National Native Title Tribunal

REASONS FOR DECISION COVER SHEET

REGISTRATION TEST

DECISION MAKER	Christopher Doepel

APPLICATION NAME	Wutha

NAMES OF APPLICANTS
June Ashwin, Geoffrey Alfred Ashwin, Ralph Edward Ashwin
And Raymond William Ashwin

NNTT NO	WC96/8 and WC96/22
FEDERAL COURT NO	WAG 6064/98 and WAG 6071/98

REGION	Goldfields, Western Australia

DATE APPLICATION MADE	19/1/96
Date application made is here taken to be date of lodgment with the NNTT of the earlier of the Wutha applications as they separately existed prior to the 22/1/99 amendments.	

I have 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. Detailed reasons for decision follow.

_____

Registrar

_____

Date

Introduction

Brief History of the amended application

On 19 January 1999 the applicants filed notices of motion, supporting documentation, and affidavits of each of the two named applicants in the Federal Court of Australia, Western Australian District Registry seeking leave to amend each of the then two Wutha applications (see below).

On 22 January 1999 the Court made orders that the applications be combined and consolidated into one combined application and that the application in "be amended in the form of the amended Native Title Determination Application filed herewith and that that amended Application do stand as the amended Application…". Since that time a single Form 1 has stood as the amended application for the combined and consolidated Wutha application.

The two applications that have been combined to form a single Wutha application are:

NNTT Number	**Fed. Court Number**	**Name**	**Date Lodged**	**Date Registered**
WC96/8	WAG 6064/98	Wutha #1	19/01/96	19/01/96
WC96/22	WAG 6071/98	Wutha #2	13/03/96	13/03/96

Subsequent to the amendments made on 22 January 1999, the Federal Court made orders for further amendments on 4 March 1999. A copy of this further amended Form 1 was given to me on 5 March 1999 in accordance with section 64(4) of the *Native Title Act 1993* (Cth) ("the Act"). On 29 April 1999 the Federal Court last made orders for further amendment of the application. A copy of this further amended Form 1 was given to me on 30 April 1999 in accordance with section 64(4) of the Act. All references to the 'amended application' in this decision, unless otherwise stated, refer to the application as most recently amended.

I note that the affidavits of the named applicants in the amended application, first filed in the Federal Court on 19 January 1999, have not been replaced by any later affidavits filed in the Federal Court. I note also that on a later occasion when the applicants sought further amendments in the Federal Court (4 March 1999) the Court ordered, among other things, that "3. Any requirement for further affidavits to be filed to verify the contents of the documents referred to in paragraph 2 [the further amended Form 1] be dispensed with." Orders in substantially the same terms were made by the Federal Court on each of the two further occasions the application sought further orders to amend the application (1 April 1999 and 29 April 1999). I have therefore regarded the affidavits filed on 19 January 1999 as accompanying the amended application.

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 WC96/8 and WC96/22

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

- Working files and related materials for native title applications that overlap the area of the Wutha application.

- The National Native Title Tribunal Geo-spatial Database;

- The Register of Native Title Claims;

- The Native Title Register;

- Determination of Representative ATSI Bodies: their gazetted boundaries;

- Transcripts, Affidavits, State Government Submissions (including tenure and land use information), Grantee Party Submissions, Objector Submissions, parties' Statements of Contention, information provided 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 in relation to the two pre-combination applications;

- Form 6 (notice of intention to be come a party) notice submitted to the Tribunal in relation to each of the pre-combination applications;

I note that I am able to consider this range of material pursuant to section 190A(3). Where any of this information falls into the categories indicated in sub-paragraphs (a) to (b) of that section I am obliged to consider that material.

I have formed the view that it is not appropriate for me to have regard to information and materials provided in the context of mediation in considering these applications under section 190A. I notified the applicants, relevant representative bodies the State of Western Australia and the Commonwealth that this was my view in November 1998. I invited the parties notified to re-submit any information provided in the course of mediation which they were of the view I ought consider.

I have recently formed the view that the transitional provisions in (Schedule 5 Part 4) do not apply once an application made pre-commencement of the amended Act is itself amended in the Federal Court. This means in that the provisions of item 11(8) do not apply to expand the range of material or information which I must consider when applying section 190A of the Act.

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.***

The following documents are referred to in the reasons for decision in relation to this section:

Location	Date	Description	Cat	Probity, Weight
Registration Test Minute Attachment A(5) WC96/8 Registration Test file folio 75	30/4/99	Amended Form 1 – amended by leave of the Federal Court 29/4/99 and referred to the Tribunal pursuant to section 64(4) 30/4/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 16	19/11/98	Letter from Crown Solicitor's Office containing Registration Test submissions from State of Western Australia	Mandatory s190A(3)(c)	Relevance varies as noted
WC96/22 Registration Test file folio 16	19/11/98	Letter from Crown Solicitor's Office containing Registration Test submissions from State of Western Australia	Mandatory s190A(3)(c)	Relevance varies as noted
WC96/8 Registration Test file folio 32A	22/12/98	Affidavit of June Ashwin sworn 22/12/98 filed with first amended From 1 on 19/1/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 32B	22/12/98	Affidavit of Geoffrey Alfred Ashwin sworn 22/12/98 filed with first amended Form 1 on 19/1/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 32C	22/12/98	Affidavit of Raymond Ashwin sworn 22/12/98 filed with first amended Form 1 on 19/1/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 32D	22/12/98	Affidavit of Ralph Ashwin sworn 22/12/98 filed with first amended Form 1 on 19/1/99	Mandatory s190A(3)(a)	High
Goldfields Tenure Index File	-	Indexes for tenure information held in relation pre- amendment Wutha applications	Mandatory s190A(3)(b)	Relevant to section 62(2)(c)
WC96/8 Registration Test file folio 34A	18/1/99	Affidavit of **[deponent's name deleted]** sworn 13/1/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 55	19/2/99	Affidavit of **[deponent's name deleted]** sworn 19/2/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 54	19/2/99	Affidavit of **[deponent's name deleted]** sworn 19/2/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 53	17/2/99	Affidavit of **[deponent's name deleted]** sworn 17/2/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 53	17/2/99	Affidavit of **[deponent's name deleted]** sworn 17/2/99	Mandatory s190A(3)(a)	High

Reasons for the Decision

I refer to the individual reasons for decision in relation to sections 61 and 62 set out below. For the reasons set out below I find that the procedural requirements of section 61 and 62 have been met and accordingly I find that the application meets the requirements of section 190C(2).

Details required in section 61

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

Reasons: See below	Decision : The application passes the condition
Federal Court Form 1, Part B ("Filing and Service") has been completed and sets out details of the applicants' legal representative and his address for service together with a postal address for the applicants.	

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

Reasons: See below	Decision : The application passes the condition
An exhaustive list of names of the persons in the native title claim group has not been provided so the requirements of section 61(4)(a) are not met. For the reasons set out in relation to section 190B(3)(b) I find that the persons in the native title claim group are described sufficiently clearly in the description provided in Schedule A of the amended application so that it can be ascertained whether any particular person is one of those persons in accordance with section 61(4)(b).	

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

Reasons: See below	Decision : The application passes the condition
The amended application meets the requirements of section 61(5)(a) in that it is in the form prescribed by Regulation 5(1)(a), *Native Title (Federal Court) Regulations 1998*. As required by section 61(5)(b), the amended application was filed in the Federal Court. The amended application is a combination of applications each of which was given to the Native Title Registrar as mentioned in section 61 of the old Act and taken to have been made to the Federal Court in accordance with *Native Title Amendment Act 1998* (Application, Saving or Transitional Provisions) Schedule 5, Part 3, item 6 case 3. The application meets the requirements of section 61(5)(c). The application contains all information as prescribed in section 62. I refer to my reasons for decision in relation to section 62. As required by section 61(5)(d) the amended application is accompanied by affidavits as prescribed by section 62(1)(a) and a map as prescribed by section 62(2)(b). I refer to my	

reasons for decision in relation those sections.

I note that section 190C(2) only requires me to consider details, other information and documents required by sections 61 and 62. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court.

Details required in section 62(1)

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

Reasons: See below	Decision : The application passes the condition

The four applicants named in the amended application are June Ashwin, Geoffrey Alfred Ashwin, Ralph Edward Ashwin and Raymond William Ashwin.

The following affidavits were each filed in the Federal Court on 19/1/99 along with the proposed amended Form 1 and accompanying Notice of Motion seeking leave to amend the application. Orders amending the application were first made in the Federal Court on 22 January 1999:

Ralph Edward Ashwin, sworn 22/12/98 in Kalgoorlie, WA;
Geoffrey Alfred Ashwin, sworn 22/12/98 in Kalgoorlie, WA;
June Ashwin, sworn 22/12/98 in Kalgoorlie, WA; and
Raymond William Ashwin sworn 22/12/98 in Menzies, WA.

These affidavits have not been replaced by later affidavits on re-amendment of the application. When orders were made further re-amending the application on 4 March 1999, an order was also made dispensing with any requirement for further affidavits to be filed to verify the contents of the amended application. Therefore affidavits filed on 19 January 1999 accompany the amended application as set out in section 62(1)(a).

In each affidavit the deponent is identified by name, address and occupation. Each affidavit has been signed by the deponent, dated and witnessed by a qualified witness, in this case a Justice of the Peace.

Each of the applicants deposes to the matters set out in section 62(1)(a), sub-paragraphs (i), (ii) and (iv) essentially repeating the words of the statue itself.

In relation to the matters set out in subparagraph (iii) each applicant has in his affidavit paragraph (c) simply stated that all of the statements made in the amended application are true. The section merely requires a statement of the deponent's belief that all of the statements in the application are true. Such belief is encompassed in the statement made in each applicant's affidavit.

In affidavit paragraph (e), each applicant uses the bare words of section 251B(a) to satisfy the requirements of subparagraph (v). No particulars of the decision making process required by such traditions laws is provided. Considerations of the kind relevant to sections 190C(4)(b) and 190C(5) do not arise here. The bare statement contained in each affidavit is sufficient to meet the requirements of section 190C(2) such that I am satisfied, relevantly,

that the application is accompanied by an affidavit that meets the requirements of section 62(1).

