National Native Title Tribunal

Registration test decision

Application name	Nyiyaparli People
Name of applicant	David Stock, Gordon Yuline, Raymond Drage, Victor Parker and Billy Cadigan
State/territory/region	Western Australia
NNTT file no.	WC05/6
Federal Court of Australia file no.	WAD6280/1998
Date application made	29 January 1999
Date application last amended	10 June 2010

Name of delegate Susan Walsh

I have considered this claim for registration against each of the conditions contained in ss. 190B and 190C of the *Native Title Act 1993* (Cwlth).

For the reasons attached, I am satisfied that each of the conditions contained in ss. 190B and C are met. I accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

Date of decision: 11 August 2010

(to be signed by the delegate)

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Susan Walsh

Delegate of the Native Title Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D of the ***Native Title Act 1993*** (Cwlth) under an i**nstrument of delegation dated 2 August 2010 and made pursuant to s. 99 of the Act.**

Reasons for decision

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Introduction

This document sets out my reasons, as the delegate of the Native Title Registrar (the Registrar), for the decision to accept the Nyiyaparli claimant application (the application) for registration pursuant to s. 190A of the Act.

Note: All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cwlth) which I shall call 'the Act', as in force on the day this decision is made, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

Application overview

The following is a brief summary of some of the more important procedural events surrounding the application:

- Five 'polygon' native title claimant applications on behalf of the Niabali People and Jigalong community were lodged with the Registrar in the period between 1996 and 1998. The term 'polygon' denotes that these applications covered mineral tenement areas.
- On 29 September 1998 a native title claimant application (WAD6280/98) was lodged with the Registrar for the Nyiyaparli People. This was known as the Nyiyaparli 'country claim' because it covered the broad extent of country claimed by the Nyiyaparli People.
- All six applications were made before the *Native Title Amendment Act 1998* (Cwlth) commenced, which introduced the test for registration in s. 190A.
- On 15 September 1999, the Federal Court made an order combining the first five 'polygon' applications with the WAD6280/98 'country claim' application.
- The combined WAD6280/98 application underwent further amendment and was ultimately accepted for registration pursuant to s. 190A by a delegate of the Registrar on 22 April 1999.
- On 30 September 2005, the Federal Court again granted leave to amend the application and to combine it with The Nyiyaparli 2 People application (WAD241/05) which had been filed earlier on 1 September 2005 and covered a small strip of land not covered by the WAD6280/98 application. The newly combined application retained the Federal Court reference WAD6280/98 and was allocated a new Tribunal reference WC05/6.
- The application was thereafter considered and accepted for registration pursuant to s. 190A on 29 November 2005.
- On 11 May 2010, the Federal Court made orders pursuant to s. 66B for the replacement of the applicant (David Stock, Gordon Yuline, Raymond Drage, Victor Parker, Richard Yuline and Brian Samson) with a new applicant who comprised David Stock, Gordon Yuline, Raymond Drage, Victor Parker, Richard Yuline and Billy Cadigan.
- On 10 June 2010 the Federal Court made orders granting leave for the further replacement of the applicant (David Stock, Gordon Yuline, Raymond Drage, Victor Parker, Richard Yuline and Billy Cadigan) with a new applicant who comprised David Stock, Gordon Yuline, Raymond Drage, Victor Parker and Billy Cadigan and to further amend the application.

Most recent amendment of the application

The Federal Court gave a copy of the further amended application to the Registrar on 11 June 2010 thereby triggering the Registrar's duty to consider the claim in the amended application under s. 190A of the Act. The further amended application effects the following substantial changes to the claim:

- The native title claim group described in Schedule A has been amended to remove the descendants of [name deleted] and named Jigalong People from the native title claim group and to add an additional three Nyiyaparli apical ancestors from whom current members of the claim group descend.
- Schedule F has been replaced with a new general description of the factual basis for the assertion that the claimed native title exists and for the three particular assertions outlined in s. 62(2)(e).

As this is an amended application, it is first necessary to consider if either of ss. 190A(1A) or (6A) apply to my consideration of the application pursuant to s. 190A. For the following reasons, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim:

- The provisions of s. 190A(1A) do not apply as the granting leave of leave by the Federal Court to amend the application was not made pursuant to s. 87A, and thus the circumstance described in s. 190A(1A) does not arise.
- Section 190A(6A) does not apply because the effect of the amendment is to change both the native title claim group described in Schedule A and the general description of the factual basis in Schedule F, such that I am not satisfied that the only effect of the amendment is to do one or more of the things identified in s. 190A(6A)(i) to (v). I note that the amendments discussed in s. 190A(6A)(i) to (v) relate to reducing the area covered by the application, removing a right or interest from those claimed in the application, changing the representative body details and altering the applicant's address for service.

Registration test

Accordingly, the combined effect of ss. 190A(6) and (6B) is that I may only accept the claim for registration if it satisfies all of the conditions in 190B and 190C of the Act. This is commonly referred to as the 'registration test'. Section 190B sets out conditions that test particular merits of the claim for native title. Section 190C sets out conditions about 'procedural and other matters'. Included among the procedural conditions is a requirement that the application must contain certain specified information and documents. In my reasons below I consider the s. 190C requirements first, in order to assess whether the application contains the information and documents required by s. 190C *before* turning to questions regarding the merit of that material for the purposes of s. 190B.

Pursuant to ss. 190A(6) and (6B), the claim in the application must be accepted for registration because it does satisfy all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment A.

Information considered when making the decision

Subsection 190A(3) directs me to have regard to certain information when testing an application for registration; there is certain information that I *must* have regard to, but I *may* have regard to other information, as I consider appropriate.

I have considered the information in the amended application and the accompanying s. 62(1)(a) affidavits by the five persons comprising the applicant. I have also had regard to the documents contained in the Tribunal's WC05/06 case management/delegates files (reference 2010/00936). Where I have had particular regard to information in documents within that file, I have identified them in this statement of reasons. I have followed Court authority and have only considered the terms of the application itself in relation to the registration test conditions in s. 190C(2) and ss. 190B(2), (3) and (4) (see *Northern Territory v Doepel* (2003) 203 ALR 385; [2003] FCA 1384 (*Doepel*) at [16]).

I have *not* considered any information that may have been provided to the Tribunal in the course of the Tribunal:

- providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK, without the prior written consent of the person who provided the Tribunal with that information, either in relation to this claimant application or any other claimant application or any other type of application, as required of me under the Act.
- undertaking its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice' (see s. 136A of the Act). Further, mediation is private as between the parties and is also generally confidential (see also ss. 136E and 136F).

Procedural fairness

I have provided procedural fairness to the State of Western Australia by providing the State with a copy of the applicant's additional affidavit material provided directly to the Registrar to support registration of the application. I offered the State an opportunity to comment on the additional material or to make a submission before my decision. The State advised on 29 July 2010 that it would not be making a submission in relation to this matter.

Until recently, there was another native title determination application for a similarly described Nyiyaparli native title claim group which overlapped the area of the application before me. This is the Wunna Nyiyaparli (WAD25/2010) application. It appears that the Wunna Nyiyaparli application was commenced/authorised by the descendants of [name deleted] (or some of them). I note that the descendants of [name deleted] have been removed from the Nyiyaparli (WAD6280/98) application as a result of its most recent amendment.

The Wunna Nyiyaparli application was dismissed pursuant to s. 190F(6) by the Federal Court (Barker J) on 2 August 2010. On 2 August 2010, the Federal Court provided a copy of the consent orders made that day to the Registrar. This dismissal of the Wunna Nyiyaparli application pursuant to s. 190F(6) follows my decision on 30 March 2010 not to accept the Wunna Nyiyaparli application for registration and the notice thereafter provided to the Federal Court pursuant to s. 190D(3) of my opinion that the claim in the Wunna Nyiyaparli application does not satisfy all of

the conditions in s. 190B. These events triggered the potential for dismissal of the application pursuant to s. 190F(6), as has now occurred.

