National Native Title Tribunal

REASONS FOR DECISION COVER SHEET

REGISTRATION TEST

(EDITED VERSION FOR RELEASE ONTO NNTT WEBSITE)

DELEGATE	Merranie Strauss

APPLICATION NAME	Ngarinyin

NAME(S) OF APPLICANT(S)	Mr Laurie Gowanulli, Mr Paddy Neowarra, Mr Paddy Wama, Mr Scotty Martin, Mr Jimmy Maline, Mr Jack Dann, Mr Jack Dale, Mr Keith Nenowatt, Mr Paul Chapman, Mr Reggie Tataya, Mr Donald Campbell, Ms Pansy Nulgit, Ms Betty Walker, Ms Kathy Oreeri, Ms Mandy Wungundin, Mr Barney U.

NNTT NO	WC95/23	FEDERAL COURT NO	WAG6016/96

REGION	North W/A

DATE APPLICATION MADE	19 July 1995

The Registrar/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.

Registrar's/delegate's signature: Date of Decision:

INTRODUCTION

The original application

The original application was lodged with the National Native Title Tribunal on 19 July 1995 under the *Native Title Act 1993* as it then was (the old Act). At that time the applicants were [name of subsequently deceased person deleted], Laurie Cowenelli (spelt Gowanulli and Gowenulli in later documents), Paddy Woma and Paddy Neowarra who applied for a "determination of native title as representatives of the Ngarinyin people". The application was lodged by solicitors Messrs Slater and Gordon on behalf of the applicants.

According to the form of application required under the Act at that time the applicants described the other persons with whom they held native title as follows:

> *Each named applicant is an aboriginal person and elder of the Ngarinyin tribe. The applicants claim native title on behalf of themselves, on behalf of their respective family groups and on behalf of the Ngarinyin people. The applicants continue to reside on or near the claimed land and continue to maintain a traditional connection with the land and waters constituting native title. The Ngarinyin people are both people of the northern Kimberley region who are recognised as belonging to the country to which the Ungarinyin language also belongs. The Ngarinyin today are descended from those people who owned and occupied the claim areas prior to the acquisition of sovereignty. They had maintained their traditional connection with the claimed land and waters in accordance with traditional law, custom and practices observed by Ngarinyin society.*

The description of the area of land and waters covered by the application stated:

> *The claim covers land in the north west Kimberley region of Western Australia. The land described is as follows:*
>
> *The claim includes land and waters as set on the attached map (Annexure A6) being land within the Prince Regent Nature Reserve (Reserve 27164), Aboriginal Reserve (Reserve 23079) and "vacant crown land" bordered by Prince Regent Nature Reserve to the west and pastoral leasehold land of Drysdale River Station and King Edward River Station to the east.*

The applicants identified the claim area as including the following reserves:

Reserve No 27164	*Prince Regent Nature Reserve for the purpose of conservation of flora and fauna,*
Reserve No 23079	*Kunmunya Reserve for the Use and Benefit of Aboriginies*
Reserve No 21972	*Nyimandum Cave Reserve for the Use and Benefit of Aboriginies*
Reserve No 21969	*Backsten Creek Cave Paintings Reserve for use and Benefit of Aboriginies*
Reserve No 8247	*Water Travellers and Stock Reserve*
Reserve No 8248	*Water Travellers and Stock Reserve*

The applicants indicated that various persons held mining interests within the claim area, also that various tourism operations were conducted in the claim area.

In the original application the applicants detailed the native title rights and interests possessed as:

> *In accordance with traditional law (the applicants) continue to enjoy the uninterrupted, possession, occupation, use, enjoyment of and obligations towards the subject land and waters to the exclusion of all others. Native Title includes the following rights:*
> - *to possess, occupy, use and enjoy the land*
> - *to go anywhere on the land and waters subject to requirements of traditional law*
> - *to regulate access to particular areas of land as required by traditional law*
> - *deal with or transfer interests in land amongst themselves in accordance with custom*
> - *meet obligations and duties in respect of claimed land and waters in the conduct of social, cultural, spiritual and economic life of the Ngarinyin peoples*
> - *to conduct ceremonies concerning the land and waters*
> - *to exchange resources collected from the land and waters amongst themselves and with people from neighbouring lands*

The representative body for the area was the Kimberley Land Council.

The application lodged 19 July 1995 was supported by an affidavit sworn 13 July 1995 by Paddy Neowarra. In accordance with the form prescribed by the Act at that time Mr Neowarra deposed that he was authorised to make the affidavit on behalf of the applicants, that he believed that native title had not been extinguished in relation to any part of the area, that he believed that none of the area was subject to an entry in the national native title register and that he believed all the statements made in the application were true and correct.

A map of the claim area dated July 1995 prepared for Slater and Gordon by the Australian Surveying and Land Information Group (AUSLIG) was submitted with the application.

This map depicts the claim area as in the far north west of Western Australia, south west of Kalumburu, south of the Mitchell River and west of the King Edward River. Part of the claim area extends to the mouth of the Roe and Prince Regent Rivers. The Roe, Moran and Prince Regent Rivers appear to be wholly within the claim area, except perhaps for some minor stretches near the river mouths.

Amendments in the Tribunal, mediation and referral to the Federal Court

By a letter dated 19 July 1995 (the same day the application was lodged) from Slater & Gordon the applicants sought to amend the claim area description (A6) by stating that the claim area included part of the area subject to application for Exploration Licences 04/986 to 04/992 in favour of Astro Mining NL.

The application was accepted by the Registrar of the Tribunal under the old Act on 29 July 1995. It was registered before commencement of the *Native Title Amendment Act 1998*

on 30 September 1998 and remains on the Register of Native Title Claims pending the outcome of this consideration for registration under the amended Act.

The application was the subject of mediation with the Tribunal. It did not result in a final agreement between the parties. On 16 October 1996 the application was referred to the Federal Court for determination.

Sadly, after referral to the Federal Court, the first named applicant [name deleted] died. On 14 November 1997 the Court ordered that Henry Mowaljarlai replace [name deleted] as the first named applicant. The Court made some additional orders in relation to the address for service of the applicants.

On 28 October 1998 the State of Western Australia issued a section 29 notice under the amended Act which affected the area covered by the application. The Registrar was required to use his best endeavours to finish considering the application for registration within 4 months from 28 October 1998, otherwise as soon as reasonably practicable (Transitional provision Part 4, paragraph 11(3)). The 4 month period expired on 28 February 1999.

The current application

By Notices of Motion filed by the applicants in the Federal Court on 8 January and 2 March 1999 the applicants sought to amend the application. On 15 January and 12 March 1999 the Court granted leave to amend the application as sought on each occasion. The Tribunal did not receive written confirmation from the Court of the orders made on 12 March 1999 until today, 19 March 1999, although the applicants had provided the Tribunal with a copy of the proposed re-amended application on 2 March 1999.

On 11 March 1999 the Tribunal received from the applicants' current solicitors, Messrs Dwyer Durack, an affidavit from [name deleted] sworn 25 February 1999 in relation to native title rights and interests claimed.

Also on 11 March 1999 the Tribunal received a facsimile from Dwyer Durack in response to a query from me about two applicants who had sworn an affidavit in support of a previous version of the application. Dwyer Durack sent a copy of a facsimile from the Kimberley Land Council dated 10 March 1999 referring to the views of Ms Oreeri and Mr Campbell in relation to one of the latest changes to the application, a more restrictive description of the members of the claim group.

I have before me, for consideration for registration, the application as amended in the Federal Court on 12 March 1999, with the following attachments:

- copy of affidavit of [2 names deleted] affirmed 21 December 1998
- copy of affidavit of [name deleted] affirmed 10 February 1999
- copy of affidavit of [name deleted] affirmed 10 February 1999
- copy of affidavit of [name deleted] affirmed 11 February 1999
- copy of affidavit of [name deleted] affirmed 16 February 1999
- copy of affidavit of [name deleted] affirmed 11 February 1999
- copy of affidavit of [name deleted] affirmed 10 February 1999
- copy of affidavit of [name deleted] affirmed 5 February 1999
- copy of affidavit of [name deleted] affirmed 10 February 1999

- copy of affidavit of [name deleted] affirmed 10 February 1999
- copy of affidavit of [name deleted] affirmed 29 January 1999
- copy of affidavit of [name deleted] affirmed 16 February 1999
- copy of affidavit of [name deleted] affirmed 2 March 1999
- copy of affidavit of [name deleted] affirmed 10 February 1999
- copy of affidavit of [name deleted] affirmed 5 February 1999
- copy of affidavit of [name deleted] sworn 6 January 1999 (Attachment A)
- copy of affidavit of [name deleted] sworn 6 January 1999 (Attachment B)
- original affidavit of (name deleted pursuant to Section 13A ADJR Act) sworn 25 February 1999
- copy of facsimile from Kimberley Land Council to Dwyer Durack 10 March 1999
- facsimile from Dwyer Durack to the Tribunal 11 March 1999
- copies of two maps of the claim area created from data supplied by the Land Claims Mapping Unit (LCMU) by the Geospatial Information Unit of the Tribunal dated 4 February 1999. One is a topographical map, marked with the claim area. The other is a map showing some topographical features (rivers, Mt York and Mt Hann), current tenure and the claim area. Both maps are at Attachment C.
- schedule of current land tenure as at October 1995, prepared by LCMU dated 16 October 1995.
- bundle of tenure related documents comprising Attachment D. This bundle includes a copy of a letter from LCMU to the Tribunal, extracts from the reserve registers, a schedule of historical data prepared by LCMU as at 26 July 1995 showing a series of pastoral leases vested in named individuals, copies of pastoral leases referred to in the schedule of historical data.
- copy of the s202 certification by Mr Peter Yu, Executive Director, Kimberley Land Council dated 22 February 1999 (Attachment E).
- copy of pastoral lease 398/844 to Sunlight Holdings Pty Ltd dated 11 September 1995 and registered 12 September 1995.
- photocopy of map of current land tenure as at 24 July 1995 prepared by LCMU showing, although not clearly due to the photocopying process, the claim area, pastoral lease areas, Reserves land, Aboriginal Reserve and Vacant Crown Land.
- photocopy of map of current land tenure as at 13 October 1995 prepared by LCMU, showing claim area, Reserves 21972, 27164, 21969, 8248, 8247 and 41886, pastoral lease 398/844 and exploration licence areas for EO4/966, EO4/985, EO4/987 EO4/989 and other EO's outside the claim area.

