

## National Native Title Tribunal

## REGISTRATION TEST

## REASONS FOR DECISION

DELEGATE	Catherine Munro
DATE	30 March 1999

Application Name	Martu		
Name(s) of Applicant(s)	Jeffrey James, Teddy Biljabu, Billy Dunn, Neil Pitu, Nancy Taylor, Nancy Paterson, Kevin Fred, Pincher Rubin, Frank French, Pukina Burton, Tommy Watson, Lindsay Hardcase, Roley Williams, Colin Peterson, Ben Odapanie, Grant Judson, Mack Gardiner, Lola Walker, Kenny Thomas, Dulcie Gibbs, Patricia Fry		
Region	Pilbara	NNTT No	WC96/78
Date Application Made	26/6/96	Fed Court No	WAG6110/98

## Brief History of the application

The Applicants lodged this claim on 26 June 1996. The claim was amended on 29 September 1998 to remove approximately one third of the claim. It was further amended on 9 March 1999 to remove some Applicants and add others.

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

## Information considered in making the decision

Pursuant to s.190A(3) 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:

WC96/78	Martu
WC96/32	Ngurrara
WC98/65	Nyangumarta
WC96/84	Nomads
WC96/9	Ngolibardu
WC97/3	Ngarlia

- The 'Future Act' files relating to the following matters:

WO96/21	WO96/148	WO97/96
WO96/43	WO96/149	WO97/103
WO96/53	WO96/150	WO97/109
WO96/70	WO97/4	WO97/154
WO96/73	WO97/11	WO97/155
WO96/83	WO97/13	WO97/271
WO96/85	WO97/14	WO97/272
WO96/110	WO97/16	WO97/301
WO96/111	WO97/24	WO97/332
WO96/115	WO97/53	WO97/434
WO96/117	WO97/68	WO97/549
WO96/118	WO97/71	WO98/665
WO96/119	WO97/72	WO98/976
WO96/144	WO97/73	WO98/977
WO96/145	WO97/87	WO98/978
WO96/146	WO97/89	
WO96/147	WO97/92	

- Other tenure information acquired by the Tribunal in relation to the area covered by the this application;
- 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;
- Transcripts, Affidavits, State Government Submissions, Grantee Party Submissions, Applicant Statements of Contention, information by the Aboriginal Affairs Department and Determinations from Future Act Files where the future act matters related to any part of the area covered by this application;
- Submissions from the Western Australian State Government.

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

## A. Procedural Conditions

<b>190C2</b>	<p><i>Information, etc, required by section 61 and section 62:</i></p> <p><i>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.</i></p>
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### Details required in section 61

<b>61(3)</b>	<i>Name and address for service of applicant(s)</i>
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Reasons relating to this sub-section	
<p>A number of applicants were removed and others added pursuant to an order of the Federal Court on 9 March 1999. There are now 21 Applicants, whose names are provided in the second schedule of the amended application.</p> <p>The address for service is given at Part B of the amended application.</p> <p>I am satisfied there has been compliance with the procedural requirements of s.61(3).</p>	

<b>61(4)</b>	<i>Names persons in native title claim group or otherwise describes the persons so that it can be ascertained whether any particular person is one of those persons</i>
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Reasons relating to this sub-section	
<p>A list of 116 names comprising the native title claim group is provided at Attachment A of the amended application.</p> <p>I am satisfied there has been compliance with the procedural requirements of s.61(4).</p>	

<b>61(5)</b>	<i>Application is in the prescribed form<sup>1</sup>; lodged in the Federal Court, contains prescribed information<sup>2</sup>, and accompanied by prescribed documents and fee</i>
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Reasons relating to this sub-section	
<p>The application is in the form prescribed by Regulation 5(1)(a) Native Title (Federal Court) Regulations 1998.</p> <p>As required under section 61(5)(b), the amended application was filed in the Federal Court.</p> <p>The application meets the requirements of section 61(5)(c) and contains all information as prescribed in section 62.</p> <p>As required by section 61(5)(d) the application is accompanied by:</p> <ul style="list-style-type: none"> <li>• Affidavits as prescribed by section 62(1)(a) (see reasons for recommendation in relation to that section);</li> <li>• a map as prescribed by sections 62(2)(b) (see reasons for recommendation in relation to section 62(2)(b)).</li> </ul> <p>I note that section 190C(2) only requires me to consider details, other information, and documents required by section 61 and 62. I am not required to consider whether the application was accompanied by the payment of a prescribed fee to the Federal Court.</p> <p>I am satisfied there has been compliance with the procedural requirements of s.61(5).</p>	

### Details required in section 62(1)

<b>62(1)(a)</b>	<i>Affidavits address matters required by s62(1)(a)(i) – s62(1)(a)(v)</i>
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Reasons relating to this sub-section	
<p>Affidavits have been received from all 21 Applicants. All affidavits are in the prescribed form and address the matters required by s.62(1)(a)(i)-(v). They have been witnessed by a competent witness.</p>	

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

<sup>2</sup> 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)”.

I am satisfied there has been compliance with the procedural requirements of s.62(1)(a).

<b>62(1)(c)</b>	<i>Details of traditional physical connection (information not mandatory)</i>
Comment on details provided	
Details of traditional physical connection are provided at Attachment M of the amended application.	

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

<b>62(2)(a)(i)</b>	<i>Information identifying the boundaries of the area covered</i>
Reasons relating to this sub-section	
<p>A written description of the external area subject to claim is provided at Attachment B (pp2-3) of the amended application. A memorandum from the Tribunal's Geospatial Unit verifies that the description allows the boundary to be identified (folio 33 of Martu Registration Test file).</p> <p>I am satisfied there has been compliance with the procedural requirements of s.62(2)(a)(i).</p>	

<b>62(2)(a)(ii)</b>	<i>Information identifying any areas within those boundaries which are not covered by the application</i>
Reasons relating to this sub-section	
<p>Areas excluded from the application are described at Schedule B(b) of the amended application. These excluded areas form the areas within the external boundary which are not covered by the application, that is, the internal boundary description. The internal boundaries are described by way of identifying classes of land tenure that are not covered by the application.</p> <p>I am satisfied there has been compliance with the procedural requirements of s.62(2)(a)(ii).</p>	

<b>62(2)(b)</b>	<i>A map showing the external boundaries of the area covered by the application</i>
Reasons relating to this sub-section	
<p>A map showing the external boundaries of the area covered by the application is provided at Attachment B of the amended application.</p> <p>I am satisfied there has been compliance with the procedural requirements of s.62(2)(b).</p>	

<b>62(2)(c)</b>	<i>Details/results of searches carried out to determine the existence of any non-native title rights and interests</i>
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Reasons relating to this sub-section	
<p>Detailed results of searches carried out to determine the existence of any non-native title rights and interests are provided at Schedule D and Attachment D of the amended application. Attachment D consists of a spreadsheet showing Land Act Reserves (current to 17/11/98), Mining Tenements (current to 17/11/98) and Petroleum Tenements (current to 17/11/98).</p> <p>The Applicants have supplied other information including results of tenure searches and pastoral lease documents for the unamended claim area (WC96/78 - Martu, Volume 1 folio 8).</p> <p>I am satisfied there has been compliance with the procedural requirements of s.62(2)(c).</p>	

