the persons in the native title claim group have also agreed to and adopted in relation to authorising the making of the application and dealing with matters in relation to doing things of that kind.

Again, there is nothing to indicate which type of decision making process, ie. traditional or non-traditional, was used to authorise the making of this application. If a combination of both traditional and non-traditional decision making processes were used in the authorisation of the application, then this needs to be explained. It is insufficient to merely state that a number of meetings were held, over a lengthy period of time, at a particular location, with the end result being the authorisation of the application.

[NAME OMITTED] and [NAME OMITTED] have attested to the authorisation process in affidavit material which was filed in the Federal Court together with the application. In their affidavits, both [NAME OMITTED] and [NAME OMITTED] state that:

3. The authorisation was given by the native title group pursuant to a process of decision-making that was agreed to and adopted by the persons in that group in relation to authorising the making of the application, and which was also consistent with traditional Mirning laws and customs in relation to authorising things of that kind.
4. This process of decision-making involves the convening of meetings of Mirning people, and the acceptance of the decisions reached by consensus of the group at those meetings. Decisions are not made by each individual Mirning person, but by representatives of significant Mirning families who attend such meetings. Mirning people recognise that, under their traditional laws and customs, meetings of such representatives have the authority to make decisions on behalf of the Mirning families who are so represented, and that such decisions are binding on all Mirning people.

Similarly, the affidavits of [NAME OMITTED] and [NAME OMITTED] provide further detail of the discussions which took place concerning the West Australian and South Australian Mirning groups.

On 03 September 2001, the GLC provided further information to the Tribunal which detailed the process by which the applicants were 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 additional

material provided specific details of meetings, who attended, agenda items, and decision making processes.

After consideration of the information contained within the application and the affidavits, as well as the additional material provided to the Tribunal, I am satisfied that the applicants are members of the native title claim group and are authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

I am satisfied that the application complies with s190C(4).

**Result: Requirements are met**

## 190C5

### *Evidence of authorisation:*

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

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

## Reasons for the Decision

The authorisation process has been outlined in Schedule R of the WA Mirning application. Schedule R of the WA Mirning application states:

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 other persons in the native title claim group, pursuant to a process of decision making that:

- (c) under the traditional laws and customs of the persons in the native title claim group, must be complied with in relation to authorising things of that kind; and
- (d) the persons in the native title claim group have also agreed to and adopted in relation to authorising the making of the application and dealing with matters in relation to doing things of that kind.

### PARTICULARS

Pursuant to the above process of decision making, the native title claim group authorised the Applicants to act on behalf of all the members of the native title claim group by consensus decision of the native title claim group at a number of meetings of the native title claim group including a meeting held at Norseman on 7<sup>th</sup> and 8<sup>th</sup> August 1999, a meeting held at Kalgoorlie on 16<sup>th</sup> September 1999 and a meeting held at Ceduna on 10<sup>th</sup> December 1999.

For the reasons given in relation to s190C(4)(b), I am satisfied that the conditions in s190C(5) have been met, since the application includes a statement in relation to authorisation and briefly sets out the grounds on which I should be satisfied that the requirements of s190C(5) have been met.

**Result: Requirements are met**

## B. Merits Conditions

### *Description of the areas claimed:*

**190B2**

*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**

In order for the application to meet the requirements of this section I must be satisfied that the information and map contained in the application, as required by s62(2)(a) and s62(2)(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.

In applying this condition, I have relied upon the information provided at Schedule B together with the map, included as Attachment B1, and the written description of the external boundary, included as Attachment B2, of the application.

#### **External Boundaries**

The applicants have provided a written technical description of the external boundaries of the application in Attachment B2 to the application. On 5 July 2001, Tribunal's Geospatial Unit provided an analysis of the external boundary description and the map.

A description of the external boundary (Attachment B2) was prepared by DOLA (Dept of Land Administration, WA). The metes and bounds description references parcels of land, maritime boundaries, native title claimant applications, geographic coordinates and roads, and clearly identifies the external boundary of the application. Areas to be excluded from the application area are identified by general clauses at Attachment B3 of the application.

Attachment B1 consists of a map of the application area which was produced by DOLA on 15 February 2001. This map clearly identifies and locates the external boundary of the application and meets the requirements of map used for these purposes.

The Tribunal's Geospatial Unit has indicated that the description (Attachment B2) and map (Attachment B1) describe the application area with reasonable certainty. The description and map are consistent and clearly identify the external boundary of the application.

