National Native Title Tribunal

REASONS FOR DECISION COVER SHEET
REGISTRATION TEST

DECISION MAKER	Andrew Jaggers

APPLICATION NAME	Wanjina/Wunggurr-Uunguu

NAMES OF APPLICANTS	Wilfred Goonack, Albert Bundamarra, Benedict Chienmora, Cecilia Waina, Ludivina Undulghumen, John Goonack, Placid Undulghumen, Sylvester Mangolamara, William Bunjuck, Pudja Barunga, Louis Karadada, Jack Karadada, Basil Djanghara, Dianna Williams and Margaret Mouda

NNTT NO	WC99/35
FEDERAL COURT NO	W6033/99

REGION	North West

DATE APPLICATION MADE	21 October 1999

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 (as amended)("the Act").

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

_____ _____

Andrew Jaggers ***DATE***

Delegate of the Registrar pursuant to sections190, 190A, 190B, 190C, 190D.

Information considered in making the decision

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

- The Application, Registration Test File and Legal Services File for application WC99/35.
- The Applications, Registration Test Files and Legal Services Files for applications WC95/23, WC99/7 and WC99/11 (see 'Related Applications' below).
- The National Native Title Tribunal Geospatial Database;
- The Register of Native Title Claims;
- The Native Title Register;
- Determination of Representative ATSI Bodies: their gazetted boundaries

Summary of proceedings

The Uunguu (WC99/35, W6033/99) native title determination application was filed with the Federal Court on 21 October 1999. It was referred to the National Native Title Tribunal on 22 October 1999 pursuant to s.63 of the *Native Title Act* 1993.

The application was then amended by order of the Federal Court on 23 May 2000. The Federal Court forwarded a copy of the amended application to the Tribunal on 2 June 2000. All references to 'the application', unless otherwise stated, are to the application as most recently amended.

Related applications

I note that Schedule A and Schedule R of the present application state that "the claimant group comprises those Aboriginal people who hold in common the body of traditional laws and customs derived from beliefs about Wanjina/Wunggurr". At Schedule R it is also stated that:

"The claimant group will seek four determinations for native title by way of four applications:
Wanjina/Wunggurr-Uunguu – WAG6033/98
Wanjina/Wunggurr-Dambimangari – WAG6061/98

Wanjina/Wunggurr-Wilinggin – WAG6015/99 and WAG6016/96”

While the areas of each of the four applications are distinct and not overlapping, I note that the claim group is identical for each of these applications. Therefore, I have reviewed Tribunal files in relation to the other three applications for information relating to the common body of traditional laws and customs of the group.

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.***

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

Reasons for the Decision

Details required in section 61

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

Reasons relating to this sub-condition	Application **complies** with this sub-section
Requirements are met. The names of the fifteen Applicants are provided in the application: Wilfred Goonack, Albert Bundamarra, Benedict Chienmora, Cecilia Waina, Ludivina Undulghumen, John Goonack, Placid Undulghumen, Sylvester Mangolamara, William Bunjuck, Pudja Barunga, Louis Karadada, Jack Karadada, Basil Djanghara, Dianna Williams and Margaret Mouda The address for service is provided at Part B of the application. I am satisfied there has been compliance with the procedural requirements of s.61(3).	

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

Reasons relating to this sub-condition	Application **complies** with this sub-section
Requirements are met. An exhaustive list of names of the persons in the native title claim group has not been provided so the requirements of s.61(4)(a) are not met. For the reasons set out in my reasons for decision in relation to s.190B(3), I am satisfied that the persons in the native title claim group are described sufficiently clearly in Schedule A so that it can be ascertained whether any particular person is one of the persons in the claim group, as required by s.61(4)(b). I am satisfied there has been compliance with the procedural requirements of s.61(4).	

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

Reasons relating to this sub-condition	Application **complies** with this sub-section

The application meets the requirements of s.61(5)(a) in that it is in the form prescribed by Regulation 5(1)(a) *Native Title (Federal Court) Regulations* 1998.

As required under s.61(5)(b), the application was filed in the Federal Court on 21 October 1999.

The application meets the requirements of s.61(5)(c) in that it contains all information as prescribed in s.62. I refer to my reasons for decision in relation to those sections.

As required by s.61(5)(d), the application is accompanied by affidavits as prescribed by s.62(1)(a). I refer to my reasons for decision in relation to that section of the Act. The application is also accompanied by a map as prescribed by s.62(1)(b). I refer to my reasons for decision in relation to s.62(2)(b) of the Act.

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

I am satisfied there has been compliance with the procedural requirements of s.61(5).

Details required in section 62(1)

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

Reasons relating to this sub-condition	Application **complies** with this sub-section

Affidavits of identical content have been received from all fifteen Applicants, affirmed by the applicants and witnessed by qualified witnesses. Eight were affirmed on 19 May 1999, six affirmed on 20 May 1999, and one affirmed on 14 July 1999.

The affidavits meet the requirements of s.62(1)(a)(i) – (iii) at points 1-3 respectively. Point 4 of the affidavits relates to the requirements of s.62(1)(a)(iv) and (v) and reads as follows: "I am authorised to make and deal with matters arising in relation to the application pursuant to the process of decision making that the persons in the native title claim group have agreed to and adopted in relation to authorising the making of the application and dealing with matters and in relation to doing things of that kind".

There is not an explicit statement "that the applicant is authorised by all the persons in the native title claim group" as required by s.62(1)(a)(iv). However I am of the view that the reference to the decision making process agreed to and adopted by the persons in the native title claim group in relation to authorising the application implies that the authorisation itself is by these persons. Further, I note at Schedule R that it is expressly stated that the applicants are authorised as required by "…all other persons in the native title claim group…", and that the affidavits affirm the truth of all statements made in the application. Therefore, I am satisfied that the requirements of s.62(1)(a)(iv) are met.

The basis on which each applicant is authorised is described in accordance with s.251B(b). Therefore, I am satisfied that the requirements of s.62(1)(a)(v) are also met.

I note that the fifteen affidavits were sworn between May and July of 1999, and that the application was subsequently amended by order of the Federal Court on 23 May 2000. At that time the Court made an order that:

"Any requirement to re-swear the affidavits of the respective Applicants verifying the proposed amended application be dispensed with".

Also, in *Drury and Ors v State of Western Australia* [2000] FCA 132, Justice French found that s.62 does not convey the requirement that fresh affidavits need to be filed every time an application is amended. He found that s62A provides that applicants may deal with all matters arising in relation the application, and that, in his opinion, such matters included the amendment of the application from time to time. He concluded that the specific cases in which amendments to an application did require the filing of fresh affidavits were ultimately within the discretion of the Court.