<b>62(2)(d)</b>	<i>Description of native title rights and interests claimed</i>
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Reasons relating to this sub-section	
<p>A description of native title rights and interests claimed is provided at Schedule E and Attachment E of the amended application. The description consists of:</p> <ul style="list-style-type: none"> <li>• a conditional generic description of the rights claimed;</li> <li>• a conditional list of 32 specific native title rights and interests; and</li> <li>• a list of 4 qualifications to the above.</li> </ul> <p>I am satisfied there has been compliance with the procedural requirements of s.62(2)(d).</p>	

<b>62(2)(e)(i)</b>	<i>Factual basis – claim group has, and their predecessors had, an association with the area</i>
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Reasons relating to this sub-section	
<p>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 is provided at Schedule F(i) of the amended application.</p> <p>I am satisfied there has been compliance with the procedural requirements of s.62(2)(e)(i).</p>	

<b>62(2)(e)(ii)</b>	<i>Factual basis – traditional laws and customs exist that give rise to the claimed native title</i>
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Reasons relating to this sub-section	
<p>A general description of the factual basis on which it is asserted that there exists traditional laws and customs that give rise to the claimed native title is provided at Schedule F(ii) of the</p>	

amended application.

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

<b>62(2)(e)(iii)</b>	<i>Factual basis – claim group has continued to hold native title in accordance with traditional laws and customs</i>
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Reasons relating to this sub-section

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 is provided at Schedule F(iii – iv) of the amended application.

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

<b>62(2)(f)</b>	<i>If native title claim group currently carry on any activities in relation to the area claimed, details of those activities</i>
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Reasons relating to this sub-section

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

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

<b>62(2)(g)</b>	<i>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)</i>
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Reasons relating to this sub-section

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

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

<b>62(2)(h)</b>	<i>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</i>
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Reasons relating to this sub-section

Details of notices under s.29 are provided at Attachment I of the amended application.

I note that information in regard to the s.29 notice that triggered this application to be

considered for registration as set out in s.190A(2) has been provided (folio 37 of the Martu Registration Test file).

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.



<p><b>190C3</b></p>	<p><i>Common claimants in overlapping claims:</i></p> <p><i>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:</i></p> <ul style="list-style-type: none"> <li><i>(a) the previous application covered the whole or part of the area covered by the current application; and</i></li> <li><i>(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</i></li> <li><i>(c) the entry was made, or not removed, as a result of consideration of the previous application under section 190A.</i></li> </ul>
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## Reasons for the Decision

A search of the Register of Native Title Claims reveals that there are no other overlapping applications on the Register of Native Title Claims as a result of consideration under s.190A of the amended *Native Title Act*. I am therefore of the view that s.190C3 has no operation.

<b>190C4(a)</b>  <b>and</b>  <b>190C4(b)</b>	<p><i>Certification and authorisation:</i></p> <p><i>The Registrar must be satisfied that either of the following is the case:</i></p> <p>(a) <i>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</i></p> <p>(b) <i>the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.</i></p>
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## Reasons for the Decision

At Schedule R of the amended application it is stated that certification by a representative Aboriginal/Torres Strait Islander body is “not applicable”.

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.

<b>190C5</b>	<p><i>Evidence of authorisation:</i></p> <p><i>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:</i></p> <p>(a) <i>includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and</i></p> <p>(b) <i>briefly sets out the grounds on which the Registrar should consider that it has been met.</i></p>
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## Reasons for the Decision

Under s.190C(5), if the application has not been certified, then 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 and 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 Attachment A of the amended application all 21 Applicants are named as members of the native title claim group.

At Part A 2 of the amended application the Applicants state that they are entitled to make this application as “ *The Applicants are members of the native title claim group and are authorised by the claim group to make this application*”.

Schedule R of the amended application states that the native title claim group “*has a traditional decision making process for authorising things of the kind contemplated by Sec251B. That process of traditional decision making has taken place and pursuant thereto the applicants are authorised to make this application*”.

The Applicants all depose in their affidavits that they are authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it. The Applicants all depose in their affidavits that they are authorised on the grounds that “*pursuant to the traditions laws and customs of the native title claim group a process of decision that must be complied with authorising things of this kind has occurred and been complied with.*”

I am satisfied that the above effects compliance with s.190C(5)(a) as required by s.190C(4)(b).

Section 190C(5)(b) requires that the application briefly sets out the grounds on which I should consider that the application has been authorised.

Attachment R of the amended application contains a statement that a claimant meeting was held at Punmu on 1-2 December 1989 (I have taken to read as 1998) and that at this meeting the native title claim group authorised the Applicants for the purposes of the Martu native title claim. It is stated that *“the process of authorisation was made in accordance with the traditional law and custom of the native title group that deals with matters of a like kind and was determined by the claim group determining applicants in accordance with group identification with country within the claim area”*. The Applicants were nominated from within the following groups:

Walakaja (the lake country)

Pilakaja (the spinifex country)

Rirrakaja (the stoney country)

Ngayunanalku (lake disappointment country)

Karamilyingurrara (the river country)

Pitjjarli (Waucarlyarly country).

An affidavit of Michael Rynne (legal representative for the Martu claimants), sworn on 11/2/99, accompanies the amended application and provides information about the process of authorisation.

It is my view that the above statement effects compliance with s.190C(5)(b) and that the requirements of s.190C(5) have been met.

## B. Merits Conditions

<b>190B2</b>	<p><i>Description of the areas claimed:</i></p> <p><i>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.</i></p>
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## Reasons for the Decision

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

### **External Boundaries:**

A map is provided at Attachment B of the amended application (page 1). The map was prepared by the Land Claims Mapping Unit and was produced on 11/11/98. The map uses a system of latitude and longitude coordinates, so that it is possible to identify the location of the areas claimed on the surface of the earth. The map shows a scale allowing distances and areas to be ascertained and identifies tenure, including vacant crown land, Rudall River National Park and other tenure. A locality diagram, which indicates generally the position of the claim within Western Australia, forms part of the map provided. The line indicating the external boundary is finely marked and easy to follow.

In addition to the provision of a map defining the external boundaries of the claim, the Applicants have provided a written technical description of the external boundaries at pp2-3 of Attachment B of the amended application. The Tribunal's geospatial unit has advised that the technical description of the external boundaries coincides with the area displayed in the map provided (folio 33 Martu Registration Test).

I am satisfied that the map and description are sufficient to identify the external boundaries of the claim area.

### **Internal Boundaries:**

The areas excluded from the application are described at Schedule B(b) of the amended application. These excluded areas form the areas within the external boundary which are not covered by the application, that is, the internal boundary description.

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

- 1) subject to (b)(4) the applicants exclude from the claim any area covered by valid acts on or before 23 December 1996 comprising such of the following as are included as extinguishing acts with the Native Title Act 1993, as amended, or Titles Validation Act 1994, as amended, at the time of the Registrar's consideration and or at the time that the application is determined, namely:-
  - (i) Category A past Acts as defined in s.228 and s.229 Native Title Act 1993

(ii) Category A intermediate Acts as defined in s.232A and s.232B Native Title Act 1993

- 2) subject to (b)(4) the applicants exclude any areas in relation to which a previous exclusion possession act as defined in s.23B Native Title Act 1993, was done in relation to an area and, either the Act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision for that act as described in s.23E Native Title Act 1993.
- 3) the applicants exclude from the claim, areas in relation to which native title rights and interests have otherwise been extinguished including areas subject to –
  - i. an act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or
  - ii. actual use made by the holder of a tenure other than native title which is permanently inconsistent with the continued exercise of native title
 and, to avoid any uncertainty, exclude from the claim communications site 42099, repeater site 42440, repeater site 42456.
- 4) paragraphs (1), (2) and (3) are subject to such of the provisions of Sections 47, 47A and 47B of the Native Title Act 1993 as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing but which include such areas as may be listed in Schedule L.

