National Native Title Tribunal

REASONS FOR DECISION COVER SHEET

REGISTRATION TEST

DELEGATE Lillian Maher

APPLICATION NAME Ngaluma/Injibandi

NAME(S) OF APPLICANT(S) David Daniel, James Solomon, Tim Kerr, Daisy Moses, David Walker, Roger Barker, Jill Churnside, Trevor Solomon and Les Hicks on behalf of the Ngaluma people and Bruce Monadee, Woodley King, Kenny Jerrold, Mary Walker, Bruce Woodley, Michelle Adams, Jimmy Horace, Linda Ryder and Judy Albert on behalf of the Yindjibarndi people.

NNTT NO WC94/5 FEDERAL COURT NO WAG6017/1996

REGION Pilbara

DATE APPLICATION MADE 20/12/94

DECISION – WC94/5 (WAG6017/96) - Ngaluma/Injibandi

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

DECISION

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

……. …… 1999

Lillian Maher Date of Decision

Delegate of the Registrar pursuant to

sections.190, 190A, 190B, 190C, 190D

Information considered in making the decision

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

- The Working Files, Registration Test Files, Legal Services Files and Federal Court Application and Amendment Files for claims WC94/5 and WC95/3. These native title determination applications were lodged with the National Native Title Tribunal prior to 30/9/98.

- These applications were combined by order of Justice Nicholson, in the Federal Court on 8 March 1999. The Orders also allowed the addition of a number of applicants to the combined application.

- Other tenure information acquired by the Tribunal in relation to the area covered by the applications;

- Working files and related materials for native title applications that overlap the area of the Ngaluma/Injibandi applications.

- The National Native Title Tribunal Geospatial Database;

- The Register of Native Title Claims;

- The Native Title Register;

- Determination of Representative ATSI Bodies: their gazetted boundaries;

- Submissions from the Western Australian State Government in relation to the applications;

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

Summary of proceedings

The WC94/5 (Ngaluma/Injibandi People) native title determination application was lodged with the National Native Title Tribunal on 20 July, 1994. Pursuant to the Transitional Provisions, applications lodged prior to 30/9/1998 are taken to have been filed in the Federal Court. The Federal Court reference for this application is WAG 6071 of 1996.

The Applicants are David Daniel, James Solomon, Tim Kerr, Daisy Moses, David Walker, Roger Barker, Jill Churnside, Bruce Monadee, Woodley King, Kenny Jerrold and Les Hicks on behalf of the Ngaluma people and Mary Walker, Trevor Solomon, Bruce Woodley on behalf of the Yindjibarndi people. The area subject to claim is located in the Pilbara region, Western Australia. The Aboriginal Legal Service of WA represent the applicants.

There have been three amendments to the application since it was deemed to be filed in the Federal Court. The first amendment to the application was filed in the Federal Court on 3 February 1999 and went to a Directions Hearing on 8 March 1999, the amendments were allowed in the form presented to the Court.

Subsequently two further amendments were filed in the Federal Court, the first on 2 April 1999 and a further amended application was filed on 30 April 1999. The matters went to a Directions Hearing on 6 May 1999, Justice Nicholson dismissed the amended application filed 2 April and ordered that the Notice of Motion dated 30 April 1999 be stood over to a date to be fixed.

(a) At a Directions Hearing on 2 June 1999, Justice Nicholson made the following Orders:

A section 29 notice was issued on 03/02/98. Pursuant to the *Native Title Act* the application is to be considered for registration within 4 months of the s29 notice being issued or as soon as reasonably practicable afterwards. The four-month period ended on 3 June 1999.

All references to the 'application' or the 'amended application' in the present decision, unless otherwise stated, refers to the application as most recently amended.

A. Procedural Conditions

190C2	***Information, etc, required by section 61 and section 62:*** ***The Registrar must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.***

Details required in section 61

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

Reasons relating to this sub-condition	
Requirements are met.	
The names of eighteen Applicants are provided in the amended application**:** Mr David Daniel, Mr James Solomon, Mr Tim Kerr, Ms Daisy Moses, Mr David Walker, Mr Roger Barker, Ms Jill Churnside, Mr Trevor Solomon, Mr Les Hicks on behalf of the Ngarluma people and Mr Bruce Monadee, Mr Woodley King, Mr Kenny Jerrold, Ms Mary Walker, Mr Bruce Woodley, Ms Michelle Adams, Mr Jimmy Horace, Ms Linda Ryder and Ms Judy Albert on behalf of the Yindjibarndi people.	
The address for service is provided at Part B of the amended application. I am satisfied there has been compliance with the procedural requirements of s.61(3).	

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

Reasons relating to this sub-condition	
Requirements are met. Schedule A provides named persons and a formula which describe the native title claim group, the description is in such a manner for it to be ascertained whether any particular person is or is not in the native title claim group. I am satisfied there has been compliance with the procedural requirements of s.61(4).	

61(5)	***Application is in the prescribed form[1]; lodged in the Federal Court, contains prescribed information[2], and accompanied by prescribed documents and fee***

Reasons relating to this sub-condition	

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

[2] Note also that "prescribed information" is that which is required by s62 as set out in the text of this reasons document under "Details required in section 62(1)".

Requirements are met. The application was lodged with the National Native Title Tribunal on 20/12/94. Applications lodged prior to 30/9/98 are taken to have been filed in the Federal Court. The application contains the prescribed information and is accompanied by prescribed documents. I am satisfied there has been compliance with the procedural requirements of s.61(5).

Details required in section 62(1)

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

Reasons relating to this sub-condition	
Requirements are met.	
A claimant application must be accompanied by an affidavit sworn by the applicant/s. Affidavits have been received from all eighteen Applicants: Mr David Daniel, Mr James Solomon, Mr Tim Kerr, Ms Daisy Moses, Mr David Walker, Mr Roger Barker, Ms Jill Churnside, Mr Trevor Solomon, Mr Les Hicks on behalf of the Ngarluma people and Mr Bruce Monadee, Mr Woodley King, Mr Kenny Jerrold, Ms Mary Walker, Mr Bruce Woodley, Ms Michelle Adams, Mr Jimmy Horace, Ms Linda Ryder and Ms Judy Albert on behalf of the Yindjibarndi people. Competent witnesses have witnessed the affidavits.	
I note submissions made by the Crown Solicitors Office at pages 2 and 3 of letters dated 18 December 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application. I am satisfied there has been compliance with the procedural requirements of s.62(1)(a).	

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

Reasons relating to this sub-condition	
Requirements are met. Details of traditional physical connection has been provided in Affidavit form as an attachment to the application. I am satisfied there has been compliance with the procedural requirements of s.62(1)(c).	

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

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

Reasons relating to this sub-condition	
Requirements are met. A written description of the external boundary of the area claimed is provided at Schedule B of the amended application. I am satisfied there has been compliance with the procedural requirements of s62(2)(a)(i).	

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

Reasons relating to this sub-condition	
Requirements are met. At Schedule B and Schedule C of the amended application the Applicants have provided a written and spatial description of the areas within the external boundary of the area claimed which are not covered by the application I am satisfied there has been compliance with the procedural requirements of s.62(2)(a)(ii).	

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

Reasons relating to this sub-condition	
Requirements are met. A map showing the external boundaries of the area covered by the application is provided at Attachment 1 of the amended application. I am satisfied that there has been compliance of the procedural requirements of s.62(2)(b).	

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

Reasons relating to this sub-condition	
Requirements are met. Attachment D to the amended application consists of details of searches, which have been carried out in relation to the land and waters, and provides information to access results of searches. I note submissions made by the Crown Solicitors Office at pages 2 and 3 of letters dated 18 December 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application. I am satisfied there has been compliance with the procedural requirements of s.62(2)(c).	

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

Reasons relating to this sub-condition	
Requirements are met. A description of native title rights and interests claimed is provided at Schedule E of the amended application. There are 12 native title rights and interests specified. I am satisfied there has been compliance with the procedural requirements of s.62(2)(d).	