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

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

Reasons relating to this sub-condition	**Details given**
It is not a mandatory requirement that details of traditional physical connection are contained in the application for the purposes of s.62(1)(c). However, Schedule M of the application asserts that "at least one member of the claimant group has a traditional physical connection to the claim area", and Schedule G contains a list of activities carried out in exercise of the claimed native title rights and interests.	

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

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

Reasons relating to this sub-condition	Application **complies** with this sub-section
Schedule B of the application refers to Attachment A to the application, which contains a description of the external boundaries of the application. For the reasons set out in my reasons for decision in relation to s.190B(2), I am satisfied that the application complies with the procedural requirements of s62(2)(a)(i).	

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

Reasons relating to this sub-condition	Application **complies** with this sub-section
Schedule B of the application contains a written description of the areas within the external boundary of the area claimed which are not covered by the application For the reasons set out in my reasons for decision in relation to s.190B(2), I am satisfied that the information provided is sufficient to meet the procedural requirements of s.62(2)(a)(ii).	

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

Reasons relating to this sub-condition	Application **complies** with this sub-section
Schedule C of the application refers to Attachment B, which contains a map showing the external boundaries of the area covered by the application. For the reasons set out in my reasons for decision in relation to s.190B(2), I am satisfied that there has been compliance of the procedural requirements of s.62(2)(b).	

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

Reasons relating to this sub-condition	Application **complies** with this sub-section

Schedule D of the application refers to Attachment C. Attachment C contains a list of land act leases and land act reserves, as at 10 June 1999, provided by the Land Claims Mapping Unit.

The requirements of s.62(2)(c) can be read widely to include all searches conducted by any person or body. However, I am of the view that I need only be informed of searches conducted by the applicant, and other searches of which the applicant is aware, in order to be satisfied that the application complies with this condition. It would be unreasonably onerous to expect applicants to have knowledge of, and obtain details about, all searches carried out by every other body or person.

I have no information before me to suggest that the applicants have conducted any searches in relation to the area of the application, nor that they are aware of any searches other than those contained at Attachment C.

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

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

Reasons relating to this sub-condition	Application **complies** with this sub-section

The section requires a description of the native title rights and interests claimed in relation to particular land or waters, *and* any activities in the exercise of the rights and interests claimed. Further, 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 have not been extinguished, at law.

A description of the native title rights and interests claimed is provided at Schedule E of the application. The description includes two sets of listed particularised rights and interests claimed in relation to two distinctly defined areas of the application. I interpret the lists of rights and interests to be complete lists, and not merely non-exhaustive lists of particulars of some larger rights. The first set of ten rights and interests are claimed to the exclusion of others, subject to any native title rights and interests which may be shared with other native title holders. No such exclusive claim is made with respect to the second set of five rights and interests.

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

There is no general or 'at large' claim to any rights and interests that may exist at law.

Schedule G identifies an apparently non-exhaustive list of activities that members of the native title claim group have continuously carried out on the land and waters in the claim area (see my reasons for decision in relation to s.62(2)(f)). These activities are activities in the exercise of one or more of the specific rights and interests identified in Schedule E. The activities described are in general terms and, are not necessarily an exhaustive list of all activities carried out in the claim area. However, I am of the view that the information supplied at Schedule G is sufficient to meet the requirements of this section.

I am satisfied there has been compliance with the procedural requirements of s.62(2)(d). See also my reasons in relation to condition 190B(4).

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

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

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

Reasons relating to this sub-condition	Application **complies** with this sub-section
The Applicants have provided a general description of the factual basis on which it is asserted that there exists traditional laws and customs that give rise to the claimed native title at Schedule F of the application. I am satisfied there has been compliance with the procedural requirements of s.62(2)(e)(ii).	

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

Reasons relating to this sub-condition	Application **complies** with this sub-section
The Applicants have provided a general description of the factual basis on which it is asserted that the claim group has continued to hold native title in accordance with traditional laws and customs at Schedule F of the application. I am satisfied there has been compliance with the procedural requirements of s.62(2)(e)(iii).	

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

Reasons relating to this sub-condition	Application **complies** with this sub-section
Schedule G of the application provides details of activities in relation to the land or waters currently being carried out by the native title claim group. I am satisfied there has been compliance with the procedural requirements of s.62(2)(f).	

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

Reasons relating to this sub-condition	Application **complies** with this sub-section
At Schedule H of the application it is stated that the applicants are not aware of any other applications which overlap the present application. Advice from the Tribunal's Geospatial Information Database confirms that there are no overlapping applications. I am satisfied there has been compliance with the procedural requirements of s.62(2)(g).	

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

Reasons relating to this sub-condition	Application **complies** with this sub-section
Schedule I states that the applicants are not aware of any s.29 notices relating to the claim area. Advice from the Geospatial Unit of the Tribunal confirms that no s.29 notices have been issued in relation to the area. I am satisfied there has been compliance with the procedural requirements of s.62(2)(h).	

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

I am satisfied that the application meets the requirements of this section and set out my reasoning as follows:-

Reasons for the Decision

A search of the Register of Native Title Claims reveals that there are no overlapping applications. I am satisfied that the application complies with this provision.

190C(4)(a) and 190C(4)(b)	*Certification and authorisation:* *The Registrar must be satisfied that either of the following is the case:* *(a) the application has been certified under paragraph 202(4)(d) by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part; or* *(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.* *Note: s.190C(5) - Evidence of authorisation:* *If the application has not been certified as mentioned in paragraph 4(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:* *(a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and* *(b) briefly set out the grounds on which the Registrar should consider that it has been met.*

I am satisfied that the application meets the requirements of this section and set out my reasoning as follows:-

Reasons for the Decision

Under s190C(4)(a) a representative Aboriginal/Torres Strait Islander body has not certified the application.

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

I am satisfied that the applicants are all members of the native title claim group, and are authorised to make the application and deal with the matters arising in relation to it. My reasons for reaching this finding are contained in my reasons for decision in relation to s190C(5).

190C(5)	*Evidence of authorisation:* *If the application has not been certified as mentioned in paragraph 4(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:* *(a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and* *(b) briefly set out the grounds on which the Registrar should consider that it has been met.*

I am satisfied that the application meets the requirements of this section and set out my reasoning as follows:-

Reasons for the Decision

Schedule R of the application states that:

The applicants are members of the native title claim group and are authorised to make the application and deal with matters arising in relation to it by all other persons in the

native title group pursuant to a process of decision making that:

(a) is in accordance with the traditional laws and customs of the persons in the native title claim group that must be complied with in relation to authorising things of that kind.