It is also my opinion that the application area has been described with reasonable certainty. I am therefore satisfied that the map submitted with the application meets the requirements of s62(2)(b).

#### **Internal boundaries**

The internal boundaries, described at Schedule B of the application, exclude a variety of tenure classes from the claim area in written form. The written description of the internal boundaries is as follows:

(b) Internal Boundaries:

(1) The Applicants exclude from the claim any areas covered by valid acts done on or before 23 December 1996 comprising such of the following as are included as extinguishing acts within the *Native Title Act 1993*, as amended, or *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995*, as amended, at the time of the Registrar's consideration:

- Category A past acts, as defined in s228 and s229 of the *Native Title Act 1993*.

- Category A intermediate period acts as defined in s232A and s232B of the *Native Title Act 1993*.
  - acts as attributable to the State (*Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* as amended).
- (2) The applicants exclude from the claim any areas in relation to which a previous exclusive possession act, as defined in section 23B of the *Native Title Act 1993*, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in section 23E *Native Title Act 1993* in relation to the act.
- (3) The Applicants exclude from the claim areas in relation to which native title rights and interests have otherwise been extinguished, including areas subject to:
- (i) an act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or
  - (ii) actual use made by the holder of a tenure other than native title which is permanently wholly inconsistent with the continued existence of native title, and to avoid any uncertainty, the applicants exclude from the claim areas the tenures set out in **Attachment B3**.
- (4) Paragraphs (1) to (3) above are subject to such of the provisions of sections 47, 47A and 47B of the *Native Title Act 1993* as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing but which include such areas as may be listed in Schedule L.

Attachment B3 states:

- B3.1 An unqualified grant of an estate in fee simple.
- B3.2 A lease which is currently in force, in respect of an area not exceeding 5,000 square metres; upon which a dwelling house, residence, building or work is constructed; and which comprises:
- (1) a lease of a worker's dwelling under the Worker's Homes Act 1911-1928;
  - (2) a 999 year lease under the Land Act 1898;
  - (3) a lease of a Town Lot or Suburban Lot pursuant to the Land Act 1933 (WA), s117; or
  - (4) a special lease under s117 of the Land Act 1933 (WA).
- B3.3 A Conditional Purchase Lease currently in force in the Agricultural areas of the South West Division under clauses 46 and 47 of the Land Regulations 1887, which include a condition that the lessee reside on the area of the lease and upon which a residence has been constructed.
- B3.4 A Conditional Purchase Lease of cultivable land currently in force under Part V, Division (1) of the Land Act 1933 (WA) in respect of which habitual residence by the lessee is a statutory condition in accordance with the Division and upon which a residence has been constructed.
- B3.5 A Perpetual Lease currently in force under the War Service Land Settlement Scheme Act 1954.
- B3.6 A permanent public work and "land or waters on which a public work is constructed, established, or situated" within the meaning given to that phrase by section 251D of the *Native Title Act 1993*.
- B3.7 An existing public road or street used by the public including any dedicated roads.

Section 62(2)(a)(ii) requires that I must be satisfied that this information is sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.



The applicants have not identified, parcel by parcel, the areas of land and waters that are excluded from the claim area. In my view, they are not required to do so in order to satisfy the requirements of s62(2)(a)(ii) and s190B(2). The internal boundaries are described by way of identifying classes of land tenure that are not covered by the application. Such class exclusions amount to information that enables the internal boundaries of the application area to be adequately identified. This may require research by the State of Western Australia and other custodians, but nevertheless it is reasonable to expect that the task could be done on the basis of the information provided by the applicants.

The wording of paragraph (3) 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 sub-paragraphs (3)(i) and (3)(ii). As such the tenures identified in sub-paragraphs (3)(i) and (3)(ii) are clearly not intended to be exhaustive even though specific tenures are then listed. This follows clauses excluding areas subject to Category A and B past acts and PEPAs. However, following the findings in *WA v Ward* [2000] 170 ALR 159; 99 FCR 316, there is no specific mention of areas where mining leases under the 1978 mining legislation and general purpose leases have been granted or where a pastoral lease was enclosed and/or improved (as the case may be). Although not expressly stated it follows that the applicants exclude, for example, any areas covered by mining or general purpose leases where such leases extinguish native title.

I find that the information enables the boundaries of any areas within the external boundaries of the application that are not covered by the application to be identified.