Map of the amended application

The Tribunal has on file a coloured map of the claim area prepared by LCMU after acceptance of the application on 29 July 1995. The map shows current land tenure as at 13 October 1995. Current land tenure within the area at that time included pastoral lease (398/844), one conservation reserve, three Aboriginal reserves, two other reserves and vacant crown land. This LCMU map depicts the claim area as it was at the time the application was referred to the Federal Court 16 October 1996.

The amendments made by the Federal Court on 15 January 1999 reduced the area of the application to remove part of the Prince Regent Reserve (Reserve 27164) and part of the Kunmunya Aboriginal Reserve (Reserve 23079). Prior to 15 January 1999 this application overlapped with the Dambimangari application (WC96/3). The amendment to the area on 15 January 1999 left a smaller area of overlap with the Dambimangari application, in the

south east corner of the Ngarinyin WC95/23 area. The amendments in the Federal Court on 12 March 1999 did not affect this area of overlap in the south east corner.

The two current claim maps (Attachment C) were prepared by the Tribunal by way of assistance to the applicants under s78 of the Act. The maps have been compiled from the applicants' earlier map of the claim area, claim area and tenure information provided to the Tribunal by LCMU and topographical information provided by the Australian Surveying and Land Information Group (AUSLIG).

The maps include the topographical features referred to in the affidavits filed in the Federal Court in support of the amended applications. These features are the Prince Regent, Roe and Moran Rivers, Backsten Creek, Mount York and Mount Hann.

State's Submission

The State has made one submission in relation to registration of this application; by letter dated 26 November 1998. I refer to this submission in later parts of these reasons. Most of the matters raised in the letter are now not relevant due to the significant amendments made by the Federal Court on 15 January and 12 March 1999. It is also my understanding that the State has been represented by the Crown Solicitor's Office at each of the amendment hearings in the Federal Court. The Court's Report of Listing document dated 12 March 1999 notes that "the Respondent" was represented at the hearing of the application to amend on that date. The State has therefore been aware of the amendments and has apparently chosen to make no further comments to the Tribunal about the application of the registration test.

Relevant Documents

In considering my decision under s190A I have had access to all documents in Tribunal files other than documents submitted for the purposes of mediation or prepared for the conduct of and in the course of mediation which, if disclosed to the Delegate or other persons for the purposes of or in relation to the outcome of the registration test decision, may prejudice the mediation of this application.

Documents which I have considered include documents from the Tribunal's working files such as maps, submissions, correspondence, documents in relation to future act proceedings, extracts from the Register of Native Title Claims, land title documents obtained from the State government or the applicant (e.g. copies of leases) and documents received from the Federal Court, such as the proposed amended application, attachments to the proposed amended application and correspondence from the Federal Court.

In my reasons, where applicable, I will refer to particular documents which I have taken into account when considering each aspect of the registration test. However, the main documents that I have relied on are:

- the original application lodged 19 July 1995, with attachments;
- documents relating to amendment of the application before referral to the Federal Court on 16 October 1996, such as correspondence with the Tribunal;
- maps submitted by the applicants, or prepared by LCMU or by the Tribunal's Geospatial Information Unit;
- schedules of current and historical tenure obtained from LCMU or submitted by the applicants;

- the application as amended 15 January and 12 March 1999, with attachments;
- the Tribunal file WO95/8 in relation to an objection to the expedited procedure lodged by the Ngarinyin people;
- the affidavit of Paddy Neowarra sworn 25 February 1999
- covering letter from Dwyer Durack dated 10 March 1999 and the facsimiles from KLC and Dwyer Durack dated 10 and 11 March 1999;
- a submission by the State of Western Australia in relation to registration of this application, dated 28 November 1998.

I shall now consider the application as amended by the Federal Court on 12 March 1999.

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.***

Decision	**Complies**

Reasons

Reasons are provided below against each separate requirement

Details required in section 61

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

Decision	**Complies**

Reasons

The applicants' representative is the Kimberley Land Council and the address for service is provided.

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***

Decision	**Complies**

Reasons

The application as amended in the Federal Court (the application) is made by Mr Laurie Gowanulli, Mr Paddy Neowarra, Mr Paddy Wama, Mr Scotty Martin, Mr Jimmy Maline, Mr Jack Dann, Mr Jack Dale, Mr Keith Nenowatt, Mr Paul Chapman, Mr Reggie Tataya, Mr Donald Campbell, Ms Pansy Nulgit, Ms Betty Walker, Ms Kathy Oreeri, Ms Mandy Wungundin, Mr Barney U.

The native title claim group (the persons on whose behalf the application is made) is described as follows:

> *The claimant group comprises those people who hold in common the body of laws and customs derived from beliefs about Wanjina/Ungurr. Those people are:*
>
> *(a) The descendants of ...* (a list of 88 names is given);
>
> *(b) Together with the descendants of Dalbi who was adopted into the native title claimant group.*

To comply with the requirements of s61(4) the application must either name the persons in the

native title claim group or otherwise describe them sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

The details required in s61(4) are the same as those required by 190B.

This claim group description identifies the persons in the native title claim group by descent; either by descent from one of more of 88 named individuals or by descent from another individual, Dalbi.

The claim group description includes another descriptor, "those people who hold in common the body of laws and customs derived from beliefs about Wanjina/Ungurr". This descriptor alone would not describe the members of the claim group sufficiently clearly for the purposes of s61(4), as it does not give any indication of how it would be ascertained whether a person is one who "holds in common" the body of laws and customs. Neither does it provide any principles of, or guidance in relation to, the laws and customs which are derived from the beliefs. The beliefs are not outlined, described or exemplified. The nature or significance of Wanjina/Ungurr is not explained.

However, this descriptor does not determine who is in the claim group; this is determined by descent from the named persons. It is not therefore necessary for me to understand the meaning of "hold in common the body of laws and customs derived from beliefs about Wanjina/Ungurr" as the claim group is defined by descent from the named persons. The reference to holding a body of laws and customs is a statement by the applicants that the people who are the descendants hold in common the body of laws and customs. The definition of the claim group does not depend on ascertaining who holds in common the body of laws and customs.

If the names of the members of the claim group are not listed the subsection requires that the persons be described "sufficiently clearly so that it *can be* ascertained whether any particular person is one of those persons" (my emphasis). This allows for the ascertainment of members of the claim group at a later date should it be necessary. This does not require the Registrar to ascertain the names of individuals for the purposes of the registration test.

The persons in the group comprise the descendants of one or more of the 89 named individuals. Whilst I do not have genealogical evidence available to me which would identify all members of the group, this material is not necessary, otherwise it would make no sense to have an alternative to naming all the persons in the native title claim group.

Although the descent records may be found in oral transmissions through the generations and the memories of the living people I am satisfied that the description provides a sufficiently precise means of identifying, at a later date if necessary, whether any particular person is in the group.

By letter dated 26 November 1998 the State of WA submitted that the claim group description, as it then was, was insufficient. The description at that time was that the claim group comprised "Ngarinyin People, including their respective family groups of Henry Mowaljarlai, Paddy Neowarra, Laurie Gowanulli, Paddy Woma". The State does not give reasons for this view.

The amendments to the application made on 12 March 1999 have resulted in a more limited claim group description. There is no reasoning in the State's submission which could be applied to the new claim group description.

I find that the claim group description is sufficient to meet the requirements of the subsection.

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

Decision	**Complies**

Reasons

Section 190C(2) requires that the application contain the details, information, affidavit and any other document required by sections 61 and 62. For the purposes of registration, I do not need to consider whether the fee has been paid.

The amended application is in the prescribed form and includes a map.

An affidavit in support of the application as amended on 12 March 1999 has been filed by each named applicant except Donald Campbell and Kathy Oreeri. Mr Campbell and Ms Oreeri affirmed an affidavit on 21 December 1998 in support of the application as previously amended in the Federal Court on 15 January 1999.

Mr Campbell and Ms Oreeri have not sworn or affirmed affidavits in support of the subsequent proposed amended application. Their views in relation to the changes made in the Federal Court on 12 March 1999 are referred to in their facsimiles dated 10 and 11 March 1999. I shall refer to this matter again when I consider the formal requirements that the named applicants provide an affidavit which includes evidence of authorisation.

For comments on the requirements of the affidavits and the contents of Form 1, see my reasons below in relation to the prescribed information required by Form 1. I am satisfied that the affidavits accompanying the application, including the joint affidavit of Mr Campbell and Ms Oreeri affirmed 21 December 1998, are sufficient to conclude that the application is accompanied by the prescribed documents.

Schedule J of the new Form 1 requires the applicant to provide a draft of the order "to be sought if the application is unopposed". The applicants say that they are not required to provide a draft order because the matter is opposed. Respondent parties have been joined and the matter has not been settled by mediation. Taking into account the wording of Schedule J, it would seem that it is not necessary for the applicants to provide a draft order.

Details required in section 62(1)

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

Decision	**Complies**

Reasons

The application as amended on 12 March 1999 is supported by individual affidavits from 14 of

the 16 named applicants. The 14 affidavits are in the same form and have been sworn on various dated between 29 January 1999 and 2 March 1999. These are the affidavits of Messrs Gowanulli, Neowarra, Wama, Martin, Maline, Dann, Dale, Nenowatt, Chapman, Tataya and Ms Nulgit and Ms Walker. I note that some of the affidavits have been sworn before Mr Dann, one of the applicants who is a Justice of the Peace.

I do not have a difficulty with Mr Dann witnessing these affidavits, even though he is a named applicant. There is nothing in the Commonwealth *Evidence* Act or the *Federal Court Act* or Rules to require that someone not associated with the matter before the Court witness any relevant affidavits.

The 14 affidavits contain statements that the deponents believe that native title rights and interests have not been extinguished; that none of the area covered by the application is covered by entry in the National Native Title Register; that the deponent believes that all of the statements made in the amended application are true and that the deponent is:

> *... authorised to make and deal with matters arising in relation to the application pursuant to the process of decision making 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 and in relation to doing things of that kind.*

Section 62(1)(a) and s251B together require each deponent to state the basis upon which the deponent is authorised.