I must be satisfied that the information and the 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.

The area covered by the application is remote and consists largely of vacant Crown land, Rudall River National Park and a number of Reserves. It does not cover any complex land tenures, for example cities or towns.

The description of areas excluded from the claim area at Schedule B(b) paragraphs 1, 2 and 3(i) refer to land where an act of a State or Commonwealth government has created interests. The excluded areas of land can be readily identified through searches of relevant Government registers. I note that at the time of making this decision, the State of Western Australia has not passed legislation in accordance with s.23E of the amended *Native Title Act*.

Paragraph 3(ii) of Schedule B(b) of the amended application excludes areas of land where actual use by the holder of tenure is permanently inconsistent with the continued existence of native title. Certain communication sites are specifically excluded as examples of tenures of this type. The description in paragraph 3(ii) is sufficient to be satisfied that the areas excluded from the application are identified with reasonable certainty.

The Applicants invoke the provisions of ss.47,47A and 47B by stating at paragraph 4 of Schedule B(b) that any areas excluded from the claim area are subject to these sections. Details of areas which may attract the provisions of ss.47,47A and 47B are not provided in the application, but will be provided prior to the hearing of the application.

I find the abovementioned class exclusions of tenure clear statements of particular land to be excluded from the claim area at the time of testing.

## Conclusion

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, subject to the exclusions specified.

I find that the information and the map submitted with the application meets the requirements of s.62. In accordance with s.62(2)(b), the areas covered by the application can be identified. The class exclusions also permit any areas within the external boundaries that are not covered by the application to be identified. I am satisfied that the criteria set out in s.190B(2) are met.

<b>190B3</b>	<p><i>Identification of the native title claim group:</i></p> <p><i>The Registrar must be satisfied that:</i></p> <ul style="list-style-type: none"> <li><i>(a) the persons in the native title claim group are named in the application; or</i></li> <li><i>(b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.</i></li> </ul>
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## Reasons for the Decision

Attachment A to the amended application contains a list of 116 names of persons comprising the native title claim group.

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



<b>190B4</b>	<p><i>Identification of claimed native title</i></p> <p><i>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.</i></p>
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## Reasons for the Decision

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

Under this limb, I must be satisfied that the native title rights and interests detailed can be readily identified. Section 62(2)(d) states that the description of the native title rights and interests claimed must not merely consist of a statement to the effect that the native title rights and interests are ‘all native title interests that may exist, or that have not been extinguished at law’.

At Schedule E and Attachment E of the amended application the native title rights and interests claimed are listed.

The list consists of:

- A conditional generic description of the rights claimed;
- A conditional list of 32 specific native title rights and interests;
- A list of 4 qualifications to the above.

The description is in the following terms:

The native title rights and interests claimed are the rights and interests of exclusive possession, use and occupation and enjoyment as against the whole world (subject to any native title rights and interests that may be shared with any other persons who establish that they are native title holders) together with such rights and interests flowing from the right to possession use and occupation including but not limited to:-

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

Further or in the alternative enjoy the right to:

- (a) possession of the land waters and resources;

- (b) occupation of the land waters and resources;
- (c) use and enjoyment of the land waters and resources;
- (d) own and control knowledge and information comprising and concerning the traditional laws and customs of the native title holders in relation to the land and waters and resources and the passing of this knowledge on to younger generations;
- (e) bear rear and teach children on the land;
- (f) conduct ceremonies on and for the land waters and resources and to attend sites of cultural and religious significance;
- (g) live and erect residences and other infrastructure on the land;
- (h) move freely about the land and waters including camping and seeking shelter;
- (i) hunt and fish on the land and in the waters and otherwise collect food from the land and waters;
- (j) take and use the resources of the land including water plants medicines animals fisheries forest products and all other components and attributes of the land;
- (k) dig for take from the land and waters and use all minerals and ores including extractive and quarry minerals such as flints clay soil sand gravel rock and like resources;
- (l) manufacture materials artefacts tools and weapons from the products of the land waters and resources;
- (m) dispose of products of the land waters and resources and manufactured products by trade or exchange;
- (n) manage conserve and look after the land waters and resources including locating and cleaning water sources and drinking water on the land;
- (o) manipulating the environment by burning the land harvesting produce sowing seed and doing other activities;
- (p) grant or refuse permission to any person to do some of all of subparagraphs (xi – xxv) inclusive either at all or subject to terms and conditions;
- (q) inherit native title rights and interests;
- (r) bestow and acquire native title rights and interests;
- (s) resolve amongst themselves any disputes concerning land waters and resources;
- (t) regulate access to parts of the land according to initiation status gender and otherwise to exclude strangers from the land;
- (u) permit persons other than native title holders to enter the land;
- (v) exclude persons other than native title holders from the land.

All claimed native title rights and interests are subject to:

- (i) To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants;
- (ii) To the extent that the native title rights and 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) Subject to paragraph (iv) 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 acts was attributable to the State of Western Australia.
- (iv) Paragraph (iii) above is subject to such of the provisions 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 but which include such areas as may be listed in Schedule L.

I am satisfied that the description of the native title rights and interests listed does not merely consist of a series of statements to the effect that the native title rights and interests are all those native title rights and interests that may exist or that have not been extinguished at law. The degree of specificity in the manner in which the application has been drafted means that the rights and interests claimed are readily identifiable.

The description “exclusive possession, use and occupation and enjoyment as against the whole world (subject to any native title rights and interest that may be shared with any other persons who establish that they are native title holders)” together with the 4 qualifications provided at Attachment E (page 2) serve to qualify the Applicants’ claim to exclusive rights and interest in respect of areas within the claimed area where such a claim cannot be made. The qualifying statements are clear and the native title rights and interests claimed can be readily identified.

I am satisfied that the description contained in Schedule E and Attachment E of the amended application as required by paragraph 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified and that the application meets this condition.

<b>190B5</b>	<p><i>Sufficient factual basis:</i></p> <p><i>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:</i></p> <ul style="list-style-type: none"> <li><i>(a) That the native title claim group have, and the predecessors of those persons had, an association with the area;</i></li> <li><i>(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;</i></li> <li><i>(c) That the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.</i></li> </ul>
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## Reasons for the Decision

There are three criteria to consider in determining overall 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 and Attachment E of this application.