I am therefore satisfied that the exclusion clauses set out in the paragraphs above are sufficient to meet the requirements of s62(2)(a)(ii).

### **Conclusion**

I find that the information and map submitted with the application meets the requirements of s62 (a) and (b). I am satisfied that the information and the map provided by the applicants are sufficient for it to be said with reasonable certainty that native title rights and interests are claimed in relation to the areas specified. The criteria set out in s190B(2) are met.

I am satisfied that the application complies with s190B(2).

**Result: Requirements are met**

**Identification of the native title claim group:**

**190B3**

**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 the requirements of 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 and Attachment A of the amended WA Mirning application states that the claim is brought on behalf of, ‘The Mirning people being those persons (including the applicants) who are 1) the biological descendants of...’ A list of named ancestors then follows together with an explanatory note of any symbols used in this list. Attachment A also states, ‘and 2) those persons adopted by the biological descendants, in accordance with Mirning tradition and custom...’ An explanation of traditional/customary Mirning adoption then follows.

As Schedule A relies on a description rather than naming the persons in the claim group, the application does not satisfy s190B(3)(a). Consequently, the applicants must rely on satisfying s190B(3)(b) and therefore the application must otherwise describe the persons in the native title claim group *sufficiently clearly* so that it can be ascertained whether any particular person is one of those persons.

In my opinion, the description provides a sufficient means of identifying whether or not any particular person belongs to the claim group and is sufficiently clear so that it can be ascertained whether any particular person is in the group. The description, therefore, meets the requirements of s190B(3)(b).

I am satisfied that the application complies with s190B(3).

**Result: Requirements are met**

**Identification of the native title rights and interests:**

**190B4** ***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 contains a description of native title rights and interests claimed as follows:

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

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

Subject to:

- (i) To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants;
- (ii) To the extent that the native title rights and interest claimed may relate to waters in an offshore place, those rights and interests are not to the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under international law in relation to the whole or any part of the offshore place.
- (iii) the applicants do not make a claim to native title rights and interests which confer possession, occupation use and enjoyment to the exclusion of all others in respect of any areas in relation to which:
  - (a) a previous non-exclusive possession act, as defined in section 23F of the *Native Title Act 1993*, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia, and a law of that State has made provision as mentioned in section 23I of the *Native Title Act 1993* in relation to the act;
  - (b) a valid non-exclusive tenure exists which at common law permanently affects the rights or interests of native title holders to possess, occupy, use, or enjoy the area subject to that tenure to the exclusion of all others.
- (iv) Paragraph (iii) above is subject to such of the provisions of sections 47, 47A and 47B of the *Native Title Act 1993* as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing but which include such areas as may be listed in Schedule L.

- (v) The said native title rights and interests claimed are not claimed to the exclusion of any other rights or interests validly created by or pursuant to the common law, a law of the State or a law of the Commonwealth.

In my view the native title rights and interests described at Schedule E are readily identifiable. Also, the qualifications listed are clear in their scope and intention, reciting general limitations to the operation of the listed rights and interests, where relevant.

I am satisfied that the description in schedule E allows the native title rights and interests claimed to be readily identified. The application complies with s190B(4).

I am satisfied the application complies with s190B(4).

**Result: Requirements are met**

**Sufficient factual basis:**

**190B5**

***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 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 assessing this condition, I am required to examine any assertions made in the application and any further material provided in support of those assertions. As seen in *Strickland v Native Title Registrar* (199) ALR 242, 261, per French J, p 4, the Registrar or his Delegate may have regard to additional material when considering s190B(5). In *Martin v Native Title Registrar* (2001) FCA 16, French J noted, that the provision of material disclosing a factual basis for the purposes of registration is, ultimately, the responsibility of the applicant. The Registrar is not required to undertake a search for such material – see [23].

In applying this condition I have relied on the following additional material:

- Affidavit of [NAME OMITTED] sworn 21 June 2000.
- Affidavit of [NAME OMITTED] sworn 5 June 2000.
- Affidavit of [NAME OMITTED] sworn 9 February 2000.
- Affidavit of [NAME OMITTED] sworn 6 June 2001.

***s190B(5)(a) – 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 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 word ‘association’ is not defined in the Act. In my view, the nature of the association required to be demonstrated by an applicant is governed by the nature of the native title rights and interests claimed. In this case, the applicants claim the rights and interests identified at Schedule E of the application.