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

Reasons relating to this sub-condition	
Requirements are met. The Applicants have provided a general description of the factual basis on which it is asserted that the claim group has, and their predecessors had, an association with the area at Schedule F of the amended application. I am satisfied there has been compliance with the procedural requirements of s.62(2)(e)(i).	

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

Reasons relating to this sub-condition	

Requirements are met.

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

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

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

Reasons relating to this sub-condition	

Requirements are met.

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

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

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

Reasons relating to this sub-condition	

Requirements are met.

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

I note submissions made by the Crown Solicitors Office at page 3 of letters dated 18 December 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

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

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

Reasons relating to this sub-condition	

Requirements are met.

The Applicants provide details at Attachment H of the amended application of 4 native title determination applications that have been made in relation to the whole or a part of the area covered by the application.

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

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

Reasons relating to this sub-condition	

Details are provided at Schedule I of the amended application of two exploration leases and one mining leases the subject of section 29 notices.

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

Reasons for the Decision

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

190C3	*Common claimants in overlapping claims:* *The Registrar must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:* *(a) The previous application covered the whole or part of the area covered by the current application; and* *(b) An entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made; and* ***(c)*** *The entry was made, or not removed, as a result of consideration of the previous application under section 190A.*

Reasons for the Decision

A search of the Register of Native Title Claims undertaken on 25 June 1999, reveals 5 overlapping applications: WC96/61 (Kurama/Marthudunera – Geospatial confirmed this overlap to be a mapping error), WC96/61 (Innawonga Bunjima Niapaili), WC96/89 (Yaburara/Mardudhunera), WC98/40 (Wong-Goo-TT-OO) and WC99/3 (Kariyarra).

At the time the Ngaluma/Injibandi application was made, none of the overlapping native title applications were on the Register of Native Title Claims

As a consequence, s190C has no operation with respect to the application under consideration.

I note that in submissions made by the Crown Solicitors Office at pages 3 and 4 of letters dated 18 December, 1998, it was argued that the literal interpretation of s190C(3) would "produce anomalous results" and to avoid such anomalies "all claims made by claimant groups including persons listed in more than one claimant group, should be denied registration".

In my opinion, this submission has no substance at law. My considerations in relation to the sub-items of s190C(3) above make it clear that I need have no regard as to whether or not there are any common claimants between this application and any overlapping claimant applications.

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.***

Reasons for the Decision

A representative Aboriginal/Torres Strait Islander body has not certified the application.

I note submissions made by the Crown Solicitors Office at pages 3 and 4 of letters dated 18 December 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

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

190C5	***Evidence of authorisation:*** ***If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:*** ***(a) Includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and*** ***(b) Briefly sets out the grounds on which the Registrar should consider that it has been met.***

Reasons for the Decision

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

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

At Schedule 1 of the amended application the eighteen Applicants are included in the named members of the native title claim group.

At Schedule R of the amended application the Applicants state that the native title claim group authorise the applicants to make the native title determination application and to deal with matters arising in relation to it according to the decision making processes of the Ngarluma and Yindjibarndi claim group.

10 of the named Applicants' are Elders of the Ngaluma and Injibandi people, their affidavits state that *"The applicants have been authorised in accordance with traditional laws and customs to make the Native Title Determination Application and deal with matters in relation to it. The authorisation of the applicants has taken place during meetings held by the Ngarluma and Yindjibarndi group"*.

The remaining 8 Applicants, described as members of the Ngaluma and Injibandi group, state in their Affidavits that: *"The decision to authorise the named applicants was in accordance with our traditional laws and customs because after consultation and discussion amongst members of the Ngarluma and Yindjibarndi people it was decided that important elders who have authority under traditional law to speak for Ngarluma and Yindjibardni country must be included as applicants as well as some younger people who can help the elders understand the white fella processes involved in native title and who represent a range of different Ngarluma and Yindjibarndi family groups"* The Applicants' affidavits describe a process of decision making as set out in s251B(a) and (b) of

the *Native Title Act 1993*.

Section 190C(5)(b) requires that the application briefly sets out the grounds on which I should consider that the application has been authorised.
Each of the applicants affidavits' describe a meeting which took place on 16 January 1999 where the applicants were chosen to represent all the native title claim group in relation to their application.

I am satisfied there has been compliance with s.190C(5)(a) as required by s.190C(4)(b).
It is my view that the above statements effect compliance with s.190C(5)(b) and that the requirements of s.190C(5) have been met.

B. Merits Conditions

190B2	***Description of the areas claimed:*** ***The Registrar must be satisfied that the information and map contained in the application as required by paragraphs 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.***

In applying this condition I have relied upon the information provided at Schedule B, the technical information of boundaries, and the maps at Attachment 1 and 2 of the amended application.

External Boundaries:

The applicants have provided a map compiled by the Aboriginal Legal Service of Western Australia on 25 February 1999. The source of data is stated on the map as being prepared by WALLIS Land Claims Mapping Unit dated 19/06/98. The map displays sufficient co-ordinates to enable the position of sites or localities within them to be identified. The map shows a scale allowing distances and areas to be ascertained and identifies vacant Crown land, special leases, various rivers and pastoral lease areas. The line indicating the external boundary is finely marked and easy to follow.

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

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

In addition to the provision of a map defining the external boundaries of the claim, the applicants have provided a written technical description of the external boundaries.

I am satisfied that the technical description of the external boundaries coincides with the map provided, based on advice received from the Tribunal's Geospatial unit on 28 April 1999.

I am satisfied that the physical description of the external boundaries meets the requirements of s62 (2)(a)(i).

Internal boundaries:

The internal boundaries, described at Schedule B of the amended application, exclude a variety of tenure classes from the claim area, description of what is excluded is provided both spatially and in written form. The spatial description is contained in a series of maps at Attachment 2. The maps use digital cadastral data supplied by Land Claims Mapping Unit on 22 June 1998, which is taken from the Department of Land Administration's Spatial Cadastral

Database. The maps identify grouped parcels of land. The written description of the internal boundaries are in the manner indicated below:

(1) Areas affected by:-

(i) valid category A Past Acts as defined in s.228 and s.229 Native Title Act 1993;

(ii) valid category A Intermediate Acts as defined in s.232A and s.232B Native Title Act 1993;

(iii) previous exclusive possession acts as defined in s.23B Native Title Act 1993 attributable to the Commonwealth; and

(iv) previous exclusive possession acts as defined in s.23B Native Title Act 1993 attributable to the State of Western Australia where a law of that State has made provision for that act as described in s.23E Native Title Act.

(2) The areas within the external boundaries that are not covered by the application includes validly created existing public roads or streets used by the public and any area that is subject to a valid grant of freehold and permanent public works.

(3) The areas within the external boundaries that are not covered by the application include any areas in relation to which all native title rights and interests are have otherwise been extinguished, including areas subject to:

(a) An act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or

(b) Actual use made by the holder of a tenure other than native title which is permanently inconsistent with the continued existence of native title.

(4) 4.1 As a result of the pre-trial direction made by the court on 24 March 1997 as amended on 28 July 1997 and 27 February 1998, in the pending application, the First Respondent and Respondent 2A served on the First Applicants documents relating to tenure (tenure documents) relevant to the claim area. Attachment 3 to the application lists the tenure instruments of the First Respondent (the State). Attachment 4 lists tenure instruments of the Respondent 2A (the Commonwealth).

4.2 The First Applicants have given consideration (as indicated in paragraphs 4.5 – 4.23 to whether or not the tenures indicated by the tenure documents fall within section 62(2)(a)(ii) of the Native Title Act (NTA) because section 61A NTA applies to exclude the areas the subject of such tenures.

4.3 In this regard, the First Applicants have also considered the terms of the *Titles Validation Act 1995 (WA)* as amended by *Titles Validation Amendment Act 1999 (WA)* (together referred to as the *TVA (WA)*) which purports to be a law of the State of Western Australia that has made provision as mentioned in section 23E and section 23I of the NTA (see section 61A(2)(b)(ii) and

(3)(b)(ii) of the NTA).