The evidence I have relied on in making my decision with regard to this section is drawn from the following sources:

1. Information contained in the amended application;
2. Affidavit of [Name Deleted], one of the Applicants, dated 3 February 1999;
3. A photocopy of a report entitled *Aboriginal Dream Spirit Beliefs in a Contact Situation* by Robert Tonkinson, field work conducted over the period June 1963-January 1965, 1966, 1967, 69-70, pp280-287;
4. A report entitled *The Canning Stock Route: June to July 1976* by CR Hamilton and K Palmer, the Aboriginal Sites Department of the Western Australia Museum;
5. Jigalong Community Traditional Lands Reserve Proposal, a survey of sites of traditional significance to aboriginal people of the Jigalong community, prepared by the Department of Aboriginal Sites, Western Australian Museum;
6. A report by Peter Veth entitled *The Archaeological Resource of the Karlamilyi (Rudall River) region*;
7. A report by Fiona Walsh entitled *The Use and Management of Animal and Plant Resources by the Martujarra, Department of Botany, UWA*;

8. A booklet for use in Martu schools;
9. Stories of 3 claimants for use in Martu schools, recorded by Fiona Walsh;
10. Stories from *These are our Waterholes*, a collection of stories by various applicants and members of the native title claim group.
11. A taped interview (with an accompanying transcript) with [Name Deleted], dated 10 March 1999.

In addition I have also had regard to the following information already held by the Tribunal and which supports my conclusion:

1. A report from Kim Doohan entitled *Report on Investigations of Alleged Site Disturbance in the Harbut Range Region, South East of Rudall River National Park*.
2. A report by Robert Tonkinson entitled *The Mardu Aborigines: Living the Dream in Australia's Desert (2<sup>nd</sup> Ed)*. This is located under the pink folio relating to WO97/271.
3. An affidavit deposed by [Name Deleted] dated 10 November 1997 and located under the file for WO97/271.
4. An affidavit deposed by [Name Deleted] dated 15 May 1997 and located under the file for WO97/14.
5. An affidavit deposed by [Name Deleted], undated and located in the file for WO97/14.
6. A report prepared by the Environmental Services Division of PA Management Consultants Pty Ltd entitled *Environmental Impact Study of a Goldmining Project in the Great Sandy Desert* located at WO96/85.
7. A report by Daniel A Vachon, Jan Turner and Roark Muhlen-Schultz entitled *Western Desert Puntukurnuparna Aboriginal Corporation Statement - The Social Impact Study on Exploration, Mining and Tourism in the Rudall River Region* located at WO96/53.

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

To be satisfied under this criterion, it must be evident that the association with the area is and was communal, that is, shared by the members of the native title claim group and their predecessors.

At Schedule F of the amended application the Applicants state:

“the native title claim group and their ancestors have, since the assertion of British sovereignty possessed occupied used and enjoyed the claim area”.

They also provide some general details about:

- i) how laws and customs are vested in members of that group;
- ii) how these traditional laws and customs continue to be passed on by traditional teaching over the generations.

I draw these conclusions from the sources stated above, in particular the following:

1) In [Name Deleted]'s affidavit sworn 3 February 1999 she states that she was born in the bush at Karalamili (known as Rudall River National Park). She makes the statement that her father was [Name Deleted], and that his country was [Name Deleted] (in the north east of the claim area) and that her mother was [Name Deleted]. Her mother's father was [Name Deleted], and his country was in the claim area.

[Name Deleted] states that all members of the claim group are related (para. 1) and that all members of the claim group know each other and that their lives have been lived as one (para. 2). At paragraph 8 of her affidavit [Name Deleted] describes how members of the native title claim group live in communities in the area of the claim.

2) [Name Deleted], in his interview dated 10 March 1999, states that his country is in the north of the claim area, an area called the Lake Country. He makes the statement that he was born at Kiinyu, 35, Canning Stock Route and that was where his uncle, grandfather and grandmother had been living. [Name Deleted] describes how he has worked, conducted law business, negotiated with mining companies, camped and gathered food throughout the claim area.

3) General evidence in support of the Martu's association with the area is found in the report titled *Jigalong Community Traditional Lands Reserve Proposal* (identified at point 3 above).

On the basis of the evidence considered above, I am satisfied that there is a factual basis which supports the assertion that the native title claim group have, and the predecessors of those persons had, an association with the claim area.

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

This subsection requires 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.

Schedule F item ii of the amended application contains the following statement:

“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 vest rights and interests in land and waters in members of the native title claim group on the basis of:

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

In this statement the Applicants outline the basis upon which the traditional laws and customs vest native title rights and interests in members of the native title claim group and the means by which such traditional laws and custom have been passed on. This information supports the assertion that there exist traditional laws and customs observed by the claim group which give rise to their native title rights and interests.

The affidavit of [Name Deleted] (2/2/99) states that the claimant group know each other, *“our lives have been lived as one”* and *“we have a system of laws about how we live”*. At paragraph 10 [Name Deleted] makes the statement that the Martu respect each other’s rights in country. She describes how someone gets to have a say in country (para. 10), provides information about the skin groups (para. 11) and how belonging to a skin group stipulates the sort of relationships Martu people can have with each other, for example, who can have a baby with whom. At paragraph 13 of her affidavit, [Name Deleted] describes other ways in which Martu have connection to country and how the claim group is comprised of sub-groups. She describes how Martu go walkabout into their country, and that there are special places for men and women (para. 15). She makes the statement that sometimes you cannot go onto country when there is law business (para. 16). At paragraph 17 [Name Deleted] states that the Martu have a number of languages with a common dialect and that is how they are able to identify other Aboriginal people. [Name Deleted] makes the statement that the Seven Sisters dreaming is an important place and describes the impact that the Harding Dam has had on the dreaming.

[Name Deleted]’s taped interview, dated 10/3/99, provides further evidence of a system of laws and customs which underpin the lives of members of the claim group. He states that ceremonies and law business continue to be conducted *“all round our country”*.

General evidence in support of the existence of the Martu’s traditional laws and customs and that such laws and customs give rise to the native title rights and interests can be found in the following two reports *Jigalong Community Traditional Lands Reserve Proposal* (identified at point 5 above); *Aboriginal Dream Spirit Beliefs in a Contact Situation* by Robert Tonkinson (identified at point 3 above).

I am satisfied that the evidence cited provides a factual basis which supports the assertion that traditional laws and customs exist that 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.

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

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.

At Schedule F items iii – v of the amended application the factual basis for this assertion is stated as follows:

- “iii. Such traditional law and custom has been passed on by traditional teaching, through the generations preceding the present generations to the present generations of persons comprising the native title claim group
- iv. The native title claim group continues to acknowledge and observe those traditional laws and customs
- v. 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 traditional rights and interests the native title claim group have continuously carried out in relation to the claim area:

“Members of the native title claim group have continuously / from time to time carried out activities on the land and waters within the area of the claim in particular, they have possessed, occupied, used and enjoyed the area. Details of activities currently carried out are such as flowing from the conduct of their daily lives on the land and pursuant to their spiritual connections with the land being such aspects of living as create the identity of the claim group as a group of separate and distinct people. Such activities included but are not limited to:

- hunting;
- camping;
- conduct of ceremonies;
- attendance at sites of cultural and religious significance;
- living on the land and erection of residences and moving freely about the land including camping and seeking shelter;
- taking and resources of the land such as water, plants, medicines, animals, fisheries and forest products;
- digging and taking from the land and waters flints clays soil sand gravel and rock;
- manufacturing materials artefacts tools weapons;
- disposing of products by trade and exchange;
- locating and cleaning water areas;
- manipulation of the environment by burning the land harvesting produce sowing seed;
- telling stories about the land;
- regulating access to the land;
- bear rear and teach younger generations about the land;
- conduct and attendance at meetings, funerals
- and such other activities are may arise from time to time”.