I refer the submissions of the State of Western Australia in relation to this section for each of the pre-combination and amendment applications (WC96/8 and WC96/22) but note that these submissions were all made prior to the filing of the amended application and accompanying affidavits and so are not relevant.

I am satisfied that the application complies with the requirements of this section.

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

Comment on details provided:	

Schedule G of the amended application sets out some details of traditional physical connection where it describes the activities carried out by members of the native title claim group in the area.

Schedule M of the amended application does not include any details of traditional physical connection with any of the land or waters covered by the application. Rather it is stated there that members of the native title claim group continue to have a traditional physical connection with the land and that affidavit evidence has been provided to the Registrar of the NNTT. (This is a reference to an affidavit of **[deponent's name deleted]**, sworn 13 January 1999 and provided to the Tribunal on 18/1/99)

Schedule N, where details of prevention of access to the area of the application may be provided, is noted as being not applicable to this amended application.

The amount and manner of provision of this non-mandatory information in the amended application does not affect a decision as to whether the amended application meets the conditions of section 190C(2).

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

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

Reasons: See below	Decision : The application passes the condition

Schedule B item (a) of the amended application confirms that a physical description of the external boundary is as outlined on pages 3 - 5 of Attachment B. For the reasons set out in my reasons for decision in relation to section 190B(2). I am satisfied that this physical description is sufficient to meet the requirements of section 62(2)(a)(i).

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

Reasons: See below	Decision : The application passes the condition
Schedule B of the amended application sets out at paragraph (b) a description of the areas within the external boundary, which are not covered by the amended application. The excluded areas are for the most part described by a formula. For the reasons set out in my reasons for decision in relation to section 190B(2), I am satisfied that the description provided is sufficient to meet the requirements of section 62(2)(a)(ii).	

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

Reasons: See below	Decision : The application passes the condition
The amended application attaches a map at Attachment B. Schedule B paragraph (a) confirms that this map depicts the external boundary of the area covered by the application. I am satisfied that the amended application meets the requirements of section 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: See below	Decision : The application passes the condition

Section 62(2)(c) in combination with section 62(1)(b) requires that the application contain details and results of all searches carried out to determine the existence of any non-native title rights and interests in relation to the land or waters in the area covered by the application. In my view this is a requirement that the applicant report on the searches he or she has carried out only.

The amended application states at Schedule D that "a search has been conducted at the Registry of the National Native Title Tribunal to determine land tenures in existence in the claim areas. Particulars of search result are attached as Attachment D pages 1-21 inclusive".

I am advised by the Tribunal's Case Management Unit that the applicants' solicitor attended Tribunal offices on 22/12/98 and reviewed indexes for each of the then two separate Wutha applications which were prepared by Tribunal staff as a summary of all tenure information held by the Tribunal, in its Case Management Unit, in relation to each claim area. Copies of some of the documents listed in the indexes were provided to the applicant's solicitor, Mr Rynne, at his request. The applicants have attached to the amended application at Attachment D copies of tenure spreadsheets provided to Mr Rynne from the material listed on the indexes viewed by him.

Therefore I find that the amended application includes a report on the details of a search conducted (a search of records held by the National Native Title Tribunal) and results of that search in the form of copies of material extracted from the Tribunal files. This section does not require an inquiry into the thoroughness of any search of the completeness of results obtained.

Whereas sub-sections 62(2)(g) and (h) require reporting on applications or notices "of which the applicant is aware", sub-section 62(2)(c) does not include this phrase. It requires reporting on "all searches carries out". Since the applicant cannot report on search of which it is not aware, I interpret this to mean that the applicant need only report on those searches conducted by the applicant. It is my view then that had the applicants not conducted any search at all, they could have satisfied the requirements of this section simply by stating this. For this reason also I am satisfied that the details of result of search conducted provided in this application are sufficient to meet the requirements of this section.

I have considered the submissions of the State of Western Australia in relation to this section for each of the pre-combination and amendment applications (WC96/8 and WC96/22) but note that these submissions were all made prior to the filing of the amended application and accompanying affidavits and so are not relevant.

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

Reasons: See below	Decision : The application passes the condition

The section requires descriptions of two things :

The native title rights and interests claimed in relation to particular land or waters; and

Any activities in the exercise of the rights and interests claimed.

Further, the section requires that the description must not consist merely of a statement to the

effect that the native title rights and interests are all native title rights and interests that may exist or that have not been extinguished at law.

The native title rights and interests claimed are described in Schedule E of the amended application in sub-paragraphs (a) – (j). I interpret the claim as being one for the rights listed in those sub-paragraphs as a complete list and not merely a non-exhaustive list of particulars of some larger right. The specific rights and interests in paragraphs (a) to (j) are claimed as against the whole world subject to any native title rights shared with other native title holders if any such are established. These specific claimed rights are also all subject to certain limitations set out in sub-paragraphs (i) to (v).

There is no general or "at large" claim to any rights and interests that may exist at law such as is proscribed in this section.

The native title rights and interests in sub-paragraph (a) to (j) are each claimed in relation to the "area". I assume it is the whole area the subject of the application which is being referred to. I have already found that the description of the area in accordance with section 62(2)(a)(i) and (ii) is adequate, then the reference to "the area" is sufficient to identify the particular land or waters in relation to which the native title rights and interests described are claimed.

Schedule G sets out a description of activities which the applicants have undertaken or do undertake. These activities can be seen as activities in the exercise one or more of the specific rights and interests identified in Schedule E. The description of activities in exercise of the rights and interests claimed can only be described as spare. I am of the view however that it is sufficient to meet the requirements of the section.

The questions of whether or not the description is sufficient to allow native title rights and interests described to be identified readily will be addressed in relation to section 190B(4).

I find that the amended application meets the requirements of this section.

62(2)(e)	***Application contains a general description of the factual basis on which it is asserted that the native title rights an interest claimed exist***

Reasons: See below	Decision : The application passes the condition

I must be satisfied that there is, in the amended application, a description of the factual basis on which it is asserted that the native title rights and interests claimed exist. The description must include each of the three elements identified in each of sub-sections 62(2)(e) (i), (ii) and (iii). A consideration of the extent or sufficiency of the description is not required. That inquiry is conducted in relation to section 190B(5).

I find that there is a general description of the factual basis set out in Schedule F of the amended application. I note further that some details of activities carried out by members of the native title claim group are provided in Schedule G of the amended application which description appears to supplement the general description in Schedule F.

I refer to the separate reasons set out below in relation to each of the particular facts

identified in each of sub-sections 62(2)(e) (i), (ii) and (iii). As set out below I find that each of the particular facts required are included in the general description of the factual basis set out in the application.

I find that the amended application meets the requirements of this section.

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

Reasons: See below	Decision : The application passes the condition

I refer to schedule F items (i) and (ii) which set out possession, occupation use and enjoyment of the area by the group and its ancestors, inheritance of the area by descent, conception and birth in the area and the passage of traditional knowledge of the area. I refer also to Schedule G which contains assertions about current activities in relation to the area. I note that the affidavits of each of the applicants, as discussed in relation to section 61(2) above, depose to the truth of the statements made in the application.

Therefore, I find that the amended application includes a general description of the factual basis on which it is asserted that the claim group has, and they and their predecessors had, an association with the area. A more detailed inquiry into whether the factual basis described is sufficient to support that assertion is an inquiry conducted under section 190B(5)(a).

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

Reasons: See below	Decision : The application passes the condition

I refer to schedule F items (ii), (iii), (iv) and (v) which set out the existence, transmission and acknowledgment of traditional laws and customs in relation to the area.

I refer also to Schedule G which identifies current activities in relation to the area which activities include preservation of traditional sites and passing on stories about the land. I note that the affidavits of each of the applicants, as discussed in relation to section 61(2) above, depose to the truth of the statements made in the application.

Therefore, I find that the amended application includes a general description of the factual basis on which it is asserted that there are traditional laws and customs that give rise to the claimed native title.. A more detailed inquiry into whether the factual basis described is sufficient to support that assertion is an inquiry conducted under section 190B(5)(b).

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

Reasons: See below	Decision : The application passes the condition

I refer to Schedule F items (i), (ii), (iii), (iv) and (v) which set out the facts of existence, transmission and acknowledgment of traditional laws and customs in relation to the area. I refer also to Schedule G which identifies current activities in relation to the area which activities include preservation of sites and areas of significance and passing on stories about the land to each generation. I note that the affidavits of each of the applicants, as discussed in relation to section 61(2) above, depose to the truth of the statements made in the application.

Therefore I find that the amended application includes a general description of the factual basis on which it is asserted that the native title claim group have continued to hold the native title in accordance with traditional laws and customs. A more detailed inquiry into whether the factual basis described is sufficient to support that assertion is an inquiry conducted under section 190B(5)(c).

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

Reasons: See below	Decision : The application passes the condition

Activities currently carried out by the native title claim group are briefly described in the amended application in Schedule G. It is a description of both current and past activities. I interpret the phrase "have continuously / from time to time carried out" as meaning that the activities are carried out in the past as well as the present (continuously) and are carried out at the times appropriate for doing so ("from time to time"). This seems to be a fairly straightforward reading of the description provided. I am satisfied that the description provided in Schedule G is in part a description of current activities.

The section requires details of current activities. I do not regard this as requiring exhaustive or minute descriptions of activities or as requiring minute descriptions of places, times and events when and where they are carried out. I find that the general description that traditional law business and customary activities are carried out, together with the (non-exhaustive) particulars of these activities provided, are sufficient to constitute details as required by the section. For clarity I note that the particulars of activities provided list the following activities :

Possession, occupation, use and enjoyment of the land including by way of hunting, gathering and camping;
Participating in site clearance and indicating sites or areas of significance that cannot be interfered with;
Passing on stories about the land to each generation; and
Protecting the land.

It is my view that if there are current activities, they ought not be omitted from the description. I refer to my comments in the introductory section to these reasons in relation to what material I may take into account in considering theses sections. I have taken the view that if the details are required to be in the application, I must be able to find them in the amended application and not elsewhere.

However if there is other material before me detailing current activities carried out in relation to

the land or waters, it would seem I need to consider whether those activities are included within the description provided in Schedule G or whether they contradict the activities described in it.