4.4 As a result of such consideration, and apart from those areas excluded by virtue of paragraph (1) – (3) of this Schedule B described above, the areas referred to in the tenure documents so served are included within the external boundaries of the claim area and are not excluded by reason of the application of section 61A NTA.

The Section 61A NTA issues: "Previous exclusive possession acts" and "previous non-exclusive possession acts" attributable to the State of Western Australia

4.5 Freehold instruments referred to at pages 1-9 of Attachment 3

4.5.1 The First Applicants acknowledge that, by reason of section 12I(1)(a) of the *TVA (WA)* the instruments in this category will have extinguished native title if the instruments were validly created or granted, in that a valid grant of freehold will, apart from the *TVA (WA)*, extinguish native title.

4.5.2 The First Applicants do not know and cannot admit that the instruments in this category validly created or granted the relevant interest as the existing state of the First Applicants' knowledge does not enable them to determine whether required executive, administrative or statutory procedures were satisfied to create or grant the interest. At the trial of the application, any Respondent who contends that any instrument extinguished native title must prove that the relevant interest was validly created or granted and the First Applicants will not carry any burden to prove that the relevant interest was not validly created or granted.

4.5.3 For example –

(1) a Crown grant will only have the status of an indefeasible interest under the *Transfer of Land Act 1897 (WA)* (*TLA*) upon registration, after delivery of a deed of grant to the Registrar of Titles and the Registrar making out a certificate of title and endorsing a memorandum on the grant specifying the folium of the Register Book where the certificate of title is bound: see section 18 *TLA*. The First Applicants have no knowledge whether these procedures were followed in the case of those instruments.

(2) Further, some of the copies of certificate of title served by the State have been endorsed "culled" and/or "cancelled" and the First Applicants cannot admit that the apparent freehold grants referred to were validly issued having regard to such notations: see, eg, Certificates of Title XI/48, XI/60, XI/91, XIV/14, XV/378, XVIII/329, XVIII/330, XVIII/331, 3/231, 7/397, 10/118, 1566/570.

4.6 **Licence to occupy** instruments referred to at page 10 of Attachment 3:

4.6.1 The First Applicants deny that the instruments in this category, which in all but one case (the exception being an application for a licence under section 45A *Land Act 1933 (WA)*) are licences to occupy issued under section 52 *Land Act 1898 (WA)*, extinguish native title at common law, even if the instruments were validly created or granted (cf ***Ward v Western Australia*** (1998) 159 ALR 483 at 572 (15-24) in relation to permits to occupy issued under section 16 *Land Act 1898*).

4.6.2 The First Applicants do not know and cannot admit that the instruments in this category were validly created or granted as the existing state of the First Applicants' knowledge does not enable them to determine whether any required executive, administrative or statutory procedures were satisfied before the instruments were created or granted. At the trial of the application, any Respondent who contends that any instrument extinguished native title must prove that the instrument was validly created or granted and the First Applicants will not carry any burden to prove that the instrument was or is invalid.

4.6.3 For example, under section 52 of the *Land Act 1898 (WA)* the Minister could issue a licence to occupy on conditions after payment of a prescribed instalment of purchase money and upon application. The First Applicants have no knowledge whether an application was made for these instruments or the other requirements, or conditions on its issue, were met. As to the application for a licence to occupy made under section 45A *Land Act 1933*, the First Applicants are unable to admit that a licence was ever issued, as no copy of such a licence was served on them by the State, although to the extent that the documents served by the State infer that such a licence was granted following the application, those same records indicate that any licence issued was cancelled in 1984.

4.6.4 Further, none of the instruments in this category –

4.6.4.1 is an act attributable to the State that, apart from the *TVA (WA)*, extinguishes native title, under section 12I(1)(a) of the *TVA (WA)*;

4.6.4.2 is a "conditional purchase lease" of the types referred to in section 12I(1)(b)(i), (ii) or (iii) of the *TVA (WA)*;

4.6.4.3 is a "perpetual lease" of the type referred to in section 12I(1)(b)(iv) of the *TVA (WA);*

4.6.4.4 is a "previous exclusive possession act" under section 23B(2)(a), (b) and (c)(ii), (iii), (iv), (v), (vii) or (viii) of the NTA for the purposes of section 12I(1)(b)(v) of the *TVA*

(WA) in that –

(1) as stated above, the First Applicants do not know and cannot admit that it is valid; and

(2) it does not consist of the grant or vesting of any of the following –

(a) a freehold estate;

(b) a commercial lease that is neither an agricultural lease nor a pastoral lease;

(c) an exclusive agricultural lease or an exclusive pastoral lease;

(d) a residential lease;

(e) what is taken by subsection 245(3) of the NTA (which deals with the dissection of mining leases into certain other leases) to be a separate lease in respect of land or waters mentioned in paragraph (a) of that subsection, assuming that the reference in subsection 245(2) to "1 January 1994" were instead a reference to "24 December 1996";

(f) either a lease (as defined in section 242 NTA) or a lease (other than a mining lease) that confers a right of exclusive possession over particular land or waters.

4.6.4.5 so far as the First Applicants can glean from the tenure documents served by the State and from their limited existing state of knowledge in respect of such tenures, was in force as at 23 December 1996. The tenure documents served by the State purport to represent the historic tenure situation in respect of land the subject of the claim and do not purport to represent the current tenure situation. The First Applicants have no means of knowing which instruments are in force as at 23 December 1996 without further extensive and costly inquiry.

4.6.4.6 is a Scheduled interest (as defined by section 249C NTA) or a community purpose lease (as defined by section 249A NTA) and, in any event, even if it were it would not extinguish native title, by virtue of section 12I(1)(c) of the *TVA (WA).*

4.7 Further -

4.7.1 none of the instruments in this category constitutes a "previous non-exclusive possession act" under section 23F of the NTA, for the purposes of section 12M of the *TVA (WA)* because –

4.7.1.1 as stated above, the First Applicants do not know and cannot admit that it is valid; and

4.7.1.2 it does not consist of the grant of –

(a) a non-exclusive agricultural lease; or

(b) a non-exclusive pastoral lease.

4.7.2 In any event, even if any of the instruments did constitute a "previous non-exclusive possession act" -

4.7.2.1 none is inconsistent with native title rights and interests in relation to the land or waters covered by each instrument and so, by virtue of section 12M(1)(a) of the *TVA (WA)*, native title rights and interests are not extinguished; alternatively,

4.7.2.2 to the extent that the grant of such instruments create rights and interests that are inconsistent with native title rights and interests in relation to the land or waters covered by the instrument, such instrument does not, apart from the *TVA (WA)*, extinguish such native title rights and interests, and so native title rights and interests in relation to land or waters covered by such instruments are not extinguished, by virtue of section 12M(1)(b) of the *TVA (WA)*.

4.8 Further, and in any event, subdivision 2B of Part 2 of the NTA in which sections 23B and 23F appear, purports to confirm the operation of the common law by providing, inter alia, that native title in relation to land will have been extinguished by certain "previous exclusive possession acts" or "previous non-exclusive possession acts" of the Commonwealth. "Previous exclusive possession acts" (defined in sections 23B, 249C and Schedule 1 of the NTA) are taken to have extinguished native title at the time the act was done: section 23C. The effect of the "previous non-exclusive possession act" (section 23F) is dealt with in section 23G which, in effect, recognises the possession at common law in respect of the co-existence of native title with pastoral and agricultural leases and the concurrent rights of leaseholders and native title holders. See generally the statement of law to this effect in ***Ward v Western Australia*** (1998) 159 ALR 483 at 635 (lines 37-48) per Lee J. The same may be said of "previous exclusive possession acts" attributable to the State: section 12I(1) of the *TVA (WA)*; and "previous non-exclusive possession acts" attributable to the State: section 12M(1) of the *TVA (WA)*. It follows, as a matter of law, that, unless at common law the creation or grant of a relevant interest extinguishes native title, as against regulating, curtailing, subordinating or suspending it, native title subsists and the grant or creation of the instrument does not and cannot create or grant rights of "exclusive possession" in the land or waters the subject of such instrument.