In addition, as native title rights and interests are defined as being related to land and waters (s223 of the Act), in my view the information about the association of members of the native title claim

group must relate to the area of land and waters where the particular native title rights and interests are claimed. In this case the extent of land and waters claimed is identified at Schedule B of the application. I must therefore be satisfied that the members of the native title claim group are and that their predecessors were, associated with the particular land and waters claimed.

Schedule F of the application provides details of the association with the application area. Further, Schedule G provides details of activities members of the native title claim group currently carry out in relation to the land and waters subject of the claim including camping, hunting, gathering, and visiting sites of significance. The applicants attest to the truthfulness of these assertions in the affidavits accompanying the application.

On the face of it, I have reason to believe that the evidence before me is sufficient to support the information in Schedules F and G. As such, I am satisfied that this requirement has been met. Below is a detailed consideration of the evidence before me.

The Supplementary Explanatory Memorandum Native Title Amendment Bill [No 2] 1997 p. 35 states, 'These matters are intended to reflect the elements of native title under the common law as outlined in the High Court's Mabo (No 2) decision.' The amendments to ss190(5) to (10) were 'designed to ensure that only credible, well researched claims which are likely to be established can be registered.'

In *Martin v Native Title Registrar* (2001) FCA 16, in relation to s190B(5)(a), his Honour upheld the delegate's finding that, whilst the factual basis supporting the assertion in relation to ancestral association was sufficient, this was not the case in relation to the factual basis for a connection between the members of the group and all of the area under claim. For example, in the *Martin* case, there was no evidence of association with some of the coastal areas claimed and no information was provided regarding association with the northern and eastern part of the claim area. French J found that the delegate had considered the relevant material and concluded, rightly in His Honour's view, that there was a lack of material to support an association, physical or spiritual, with the entire area claimed. The delegate was not obliged to accept very broad statements about association which had no geographical particularity.

The Affidavit of [NAME OMITTED]:

- Paragraph 5: *[NAMES OMITTED] was married at Eucla, in the claim area... to my mother... who was the daughter of... a full-descent Mirning woman.*
- Paragraph 6: *My father spoke the Ngadju language and a bit of Mirning, and was able to pass at will through both the Ngadju and Mirning country in pursuit of contract work.*
- Paragraph 7: *I spoke Mirning in particular and I learned... from old Mirning people who used to come in from Eucla and Madura to Eyre's Patch which is in the claim area. The people who taught me... apart from my mother and her cousin, were mostly her relatives. The applicant then lists various Mirning relatives who instructed him in Mirning culture. He locates these relatives within the claim area.*
- Paragraph 10: *When I was a little boy, we were camped in the Mirning country near Eyre's Patch...*
- Paragraph 11: *My father... lived and worked right through the Ngadju and Mirning country, and I went with him... Various place names are then listed.*
- Paragraph 20: *I have lived in Ngadju and Mirning country for most of my life...*

The Affidavit of [NAME OMITTED]:

- Paragraph 3: *My mother was... born at Eucla in 1898. Eucla is within the claim area.*
- Paragraph 10: *I travelled around with my Mum and Dad between the stations. Various stations are then named.*

- Paragraph 11: *If Dad had any time off, we would go out to the Mirning country around Madura and down to Eucla.*
- Paragraph 19: *Mum was telling us that they used to walk the Nullarbor.* While the Nullarbor is an expansive area, the WA Mirning claim is located within this region.
- Paragraph 21: *The Mirning people would go down to the coast and walk along the beach.* The southern portion of the WA Mirning application is located along the coast.
- Paragraph 23: [NAME OMITTED] describes how her mother travelled through Mirning country, drinking from various rock holes.
- Paragraph 28: [NAME OMITTED] states that she worked at various locations within the claim area. *People would sometimes ask me what are you doing here. I would say: "This is my land." I felt at home out there.*

The aforementioned information is sufficient to satisfy me that at least some, if not all, of the applicants/claimants to the WA Mirning application have, and their predecessors had, an association with the claim area which satisfies the requirements of this section. The affidavit material also provide examples in support of the assertion that the native title rights and interests claimed exist and in particular that the native title claim group have, and the predecessors of those persons had, an association with the area.

On the basis of the above considerations, I find that the factual basis upon which it is asserted that the native title claim group have, and their predecessors had, an association with the area is sufficient to support the assertion.

The requirements of s190B(5)(a) are met.