Section 251B states that a person is "authorised" if the members of the native title claim group authorise the applicants either by a traditional process of decision making or a process of decision making agreed to and adopted by the members of the native title claim group for authorising the applicants and dealing with the application or dealing with things of that kind.

When considering compliance with s62(1)(v) (which requires the applicants to state the basis on which they are authorised), I find that it is sufficient for the applicants to state either that they have been authorised by a traditional decision making process or that they have been authorised by a process agreed to and adopted by the members of the claim group for conducting the application. I do not believe it is necessary for the applicants to specify the actual process that was applied to confirm the authorisation.

Here the applicants have given a general statement that the process used was agreed to and adopted by the members of the claim group. They are required to state the basis on which they have been authorised and the basis is that they have conducted a process which has been agreed to and adopted by the members of the claim group.

The remaining 2 named applicants, Mr Campbell and Ms Oreeri, affirmed a joint affidavit on 21 December 1998 in support of the application as amended on 15 January 1999. They did not submit a fresh affidavit in support of the application as amended 12 March 1999.

In their affidavit affirmed 21 December 1998 Mr Campbell and Ms Oreeri state that they believe the native title rights and interests have not been extinguished, that none of the area covered by the application is covered by an entry in the National Native Title Register and that

all the statements made in the application (as amended 15 January 1999) are true. They also depose 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, on the grounds that ... the persons in the native title claim group have authorised me/us in accordance with a process of decision making which they have agreed to and adopted."

The amendments ordered by the Court on 12 March 1999 amended the application of 15 January 1999 in the following respects:

- the claim group description was redefined to limit the extent of the group to the descendants of 89 ancestors. (Previously the claim group comprised this group and possibly another set of people who, in addition to the descendants, have a socially recognised connection to [cultural reference to area deleted] within the claim area in accordance with laws and customs derived from a body of beliefs about *Wanjina/Ungurr*.)
- The phrase "subject to any shared right of exclusivity" in relation to native title rights and interests claimed was replaced with the phrase "subject to any native title rights and interests which may be shared with others who establish that they are native title holders."
- The applicants clarified that the native title rights and interests were "not claimed to the exclusion of any other rights of interest validly granted or pursuant to the common law, the laws of the State or a law of the Commonwealth."

I note that it is not certain that the scope of the claim group will have been reduced by the latest amendment even though the words provide a more restrictive definition.

On receipt of the proposed further amended application filed with the Federal Court on 2 March 1999 and upon my noticing that there were no fresh affidavits from Mr Campbell and Ms Oreeri I asked the Tribunal's Case Manager, Mr Bill Lawrie, to make enquiries about Mr Campbell's and Ms Oreeri's views particularly in relation to the more limited scope of the claim group description.

In response the Tribunal received a facsimile from Dwyer Durack dated 11 March 1999 with a copy of a facsimile from the KLC dated 10 March 1999, the latter stating:

> *I refer to your facsimile of 10 March 1999 advising of the delegate's requirement that Oreeri and Campbell are aware of the most recent amendment to the claim group description. I hereby advise that Oreeri and Campbell are aware of this amendment and are happy with those changes.*

I note that the previous affidavit from Mr Campbell and Ms Oreeri refers to their addresses as separate addresses in Wyndham. To some extent therefore Mr Campbell and Ms Oreeri are isolated and in view of the distances and timeframes involved (I am now pressed to make a decision as soon as practicable following the amendments in the Federal Court on 12 March 1999), I am prepared to accept the facsimile from the KLC dated 10 March 1999 as evidence that Mr Campbell and Ms Oreeri are still in support of the application as named applicants even though the extent of the claim group may have been reduced.

In relation to authorisation (s62(1)(a)(iv) and (v)) the affidavit of Mr Campbell and Ms Oreeri meets the requirements in relation to the application as amended on 15 January 1999. I am

satisfied that it also meets the requirements for the application as amended on 12 March 1999. I have formed this view taking into account the limited nature of the amendments, the fact that they are authorised "to deal with matters arising in relation to the application" (as deposed in their affidavit of 21 December 1998) and the confirmation from the applicants' representative (KLC) that Mr Campbell and Ms Oreeri agree to the latest amendments.

I note the State's Submission dated 26 November 1998 that unless the applicant has provided an affidavit including all the criteria required under this section, it is the State's contention that the Registrar should find that the application has failed to satisfy this requirement. No specific deficiencies were raised by the State.

In all the circumstances I am satisfied that the affidavits meet the requirements of the subsection.

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

Decision	**Complies**

Reasons

The application and accompanying affidavits provide evidence of traditional physical connection by more than one member of the claim group.

Schedule M of the amended application provides examples of traditional physical connection maintained by members of the group and their predecessors.

There are references to practising traditional activities at [name deleted] (Reserve 41886), including hunting, fishing and cultural activities. Two of the named applicants [name deleted] and [name deleted], have travelled with their families from one area to another, [reference to cultural practices deleted]. They camped at particular sites, significant for cultural and resource reasons.

Other customs were practised in relation to the area, such as [cultural practice deleted].

I refer to traditional physical connection in more detail in relation to s190B(5) and s190B(6).

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

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

Decision	**Complies**

Reasons

The amended application provides a description of the outer boundary of the claim area by reference to latitudes and longitudes.

The applicant excludes areas within the external boundary by describing the types of areas excluded rather than by excluding particular parcels of land.

I find the information and map to be satisfactory for the reasons given in relation to s190B(2).

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

Decision	**Complies**

Reasons

The application provides details of internal boundaries which are not included as part of the claim. Refer to my reasons under s190B(2).

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

Decision	**Complies**

Reasons

The maps attached to the amended application (Attachment C) show the external boundary of the area claimed.

This requirement has been met.

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

Decision	**Complies**

Reasons

Attachment D to the amended application includes a letter from the Land Claims Mapping Unit dated 25 July 1995 referring to current and historical tenure and advising that no pastoral leases were approved within the "window period 30/12/1932 to 21/1/1935". Attachment D also includes copies of reserves index searches, a schedule of current tenure information dated 26 July 1995, a schedule of historical tenure information also dated 26 July 1995 (both from LCMU) and copies of historical pastoral leases. There is also a subsequent schedule of current tenure as at October 1995 (dated 16 October 1995) showing that pastoral lease 398/844 to Sunlight Holdings Pty Ltd, granted 11 September 1995, is included in the claim area.

In relation to LCMU's advice that no "window period" leases were approved, there is sufficient material for me to conclude, prima facie, that no pastoral leases were granted within the claim area that did not reserve, either in the Land Act as it was at the relevant time or in the terms of the lease, a right of access in favour of Aboriginal people.

I note the State's submission dated 26 November 1998 is that the application should fail unless details of searches are provided. The State's concern in relation to this requirement has been addressed by the amendment of the application in the Federal Court and the provision of search material with the amended application.

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

Decision	**Complies**

Reasons

A description of the native title rights and interests claimed is included in Schedule E. As required by the subsection, the rights and interests are stated in a form which goes beyond a mere statement that the native title claim group seeks all native title rights and interests which have not been extinguished.

The application meets this requirement.

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

Decision	**Complies**

Reasons

The application must contain:

> *62(2)(e) 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 (has), and the predecessors of those persons had, an association with the area;*
>
> *(ii) there exists traditional laws and customs that give rise to the claimed native title; and*
>
> *(iii) the native title claim group (has) continued to hold the native title in accordance with those traditional laws and customs;*

This subsection requires that the *application* contain a general description of the factual basis for three assertions that would form the foundation of a finding that native title continues to exist.

Section 190B(5) requires something more; that the Registrar be satisfied that the factual basis provided is "sufficient to support the assertion(s)". That subsection does not contain the same reference to "the application" and therefore it would seem open to the Registrar under that section to take into account material beyond the application.

From the material in the application I conclude that there is a general description of the factual basis upon which these assertions are made.

The general factual basis is found in Schedule F of the amended application. There is also relevant material in Schedules A, G and M.

Schedule F contains the following material by way of factual basis for each of the three assertions.

(i) the predecessors of the native title claim group had an association with the area

- the ancestors of the native title claim group have, since the assertion of British sovereignty, possessed, occupied, used and enjoyed the claim area
- the possession, occupation, use and enjoyment has been pursuant to and possessed under the laws and customs of the claim group
- preceding generations have passed on the traditional law and custom to the present

generation in the native title claim group
- the traditional laws and customs include laws and customs about the vesting of rights and interests in land and waters in members of the native title claim group on the basis that they are descended from ancestors connected to the area
- the traditional laws and customs also include laws and customs about vesting rights in members of the group on the basis of other principles which connect people with the area (for example, conception in the area, birth in the area, traditional knowledge of the area).

It is reasonable for me to infer that the traditional laws and customs passed on by the predecessors through the generations are laws and customs related to the land.

(i) the native title claim group (has) an association with the area

- the native title claim group has possessed, occupied, used and enjoyed the area
- the group has possessed, occupied, used and enjoyed the area according to laws and customs of the claim group
- it is traditional laws and customs which have been passed on to the claim group through the preceding generations
- the laws and customs are based on principles which connect people with the land, eg conception in the area, birth in the area, traditional knowledge of the area
- the group continues to observe traditional laws and customs based on principles which connect members of the claim group with the area.

The reasonable inference from this series of statements is that the continued observance of the traditional laws and customs by members of the claim group gives them an ongoing association with the area because the laws and customs include principles which connect the members of the claim group with the area.

(ii) there are traditional laws and customs which give rise to the claimed native title

- the predecessors possessed, occupied, used and enjoyed the area according to traditional laws and customs
- the traditional laws and customs have been passed down through the generations
- the traditional laws and customs relate to the area (eg they include principles about birth and conception in the area and traditional knowledge of the area)
- the members of the native title claim group continue to observe the traditional laws and customs which relate to the area
- the traditional laws and customs include laws which enable rights and interests in the area to be vested in members of the native title claim group. These principles of traditional law connect people with the area in such a way that they inherit rights and interests.

This series of statements outlines how the traditional laws and customs vest native title rights and interests in members of the claim group.