4.9 **Lease** instruments referred to in pages 11-19 of the Attachment 3:

4.9.1 The First Applicants deny that the instruments in this category, which

include leases issued under section 152 of the *Land Act 1898 (WA)*, and sections 116 and 117 of the *Land Act 1933 (WA)*, as well as leases of reserves under section 41S of the *Land Act 1898* and sections 32 and 33 of the *Land Act 1933*, and also leases granted or ratified by Acts of Parliament ratifying State Agreements, extinguish native title at common law, even if the instruments were validly created or granted (see generally ***Ward v Western Australia*** (1998) 159 ALR 483 at 616-634).

4.9.2 The First Applicants do not know and cannot admit that the instruments in this category were validly created or granted as the existing state of the First Applicants' knowledge does not enable them to determine whether any required executive, administrative or statutory procedures were satisfied before the instruments were created or granted. At the trial of the application, any Respondent who contends that any instrument extinguished native title must prove that the instrument was validly created or granted and the First Applicants will not carry any burden to prove that the instrument was or is invalid.

4.9.3 For example-

(1) leases may be issued under section 41A of the *Land Act 1898* and sections 116 and 117 of the *Land Act 1933* upon application. The First Applicants have no knowledge whether the applications were made.

(2) As to special leases for a one year duration that may be granted under section 33 *Land Act 1933*, the State has served, in some cases, applications for such special leases but not a copy of any special lease: see, eg, applications 332/569 and 332/1544. The First Applicants cannot admit that a lease was actually granted in each case.

4.9.4 Further, none of the instruments in this category –

4.9.4.1 is an act attributable to the State that, apart from the *TVA (WA)*, extinguishes native title, under section 12I(1)(a) of the *TVA (WA)*;

4.9.4.2 is a "conditional purchase lease" of the types referred to in section 12I(1)(b)(i), (ii) or (iii) of the Titles Validation Act (as amended) (WA);

4.9.4.3 is a "perpetual lease" of the type referred to in section 12I(1)(b)(iv) of the *TVA (WA);*

4.9.4.4 is a "previous exclusive possession act" under section 23B(2)(a), (b) and (c)(ii), (iii), (iv), (v), (vii) or (viii) of the NTA for the purposes of section 12I(1)(b)(v) of the *TVA (WA)* in that –

(1) as stated above, the First Applicants do not know and cannot admit that it is valid; and

(2) it does not consist of the grant or vesting of any of the following –

(a) a freehold estate;

(b) a commercial lease that is neither an agricultural lease nor a pastoral lease;

(c) an exclusive agricultural lease or an exclusive pastoral lease;

(d) a residential lease;

(e) what is taken by subsection 245(3) of the NTA (which deals with the dissection of mining leases into certain other leases) to be a separate lease in respect of land or waters mentioned in paragraph (a) of that subsection, assuming that the reference in subsection 245(2) to "1 January 1994" were instead a reference to "24 December 1996";

(f) either a lease (as defined in section 242 NTA) or a lease (other than a mining lease) that confers a right of exclusive possession over particular land or waters.

4.9.4.5 Further, notwithstanding that an instrument in this category may appear to constitute a "commercial lease" (as defined in section 246 NTA) that is neither an agricultural lease nor a pastoral lease as defined in the NTA, such instrument –

(1) is a Scheduled interest (as defined by section 249C NTA), in that Schedule 1 NTA, Part 4 expressly includes it within the meaning of a Scheduled interest; and

(2) the interests created by such instruments may be inconsistent with, but do not extinguish, native title rights or interests in relation to the land or waters covered by the instrument, by virtue of section 12I(c) *TVA (WA)*.

4.9.4.6 so far as the First Applicants can glean from the tenure documents served by the State and from their limited existing state of knowledge in respect of such tenures, was in force as at 23 December 1996. The tenure documents served by the State purport to represent the historic tenure situation in respect of land the subject of the claim and do not purport to represent the current tenure situation. The First Applicants

have no means of knowing which instruments are in force as at 23 December 1996 without further extensive and costly inquiry.

4.9.4.7 is a community purpose lease (as defined by section 249A NTA) and, in any event, even if it were it would not extinguish native title, by virtue of section 12I(1)(c) of the *TVA (WA)*.

4.10 Further -

4.10.1 none of the instruments in this category constitutes a "previous non-exclusive possession act" under section 23F of the NTA, for the purposes of section 12M of the *TVA (WA)*, because –

4.10.1.1 as noted above, the First Applicants do not know and cannot admit that it is valid and the Respondents carry the onus to prove, at trial that each instrument is valid; and

4.10.1.2 it does not consist of the grant of –

(a) a non-exclusive agricultural lease; or

(b) a non-exclusive pastoral lease.

4.10.2 In any event even if any of the instruments did constitute a "previous non-exclusive possession act" -

4.10.2.1 none is inconsistent with native title rights and interests in relation to the land or waters covered by each instrument and, by virtue of section 12M(1)(a) of the *TVA (WA)*, native title rights and interests are not extinguished; alternatively:

4.10.2.2 to the extent that the grant of such instruments create rights and interests that are inconsistent with native title rights and interests in relation to the land or waters covered by the instrument, such instrument does not, apart from the *TVA (WA)*, extinguish such native title rights and interests, and thereby native title rights and interests in relation to land or waters covered by such instruments are not extinguished, by virtue of section 12M(1)(b) of the *TVA (WA)*.

4.11 Further, and in any event, subdivision 2B of Part 2 of the NTA in which sections 23B and 23F appear, purports to confirm the operation of the common law by providing, inter alia, that native title in relation to land will have been extinguished by certain "previous exclusive possession acts" or "previous non-exclusive possession acts" of the Commonwealth. "Previous exclusive possession acts" (defined in sections 23B, 249C and Schedule 1 of the NTA) are taken to have extinguished native title at the time the act was done: section 23C. The effect of the "previous non-exclusive possession act" (section 23F) is dealt with in section 23G which, in effect, recognises the possession at common law in respect of the co-existence of native title with pastoral and agricultural leases and the concurrent rights of leaseholders and native title

holders. See generally the statement of law to this effect in ***Ward v Western Australia*** (1998) 159 ALR 483 at 635 (lines 37-48) per Lee J. The same may be said of "previous exclusive possession acts" attributable to the State: section 12I(1) of the *TVA (WA)*; and "previous non-exclusive possession acts" attributable to the State: section 12M(1) of the *TVA (WA)*. It follows, as a matter of law, that, unless at common law the creation or grant of a relevant interest extinguishes native title, as against regulating, curtailing, subordinating or suspending it, native title subsists and the grant or creation of the instrument does not and cannot create or grant rights of "exclusive possession" in the land or waters the subject of such instrument.

4.12 **Pastoral lease** instruments referred to in pages 20-58 of Attachment 3:

4.12.1 The First Applicants deny that the instruments in this category, which include pastoral leases issued under Land Regulations 1851 (WA), Land Regulations 1882 (WA), Land Regulations 1887 (WA), *Land Act 1898 (WA)* and *Land Act 1933 (WA)*, extinguish native title at common law, even if the instruments were validly created or granted (see ***Ward v Western Australia*** (1998) 159 ALR 483 at 553-560).

4.12.2 The First Applicants do not know and cannot admit that the instruments in this category were validly created or granted as the existing state of the First Applicants' knowledge does not enable them to determine whether any required executive, administrative or statutory procedures were satisfied before the instruments were created or granted. At the trial of the application, any Respondent who contends that any instrument extinguished native title must prove that the instrument was validly created or granted and the First Applicants will not carry any burden to prove that the instrument was or is invalid.

4.12.3 For example –

(1) in many cases the copy tenure documents served by the State include documents that disclose an application was made for a lease or licence but do not disclose whether a lease or licence issued: see N542-N605. The First Applicants cannot admit that any valid lease or licence was issued following such applications.

(2) Under sections 90-91 of the *Land Act 1933*, an application in prescribed form must be made together with the payment of a deposit before such an instrument may issue. Additionally, under section 91(3) an application by a body corporate must be approved on the specific recommendation of the Minister. The First Applicants do not know on their existing state of knowledge whether these procedures were followed and whether the specific recommendation of the Minister was given in relation to applications by bodies corporate.