I have considered a number of affidavits provided to be by members of the native title claim group for the purpose of my consideration of this application under the Registration Test. They are:

Affidavit of **[deponent's name deleted]** sworn 13/1/99
Affidavit of **[deponent's name deleted]** 19/2/99
Affidavit of **[deponent's name deleted]** sworn 19/2/99
Affidavit of **[deponent's name deleted]** sworn 17/2/99
Affidavit of **[deponent's name deleted]** sworn 17/2/99

I find that all of the activities or types of activities described in these affidavits are examples of the activities identified in Schedule G.

I have considered the submissions of the State of Western Australia in relation to this section for each of the pre-combination and amendment applications (WC96/8 and WC96/22) but note that these submissions were all made prior to the filing of the amended application and accompanying affidavits and so are not relevant.

I find that the amended application meets the requirements of this section.

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: See below	Decision : The application passes the condition

A list of applications for determination of native title applications now in the Federal Court which overlap the area of the amended application is attached at attachment H.

This list does not reflect the amendment by combination of applications that have taken place this year. It lists separately applications, which have been combined to form the combined Wongatha, Koara and Maduwongga applications. It continues to lists application WC97/3 Harris which application was discontinued in the Federal Court on 30 December 1998.

Attachment H also shows an overlap with WC97/3, Ngalia. I have confirmed with the Tribunal's geo-spatial information unit that this application does not overlap Wutha. The applicants have provided this erroneous information relying on lists provided to them by the Tribunal. The lists appearing at Attachment H of the amended application are copies of lists provided by the Tribunal to the applicants on 4 November 1998 (*see* WC96/8 Registration Test file folio 14 and WC96/22 Registration Test file folio 14). At that time both the State's Land Claims Mapping Unit and the NNTT held incorrect data in relation to the area of Ngalia WC97/3. Overlap lists were derived from this incorrect data set and provided to the applicants.

I am advised by the Tribunal's geo-spatial information unit that but for the results of combination of applications, and the inclusion of the discontinued WC97/9 and the non-overlapping WC97/3, the list provided at Schedule H is accurate.

I accept that it is difficult for the applicants to be aware of all overlaps at this time since almost all applications in the region are in the process of being amended. Further it is my view that it would place a heavy burden on the applicants to have to be aware of possible changes to such a list up to the moment of seeking orders for amendment in the Federal Court. Changes in areas of other applications, combinations of applications or withdrawal of applications are occurring frequently in this period of high amendment rates. I accept also that the applicants provided information in relation to WC97/3 relying on information provided to them by the Tribunal

I find that the amended application meets the requirements of this section.

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: See below	Decision : The application passes the condition

The applicant provides information on this in Attachment I to the amended application.

The applicant submits lists prepared by the NNTT Geo-spatial Information Unit setting out :

Lists of all section 29 notices in the area of each of the two previously separate Koara applications where those section 29 notices resulted in either "WO" or "WF" files run by the Tribunal's Future Act Unit; and

Lists of all section 29 notices affecting the area of each of the Wutha applications from 14 October 1998 to 9 December 1998.

These lists were provided as part of approved section 78 assistance to Applicants under cover of letter dated 22/12/98 (see Wutha WC96/8 Registration Test File folio 32).

I am not aware that the applicants have conducted any other searches the results of which the applicants have failed to report.

I am satisfied that the amended application complies with the requirements of this section.

190C(3)	***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:*** ***the previous application covered the whole or part of the area covered by the current application; and*** ***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*** ***the entry was made, or not removed, as a result of consideration of the previous application under section 190A.***

The following documents are referred to in the reasons for decision in relation to this section:

Location	Date	Description	Cat	Probity, Weight
WC96/8 Registration Test file folio 75	30/4/99	Amended Form 1 – amended by leave of the Federal Court 29/4/99 and referred to the Tribunal pursuant to section 64(4) on 30/4/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 16	19/11/98	Letter from Crown Solicitor's Office containing Registration Test submissions from State of Western Australia	Mandatory s190A(3)(c)	Relevance varies as noted
WC96/22 Registration Test file folio 16	19/11/98	Letter from Crown Solicitor's Office containing Registration Test submissions from State of Western Australia	Mandatory s190A(3)(c)	Relevance varies as noted
WC96/8Registration Test File folio 59	5/3/99	Telephone attendance note – TT Michael Rynne	Mandatory s190A(3)(a)	High
WC96/8Registration Test File folio 61	9/3/99	Submission from Applicants' solicitor re section 190C(3)	Mandatory s190A(3)(a)	Low

Reasons for Decision

The following applications for determination of native title overlap the area covered by the combined Wutha application in terms of section 190C(3)(a):

Maduwongga WAG 6063 and others
Wongatha WAG 6005/98 and others
Koara WAG 6008 and others
Mantjintjarra Ngalia WAG 6069/98
Pandawn Descendants WAG6043/98
Wongutha Yoongarra WAG6235/98
Evelyn Gilla & William Shay WAG6269/98

Of these only Wongatha and Koara have been considered under section 190A and passed the Registration Test. Only those two applications have been "not removed" from the Register of Native Title Claims in terms of section 190C(3)(c). It is therefore only in relation to Wongatha and Koara that there may be any need to make the inquiry required by

section 190C(3)(b).

In relation to each I need to consider whether an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made (section 190C(3)(b)).

Application of subsection 190C(3)(b) to combined applications is not straightforward. It is necessary to attempt to make sense of it as far as possible in the circumstance of combined claims. To determine what the provision requires it is necessary to look at the meaning of the phrase "when the current application (Wutha) was made".

It could mean one of three things:

When the application to amend the pre-combination applications to combine them was filed;

When the application that was amended to combine it with the other applications was made; or

When each of the relevant pre-amendment applications was made.

The first meaning, in my view, should be discounted since it is the making of the application (claim) in the first place that is relevant, not simply the time when last amendment was made, albeit combining pre-existing applications.

The second possible meaning does not seem to accord with the problem that the section was designed to address. The problem that the section is aimed at is the lodging of a later application over (in part or full) an earlier application where the latter was on the register at the time and where there were persons in common.

Thus in my view it is necessary to look at the pre-combination applications to ascertain the relevant dates. It is necessary then to ask if any of the separate pre-combination Koara and Wongatha applications, which overlapped any of the pre-combination Wutha applications, were on the Register when any of those pre-combination Koara applications were made.

Wutha WC96/8 was made (lodged) on 19/1/96. Wutha WC96/22 was made (lodged) on 13/3/96.

Each of the pre-combination Koara applications overlapping either of the Wutha applications were registered prior to the lodgment of each of the Wutha applications. Wutha WC96/8 overlapped Koara WC95/1, WC95/12, WC95/22, WC95/42 . Wutha WC96/22 overlapped Koara WC95/1, Wc95/12 and WC95/41. Each of the pre-combination Koara applications was registered in 1995.

Two of the pre-combination Wongatha constituent applications were registered prior to either of the Wutha applications being lodged. Ngurludharra Waljen WC95/32 (registered 8/9/95) overlapped each of Wutha WC96/8 and WC96/22. Tjinintjarra Family Group WC95/57 (registered 06/10/95) was overlapped only by Wutha WC96/8.

I have not been able to determine in relation to Wutha and Koara that there are any common members of those native title claim groups. I have considered the native title claim group description provided in the amended application of each, and lists of names

provided elsewhere in that application or in further affidavits provided to me for the purpose of my consideration of the amended applications under section 190A of the Act. I have not found, on the face of this material, any indication that there are applicants in common.

I have considered the same material in relation to Wongatha and Wutha. Since I was aware that the one of the named applicants on Wutha, **[applicant's name deleted]** and one of the named applicants on the Wongatha applications, **[applicant's name deleted]**, are married I made a further inquiry to find out if they have children in common. The applicants' legal representative advised me that this was the case.

Following this inquiry the amendments referred to in the introduction to these reasons were made on 29 April 1999. The description of the Wutha native claim group now set out in Schedule A of the amended application expressly excludes from that group named persons and their offspring. Staff assisting me have been advised by the applicant's legal representative that the first five names listed are the children of Mr and Mrs **[name deleted]** and that other named persons and lineages now excluded from the native title claim group are all those persons identified by the applicants as being also included in the native title claim group for the Wongatha application.

I have not made independent inquiry on this point. I accept the explanation of this list of exclusions provided. I have no other reason to believe, on the material before me, that there are any other members common to each of the Wutha and Wongatha applications.

I refer to the submissions of the State of Western Australia in relation to this section but note that these submissions were made prior to the filing of the amended application so most comments specific to the applications before amended and combined are not relevant. I do note that the State submits in general terms that if section 190C(3) were, as it says, applied literally, it could produce the anomalous result such that "overlapping claims would remain on the Register – which is exactly the situation which the registration test was designed to resolve." This quotation is taken from the State's letter to 19 November 1998 in relation to Wutha WC96/8.

I do not accept this submission. It may be that application of the Act to specific fact situations produces results that one or more of the parties regard as anomalous. I cannot disregard the apparent requirements of the Act in order to achieve or avoid a particular result. For example, but for the overlap with the Wongatha application, the Act would allow the registration of each of Koara and Wutha even though they are overlapping applications.

I find that the amended application satisfies the conditions of section 190C(3) in that it has no common native title claim group members with either the Koara or the Wongatha application, which, for the reasons set out above, are the only applications in relation to which I need to consider the questions of common native title claim group membership.

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

The following documents are referred to in the reasons for decision in relation to this section:

Location	Date	Description	Cat	Probity, Weight
WC96/8 Registration Test file folio 75	30/4/99	Amended Form 1 – amended by leave of the Federal Court 29/4/99 and referred to the Tribunal pursuant to section 64(4) on 30/4/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 16	19/11/98	Letter from Crown Solicitor's Office containing Registration Test submissions from State of Western Australia	Mandatory s190A(3)(c)	Relevance varies as noted in reasons
WC96/22 Registration Test file folio 16	19/11/98	Letter from Crown Solicitor's Office containing Registration Test submissions from State of Western Australia	Mandatory s190A(3)(c)	Relevance varies as noted in reasons
WC96/8 Registration Test file folio 32A	22/12/98	Affidavit of June Ashwin sworn 22/12/98 filed with first amended Form 1 on 19/1/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 32B	22/12/98	Affidavit of Geoffrey Alfred Ashwin sworn 22/12/98 filed with first amended Form 1 on 19/1/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 32C	22/12/98	Affidavit of Raymond Ashwin sworn 22/12/98 filed with first amended Form 1 on 19/1/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 32D	22/12/98	Affidavit of Ralph Ashwin sworn 22/12/98 filed with first amended Form 1 on 19/1/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 34A	3/3/99	Affidavit of **[deponent's name deleted]** sworn 3/3/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 53	17/2/99	Affidavit of **[deponent's name deleted]** sworn 17/2/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 54	19/2/99	Affidavit of **[deponent's name deleted]** sworn 19/2/99	Mandatory s190A(3)(a)	High

Reasons for Decision

The amended application has not been certified in accordance with section 190C(4)(a). Rather the applicants assert that they are authorised to make and deal with the application.