Apart from my decision not to accept the Wunna Nyiyaparli application for registration on 30 March 2010, there has been no communication between the Registrar/Tribunal and the persons who made the Wunna Nyiyaparli application in relation to the most recent amendment of the Nyiyaparli application and its scheduling for the registration test. I have decided that the descendants of [name deleted] who made or authorised the Wunna Nyiyaparli application are not entitled to procedural fairness before my decision. As I have noted, there has been no communication with the Wunna Nyiyaparli applicant such that there is no issue that actions taken by the Registrar could give rise to any legitimate expectation that procedural fairness would be afforded. According to Mansfield J in *Hazelbane v Doepel* (2008) 167 FCR 325; [2008] FCA 290 at [26] (*Hazelbane*):

> [Section] 66(6)(a) makes it plain that in the normal course a competing registered native title claimant is not entitled to be given the opportunity to be heard when the Registrar is considering whether to accept for registration a native title determination application over the same area of land. The mere fact of having standing to challenge the Registrar's decision does not mean that the Town of Batchelor No 1 applicants were entitled to the opportunity to make submissions to the Registrar and to present material to him when he was considering such a decision.

In my view, the circumstances outlined in *Hazelbane* similarly apply to the persons who made the Wunna Nyiyaparli application. I note also that s. 84(5) would appear to allow persons whose interests may be affected by a determination to seek the leave of the Court to be joined as a party to the proceedings.

Procedural and other conditions: s. 190C

Subsection 190C(2)
Information etc. required by ss. 61 and 62

> The Registrar/delegate 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 application **satisfies** the condition of s. 190C(2), because it **does** contain all of the details and other information and documents required by ss. 61 and 62, as set out in the reasons below.

In reaching my decision, I understand that the condition in s. 190C(2) is of a procedural kind and requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss. 61 and 62. Section 190C(2) does not require me to undertake any merit or qualitative assessment of the material for the purposes of s. 190C(2)—*Northern Territory of Australia v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16] and also at [35] to [39].

I turn to each of the various parts of ss. 61 and 62 which relevantly prescribe that the application must contain certain details and other information or that the application must be accompanied by any affidavit or other document:

Native title claim group: s. 61(1)

> The application must be made by a person or persons authorised by all of the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.

The application **contains** all details and other information required by s. 61(1).

Decision in Doepel

Mansfield J in *Doepel* characterised the task for the Registrar in relation to s. 190C(2), when considering the requirements of s. 61, as follows:

> Section 190C(2) directs attention to the contents of the application and the supporting affidavits. It seeks to ensure that the application contains 'all details' required by s 61. There is obviously good reason why that should be so. If the application did not contain the required information, for example as to the composition of the native title claim group, the subsequent determination of the application would be difficult. And the identity of those on whose behalf the claimants would enjoy procedural rights under subdiv P of Div 3 of Pt 2 of the NT Act upon registration of the claim would be unclear. It also ensures that the claim, on its face, is brought on behalf of all members of the native title claim group: see e.g. *Edward Landers*; Quall *v Native Title Registrar* [2003] FCA 145 (*Quall v NTR*)—at [35]
>
> In my judgment, s 190C(2) relevantly requires the Registrar to do no more than he did. That is to consider whether the application sets out the native title claim group in the terms required by s 61. That is one of the procedural requirements to be satisfied to secure registration: s 190A(6)(b). *If the description of the native title claim group were to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirement of s 190C(2) would not be met and the Registrar should not accept the claim for registration*. In *Edward Landers* at [33], on an application to dismiss an application for determination of native title I said:
>
> > `I have rejected the submission that the Edward Landers' application should be summarily dismissed because it is clear that it was not authorised by the Dieri People under s 251B of the NT Act. But, in my view, it also follows from the need for such authorisation that s 61(4) requires the application to be on behalf of the people who have authorised it. It does not permit the making of a claim by a native title determination application by a subgroup of the native title claim group, or the grant of native title to a subgroup of the real native title claim group: see Ward v State of Western Australia (1998) 159 ALR 483 at 541, Risk v National Native Title Tribunal [2000] FCA 1589 at [60], Tilmouth v Northern Territory of Australia [2001] FCA 820; (2001) 109 FCR 240. By excluding from the authorising group, namely the Dieri People, the 87 persons named as the applicant group (or even merely the Dieri Mitha group) in the Dieri Mitha application, that is what the Edward Landers' group has done. The smaller group, as expressed, is not the group of people who should exclusively enjoy the communal native title.'
>
> *It is not suggested that the face of the application in this matter raises such difficulties*. (*emphasis added*)—at [36]

Description of the native title claim group in the application before me

In light of the decision in *Doepel*, I have confined my consideration to the information contained in the application itself about the identity of the native title claim group. This is found in Schedule

A which identifies that the native title claim group are the descendants of nine apical ancestors. The text of Schedule A is replicated in my reasons below at s. 190B(3).

There is nothing on the face of the application before me to indicate a problem of the kind discussed by Mansfield J in *Doepel*. I have thus formed the view that the application contains the details required by s. 190C(2) in relation to s. 61(1).

For these reasons I am of the view that the requirements of s. 190C(2) in relation to s. 61(1) are met.

Name and address for service: s. 61(3)

> The application must state the name and address for service of the person who is, or persons who are, the applicant.

The application **contains** all details and other information required by s. 61(3). These are found on pp. 2 and 13 respectively.

Native title claim group named/described: s. 61(4)

> A native title determination application that persons in a native title claim group authorise the applicant to make must:
> (a) name the persons in the native title claim group, or
> (b) 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.

The application **contains** all details and other information required by s. 61(4).

I refer to my reasons above in relation to the details and other information required by s. 61(1). It follows in my view that the application contains the details required by the related provisions of s. 61(4). These details are found in Schedule A, as referred to in my reasons above. Whether or not I am satisfied that the description is sufficiently clear, so that it can be ascertained whether any particular person is a person in the native title claim group, is the task when considering the relevant merit condition of the registration test in subsection 190B(3)—see *Gudjala People # 2 v Native Title Registrar* [2007] FCA 1167 at [31] and [32] (*Gudjala 2007*).

Affidavits in prescribed form: s. 62(1)(a)

> The application must be accompanied by an affidavit sworn by the applicant:
> (i) that the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
> (ii) that the applicant believes that none of the area covered by the application is also covered by an entry in the National Native Title Register, and
> (iii) that the applicant believes all of the statements made in the application are true, and
> (iv) that the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and
> (v) stating the basis on which the applicant is authorised as mentioned in (iv).

The application **is accompanied** by the affidavit required by s. 62(1)(a).

Each of the five persons comprising the applicant has made an affidavit. I have been provided with copies of these affidavits as filed in the Federal Court on 31 May 2010. Each affidavit contains the statements required by subparagraphs (i) to (v) at [2] to [7] respectively.

Application contains details required by s. 62(2): s. 62(1)(b)

> The application must contain the details specified in s. 62(2).

The application **contains** all details and other information required by s. 62(1)(b).

The application does contain the details specified in ss. 62(2)(a) to (h), as identified in the reasons below.

Information about the boundaries of the area: s. 62(2)(a)

> The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:
> (i) the area covered by the application, and
> (ii) any areas within those boundaries that are not covered by the application.

The application **contains** all details and other information required by s. 62(2)(a).

This information is found in Schedule B (internal boundary description) and Attachment B (external boundary description).

Map of external boundaries of the area: s. 62(2)(b)

> The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

The application **contains** all details and other information required by s. 62(2)(b).

A map showing the external boundaries of the application area is found in attachment C.

Searches: s. 62(2)(c)

> The application must contain the 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 and waters in the area covered by the application.

The application **contains** all details and other information required by s. 62(2)(c).

A spreadsheet providing details and results of relevant searches is found in Attachment D.

Description of native title rights and interests: s. 62(2)(d)

> The application must contain a description of native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests), but not merely consisting 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 application **contains** all details and other information required by. 62(2)(d).

A description of the claimed native title rights and interests is found in Schedule E. It is does not merely consist of a statement to the effect that the native title rights and interests are all that may exist or have not been extinguished.

Description of factual basis: s. 62(2)(e)

The application must contain a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist, and in particular that:

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

(ii) there exist traditional laws and customs that give rise to the claimed native title, and

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

The application **contains** all details and other information required by s. 62(2)(e).

A general description of the factual basis is found in Schedule F of the application.