4.12.4 Further, none of the instruments in this category –

4.12.4.1 is an act attributable to the State that, apart from the *TVA (WA)*, extinguishes native title, under section 12I(1)(a) of the *TVA (WA)*;

4.12.4.2 is a "conditional purchase lease" of the types referred to in section 12I(1)(b)(i), (ii) or (iii) of the *TVA (WA)*;

4.12.4.3 is a "perpetual lease" of the type referred to in section 12I(1)(b)(iv) of the *TVA (WA);*

4.12.4.4 is a "previous exclusive possession act" under section 23B(2)(a), (b) and (c)(ii), (iii), (iv), (v), (vii) or (viii) of the NTA for the purposes of section 12I(1)(b)(v) of the *TVA (WA)* in that –

(1) as stated above, the First Applicants do not know and cannot admit that it is valid; and

(2) it does not consist of the grant or vesting of any of the following –

(a) a freehold estate;

(b) a commercial lease that is neither an agricultural lease nor a pastoral lease;

(c) an exclusive agricultural lease or an exclusive pastoral lease. Notwithstanding that an instrument in this category may appear to constitute a "pastoral lease" (as defined by section 248 NTA), it does not constitute an "exclusive pastoral lease" (as defined in section 248A NTA) because it does not confer a "right of exclusive possession" to the land or waters covered by the instruments as required by the latter definition: see generally, ***Ward v Western Australia*** (1998) 159 ALR 483 at 562, per Lee J;

(d) a residential lease;

(e) what is taken by subsection 245(3) of the NTA (which deals with the dissection of mining leases into certain other leases) to be a separate lease in respect of land or waters mentioned in paragraph (a) of that subsection, assuming that the reference in subsection 245(2) to "1 January 1994" were instead a reference to "24 December 1996";

(f) either a lease (as defined in section 242 NTA)

or a lease (other than a mining lease) that confers a right of exclusive possession over particular land or waters.

4.12.4.5 so far as the First Applicants can glean from the tenure documents served by the State and from their limited existing state of knowledge in respect of such tenures, was in force as at 23 December 1996. The tenure documents served by the State purport to represent the historic tenure situation in respect of land the subject of the claim and do not purport to represent the current tenure situation. The First Applicants have no means of knowing which instruments are in force as at 23 December 1996 without further extensive and costly inquiry.

4.12.4.6 is a Scheduled interest (as defined by section 249C NTA) or a community purpose lease (as defined by section 249A NTA) and, in any event, even if it were it would not extinguish native title, by virtue of section 12I(1)(c) of the *TVA (WA).*

4.13 Further -

4.13.1 none of the instruments in this category constitutes a "previous non-exclusive possession act" under section 23F of the NTA, for the purposes of section 12M of the *TVA (WA)* because as noted above, the First Applicants do not know and cannot admit that it is valid and the Respondents carry the onus to prove, at trial that each instrument is valid.

4.13.2 In any event, even if any of the instruments does constitute a "previous non-exclusive possession act", for example, because it appears to be a "non-exclusive pastoral lease" (as defined in section 248B NTA) -

4.13.2.1 none is inconsistent with native title rights and interests in relation to the land or waters covered by each instrument and so, by virtue of section 12M(1)(a) of the *TVA (WA),* the native title rights and interests are not extinguished; alternatively,

4.13.2.2 to the extent that the grant of such instruments create rights and interests that are inconsistent with native title rights and interests in relation to the land or waters covered by the instrument, such instrument does not, apart from the *TVA (WA),* extinguish such native title rights and interests, and thereby native title rights and interests in relation to land or waters covered by such instruments are not extinguished, by virtue of section 12M(1)(b) of the *TVA (WA).* At common law, a State pastoral lease is a non-exclusive pastoral lease and does not extinguish native title: see ***Ward v Western***

Australia (1998) 159 ALR 483 AT 553-560 PER Lee J.

4.14 Further, and in any event, subdivision 2B of Part 2 of the NTA in which sections 23B and 23F appear, purports to confirm the operation of the common law by providing, inter alia, that native title in relation to land will have been extinguished by certain "previous exclusive possession acts" or "previous non-exclusive possession acts" of the Commonwealth. "Previous exclusive possession acts" (defined in sections 23B, 249C and Schedule 1 of the NTA) are taken to have extinguished native title at the time the act was done: section 23C. The effect of the "previous non-exclusive possession act" (section 23F) is dealt with in section 23G which, in effect, recognises the possession at common law in respect of the co-existence of native title with pastoral and agricultural leases and the concurrent rights of leaseholders and native title holders. See generally the statement of law to this effect in ***Ward v Western Australia*** (1998) 159 ALR 483 at 635 (lines 37-48) per Lee J. The same may be said of "previous exclusive possession acts" attributable to the State: section 12I(1) of the *TVA (WA);* and "previous non-exclusive possession acts" attributable to the State: section 12M(1) of the *TVA (WA).* It follows, as a matter of law, that, unless at common law the creation or grant of a relevant interest extinguishes native title, as against regulating, curtailing, subordinating or suspending it, native title subsists and the grant or creation of the instrument does not and cannot create or grant rights of "exclusive possession" in the land or waters the subject of such instrument.

4.15 Reserve instruments referred to at pages 59 – 71 of Attachment 3:

4.15.1 The First Applicants deny that the instruments in this category, which include reserves made under section 39 *Land Act 1898 (WA)* and sections 29 and 33 *Land Act 1933 (WA),* extinguish native title at common law, even if the instruments were validly created or granted (see ***Ward v Western Australia*** (1998) 159 ALR 483 at 574-576).

4.15.2 The First Applicants do not know and cannot admit that the instruments in this category were validly created or granted as the existing state of the First Applicants' knowledge does not enable them to determine whether any required executive, administrative or statutory procedures were satisfied before the instruments were created or granted. At the trial of the application, any Respondent who contends that any instrument extinguished native title must prove that the instrument was validly created or granted and the First Applicants will not carry any burden to prove that the instrument was or is invalid.

4.15.3 For example, by reason of the tenure documents served by the State the First Applicants know that vesting orders made under the *Land Act 1898* and the *Land Act 1933* were published in the Gazette but do not know if the reserves referred to were validly created under those Acts prior to the vesting orders being made.

4.15.4 Further, none of the instruments in this category –

4.15.4.1 is an act attributable to the State that, apart from the *TVA (WA)*, extinguishes native title, under section 12I(1)(a) of the *TVA (WA)*;

4.15.4.2 is a "conditional purchase lease" of the types referred to in section 12I(1)(b)(i), (ii) or (iii) of the *TVA (WA)*;

4.15.4.3 is a "perpetual lease" of the type referred to in section 12I(1)(b)(iv) of the *TVA (WA);*

4.15.4.4 is a "previous exclusive possession act" under section 23B(2)(a), (b) and (c)(ii), (iii), (iv), (v), (vii) or (viii) of the NTA for the purposes of section 12I(1)(b)(v) of the *TVA (WA)* in that –

(1) as stated above, the First Applicants do not know and cannot admit that it is valid; and

(2) it does not consist of the grant or vesting of any of the following –

(a) a freehold estate;

(b) a commercial lease that is neither an agricultural lease nor a pastoral lease;

(c) an exclusive agricultural lease or an exclusive pastoral lease;

(d) a residential lease;

(e) what is taken by subsection 245(3) of the NTA (which deals with the dissection of mining leases into certain other leases) to be a separate lease in respect of land or waters mentioned in paragraph (a) of that subsection, assuming that the reference in subsection 245(2) to "1 January 1994" were instead a reference to "24 December 1996";

(f) either a lease (as defined in section 242 NTA) or a lease (other than a mining lease) that confers a right of exclusive possession over particular land or waters.

4.15.4.5 so far as the First Applicants can glean from the tenure documents served by the State and from their limited existing state of knowledge in respect of such tenures, was in force as at 23 December 1996. The tenure documents served by the State purport to represent the historic tenure situation in respect of land the subject of the claim and do not purport to represent the current tenure situation. The

First Applicants have no means of knowing which instruments are in force as at 23 December 1996 without further extensive and costly inquiry.