In the alternative

(b) the persons in the native title claim group have also agreed to and adopted in relation to authorising the making of the application and dealing with matters and in relation to doing things of that kind.

These are the respective processes of authorisation as set out in s.251B(a) and s.251B(b) of the *Native Title Act 1993*.

Each of the applicants has also sworn an affidavit under s.62(1)(a) stating that:

- The applicant is authorised to make and deal with matters arising in relation to the application; and
- That the basis on which the applicant is authorised is "the process of decision making that the persons in the native title claim group have also agreed to and adopted in relation to authorising the making of the application and dealing with matters and in relation to doing things of that kind".

I note that the applicants do not state in their affidavits that they have been authorised through a process of decision making, in accordance with traditional laws and customs relating to such authorisation.

I am satisfied that the application is authorised pursuant to s.251B(b), for the reasons outlined below. I am not required to also consider wether the application is also authorised pursuant to s.251B(a).

Reasons

Schedule R states that the native title claim group for the present application has made four applications for determinations of native title; namely, the present application (Wanjina/Wunggurr-Uunguu), the Wanjina/Wunggurr-Dambimangari application, and two Wanjina/Wunggurr-Wilinggin applications. The claim group is described as being made up of three 'claimant sub-groups' – one associated with the present application, one associated with the Wanjina/Wunggurr-Dambimangari application, and one with the Wanjina/Wunggurr-Wilinggin applications.

Particulars are provided at Schedule R of a series of four meetings – two with 'Uunguu claimant members' on 19 and 20 May 1999, and one with each of the Wilinggin and Dambimangari 'claimant sub-groups' on 10 August 1999 and 2 September 1999 respectively. Legal and project development officers of the KLC are stated to have been present at all meetings. During the course of these meetings, each of the sub-groups is stated to have provided instructions to the KLC confirming that they were "part of one

larger claim group which followed the Wanjina Wunggur laws" and that this larger claim group included the three claimant sub-groups.

In terms of the representativeness of the meetings, it is stated that 'the majority of the Uunguu claimant members' attended the meetings of that sub-group, that the Wilinggin meeting was a 'large bush claimant meeting' with 'high attendance', and that the Dambimangari sub-group had a 'full meeting'. All families are said to have been represented at the Dambimangari meeting; at the Uunguu meeting all the 'main families' are said to be represented; and all three meetings are said to have been attended by key 'senior and knowledgeable' claimants.

In terms of the process of decision making, the Uunguu sub-group are described as having confirmed that they were happy with the area of the claim, arriving, by a process of nomination and consensual agreement, on a group of members who should represent their families and country, and unanimously authorising these people as Applicants in accordance with the requirements of s.190C(4)(b) of the Act.

At the meetings of the Wilinggin and Dambimangari sub-groups, the list of Applicants nominated by the Uunguu sub-group is stated to have been presented to them, following which the sub-groups discussed the nominations and 'authorised unanimously' the named Applicants for the present application.

Schedule R concludes that 'the whole claimant group has authorised the named Applicants' for the present application.

[Name deleted], the senior legal officer with the Kimberley Land Council with carriage of the Wanjina/Wunggurr-Uunguu, Wanjina/Wunggurr-Dambimangari and Wanjina/Wunggurr-Wilinggin applications, affirmed an affidavit on 19 April 2000 in relation to the authorisation of the current application. The information provided in her affidavit confirms the details set out in Schedule R of the application.

[Name deleted], a project officer with the Kimberley Land Council, in an affidavit dated 12 July 1999 concerning the meetings of the Uunguu sub-group, affirms that they were 'a full claimant's meeting', and that the named Applicants were authorised at these meetings.

In considering whether this information constitutes sufficient grounds for me to consider that the applicants are authorised by *all the other persons* in the native title claim group, I note that the wording of Schedule R suggests that not all of the members of each of the claimant sub-groups may have attended their respective sub-group meetings.

However, it is expressly stated that there was at least 'high' or 'majority' attendance from the sub-group in each case, amongst whom were 'key senior and knowledgeable people'. I consider that the series of meetings involving most members of the claimant group, and the affidavits by the applicants and officers of the KLC are sufficient for me to be satisfied that all members of the claimant group have authorised that application.

I am satisfied that the application satisfies the requirements of 190C(5)(b), and therefore that the requirements of s.190C(4)(b) have also been met.

B. Merits Conditions

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

I am satisfied that the application meets the requirements of this section and set out my reasoning as follows:-

Reasons for the Decision

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

External Boundaries
The applicants have provided a written technical description of the external boundaries of the application at Attachment A to the application. I am satisfied that the information provided enables the boundaries of the area covered by the application to be identified, and therefore, that the requirements of s.62(2)(a)(i) are met.

Attachment B is a map compiled by WALIS, Land Claims Mapping Unit, dated 9 June 1999. The map displays sufficient co-ordinates to enable the position of sites or localities within them to be identified. The map shows a scale allowing distances and areas to be ascertained and identifies unallocated Crown land, reserves, leases and various rivers. The line indicating the external boundary is finely marked and easy to follow. A locality diagram indicates generally the position of the application within the state of Western Australia, and forms part of the map provided.

Advice from the Tribunal's Geospatial Unit confirms that the map shows the boundaries of the area as described in Attachment A. I am therefore satisfied that the map submitted with the application meets the requirements of s62 (2)(b).

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

Internal Boundaries

a) The Applicants exclude from the claim any areas covered by valid acts which occurred on or before 1 January 1994 comprising such of the following as are included as extinguishing acts within the Native Title Act 1993, as amended, or Titles (Validation) and Native Title (Effect of Past Acts) Act 1995, as amended, at the time of the Registrar's consideration:

(i) Category A past acts, as defined in NTA s228 and s229;

(ii) Category A intermediate period acts as defined in NTA s232, s232A and s232B.

(b) The Applicants exclude from the claim any areas in relation to which a previous exclusive possession act, as defined in section 23B of the NTA, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in section 23E NTA 1993 in relation to the act.

(c) The Applicants exclude from the claim area any areas in relation to which native title rights and interests have otherwise been extinguished. To avoid any uncertainty, the Applicants particularly exclude from the claim area:

(i) any areas covered or previously covered by pastoral leases which are enclosed or improved where such enclosure or improvement extinguishes native title;

(ii) any area covered by a mining or general purpose lease granted under the Mining Act 1978 (WA) where such leases extinguish native title.