[Name Deleted] provides details in her affidavit (3/2/99) of ways someone gets to have a say in country (para. 10) and the different skin groups of Martu people (para. 11). At paragraph 15 [Name Deleted] describes how Martu people go “walkabout” in their country and the special places where people can and cannot go. [Name Deleted] makes the statement that sometimes people cannot go into country because of law business (para. 16). These statements provide evidence of the continuance of the laws and customs that give rise to native



title rights and interests, ie-contemporary observance of laws and customs.

[Name Deleted]'s taped interview, dated 10/3/99, provides further evidence of the continuance of the laws and customs of the Martu people. He makes the statement that the claim group continue to live on the land, camp, carry out ceremonies and law business, gather food, hunt for wallaby, bush cat and dingo etc. His interview provides details of a system of laws and customs which underpin the lives of members of the claim group. [Name Deleted] states that ceremonies and law business continue to be conducted "*all round our country*".

General evidence in support of the native title claim group continuing to hold native title in accordance with traditional laws and customs can be found in the following reports, *Jigalong Community Traditional Lands Reserve Proposal* (identified at point 5 above); *Aboriginal Dream Spirit Beliefs in a Contact Situation* by Robert Tonkinson (identified at point 3 above).

### **Conclusion**

In summary, the Applicants have stated by way of affidavit and a taped interview that they continue to access, occupy, use and enjoy the claim area. This includes hunting, gathering for food, camping, visiting and protecting sites. There is evidence that the claim group continue to pass on custodian ship of the land, and the associated traditional dreaming stories and songlines. There is also evidence that they continue to observe traditional law and protocol in respect of this information, for example rights to speak about certain parts of the country.

I am satisfied, based on the amended application, affidavit by [Name Deleted] (3/2/99), transcript of interview with [Name Deleted] (10/3/99), the other reports provided in the context of future act matters relating to the claim area and the reports provided by the Applicants, that this condition is met.

<b>190B6</b>	<p><i>Prima facie case:</i></p> <p><i>The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.</i></p>
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## Reasons for the Decision

In applying this condition I have relied upon:

- the information provided in the amended application;
- affidavit of [Name Deleted], sworn 3 February 1999;
- transcript of interview of [Name Deleted], dated 10/3/99;
- affidavit of [Name Deleted], dated 15 May 1997, provided in the course of future act matter WO97/14;
- affidavit of [Name Deleted], dated 10 November 1997, provided in the course of future act matter WO97/271;
- A photocopy of a report entitled *Aboriginal Dream Spirit Beliefs in a Contact Situation* by Robert Tonkinson, field work conducted over the period June 1963-January 1965, 1966, 1967, 69-70, pp280-287;
- A report entitled *The Canning Stock Route: June to July 1976* by CR Hamilton and K Palmer, the Aboriginal Sites Department of the Western Australia Museum;
- Jigalong Community Traditional Lands Reserve Proposal, a survey of sites of traditional significance to aboriginal people of the Jigalong community, prepared by the Department of Aboriginal Sites, Western Australian Museum;
- A report by Peter Veth entitled *The Archaeological Resource of the Karlamilyi (Rudall River) region*;
- A report by Fiona Walsh entitled *The Use and Management of Animal and Plant Resources by the Martujarra, Department of Botany, UWA*;
- A booklet for use in Martu schools;
- Stories of 3 claimants for use in Martu schools, recorded by Fiona Walsh;
- Stories from *These are our Waterholes*, a collection of stories by various applicants and members of the native title claim group.

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 Galanjanja Aboriginal Corporation v Qld* 185 CLR 595 by their Honours Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, who noted:

*“The phrase can have various shades of meaning in particular statutory contexts but the ordinary meaning of the phrase “prima facie is: “At first sight; on the face of it; as it appears at first sight without investigation.” [Citing the Oxford English Dictionary (2<sup>nd</sup> ed 1989)].*

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

application.

On the basis of the abovementioned affidavits, the transcript of interview with [Name Deleted] and the above reports it is my decision that the following native title rights and interests can prima facie be established, subject to the 4 qualifications at s.190B(4):

- (i) To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants;
- (ii) To the extent that the native title rights and 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) Subject to paragraph (iv) 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 acts was attributable to the State of Western Australia.
- (iv) Paragraph (iii) above is subject to such of the provisions 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 but which include such areas as may be listed in Schedule L.

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

[affidavit from [Name Deleted] (3/2/99) states that she lives in the western desert lands or at Jigalong or outside Newman. [Name Deleted] provides details of how Martu use and enjoy the area subject to claim. [Name Deleted] (10/3/99) states that his country is in the north of the claim area, an area called the Lake Country and describes how he has worked, conducted law business, negotiated with mining companies, camped and gathered food throughout the claim area. [Name Deleted] states in his affidavit (15/5/97) that he speaks for country around Gumbubindil, (also known as Lake Disappointment) and on to Knawarritji, that he was born in this country, lived a traditional life in this country and walked all through this country.

Whilst I am satisfied that these rights and interests can be established on the information noted above, general evidence can also be found in the reports *Jigalong Community Traditional Lands Reserve Proposal; The Canning Stock Route – June / July 1976; The Archaeological Resource of the Karlamilyi (Rudall River) Region.*]

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

[the affidavit of [Name Deleted] (3/2/99) at paragraph 10 provides details of the ways that people get to have a say in country. [Name Deleted] in his affidavit (10/11/97) states that he has the authority to speak for country about mining in the area around Mt Isdell. [Name Deleted] (15/5/97) states that he is an elder of the Martu people and has the authority to speak for the country around Gumbubindil, also known as Lake Disappointment and on to Kunawarritji. [Name Deleted] (10/3/99) states that if people want to go onto his country they should seek his permission first.]

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

[[Name Deleted] provides details at paragraph 15 of her affidavit (3/2/97) of how Martu can

go into each other's country, and that the older Martu know where they can and cannot go. [Name Deleted] (10/3/99) states that he has worked, conducted law business, negotiated with mining companies, camped and gathered food throughout the claim area. [Name Deleted] states in his affidavit (15/5/97) that he speaks for country around Gumbubindil, (also known as Lake Disappointment) and on to Kunawarritji. He makes the statement that he was born in this country, lived a traditional life in this country and walked all through this country.]

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

[affidavit of [Name Deleted] (3/2/97) at paragraph 15 describes how Martu can all go into each other's country, and that in other's country the older Martu know where they can and cannot go. [Name Deleted] makes the statement that at times you cannot go into Country, and that people who are not Martu people have to seek permission to enter Martu country. In his affidavit [Name Deleted] (15/5/97) states that he is in elder of the Martu people and has the authority to speak for the country concerned around the Lake Disappointment area and on to Kunawarritji. [Name Deleted] (10/3/99) states that if people want to go onto his country they should seek his permission first.]

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

[in her affidavit of 3/2/97 at paragraph 18 [Name Deleted] states how Martu people travel through their country and preserve, protect and use camping and accommodation sites so that food sources can continue. [Name Deleted] makes the statement that they use the land to make tools, weapons, and collect ochres for use in traditional activities. Also the interview transcript of [Name Deleted] (10/3/99) provides details of collecting and hunting for food, making spears for hunting.]