4.15.4.6 is a Scheduled interest (as defined by section 249C NTA) or a community purpose lease (as defined by section 249A NTA) and, in any event, even if it were it would not extinguish native title, by virtue of section 12I(1)(c) of the *TVA (WA)*.

4.16 Further -

4.16.1 none of the instruments in this category constitutes a "previous non-exclusive possession act" under section 23F of the NTA, for the purposes of section 12M of the *TVA (WA)*, because –

4.16.1.1 as noted above, the First Applicants do not know and cannot admit that it is valid; and

4.16.1.2 it does not consist of the grant of –

(a) a non-exclusive agricultural lease; or

(b) a non-exclusive pastoral lease.

4.16.2 In any event, even if any of the instruments did constitute a "previous non-exclusive possession act" -

4.16.2.1 none is inconsistent with native title rights and interests in relation to the land or waters covered by each instrument and, by virtue of section 12M(1)(a) of the *TVA (WA)*, native title rights and interests are not extinguished; alternatively,

4.16.2.2 to the extent that the grant of such instruments create rights and interests that are inconsistent with native title rights and interests in relation to the land or waters covered by the instrument, such instrument does not, apart from the *TVA (WA)*, extinguish such native title rights and interests, and thereby native title rights and interests in relation to land or waters covered by such instruments are not extinguished, by virtue of section 12M(1)(b) of the *TVA (WA)*.

4.17 Further, and in any event, subdivision 2B of Part 2 of the NTA in which sections 23B and 23F appear, purports to confirm the operation of the common law by providing, inter alia, that native title in relation to land will have been extinguished by certain "previous exclusive possession acts" or "previous non-exclusive possession acts" of the Commonwealth. "Previous exclusive possession acts" (defined in sections 23B, 249C and Schedule 1 of the NTA) are taken to have extinguished native title at the time the act was done: section 23C. The effect of the "previous non-exclusive possession act" (section 23F) is dealt with in section 23G which, in effect, recognises the possession at common law in respect of the co-existence of native title with pastoral and

agricultural leases and the concurrent rights of leaseholders and native title holders. See generally the statement of law to this effect in ***Ward v Western Australia*** (1998) 159 ALR 483 at 635 (lines 37-48) per Lee J. The same may be said of "previous exclusive possession acts" attributable to the State: section 12I(1) of the *TVA (WA)*; and "previous non-exclusive possession acts" attributable to the State: section 12M(1) of the *TVA (WA)*. It follows, as a matter of law, that, unless at common law the creation or grant of a relevant interest extinguishes native title, as against regulating, curtailing, subordinating or suspending it, native title subsists and the grant or creation of the instrument does not and cannot create or grant rights of "exclusive possession" in the land or waters the subject of such instrument.

4.18 **Easement** instruments referred to at pages 72-79 of Attachment 3:

4.18.1 The First Applicants deny that the instruments in this category, which appear to have been granted under various State Acts including under section 134B *Land Act 1933 (WA)*, extinguish native title at common law, even if the instruments were validly created or granted.

4.18.2 The First Applicants do not know and cannot admit that the instruments in this category were validly created or granted as the existing state of the First Applicants' knowledge does not enable them to determine whether any required executive, administrative or statutory procedures were satisfied before the instruments were created or granted. At the trial of the application, any Respondent who contends that any instrument extinguished native title must prove that the instrument was validly created or granted and the First Applicants will not carry any burden to prove that the instrument was or is invalid.

4.18.3 For example, easements may be granted under section 134B *Land Act 1933*, inter alia, under conditions, and upon application. The First Applicants do not know whether applications were made or the detailed procedures referred to (eg section 134B(2)) were satisfied, or whether conditions imposed on such easements have been met, especially in the period prior to 23 December 1996.

4.18.4 Further, none of the instruments in this category –

4.18.4.1 is an act attributable to the State that, apart from the *TVA (WA)*, extinguishes native title, under section 12I(1)(a) of the *TVA (WA)*;

4.18.4.2 is a "conditional purchase lease" of the types referred to in section 12I(1)(b)(i), (ii) or (iii) of the Titles Validation Act (as amended) (WA);

4.18.4.3 is a "perpetual lease" of the type referred to in section 12I(1)(b)(iv) of the *TVA (WA);*

4.18.4.4 is a "previous exclusive possession act" under section

23B(2)(a), (b) and (c)(ii), (iii), (iv), (v), (vii) or (viii) of the NTA for the purposes of section 12I(1)(b)(v) of the *TVA (WA)* in that –

(1) as stated above, the First Applicants do not know and cannot admit that it is valid; and

(2) it does not consist of the grant or vesting of any of the following –

(a) a freehold estate;

(b) a commercial lease that is neither an agricultural lease nor a pastoral lease;

(c) an exclusive agricultural lease or an exclusive pastoral lease;

(d) a residential lease;

(e) what is taken by subsection 245(3) of the NTA (which deals with the dissection of mining leases into certain other leases) to be a separate lease in respect of land or waters mentioned in paragraph (a) of that subsection, assuming that the reference in subsection 245(2) to "1 January 1994" were instead a reference to "24 December 1996";

(f) either a lease (as defined in section 242 NTA) or a lease (other than a mining lease) that confers a right of exclusive possession over particular land or waters.

4.18.4.5 so far as the First Applicants can glean from the tenure documents served by the State and from their limited existing state of knowledge in respect of such tenures, was in force as at 23 December 1996. The tenure documents served by the State purport to represent the historic tenure situation in respect of land the subject of the claim and do not purport to represent the current tenure situation. The First Applicants have no means of knowing which instruments are in force as at 23 December 1996 without further extensive and costly inquiry.

4.18.4.6 is a Scheduled interest (as defined by section 249C NTA) or a community purpose lease (as defined by section 249A NTA) and, in any event, even if it were it would not extinguish native title, by virtue of section 12I(1)(c) of the *TVA (WA).*

4.19 Further -

4.19.1 none of the instruments in this category constitutes a "previous non-exclusive possession act" under section 23F of the NTA, for the purposes of section 12M of the *TVA (WA)*, because –

4.19.1.1 as noted above, the First Applicants do not know and cannot admit that it is valid and the Respondents carry the onus to prove, at trial that each instrument is valid; and

4.19.1.2 it does not consist of the grant of –

(a) a non-exclusive agricultural lease; or

(b) a non-exclusive pastoral lease.

4.19.2 In any event even if any of the instruments did constitute a "previous non-exclusive possession act" -

4.19.2.1 none is inconsistent with native title rights and interests in relation to the land or waters covered by each instrument and, by virtue of section 12M(1)(a) of the *TVA (WA)*, native title rights and interests are not extinguished; alternatively:

4.19.2.2 to the extent that the grant of such instruments create rights and interests that are inconsistent with native title rights and interests in relation to the land or waters covered by the instrument, such instrument does not, apart from the *TVA (WA)*, extinguish such native title rights and interests, and thereby native title rights and interests in relation to land or waters covered by such instruments are not extinguished, by virtue of section 12M(1)(b) of the *TVA (WA)*.

4.20 Further, and in any event, subdivision 2B of Part 2 of the NTA in which sections 23B and 23F appear, purports to confirm the operation of the common law by providing, inter alia, that native title in relation to land will have been extinguished by certain "previous exclusive possession acts" or "previous non-exclusive possession acts" of the Commonwealth. "Previous exclusive possession acts" (defined in sections 23B, 249C and Schedule 1 of the NTA) are taken to have extinguished native title at the time the act was done: section 23C. The effect of the "previous non-exclusive possession act" (section 23F) is dealt with in section 23G which, in effect, recognises the possession at common law in respect of the co-existence of native title with pastoral and agricultural leases and the concurrent rights of leaseholders and native title holders. See generally the statement of law to this effect in ***Ward v Western Australia*** (1998) 159 ALR 483 at 635 (lines 37-48) per Lee J. The same may be said of "previous exclusive possession acts" attributable to the State: section 12I(1) of the *TVA (WA)*; and "previous non-exclusive possession acts" attributable to the State: section 12M(1) of the *TVA (WA)*. It follows, as a matter of law, that, unless at common law the creation or grant of a relevant interest extinguishes native title, as against regulating, curtailing, subordinating or suspending it, native title subsists and the grant or creation of

the instrument does not and cannot create or grant

rights of "exclusive possession" in the land or waters the subject of such instrument.