(iii) the native title claim group (has) continued to hold the native title in accordance with those traditional laws and customs

- the traditional laws and customs have been passed down through the generations
- native title rights and interests vest in members of the group according to principles of traditional law and custom (eg descent from ancestors who possessed, occupied, used or enjoyed the area, conception in the area, birth in the area, traditional knowledge of the area)

- the group has continued to observe the traditional law and custom
- the continued observance of those laws and customs has maintained the group's connection with the area
- members of the claim group are vested with native title because the traditional laws and customs give them rights and interests in relation to the land.

The conclusion to be drawn from this series of statements is that the group, because it continues to observe the traditional laws and customs which give the members rights and interests in relation to the land, has maintained those rights and interests. These are native title rights and interests.

Schedule A identifies the body of laws and customs common to the members of the claim group; it is the body of laws and customs derived from beliefs about Wanjina/Ungurr. It is not necessary for me, for the purposes of this registration decision, to know and understand the beliefs about Wanjina/Ungurr. It is enough for me to note that there is a particular set of laws and customs by which the members of the claim group live. This statement further describes "the traditional law and custom of the claim group" referred to in Schedule F.

Schedule G refers to members of the claim group carrying out various activities on the land, including conducting traditional ceremonies.

Further material supporting s62(2)(e)(ii) and (iii) is provided in Schedule M, which gives examples of traditional practices carried on within the claim area by members of the claim group. Schedule M refers to hunting, fishing, cultural activities, ceremonies and land management practices being conducted within the claim area. There are also references to significant [cultural reference deleted] sites within the claim area and [cultural reference deleted]. Schedule M includes a reference to Wanjina:

> *When [name deleted] and [name deleted] were adolescents they would travel with their families from the [location deleted] area and live with relations in [name deleted] area, which is [name deleted]'s mother's country. They remember many people living in the country at that time. There they learnt [reference to cultural matters deleted].*

[Area deleted] is located within the claim area.

In summary, I find that the applicants have provided some factual material which goes beyond the assertions set out in s62(2)(e). Later in these reasons I consider whether the material is sufficient for me to be satisfied that the factual basis supports the assertions to the extent required by s190B(5).

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

Decision	**Complies**
Reasons I find that the requirements for this subsection are met. Refer to my reasons under s62(2)(e)(i).	

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

Decision	**Complies**

Reasons

I find that the requirements of this subsection are met. Refer to my reasons under s62(2)(e)(i).

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

Decision	**Complies**

Reasons

Details of activities carried out are set out in Schedules G and M.

Schedule G refers to the carrying on of activities including hunting, gathering, fishing and conducting traditional ceremonies.

Schedule M of the application refers in more detail to traditional activities being carried out on part of the claim area by living claim group members, including hunting, fishing, ceremonial activities, including initiations and ceremonial gatherings, and fire driving of kangaroos.

This requirement has been addressed.

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)***

Decision	**Complies**

Reasons

The applicants state, in Schedule H, that they are not aware of the details of any other applications to the relevant courts or bodies in relation to any part of the area. However, there is one application which overlaps, Dambimangari, WC96/3. I refer to this in more detail in relation to s190C(3) which deals with the circumstances when overlap can prevent registration of the application being considered.

Dambimangari WC 96/3 must be considered to be an application to the Federal Court, as the transitional provisions of the current Act deem it to have been filed in the Court. I consider the applicants' failure to mention this here to be an oversight on their part as the overlap is well known to the applicants and the Tribunal. I am informed by the Tribunal's case manager, Mr Bill Lawrie, that discussions between the two sets of claimants are continuing with a view to removing the overlap. The oversight is not of a kind which by itself should prevent registration of the application.

Taking these circumstances into account I find that there is sufficient compliance with this subsection..

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

Decision	**Complies**

Reasons

Details of notices under s29 are given in Schedule I of the application. I note that the s29 notices referred to in Schedule I were advertised 28 October 1998.

I am aware of s29 notices issued under the old Act. The Tribunal conducted proceedings pursuant to objections to the expedited procedure. The applicants have not provided details of any s29 notices issued under the old Act.

Does the subsection require the applicants to provide details of any notices issued under s29 of the old Act?

The notation immediately beneath subsection 2(h) states:

> *Note: Notices under s29 are relevant to subsection 190A(2).*

The inclusion of the *Note* implies that information about s29 notices is required to assist the Registrar to determine whether s190A(2) applies. Section 190A(2) provides that if a s29 notice which affects the claim area is given before or while the Registrar is considering the application for registration, the Registrar must use his or her best endeavours to finish considering the claim by the end of 4 months after the notification date specified in the s29 notice.

The inclusion of s29 information under the current Act would assist the Registrar to determine whether the 4 month period applies. The main purpose of the subsection appears to be to put the Registrar on notice of s29 activity under the new Act.

I conclude that the Act is more likely to be intended to require the applicant to give details of any s29 notices issued under the current Act. This is supported by paragraph 25.39 of the Explanatory Memorandum to the *Native Title Amendment Bill 1997* which refers to the 4 month period.

Even if the current Act is intended to require details of s29 notices issued under the old Act as well as the current Act, this would not be a reason for me to fail to register this particular application. If this were the only deficiency in the application I would be in a position to conclude that the applicant has substantially complied with the formal requirements of s62. Through an independent process of information sharing between the Tribunal and the Western Australian Department of Minerals and Energy the Tribunal has on file details of s29 notices issued under the old Act. Taking this into account, I could not conclude that, by itself, failure to provide details of notices issued under the old Act s29 would defeat registration.

In the circumstances I find that the applicant has complied with this requirement.

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.***

Decision	**N/A**

Reasons

A search of Tribunal geospatial data reveals that there is one application overlapping this application, Dambimangari, WC96/3 which was lodged on 15 January 1996 and registered on the Register of Native Title Claims on the same date. Ngarinyin (the current application) WC95/23 was lodged on 19 July 1995.

"Previous" is not defined in s190C(3) or the general definition section, s253. The wording of s190C(3) implies that "previous application" means an application which was lodged, or filed, and registered before the current application was lodged, or filed.

In this case Ngarinyin WC95/23, in plain terms, preceded Dambimangari WC96/3 as Ngarinyin was lodged and registered before Dambimangari was lodged. Further, although Dambimangari WC96/3 is registered, it is not on the Register, or does not remain on the Register, as a result of a registration decision under s190A. In the circumstances, and in the absence of any overlap with any other application, this section is not relevant in the circumstances of this application.

I note the submission by the State of WA that [name deleted] who is listed as a claimant in Dambimangari WC 96/3, is likely to be a member of the native title claim group for Ngarinyin WC95/23. While a common claimant (if that is the case) may well pose a problem in relation to WC96/3, it does not prevent the registration of the current application because the section does not apply to my consideration for registration of this application (WC95/23).

190C4(a) and 190C4(b)	***Certification and authorisation:*** ***The Registrar must be satisfied that either of the following is the case:*** ***(a) the application has been certified under paragraph 202(4)(d) by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part; or*** ***(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.***

Decision	**Complies**

Reasons

Schedule K of the application states that the Kimberley Land Council and the Aboriginal Legal Service of W.A. (Inc) are the representative bodies for the area covered by the application. The application states that the applicants' representative is the KLC. The KLC has provided a Certificate signed by Mr Peter Yu, Executive Director of the KLC dated 22 February 1999. Mr Yu certified that the KLC is of the opinion that the applicants have the authority to make the application and that the KLC has made all reasonable efforts to ensure the application describes or otherwise identifies all other persons in the native title claim group.

The Certificate provides the following reasons for its opinion:

- The KLC is aware that extensive research and community consultation has been undertaken by Kamali Land Council (an organisation which represents the applicants).
- The KLC is aware of a series of six community meetings held with claimants for the purposes of authorising the applicants.
- A KLC representative attended these meetings and observed that the applicants were authorised by the claimant group.
- The KLC is aware that a meeting was held between the claimants of WC95/23 and WC96/3. A KLC representative attended this meeting and observed that a new boundary was agreed which removed the overlap between the claims. The amended boundary for WC95/23 is shown on the amended map attached to the application. Further amended map and application are being prepared for WC96/3.

In relation to the last dot point, the history of the application shows that the current application area is the result of a reduction in the claim area to partly remove overlap with Dambimangari WC96/3. This would explain the reference in the certificate to the amended boundary for this application (Ngarinyin WC95/23) and the amended map. The Tribunal's Case Manager for this application and Dambimangari WC96/3, Mr Bill Lawrie, informs me that further discussions have taken place between the two groups of applicants to address the remaining area of overlap.

I am satisfied that the KLC has sufficiently referred to efforts to date to reduce overlap to meet the requirements of s202(7)(c).

S190C4(a) requires certification by "each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that part". S190C4(b)

provides that, where there is more than one representative body for the area, it is sufficient for one body to certify.

The KLC's certificate meets the requirements of s202. It includes a statement of the KLC's opinion about the applicants' authority and sets out the reasons for being of that opinion. The certificate also sufficiently refers to efforts to reduce overlap.

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.***

Decision	**N/A**

Reasons

The section does not apply as the application has been certified by the KLC which is a representative body for the area and the applicants' chosen representative.

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.***

Decision	**Complies**

Reasons

In Schedule B the applicants describe the external boundary of the claim area by reference to latitudes and longitudes and the external boundary is shown on the attached map (Attachment C). By way of further information Attachment C also includes current tenure data from LCMU. This current tenure has been plotted on the claim map.

Section 62(2) requires that the application include:

> *(a) information, whether by physical description or otherwise, that enables the boundaries of:*
> *(i) the area covered by the application; and*
> *(ii) any areas within those boundaries that are not covered by the application; to be identified;*
> *(b) a map showing the boundaries of the area mentioned in subparagraph (a)(i);*

Section 190B(2) requires that I be satisfied that the information and the map provided pursuant to s62(2) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

The map and land description clearly indicate the external boundary of the area covered by the application. The map also indicates most of the current tenure; pastoral lease, reserve land and vacant crown land. There are also mining interests in the area. The current tenure information has been obtained from LCMU, which has also advised that the historical tenure in the area comprises pastoral leases.

In Schedule B the applicants seek to address s62(2)(a)(ii) by excluding areas within the external boundary by class, rather than by excluding particular parcels.