Section 190C(4) does not restrict me to the contents of the application alone in considering whether I am satisfied that the requirements of the section are met. However I must also be satisfied that certain matters are set out in the application. In relation to this latter point I refer to my reasons for decision in relation to section 190C(5).

Affidavits of each of the four named applicants sworn on 22/12/98 accompanied the first proposed amended application when filed in the Federal Court on 19/1/99.

In each affidavit the deponent states that :
he or she is authorised to make the amended application and to deal with all matters arising to it;
this authorisation comes from all members of the native title claim group; and
the authorisation has been made pursuant to the traditional laws and customs of the native title claim group for making such decisions.

Schedule R of the amended application includes a statement to the same effect (see reasons for decision in relation to section 190C(5).

In **[text deleted - 1 word]** affidavit sworn 17 February 1999, **[deponent's name deleted]** states that:

[text identifying individual deleted – 1 word] is **[text identifying individual deleted – 9 words]** member of the native title claim group;

The traditions of **[text identifying individual deleted – 1 word]** mother's people entitle **[text identifying individual deleted – 1 word]** as the **[text identifying individual deleted – 2 words]** and member of the group to speak for the people in the claim group in relation to the land;

The same traditions and laws and customs entitle **[text identifying individual deleted – 1 word]** to appoint other applicants; and

[text identifying individual deleted – 1 word] has appointed **[text identifying individuals deleted – 7 words]** to be **[text identifying individual deleted – 1 word]** co-applicants.

There is no reference to any process of consultation with other members of the claim group. Affidavits each of the applicants and the statement in Schedule R state that the traditional method of decision making contemplated by section 251B been complied with. This appears to be no more than a recognition of the authority of **[text identifying individual deleted – 3 words]** to act and appoint others to act with **[text deleted - 1 word]**.

I have been provided with additional material addressing processes of consultation within the claim group in an affidavit of **[deponent "1" - name deleted]**. **[Deponent "1" - name deleted]**, is not a member of the immediate family of **[name deleted]** or the other applicants. I refer to the Affidavit of **[deponent "2" - name deleted]** sworn 19 February 1999. In this **[deponent "2" - name deleted]**, **[text identifying relationship of deponent "2" with the applicants deleted –7 words]**, identifies each of **[text identifying relationship of deponent "2" with the applicants deleted –2 words]**. **[Deponent "1" - name deleted]**, is not one of these. There is nothing else before me to indicate how **[deponent "1" - name deleted]**, is related to the named applicants. In **[text deleted – 1 word]** affidavit sworn 3 March 1999 **[deponent "1" - name deleted]** states that :

[text deleted – 1 word] is a member of the native title claim group;

according to traditional laws and customs of the people in the native title claim group, **[text identifying individual deleted – 6 words]** is entitled to speak on behalf of people for country;

[name deleted] is therefore entitled to make this claim and is entitled to appoint other people to speak for country subject to consultation with other members of the group; and

The claim group have agreed that the four named applicants be the authorised applicants for the purposes of the Wutha native title claim.

I find that the statements in the affidavits accompanying the application, the statement in schedule R of the amended application and the further information provided in further affidavits are sufficient to satisfy me that :

There is a process of decision making under traditional laws and customs which is to be followed;

It has been followed such that the applicants are authorised in the manner contemplated by section 251B; and

The authorisation complies with section 190C(4)(b).

I refer the submissions of the State of Western Australia in relation to this section for each of the pre-combination and amendment applications but note that these submissions were all made prior to the filing of the amended application so most comments specific to the applications before amended and combined are not relevant. I note the State's submission that I must be satisfied that the applicants have been authorised by all claimants (*sic*) either in a traditional or contemporary manner. For the reasons I have set out above I am satisfied that the applicants have been authorised in the manner contemplated by section 251B(a).

I am satisfied that the amended application meets the requirements of section 190C4

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

The following documents are referred to in the reasons for decision in relation to this section:

Location	Date	Description	Cat	Probity, Weight
WC96/8 Registration Test file folio 74	30/4/99	Amended Form 1 – amended by leave of the Federal Court 29/4/99 and referred to the Tribunal pursuant to section 64(4) on 30/4/99	Mandatory s190A(3)(a)	High

Reasons for Decision

This is not a certified application. Therefore I cannot be satisfied that the condition in subsection 190C(4) has been satisfied unless the application itself deals with the matters set out in subsection 190C5(a) and 5(b). I referred to this in my reasons for decision in relation to section 190C(4).

I refer to Schedule R of the amended application. The statement in Schedule R does not exactly reproduce the words of subsection (5). It does not need to. The statement in total is as follows :

The applicants are members of the native title claim group which has traditional decision making process for authorising things of the kind contemplated by section

251B. That process of traditional decision making has taken place and pursuant thereto the applicants are authorised to make this application on behalf of the claim group.

The statement does not expressly say that

- the applicants are authorised to deal with matters arising out of the application; or
- the authorisation is given by *all* members of the native title claim group.

However, it is my view that the reference to section 251B and the statement that a traditional decision making process has taken place incorporates these two points.

I find that the amended application meets the requirments of this section.

B. Merits Conditions

190B(2)	***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.***

The following documents are referred to in the reasons for decision in relation to this section:

Location	Date	Description	Cat	Probity, Weight
WC96/8 Registration Test file folio 75	30/4/99	Amended Form 1 – amended by leave of the Federal Court 29/4/99 and referred to the Tribunal pursuant to section 64(4) on 30/4/99	Mandatory s190A(3)(a)	High
WC96/8 Legal Services File folio 4	4/3/99	Amended Form 1 – amended by leave of the Federal Court 4/3/99 and referred to the Tribunal pursuant to section 64(4) on 5/3/99		
WC96/8 Registration Test file folio 16	19/11/98	Letter from Crown Solicitor's Office containing Registration Test submissions from State of Western Australia	Mandatory s190A(3)(c)	Relevance varies as noted in reasons
WC96/22 Registration Test file folio 16	19/11/98	Letter from Crown Solicitor's Office containing Registration Test submissions from State of Western Australia	Mandatory s190A(3)(c)	Relevance varies as noted in reasons

Reasons for Decision

Map and External Boundary Description

Information identifying the area covered by the amended application is provided in Schedule B item (a) and in two attachments each called Attachment B. Schedule B item (a) confirms that :

- the external boundary of the claim is as shown on the map at page 2 of Attachment B; and
- a written description of the external boundary is as outlined on pages 3 – 5 of Attachment B.

A map is attached at page 1 of the first Attachment B. This map is headed "Proposed Native Title Claim – Generalised Land Tenure". The map was produced by Land Claim Mapping Unit of the WA Land Information System on 18/12/98. The Land Claim Mapping Unit is part of the State of Western Australia's Department of Land Administration.

The map is finely produced and easy to follow. It shows:

- north south orientation;

- latitude and longitude;
- scale;
- the location of the claim area within the state of Western Australia;
- a cadastral plan of generalised land tenure as at October 1998;
- towns and roads in the vicinity; and
- Pastoral leases identified by name.

The map attached to the amended application was amended on 4 March 1999 by removal of two discontinuous areas in the region of Lake Violet and Milbilliee pastoral leases near Wiluna. These two areas have simply been crossed out on the map attached to the amended application. This does not affect the usefulness or clarity of the map.

Further information allowing the external boundary of the area covered by the amended application to be identified is provided in the three pages also attached to the amended application as Attachment B, and headed "Wutha Amalgamated Native Title Claim, Technical Description of External Boundary".

The amended map shows that the amended application is now made up of only two separate areas. A separate description is provided for each of these two areas. I note that the description is headed by the now incorrect statement "the Claim consists of four separate parts". Prior to certain amendments made to the amended application on 4 March 1999 the application was made up of 4 discontinuous areas. It is apparent that the applicants simply detached the pages setting out descriptions of the now excised areas of the application but failed to amend the heading. It is not more that an oversight. It does not affect substantially the accuracy of the description.

The description of each of the two remaining areas describes the application's external boundary as though it were a line travelled from a starting point around the edge of the area and back to that point. The line is described by compass direction, reference to cadastral boundaries and with the points of change in direction identified by both cadastre and latitude or longitude as appropriate. Where the line travels along or intersects another native title application boundary the boundary is described by a series of points of latitude (south) and longitude (east). I note that where the line departs from a boundary of another piece of tenure it is similarly plotted by geographic co-ordinates.

The geographic co-ordinates in the description are provided in decimal degrees and derived from the Australia Geodetic Datum (1984). This reference is not included in the pages attached to the amended application. These pages omit the description of areas three and four, the areas excised from the claim area on 4 March 1999 as I have noted. The data source note appeared on the final page of the description attached to the first amended application.

I have considered the submissions of the State of Western Australia in relation to this section for each of the pre-combination and amendment applications but note that these submissions were all made prior to the filing of the amended application. The comments are generally specific to the applications before amended and combined are not now relevant. I note however that the State of Western Australia has submitted in relation to WC96/22 (Wutha #2) that there were anomalies in the description of the application area owing to the use of both cadastral boundaries and co-ordinate values.

I find there is no such ambiguity in the amended application. The written external boundary description follows cadastral boundaries or geographic co-ordinates or it follows cadastral boundaries but uses geographic co-ordinates to pin point or confirm a particular position on a cadastral boundary where the line describing the external boundary of the application area changes direction. Some care seems to have been taken to ensure that the description is consistently and accurately related to both cadastral boundary and geographical co-ordinate description systems.