(d) Where section 47, 47A or 47B of the NTA applies to any part of the area covered by this application, that part of the area is not excluded from the claim. Particulars of such areas will be provided prior to the hearing but include such areas as may be listed in Schedule L.

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

The applicants have not identified, parcel by parcel, the areas of land and waters that are excluded from the claim area. In my view, they are not required to do so in order to satisfy the requirements of s.62(2)(a)(ii) and s.190B(2). The internal boundaries are described by way of identifying classes of land tenure that are not covered by the application. Such class exclusions amount to information that enables the internal boundaries of the application area to be adequately identified. This may require research by the State of Western Australia and other custodians, but nevertheless it is reasonable to expect that the task could be done on the basis of the information provided by the applicants. I find that the information enables the boundaries of any areas within the external boundaries of the application that are not covered by the application to be identified.

I am therefore satisfied that the exclusion clauses set out in the paragraphs above are sufficient to meet the requirements of s.62(2)(a)(ii).

Conclusion

I find that the information and map submitted with the application meet the requirements of s.62 (a) and (b). I am satisfied that the information and the map provided by the Applicants are sufficient for it to be said with reasonable certainty that native title rights

and interests are claimed in relation to the areas specified. The criteria set out in s.190B(2) are met by the application.	
190B3	***Identification of the native title claim group:*** ***The Registrar must be satisfied that:*** ***(a) The persons in the native title claim group are named in the application; or*** ***(b) The persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.***

I am satisfied that the application meets the requirements of this section and set out my reasoning as follows:-

Reasons for the Decision

To meet the requirements of s.190B(3) the description of the native title claim group must be sufficiently clear so that it can be ascertained whether any particular person is a member of the native title claim group.

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

In the alternative, pursuant to s.190B(3)(b) the application must otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

Schedule A of the application states that:

"[t]he claimant group comprises those Aboriginal people who hold in common the body of traditional laws and customs derived from beliefs about Wanjina/Wunggurr. These people are:"

The subsequent three paragraphs then define the membership of the claim group. Paragraph a) refers to the descendants of 36 specifically named individuals. Paragraph b) refers to the descendants of 59 specifically named individuals, as well as the descendants of another named individual, who, it is stated, 'was adopted into the native title claimant group'. Paragraph c) refers to the descendants of 20 specifically named individuals, as well as three further named individuals, stated to have been adopted into the claim group, and their descendants.

I note that the names of the 119 individuals are Aboriginal names, and the majority consists of just one name. I am satisfied that the individuals' named could be readily identified.

The claim group is defined as primarily consisting of those people who are the 'descendants of' the named individuals. I note that the application does not specify biological descendants. The *MacMillan Dictionary of Anthropology (1986)* defines 'descent' as importing a wide meaning which is not necessarily limited to biological relationships. However, the *New Shorter Oxford English Dictionary (1993)* defines 'descendant' as a person descended from or derived from an ancestor. I am of the view

that descent implies biological descendants and excludes non-biological relations by marriage or adoption.

I note that four of the named individuals whose descendants are said to be part of the native title claim group, are expressly said to have been 'adopted' into the claim group (paragraphs b and c). This concurs with my understanding that where relationships are by means other than biological, the nature of the relationship (ie, in this case, adoptive) has been expressly stated.

I also note that in paragraph c), there are two instances where individuals whose descendants are members of the claim group, are named in pairs – ie "**[name W deleted]** and **[name X deleted]**" and "**[name Y deleted]** and **[name Z deleted]**". By way of clarification, the Legal Officer of the Kimberley Land Council advised, in a letter dated 25 May 2000, "that the native title claim group relevantly consists of the descendants of **[name W deleted]** and **[name X deleted]**, as a couple, and descendants of **[name Y deleted]** and **[name Z deleted]**, as a couple".

I am satisfied that the persons in the group are described sufficiently clearly so that it can be ascertained whether any particular person is in the group. The requirements of s.190B(3)(b) are met.

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

I am satisfied that the application meets the requirements of this section and set out my reasoning as follows:-

Reasons for the Decision

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

The Applicants state at Schedule E:

"The native title rights and interests claimed are:

(a) Over those areas where section 47, 47A or 47B is relied on, or where there has been no act that extinguishes native title, or where, by operation of the Native Title Act or the common law native title has not been extinguished, the right to the possession, occupation, use and enjoyment to the exclusion of all others (subject to any native title rights and interests which may be able to be shared with others who establish that they are native title holders) in an area, and in particular comprise:

(i) the right to possess, occupy, use and enjoy the area;
(ii) the right to make decisions about the use and enjoyment of the area;
(iii) the right of access to the area;
(iv) the right to control the access of others to the area;
(v) the right to use and enjoy resources of the area;
(vi) the right to control the use and enjoyment of others of resources of the area;
(vii) the right to trade in resources of the area;
(viii) the right to receive a portion of the benefit of any resources taken by others from the area;
(ix) the right to maintain and protect places of importance under traditional laws, customs and practices in the area; and
(x) the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area.

(b) Over the remaining areas the right to the possession, use, occupation, enjoyment of the area, and in particular comprise:

(i) the right to possess, occupy, use and enjoy the area;
(ii) the right to make decisions about the use and enjoyment of the area;
(iii) the right of access to the area;
(iv) the right to use and enjoy the traditional resources of the area;
(v) a right to maintain and protect places of importance under traditional laws, customs and practices in the area.

In effect, the applicants are claiming two different sets of rights over different parts of the claim area. With respect to the first set of rights and interests claimed, I am of the view that the definition of classes of tenure over which these rights and interests are claimed is sufficiently clear to allow the areas in relation to which these particular native title rights and interests are being claimed to be readily identified. Research of tenure data held by the State of Western Australia and other custodians may be required in order to identify the particular areas which fall within this definition, but it is reasonable to expect that the task can be done on the basis of the information provided in the application. The second set of rights and interests applies to all remaining areas not covered by the first set, and as such, the areas in relation to which this series of rights and interests is being claimed are equally readily identifiable.

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

In addition, I note that the applicants have sought to limit the claimed native title rights and interests. Essentially, the limitations qualify the applicants' claim to exclusive possession of the claim area where such a claim cannot be made at law. The effect of the limitations is that the claimed rights and interests are those not inconsistent with the validly held rights and interests of others with respect to the claim area.