***s190B(5)(b) – 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 information contained at Schedules F and G of the application asserts the existence, acknowledgment and observation of traditional laws and customs. The traditional laws and customs, which give rise to rights and interests in land and waters, are vested in members of the native title claim group on the basis of:

- descent from ancestors connected to the area
- conception in the area
- birth in the area
- traditional religious knowledge of the area
- traditional knowledge of the geography of the area
- traditional knowledge of resources of the area
- knowledge and use of traditional ceremonies of the areas

The applicants attest to the truthfulness of these assertions in the affidavits accompanying the application.

To be satisfied that those laws and customs are respectively acknowledged and observed by the native title claim group, I have examined the evidence provided.

Affidavit of [NAME OMITTED]:

- Paragraph 7: *As a little boy, I spoke Mirning in particular and I learned a number of Dreamtime stories from old Mirning people who used to come in from Eucla and Madura to Eyre's Patch which is in the claim area. The people who taught me these stories, apart from my mother and her cousin, were mostly her relatives.* [NAME OMITTED] then names various Mirning relatives who taught him traditional stories.
- Paragraph 8: [NAME OMITTED] provides an example of a traditional story.
- Paragraph 9: *As a small boy I witnessed both Ngadju and Mirning people taking part in a big corroboree...* [NAME OMITTED] then provides some detail of the corroboree. *Old Ngadju and Mirning people went right through the Eucla with them.*
- Paragraph 12: *In the bush in Ngadju and Mirning country, most of our diet came from gathering traditional foods. We were taught about these foods and how to collect them by our parents and other old people, both Ngadju and Mirning.* [NAME OMITTED] then provides details of traditional hunting and gathering.
- Paragraph 18: [NAME OMITTED] provides details of traditional Mirning kinship and descent. *Because I was Mirning, they taught me about the country, about language, and about the Dreaming stories – that's our heritage.*
- Paragraph 22: *I have learnt from my mother, and her Cousin...and from Mirning old men...something about the traditional laws and customs of the Mirning people and about Mirning country.*

Affidavit of [NAME OMITTED]:

- Paragraph 13: *Mum would tell us stories about the Mirning people and how they used to live and hunted on Mirning land. She would tell us about how they drank from the water holes and the water trees and roots, ate berries and wild turkeys. There were cats, possums, fish and penguins to eat.*
- Paragraph 14: [NAME OMITTED] discusses traditional Mirning hunting and gathering.
- Paragraph 16: *There is a big dreamtime story about...* [NAME OMITTED] then discusses a Dreamtime story.
- Paragraph 17: *Another Mirning dreamtime story that Mum told us...* [NAME OMITTED] then discusses another Mirning Dreamtime story.
- Paragraph 18: *My mother told me another story about a songline from...* Details of this songline are then provided by [NAME OMITTED].
- Paragraph 19 to 22: [NAME OMITTED] discusses and provides examples of traditional hunting and gathering.
- Paragraph 26: *I never saw any ceremonies because I wasn't allowed. There used to be strong women's business and strong men's business...*
- Paragraph 33: [NAME OMITTED] discusses traditional Mirning practices regarding residence and marriage.

I am satisfied that the evidence provided is sufficient to support the assertion that that there exist traditional laws acknowledged by, and traditional customs observed by, the members of the native title claim group that give rise to the claim to native title rights and interests.

On the basis of the above considerations, I find that the factual basis upon which it is asserted that there exist traditional laws acknowledged by and traditional customs observed by the members of the native title claim group that give rise to the rights and interests claimed is sufficient to support the assertion.

The requirements of s190B(5)(b) are met.



***s190B(5)(c) – 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.

Schedule F states that traditional law and custom 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. The assertions at Schedule F together with consideration of the other information detailed above is meant to support the notion that the native title claim group continues to hold native title in accordance with traditional laws and customs.

As previously indicated (see (a) & (b) above) Schedules F & G contain assertions in relation to the traditional laws and customs which give rise to the claimed native title.