In the circumstances of this application I am satisfied that the applicants have complied with s62(2)(a)(ii). I am also satisfied (under s190B(2)) that the information provided pursuant to s62(2) is sufficient for it to be reasonably certain whether native title rights and interests are claimed in relation to particular areas of land.

I have no information which would lead me to conclude that there are areas within the external boundary where native title has obviously been extinguished. For example, there is no evidence of public works, public roads, past grants of private freehold or past grants of leases

of a type which clearly would have extinguished native title either according to common law or pursuant to statute.

This leads me to believe that the applicants intend to claim native title in respect of the whole area but nevertheless set up some class exclusions in case there are areas where native title has been extinguished.

In these circumstances, and also because it would be difficult at this stage to ascertain all historical dealings in relation to the area, I am satisfied that it is reasonable for the applicants to define any areas not claimed by excluding classes of grants or dealings in land rather than by excluding particular parcels of land.

The following explains the context of the exclusions in more detail.

Details of current and historical tenure and exclusions

The LCMU tenure information indicates that there are seven reserves and one pastoral lease within the external boundary. Two reserves (8247 and 8248) were apparently neither vested nor granted as at October 1995 but were intended for the purpose of *a watering place for travellers and stock*.

Reserve 27164 was vested in the WA Wildlife Authority for the purpose of conservation of flora and fauna.

Three reserves, 21969, 21972 and 41886 were vested in the Aboriginal Lands Trust for the use and benefit of Aborigines.

Pastoral Lease 398/844 was granted 11 September 1995 to Sunlight Holdings Pty Ltd.

Also attached to the application by way of searches previously undertaken is a schedule of historical data obtained from the LCMU, dated 26 July 1995. This indicates that as at that date 23 pastoral leases affecting the area had been issued, although this may not have been an exhaustive search.

The letter from LCMU dated 25 July 1995 (Attachment D) refers to the underlying pastoral lease history for the claim and advises "there (were) no pastoral leases approved within the window period 30 December 1932 to 21 January 1935". It is sufficient for me to say, for the purposes here, that any pastoral leases granted in Western Australia before 30 December 1932 or after 21 January 1935 either contained a clause in the lease reserving a right of access to Aboriginal people or were granted under legislation which reserved a right of access to Aboriginal people. The effect of this is that, according to LCMU's search, none of the historical pastoral leases were issued without a reservation in favour of indigenous people. Accordingly, applying the common law, I cannot conclude that these historical pastoral leases extinguished native title. (Even if there were pastoral leases issued without a reservation the common law would not rule out the continuation of native title.)

In relation to the three reserves (41886, 23079 and 21969) vested in the Aboriginal Lands Trust for the use and benefit of Aborigines, the applicants say that members of the native title claim group occupy this area (Schedule L of the application).

The applicants also say that the vacant crown land within the claim area is not used for a public purpose or pursuant to any freehold estate, lease, crown reservation or legislation. It is stated that [name deleted] and [name deleted] and their families, being members of the native title claim group, occupy the area (Schedule L of the application).

In this case the applicants have *excluded*, in Schedule B(b):

> *(i) ... any areas covered by valid acts on or before 23 December 1996, comprising such of the following as are included as extinguishing acts within the Native Title Act 1993, as amended, or Titles Validation Act 1994, as amended, at the time of the Registrar's consideration:*
> - *Category A past acts, as defined in NTA s228 and s229*
> - *Category A intermediate period acts as defined in NTA s232A and s232B.*
>
> *(ii) ... any areas in relation to which a previous exclusive possession act, as defined in s23B of the NTA, was done in relation to an area, and either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia, and a law of that State has made provision as mentioned in s23E in relation to the Act.*

The general intention of this formula is to exclude from the claim area any previous grants of interest in land which, under Commonwealth or State native title legislation, have extinguished native title. I note that there is here no general exclusion of any areas where native title may have been extinguished at common law.

However, in Schedule E, description of native title rights and interests the applicants state:

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

At the time when I am considering this application for registration there is no Western Australian legislation confirming that State previous exclusive possession acts extinguish native title. There is State legislation validating category A past acts but none validating category A intermediate period acts.

By the formula in Schedule B the applicants have excluded from the claim any areas which have been subject to extinguishing events, as validated and defined by the *Native Title Act* and any State legislation operating to validate and confirm extinguishment of native title.

In the case of Commonwealth acts the provisions of the *Native Title Act* referred to in Schedule B(b) have the effect of defining the types of grants or events in the past which will have extinguished native title. These include, for example, grants of freehold and grants of certain types of leases defined as category A past acts (eg commercial and residential leases).

The applicants also say in Schedule B that their exclusion of these Commonwealth acts does not apply to areas referred to in s47, s47A and s47B. In this case the application area includes vacant crown land and reserves for the use and benefit of Aboriginal people. The

applicants invoke s47A and s47B to say that native title is still claimed in respect of these areas.

In the case of past State grants or events, Schedule B(b) refers to State legislation which may, in conjunction with the *Native Title Act*, define and validate grants which have extinguished native title. The applicants say that if there are such events then native title is not claimed in respect of those areas.

The State has legislated to validate certain grants prior to 1 January 1994 (and some types of past acts after that date) and to provide that they extinguish native title. This legislation relates in part to category A past acts.

The State has not however legislated in respect of acts between 1 January 1994 and 23 December 1996 (intermediate period acts). It is therefore conceivable that there may have been extinguishing events at common law which have not been covered by State legislation.

The applicants say that, in respect of State acts also, sections 47, 47A and 47B apply to any area which would otherwise be affected by a State extinguishing event, then those areas are not excluded from the claim as they are "protected" these sections.

The applicants have not included any statement that, in addition to any extinguishment brought about by legislation, the claim does not include any area where native title may have been extinguished at common law.

Section 190B(2) requires me to be satisfied that the information provided to meet the requirements of s62(2) 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*. Under s190B(8) I must be satisfied that the application and accompanying documents do not disclose, and I must not otherwise be aware, that native title is claimed where there has been a previous exclusive possession act.

In this case I am not aware of any previous exclusive possession act. (See my reasons below in relation to s190B(8)). There is no evidence of prior extinguishment at common law which would require the applicants to clearly state whether the particular parcel was included or excluded. This is a case where the known current and historical tenure, *prima facie*, allows for the continuation of native title. The exclusions in Schedule B are put in by the applicants "just in case" there have been any grants or events which, under the *Native Title Act* or any relevant State legislation, have extinguished native title.

In all these circumstances I am satisfied that the application meets the requirements of s62(2) and s190B(2).

190B3	***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.***

Decision	**Complies**

Reasons

This requirement is similar to the requirement in section 61, which I have previously considered under s190C(2).

Section 61 provides:

> *s61(4) ... the application ... must:*
> *(a) name the persons; or*
> *(b) otherwise describe the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.*

I refer to my reasons given in relation to s190C(2) and confirm that I am satisfied that the application contains a sufficiently clear description of the persons in the native title claim group so that it can be ascertained whether any particular person is one of the persons in the claim group.

190B4	***Identification of claimed native title*** ***The Registrar must be satisfied that the description contained in the application as required by paragraph 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.***

Decision	**Complies**

Reasons

The application, in Schedule E, states:

> *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 others to establish that they are native title holders) of the area and any right or interest included within the same, and in particular, comprise;*

and the application proceeds to list the rights and interests claimed in subparagraphs (a) to (j).

The rights and interests are then said to be subject to Crown rights to minerals, petroleum or gas, rights created in offshore places, and rights arising as a result of previous non-exclusive possession acts, except in cases where the applicants have the benefit of s47, 47A and 47B.

The rights and interests are also:

> *(v) ... not claimed to the exclusion of any other right or interest validly created by or pursuant to the common law, the law of the State or a law of the Commonwealth.*

The particularised native title rights and interests include, for example, rights and interests to possess, occupy, use and enjoy, the right of access, the right to control the use and enjoyment of others of resources of the area and the right to maintain and protect places of importance under traditional laws, customs and practices. Each of the rights and interests set out in (a) to (j) refer to some practice or some interaction with the area which can be readily understood in plain language.

In my view the words "as against the whole world" indicate that, irrespective of who else may possess rights in the area, the rights and interests vested in the native title holders are to be recognised by all others. The recognition of native title rights and interests as against the whole world would not preclude the recognition of concurrent rights and interests in the same area. Furthermore, subparagraph (v) quoted above confirms that native title is not claimed to the exclusion of other valid concurrent rights.

I note that the current tenure includes a pastoral lease, 398/844, granted 11 September 1995. The applicants have not raised any question of validity of this lease and I am treating it as part of the current tenure. If this lease is valid, or has been validated, it would confer rights of possession, use and occupation. The applicants claim recognises that other rights and interests

"validly created by or pursuant to the Commonwealth law, the law of the State or law of the Commonwealth" may continue. Although this pastoral lease may not have been validly created, I conclude that the applicants' statement that native title is "not claimed to the exclusion of any other rights or interests validly created by or pursuant to the ... law of the State ..." is sufficient to indicate that any rights pursuant to the grant of pastoral lease 398/844 will continue. In Schedule E(iii) the applicants also state that exclusive possession is not claimed where non exclusive possession acts may have occurred.

I am satisfied that the description of the native title rights and interests claimed and the extent of the rights claimed is sufficient to allow the native title rights and interests claimed to be readily identified.

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.***

Decision	**Complies**

Reasons

Under this subsection I must be satisfied that the factual basis on which it is asserted that native title rights and interests exist is sufficient to support the assertions. S190B(5) requires that the factual basis must support the three assertions forming the basis of a claim that native title exists. Unlike s62(2) the section does not require that the application alone contain sufficient information. I will therefore also consider material supplementary to the application.

The three assertions set out in s62(2)(e) are the same as those referred to in 190B(5) except that assertion (b) in 190B(5), contains some additional words, indicated in italics below.

> 190B(5)(b) That there exists traditional laws *acknowledged by*, and *traditional* customs, *observed by*, *the native title claim group* that give rise to the claimed native title *rights and interests*;

I do not believe the difference in wording gives any extra guidance about how to apply s190B5. The extra words in 190B5(b) shown in italics make it clear that the native title claim group must acknowledge and observe the laws and customs. It is difficult to see how the laws and customs could "give rise" to the claimed native title unless the claimant group continue to observe and acknowledge them.