*(f) the right to control the use and enjoyment of others of resources of the area;*

[in his affidavit [Name Deleted] (15/5/97) states that he is in elder of the Martu people and has the authority to speak for the country concerned around the Lake Disappointment area and on to Kunawarritji in respect to proposed future mining acts. [Name Deleted] (10/3/99) states that if people want to go onto his country they should seek his permission first and that miners must ask for his permission to mine in his country.]

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

[affidavit of [Name Deleted] (3/2/97) at paragraph states that when Martu women from different country were together for ceremonies in the past they would exchange seeds from different areas.

Whilst I am satisfied that these rights and interests can be established on the information noted above, general evidence can also be found in the report *The Use and Management of Animal and Plant Resources by the Martujarra*. The report states that wooden artefacts continue to be made by men within the communities and that these artefacts are produced for ceremonial and functional use and for trade and exchange. At page 202 of the report Fiona Walsh states that wooden bowls were once an important part of the process of harvesting and cleaning seed, but that the bowls are now produced almost entirely as items for exchange or sale.]

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

[[Name Deleted] states in her affidavit (3/2/97) at paragraph 21 states that preservation and teaching of knowledge is an important part of the Martu people's lives. [Name Deleted] at paragraph 23 describes how the Seven Sisters Dreaming is an important place and how they tried to stop the building of the dam. At paragraph 24 she makes the statement "*We want our land protected so that the Martu way of life can continue*". In his affidavit [Name Deleted](15/5/97) states that he is in elder of the Martu people and has the authority to speak for the country concerned around the Lake Disappointment area and on to Kunawarritji. He describes how wild spirit people live under the Lake eat people if they are disturbed, and that this will happen from the proposed drilling / excavation work. [Name Deleted] (10/11/1997) states that he is an elder has the authority to speak for country concerned with the area around Mt Isdell and that there are a lot of waterholes and other sites of significance in the area that need to be protected.

Whilst I am satisfied that these rights and interests can be established on the information noted above, general evidence can also be found in the report *The Canning Stock Route: June to July 1976.*]

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

[in her affidavit of 3/2/97 at paragraph 21 [Name Deleted] states that preservation and teaching of knowledge is an important part of their lives. She describes how the Seven Sisters Dreaming is an important place and how they tried to stop the building of the dam (paragraph 23). At paragraph 24 she makes the statement "*We want our land protected so that the Martu way of life can continue*". In his affidavit [Name Deleted](15/5/97) states that he is in elder of the Martu people and has the authority to speak for the country concerned around the Lake Disappointment area and on to Kunawarritji. He describes how wild spirit people live under the Lake eat people if they are disturbed, and that this will happen from the proposed drilling / excavation work.

[Name Deleted] (10/11/1997) states that as an elder he has the authority to speak for country concerned with the area around Mt Isdell and that there are a lot of waterholes and other sites of significance in the area that need to be protected.]

*Further or in the alternative enjoy the right<sup>3</sup> to:*

(i) *possession of the land waters and resources;*

[see reasons provided at paragraphs a) and b) above.]

(ii) *occupation of the land waters and resources;*

[see reasons provided at paragraphs a) and b) above.]

(iii) *use and enjoyment of the land waters and resources;*

[see reasons provided at paragraphs a), b) and e) above.]

<sup>3</sup> Please note that these native title rights and interests are listed alphabetically in the amended application at Attachment E. In order to be able to clearly identify how each of the native title rights and interests have been prima facie established, I have substituted the alphabetical numbering with roman numerals.

(iv) *own and control knowledge and information comprising and concerning the traditional laws and customs of the native title holders in relation to the land and waters and resources and the passing of this knowledge on to younger generations;* [[Name Deleted] states in her affidavit (3/2/97) that preservation and teaching of knowledge is an important part of the Martu people's lives (para. 21). She makes the statement that the "*Martu continue to observe their traditions laws and customs, all of these come from our grandfathers and our grandmothers and we retain our separate identity as a people by our skin groups, language and connection to our country.*" In his interview [Name Deleted] (10/3/99) states that his uncle, grandfather, grandmother lived on this country and that he inherited the country from them.

Whilst I am satisfied that these rights and interests can be established on the information noted above, general evidence in support of the Martu people owning, controlling and passing on knowledge can be found in the following reports: *Stories of Three claimants for use in Martu schools; Booklet for use in Martu schools; These are our Waterholes*, a collection of stories by various applicants and members of the native title claim group.]

(v) *bear rear and teach children on the land;* [[Name Deleted] provides details in her affidavit (3/2/97) of skin groups and how women from one particular skin group can only have a baby with a man from another particular skin group (para. 11). At paragraph 15 she makes the statement that children have to be shown the special places where they can and cannot go.

Whilst I am satisfied that these rights and interests can be established on the information noted above, general evidence in support of the Martu people rearing and teaching their children on the land can be found in the following reports: *Stories of Three claimants for use in Martu schools; Booklet for use in Martu schools; These are our Waterholes*, a collection of stories by various applicants and members of the native title claim group.]

(vi) *conduct ceremonies on and for the land waters and resources and to attend sites of cultural and religious significance;* [[Name Deleted] (10/3/99) states that the Martu people continue to conduct ceremonies and law business on country. [Name Deleted] makes reference to collecting ochre for ceremonies (affidavit of 3/2/99 at paragraph 23). At paragraph 24 she states that the Martu continue "*to observe their traditions laws and customs*".

Whilst I am satisfied that these rights and interests can be established on the information noted above, general evidence in support of the Martu people conducting ceremonies and attending sites of cultural and religious significance can be found in the following reports: *Jigalong Community Traditional Lands Reserve Proposal; Aboriginal Dream Spirit beliefs at in a contact situation*, Jigalong, Western Australia.]

(vii) *live and erect residences and other infrastructure on the land;* [[Name Deleted] (10/3/99) states that he used to travel and camp around the area of the claim. He makes the statement that prior to the establishment of the communities, the Martu

people made camp called “Kanada”, which means a house they used to make themselves. [Name Deleted] provides details in her affidavit (3/2/99) of the three central camps set up for Martu people. In the late 1970’s a camp was set up at Punmu (next to Lake Dora), a couple of years later one at Kunawarji (Well 33) and then at Cotton Creek (Pargurr community).

Whilst I am satisfied that these rights and interests can be established on the information noted above, general evidence of the Martu people erecting residences can be found in Fiona Walsh’s report *The Use and Management of Animal and Plant Resources by the Martujarra.*]

(viii) *move freely about the land and waters including camping and seeking shelter;*  
[see reasons provided at paragraphs a), vii).]

(ix) *hunt and fish on the land and in the waters and otherwise collect food from the land and waters;*

[[Name Deleted] makes the statement in her affidavit (3/2/99) of “*the importance of preserving water supplies and the needs of the land in order to continue to preserve food sources for us and the animals that we rely on for meat*”. Also the transcript of [Name Deleted]’s interview (10/3/99) provides details of collecting and hunting for food and making spears for hunting.

Whilst I am satisfied that these rights and interests can be established on the information noted above, general evidence of the Martu hunting, fishing and collecting food from the land and waters can be found in the *Booklet for use in Martu schools; The Use and Management of Animal and Plant Resources by the Martujarra.*]

(x) *take and use the resources of the land including water plants medicines animals fisheries forest products and all other components and attributes of the land;*  
[see reasons provided at paragraphs e) and ix).]