Activities: s. 62(2)(f)

If the native title claim group currently carries out any activities in relation to the area claimed, the application must contain details of those activities.

The application **contains** all details and other information required by s. 62(2)(f).

These details are found in Schedule G of the application.

Other applications: s. 62(2)(g)

The application must contain details of any other applications to the High Court, Federal Court or a recognised state/territory body of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application and that seek a determination of native title or of compensation in relation to native title.

The application **contains** all details and other information required by s. 62(2)(g).

The relevant details are found in Schedule H of the application.

Section 29 notices: s. 62(2)(h)

The application must contain details of any notices given under s. 29 (or under a corresponding provision of a law of a state or territory) of which the applicant is aware that relate to the whole or a part of the area covered by the application.

The application **contains** all details and other information required by s. 62(2)(h).

The relevant details are found in a spreadsheet in Attachment I of the application.

Subsection 190C(3)
No common claimants in previous overlapping applications

The Registrar/delegate 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) 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 the previous application being considered for registration under s. 190A.

The application **satisfies** the condition of s. 190C(3).

I have undertaken a search against the Tribunal's Geospatial mapping database and see that there is one application which overlaps the area of the current application being considered for registration. The one application which overlaps the current application is the Wunna Nyiyaparli application (WAD25/2010, WC10/1).

However, the Wunna Nyiyaparli application is not a 'previous' application in the sense required by subparagraphs 190C(3)(b) or (c) or at all. This is because the Wunna Nyiyaparli application was only made earlier this year when it was filed in the Federal Court on 8 February 2010. The current application was made well before this date and has been entered on the Register since 22 April 1999, when it was considered and accepted for registration pursuant to s. 190A.

Further, the Wunna Nyiyaparli application was considered for and not accepted for registration pursuant to s. 190A on 30 March 2010 and is therefore not on the Register of Native Title Claims.

As the Wunna Nyiyaparli application does not satisfy the criteria of an overlapping application that is previous or earlier in time to the application before me, as discussed in s. 190C(3), it is not necessary that I consider the issue of common members between the two applications.

Subsection 190C(4) Authorisation/certification

Under s. 190C(4) the Registrar/delegate must be satisfied that either:
(a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, 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.

Part 11:

Under s. 203BE(2) a representative body must not certify an application for a determination of native title unless it is of the opinion that:
(a) all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and
(b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

Under s. 203BE(4) a certification of an application for a determination of native title must:
(a) include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (2)(a) and (b) have been met; and
(b) briefly set out the body's reasons for being of that opinion; and
(c) where applicable, briefly set out what the representative body has done to meet the requirements of subsection (3).

For the reasons set out below, I am **satisfied** that the requirements of s. 190C(4)(a) are met.

Attachment R of the application contains two signed certifications of the application by the Yamatji Marlpa Aboriginal Corporation (YMAC) and the Central Desert Native Title Services Ltd (CDNTS) dated 20 May and 24 May 2010 respectively.

I understand that YMAC is a representative body that is recognised under s. 203AD and thus has the power under the Act to certify claimant applications.

CDNTS is not recognised under s. 203AD. It is my understanding however that CDNTS is funded pursuant to s. 203FE(1) to perform all of the functions of a representative body. Section 203FEA(1) provides that:

> A person or body to whom funding is made available under subsection 203FE(1) to perform a function in respect of a particular area has the same obligations and powers in relation to the performance of that function as a body recognised as the representative body for that area would have in relation to the performance of that function.

In light of the provisions of s. 203FEA(1), it is my view that CDNTS, as a body funded to perform all of the functions of a representative body pursuant to s. 203FE(1), is therefore empowered to certify the application pursuant to s. 203BE.

The Tribunal's geospatial report dated 30 June 2010 shows that the application area is covered by CDNTS and YMAC representative body areas respectively and that there are no other s. 203AD recognised bodies or s. 203FE funded bodies for the application area. Accordingly, CDNTS and YMAC are the only representative bodies that could certify the application under Part 11.

For the certifications to satisfy the requirements of s. 190C(4)(a) they must comply with the provisions of s. 203BE(4)(a) to (c). I am satisfied that they do so comply, for the reasons that follow:

- Pursuant to s. 203BE(4)(a) the certifications contain statements that satisfy s. 203BE(2), that is, CDNTS and YMAC respectively are of the opinion that the requirements of s. 203BE(2) have been met—each body certifies to their opinion that all persons in the native title claim group have authorised the applicant to make the application and deal with all matters in relation to it and that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.
- Pursuant to s. 203BE(4)(b), both certifications include brief reasons as to why each body holds these opinions. I note that s. 190C(4)(a) does not require me to 'look behind' these reasons or to question the merits of the representative body's certification. This reasoning is drawn from *Doepel* at [80] and [81], which was confirmed in *Wakaman People 2 v Native Title Registrar and Authorised Delegate* (2006) 155 FCR 107; [2006] FCA 1198 at [31] and [32].
- Pursuant to s. 203BE(4)(c):
  - CDNTS certification states that the representative body is aware of the overlapping Wunna Nyiyaparli application and has not made any reasonable efforts to achieve agreement or to minimise the number of applications and is relying on YMAC to deal with this matter;
  - YMAC certification states that YMAC staff are currently considering the overlapping Wunna Nyiyaparli native title application and will 'further advise the Nyiyaparli native title claim group in due course.'

- Section 203BE(4)(c) requires the representative body to, 'where applicable, briefly set out what the representative body has done to meet the requirements of s. 203BE(3)'. In my view, s. 203BE(4)(c) does not oblige the representative body to make the efforts discussed in s. 203BE(3) to achieve agreement between overlapping applications and to minimise the number of applications over a particular area. It simply requires the representative body to set out in a brief fashion what, if anything, has been done where there are overlapping applications of which the representative body is aware, as discussed in s. 203BE(3). In my view, the statements I have referred to above from each certification comply with s. 203BE(4)(c).

It follows that I am satisfied that the application has been certified pursuant to Part 11 because the certifications by YMAC and CDNTS comply with the relevant provisions of Part 11 at s. 203BE(4).

Merit conditions: s. 190B

Subsection 190B(2)
Identification of area subject to native title

> The Registrar must be satisfied that the information and map contained in the application as required by ss. 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 application **satisfies** the condition of s. 190B(2).

As I noted in my reasons above at s. 190C(2), the application complies with ss. 62(2)(a) and (b) as it contains a written description of the area covered (the external boundary) and areas not covered by the application (the internal boundaries) in Schedule B and Attachment B and a map showing the external boundary in Attachment C.

The written description of the external boundary (Attachment B) and the map showing the boundaries in Attachment C are, in my view, sufficiently and reasonably clear to locate the areas covered by the application on the earth's surface. There is a statement in Schedule B that the application specifically excludes any area of minor overlap with the Birriliburu native title application.

Paragraph 4 of Schedule B states that the application includes any area in relation to which the non-extinguishment principle applies, as defined in s. 238 of the Act, including any area to which ss. 47, 47A or 47B of the Act apply, including any such areas that are listed in Schedule L.

The written description in Attachment B describes the external boundary using geographic coordinates in decimal degrees referenced to GDA94 and also using topographic features. The references to the source of topographic features are also provided. The map in Attachment C depicts the application area with a bold outline and hachuring. The map contains details of underlying cadastral land tenure, rivers, scale bar, coordinate grid, locality map and source, currency and datum notes. The Tribunal's geospatial report dated 30 June 2010 expresses the opinion that the description and map are consistent and identify the application area with reasonable certainty.

Having regard to the comprehensive identification of the external boundary in Attachment B and the clarity of the mapping of this external boundary on the map in Attachment C, I am satisfied that the external boundaries of the application area have been described such that the location of it on the earth's surface can be identified with reasonable certainty.

A written description of the internal boundaries is also found in Schedule B. This is a generic description that excludes from the application any areas subject to a number of acts defined in the Act and in Western Australian legislation. It also excludes land covered by acts described in s. 23B of the Act. It also states that the application does not include areas where native title has otherwise been extinguished.