In specifying these limitations, the applicants have referred to classes of tenure – as in

Schedule B. For the same reasoning as set out above, I am of the view that such class exclusions allow the identification of the areas where native title rights and interests are claimed.

I am therefore satisfied that the qualifications to the rights and interests claimed are sufficient to allow the particular native title rights and interests claimed to be readily identified in relation to all parts of the claim area.

I am satisfied that all of the rights and interests claimed can be readily identified from the description provided in the application. The application therefore meets the requirements of s.190B(4).

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

I am satisfied that the application meets the requirements of this section and set out my reasoning as follows:-

Reasons for the Decision

In applying this condition I have particularly relied on the information provided at Schedule F and Schedule G in the application and on the following affidavits submitted in relation to the present application for the purpose of the registration test:

- Affidavit of **[name of deponent A deleted]** sworn on 20 May 1999;
- Affidavit of **[name of deponent B deleted]** sworn on 20 May 1999;
- Affidavit of **[name of deponent C deleted]** sworn on 20 May 1999;
- Affidavit of **[name of deponent D deleted]** sworn on 20 May 1999, and
- Affidavit of **[name of deponent D deleted]** sworn on 22 October 1999

I note that each of these individuals is an applicant, and therefore a member of the native title claim group.

I have also had regard to the following affidavits, submitted respectively in relation to the following three applications who have the same native title claim group as the present application.

Wanjina/Wunggurr-Wilinggin – WAG6015/99

- Affidavit of **[name of deponent E deleted]** – sworn 2 July 1999

- Affidavit of **[name of deponent F deleted]** – sworn 22 May 1999
- Affidavit of **[name of deponent G deleted]** – sworn 18 July 1999
- Affidavit of **[name of deponent H deleted]** – sworn 2 July 1999

Wanjina/Wunggurr-Wilinggin – WAG6016/96
- Affidavit of **[name of deponent I deleted]** sworn 6 January 1999
- Affidavit of **[name of deponent J deleted]** – sworn 6 January 1999
- Affidavit of **[name of deponent J deleted]** – sworn 25 February 1999

Wanjina/Wunggurr-Dambimangari – WAG6061/98
- Affidavit of **[name of deponent K deleted]** – sworn 29 March 1999
- Affidavit of **[name of deponent L deleted]** – sworn 29 March 1999
- Affidavit of **[name of deponent M deleted]** – sworn 29 March 1999
- Affidavit of **[name of deponent N deleted]** – sworn 29 March 1999
- Affidavit of **[name of deponent O deleted]** – sworn 29 March 1999
- Affidavit of **[name of deponent P deleted]** – sworn 29 March 1999

Schedules A and R of the present application state that the claimant group on each of these applications holds in common "the body of traditional laws and customs derived from beliefs about Wanjina/Wunggurr". The information contained in these affidavits, while not provided in relation to the present application, supports evidence contained in the affidavits of **[name of deponents A, B, C and D deleted]** in relation to the existence of a common body of traditional laws and customs shared by the claim group which gives rise to their claimed native title rights and interests.

Having considered that these affidavits are generally supportive of the evidence of **[name of deponents A, B, C and D deleted]**, I review in more detail the evidence of these four deponents, below.

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

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

Schedule F paragraph (a) of the application sets out that *"[t]he native title rights and interests are those of and flowing from the right to possession, occupation, use and enjoyment of the land and waters pursuant to the traditional laws and customs of the claim group, based on a number of specified facts.*

Paragraph (a)(i) then asserts that *"the native title claim group and their ancestors have, prior to and since the assertion of British sovereignty, possessed, occupied, used and enjoyed the claim area".*

Along similar lines, Schedule G asserts that *"Members of the native title claim group*

have continuously carried out activities on the land and waters within the area of the claim and have possessed, occupied, used and enjoyed the area". Examples are then given of some of the activities carried out.

This is sufficient to satisfy the requirements of s.62(2)(e); however it is a general assertion, and I have relied on the affidavits from the applicants for specific details.

The affidavits of **[names of deponents A, B, C and D (20/05/99) deleted]** refer to the predecessors of the claim group, and the claim group themselves, having an association with places throughout the claim area.

[Text deleted to protect the confidentiality of affidavit information. In summary, deponent C refers to beliefs about the origins of their country].

[Names of deponent B and A deleted] similarly describe their country, which they look after, as including land, sea and islands in the claim area from their parents and grandparents.

[Text deleted to protect the confidentiality of affidavit information. In summary, deponent D (20/05/99) refers to inheriting the country from his predecessors and of being taught the Law from them].

[Names of deponent D and B deleted] describe being involved in big gatherings with different family groups at particular times and places in the claim area.

[Text deleted to protect the confidentiality of affidavit information. In summary, deponents A, B, C and D speak of having travelled across the extent of their country. Deponents A and B refer to their origins in the bush, and deponent B speaks of being taught, and of living in the traditional way on his country. Deponents C and D speak of currently living on parts of the claim area at particular times during the year].

There is further information throughout the affidavits of the four deponents which provides evidence of a continued association with the claim area. The information referred to my reasons in relation to s.190B(5)(b) and (c) also supports the applicants' claims in respect of this provision.

To be satisfied under this criterion it must be evident that association with the area is and was communal, that is, shared by a number of members of the native title claim group. I note that all four deponents talk predominantly in terms of 'we' rather than I, and throughout their affidavits convey the communal nature of their responsibilities and rights.

I am satisfied that the native title claim group have, and the predecessors of those persons had, an association with the area. The requirements of s.190B(5)(a) are met.

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

This subsection requires me to be satisfied that: traditional laws and customs exist; that those laws and customs are respectively acknowledged and observed by the native title claim group, and that those laws and customs give rise to the claim to native title rights and interests.

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

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

[Text deleted to protect the confidentiality of affidavit information. In summary, deponents A, B, C and D (20/05/99) refer to the existence of, and their continued observance and passing on to their descendants of, traditional dreaming stories and Law].

[Names of deponents D (20/05/99), C, B and A deleted] describe particular sites relating to dreaming stories, predecessors and current individuals, their enduring significance to their people, and the responsibility of particular members of the claim group in relation to the protection of particular sites.

[Names of deponents D, C, B and A deleted] give examples of laws and customs that have existed, and continue to be acknowledged and observed, relating to, for example, the origins of the country, birth, the 'symbols' or 'dreamings' that people inherit, sharing of food and other items (all four make statements in these respects), marriage (**[names of deponents D (20/05/99), B and A deleted]**), trade, burial, travel routes, social gatherings, burning the country (**[name of deponent D deleted]** 20/05/99, 22/10/99), sacred sites, death and mourning **[name of deponent C deleted]**.