I am advised by the Tribunal's Geo-Spatial Information Unit that there are no contradictions between the physical description and the map provided. I note in any event, that each was provided to the applicants by the Land Claims Mapping unit by arrangement with the Tribunal as part of section 78 assistance provided to applicants. I am entitled to assume that this being the case there is no contradiction between the map and the physical description provided.

I find that each of the map and information provided allow the outside limit of the area of the application to be identified such that it can be said with reasonable certainly that native title rights and interests are not claimed in relation to land or waters outside that limit.

Internal Boundaries – or exclusion of areas within the external boundary

Schedule B of the amended application sets out at paragraph (b), sub-paragraphs (1) to (4), a description by a formula of the areas within the external boundary, which are not covered by the amended application. The formula is supplemented by a further list of categories of excluded tenure attached at Attachment B.

It is my view that this formula can be applied objectively to establish whether any particular area of land within the external boundary of the application area is excluded from it. The fact that no map or list of land parcels is provided is not a bar to complying with the requirements of this section.

The formula is supplemented by a further list of categories of excluded tenure attached at Attachment B. In addition the applicants at Schedule B sub-paragraph (5) confirm that all areas excluded from the area of the application prior to the current amendments continue to be excluded. The amended application does not set out all those exclusions except for a short list of special leases expressly excluded.

I have considered whether this introduces a point of uncertainty in the description. In my view it does not. It is clear that areas previously excluded continue to be so. These exclusions may be ascertained by reference to Federal Court files of the pre-combination applications or as appropriate to the records of the National Native Title Tribunal.

I have checked the previously excluded tenure to see if there is anything in those exclusions or the descriptions of them which would render the overall formula or description of excluded tenure uncertain. Each of the pre-amendment and combination applications did not claim any native title rights and interest (at A9 of the old form application) “over current or former freehold land”. I take it that this excludes from the area of the application all validly granted freehold land.

Each pre-combination and amendment Wutha application also excluded all 99 year leases within the area of the application. Wutha #2 WC96/22 also excluded each of the special leases identified in paragraph (5) of Schedule B of the amended application and one other lease, being L6298/163.

The Tribunal has received advice from the Land Claims Mapping unit that there is no such special lease. Its omission from the list appearing in paragraph (5) Schedule B appears to be in line with this. The Tribunal has also been advised by the LCMU that special lease L417/42 does not fall within the area of the application Wutha WC96/22 as it existed prior to 22/1/99. Even if this lease is not within the area of the amended and combined application this is unproblematic. At worst it is unnecessary. It does not render the description provided at Schedule B uncertain.

I note also that the exclusions set out in Schedule B paragraphs (1) and (2) are said, in paragraph (4), to be subject to the provisions of sections 47, 47A and 47 B. Particulars of tenure, or other factors allowing the applicants to claim of benefit of these provisions is not provided. However I am satisfied that a formula is provided that allows it to be shown objectively whether or not applicants may have benefit of these provisions and that this is all that is required by this section.

I refer to the State of Western Australia's submissions in relation to each of the pre-amendment and combination WC96/8 and WC96/22. The State seems to submit that the exclusion of freehold land without specifying the type of freehold excluded in the former WC96/22 is a problem. I do not agree. As I have already said I take this to mean all validly granted freehold. I do not agree that further definition is required in order to provide the necessary clarity.

The State also submits that it is necessary to specify excluded areas and provide a map of internal boundaries. I do not agree. I find that the formula or description provided can be applied objectively to establish whether any particular area of land within the external boundary of the application area is excluded from it. Therefore it is unnecessary to provide a map of internal boundaries or a list of land parcels excluded.

It is my view that it is also inappropriate to require provision of a map or list of land parcels. In reaching this conclusion I have considered the practical realities associated with collecting accurate tenure information in order to specify and map excluded areas. These practical realities include the following:

- The volume of tenure information associated with the claim area;
- The length of time needed to obtain and check all the relevant tenure, in particular given the four month time frame for a consideration of this application;
- The cost burden to applicants of obtaining such tenure information;
- The inherent uncertainly and incompleteness of tenure information without full inquiry into the validity and purpose of grants and the actual uses to which the land has been put, activities on the land and the location of those activities; and
- The fact the full details of historical tenure and land use are not easily obtainable.

It appears to me to be unreasonable to expect the applicants to undertake the burden of research and cost required by a parcel by parcel land tenure and land use inquiry for the entire area of the application.

Whether the exclusions identified by this formula are sufficient to meeting the conditions of section 190B(8) and (9) is not considered here. I refer to my reasons for decision in relation to those sections.

I find that the map and description of the external boundary, together with the description of areas within that boundary that are excluded from the amended application, are sufficient for it to be said with reasonable certainly whether native title rights and interests are claimed in relation to particular land or waters.

190B(3)	***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.***

The following documents are referred to in the reasons for decision in relation to this section:

Location	Date	Description	Cat	Probity, Weight
WC96/8 Registration Test file folio 75	30/4/99	Amended Form 1 – amended by leave of the Federal Court 29/4/99 and referred to the Tribunal pursuant to section 64(4) on 30/4/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 16	19/11/98	Letter from Crown Solicitor's Office containing Registration Test submissions from State of Western Australia	Mandatory s190A(3)(c)	Relevance varies as noted in reasons
WC96/22 Registration Test file folio 16	19/11/98	Letter from Crown Solicitor's Office containing Registration Test submissions from State of Western Australia	Mandatory s190A(3)(c)	Relevance varies as noted in reasons

Reasons for the Decision

A list of names of all the persons in the native title claim group has not been provided so the requirements of section 190B(3)(a) are not met.

In the alternative section 190B(3)(b) requires me to be satisfied that the persons in the native title claim group are described in the application sufficiently clearly so that it can be ascertained whether any particular person is in that group.

In considering the requirement of this subsection I proceed on the basic principle that there should be some objective way of deciding who is included or not included in the native title claim group.

The definition of native title claim group at Schedule A of amended application is limited to a group made up of the biological descendants of named apical ancestors and persons adopted by those biological descendants where that adoption has occurred in accordance with "Wutha tradition and custom" from which group a specified list of individual and their descendants are excluded.

The apical ancestors are identified by gender and by both Aboriginal and European name. They are not identified by date or place of birth or death or by any relationship to one another. I find that this is sufficient information to allow the apical ancestors to be identified.

It is not expressly stated how members of the native title claim group are descended from the two named people. I assume that the biological descendant may be a descendant of either of those persons named.

From the group made up of biological descendants a list of persons and lineages are then excluded. The five children of **[names deleted]** are excluded by name. *No reference is made to any exclusion of their offspring or descendants. I assume this is because none of these individuals have children at this time. The remaining individuals named are excluded along with their offspring.* [1] I take it that offspring means all descendants not just children of the first generation. It is clear that certain descent lines are being excluded from the family lines descended from the named apical ancestors. I find that this is sufficient to set out an objective criterion to determine whether or not a person is a member of the native title claim group by biological descent as qualified by certain exclusions.

A definition of adoption under "Wutha tradition and custom" is provided. It is stated that adoption does not require formal adoption under the non-Aboriginal legal system. It is said to apply to circumstances of the raising of a child (a child is "grown up") by either relatives or non-biologically related parents. It occurs either where a child is "gifted" to such persons or where a child is left in the care of such persons as a result of the biological parent not being able to care for that child. I do not find that there is any problematic ambiguity in the use of the term "gifted". It appears to have been used only to provide an example of the circumstances in which the raising or growing up of a child occurs. This is sufficient to set out objective criteria to determine whether or not a person is a member of the native title claim group by way of adoption by biological descendants of named apical ancestors.

[1] ***Erratum*** : The text, identified by italics here, appeared in the reasons for decision provided to the applicants following decision of the Registrar. However this text was included in error in those written reasons for decision. This text formed part of an earlier draft document prepared prior to referral of amendments made to the application in the Federal Court on 29 April 1999. The Registrar had been provided with an earlier version of the proposed amendments to Schedule A to the application which version did not include reference to the offspring of the first five persons listed as being excluded from the native title claim group. Elsewhere (see reasons re section 190C(3), at page 18) the reasons for decision reflect consideration of the Schedule A as amended 29 April 1999.

I have considered the submissions of the State of Western Australia in relation to this section for both of the pre-combination and amendment applications. These submissions were all made prior to the filing of the amended application. The comments are specific to the applications before as they were before being amended and combined and are not now relevant.

I accept that further factual inquiry or information provision is necessary to answer the question "is this person a member of the native title claim group?". I find that objective criteria have been provided in this description so that unless either of the criteria of biological descent, as qualified by the excluded descent lines, or adoption are met, the answer will be no.

I have considered also whether anything more is required than an inquiry about the clarity of the description provided. I note the definition of native title claim group provided in section 61(1), item (1) of the Table. The native title claim group is defined as being all the persons who according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed. Where, as is the case here, the native title claim group involves an exclusion of a group of people, this definition raises the question as to whether I am required also to consider the correctness or completeness of the definition provided in the application.

It is my view that I am not. All that section 190B(3) requires is an assessment of the clarity of the description provided, not whether the description includes all persons who hold the common or group rights claimed. If this view is wrong, I am also of the view that the kind of inquiry required to determine this question of the correctness of the claim group description is not appropriate for an administrative decision making process of this kind. The information required for such consideration is not before me. It is the kind of inquiry that would require the calling of a range of complex evidence. Indeed it is one of the matters that is to be determined by the Federal Court following a full hearing of the application (*see* section 225(a)). It is for this reason that I do not consider the native title claim group definition further in relation either to sections 190B(5) or 190B(6).

I am satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

190B(4)	***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.***

The following documents are referred to in the reasons for decision in relation to this section:

Location	Date	Description	Cat	Probity, Weight
WC96/8 Registration Test file folio 75	4/3/99	Amended Form 1 – amended by leave of the Federal Court 29/4/99 and referred to the Tribunal pursuant to section 64(4) on 30/4/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 16	19/11/98	Letter from Crown Solicitor's Office containing Registration Test submissions from State of Western Australia	Mandatory s190A(3)(c)	Relevance varies as noted in reasons
WC96/22 Registration Test file folio 16	19/11/98	Letter from Crown Solicitor's Office containing Registration Test submissions from State of Western Australia	Mandatory s190A(3)(c)	Relevance varies as noted in reasons

Reasons for the Decision

I refer to my reasons for decision in relation to section 62(2)(d). I have found that the description of native title rights and interests and the activities in relation to those rights and interests is sufficient to meet the procedural requirements of that section.