*Affidavit of [NAME OMITTED]:*

- Paragraph 18: *I can still speak some Mirning language today, and that I can remember some of the dreaming stories for important Mirning places such as...the knowledge I have will be passed on at the proper time to the appropriate people.*
- Paragraph 21: *I go back to my old country whenever I get the chance, and if possible I take members of my family with me.*
- Paragraph 22: *I have been taught that it is important for us to care for our country and that other people also have to respect it and respect our laws when they are in the Mirning country.*
- Paragraph 23: *I have taught other Mirning people including my children about the Mirning country and Mirning laws and customs and continue to follow them.*

*Affidavit of [NAME OMITTED]:*

- Paragraph 34: *I have frequently been camping on Mirning country whenever time and money allows me.*
- Paragraph 35: *Some of my favourite camping spots are those...The cliffs in this area have great significance in our Mirning dreaming.*
- Paragraph 36 & 37: *[NAME OMITTED] discuss various camping sites. This has great significance for the Mirnings.*
- Paragraph 38: *I have often been out there with various people, especially my sister, my brother-in-law, and their children. My brother-in-law has shot kangaroos, turkeys and rabbits, and my sister, their children and I have collected witchetty grubs, and also cooked damper. I have often been for a weekend.*
- Paragraph 39: *The Mirning area is my country. I feel in my heart that I, together with other Mirning people, can make decisions about the land and I regard myself as an Elder of the land, charged with caring for the land.*
- Paragraph 40: *If I see people out there I am curious what they are doing. I watch what they are doing. Sometime I have even asked people what they are doing out there. I have spoken a number of times to campers or Main Roads and Optus people about their activities.*

I am satisfied that the evidence provided is sufficient to support the assertion that the native title claim group have continued to hold the native title in accordance with traditional laws and customs.

The requirements of s190B(5)(c) are met.

## **Conclusion**

For the reasons set out above, I am satisfied that the factual basis upon which the three assertions contained at s190B(5) are made is sufficient to support the assertions.

I am satisfied that the application complies with s190B(5).

**Result: Requirements are met**

*Prima facie case:*

**190B6**

*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**

For the application to meet the requirements of this condition I must consider that, prima facie, at least some of the rights and interests claimed can be established.

I have already decided at 190B(4) that the native title rights and interests claimed, at Schedule E are readily identifiable. To meet the current condition, only some of these rights and interests, prima facie, need to be able to be established.

The term ‘prima facie’ was considered in *North Galanjanja 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 (2<sup>nd</sup> 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 s223 of the Act. This definition specifically attaches native title rights and interests to land and water, and in summary requires:

- A. the rights and interests to be linked to traditional laws and customs;
- B. those claiming the rights and interests to have a connection with the relevant land and waters; and
- C. those rights and interests to be recognised under the common law of Australia.

This definition is closely aligned with all the issues I have already considered in relation to s190B(5), and I refer to my reasons in relation to that section. I have found that there is sufficient factual basis, for the claimed native title rights and interests.

In relation to the requirement that the rights and interests be recognised under the common law of Australia, I note that at Attachment E, paragraph (R) of the application states that the native title rights and interests are not claimed to the exclusion of any other rights and interests validly created by or pursuant to the common law, a law of the State or a law of the Commonwealth.

Information considered:

I note that there is information included in the application at Schedule E and G that contains a list of activities, described in general terms. I have also considered the following affidavit material in relation to this section:

- Affidavit of [NAME OMITTED] sworn 9 February 2000
- Affidavit of [NAME OMITTED] sworn 6 June 2001

Schedule E of the application contains a description of native title rights and interests claimed as follows:

The native title rights and interests claimed are the rights to the possession, occupation, use and enjoyment as against the whole world (subject to any native title rights and interests which may be

shared with any others who establish that they are native title holders) of the area and any right or interest included within the same, and in particular, comprise:

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

Subject to:

- (i) To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants.
- (ii) To the extent that the native title rights and interest claimed may relate to waters in an offshore place, those rights and interests are not to the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under international law in relation to the whole or any part of the offshore place.
- (iii) The applicants do not make a claim to native title rights and interests which confer possession, occupation use and enjoyment to the exclusion (sic.) of all others in respect of any areas in relation to which:
  - (a) a previous non-exclusive possession act, as defined in section 23F of the *Native Title Act 1993*, was done in relation to an area, and either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia, and a law of that State has made provision as mentioned in section 23I of the *Native Title Act 1993* in relation to the act;
  - (b) a valid non-exclusive tenure exists which at common law permanently affects the rights or interests of native title holders to possess, occupy, use or enjoy the area subject to that tenure to the exclusion of all others.
- (iv) Paragraph (iii) above is subject to such of the provisions of section 47, 47A and 47B of the *Native Title Act 1993* as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing but which include such areas as may be listed in schedule L.
- (v) The said native title rights and interests are not claimed to the exclusion of any other rights and interests validly created by or pursuant to the common law of the State or a law of the Commonwealth.