A generic or class formula to describe the internal boundaries of an application is acceptable if the applicant has only a limited state of knowledge about any particular areas that would fall within the generic description provided: see *Daniels & Ors v State of Western Australia* [1999] FCA 686. There is nothing in the information before me to the effect that the applicant is in possession of information such that a more comprehensive description of these areas would be required to meet the requirements of the section. In these circumstances, I find the written description of the internal boundaries is acceptable as it offers an objective mechanism to identify which areas fall within the categories described.

For these reasons, I am satisfied that the information and map in the application required by ss. 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 areas of land or waters and the requirements of s. 190B(2) are therefore met.

Subsection 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 application **satisfies** the condition of s. 190B(3).

Applicable limb of s. 190B(3)

I refer to my reasons above at s. 190C(2), in relation to s. 61(1), where I have reproduced the information in the application in relation to the identity of the persons in the native title claim group. The description of the native title claim group uses an 'apical ancestor model', where the members of the native title claim group are identified as the descendants of nine named apical ancestors. As the description does not name the persons in the native title claim group, it is therefore necessary to consider the application against the requirements in subparagraph 190B(3)(b).

Law in relation to the requirements of s. 190B(3)(b)

Section 190B(3)(b) requires me to be 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. In *Doepel*, Mansfield J stated that:

> The focus of s. 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group. Section 190B(3) has two alternatives. Either the persons in the native title claim group are named in the application: subs 3(a). Or they are described sufficiently clearly so it can be ascertained whether any particular person is in that group: subs (3)(b). Although subs (3)(b) does not expressly refer to the application itself, as a matter of construction, particularly having regard to subs (3)(a), it is intended to do so—at [51].

At [37] of *Doepel*, Mansfield J stated that the focus of s. 190B(3) is not 'upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of [*sic*] any particular person in the identified native title claim group can be ascertained'. I note that *Doepel* at [16] is authority that s. 190B(3) has requirements 'which do not appear to go beyond consideration of the terms of the application'. In other words, I should restrict my consideration to what is in the application and should not consider material extraneous to it.

A description that necessitates a further factual inquiry to ascertain whether a person is in the group may still be sufficient for the purposes of s. 190B(3). In *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 at [64] (*Western Australia v Native Title Registrar*), Carr J considered a claim group described as:

> 1.The biological descendants of the unions between certain named people;
> 2.Persons adopted by the named people and by the biological descendants of the named people; and
> 3.The biological descendants of the adopted people referred to in paragraph 2 above.

Carr J referred to this method of identification as the 'Three Rules' and stated he was satisfied that the application of these rules described the group sufficiently clearly, his reasoning being:

> The starting point is a particular person. It is then necessary to ask whether that particular person, as a matter of fact, sits within one or other of the three descriptions in the Three Rules. I think that the native title claim group is described sufficiently clearly. In some cases the application of the Three Rules may be easy. In other cases it may be more difficult. Much the same can be said about some of the categories of land which were used to exclude areas from the claim. *It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described.* But that does not mean that the group has not been described sufficiently. It is more likely to result from the effects of the passage of time and the movement of people from one place to another. The Act is clearly remedial in character and should be construed beneficially: *Kanak v National Native Title Tribunal* (1995) 61 FCR 103 at 124. In my opinion, the views expressed by French J in *Strickland* at para 55…in relation to definition of areas, apply equally to the issue of sufficient description of the native title group–at [67]. (*emphasis added)*

The reference by Carr J to what was said by French J in *Strickland v Native Title Registrar* (1999) 168 ALR 242; [1999] FCA 1530 at [55] was that:

> The Act is to be construed in a way that renders it workable in the advancement of its main objects as set out in s 3, which include providing for the recognition and protection of native

> title. The requirements of the registration test are stringent. It is not necessary to elevate them to the impossible. As to their practical application to a particular case, subject to the constraints imposed by the law, that is a matter for the Registrar and his delegates and not for the Court.

My consideration of the description against the requirements of s. 190B(3)

Schedule A of the application contains the following description of the persons in the native title claim group:

> The persons who comprise the Nyiyaparli People's native title claim group are those persons who are the descendants of the Nyiyaparli apical ancestors listed below:
> (i) Mintaramunya;
> (i) Pitjirrpangu;
> (iii) Yirkanpangu (Jesse);
> (iv) Kitjiempa (Molly);
> (v) Mapa (Rosie);
> (vi) Billy Martin Moses;
> (vii) Parnkahanha;
> (viii) Wirlpangunha (Rabbity-Bung); and
> (ix) Wuruwurunha.

The description does require a further factual inquiry to establish if any particular person is in the group due to the requirement that a person claiming membership must show that they are a descendant of one or more of the apical ancestors. However, it is my view that the description is clearly within the bounds of the 'Three Rules' test discussed above by Carr J—I am provided with a starting point, that is, the names of the apical ancestors, and from there it is possible, with a further factual inquiry, to work out who is descended from such persons. It follows that I am satisfied that the native title claim group has been described sufficiently clearly so that it can be ascertained whether any particular person is in the group.

Subsection 190B(4)
Native title rights and interests identifiable

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

The application **satisfies** the condition of s. 190B(4).

My view is that for a description to meet the requirements of s. 190B(4), it must describe what is claimed in a clear and easily understood manner: *Doepel* at [91] and [92], [95], [98] to [101], [123].

The description of the claimed native title rights and interests is in Schedule E and is in the following terms:

> The native title rights and interests claimed in this Application are subject to and exercisable in accordance with:
> 1. the common law, the laws of the State of Western Australia and the Commonwealth of Australia;

2. valid interests conferred under those laws; and
3. the body of traditional laws and customs of the Aboriginal society under which rights and interests are possessed and by which *(sic)* native title claim group have a connection to the area of land and waters the subject of this Application.
4. In accordance with sub section 61A(3) of the Act, the Applicant does not make claim to native title rights and interests which confer possession, occupation, use and enjoyment to the exclusion of others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in section 23F of the Act, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in section 23I in relation to that act;
5. In accordance with sub section 61A (4), paragraph 3 above is subject to such of the provisions of section 47B of the Act as apply to any part of the area in this application.

The said native title rights are not claimed to the exclusion of any other rights or interests validly created by or pursuant to the Common Law, a Law of the State or a Law of the Commonwealth.

Rights in Area A

The Applicant claims the following listed native title rights and interests relating to exclusive possession in relation to Area A only.

1. The right to possess, occupy, use and enjoy the area as against the whole world;
2. A right to occupy the area;
3. A right to use the area;
4. A right to enjoy the area;
5. A right to make decisions about the use of the area by persons who are not members of the Aboriginal society to which the native title claim group belong;
6. A right to control access of others to the area;
7. A right to control access of others to the area except such person as may be exercising a right accorded by the common law, statute law of the Commonwealth or the State of Western Australia or a lawful grant by the British sovereign or its successor; and
8. A right to control the taking, use and enjoyment by others of the resources of the area.

Rights in Areas A and C

The Applicant claims the following listed native title rights and interests in relation to Areas A and C, but not Area B:

9. A right to hunt in the area;
10. A right to fish in the area;
11. A right to take fauna; and
12. A right to take traditional resources, other than minerals and petroleum from the area.

Rights in Areas A, B and C

The Applicant claims the following listed native title rights and interests in relation to Areas A, B and C:

13. A right to be present on or within the area;
14. A right to make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;
15. A right to invite and permit others to have access to and participate in or carry out activities in the area;
16. A right of access to the area;
17. A right to live within the area;
18. A right to erect shelters upon or within the area;
19. A right to camp upon or within the area;
20. A right to move about the area;

21. A right to engage in cultural activities within the area;
22. A right to conduct and participate in ceremonies and meetings within the area;
23. A right to visit, care for and maintain places of importance and protect them from physical harm;
24. A right to take flora (including timber);
25. A right to take soil;
26. A right to take sand;
27. A right to take stone and/or flint;
28. A right to take clay;
29. A right to take gravel;
30. A right to take ochre;
31. A right to take water;
32. A right to manufacture traditional items from the resources of the area;
33. A right to trade in the resources of the area; and
34. A right to maintain, conserve and protect significant places and objects located within the area.

I find the description of the native title rights and interests claimed to be all clear and understandable. I am therefore satisfied that the description is sufficient to allow the native title rights and interests claimed to be readily identified for the purposes of s. 190B(4).