Section 190B(4) requires me separately to be satisfied that the description of native title rights and interests provided in Schedule E of the amended application is sufficient to allow the native title rights and interests claimed to be readily identified.

The rights and interests claimed are exhaustively listed in sub-paragraphs (a) to (j) of Schedule E. There is no larger or compendium right of which those paragraphs provide an incomplete list of particulars.

The right to possession occupation use and enjoyment of the relevant land (paragraph (a)) are the rights identified in *Mabo v Queensland (No 2)* (1992) 175 CLR 1. They are known to the law and have been regarded by the High Court of Australia as capable of identification.

The rights and interests described in paragraphs (b) to (j) are taken from the order of Lee J in the *Ward v State of Western Australia* (1998) 159 ALR483. That case held these rights to be known to the law and capable of identification, it is open for me to do the same.

Limitations to the claimed rights and interest are clearly specified in sub-

paragraphs (i) to (v) of the same Schedule E. The fact that sub-paragraph (iii) appears to have a possible prospective effect in the event that the State passes legislation as mentioned in section 23I of the Act does not make its meaning any less clear.

The overarching limitation on the rights and interests claimed, such that they are all subject to any shared native title rights and interests which may be determined, appears to be clearly set out.

It is not necessary for me to ascertain the extent of the rights and interests claimed beyond this. That is a matter for agreement of the parties or for determination by the Federal Court.

I refer the submissions of the State of Western Australia in relation to this section for each of the pre-combination and amendment Wutha applications. These submissions were made before the filing of the amended application. The comments are specific to those two applications before they were amended and combined and are not now relevant.

I am satisfied that description of native title rights and interests provided in Schedule E of the amended application is sufficient to allow the native title rights and interests claimed to be readily identified.

190B(5)	***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.***

The following documents are referred to in the reasons for decision in relation to this section:

Location	Date	Description	Cat	Probity, Weight
Registration Test Minute Attachment A(5) Registration Test file folio 75	4/3/99	Amended Form 1 – amended by leave of the Federal Court 29/4/99 and referred to the Tribunal pursuant to section 64(4) on 30/4/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 34A	18/1/99	Affidavit of **[deponent's name deleted]** sworn 13/1/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 55	19/2/99	Affidavit of **[deponent's name deleted]** sworn 19/2/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 54	19/2/99	Affidavit of **[deponent's name deleted]** sworn 19/2/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 53	17/2/99	Affidavit of **[deponent's name deleted]** sworn 17/2/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 53	17/2/99	Affidavit of **[deponent's name deleted]** sworn 17/2/99	Mandatory s190A(3)(a)	High
WF96/1 Transcript files	29/4/96	Transcript of Evidence Provided by**[witness' name deleted]** (evidence in chief and cross-examination) and **[witness' name deleted]** (brief evidence in chief) given 29/4/96 pages 328 - 363	May be taken into account 190A(3)	Low / Moderate – No direct evidence of contra Wutha applicants
WO98/114 Folio 26		Affidavit of **[deponent's name deleted]**	May be taken into account 190A(3)	Low/Moderate – pro forma future act affidavit
WO 98/114 Folio 27	28/5/98	Affidavit of **[deponent's name deleted]** sworn 28/5/98 and annexed anthropological report "Report of Aboriginal Heritage – Herald Resources Survey Leases M57/68 and M57/1 for Wutha Peoples " dated 1997	May be taken into account 190A(3)	Low/Moderate – little material beyond general anthropology of area

WO98/135 Folio not noted	4/9/98	Affidavit of **[deponent's name deleted]** sworn 4/9/98	May be taken into account 190A(3)	Low/Moderate – pro forma future act affidavit
WO97/547 Folio 35	13/3/98	Affidavit of **[deponent's name deleted]** on behalf of Mugung People	May be taken into account 190A(3)	Low/Moderate – pro forma future act affidavit
WO97/381 Folio 39	13/3/98	Affidavit of **[deponent's name deleted]** on behalf of Mugung People	May be taken into account 190A(3)	Low/Moderate – pro forma future act affidavit
WC96/8 Registration Test file folio 16	19/11/98	Letter from Crown Solicitor's Office containing Registration Test submissions from State of Western Australia	Mandatory s190A(3)(c)	Relevance varies as noted in reasons
WC96/22 Registration Test file folio 16	19/11/98	Letter from Crown Solicitor's Office containing Registration Test submissions from State of Western Australia	Mandatory s190A(3)(c)	Relevance varies as noted in reasons

Reasons for Decision

Schedule F of the amended application sets out a factual basis for the assertion that the native title rights and interests claimed exist. I relied on the statements in Schedule F in reaching my decision in relation to section 62 (2)(e). I am not restricted to Schedule F in my consideration of the sufficiency of that factual basis under section 190B(5). I have considered further information provided by the applicants for the purpose of these considerations. I have also considered relevant material provided by the applicants and others in relevant future Act proceedings.

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

The term "an association" imports a very wide meaning. It is not necessary to look for any particular physical or traditional association under this section.

In relation to current association with the area I refer to my reasons for decision in section 190B(7) below. I set out there summaries of affidavit material on which I am satisfied that the deponents, each of whom are members of the native title claim group, has and had a traditional physical connection with any part of the are covered by the application. The same material satisfies me that those deponents have and had an association with the area.

It is my view that I do not need to have evidence about the association of each member of the claim group with the area. I have evidence from four members of it. There is evidence in the affidavit of **[deponent's name deleted]** that the group's association, at least in the case of **[text deleted – 1 word]** children extends to the next generation with **[text deleted – 1 word]** sons being educated by **[text deleted – 1 word]** family and taken out hunting by **[text deleted – 1 word]** and other family

members (paragraph 14). There is general evidence in the affidavit of **[deponent's name deleted]** that there is at least an association with the land through continuing importance of sacred sites and sites of significance in the area which **[text deleted – 1 word]** describes as being "vital to our culture, [to] us as a people" (paragraph 17). Taken together this is sufficient to satisfy me that the native title claim group has an association with the area.

The predecessors of the claim group are not well defined in the affidavit material before me. I note in my reasons in relation to section 190B(7) how each of the deponents state they acquired knowledge through their parents and in some cases from other relatives of their parents generation. I find that it is implicit in this that the older generation had in turn acquired knowledge of country and been associated with it from the generation before. I rely on Schedule F(i) of the amended application to support this. It sets out the applicants' assertion that "the native title claim group and their ancestors have since the assertion of British sovereignty possessed, occupied, used and enjoyed the claim area". Examples of current activities are provided in the affidavit material. These are not to be read however as merely historical incidents. They are asserted as current exemplar of what is said to be an inherited tradition.

There is some material before me that shows the current members of the native title claim group acquired some aspects of their knowledge of area from older people, not related to them and not part of the claim group. I do not rely on this material to reach the view that the native title claim groups' predecessors also had an association with the area.

(b) that there exist traditional laws acknowledged and traditional customs observed by the native title claim group that give rise to the claim to native title rights and interests.

I refer to the affidavits of **[deponent's name deleted]**, **[deponent's name deleted]**, **[deponent's name deleted]** and **[deponent's name deleted]** listed in the table above and to summaries on this material set out in my reasons for decision in relation to section 190B(7). Each of these provides evidence of the existence of and continued acknowledgment and observation of traditional laws and customs into the current generation.
This material centres on the passing on of knowledge in relation to:

- Continuing use of the land in particular hunting and camping on the land in continuation of practices learnt from forbears;
- Protection and maintenance of sites and places of significance and waterholes; and
- Knowledge held by the current generation being passed onto the next.

It appears from the material before me that not all the traditional laws and customs observed by the deponents parents or parents' generation was passed onto them. For example, I note that whereas there is evidence that the deponent's father participated in ceremonies on the law grounds near Leonora (**[deponent's name deleted]** paragraph 8), it appears **[text identifying individuals deleted – 4 words]** did not undergo initiation ceremonies into the law. (**[deponent's name deleted]**,

paragraph 11). However it is not necessary that the applicants show unaltered passage of all traditional laws and customs acknowledged and observed by forbears into the current generation.

The types of traditions and customs identified as being observed and acknowledged by this native title claim group relate to knowledge of and protection of sites, methods of using country through hunting, gathering and camping and methods of passing on responsibility for country. This is consisted with a system of traditional laws and customs that may give rise to a claim for native title rights and interests.

On the material before me I can find that there is a factual basis sufficient to support the assertion set out in section 190B(5)(b).

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

The affidavit material referred to above contains evidence of the existence and continued observation by members of the native title claim group of traditional laws and customs in relation to the application area. The impression I gain from this material overall is that the range of activities undertaken on the land by the deponents' forbears or by the deponents themselves when children or at earlier times in their lives, was greater that the activities they now undertake.

However there is evidence that members of the claim group continue to visit or to live in the area and to regard their rights to visit, camp and hunt in the area and their obligations to care for the area as arising from inherited rights and obligations attaching to their parents and parent's forbears.

There is material before me that indicates that other native title claims groups or parts of such have asserted ownership of land and custodianship of sites for particular areas within the area of the application. I refer to the affidavits of **[deponent's name deleted]**, sworn 13 March 1998, and filed in Future Act proceedings WO97/547 and WO97/381. These proceedings each related to the application of the expedited procedure to the proposed grant of prospecting licences in the area of Pinjanie Hill within the application area. **[Deponent's name deleted]**, provided evidence on behalf of the Mugung people. **[Deponent's name deleted]**, states that the area is Mugung country (paragraph 3); that the Mugung people have inherited ownership of the land and custodianship of the sites in the area (paragraph 4).

I refer also to the affidavit of **[deponent's name deleted]**, sworn 4 September 1998 and filed in Future Act proceedings WO98/135. Here **[deponent's name deleted]**, states that the Yulbarri people are the people who inherited ownership of the land and custodianship of the sites in the area (paragraph 4). In each affidavit the material relates only to a small area within the are of the Wutha application. The affidavits are pro *forma* affidavits filed in future Act proceedings. Moreover it does not fall to me to determine competing native title claim determinations.