(xi) *dig for take from the land and waters and use all minerals and ores including extractive and quarry minerals such as flints clay soil sand gravel rock and like resources;*

[[Name Deleted] provides details in her affidavit (3/2/99) of finding grinding stones and stones to make tools, making collection scoops from trees and collecting ochre for ceremonies. [Name Deleted] states in his interview (10/3/99) that they made spears for hunting.

Whilst I am satisfied that these rights and interests can be established on the information noted above, general evidence of the Martu using minerals, ores and like resources can be found in the report *The Use and Management of Animal and Plant Resources by the Martujarra.*]

(xii) *manufacture materials artefacts tools and weapons from the products of the land waters and resources;*  
[see reasons provided at paragraph xi).]

Whilst I am satisfied that these rights and interests can be established on the information noted

above, general evidence of the manufacture of artefacts tools and weapons can be found in the report *The Use and Management of Animal and Plant Resources by the Martujarra.*]

(xiii) *dispose of products of the land waters and resources and manufactured products by trade or exchange;*

[see reasons provided at paragraph g).]

(xiv) *manage conserve and look after the land waters and resources including locating and cleaning water sources and drinking water on the land;*

[[Name Deleted] states in her affidavit (3/2/99) that they freely travel about the country to preserve, protect and use camping and accommodation sites. She makes the statement that many rockholes have to be maintained to preserve water supplies and that the land needs to be cared for to continue to preserve food sources. She states that this means that from time to time they burn the land.

Whilst I am satisfied that these rights and interests can be established on the information noted above, general evidence of the Martu people conserving the land and waters can be found in Fiona Walsh's report *The Use and Management of Animal and Plant Resources by the Martujarra.*]

(xv) *manipulating the environment by burning the land harvesting produce sowing seed and doing other activities;*

[See reasons provided above at paragraph xiv).]

(xvi) *grant or refuse permission to any person to do some of all of subparagraphs (a – o) inclusive either at all or subject to terms and conditions;*

[see reasons provided at paragraphs d), f), i), j) and xx).]

(xvii) *inherit native title rights and interests;*

[[Name Deleted] states in his interview (10/3/99) that he inherited country from his father and his grandfather and grandmother. In this way he is responsible for his country.

[Name Deleted] makes the statement in her affidavit (3/2/99) that the Martu get country from 'Jamukunuyaparlikunumgurra' or 'Nyamukulaparlikungurra' which in English means 'the country belonging to the grandmothers and grandfathers'. She states that there are other ways of inheriting country, eg if a baby is born outside of their grandmothers' and grandfathers' country, they will get some rights because that country 'grew' the baby. At paragraph 24 [Name Deleted] states that the Martu continue to observe their traditions laws and customs, and that these come from their grandfathers and grandmothers.]

(xviii) *bestow and acquire native title rights and interests;*

[see reasons provided at paragraph xvii) above.]

(xix) *resolve amongst themselves any disputes concerning land waters and resources;*

[[Name Deleted] states in his interview (10/3/99) that if one of his mob creates 'humbug' then he sends them back to their own country. In her affidavit of 3/2/99 [Name Deleted] states that



the Martu respect each other's right in country. She makes the statement "*How a Martu starts and finishes is important, dreamings, men's and women's business, all are important in knowing how we talk in the claim area*".]

(xx) *regulate access to parts of the land according to initiation status gender and otherwise to exclude strangers from the land;*

[see reasons provided at item xix) above. At paragraph 15 of her affidavit (3/2/99) [Name Deleted] states that the older Martu know where they can and cannot go because "*everyone has special places that only they can go. The children have to be shown these places. There are special places for both men and women*". [Name Deleted] states in his interview (10/3/99) that if a miner wants to mine he must come and talk to him first.]

(xxi) *permit persons other than native title holders to enter the land;*

[see reasons provided at paragraphs d) and xx) above.]

I have found that each of the above native title rights and interests claimed can be established on a prima facie basis.

However, in so finding I note that Schedule E of the application states:

"The native title rights and interests claimed are the rights and interests of exclusive possession, use and occupation and enjoyment as against the whole world (subject to any native title rights and interests that may be shared with any other persons who establish that they are native title holders) together with such rights and interests flowing from the right to possession use and occupation ...".

The question that is raised is whether the Applicants can make a claim of exclusive possession to an area of land over which there are other validly created interests. The tenure information reveals that the claim covers Rudall River National Park, which is vested in the National Parks and Nature Conservation Authority.

In deciding whether the Applicants are entitled to make a claim of exclusive possession of a National Park, I will firstly consider whether it is the Applicant's intention to make such a claim. If the Applicants do not intend to claim exclusive possession of a National Park, then I need not consider further whether or not they are entitled to make such a claim.

The application states that "all claimed native title rights and interests are subject to ..." and lists four qualifications (Attachment E, i-iv). These qualifications indicate a clear intention that the Applicants intend to claim native title rights and interests subject to other validly created rights and interests. There is no other information within the application or accompanying material to indicate that the claim is for exclusive possession over areas of land where other interests have been validly granted. I am therefore satisfied that it is not the Applicant's intention is to claim exclusive possession of a National Park, and accordingly have read the words "exclusive possession" to mean subject to other validly granted interests.

I cannot be satisfied that the following native title rights and interests can prima facie be established:

(h) *the right to receive a portion of any resources taken by others from the area;*

(v) *exclude persons other than native title holders from the land.*

<p><b>190B7</b></p>	<p><i>Traditional physical connection:</i></p> <p><i>The Registrar must be satisfied that at least one member of the native title claim group:</i></p> <ul style="list-style-type: none"> <li>(a) <i>Currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or</i></li> <li>(b) <i>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> <ul style="list-style-type: none"> <li>(i) <i>the Crown in any capacity; or</i></li> <li>(ii) <i>a statutory authority of the Crown in any capacity; or</i></li> <li>(iii) <i>any holder of a lease over any of the land or waters, or any person acting on behalf of such holder of a lease.</i></li> </ul> </li> </ul>
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## Reasons for the Decision

In applying this condition I have relied on the information provided in the amended application and the affidavit of [Name Deleted].

At Schedule M of the amended application it states:

“members of the claim group whose addresses are shown as Parngurr, Punmu or Kunawarritji live permanently in the claim area and have a continuing traditional physical connection with the claim area. Members of the claim group with addresses outside of the claim area have a continuing physical connection with the area as their social interactions and spiritual beliefs is *[sic]* articulated through the exercise of native title rights and interests in the claim area from time to time”.

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.

[Name Deleted] in her affidavit states that she was born in the bush at [place deleted] and is a traditional Martu woman. She lives either in the western desert lands or at Jigalong or outside Newman. Her father was [Name Deleted]Wangari, and his country was [place deleted] in the north east of the claim area. Her mother was [Name Deleted]Ippashalo and her mother’s father was [Name Deleted], whose country was “*further north of my fathers; his country was in the claim area*”. At paragraph 6 of her affidavit, [Name Deleted] makes the statement that she lived with all the Martu in Jigalong under she was 16 or 17 years of age.

At paragraph 8 [Name Deleted] states that the three central places for Martu on country are Jigalong, Nullagine and Marble Bar.