Subsection 190B(5)
Factual basis for claimed native title

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

The application **satisfies** the condition of s. 190B(5) because the factual basis provided is **sufficeint** to support each of the particularised assertions in s. 190B(5), as set out in my reasons below.

Law in relation to the requirements of s. 190B(5)

The Registrar is not confined to the information contained in the application when considering the requirements of this section: *Strickland v Native Title Registrar* (1999) 168 ALR 242; [1999] FCA 1530 at [62] (*Strickland*); approved on appeal by the Full Court in *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 at [88]–[89]; *Martin v Native Title Registrar* [2001] FCA 16 at [23] (French J); *Queensland v Hutchison* (2001) 108 FCR 575; [2001] FCA 416 at [25] and *Doepel* at [16].

The Full Court in *Gudjala People #2 v Native Title Registrar* (2008) FCR 317; [2008] FCAFC 157 (*Gudjala FC*) observed at [90] to [92] that there is a correlation between the requirements of ss. 62(2)(e) and 190B(5) in that s. 62 prescribes the information to be contained in an application in relation to the factual basis and s. 190A provides for an assessment by the Registrar of that

information, with a view to determining whether it should be accepted for registration. The Full Court concluded at [90] that the statutory scheme in ss. 62 and 190A contemplates that an application and accompanying affidavit which 'fully and comprehensively' addressed all the matters in s. 62, could 'provide sufficient information to enable the Registrar to be satisfied about all matters referred to in s. 190B'.

Gudjala FC allowed an appeal against the decision of Dowsett J in *Gudjala 2007* that the Gudjala application did not satisfy the requirements of s. 190B(5) on the basis that Dowsett J 'applied to his consideration of the application a more onerous standard than the NTA requires'—at [7]. The matter was remitted back to Dowsett J who reconsidered the application against the conditions in ss. 190B(5), (6) and (7) in *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 on 23 December 2009 (*Gudjala 2009*).

I am not, as the Registrar's delegate, to 'test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts'—*Doepel* at [17]. Although I am required 'to address the quality of the asserted factual basis', I must assume that what is asserted is true, and assuming it is true, the task is whether I am satisfied that 'the asserted facts can support the claimed conclusions'—*Doepel* at [17]. This assessment of the task at s. 190B(5) from *Doepel* was approved in *Gudjala FC* at [83] to [85].

The Full Court also said at *Gudjala FC* [92] that a general description of the factual basis under s. 62(2)(e), provided it is 'in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and [is] something more than assertions at a high level of generality' could, when read with the applicant's affidavit swearing to the truth of the matters in the application, satisfy the Registrar in relation to the corresponding merit condition in s. 190B(5).

I refer also the following comments from *Gudjala FC*:

- providing a sufficient factual basis does not require the applicant to 'provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim'—at [92].
- the applicant is 'not required to provide evidence that proves directly or by inference the facts necessary to establish the claim'—at [92]. The Full Court indicated at [93] that if the Registrar were to approach the material provided in relation to the factual basis 'on the basis that it should be evaluated as if it was evidence furnished in support of the claim', that would be erroneous.

Following *Doepel* and *Gudjala FC*, I therefore do not evaluate the factual basis materials that are before me as if they were evidence furnished in support of the claim, nor do I criticise or refuse to accept what is stated in the application and the additional information in relation to the factual basis, apart from its sufficiency to fully and comprehensively address the relevant matters in s. 190B(5). My assessment of the material is limited to whether the asserted facts can support the claimed conclusions set out in subparagraphs (a) to (c) of s. 190B(5).

In *Gudjala FC* at [68] to [72] and [77], the Full Court considered the analysis by Dowsett J in *Gudjala 2007* as to what must be addressed when providing a suffucient factual basis for the assertions in s. 190B(5). There is nothing in the reasons to indicate that the Full Court considered

Dowsett J to have erred in this respect. It is therefore my view that in assessing whether the asserted facts are sufficient to support the assertions in s. 190B(5)(a) to (c), I must consider the decision in *Gudjala 2007* where it was not expressly criticised by the Full Court. I am of the view that I must consider how the assertions in s. 190B(5) interact with the definition in s. 223 of the expression 'native title rights and interests' and the related case law. I am of the view that the most recent *Gudjala 2009* decision does not appear to detract or depart from the general principles enunciated in either of the *Gudjala 2007* decision or the *Gudjala FC* decision as to the requirements of s. 190B(5).

Finally, in relation to how I approach the task, I note that *Doepel* is authority that I should analyse 'the information available to address, and make findings about, the particular matters to which s. 190B(5) refers'—at [130]. I refer also to the comments of Mansfield J at [132] that it is correct for the Registrar to focus primarily upon the particular requirements of s. 190B(5), as this is the way in which the Act draws the Registrar's attention to the task at hand. If the factual basis supports the three assertions in subparagraphs (a) to (c), then the requirements of the section overall are likely to be met. I therefore address the three assertions before concluding whether overall the requirements of the section are met.

Factual basis provided by the applicant

Schedule F of the application contains the following general description of the factual basis for the assertion that the claimed native title rights and interests exist:

> The native title rights and interests claimed in this Application exist on the basis that the Nyiyaparli people have, and the predecessors of the Nyiyaparli people had, an association with the area; that there exist traditional laws and customs which give rise to the claimed native title; and that the native title claim group has continued to hold native title in accordance with their traditional laws and customs, as supported by the following facts:
>
> 1. Since prior to the acquisition of sovereignty, the Nyiyaparli people have had, and continue to have, a system of traditional laws and customs which they continue to acknowledge and observe. It was these Nyiyaparli traditional laws and customs that governed the Nyiyaparli people and the claim area at sovereignty and continue to the present day.
> 2. The Nyiyaparli traditional laws and customs are believed to have been put in place by the ancestral beings (Mangunpa) when the world was created, as laws binding on the Nyiyaparli peole and governing Nyiyaparli country.
> 3. The laws from the Mangunpa govern what Nyiyaparli people can and cannot do in Nyiyaparli country. They govern the exercise of the rights and interests in the claim area and who can exercise them, including such rights as those claimed in this application, from prior to sovereignty to the present day. The laws set down rules for the Nyiyaparli ownership and responsibility for the Nyiyparli country, and rules for people to follow for matters such as ceremonies and rituals, sections or skin groups, avoidance and marriage and the preparation and consumption of food. Under these laws and customs, it is the Nyiyaparli people who hold the rights and interests in the claim area and have responsibilities to it.
> 4. The laws and customs of the Mangunpa connect the Nyiyaparli people to their country. Many important places to the Nyiyaparli people were made by the spirit people during the Mangunpa, and these carry stories and songs which have been passed down. The laws of the Mangunpa tell the Nyiyaparli people who can learn the stories and sing the songs which are associated with these important places.

5. These laws and customs were observed by the Nyiyaparli people at the time sovereignty was asserted and their descendants and successors are the Nyiyaparlia people today. These laws and customs have been acknowledged and observed and had a substantially continuous existence and vitality since prior to sovereignty. They were taught to the Nyiyaparli people of today by their elders, and they in turn have passed it on to their children. The Nyiyaparli people continue to follow and teach their children these ways and to exercise the rights and interests claimed in the claim area today.
6. Under the Nyiyaparli traditional laws and customs, Nyiyaparli people must be descended from a Nyiyaparli person. The Nyiyaparli ancestors named in Schedule A are the ancestors of the Nyiyaparli people today. Those ancestors are in turn descended from Nyiyaparli people who, along with other Nyiyaparli people at the time who may not have any Nyiyaparli descendants today, formed part of the Nyiyaparli society at the time of sovereignty. In this way, the Nyiyaparli people today believe, and their laws and customs provide, that they are descendants of Nyiyaparli people who belonged to Nyiyaparli country when it was created in the Mangunpa time.
7. Under the traditional laws and customs of the Nyiyaparli people, the area claimed in this application is, and has been since prior to sovereignty, the traditional country of the Nyiyaparli people.

Schedule A identifies that the persons in the native title claim group are the descendants of the nine Nyiyaparli apical ancestors named in Schedule A.