I find that the factual basis is sufficient to support the assertion that the native title

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

General Question: Is the factual basis on which it is asserted that the native title rights and interests claimed exist, sufficient to support that assertion?

I refer the submissions of the State of Western Australia in relation to this section for each of the pre-combination and amendment Wutha applications. These submissions were made before the filing of the amended application. The comments are specific to those two applications before they were amended and combined and are not now relevant.

The three particular limbs of the test in this section relate to the overall test. The cumulative effect of my conclusion with regard to the three specific assertions is that the condition as a whole is met.

I have not examined each of the specific rights and interests claimed as they are set out in schedule E of the amended application. I do so when considering the amended application under section 190B(6).

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.***

The following documents are referred to in the reasons for decision in relation to this section:

Location	Date	Description	Cat	Probity, Weight
WC96/8 Registration Test file folio75	4/3/99	Amended Form 1 – amended by leave of the Federal Court 29/4/99 and referred to the Tribunal pursuant to section 64(4) on 30/4/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 16	19/11/98	Letter from Crown Solicitor's Office containing Registration Test submissions from State of Western Australia	Mandatory s190A(3)(c)	Relevance varies as noted in reasons
WC96/22 Registration Test file folio 16	19/11/98	Letter from Crown Solicitor's Office containing Registration Test submissions from State of Western Australia	Mandatory s190A(3)(c)	Relevance varies as noted in reasons
WC96/8 Registration Test file folio 34A	18/1/99	Affidavit of **[deponent's name deleted]** sworn 13/1/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 55	19/2/99	Affidavit of **[deponent's name deleted]** sworn 19/2/99	Mandatory s190A(3)(a)	High

WC96/8 Registration Test file folio 54	19/2/99	Affidavit of **[deponent's name deleted]** sworn 19/2/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 53	17/2/99	Affidavit of **[deponent's name deleted]** sworn 17/2/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 53	17/2/99	Affidavit of **[deponent's name deleted]** sworn 17/2/99	Mandatory s190A(3)(a)	High

Reasons for the Decision

The *prima facie* inquiry is a mixed question of fact and law. I have already decided that there is a factual basis, in general terms, for the claim to native title rights and interests. I refer to my reasons for decision in relation to section 190B(5).

The issue here is whether in law and fact each of the particular native title rights and interests claimed in Schedule E of the amended application may *prima facie* be capable of being established.

Each of the rights and interests claimed in Schedule E are known to the common law and are capable of proof by native title claimants. I note that item (a) uses the terminology used in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, and that rights (b) to (j) are taken from the order of Justice Lee in *Ward v State of Western Australia* (1998) 159 ALR 483, at 639-670. Justice Olney found in *Yarmirr v Northern Territory of Australia (*1998) 156 ALR 370, at 423, that the apportionment of resources taken from the area could not be found to be within the ambit of the statutory definition of native title. However this type of right, claimed by the applicants at item (h) of Schedule E, has been found to be capable of being proved in Western Australia.

I refer to the affidavits of **[deponent's name deleted]**, **[deponent's name deleted]**, **[deponent's name deleted]** and **[deponent's name deleted]** listed in the table above and to summaries on this material set out in my reasons for decision in relation to section 190B(7).

There is sufficient material in the affidavits and in the amended application (in particular see Schedule F(i))to satisfy me that the rights and interests in paragraph (a) to possession***, occupation, use and enjoyment of the area*** are *prima facie* capable of being established.

It may be argued that if the rights set out in paragraph (a) are found *prima facie* to be capable of being established, all other rights must flow from this. I prefer the view that each right and interest particularised need to be examined. I think that is particularly the case where as here, possession, occupation, use and enjoyment is framed not as a compendium right from which others flow as a non-exhaustive list of particulars, but where each is listed separately as part of an apparently exhaustive list of rights and interests claimed.

I do find however that the same material that goes to satisfy the requirement in relation to paragraph (a) also satisfies it in relation to paragraphs (b) ***the right to make decisions about the use and enjoyment of the area*** and (c) ***the right of access to the area***.

In relation to paragraph (d) ***the right to control the access of others to the area*** there is material before me that indicates that applicants may be able to establish that the native title claim group people acknowledge the need for permission to be sought and obtained by people to visit country not their own, and that this need is part of their understanding of their own rights over the area of the applications. I refer in particular to the affidavit of **[deponent's name deleted]** sworn 19 February 1999, in which **[text deleted – 1 word]** notes **[text deleted – 1 word]** ability to visit **[text deleted – 1 word]** country without asking for permission of other Aboriginal people to do so (paragraph 6).

In relation to paragraph (e) ***the right to use and enjoy the resources of the area*** there is material before me that indicates that the applicants may be able to establish that the native title claim group have and do use and enjoy the resources of the area in accordance with traditional laws and customs. This material relates to hunting and gathering, use of water resources.

There is considerable emphasis placed by the deponents on the need to care for water holes and the inheritance of this responsibility (**[deponent's name deleted]**, paragraph 12, **[deponent's name deleted]** paragraph 5 and 6, **[deponent's name deleted]** paragraph 12). Together with the continuing practices of hunting and gathering on the land, and given that water sources are a particularly vital resource in a desert region I find that there is sufficient material before to indicate *prima facie* that the right claimed in paragraph (f) ***to control the use and enjoyment of others of the resources of the area*** may be capable of being established.

I am unable to identify material that can support the rights and interest claimed in paragraphs (g) and (h) however. I cannot find any material that supports a tradition or custom in trade in resources or a right to receive a portion of such resources taken by others from the area.

I take it that the right specified in paragraph (j) is a right in relation the cultural knowledge associated with the area. If so it is a right in relation to land or waters as required under the Act. I find that there is material before me to indicate that each of the rights claimed to maintain and protect sites and knowledge in relation to the area as set out in paragraphs (i) ***the right to maintain and protect places of importance under traditional laws, customs and practices in the area***, and (j) t***he right to maintain, protect and prevent misuse of cultural knowledge of the common law holders associated with the area*** are capable *prima facie* of being established.

I refer to the following in support of this :

- **[deponent's name deleted]** states that **[text deleted – 1 word]** participates in site clearances conducted for mining companies to ensure that **[text deleted – 1 word]** protect and care for the country (paragraph 12);

- **[deponent's name deleted]** states that although **[text deleted – 1 word]** now lives in Kalgoorlie, **[text deleted – 1 word]** continues to care for water holes and visit them on a monthly basis, hunt and camp on the land and accept **[text deleted – 1 word]** responsibilities to care for the land and pass on the stories to **[text deleted – 1 word]** children and grand children (paragraphs 6 and 7);
- **[deponent's name deleted]** states that ensures that **[text deleted – 1 word]** sons are educated about the country by **[text deleted – 1 word]** family (paragraph 14); and
- **[deponent's name deleted]** states that the protection of sites is vital to **[text deleted – 1 word]** and to **[text deleted – 1 word]** people. (paragraph 17).

I refer the submissions of the State of Western Australia in relation to this section for each of the pre-combination and amendment Wutha applications. These submissions were made before the filing of the amended application. The comments are specific to those two applications before they were amended and combined and are not now relevant.

I find that the rights and interest claimed in paragraphs (a) to (f) inclusive and those claimed in paragraphs (i) to (j) inclusive of schedule E, are *prima facie* can be established. The rights claimed in paragraphs (g) and (h) of that Schedule are not. Therefore the amended application meets the requirements of section 190B(6).

190B(7)	***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.***

The following documents are referred to in the reasons for decision in relation to this section:

Location	Date	Description	Cat	Probity, Weight
WC96/8 Registration Test file folio75	4/3/99	Amended Form 1 – amended by leave of the Federal Court 29/4/99 and referred to the Tribunal pursuant to section 64(4) on 30/4/99	Mandatory s190A(3)(a)	High

WC96/8 Registration Test file folio 16	19/11/98	Letter from Crown Solicitor's Office containing Registration Test submissions from State of Western Australia	Mandatory s190A(3)(c)	Relevance varies as noted in reasons
WC96/22 Registration Test file folio 16	19/11/98	Letter from Crown Solicitor's Office containing Registration Test submissions from State of Western Australia	Mandatory s190A(3)(c)	Relevance varies as noted in reasons
WC96/8 Registration Test file folio ____	18/1/99	Affidavit of **[deponent's name deleted]** sworn 13/1/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 55	19/2/99	Affidavit of **[deponent's name deleted]** sworn 19/2/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 54	19/2/99	Affidavit of **[deponent's name deleted]** sworn 19/2/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 53	17/2/99	Affidavit of **[deponent's name deleted]** sworn 17/2/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 53	17/2/99	Affidavit of **[deponent's name deleted]** sworn 17/2/99	Mandatory s190A(3)(a)	High

Reasons for Decision

No details of traditional physical connection as required by section 190B(7) are contained in the amended application itself. Schedule M of the amended application sets out that "Members of the claim group continue to have a traditional physical connection with the land. Affidavit evidence has been provided to the Registrar NNTT". According to the note in Schedule N of the amended application, no issue of exclusion from the area of the application in terms of section 190B(7)(b) arises. Section 190B(7) does not require that information be contained in the application itself. I am entitled to look at further information provided by the applicants.

I have considered affidavits provided to me by each of **[deponent's name deleted]**, **[deponent's name deleted]**, **[deponent's name deleted]** and **[deponent's name deleted]**. I am only required to be satisfied that one member of the native title claim group has the requisite traditional physical connection. However, since evidence going to traditional physical connection of other members of the claim group has been provided to me and in order to avoid the problems that might arise where a decision is based only on one member of the native title claim group and that one member passes away, I have considered whether or not each of the deponents have the requisite traditional physical connection.