I have already found, in considering s62(2)(e), that the application provides a general description of the factual basis on which these assertions are made.

(a) the native title claim group (has), and the predecessors ... had, an association with the area

Schedule F states:

- the native title claim group have and their ancestors had, since the assertion of British sovereignty possessed, occupied, used and enjoyed the claim area;
- the current group and the ancestors have possessed, occupied, used and enjoyed the area according to traditional laws and customs;
- the members of the current claim group are connected to the claim area according to

traditional law and custom, including laws about conception in the area, birth in the area and traditional knowledge of the area.

The people living at the time of sovereignty are not now alive and able to give direct evidence of their possession, occupation, use and enjoyment. The predecessors living at the time of sovereignty will not have written down, in white man's language, records of their possession, occupation, use and enjoyment. Stories supporting or confirming the possession, occupation and use may have been passed down through the generations orally or by other means of traditional communication, such as through art, artefacts and other traditional items or practices. In some cases the best evidence available of the predecessors' association with the area may be in the stories told to the living descendants.

I do not believe for the purposes of applying the registration test that it is necessary in every case for the applicant to present to the Registrar a body of research supporting prior occupation by the ancestors of the claim group, or supporting other kinds of association with the area. There may be cases where this is desirable and/or necessary to support other aspects of the test, such as the prima facie test for rights and interests.

The original application lodged 19 July 1995 states:

> *We, [names deleted] apply for a determination of native title as representatives of the Ngarinyin people...*
>
> *Each named applicant is an aboriginal person and elder of the Ngarinyin tribe. The applicants claim native title on behalf of themselves, on behalf of their respective family groups and on behalf of the Ngarinyin people. The applicants continue to reside on or near the claimed land and continue to maintain a traditional connection with the land and waters constituting native title. The Ngarinyin people are those people of the northern Kimberley region who are recognised as belonging to the country to which the [name deleted] language also belongs. The Ngarinyin today are descendants of those people who owned and occupied the claim areas prior to the acquisition of sovereignty. They have maintained their traditional connection with the claimed land and waters in accordance with traditional laws, custom and practices observed by Ngarinyin society.*

The original application is supported by the affidavit of [name deleted] sworn 13 July 1995 who deposes that [s/he] believes these statements to be true.

The amended application (12 March 1999) is supported by the affidavits of the named applicants sworn or affirmed variously between 29 January and 2 March 1999. The affidavits of [name deleted] and [name deleted] sworn 6 January 1999 also contain relevant material.

Although [name deleted] in [his/her] affidavit sworn 6 January 1999 does not directly state that [s/he] was born in the claim area, there is direct evidence of [his/her] physical connection with the claim area in Schedules M of the application.

Schedule M states:

> *[names deleted] and many of the other older claimants visited this living area on a regular basis since they were children and ranged over the entire claim area in the course of economic, social and ceremonial life.*

Later in Schedule M it is stated:

> *When people such as [three names deleted] travelled from [location deleted] and [location deleted] by foot with their families they would cross the Prince Regent River at a place called [name deleted] camping at [location deleted] where [cultural practice deleted], and then travelled to [location deleted] which was an important place for [cultural practice deleted] and then back down to [location deleted] to [location deleted] where they would camp with relations living in that area.*

The map dated 4 February 1999 shows the locations of the [five locations/physical features deleted] in the claim area. From this map and the wording in Schedule M I can conclude that this part of Schedule M refers to physical and ceremonial interaction with the claim area.

I am satisfied that the factual basis outlined is sufficient to support the assertion in relation to association with the area.

(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

Schedule F states that under traditional laws and customs, rights and interests in the land are vested in the members of the native title group. This is according to a set of principles, each of which connects members of the native title group to the area; for example descent from ancestors connected to the area, conception in the area, birth in the area, traditional knowledge of the area and knowledge of traditional ceremonies of the area. This statement outlines the basis of the native title held by the claim group – it is that the members of the claim group are vested with rights and interests because they have the appropriate connection to the area.

I refer to further supporting material below.

(c) The native title claim group have continued to hold the native title in accordance with those laws and customs

Schedule F of the amended application states that traditional laws and customs have been passed on to the present generation by traditional teaching and that the current group continues to acknowledge and observe those traditional laws and customs. Examples to support these statements are provided in Schedule M and the affidavits of [two names deleted] sworn 6 January 1999

I refer to further supporting material below.

Material supporting s190B5(b) and (c)

[Name deleted] gives further information in [his/her] affidavit sworn 6 January 1999 which supports assertions (b) and (c) in s190B(5). For example, [s/he] speaks about [his/her]

father's [cultural practices deleted] and about passing on to young people, 'the right way to do things' and 'how to look after their country'; as well as bringing the young people "into the law" (paragraph 12).
In [his/her] affidavit of 6 January 1999 [name deleted] also indicates that a group is participating in the activities. For example, [s/he] speaks of [five cultural practices deleted]. This is evidence of communal activities associated with the land and traditional laws and customs.

The amended application links the claim group to the area by possession, use and occupation. In [his/her] affidavit sworn 6 January 1999 [name deleted] gives evidence of [his/her] physical and spiritual connection to the country and refers to traditional practices carried on in the area and passed onto children.

In Schedule M [name deleted] is further linked with the claim area by the references to [three location/physical features deleted]. In [his/her] affidavit sworn 6 January 1999 [name deleted] states that [his/her] mother's country "is in [location deleted]". There is a significant area of country within the claim area between [area deleted]. These locations are now shown to be within the claim area (see the map dated 4 February 1999).

In paragraph 19 of [his/her] affidavit sworn 6 January 1999 [name deleted] talks about taking the children "up around [location deleted] on holiday time". {Locations deleted] are within the claim area. [S/he] says "I teach them how to [six cultural practices deleted].

[Name deleted] refers to learning about [two cultural practices deleted] and states "and now I do those things" (paragraph 20). [S/he] also talks about [his/her] authority in relation to the [area deleted] as [s/he] is "the most senior person left to talk about that part of the country" (paragraphs 21 and 23). [S/he] has responsibility for [cultural practice deleted] in that area (paragraph 23).

The reserve known as [name deleted] is within the claim area [location deleted]. In relation to that area [name deleted] describes various traditional activities that [s/he] has carried out over time and has also passed on to children. These activities include [five cultural practices deleted] (paragraph 26).

[Name deleted] also talks about [his/her] son's traditional place, [his/her] [cultural reference deleted] (paragraph 27).

In [name deleted]'s affidavit of 6 January 1999 there are several references to group activities which appear to be traditional activities related to the land. For example, identified people have to be consulted about [location deleted] – [names deleted] and the [name deleted] people [three cultural references deleted]. Those references indicate that group activities were carried on in the claim area and support the assertion that the group has continued to hold a native title, which is a communal title.

I am satisfied that there is sufficient material to support the assertions that there are traditional laws and customs which the claim group observe and which give rise to the native title claimed; and that the group has continued to hold the native title in accordance with those traditional laws and customs.

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.***

Decision	**Complies**

Reasons

Prima facie means "on the face of it"; or "at first sight" can the rights be established? *(North Ganalanja Aboriginal Corporation v Queensland 185CLR595.)* Has the applicant provided enough evidence to satisfy me that there is a real possibility, not a speculative one, that the rights will be established? (Butterworths Encyclopedic Australian Law Dictionary). Does the application present a serious question to be determined? Is there sufficient material supporting the claims of native title rights and interests made by the applicants to enable me to say that there is material which, if accepted, would establish the native title rights and interests? Is there any material adverse to the applicants of such a weight that it prevents me forming the conclusion that prima facie the native title rights can be established?

I am not aware of any submission by the State that the Ngarinyin people do not hold native title rights and interests in relation to this area. The State's letter dated 26 November 1998 takes issue with only one particular right and interest claimed in the application as it stood at that time, the right to exchange resources amongst themselves and with people from neighbouring lands. This submission was made in the context of s190B(9)(a); the State considered that this statement indicated an intention to be granted rights to minerals, petroleum or gas which are wholly owned by the crown. In its letter of 26 November 1998 the State did not make any submissions in relation to s190B(6).

In the future act proceedings, for example WO95/8 in relation to the expedited procedure, the State does not appear to have challenged the traditional nature of Ngarinyin activities or their association with the area. In those and the other future act proceedings about the proposed grants of exploration licences within the claim area, the State's arguments have centred around the interpretation of s237 of the old Act, including the meaning of "interference with community life".

The native title rights and interests claimed, as set out in Schedule E, are all subject to the following qualifications:

- The native title rights and interests claimed are subject to any native title rights and interests which may be shared with others to establish that they are native title holders;
- The applicants do not claim any minerals, petroleum or gas within the area which are wholly owned by the State or Commonwealth;
- Any offshore native title rights and interests are not claimed to the exclusion of others rights and interests;
- 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 area in relation to which a previous non-exclusive possession act was done in relation to an area, attributable to the State or Commonwealth (except where s47, 47A or 47B apply);

and

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

Accordingly, I shall consider whether, prima facie, each of the native title rights and interests claimed is made out, taking into account that the applicants are not seeking to make out a prima facie case for exclusive rights to the area.

(a) rights and interests to possess, occupy, use and enjoy the area;

The original application and Schedule F of the amended application state that ancestors of the native title claim group have occupied, used and enjoyed the claim area since sovereignty through to the present; the native title right to possess, occupy, use and enjoy has been transmitted to the present generations and the preceding generations by the passage of traditional laws and customs.

Schedule G states that members of the native title claim group have either continuously or from time to time carried out activities on the land and waters within the area of the claim, including hunting, gathering, fishing and conducting traditional ceremonies.

The original and amended applications are supported by affidavits of named applicants.

As discussed earlier in these reasons Schedule M gives specific examples of current use and occupation by, among others, [name deleted] and [name deleted]. Possession, occupation, use and enjoyment has been in accordance with traditional laws and customs. Schedule M of the application and the affidavits of [name deleted] and [name deleted] give specific examples of cultural activities involving possession, occupation, use and enjoyment of various parts of the claim area. There are several references to communal or group activities.

In the absence of any submission from any other party, including the Western Australian government, that there has not been a traditional connection with the area over the time since sovereignty, and in the absence of any evidence of dealings in the area of the claim which are clearly inconsistent with a non-exclusive right to possession, occupation, use and enjoyment, I find that prima facie the right has been made out.