Schedule G states that:

> The members of the native title claim group currently carry out the following activities in relation to the land and waters:
> (i) hunting, gathering and fishing;
> (ii) moving about, living, residing, erecting shelters and camping;
> (iii) conducting and engaging in cultural activities, ceremonies, rituals, meetings and teaching of, maintaining, conserving and protecting the significant and physical attributes of the area and places, works and objects within the area; and
> (iv) taking resources from the area, including fauna, flora, soil, sand, stone, flint, clay, gravel, ochre, water for use and consumption for food, shelter, healing, decoration, cultural, religious, ceremonial and ritual purposes and for manufacture and trade of objects, materials and goods, in the form of tools, weapons, clothing, shelter and decoration.

Each of the five persons comprising the applicant has sworn to the truth of these statements from the application in their accompanying s. 62(1)(a) affidavits, which were filed on 31 May 2010.

The applicant has also provided additional information to support the requirements of this condition directly to the Registrar, in the form of three affidavits from [name deleted] and [name deleted] (two of the persons comprising the applicant) dated 18 April 2002, 9 August 2005 and 18 March 2010.

In his affidavit dated 18 March 2010, [name deleted] states:

1. My Aboriginal name is [name deleted]. My skin name is [name deleted]. I am a senior elder and lawman of the Nyiyaparli people. I am an applicant on the Nyiyaparli native title claim WAD6280 of 1998 ("the Nyiyaparli claim"). I was born out bush at Roy Hill Station which is in the Nyiyaparli claim area. I speak the Nyiyaparli language well. I have sworn two other affidavits for the registration test before. . .

2. Nyiyaparli people are the people who hold rights in Nyiyaparli claim area under our Nyiyaparli traditional laws and customs. I have been taught by the Nyiyaparli elders that all of the area we have claimed in the Nyiyaparli claim has been our Nyiyaparli country since it was created.
3. The laws and customs of the Nyiyaparli people have all been set down by the Mangunpa when the world was created, like what other people call the dreamtime. Desert people call it Jukurrpa. The Mangunpa put the law in the Nyiyaparli country. Nyiyaparli people have been taught the laws from the Mangunpa by their elders and have passed it to their children. This was from long before whitefellas came to our country. Nyiyaparli people have always been taught to follow these laws and still follow them today.
4. These Mangunpa laws tell us what we can do on our country and rules about who can do it and how we do it. These laws put down rules for our ceremonies when boys become men. The Mangunpa laws also tell us such things as our skin groups, who we can marry and who we must stay away from. There are also laws about how we prepare and cook tucker and about times when certain people cannot eat some animals. The sorts of things I talked about in my earlier affidavits are the types of things our ancestors have done in Nyiyaparli country from the beginning and are set out in our laws. We still follow and teach our children these ways.
5. Many important places in Nyiyaparli country were made by old spirit people called the Mangunpa. There are stories about these that have been passed down. I also know and can sing songs about such things. Who can learn which stories and songs also depends on the laws about them. Some things can only be learned when you have gone right through the Law. We have always been taught that we must look after these places and respect them. I visit Nyiyaparli country often and check to make sure that such places are fine.
6. There is the milurra or snake who lives in permanent pools. He made those waters and can make people sick and can make wind and rain. Nyiyaparli people have to respect and blow water and cry out to greet the milurra when they come to those pools. We have to call out to them in Nyiyaparli language. We were taught this by the old Nyiyaparli people and we teach it to our kids.
7. Nyiyaparli people have to be descended from a Nyiyaparli person. The Nyiyaparli ancestors we have named in the papers for our claim are the names of the ancestors of Nyiyaparli people today. They all come from families of the Nyiyaparli people who were the people belonging to Nyiyaparli country from when that country was created in the Mangunpa time. This is what we have been taught.
8. My grandfather [name deleted] is one of the ancestors for the Nyiyaparli people. [Name deleted] was a Nyiyaparli man. My mother and other old people told me about him. He was named after a place called [name deleted] in the Nyiyaparli claim area at Mount Newman. That is now a special place for me. It was handed to me though *(sic)* my mother [name deleted] who was [name deleted] daughter. She was a Nyiyaparli woman and taught me many things about Nyiyaparli country.
9. Though I have special places, I am also connected with all of Nyiyaparli country and can travel around to other places because I am Nyiyaparli.
10. I have heard of the other people listed as Nyiyaparli ancestors . . . I have heard about most of them from other old Nyiyaparli people. Some of those named ancestors who are men have names which are names of places in Nyiyaparli country.

[Name deleted] continues his affidavit discussing each of the other eight apical ancestors named in Schedule A, including the names of Nyiyaparli persons descended from such ancestors and, in some cases, the location of their special places or places of origin within Nyiyaparli country.

An affidavit dated 18 March 2010 in similar terms has also been provided by the applicant [name deleted]. [Name deleted] identifies in [8] of his affidavit that his Nyiyaparli apical ancestor is his great-grandmother [name deleted]. It is [name deleted] evidence that he comes from a long line of Nyiyaparli people, including his mother's mother, [name deleted] and his mother, [name deleted] . He states that there are many other Nyiyaparli people descended from [name deleted]. In [9] of his affidavits he states that one of his mother's and grandmother's special areas is [name deleted], near Capricorn in the Nyiyaparli claim area. He states that this is also his special country as it was passed to him and his family by his mother. He states at [10] that although he has special places, he is also connected with all of Nyiyaparli country and can travel around to other places because he is Nyiyaparli. [Name deleted] then continues his affidavit by providing details about the other eight apical ancestors named in Schedule A, including the names of Nyiyaparli persons descended from such ancestors and, in some cases, the location of their special places or places of origin within Nyiyaparli country.

Reasons for s. 190B(5)(a)

I am **satisfied** that the factual basis provided is sufficient to support the assertion in s. 190B(5)(a), that the native title claim group have, and the predecessors of those persons had, an association with the area.

I understand from comments by Dowsett J in *Gudjala 2007* that a sufficient factual basis for this assertion needs to address that:

- the claim group as a whole presently has an association with the area, although it is not a requirement that all members must have such an association at all times;
- there has been an association between the predecessors of the whole group over the period since sovereignty—at [52].

This analysis of what the factual basis materials must support was not criticised by the Full Court in *Gudjala FC*—see [69] and also at [96].

There is a wealth of information about the association that the native title claim group presently has with the application area, and that of their predecessors, in the two affidavits provided by [name deleted] and [name deleted] and I am satisfied that a sufficient factual basis has been provided to support the assertion in s. 190B(5)(a).

Reasons for s. 190B(5)(b)

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by 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.

The language of the assertion in subparagraph s. 190B(5)(b) nearly mirrors that found in s. 223(1)(a). In my view, the factual basis must be sufficient to support an assertion that the claimed native title rights and interests find their source in 'traditional' laws and customs. My usage of inverted commas around the word 'traditional' highlights that its meaning in s. 223(1)(a) is central to an understanding of whether native title rights and interests exist in relation to an area of land or waters. I understand that the legislature intends that the expression 'traditional' in relation to the meaning of native title rights and interests is used uniformly throughout the Act.

Accordingly in my view the factual basis provided by an applicant must pay attention to the High Court's decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; (2002) 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*) and in Full Court decisions since as to what is meant by rights and interests being possessed under 'traditional' laws and customs. This was the view taken by Dowsett J in *Gudjala 2007* which was not criticised by the Full Court who noted that one question, among others, which needs to be addressed in the factual basis materials is whether 'there was, in 1850–1860, an indigenous society in the area, observing identifiable laws and customs'—*Gudjala FC* at [96]. I refer also to the most recent consideration by Dowsett J in *Gudjala 2009* at [19] to [21] setting out the findings in *Yorta Yorta* at [45] to [47], [50] and [186] as to the meaning of 'traditional' laws and customs, in the context of s. 223(1).