In **[text deleted – 1 word]** affidavit, sworn 22/12/98, **[deponent's name deleted]** states that **[text deleted – 1 word]** is a member of the native title claim group. In **[text deleted – 1 word]** affidavit sworn 19 February 1999 **[text deleted – 1 word]** states that **[text deleted – 1 word]** has a current traditional physical connection with the area of the application in that :

- **[text deleted – 1 word]** continues to visit what **[text deleted – 1 word]** describes as **[text deleted – 1 word]** country, where **[text deleted – 1 word]** hunts and camps; (paragraph 12)
- **[text deleted – 1 word]** maintains water holes and ensures that these are not polluted; (paragraphs 10, 12 – the second paragraph so numbered)
- **[text deleted – 1 word]** participates in site clearances conducted for mining companies to ensure that **[text deleted – 1 word]** protects and cares for the country (paragraph 12); and
- although not born on the claim area, **[text deleted – 1 word]** moved into the area with **[text deleted – 1 word]** family as a child and learned about the area and about hunting, camping and the stories of the area from **[text deleted – 1 word]** parents and **[text deleted – 1 word]** father's people (paragraph 2, 3, 4, 5, 9 and 11); and
- each of **[text deleted – 1 word]** parents belonged to country at least partly within the area of the current applications (paragraphs 1, 2 and 5).

I am satisfied on the basis of this material that **[name deleted]** had and continues to have a traditional physical connection with the area.

In **[text deleted – 1 word]** affidavit, sworn 22/12/98, **[deponent's name deleted]** states that **[text deleted – 1 word]** is a member of the native title claim group. In **[text deleted – 1 word]** affidavit sworn 19 February 1999 **[text deleted – 1 word]** states :

- **[text deleted – 1 word]** was born in the area and was taught by **[text deleted – 1 word]** parents how to hunt and camp on the land in accordance with custom and tradition and that **[text deleted – 1 word]** has responsibilities to care for the country and particular places in it (paragraphs 1,3, 4 and 5); and
- Although **[text deleted – 1 word]** now lives in Kalgoorlie, **[text deleted – 1 word]** continues to care for water holes and visit them on a monthly basis, hunts and camps on the land and accepts **[text deleted – 1 word]** responsibilities to care for the land and pass on the stories to **[text deleted – 1 word]** children and grand children (paragraphs 6 and 7).

I am satisfied on the basis of this material that **[name deleted]** had and continues to have a traditional physical connection with the area.

In **[text deleted – 1 word]** affidavit, sworn 22/12/98, **[deponent's name deleted]** states that **[text deleted – 1 word]** is a member of the native title claim group. In **[text deleted – 1 word]** affidavit sworn 17 February 1999 **[text deleted – 1 word]** states :

- as a child **[text deleted – 1 word]** lived within that area of the application in the vicinity of Leonora (paragraph 5) where **[text deleted – 1 word]** was taught how to hunt and to gather food and bush medicines by **[text deleted – 1 word]** parents (paragraphs 6,7 and 8) and where **[text deleted – 1 word]** witnessed, but did not participate in, ceremonies at nearby ceremonial grounds (paragraph 11);
- **[text deleted – 1 word]** does not live in the application area now but returns for weekends and holiday times when **[text deleted – 1 word]** continues to go hunting with **[text deleted – 1 word]** family (paragraph 14); and

- **[text deleted – 1 word]** ensures that **[text deleted – 1 word]** sons are educated about the country by **[text deleted – 1 word]** family (paragraph 14).

I am satisfied on the basis of this material that **[name deleted]** had and continues to have a traditional physical connection with the area.

In **[text deleted – 1 word]** affidavit, sworn 19 February, **[deponent's name deleted]** states that **[text deleted – 1 word]** is the **[text identifying relationship deleted – 1 word]** of the named applicants (paragraph 1) and states that :

- **[text deleted – 1 word]** was born in the area at Leonora and lived with **[text deleted – 1 word]** family there until **[text deleted – 1 word] [text identifying individual deleted – 1 word]** in 1970 (paragraphs 1 and 2);
- although living in Leonora town **[text deleted – 1 word]** and **[text deleted – 1 word]** family learned about hunting and gathering bush foods and medicines from their mother and other old people (paragraphs 6, 7 10, 11 and 13);
- **[text deleted – 1 word]** was taught about places **[text deleted – 1 word]** could walk through and places to avoid; ceremonies to undertake when approaching certain springs or water holes and witnessed ceremonies such as corroborees and funerals where attendance by women and children were permitted (paragraphs 7, 11, 12 and 14);
- **[text deleted – 1 word]** father was a caretaker or protector of sacred items associated with ceremonies and was involved in ceremonies with the other men (paragraph 8);
- **[text deleted – 1 word]** no longer lives in Leonora but has visited or lived there for periods of time over the years; and
- **[text deleted – 1 word]** continues to regard Leonora as **[text deleted – 1 word]** home town and to have continuing concern about the land and places of significance in it. (paragraphs 2, 16 and 17).

I am satisfied on the basis of this material that **[name deleted]** had and continues to have a traditional physical connection with the area.

I refer to the submissions of the State of Western Australia in relation to this section for each of the pre-combination and amendment Wutha applications. I note that these submissions were made prior to the filing of the amended application and the provision to me of further information in the form of affidavits. The comments are specific to the applications before amended and combined and the State did not have benefit of reviewing the additional information recently provided to me by the applicants. The submissions are not now relevant.

I am satisfied on the basis of affidavit evidence before me from four members of the native title claim group that each have and have had the kind of traditional physical connection with the area required by the section.

190B(8)	***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.***

The following documents are referred to in the reasons for decision in relation to this section:

Location	Date	Description	Cat	Probity, Weight
Registration Test Minute Attachment A(5) Registration Test file folio 75	30/4/99	Amended Form 1 – amended by leave of the Federal Court 29/4/99 and referred to the Tribunal pursuant to section 64(4) on 30/4/99	Mandatory s190A(3)(a)	High
WC96/8 Registration Test file folio 16	19/11/98	Letter from Crown Solicitor's Office containing Registration Test submissions from State of Western Australia	Mandatory s190A(3)(c)	Relevance varies as noted in reasons
WC96/22 Registration Test file folio 16	19/11/98	Letter from Crown Solicitor's Office containing Registration Test submissions from State of Western Australia	Mandatory s190A(3)(c)	Relevance varies as noted in reasons

Reasons for the Decision

I have referred to the National Native Title Register. There are no approved determinations of native title for the area the subject of the amended application. The amended application therefore complies with section 61A(1)

Previous exclusive possession acts attributable to the Commonwealth or the State have been excluded from the area of the amended application by virtue of Schedule B paragraph (2). The amended application therefore complies with section 61A(2).

Similarly native title rights and interests claimed in relation to previous non-exclusive possession acts attributable to the Commonwealth and of the State have been limited as required by section 61A(3) by virtue of Schedule E paragraph (iii). The amended application therefore complies with section 61A(3).

I refer to the submissions of the State of Western Australia in relation to this section each pre-combination and amendment applications but note that these submissions were all made prior to the filing of the amended application. The comments are for the most part specific to the applications before amended and combined are not now relevant.

I note in relation to the pre-combination application the State submits that a comprehensive search of the tenure [in the area] should be undertaken and that unless all tenures are identified the application should fail the requirements of this section. I have already indicated in my

reasons in relation to section 190B(2) that I do not think such an onerous burden should be placed on the applicants. Nor is it necessary to for such a search to be undertaken by anyone to ensure that section 190B(8) is complied with.

I therefore find that the application meets the requirements of section 190B(8).

190B(9) (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:*** ***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;***

The following documents are referred to in the reasons for decision in relation to this section:

Location	Date	Description	Cat	Probity, Weight
WC96/8 Registration Test file folio 75	30/4/99	Amended Form 1 – amended by leave of the Federal Court 29/4/99 and referred to the Tribunal pursuant to section 64(4) on 30/499	Mandatory s190A(3)(a)	High

Reasons for the Decision

Schedule E paragraph (i) in the amended application sets out that any minerals, petroleum or gas within the area of the claim are not claimed by the applicants to the extent that they are wholly owned by the Crown in right of the Commonwealth or the State of Western Australia.

The limitation to the claim contained in the application as set out in Schedule E paragraph (i) is not contradicted by any information in the map or affidavits accompanying the amended application and appears to be conclusive on this point. There is no need for me to consider what may be disclosed in any other material since it appears that any earlier claim or assertion by the applicants of the type prohibited by section 190B(9)(a) must be displaced by Schedule E paragraph (i).

I therefore find that the amended application meets the requirements of section 190B(9)(a).

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;***

The following documents are referred to in the reasons for decision in relation to this section:

Location	Date	Description	Cat	Probity, Weight
WC96/8 Registration Test file folio ___	4/3/99	Amended Form 1 – amended by leave of the Federal Court 4/3/99 and referred to the Tribunal pursuant to section 64(4) on 5/3/99[2]	Mandatory s190A(3)(a)	High

Reasons for the Decision

Schedule E paragraph (ii) confirms that no part of the application is in relation to an offshore place. Reference to the map and external boundary description in Schedule B would have provided the same information.

No consideration of the requirements of section 190B(9)(b) is necessary.

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)).***

The following documents are referred to in the reasons for decision in relation to this section:

Location	Date	Description	Cat	Probity, Weight
WC96/8 Registration Test file folio ___	4/3/99	Amended Form 1 – amended by leave of the Federal Court 4/3/99 and referred to the Tribunal pursuant to section 64(4) on 5/3/99[3]	Mandatory s190A(3)(a)	High

Reasons for the Decision

Schedule B paragraph (3) of the amended application provides a general formula, in addition to the statutory definitions incorporated in paragraphs (1) and (2) and the express exclusion of identified special leases in paragraph (5), for the exclusion of areas where native title rights and interests have been extinguished. I am assisted in finding that the description in paragraph (3) is adequate to exclude all other areas where native title rights and interest are excluded by its incorporation of the list of tenure types excluded from the area of the application set out in Attachment B.

I do not think a parcel by parcel identification of excluded areas is necessary. In this regard I refer to my reasons for decision in relation to section 190B(2).

The exclusion of areas to the claim contained in the application as set out in Schedule B

[2] Erratum : Description of document not updated to list application as amended in the Federal Court on 29/4/99

[3] Erratum : Description of document not updated to list application as amended in the Federal Court on 29/4/99

paragraph (3) is not contradicted by any information in the map or affidavits accompanying the amended application and appears to be sufficient on this point.

There is no need for me to consider what may be disclosed in any other material, in particular in tenure information obtained by the Tribunal or provided to it by parties to the application. It appears that even if areas of the type prohibited by section 190B(9)(c) are located within the external boundary of the area of the amended application, such areas will be excluded by virtue of Schedule B paragraph (3).

I therefore find that the amended application meets the requirements of section 190B(9)(c).

End of Document