[Name of deponent D deleted] (20/05/99) speaks of teaching his children, who are in turn teaching their children. **[Text deleted to protect the confidentiality of affidavit information. In summary, deponent D refers to continuing to follow the Law, and deponents D, B and A state that their descendants will eventually take over responsibility for the Law and country, from them]**.

The information provided in the affidavits of the four claim group members constitutes significant factual support for the continued acknowledgment and observance of traditional laws and customs that give rise to the native title rights and interests listed in Schedule E.

I am satisfied that there exist traditional laws acknowledged by, and traditional customs observed by, the claim group that give rise to the claim to native title rights and interests, and that the requirements of s.190B(5)(b) are met.

s.190B(5)(c) – that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs

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

Schedule F of the application states that: "*Such traditional laws and customs have been passed by traditional teaching, through the generations preceding the present generations to the present generations of persons comprising the native title claim group; the native title claim group continues to acknowledge and observe those traditional laws and customs; the native title claim group by those laws and customs have a continuing connection with the land in respect of which the claim is made*…"

Schedule G of the application identifies some of the activities that members of the native title claim group carry out, and states that members of the claim group *"have continuously carried out activities on the land and waters within the area of the claim…."*

The information referred to above in relation to s.190B(5)(b) and s.190B(6) is also relevant to this section. On the basis of that information, I am satisfied that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.

Conclusion

The three particular strands of the test in this sub-section relate to the overall requirements of s.190B(5). I am satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. The requirements of s.190B(5) are met.

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.***

I am satisfied that the application meets the requirements of this section and set out my reasoning as follows:-

Reasons for the Decision

'Native title rights and interests' are defined at s.223 of the Native Title Act. This definition specifically attaches native title rights and interests to land and water, and in summary requires:

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

This definition is closely aligned with all the issues I have already considered in relation to s.190B(5), and I refer to my reasons in relation to that section. I have found that there is sufficient factual basis, for the claim to native title rights and interests.

Under s.190B(6) I must consider that, prima facie, at least some of the rights and interests claimed can be established.

The term prima facie was considered in *North Ganalanja Aboriginal Corporation v Qld* 185 CLR 595 by their Honours Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, who noted: "The phrase can have various shades of meaning in particular statutory contexts but the ordinary meaning of the phrase "prima facie" is: "At first sight, on the face of it; as appears at first sight without investigation." [Citing the Oxford English Dictionary (2nd ed 1989)].

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

In relation to the requirement that the rights and interests be recognised under the common law of Australia, Schedule F, paragraph (a)(vi) asserts that: *"the rights and interests are capable of being recognised by the common law of Australia"*.

I note that at Schedule E of the application, the applicants limit the rights and interests claimed subject to the valid rights and interests of others; recognising that native title rights and interests are extinguished to the extent of any inconsistency with other valid acts.

However, taking account of the judgement of the Federal Court in *State of Western Australia v Ward* [2000] FCA 191, I am of the view that some of the rights and interests claimed by the Applicants are not capable of being recognised by the common law of Australia.

The applicants claim two sets of rights and interests in relation to the claim area. The first set of ten rights and interests are claimed over those areas where s47, s47A and s47B is relied upon, and areas where native title has never been extinguished. A sub-set of five of these rights and interests are claimed over the remaining areas of the application. With respect to the former set of rights, the applicants claim these rights *"to the exclusion of all others (subject to any native title rights and interests which may be shared with any others who establish that they are native title holders) of the area"*.

The sub-set of rights claimed in relation to remaining areas are not claimed to the exclusion of all others.

I note that there is information included in the application at Schedule G which contains a list of activities, described in general terms. Whilst these activities relate to the rights and interests claimed, they do not provide any specific evidence. I do not consider this information sufficient for the prima facie establishment of specific claimed native title rights and interests.

In order to establish the native title rights and interests on a prima facie level, I have primarily relied on the affidavits of:

- Affidavit of **[name of deponent A deleted]** sworn on 20 May 1999;
- Affidavit of **[name of deponent B deleted]** sworn on 20 May 1999;
- Affidavit of **[name of deponent C deleted]** sworn on 20 May 1999;
- Affidavit of **[name of deponent D deleted]** sworn on 20 May 1999, and
- Affidavit of **[name of deponent D deleted]** sworn on 22 October 1999

I note that each of these individuals is an applicant, and therefore a member of the native title claim group.

As noted in my reasons for decision in relation to s.190B(5), the thirteen affidavits provided in relation to the other three Wanjina/Wungurr applications (W6015/99, WG6016/96 and WG6061/98) contain information generally supportive of the existence of a body of traditional law and custom held by the claim group, which gives rise to the native title rights and interests claimed.

The following rights and interest can be established at a prima facie level:

(a)(i), (b)(i) The right to possess, occupy, use and enjoy the area;
This right is claimed in relation to the whole of the claim area. I note that in *State of Western Australia v Ward* [2000] FCA 191, this right formed part of the determination made by their Honours.

The affidavits/evidence provided by **[names of deponents A, B, C and D deleted]** contain a range of information supporting the claim to this right. I am of the view that the rights and interests mentioned below constitute a subset of the right to possess, occupy, use and enjoy the area. Thus, the evidence I rely upon with respect to the prima facie establishment of the following rights and interests applies also to the establishment of the right to possess, occupy, use and enjoy the area.

I am satisfied on the basis of this information that the right can be established on a prima facie basis.

(a)(ii), (b)(ii): the right to make decisions about the use and enjoyment of the area;
This right is claimed in relation to the whole of the claim area. I note that in *State of Western Australia v Ward* [2000] FCA 191, this right formed part of the determination

made by their Honours.

I refer to information from the affidavits/evidence provided by **[names of deponents A, B, C and D deleted]**, reviewed in relation to the rights and interests considered below, as supportive of this right.

I am satisfied on the basis of this information that the right can be established on a prima facie basis.

(a)(iii), (b)(iii): the/a right of access to the area;
This right is claimed in relation to the whole of the claim area. I note that in *State of Western Australia v Ward* [2000] FCA 191, this right formed part of the determination made by their Honours.

The affidavits of **[names of deponents A, B, C and D deleted]** all contain information about the right of access to and responsibility for the claim area having been passed down to them from their predecessors, including 'Dreaming' beings. I refer to the information considered in relation to s.190B(5)(a) as directly supportive of this right.