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

My comments about Schedule F under (a) above are also relevant.

In [his/her] affidavit sworn 6 January 1999 [name deleted] refers to [his/her] right to speak for country in the [name deleted] area. This part of country is within the claim area.

In paragraph 23 of [his/her] affidavit [name deleted] states that [s/he] is the senior person left to talk about that part of the country. [S/he] refers to [his/her] responsibility to talk for other parts of the country because [cultural practice deleted]. [S/he] has responsibility for [cultural reference deleted].

Some statements were filed on behalf of the Ngarinyin people in the future act proceedings WO95/8 by way of an objection to the expedited procedure. [Name deleted], a senior Ngarinyin lawman, now deceased, read out a written statement in the case of the future act

inquiry in relation to the proposed grant of exploration licence EO4/985 which, as shown on the map forming part of the WO95/8 file, sits within the claim area. [Name deleted] talked about the Ngarinyin way of talking to Ngarinyin and coming onto country. S/he talked of the proper way:

> *There is a proper way to behave in the law of the country.* [Three sentences of cultural references deleted].

In view of the above and in the absence of any submissions or evidence to refute the statements that these are traditional practices which have been passed on through the generations, I find that there is a prima facie case for a finding that at least some members of the native title claim group have the right to make decisions about the use and enjoyment of the area.

(c) the right of access to the area;

My comments under (a) and (b) above in relation to possession, use and occupation and the right to speak for country are also relevant here.

The affidavits of [name deleted] and [name deleted] sworn 6 January 1999 refer to their accessing various parts of the claim area. There is evidence of present day physical connection with the area (see my reasons in relation to 190B(7) below). There is nothing to indicate that the claim members have been denied access or that access has been broken for any period of time which would have resulted in the extinguishment of native title.

The right is not claimed to the exclusion of other rights of access under the common law or a law of the State or Commonwealth (Schedule E(v)). Previous non-exclusive possession acts, if they have occurred in relation to the area, are also recognised (Schedule E(iii)).

I find that the rights of access to the area is intended to be subject to any other valid rights in relation to the area and that prima facie this rights can be established.

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

I refer to my comments in relation to (b) above about authority in respect of parts of the country held by, for example, [name deleted] and the late [name deleted]. I find that prima facie, the traditional laws and customs include law and custom in relation to certain members of the claim group having authority to say who can access various parts of the claim area.

For example in [his/her] affidavit sworn 6 January 1999 [name deleted] states (paragraph 21):

> *[paragraph relating to traditional land access protocols deleted]*

In the written statements which [s/he] read out in proceedings WO95/8, [name deleted] stated:

> *[three paragraphs relating to traditional land access protocols deleted]*

The right is "not claimed to the exclusion of any other rights or interests validly created by or pursuant to the common law, the law of the State or the law of the Commonwealth" (Schedule E(v)). Although this may be an unusual way to express it, I read sub-paragraph (v) to mean that concurrent rights, whether pursuant to State or Commonwealth law or common law, are

recognised. If any previous non-exclusive possession acts affect the area, these also are recognised (Schedule E(iii)).

I am therefore satisfied that the right to control the access of others to the area is claimed subject to other rights of access at common law or by State or Commonwealth law and that this right has prima facie been established, and that this right can prima facie be established.

(e) the right to use and enjoy resources of the area;
Schedule G of the application states that the claimant group has continuously or from time to time possessed, occupied, used and enjoyed the area by way of hunting, gathering, and fishing. This is evidence of use of the resources of the area.

Schedule M refers to [four cultural practices deleted] and "(utilising) the claim area for traditional purposes".

The affidavit by [name deleted] (paragraph 19) states [four sentences of details of traditional resource use deleted].

I note their Schedule M refers to a continuing practice of living off the land. There is here evidence of the right to use and enjoy resources of the area still being enjoyed by the current generation.

The applicants intend that this right be subject to Schedule E(i) which states that the applicants do not claim any minerals, petroleum or gas within the area which are wholly owned by the State or Commonwealth Crown.

I am satisfied that the factual material provided in the application and the affidavit material in relation to use of resources refers to traditional ways of using and enjoying resources. Accordingly I find that prima facie this right can be established.

(f) the right to control the use and enjoyment of others of resources of the area;
The right flows in part from the right to control the access of others to the area, referred to in (d) above.

The claim to this right must also be read subject to the ownership rights of the State and Commonwealth in relation to minerals, petroleum and gas referred to in E(i) and in offshore waters referred to in E(ii). The claim to this right is also subject to rights granted under any previous non-exclusive possession act (E(iii)) and any other rights or interests under common law or laws of the State or Commonwealth (E(v)). Under E(v) valid rights to mine are not affected by native title.

I refer to my comments under (d) above. In [his/her] evidence in WO95/8, [name deleted] also stated:

> *In your Law you have made licences and leases which affect our country. If you are really trying to recognise Native Title then you have to learn to listen to us, and to respect our law. …*
>
> *When you make those licences and leases you are not respecting us. You are not*

taking us seriously. … You are protecting your land usage interest because you are ignorant about the meaning of culture in this country. We don't do that. If we want to go to somebody else's country we respect them. We sit down and talk to them, lawmen to lawmen. We negotiate what we want and what they want. We listen to them. We accept their word. They are the true people to speak for their country and we must obey them. …

We don't give permission for any land usage, any leases or any licences by people who are strangers in our country. We can't do that. That is against our Law. When you recognise our Native Title in your Law, then we sit down and talk about what you want and what we want, and what is the Law in this country. That is the proper way. That is the way of respect.

In [his/her] affidavit sworn 25 February 1999 [name deleted] states:

5. *Sometimes, if I need* [traditional resource deleted] *that I sell or else for a ceremony I can make a private* [name of trading system deleted]. *I can get in touch with* [name deleted] *in* [location deleted] *and* [s/he] *will talk with* [his/her] *mob to make sure that it's ok. Then we can have permission to do a private trade without going through all the partners in between.*

11. *Around our own camp, in our own families and in our own country, we make* [name of trading system deleted] *too. If someone kills* [animals deleted], *he's gotta split it up through the sharing law, give one side to his* [relationship deleted], *another to his* [relationship deleted], *some to his* [relationship deleted] *and then look after his* [relationship deleted] *too. Even if there's not much to go round, everybody must still get a taste. Same for* [animals deleted] *or any sort of thing.*

12. *A man can't sit in a corner and eat everything he's got to himself. That's more the gardiya (non-Aborigine) law.*

13. *All our laws about this sort of thing comes from the time of the* [details of Dreamtime history deleted – six sentences]. *We've made plenty of pictures of that place that we can show you anytime.*

14. *Now everybody has to share what comes from the ground and the water, in the same order that we took the* [detail from Dreamtime history deleted]. *That's why we say we have a "rank",* [translation deleted], *in the* [name of trading system deleted]. *You have to go from the top part to the bottom part and there's a gatekeeper for every branch of the* [name of trading system deleted]. *Look out to anyone that tries to go past the gatekeeper! There'll be big trouble.*

Some of this evidence appears to refer to control of the use of resources within the group. Other comments relate to, or could relate to, controlling people outside the group.

I am satisfied that this evidence supports, *prima facie*, a right, and a duty, to control the use and enjoyment by others of the resources of the area. I am satisfied that this right (and duty) derives from traditional law and custom.

The State has raised an issue about the claimants' possible intention "to be granted rights to minerals, petroleum or gas which are wholly owned by the Crown" (letter from the State dated 26 November 1998).

The evidence of [name deleted] in [his/her] affidavit sworn 25 February 1999 is a powerful indication of the existence of rights and responsibilities in relation to managing resources of the area. In this affidavit [name deleted] also refers to traditional practices associated with gift giving. There is clearly a set of well established traditional principles in relation to exchange of resources, including rules about who has access to resources or who has authority to authorise other Aborigines to take or use particular resources. The applicants' reference to management of resources is a reference to a holistic system of law and custom relating to management of a range of resources much more extensive than minerals, petroleum or gas.

In any event the application has been amended to claim this right subject to State and Commonwealth rights of ownership in relation to minerals, petroleum and gas.

I am satisfied that prima facie this right has been established.

(g) the right to trade in resources of the area;

In Schedule M there is a reference to people ranging over the whole claim area in the course of economic, social and ceremonial life.

In [his/her] affidavit sworn 25 February 1999 [name deleted] talks about the traditional system of trade, the [name of trading system deleted]. For example:

1. *All us Kimberley Aborigines are connected through the* [name of trading system deleted]. *This is how we trade one thing or another right across the Kimberley and down into the desert. All sorts of things, not just secret thing, but* [type of resource deleted] *too. Or I might need a special type of* [type of resource deleted] *for something I'm making or* [type of resource deleted]. *All these sorts of things I can get through the* [name of trading system deleted].

3. *We can trade* [type of resource deleted], *this way. Usually it comes from* [location deleted] *or* [location deleted]. *We send that* [type of resource deleted]. *Other people might ask me to bring* [type of resource deleted] *from my country for painting a background.*

4. *In some parts of the country several of these trading lines join up and these become famous places for* [name of trading system deleted]. *There are places like this at* [location deleted] *and* [location deleted].

5. *Sometimes, if I need* [type of resource deleted] *that I sell or else for a ceremony I can make a private* [name of trading system deleted]. *I can get in touch with* [name deleted] *in* [location deleted] *and* [s/he] *will talk with* [his/her] *mob to make sure that it's ok. Then we can have permission to do a private trade without going through all the partners in between.*

6. *Then when I see him next I can kill a* [animal deleted] *for him. Later on he might need something from me and he will let me know.*

[Name deleted] in [his/her] affidavit sworn 6 January 1999 states in paragraph 9 that [s/he] "was taken to the place where the [name of trading system deleted] starts and shown the law".

There is sufficient evidence to satisfy me that prima facie this is a continuing right derived from native title, based on traditional law and custom.

(h) the right to receive a portion of any resources taken by others from the area;
In [his/her] affidavit sworn 25 February 1999 [name deleted] refers to the responsibility to share resources, for example after killing [animals deleted] (see above re paragraph 11 of the affidavit). There is also a general reference to the responsibility to share in paragraphs 12, 13 and 14 of this affidavit.