The findings of extinguishment in *WA v Ward* [2000] 170 ALR; 99 FCR 316 must be considered in relation to the aforementioned native title rights and interests.

The first and second rights and interests claimed in Schedule E, which are essentially claims to exclusive possession, occupation, use, and enjoyment, may be registered with respect to areas where s47, s47A, and s47B apply. These sections are relied upon in Schedule E at paragraph (iv). In relation to the list of specific rights and interests, which is indicated in Schedule E at paragraph (a)-(k), the following questions, which pertain to the aforementioned *Ward* decision, need to be considered:

- Can it be said that these are rights and interests that involve physical presence on the area claimed; or

- Do they entail activities on the area claimed associated with traditional social and cultural practices;  
or
- Are the rights and interests claimed of a purely spiritual or religious affiliation with the land, divorced from actual physical use and enjoyment of the land?

If the rights and interests claimed are of a purely spiritual or religious affiliation with the land, divorced from actual physical use and enjoyment of the land, then those rights and interests fall foul of the *Ward* decision and can not be registered.

At Schedule E, rights and interests labelled (a) to (c) and then (e) to (f) and (j) all appear to be acceptable when considered in light of the *Ward* decision. In relation to right and interest (d) and (g) this can only be made out in relation to land the subject of s47, s47A and s47B or land on which there is no prior extinguishment. It is evident that these particularised rights and interests involve direct physical presence on the area claimed, or are needed for this, and are associated with traditional social and cultural practices.

The rights and interests described at point (h), (i) and (k) are, in light of the *Ward* decision, not acceptable for registration.

Material in support of the following rights and interests (as at Schedule E) can be found in the information listed under the particular rights and interests listed below. Specific examples will be drawn from the affidavit material provided by [NAME OMITTED] and [NAME OMITTED]:

a) *rights and interest to possess, occupy, use and enjoy the area;*

- The affidavit of [NAME OMITTED] at points: 1, 3, 6, 7, 11, 12, 18, 21, 22 & 23.
- The affidavit of [NAME OMITTED] at points: 1, 3, 5, 10, 11 to 14, 16, 17, 18, 19, 20, 21, 22, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 & 40.

b) *the right to make decisions about the use and enjoyment of the area;*

- The affidavit of [NAME OMITTED] at points: 1, 7, 18, 22 & 23.
- The affidavit of [NAME OMITTED] at points: 1, 30, 33, 39 & 40.

c) *the right of access to the area;*

- The affidavit of [NAME OMITTED] at points: 1, 6, 10, 11, 18, 20, 21 & 22.
- The affidavit of [NAME OMITTED] at points: 1, 3, 10, 19, 21, 28, 29, 34, 35, 37, 38, 39, 40.

d) *the right to control the access of others to the area;*

- The affidavit of [NAME OMITTED] at points: 18 & 23.
- The affidavit of [NAME OMITTED] at points: 28, 29, 39 & 40.

The aforementioned native title right and interest is not divorced from actual physical use and enjoyment of the land – see [108 of the *Ward* Decision].

e) *the right to practice the traditional religious customs;*

- The affidavit of [NAME OMITTED] at points: 9, 18, 22 & 23
- The affidavit of [NAME OMITTED] at points: 16, 17, 18 & 26

f) *the right to use and enjoy resources of the area;*

- The affidavit of [NAME OMITTED] at points: 11 & 12
- The affidavit of [NAME OMITTED] at points: 12, 13, 14, 19, 20, 21, 22 & 38

g) *The right to control the use and enjoyment of others of resources of the area;*

- The affidavit of [NAME OMITTED] at points: 11, 12 & 22.
- The affidavit of [NAME OMITTED] at points: 39 & 40.

The aforementioned native title right and interest is not divorced from actual physical use and enjoyment of the land – see [108 of the *Ward Decision*].

j) *the right to maintain and protect places of importance under traditional laws, customs and practices in the area;*

- The affidavit of [NAME OMITTED] at points: 9, 18, 22 & 23.
- The affidavit of [NAME OMITTED] at points: 13, 16, 17, 18, 23, 26, 30, 39 & 40.

### **Conclusion**

The applicants have established prima facie, the following native title rights and interests:

- a) *rights and interests to possess, occupy, use and enjoy the area;*
- b) *the right to make decisions about the use and enjoyment of the area;*
- c) *the right of access to the area;*
- d) *the right to control the access of others to the area;*
- e) *the right to practice the traditional religious customs;*
- f) *the right to use and enjoy resources of the area;*
- g) *the right to control the use and enjoyment of others of resources of the area;*
- j) *the right to maintain and protect places of importance under traditional laws, customs and practices in the area*

These rights and interests are subject to the aforementioned conditions in Schedules E

I am satisfied that the application complies with s190B(6).