The Section 61A NTA "Previous exclusive possession acts" and "previous non-exclusive possession acts" attributable to the Commonwealth

4.21 The First Applicants deny that any of the instruments in Attachment 4 extinguish native title at common law.

4.22 Further, none of the permits, licences, declarations or authorities referred to in Attachment 3 constitutes a "previous exclusive possession act" as defined in section 23B(2) NTA in that none of these instruments consists in the grant or vesting of any of the following :

4.22.1 a Scheduled interest (as defined by section 249C);

4.22.2 a freehold estate;

4.22.3 a lease as defined in section 242 NTA and so does not constitute

4.22.4 any of the forms of lease referred to in section 23B(2)(c)(iii) – (viii) NTA.

4.23 Further, none of the permits, licences, declarations or authorities referred to in Attachment 3 constitutes a "previous non-exclusive possession act" as defined in section 23F NTA in that none consists of the grant of a non-exclusive agricultural lease (as defined in section 247B NTA) or a non-exclusive pastoral lease (as defined in section 248B NTA).

(5) Paragraphs (1), (2), (3) and (4) are subject to such of the provisions of s.47, 47A, 47B Native Title Act 1993 as apply to any part of the area within the external boundaries of this application, particulars of which will be provided prior to the hearing but which include such areas as may be listed in Schedule L.

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

The applicants make it clear at Schedule B that the class exclusion clause is to operate in relation to valid previous exclusive possession acts. Upon the issue of the validity of previous exclusive possession acts within the claim area being resolved, and which cannot properly be resolved at this stage of the proceedings or by the Tribunal, Schedule B acts as a springing exclusion clause, removing those previous exclusive possession acts from the claim area. Given that the applicants have clearly raised the issue of the validity of previous exclusive possession acts in the application, I am satisfied that they have adequately defined the internal boundaries of the claim area.

I find the abovementioned class exclusions of tenure clear statements of particular lands and waters to be excluded from the claim area. This finding is made notwithstanding the practical difficulty of applying this definition in order to identify each parcel of land or area of water.

I note submissions made by the Crown Solicitors Office at page 1 of a letter dated 18 December 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

In summary I am satisfied that the exclusion clauses set out in paragraphs above, taken together with the boundary description information, satisfy the requirements of s.62(2)(a).

Conclusion:

I find that the information and map submitted with the application meet the requirements of s.62 (a) and (b).

I am satisfied that the information and the map provided by the Applicants are sufficient for it to be said with reasonable certainty that native title rights and interests are claimed in relation to the areas specified. The criteria set out in s.190B(2) are met by the application.

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.***

Reasons for the Decision

Schedule A of the amended application describes the native title claim group as those persons described in Schedule 1, 2, 3 & 4 of the amended application.

Schedules 1, 2 and 3 names persons (including the 18 Applicants) belonging to the native title claim group.

Schedule 4 provides a formula to describe other persons included in the native title claim group. The formula reads in part as follows: *"Those Aboriginal people who are: the respective living parents, grandparents, and other ancestors (such ancestor being defined as one from whom one's father or mother is descended); of and the respective living biological children, grandchildren and other biological descendants of; and the biological children, grandchildren and other biological descendants of the parents, grandparents and ancestors (such ancestor being defined…)…of"* the persons named in Schedule 1, 2 and 3.

Schedule A, also specifically excludes those persons in the native title claim groups of the following native title determination applications: WC96/89 (Yaburara/Mardudhunera) and WC98/40 (Wong-Goo-TT-OO).

The named persons together with the formula describe the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is in that group.

I note submissions made by the Crown Solicitors Office at pages 1and 2 of letters dated 18 December 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

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

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.***

Reasons for the Decision

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

The Applicants state at Schedule E that the *"applicants claim native title to the area covered by the application ("the area")"*. They then particularise the native title rights and interests claimed which derive from that native title as:

a. the right to possess, occupy, use and enjoy the land and waters claimed;
b. the right to be asked, and the enforceable right to say no, with respect to any proposed activity by any person not part of the native title claim group within or affecting the determination area;
c. the right to make decisions about the use and enjoyment of the land and waters claimed;
d. the right of free access to the land and waters claimed;
e. the right to control the access of others to the land and waters claimed;
f. the right to use and enjoy the resources of the land and waters claimed; area;
g. the right to control the use and enjoyment of others of the resources of the land and waters claimed;
h. the right to trade in the resources of the land and waters claimed;
i. the right to receive a portion of any resources taken by others from the land or waters claimed;
j. the right to maintain and protect places of importance under traditional laws, customs and practices on the land and in the waters claimed;
k. the right to maintain, protect and prevent the misuse of cultural knowledge associated with the land and waters claimed; and
l. the right to decide on and regulate membership of the Ngarluma and Yindjibarndi Native Title Claim Group.

Section 62(2)(d) of the *Native Title Act* states that the description of native title rights and interests claimed must not merely consist of a statement to the effect that native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished at law.

By particularising the rights and interests claimed into a list specific rights and interests which are comprehensible, I consider the rights and interests identified by the applicants to be clearly

defined and therefore readily identifiable.

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

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

190B5	***Sufficient factual basis:*** ***The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:*** ***(a) that the native title claim group have, and the predecessors of those persons had, an association with the area;*** ***(b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests;*** ***(c) that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.***

Reasons for the Decision

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

- **(Names deleted)**

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

1. 190B(5)(a)

Schedule F (a) of the amended application states in part, *"The native title rights and interests are those of and flowing from the right to possession occupation use and enjoyment of the land pursuant to the traditional laws and customs of the claim group …the native title claim group and their ancestors have, prior to and since the assertion of British sovereignty possessed, occupied, used and enjoyed the claim area…".*

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

(Name and information deleted due to cultural and customary concern)

Throughout both **(Names deleted)** affidavits there are details of there ongoing association with the claim area, either through the stories **(Name and information deleted due to cultural and customary concern)**

To be satisfied under this criterion it must be evident that association with the area is and was communal, that is, shared by a number of members of the native title claim group.
Details that the association with the area is and was communal are provided in the application and affidavits noted above.

I am satisfied that there has been a past and continuing communal association with the area sufficient to meet the requirements of s.190B(5)(a).

2. 190B(5)(b)

Schedule F of the amended application states that *"Such possession, occupation, use and enjoyment has been pursuant to and possessed under the laws and customs of the claim group, including traditional laws and customs that rights and interest in land and waters vest in members of the native title claim group on the basis……descent from ancestors connected to the area, conception in the area, birth in the area, traditional spiritual knowledge of the area, traditional knowledge of geography of the area, traditional knowledge of the resources of the area and knowledge of traditional ceremonies of the area".*

I note that Schedule F provides general assertions rather than specific details. The Applicants provide at Schedule G of the amended application details of activities that are currently carried out by the native title claim group. These activities are listed in general terms without specific detail. I have also relied on the affidavits detailed above as they provide specific details.

This subsection requires me to be satisfied that: traditional laws and customs exist; that those laws and customs are respectively acknowledged and observed by the native title claim group, and that those laws and customs give rise to the claim to native title rights and interests.
(names and information deleted due to cultural and customary concern)

The information provided includes factual support for the existence of traditional laws or customs that give rise to the native title rights and interests listed in Schedule E. I am satisfied that these traditional laws and customs continue to be observed by the native title claim group and that the requirements of s.190B(5)(b) are met.