The following is a brief synopsis of the legal principles which have developed around the requirement in s. 223(1)(a) that native title rights and interests must be possessed under 'traditional' laws and customs:

- For laws and customs to be 'traditional', they must derive from a body of norms or normative system that existed before sovereignty and which has had a substantially continuous existence and vitality since sovereignty.
- A society is a body of people united in their acknowledgment and observance of laws and customs with normative content.
- The acknowledgment and observance of the laws and customs of the pre-sovereignty normative system must have continued 'substantially uninterrupted' in each generation from sovereignty until the present time.
- It is this continuity in the acknowledgment/observance of traditional laws and customs, rather than continuity of a society, which must inform the inquiry as to whether the native title is possessed under 'traditional' laws and customs.
- Change or adaptation of traditional law and custom may be acceptable; however, the trial court needs to carefully consider whether it points to a cessation or substantial interruption of the normative system, such that the laws and customs currently acknowledged and observed are no longer traditional; i.e. they are not the laws and customs of the normative system at sovereignty.[1]

Having regard to the authorities, it is my view that the factual basis provided by an applicant to support the assertion in s. 190B(5)(b) needs to address the requirement that the traditional laws and customs giving rise to the claim to native title rights and interests have their origin in a pre-sovereignty normative system with a substantially continuous existence and vitality since sovereignty. I note that Dowsett J was of the view in *Gudjala 2007* that the factual basis materials for this assertion must address:

- That the laws and customs currently observed have their source in a pre-sovereignty society and have been observed since that time by a continuing society—at [63].

[1] The special meaning of the word 'traditional' in s. 223(1) was first considered by the High Court in *Yorta Yorta*. What is required under s. 223(1) has been considered in numerous decisions since, including the Full Court decisions of *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; [2005] FCAFC 135 (*Alyawarr FC*) and *Bodney v Bennell* (2008) 167 FCR 84; [2008] FCAFC 63 (*Bennell FC*). This synopsis is drawn from *Yorta Yorta HC*, *Alyawarr FC* and *Bennell FC*.

- That there existed at the time of European settlement a society of people living according to a system of identifiable laws and customs, having a normative content—at [65] and see also at [66] and [81].
- That the link between the claim group described in the application and the area covered by the application is explained, which process, in the case of a claim group defined using an apical ancestry model, may involve 'identifying some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage', although the apical ancestors need not themselves have comprised a society—at [66] and [81].

This aspect of Dowsett J's decision was not criticised by the Full Court—see *Gudjala FC* at [71], [72] and [96]. In this latter passage the Full Court said that one question that must be addressed is whether 'there was, in 1850–1860, an indigenous society in the area, observing identifiable laws and customs'.

In my view, Schedule F provides a concise and cogent description of the factual basis for this particular assertion.

It is the applicant's case that the native title claim group have had, since before sovereignty and continue to have, a system of traditional laws and customs which they continue to acknowledge and observe. Central to this is a belief that their traditional laws and customs have been put in place by the ancestral beings (Mangunpa) when the world was created, as laws binding on the Nyiyaparli People and governing Nyiyaparli country. These laws govern what they can and cannot do on Nyiyaparli country. They govern the exercise of rights and interests and who can exercise them. They set down rules for Nyiyaparli ownership and responsibility for country and rules for matters such as ceremonies and rituals, sections or skin groups, avoidance and marriage, and the preparation and consumption of food. Under these laws and customs it is the Nyiyaparli People who hold the rights and interests in the claim area and have responsibilities for it.

The applicant states that these laws and customs were observed by the Nyiyaparli People at sovereignty and have been acknowledged and observed, and had a substantially continuous existence and vitality since sovereignty. It is the applicant's case that Nyiyaparli laws and customs were taught to the Nyiyaparli People of today by their elders, and they in turn have passed it on to their children. The Nyiyaparli People continue to follow and teach their children these ways and to exercise the rights and interests claimed in the area covered by the application today.

The applicant claims that under the Nyiyaparli traditional laws and customs, Nyiyaparli People must be descended from a Nyiyaparli person. The Nyiyaparli ancestors named in Schedule A are the ancestors of the Nyiyaparli People today, and they in turn, are descended from Nyiyaparli People who, along with other Nyiyaparli People at the time who may not have any Nyiyaparli descendants today, formed part of the Nyiyaparli society at the time of sovereignty. In this way, the Nyiyaparli People today believe, and their laws and customs provide, that they are descendants of the Nyiyaparli People who belonged to Nyiyaparli country when it was created in the Mangunpa time.

[Name deleted] and [name deleted] have provided affidavits to further support the factual basis described in Schedule F. Both men state that they are senior elders and lawmen of the Nyiyaparli People. They eloquently describe allegiance to and observance of the Nyiyaparli traditional laws and customs, including Nyiyaparli belief in the Mangunpa and how it tells them what they can

do on their country. They describe how these laws and customs govern their relationship with their country and with other members of their Nyiyaparli society. They describe a rich ceremonial life, including rules about who can do what and where it is done, ceremonies for when boys become men, skin groups, marriage, and who they must stay away from. They tell of laws about how food is to be prepared and what is allowed to be eaten. They say that these are 'things our ancestors have done in Nyiyaparli country from the beginning and are set out in our laws. We still follow and teach our children these ways.'[2] They say that 'this was from long before whitefellas came to our country, Nyiyaparli People have always been taught to follow these laws and still follow them today.'[3]

Both [name deleted] and [name deleted] have made two other affidavits describing their lifelong connection with Nyiyaparli country and their traditional laws and customs.

In their latest affidavits they each describe descent from an apical ancestor identified in Schedule A. They tell how they were handed their ancestor's special places and that these are now their special places. They provide information about the other seven apical ancestors, including where they are from in the application area and the identity of their descendants.

In my view, the affidavit material cogently describes the existence of traditional laws and customs acknowledged and observed by the native title claim group, in a substantially uninterrupted manner since sovereignty, with a strong emphasis on inter-generational transmission of traditional law and custom from the apical ancestors named in Schedule A, all of whom are said to be from areas covered by the application and who have descendants that currently form part of the native title claim group. The evidence from [name deleted] and [name deleted] is that they have a strong and abiding connection with their Nyiyaparli identity and Nyiyaparli country and that this is sourced in their allegiance to and observance of Nyiyaparli traditional laws and customs that have been passed to them from their Nyiyaparli ancestors. Central to this is the belief in the Mangunpa, the old spirit people who created the law about Nyiyaparli country and which has been passed to them from their ancestors, as they now pass on to their own children.

Based on the material before me, I am satisfied that the factual basis is sufficient to support an assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claimed rights and interests.

Reasons for s. 190B(5)(c)

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(c), that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

I take the view that the assertion in subparagraph (c) is also referrable to the second element of what is meant by the term 'traditional laws and customs' in *Yorta Yorta*, namely, that the native title claim group have continued to hold their native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way: see *Yorta Yorta* at [47] and also at [87].

[2] [Name deleted], 18 March 2010, [4]; [Name deleted], 18 March 2010, [4].
[3] [Name deleted], 18 March 2010, [3]; [Name deleted], 18 March 2010, [3].

Gudjala 2007 indicates that this particular assertion may require the following kinds of information:

- that there was a society that existed at sovereignty that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed to the current claim group;
- that there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement—at [82].

The Full Court in *Gudjala FC* at [96] appears to agree that the factual basis must identify the existence of an Indigenous society observing identifiable laws and customs at the time of European settlement in the application area.

The information in the application at Schedules A, F and G and the affidavits by [name deleted] and [name deleted], discussed above, identifies that the society at sovereignty was the Nyiyaparli People and that the application area falls within the traditional territory of that pre-sovereignty society. The affidavits provide examples of how the native title claim group have continued to observe and acknowledge traditional laws and customs.

Having regard to all of these materials, examples of which I have referred to above, I am of the view that there is a sufficient factual basis for the assertion that the native title claim group has continued to hold the claimed native title by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way.

Conclusion

To conclude, the application **satisfies** the condition of s. 190B(5) overall because I am satisfied that the factual basis is sufficient to support each of the three particular assertions in s. 190B(5), as set out in my reasons above.

Subsection 190B(6)
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 application **satisfies** the condition of s. 190B(6). The claimed native title rights and interests that I consider can be prima facie established are identified in my reasons below.

Registrar's task at s. 190B(6)

I note the following comments by Mansfield J in *Doepel* in relation to the Registrar's consideration of the application at s. 190B(6):

> Section 190B(6) requires some measure of the material available in support of the claim—at [126].
> On the other hand, s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s 190B(6)—at [127].
> [Section] 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed—at [132].