I am satisfied on the basis of this information that the right can be established on a prima facie basis.

(a)(iv): the right to control the access of others to the area;
I note that in *State of Western Australia v Ward* [2000] FCA 191, their Honours declined to include this right in any determination of native title in relation to areas where native title was found to have been partially extinguished. However, in the present instance, this right is being claimed only in relation to those areas where s47, s47A and s47B is relied upon and areas where native title has never been extinguished. There is nothing before me to suggest that this right as claimed in the present instance cannot be made out at common law.

I refer to the affidavit information considered in relation to s.190B(5)(a). Further, **[text deleted to protect the confidentiality of affidavit information. In summary, deponent D (20/05/99) refers to his responsibility for and authority in relation to the country, that his descendants are learning this from him, and that outsiders must ask their permission before accessing their country]**.

[Text deleted to protect the confidentiality of affidavit information. In summary, deponent C refers to the existence and observance of traditional protocols in relation to particular places in the claim area, and the negative consequences if strangers breach these protocols].

[Text deleted to protect the confidentiality of affidavit information. In summary, deponents A and B state that outsiders such as tourists, pearlers and miners must ask their permission to visit the country].

I am satisfied on the basis of this information that the right can be established on a prima

facie basis.

(b)(iv): a right to use and enjoy the traditional resources of the area.
I note that in *State of Western Australia v Ward* [2000] FCA 191, their Honours found that this right formed part of the determination as a non-exclusive right. In the present case, the right is similarly being claimed non-exclusively – in relation to those areas where s47, s47A and s47B cannot be relied upon and areas where native title has been partially extinguished.

[Name of deponent D (20/05/99) deleted] describes in detail how in the past and present, they hunt, eat bush tucker and create traditional items according to methods taught to them by their predecessors. He speaks of teaching their children how to hunt turtle, fish and kangaroo, and how to dig for yams and roots. He states that they are in turn teaching their children.

[Text deleted to protect the confidentiality of affidavit information. In summary, deponent C refers to their (dreaming) ancestors having created the country's traditional resources for them].

[Name of deponent B deleted] describes visiting Islands in the claim area and learning about and eating bush tucker from the fresh water, the reef and the shore; also of hunting and sharing food with other local groups. **[Name of deponent A deleted]** describes in detail aspects of being taught how to fish, hunt and gather a range of bush tucker on the islands, the reefs and on the mainland.

I am satisfied on the basis of this information that the right can be established on a prima facie basis.

(a)(ix), (b)(v): the/a right to maintain and protect places of importance under traditional laws, customs and practices in the area; and
This right is claimed in relation to the whole of the claim area. I note that in *State of Western Australia v Ward* [2000] FCA 191, this right formed part of the determination made by their Honours.

I refer to the information considered in relation to (a)(iv) above. **[Text deleted to protect the confidentiality of affidavit information. In summary, deponent C speaks of an inherited responsibility for looking after the country, including specific family burial areas and caves]**.

I am satisfied on the basis of this information that the right can be established on a prima facie basis.

The following rights and interest can not be established at a prima facie level:

(a)(v): the right to use and enjoy resources of the area;
This right is claimed in relation to areas of the application where s47, s47A and s47B is

relied upon and areas where native title has never been extinguished. I note that this right is similar to the right claimed at (b)(iv). However in that instance the right claimed was in relation to the *traditional* resources of the area. By contrast, the absence of the word 'traditional' in the present case implies that the applicants are claiming a larger right – to use and enjoy both traditional and non-traditional resources in the area.

I refer to the evidence considered in relation to (b)(iv) as evidence of the right to use and enjoy the traditional resources of the area; however, there is no further evidence before me to support, prima facie, the right of the claim group to use and enjoy non-traditional resources of the area.

I am therefore *not* satisfied that this right can be prima facie established.

(a)(vi): the right to control the use and enjoyment of others of resources of the area;
I note that in *State of Western Australia v Ward* [2000] FCA 191, the majority declined to include this right in the determination of native title in relation to areas where native title was found to have been partially extinguished. In the present instance, this right is being claimed only in relation to those areas where s47, s47A and s47B is relied upon and areas where native title has never been extinguished. There is nothing before me to suggest that this right as claimed in the present instance cannot be made out at common law.

I refer to the quotes from **[name of deponent D deleted]** (20/05/99) in relation to (iv) above. **[Name of deponent D deleted]** (20/05/99) also states that **[text deleted to protect the confidentiality of affidavit information. In summary, he states that 'whitefellas' who want to access the country's resources have to consult first with the traditional owners to ensure that they observe the Law in relation these resources, and in relation to other activities on country]**.

This information is evidence in relation to the *traditional* resources of the area. However, there is no further evidence before me to support, prima facie, the right of the claim group to control the use and enjoyment of others of non-traditional resources of the area.

On the basis of these considerations I am *not* satisfied that this right can be prima facie established.

(a)(vii): the right to trade in resources of the area;
[Name of deponent D deleted] (22/10/99) refers to the claimant group having their own trade route, which comes from their Aboriginal Law. **[Text deleted to protect the confidentiality of affidavit information. In summary, deponent D describes the existence of a traditional trading Law, in accordance with which particular items have been, in the past, and continue to be, traded with other groups]**.

This may be considered to be evidence of a right to trade in the traditional resources of the area. However, as considered in relation to (a)(v), the absence of the word 'traditional' implies a claim to a right to trade in non-traditional as well as traditional

resources of the area.

I am not satisfied on the basis of the information before me that there is evidence to support, prima facie, the right of the claim group to trade in non-traditional resources of the area.

Further, I note that in *State of Western Australia v Ward* [2000] FCA 191, the majority declined to include the right to trade in the resources of the claim area in the determination of native title.

In light of these considerations, I am <u>*not*</u> satisfied that the right can be prima facie established.

(a)(viii): the right to receive a portion of the benefit of any resources taken by others from the area;

I note that in *Yarmirr v Northern Territory* [1998] 82 FCR 533 Olney J found that this right was not a right that could form part of a determination of native title. In *Ward v State of Western Australia [*1998]159 ALR 483 Lee J differed from Olney J with respect to this finding. However, Lee J.'s determination was overturned by a majority of the Full Court in *State of Western Australia v Ward* [2000] FCA 191. I therefore follow the finding by Olney J and conclude that this right is not recognised under the common law of Australia.

On the basis of these considerations I am <u>*not*</u> satisfied that this right can be prima facie established.