**Result: Requirements are met**

**Traditional physical connection:**

**190B7**

**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**

The requirements of this section are such that I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.

Traditional physical connection is not defined in the 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. Paragraph 5.9.9 of the registration test procedures refers to the explanatory memorandum to the *Native Title Act 1993* which states that this ‘connection must amount to more than a transitory access or intermittent non-native title access’ (para 29.19 of the 1997 EM on page 304).

Schedule M, in which the applicants/claimants are asked to provide details of any traditional physical connection with any of the land or waters covered by the application by any member of the native title claim group, has not been included within the application.

In applying this condition, I have relied upon the affidavit material provided by [NAME OMITTED] and [NAME OMITTED] as well as any further information provided to or held by the Tribunal in relation to this matter.

For the reasons given in my reasons for decision in relation to 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 find that the information provided in the aforementioned affidavits is sufficient to satisfy me that [NAME OMITTED] and [NAME OMITTED] have the requisite connection with the claim area to satisfy the requirements of this section.

I am satisfied that the application complies with s190B(7).

**Result: Requirements are met**

*No failure to comply with s61A:*

**190B8**

*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**

For the reasons that follow I have reached the conclusion that there has been compliance with s61A and that the requirements of this condition are met.

### **s61A(1) – Native Title Determination**

A search of the Native Title Register 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**

At Schedule B, section (b), paragraph (2) of the application, the applicants exclude areas in relation to which the State of Western Australia or the Commonwealth has done previous exclusive possession acts. Therefore, the application complies with s61A(2).

### **s61A(3) – Previous Non-Exclusive Possession Acts**

The exclusion clause at paragraph (iii) of Schedule E of the application states that the applicants do not make a claim to exclusive native title rights and interests in relation to areas where a previous non-exclusive possession act has been done by either the State of Western Australia or the Commonwealth. Therefore, the application complies with s61A(3).

### **s61A(4) – s47, s47A, s47B**

The applicants claim the benefit of ss47, 47A and 47B at Schedules B and E or at Schedule L. Whether or not the applicants have provided sufficient information to bring any area of land and waters covered by the application within the ambit of sections 47, 47A and 47B is a matter to be settled in another forum. The outcome of such an inquiry is immaterial here, as I have already found that the application does not offend s61A.

## **Conclusion**

The application complies with s190B(8).

**Result: Requirements are met**



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

**190B9**

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

**(a)**

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

## **Reasons for the Decision**

In applying this condition I have relied upon information contained at Schedule E paragraph (i) of the application, which states:

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

The limitation of the claim contained in the application, as set out in Schedule E paragraph (i), is not contradicted by any other information or other documents.

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

The application complies with s190B(9)(a).

**Result: Requirements are met**

***Exclusive possession of an offshore place:***

**190B9**

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

**(b)**

***(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**

In applying this condition, I have relied upon information contained at Schedule E paragraph (ii) of the application, which 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.

The limitation of the claim contained in the application, as set out in Schedule E paragraph (ii), is not contradicted by any other information or other documents.

The application complies with s190B(9)(b).

**Result: Requirements are met**

***Other extinguishment:***

**190B9**

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

**(c)**

***(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**

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

The application contains exclusion clauses at Schedule B and Attachment B3.

As previously stated (please refer to s190B(2)), following the findings in *WA v Ward* [2000] 170 ALR 159; 99 FCR 316, there is no specific mention of areas where mining leases under the 1978 mining legislation and general purpose leases have been granted or where a pastoral lease was enclosed and/or improved (as the case may be). Although not expressly stated it follows from the following statement at Schedule B(3), ie. 'The applicants exclude from the claim areas in relation to which native title rights and interests have otherwise been extinguished...', that the applicants exclude, for example, any areas covered by mining or general purpose leases where such leases extinguish native title.

I am satisfied that these general exclusion clauses effectively exclude any areas where native title has been extinguished, but where the application has not otherwise excluded them.

Even if areas of the type prohibited by s190B(9)(c) are located within the external boundary of the area of the application, such areas are excluded by virtue of the clauses contained in the application.

The application complies with s190B(9)(c).

**Result: Requirements are met**

**End of Document**