[Name Deleted] states that all Martu continue to go back into country and practice their traditional culture and law, through the dreamings and ceremonies. At paragraph 18 of her affidavit, she states that the Martu are able to “freely go about the country” and in so doing,

they “preserve and protect and use camping and accommodation sites”. This involves maintaining water and food resources and burning the land from time to time. She states that they use the land to make tools, weapons and collect ochres for use in traditional activities. [Name Deleted], in his interview dated 10 March 1999, states that his country is in the north of the claim area, an area called the Lake Country. He makes the statement that he was born at Kiinyu, 35, Canning Stock Route and that was where his uncle, grandfather and grandmother had been living. [Name Deleted] describes how he has worked on stations throughout the claim area. He makes the statement that he has and continues to conduct law business, negotiate with mining companies, camp and gather food throughout the claim area.

I note the State’s view expressed in the submission of 24 November 1998 that the Applicants have asserted that they “maintain their traditional connection ...” and that this mere assertion could not satisfy the Registrar that any 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. However the State’s submission was made prior to the provision of [Name Deleted] affidavit and is superseded by the affidavit.

I take the statement of [Name Deleted] as evidence that she, being a member of the native title claim group, has maintained a traditional physical connection with the land and waters covered by the application.

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

<b>190B8</b>	<p><i>No failure to comply with s61A:</i></p> <p><i>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.</i></p>
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## Reasons for the Decision

After reviewing the amended application, accompanying documents I have formed the conclusion that there has been compliance with s.61A.

### **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**

Schedule B of the amended application states:

“subject to (B)(4) the Applicants exclude any areas in relation to which a previous exclusion possession act as defined in s.23B Native Title Act 1993, was done in relation to an area and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision for that act as described in Sec 23E Native Title Act”.

It is my view that the inclusion of the above statement effects compliance with s.61A(2).

At the time of making this decision, the State of Western Australia has not passed legislation in accordance with section 23E of the *Native Title Act*. Without such legislation there are no previous exclusive possession acts attributable to the State.

The tenure information provided at Attachment D of the amended application shows that there is a communications site within the area subject to claim. The communications site is vested in the Australian Telecommunications Commission. It is unclear as to whether this is a previous exclusive possession act attributable to the Commonwealth or the State, but in any event the communications site is excluded from the application at Schedule B(3). The tenure information also provides details of two Repeater Station Sites (42440 & 42456) within the claimed area. I take these to be previous exclusive possession acts attributable to the Commonwealth and note that they have also been excluded from the application at Schedule B (3).

There is no other information to which I may or must have regard in applying this condition to make me aware that the above statement does not adequately exclude previous exclusive possession acts from the claimed area. I am therefore of the view that the above statement effects compliance with s.61A(2) in excluding previous possession acts attributable to the

Commonwealth.

**S61A(3) Previous Non-Exclusive Possession Acts**

The State of Western Australia has not passed legislation in accordance with section 23I of the *Native Title Act*. There is no information in the application or elsewhere indicating that there are previous non-exclusive possession acts attributable to the Commonwealth within the area the subject of the claim.

I am, therefore, of the view that the application complies with S.61A(3).

**S61A(4) - s47,47A, 47B**

At Schedule B(4) the application states:

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

At Schedule L the application states:

- (a) pastoral leases – nil
- (b) leased or reserved areas – nil
- (c) vacant crown land – pursuant to traditional law and custom the claim group occupies all vacant crown land within the area of the claim
- (d) disregarding of Sec 47, 47A or 47B areas – particulars will be supplied prior to trial.

Attachment E paragraph iv of the amended application states that the Applicants claim to possession, occupation, use and enjoyment of any area to which a previous non-exclusive possession act was done is subject to the provisions of sections 47,47A and 47B and that particulars will be provided prior to the hearing.

I am required to ascertain whether this is an application that should not have been made because of the provisions of s.61A. In my opinion, the Applicants’ express statements with respect to the provisions of that section are sufficient to meet the requirements of s.190B(8). Subsection 61A(4) of the Act provides that an application may be made in these terms. Whether or not the Applicants have provided sufficient information to bring any area of land and waters covered by the application within the ambit of sections 47, 47A and 47B is a matter to be settled in another forum.

<p><b>190B9</b></p> <p><b>(a)</b></p>	<p><i>Ownership of minerals, petroleum or gas wholly owned by the Crown:</i></p> <p><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i></p> <p><i>(a) to the extent that the native title rights and interests claimed consist or include ownership of minerals, petroleum or gas - the Crown in right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas;</i></p>
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## Reasons for the Decision

Schedule Q of the amended application states:

“The Applicant make no claim to ownership of minerals petroleum or gas wholly owned by the Crown”.

Paragraph (i) of Attachment 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”.

The State of Western Australia, in their submission dated 24 November 1998, state that the Applicants are claiming as a native title right at Schedule E (Attachment E) of the application the right “*to dig for, take from the land and waters and use all minerals and ores, including extractive and quarry minerals such as flints, clay soil, sand, gravel, rock and all like resources*”. The State submits that all precious metals and most minerals in their natural condition are the property of the Crown. I note however that the State submission was made prior to the amended application and the insertion of paragraph (i) at Attachment E.

The above statements are sufficient for me to be satisfied that the Applicants are not claiming ownership of minerals, petroleum or gas wholly owned by the Crown.

There is no further information accompanying documents or otherwise that makes me aware that the Applicants claim minerals, petroleum or gas that is wholly owned by the Crown in right of the Commonwealth or State Government.

For this reason I am satisfied that the application complies with the requirements of s.190B(9)(a).

<p><b>190B9</b></p> <p><b>(b)</b></p>	<p><i>Exclusive possession of an offshore place:</i></p> <p><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i></p> <p><i>(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;</i></p>
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## Reasons for the Decision

The application does not cover any offshore area. Therefore the criterion set out in s.190B(9)(b) does apply to this application and it is not necessary for me to consider this section further.



<p><b>190B9</b></p> <p><b>(c)</b></p>	<p><i>Other extinguishment:</i></p> <p><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i></p> <p>(c) <i>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)).</i></p>
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## 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).

At Schedule B, paragraph (b)(3) the application states:

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

- (i) an act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or
  - (ii) actual use made by the holder of a tenure other than native title which is permanently inconsistent with the continued exercise of native title
- and, to avoid any uncertainty, exclude from the claim communications site 42099, repeater site 42440, repeater site 42456.

Attachment D of the amended application provides details of a search conducted by the Land Claims Mapping Unit of the State of Western Australia. I note that the area claimed comprises largely vacant crown land, Rudall River National Park and a small number of Reserves, including the Rabbit Proof Fence No 1, a Communications Site, Repeater Station Sites etc. Details are provided of historic pastoral leases. The claim does not include towns or cites.

The general exclusion clause at paragraph 3 covers any areas that may otherwise have extinguished native title rights and interests and have not been specifically excluded or otherwise removed from the claim area as a result of being listed at Schedule B or Attachment B. It clearly covers other extinguishing acts such as public works and dedicated roads.

At the time of making this decision, the State of Western Australia has not passed legislation referred to at s.23E of the amended *Native Title Act*.

The application and accompanying documents do not disclose, and neither am I otherwise

aware of, any additional extinguishment of native title rights and interests in the area claimed.

I am satisfied that the requirements of this section have been met.

*End of Document*