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

I note that in *State of Western Australia v Ward* [2000] FCA 191 it was found that this right was not "a right in relation to land of the kind that can be the subject of a determination of native title" at para [666]. I further note the submission by the State of Western Australia on 14 April 2000 that "such a right cannot therefore be included on the Register of Native Title Claims and should be excluded from any application in which it is included in Schedule E".

In *Hayes v Northern Territory of Australia* [2000] FCA 671,Olney J held "the right to manage the spiritual forces and to safeguard the cultural knowledge associated with the land and waters of their respective estates within the determination area" in the formal determination made. However, this right differs slightly from that claimed in the present case.

I am of the view that I am bound by the decision of the Full Court in *State of Western Australia v Ward* [2000] FCA 191, and note that the right being claimed in this instance is precisely that right which their Honours found not to be a right in relation to land of the kind that can be the subject of a determination of native title. I therefore conclude, following the finding of their Honours, that this right it is not recognised under the common law of Australia.

As a result of these considerations I am *not* satisfied that this right can be prima facie established.

Conclusion

Section 190B(6) requires that I be satisfied that at least some of the claimed native title rights and interests can be established on a prima facie basis. I am satisfied that five of the ten listed native title rights and interests claimed in relation to those areas where s47, s47A and s47B is relied upon and areas where native title has never been extinguished can be prima facie established. In relation to the remaining areas, I am satisfied that all five of the native title rights and interests claimed can be prima facie established. The application meets the requirements of this section.

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

I am satisfied that the application meets the requirements of this section and set out my reasoning as follows:-

Reasons for the Decision

In applying this condition I have relied on the following:

- Affidavit of **[name of deponent A deleted]** sworn on 20 May 1999;
- Affidavit of **[name of deponent B deleted]** sworn on 20 May 1999;
- Affidavit of **[name of deponent C deleted]** sworn on 20 May 1999;
- Affidavit of **[name of deponent D deleted]** sworn on 20 May 1999, and
- Affidavit of **[name of deponent D deleted]** sworn on 22 October 1999

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

[Name of deponent D deleted] (20/05/99) speaks of being born and raised in his country, and continuing to live on his country in the present day. **[Text deleted to protect the confidentiality of affidavit information. In summary, deponent D describes having lived traditionally in the claim area, in accordance with the Law and customs taught to him by his predecessors, having inherited responsibility for the country, and continuing to observe, and to pass on these Laws and customs to his descendants in the present day]**.

Such information is sufficient to satisfy me that **[name of deponent D deleted]** has the requisite connection with the claim area to satisfy the requirements of this section. I note that on the basis of the information contained in the affidavits of **[names of deponents A, B and C deleted]** listed above, and referred to in relation to s.190B(5) and s.190B(6), I am satisfied that they too have a continuing traditional physical connection with the claim area.

The requirements of s.190B(7) are met.

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

I am satisfied that the application meets the requirements of this section and set out my reasoning as follows:-

Reasons for the Decision

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

S61A(1) – Native Title Determination
A search of the Native Title Register has revealed that there is no approved determination of native title in relation to the area claimed in this application. Therefore, the application complies with s.61A(1).

S61A(2) – Previous Exclusive Possession Acts
At Schedule B, paragraphs (a) and (b) of the application, the Applicants exclude areas in relation to which previous exclusive possession acts have been done by the State of Western Australia or the Commonwealth. Therefore, the application complies with s.61A(2).

S61A(3) – Previous Non-Exclusive Possession Acts
The exclusion clause at paragraph 2(c) of Schedule E of the application states that the applicants do not make a claim to exclusive native title rights and interests in relation to areas where a previous non-exclusive possession act has been done by either the State of Western Australia or the Commonwealth. Therefore, the application complies with s.61A(3).

S61A(4) – s47,s47A, s47B
The applicants claim the benefit of ss47, 47A and 47B at Schedules B and E, providing particulars at Schedule L of the application. Whether or not the applicants have provided sufficient information to bring any area of land and waters covered by the application within the ambit of sections 47, 47A and 47B is a matter to be settled in another forum. The outcome of such an inquiry is immaterial here, as I have already found that the application does not offend s.61A.

Conclusion
For the reasons set out above, I find that there has been compliance with s.61A. I am therefore satisfied that the requirements of s.190B(8) are met.

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

I am satisfied that the application meets the requirements of this section and set out my reasoning as follows:-

Reasons for the Decision

Schedule E, paragraph 2(a) of the application states that to*"[t]he extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the Applicants"*. I am therefore satisfied that the application meets the requirements of this section.

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;***

I am satisfied that the application meets the requirements of this section and set out my reasoning as follows:-

Reasons for the Decision

Schedule E, paragraph 2(b) of the application states that*"[t]o the extent that the native title rights and interests claimed may relate to waters in an offshore place, those rights and interests are not to the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under international law in relation to the whole or any part of the offshore place."* I am therefore satisfied that the application meets the requirements of this section.

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)).***

I am satisfied that the application meets the requirements of this section and set out my reasoning as follows:-

Reasons for the Decision

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

The application contains exclusion clauses at Schedules B and E that go beyond the exclusions required by other sections of the Act (already considered).

Schedule B paragraph (c) states that "*[t]he Applicants exclude from the claim area any areas in relation to which native title rights and interests have otherwise been extinguished. To avoid any uncertainty, the Applicants particularly exclude from the claim area:*

(i) any areas covered or previously covered by pastoral leases which are enclosed or improved where such enclosure or improvement extinguishes native title;

(ii) any area covered by a mining or general purpose lease granted under the Mining Act 1978 (WA) where such leases extinguish native title.

Schedule E, paragraph 2(d) states that *"[t]he said native title rights and interests are not claimed to the exclusion of any other rights and interests validly created by or pursuant to the common law, a law of the State or a law of the Commonwealth"*.

Schedule E, paragraph 2(e) states that *"[t]he Applicants acknowledge that the exercise of their native title rights and interests might be regulated, controlled, curtailed, restricted, suspended, or postponed by reason of the existence of valid concurrent rights and interests in others by or under such laws"*.

Schedule E, paragraph 2(f) states that *"[t]he Applicants do not claim the right to take fauna where it is otherwise extinguished"*.

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

Even if areas of the type prohibited by section 190B(9)(c) are located within the external boundary of the area of the amended application, such areas are excluded by virtue of the clauses contained in the application. I am therefore satisfied that the application meets the requirements of s.190B(9)(c).

End of Document