The right which corresponds with the duty to share is a right to receive a portion of any resources taken by others from the area.

I therefore find that this right has also been, prima facie, established.

(i) the right to maintain and protect places of importance under traditional laws, customs and practices in the area;
In [his/her] affidavit sworn 6 January 1999 [name deleted] states (paragraph 23):

> *I am the most senior person left to talk about that part of the country. My next door neighbour is* [name deleted] *and* [name of deceased deleted]. *On the other side, the people who belong to that country through their* [relationship deleted] *are all gone. That means that me as the next door neighbour now has to look after that area for them. There were three tribes that are now all gone. That means I have responsibility for their paintings, their places that they would go to. Last time I saw them I was travelling with one of my Ngarinyin boys,* [name deleted] *from* [location deleted].

He further says in paragraph 27:

> *There are many important* [site detail deleted] *places close by our community, such as* [location deleted], *which is my wife's father's* [type of place deleted], *and we visit our* [site detail deleted] *to make sure they haven't been disturbed. We sing out to them to let them know there are family in the area. My boy* [name deleted] *has his* [site detail deleted], *just north of* [location deleted] *and we take care of it because of the* [name deleted] *living there and because it's the place where* [name deleted]*'s life came from.*

In [his/her] affidavit of 6 January 1999 [name deleted] says (paragraph 10):

> *The law taught me about my responsibilities for the land. There are big public ceremonies for the land that we can have anywhere. There are also secret ceremonies that we perform up in the bush. The law is contained in the songs that I learned, that are in my head.*

There are also several references in the affidavits and Schedule M to the teaching of the law and the passing on of traditional customs to children. For example in paragraph 19 of [his/her] affidavit [name deleted] says:

> *I teach (the children) how to catch animals and fish and how to cook them Aborigine way. I also teach them about catching* [animals deleted]. *These were the things taught to me by my* [relationship deleted] *and my* [relationship deleted]. *I also teach my children about the law. I teach them about places where they can touch this, but not touch that; places where they can go here, but not go there. We show the places around that belong to this tribe or to that tribe.*

In paragraph 27 [name deleted] states:

> *There are many important* [site detail deleted] *close by our community… and we visit our* [site detail deleted] *to make sure that they haven't been disturbed. We sing out to let them know that there are family in the area.*

There is sufficient evidence for me to conclude that prima facie the applicants can establish this native title right.

(j) the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area.

The right to maintain, protect and prevent misuse is evidenced by the practices referred to (i) above. With respect to maintaining and protecting places of importance, there is also evidence in the affidavit of [name deleted], (see extracts above from paragraphs 19 and 23).

[Name deleted] in [his/her] affidavit (paragraph 10) refers to the distinction between big public ceremonies for the land and secret ceremonies "that we perform up in the bush".

As previously mentioned there are several references to passing on traditional law and custom in a general sense, but also particular references to teaching particular aspects of law and custom to the children.

The late [name deleted], in Tribunal proceedings WO95/8, referred to the "proper Ngarinyin way" and responsibilities arising under the Law.

I find that there is sufficient material for me to be satisfied that there is, prima facie, a continuing right to maintain, protect and prevent the misuse of cultural knowledge.

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.***

Decision	**Complies**

Reasons

The first requirement is that at least one member of the claim group must currently have, or must have previously had, a traditional physical connection with a part of the land or waters covered by the application.

Schedule F, supported by the affidavits of the named applicants, states that the native title claim group now possesses, occupies, use and enjoys the area and does so according to traditional laws and customs which have been passed through the generations to the present generation. It states they are authorised by the native title claim group to make the native title determination application. By implication from the wording in Schedule M of the application and their affidavits sworn 6 January 1999, [name deleted] and [name deleted] are members of the native title claim group. Both [name deleted] and [name deleted] were named applicants in the original application. The original application is supported by the affidavit of [name deleted] sworn 13 July 1995. [S/he] deposes that [s/he], [name deleted], and [name deleted] are elders of the Ngarinyin tribe and that:

- they continue to reside on or near the claimed land,
- they continue to maintain a traditional connection,
- the Ngarinyin today are descendants of those who owned and occupied the claim areas prior to the acquisition of sovereignty, and
- the people have maintained traditional connection in accordance with traditional law, custom and practices.

In Schedule M and in their affidavits sworn 6 January 1999 [name deleted] and [name deleted] refer to a range of activities which they have carried out, and continue to carry, on the claim area.

I have referred to these activities in previous parts of these reasons. They include hunting, camping, visiting sites, conducting ceremonies on country and taking children to places to teach them about traditional practices, animals and the significance of places.

There is sufficient material to satisfy me that at least one member of the group currently has a traditional physical connection with part of the area covered by the application.

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.***

Decision	**Complies**

Reasons

The requirements of s61A are considered in order below.

61A(1) No previous determination of native title

In order to comply with s61A(1), there must be no previous approved determination of native title.

An "approved determination of native title" is defined in s13. In so far as it is relevant here an approved determination of native title would be one made by the Federal Court or the High Court on an application under the Act, once finally determined.

In the amended application, the applicants advise there has been no approved native title determination over the claimed area. A search of the Register of Native Title Determinations reveals that no determination of native title for the area has been registered..

61A(2) No previous exclusive possession acts

This subsection provides that the area must not have been subject to a previous exclusive possession act attributable to the Commonwealth or, where there is State legislation, attributable to the State.

In the amended application the applicants have sought to exclude any areas where there may have been a previous exclusive possession act attributable to the Commonwealth. This exclusion is found in Schedule B of the application.

In this case there is currently no State legislation providing that State previous exclusive possession acts extinguish native title. Nevertheless the applicants have also, in Schedule B, excluded any area which may be affected by any State previous exclusion possession act.

The current tenure comprises vacant crown land, reserves and pastoral lease land. I am not aware of any grants of current or historical interests which are exclusive possession acts.

I am satisfied that neither the application nor any relevant material discloses that the application area has been affected by a previous exclusive possession act attributable to the Commonwealth or the State.

61A(3) No claim to exclusive possession over areas the subject of previous non

exclusive possession acts

Section 61A(3) provides that the application must not disclose, and I must not otherwise be aware, that the applicants claim exclusive possession of an area which has been the subject of a previous non exclusive possession act attributable to the Commonwealth or the State. (The State has not yet legislated to confirm that previous non exclusive possession acts attributable to the State will partially extinguish native title.)

The applicants state that they do not claim exclusive possession of any area which *may* have been subject to a previous non exclusive possession act on the part of the Commonwealth or the State. Schedule E of the amended application states:

> *(iii) The applicants do not make a claim to native title rights and interests which confer possession, use, occupation and enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non exclusive possession act, as defined in s23F of the NTA was done in relation to an area, and either the act was an act attributable to the Commonwealth, or ... the state ...*

In any event, none of the native title rights and interests are claimed to the exclusion of other validly created rights.

Schedule E(v) states:

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

In its submission dated 28 November 1998 the State does not complain of any prior extinguishment, or that any part of the claim cannot be made out because of a claim to rights that no longer exist or are inconsistent with other rights, except in the case of minerals, petroleum or gas owned by the Commonwealth.

Further, I am not otherwise aware that, because of s61A, the application should not have been made.

I have previously discussed the current and historical tenure in relation to the claim area. The historical tenure, as far as is disclosed to me, consists of pastoral leases, all granted by the State and all subject to a reservation granting access rights in some form to Aboriginal people.

Current tenure, as far as I am aware, consists of vacant crown land, reserves and one pastoral lease. There are also mining interests in the area. The pastoral lease has been granted by the State and is subject to a reservation in favour of Aboriginal people. There is no evidence of public works or public roads in the area, but if there are the applicants have made it clear that they recognise extinguishing events and concurrent rights.

In the circumstances I conclude that the application passes this element of the test.

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;***

Decision	**Complies**

Reasons

Schedule E of the amended application states:

> *To the extent that any minerals, petroleum or gases in 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.*

In its submission dated 26 November 1998, the State maintains that the application (as it then was) fails to satisfy this section because the applicants wish to "exchange resources collected from the lands and waters amongst themselves and with people from neighbouring lands" indicating an intention to claim minerals, petroleum and gas which are wholly owned by the Crown.

There is no longer a claim to a right to exchange resources in the terms quoted by the State, although the applicants now claim rights to use and enjoy resources, control the use and enjoyment of others of resources, trade in resources and receive a portion of resources taken by others from the area. Nevertheless, the application makes these claims in relation to resources subject to the statement that any minerals, petroleum or gas owned by the Crown are not claimed.

I am not otherwise aware that the applicants assert any claim to minerals, petroleum or gas which is inconsistent with their express statement that they do not claim these if they are wholly owned by the crown.

I therefore conclude that this requirement has been 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;***

Decision	**Complies**

Reasons

No rights and interests claimed in the amended application relate to waters in an offshore place. This is evident from the maps supplied with the application, including the topographical map. Neither does the description of the claim area include any reference to offshore waters.

Accordingly the application satisfies this requirement.

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)).***

Decision	**Complies**

Reasons

In the amended application, the applicants assert that there is nothing to their knowledge which would suggest that their native title rights and interests have been extinguished.

In earlier parts of these reasons I have canvassed the description of the areas within the external boundary claimed, the current and historical tenures, specific exclusions of any areas which may have been subject to previous exclusive possession acts, the statement that there is no claim to exclusive possession in respect of any area which may have been affected by a previous non exclusive possession act and the statement that native title rights and interests are not claimed to the exclusion of common law rights or valid rights under State or Commonwealth law.

There is nothing on the face of the information that I have to indicate that native title in the area would have been extinguished by the operation of the common law. For example I do not have evidence of any areas where there has been use of the land in such a way that would clearly indicate an intention on the part of the Crown or a statutory authority to extinguish native title. I am unaware of any buildings, other structures or public works, the construction and use of which would be clear evidence of an intention to extinguish native title. Neither am I aware of any dedicated roads in the area, whether or not they have been actually constructed for and used by the public.

The application does not disclose and I am not aware of any extinguishing events which would be contrary to the native title claimed by the applicants. There is no other information which would lead me to conclude that any of the native title rights and interests claimed have been extinguished.