3. 190B(5)(c)

Schedule F of the amended application states that: *"Such traditional law and custom has been passed by traditional teaching, through the generations preceding the present generations to the present generation of persons comprising the native title claim group; the native title claim group continues to acknowledge and observe those traditional laws and customs, the native title claim group by those laws and customs have a connection with the land in respect of which the claim is made…*" Schedule G of the amended application identifies some of the activities that members of the native title claim group carry out, and states that members of the claim group *"have continuously carried out activities on the land and waters within the claim area…."*

Under this criterion, I must be satisfied that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

I have already referred in No2. 190B(5)(b) above to affidavits which provide factual information about the ongoing observation of traditional laws and customs by **(names**

deleted)
In addition, **(name deleted)** affidavit refers to, **(information deleted due to cultural and customary concern)**

Use of Ngaluma Injibandi country by the native title claim group continues, in my view, to be governed by a system of rights founded on these traditional laws and customs. I am satisfied that the information provided is sufficient to demonstrate that the native title claim group have continued to hold native title in accordance with their traditional laws and customs.

Conclusion
The three particular strands of the test in this sub-section relate to the overall test of the Registrar needing to 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. The cumulative effect of my conclusions regarding the three specific limbs of this section is that the condition is met as a whole.

190B6	***Prima facie case:*** ***The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.***

Reasons for the Decision

In applying this condition I have particularly relied on:

- **(names deleted)**
- the information provided in the amended application

These affidavits provide various details relating to one or more of the native title rights claimed. They refer to:

(information deleted due to cultural and customary concern)

The applicants have claimed their native title rights and interests subject to:

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

ii. *to the extent that the native title rights and interests claimed may relate to waters in an offshore place, those rights and interests are not to the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under international law in relation to the whole or any part of the offshore place;*

iii. *the applicants do not make a claim to native title rights and interests which confer possession, occupation, use and enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in section 23F 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 section 23I in relation to the act;*

iv. *Paragraph (iii) above is subject to such of the provision of sections 47, 47A and 47B of the Act as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing;*

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.

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

"The phrase can have various shades of meaning in particular statutory contexts but the ordinary meaning of the phrase "prima facie is: "At first sight; on the face of it; as

it appears at first sight without investigation." [Citing the Oxford English Dictionary (2nd ed 1989)].

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

On the basis of the abovementioned affidavits, I have reached the conclusion that if each of the following native title rights and interests were to be taken in isolation, they could be established on a prima facie basis:

a. *the right to possess, occupy, use and enjoy the land and waters claimed;*
b. *the right to make decisions about the use and enjoyment of the land and waters claimed;*
c. *the right of free access to the land and waters claimed;*
d. *the right to control the access of others to the land and waters claimed;*
e. *the right to use and enjoy the resources of the land and waters claimed;*
f. *the right to maintain, protect and prevent the misuse of cultural knowledge associated with the land and waters claimed*
g. *the right to decide on and regulate membership of the Ngarluma and Yindjibarndi Native Title Claim Group and;*
h. *the right to trade in the resources of the land and waters claimed;*
i. *the right to maintain and protect places of importance under traditional laws, customs and practices on the land and in the waters claimed.*

I have been unable to find prima facie evidence of the following rights and interests:

a. *the right to be asked, and the enforceable right to say no, with respect to any proposed activity by any person not part of the native title claim group within or affecting the determination area;*
b. *the right to receive a portion of any resources taken by others from the land or waters claimed;*
c. *the right to control the use and enjoyment of others of the resources of the land and waters claimed*

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

190B7	***Traditional physical connection:*** ***The Registrar must be satisfied that at least one member of the native title claim group:*** ***(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or*** ***(b) previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to land or waters) by:*** ***(i) the Crown in any capacity; or*** ***(ii) a statutory authority of the Crown in any capacity; or*** ***(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such holder of a lease.***

Reasons for the Decision

In applying this condition I have relied on:

- **(names deleted)**
- the information provided in the amended application

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

(names and information deleted due to cultural and customary concern)

It is sufficient to meet this condition of the test if only one person has maintained a traditional physical connection to the land and waters. From the information and evidence I am satisfied that **(name deleted)**, being a member of the native title claim group, has maintained a traditional physical connection with Ngaluma Injibandi country.

I note submissions made by the Crown Solicitors Office at page 2 of letters dated 18 December 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

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

190B8	***No failure to comply with s61A:*** ***The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that, because of s61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.***

Reasons for the Decision

After reviewing the amended application, accompanying documents and other material before me I have formed the conclusion that there has been compliance with s61A.

S61A(1) – Native Title Determination
A search of the Native Title Register has revealed that there is no approved determination of native title in relation to the area claimed in this application.

S61A(2) – Previous Exclusive Possession Acts
At Schedule B of the amended application, the Applicants exclude areas in relation to which native title rights and interests have otherwise been extinguished from the application. The applicants exclude by formula as outlined under 190B (2) previous exclusive possession acts. The applicant's appear to include certain tenure in Schedule B at 4.2 to 4.23 in response to the State and Commonwealth as outlined at 4.1, there is nothing to indicate that this would then include tenure that should be removed. I am of the view that statements made in Schedule B effect compliance with s.61A(2) in excluding previous possession acts attributable to the law of the State of Western Australia and an act attributable to the Commonwealth.

S61A(3) – Previous Non-Exclusive Possession Acts
There is no information in the application indicating that there are Commonwealth or State previous non-exclusive possession acts within the area the subject of the claim.
The applicant's appear to include certain tenure in Schedule B at 4.2 to 4.23 in response to the State and Commonwealth as outlined at 4.1, there is nothing to indicate that this would then include tenure that should be removed.

There is nothing in the application before me to indicate that the applicants are seeking exclusive possession of any of the area claimed. The application states at Schedule E that 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. I am therefore of the view that the Applicants have not contravened s.61A(3).

S61A(4) – s47,s47A, s47B
The applicants have provided some detail at Schedule L of tenure, which may be subject to the above provisions of the Act, the applicant's state that they intend to provide further particulars prior to hearing.

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

190B9 (a)	***Ownership of minerals, petroleum or gas wholly owned by the Crown:*** ***The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:*** ***(a) to the extent that the native title rights and interests claimed consist or include ownership of minerals, petroleum or gas - the Crown in right of the Common-wealth, a State or Territory wholly owns the minerals, petroleum or gas;***

Reasons for the Decision

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

Schedule E of the amended application states: "*to the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants"*

There is no decision in Western Australia that holds that the Crown, in right of the State, wholly owns minerals, petroleum or gas.

I note submissions made by the Crown Solicitors Office at page 2 of letters dated 18 December 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

I conclude that the provisions of this section have 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;***

Reasons for the Decision

In applying this condition I have relied on the information at Schedule E of the application.

Schedule E states that *"to the extent that the native title rights and interests claimed may relate to waters in an offshore place, those rights and interests are not to the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under international law in relation to the whole or any part of the offshore place."*

I note submissions made by the Crown Solicitors Office at pages 2 and 3 of letters dated 18 December 1998 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

I note submissions made by the Australian Government Solicitor at pages 1 of a letter dated 20 January 1999 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

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

190B9 (c)	***Other extinguishment:*** ***The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:*** ***(c) in any case – the native title rights and interests claimed have otherwise been extinguished (except to the extent that the extinguishment is required to be disregarded under subsection 47(2), 47A(2) or 47B(2)).***

Reasons for the Decision

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

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

The applicants state clearly in the following paragraph that the claim excludes any area where native title rights and interests have otherwise been extinguished.

The areas within the external boundaries that are not covered by the application include any areas in relation to which all native title rights and interests are have otherwise been extinguished, including area subject to:
(a) and act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or
(b) actual use made by the holder of a tenure other than native title which is permanently inconsistent with the continued existence of native title.

The application also details, to avoid uncertainty, some significant classes of tenure which are excluded. The relevant tenure classes are detailed above in my S190B(2) reasons.
The applicant's appear to include certain tenure in Schedule B at 4.2 to 4.23 in response to the State and Commonwealth as outlined at 4.1, there is nothing to indicate that this would then include tenure that should be removed.

I note submissions made by the Australian Government Solicitor at page 1 and 2 of letters dated 14 and 20 January 1999 in relation to this condition of the test. The submissions were made prior to the amended application and are no longer relevant to this application.

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

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