Following *Doepel*, it is my view that I must carefully examine the asserted factual basis provided for the assertion that the claimed native title rights and interests exist against each individual right and interest claimed in the application to determine if I consider, prima facie, that they:

- exist under traditional law and custom in relation to any of the land or waters under claim;
- are native title rights and interests *in relation to land or waters* (see chapeau to s. 223(1)); and
- have not been extinguished over the whole of the application area.

I elaborate below on these three points:

1. *Right exists under traditional law and custom in relation to any of the land or waters under claim*

It is my view that the definition of 'native title rights and interests' in s. 223(1) and relevant case law must guide my consideration of whether, prima facie, an individual right and interest can be established. I refer to my discussion at s. 190B(5) above in relation to the authority provided by *Yorta Yorta* as to what it means for rights and interests to be possessed under the ***traditional*** laws acknowledged by, and the ***traditional*** customs observed by, the native title claim group (my emphasis).

It is not my role to resolve whether the asserted factual basis will be made out at trial. The task is to consider whether there is any probative factual material which supports the existence of each individual right and interest, noting that as long as some can be prima facie established the requirements of the section will be met. Only those rights and interests I consider, prima facie, can be established will be entered on the Register pursuant to s. 186(1)(g). An element of that task requires me to consider whether there is some material which supports the existence prima facie of the claimed rights and interests under the ***traditional*** laws and customs acknowledged by, and observed by, the native title claim group.

2. *Right is a native title right and interest in relation to land or waters*

It is my view that s. 190B(6) requires that I consider whether a claimed right can in fact amount to a 'native title right and interest' as defined in s. 223(1) and settled by case law, most notably *Ward HC,* that a 'native title right and interest' must be 'in relation to land or waters'. In my view, any rights that clearly fall outside the scope of the definition of 'native title rights and interests ' in s. 223(1) cannot be established, prima facie.

3. *Right has not been extinguished over the whole of the application area*

I note there is now much settled law relating to extinguishment which, in my view, I do need to consider when examining each individual right. For example, if there is evidence that the application area is or was entirely covered by a pastoral lease, I could not (unless ss. 47–47B applies) consider exclusive rights and interests to be prima facie established, having regard to a number of definitive cases relating to the extinguishing effect of pastoral leases on exclusive native title, starting with *Western Australia v Ward* (2002) 213 CLR 1 [2002] HCA 28 (*Ward HC*).

Considering the claimed native title rights and interests

With these principles in mind I will consider the native title rights and interests described in Schedule E. To assist the reader, I identify at the outset whether or not I consider that, prima facie, the claimed right or rights can be established. I have grouped together those rights where similar issues arise or similar factual information is provided to support that they can be established, prima facie.

Rights in Area A*

The Applicant claims the following listed native title rights and interests relating to exclusive possession in relation to Area A only.

1. The right to possess, occupy, use and enjoy the area as against the whole world;
2. A right to occupy the area;
3. A right to use the area;
4. A right to enjoy the area;
5. A right to make decisions about the use of the area by persons who are not members of the Aboriginal society to which the native title claim group belong;
6. A right to control access of others to the area;
7. A right to control access of others to the area except such person as may be exercising a right accorded by the common law, statute law of the Commonwealth or the State of Western Australia or a lawful grant by the British sovereign or its successor; and
8. A right to control the taking, use and enjoyment by others of the resources of the area.

*Area A is defined in the application to mean:

land and waters within the Application area that are landward of the high water mark and which comprise:

(i) areas of unallocated Crown land (including islands) that have not been previously subject to any grant by the Crown;
(ii) areas to which s. 47 applies;
(iii) areas to which s. 47A applies;
(iv) areas to which s. 47B applies;
(v) other areas to which the non-extinguishment principle, set out in s. 238 of the Act, applies and in relation to which to *(sic)* there has not been any prior extinguishment of native title.

Outcome: I consider all of these rights to be prima facie established.

I use the shorthand 'exclusive right' when discussing these rights. *Ward HC* is authority that the exclusive rights are potentially available to be prima facie established in relation to areas where there has been no previous extinguishment of native title or where extinguishment is to be disregarded as a result of the NTA. I note that the applicant takes account of extinguishment issues by only claiming these rights where there has been no extinguishment or any extinguishment must be disregarded. Ward HC states that:

> [A] core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'. It is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to posses [*sic*], occupy, use and enjoy land to the exclusion of all others—at [88].

Sampi v State of Western Australia [2005] FCA 777 states:

> [T]he right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation—at [1072].

More recently, the Full Court in *Griffiths v Northern Territory* (2007) 243 ALR 7 (*Griffiths FC*) reviewed the case law about what was needed to prove the existence of exclusive native title in any given case and found that it was wrong for the trial judge to have approached the question of exclusivity with common law concepts of usufructuary or proprietary rights in mind:

> [T]he question whether the native title rights of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usufructuary or proprietary. It depends rather on consideration of what the evidence discloses about their content under traditional law and custom. It is not a necessary condition of the existence of a right of exclusive use and occupation that the evidence discloses rights and interests that "rise significantly above the level of usufructuary rights"—at [71] (emphasis added).

Griffiths FC indicates at [127] that what is required to prove the exclusive rights is to show how, under traditional law and custom, being those laws and customs derived from a pre-sovereignty society and with a continued vitality since then, the group may effectively 'exclude from their country people not of their community', including by way of 'spiritual sanction visited upon unauthorised entry' and as the 'gatekeepers for the purpose of preventing harm and avoiding injury to country'. The Full Court stressed at [127] that:

> [It is also] important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people (emphasis added).

I examined the information provided by the applicant in relation to the asserted factual basis for the claim in my reasons at s. 190B(5) and decided that a sufficient factual basis was provided for the assertion that the claimed native title rights and interests exist and for the particular assertions therein, including, pertinently to the inquiry at s. 190B(6), that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claim to native title rights and interests.

A review of that same material indicates to me that, prima facie, the exclusive right is shown to exist under traditional law and custom over those areas where it has not been extinguished or where any extinguishment must be disregarded. I refer to the following information which in my view prima facie supports the existence of the exclusive rights:

- Schedule F states that the laws from the Mangunpa govern what Nyiyaparli People can and cannot do in Nyiyaparli country. They govern the exercise of the rights and interests in the claim area and who can exercise them. They set down rules for Nyiyaparli ownership and responsibility for country. Under these laws and customs it is the Nyiyaparli People who hold the rights and interests in the claim area and have responsibilities to it. Under their laws and customs the area claimed is the traditional country of the Nyiyaparli People.
- [Name deleted] and [name deleted] state in their affidavits that:
- Mangunpa laws tell us what we can do on our country and rules about who can do it and how we do it—[name deleted] and [name deleted], 18 March 2010, [3].
- We have always been taught that we must look after [important places made by old spirit people] and respect them. We visit Nyiyaparli country often and check to make sure that such places are fine—[name deleted] and [name deleted], 18 March 2010, [5].
- Though I have special places, I am also connected with all of Nyiyaparli country and can travel to other places because I am Nyiyaparli—[name deleted], 18 March 2010, [9]; [name deleted], 18 March 2010 [10].
- My old people told me that if you go into someone elses *[sic]* country then you must follow the leader of that country. He will show you where to go so you will be safe. So

when a stranger wants to come to my country they should ask me and then I would take the lead for them to make sure they will be alright. This is tradition that we respect and pass on today—[name deleted], 18 April 2002, [13]

- If someone wants to come into Nyiyaparli country then they should talk to the right people. They would have to talk to the Nyiyaparli elders. We do not like it if somebody goes into our area without our permission. Mining companies or anyone has to enter my country and Nyiyaparli country the right way—[name deleted], 18 April 2002, [20].
- The elders who live at the Jigalong community do not have to ask permission to hunt in Nyiyaparli country. The Nyiyaparli elders asked the people at Jigalong to look after Nyiyaparli country in the area where the Jigalong community is. They look after the country well, so they are free to move about that country. We have given them this permission—[name deleted], 18 April 2002, [21].
- I can live on my family's country if I want. No one can stop me. If someone else wanted to they would talk to me first and ask—[name deleted], 9 August 2005, [2].
- My country is around the Ethel Creek, Roy Hill Sylvania area. I can make decisions about that area, such as who can go into that area. If someone wants to go into that area they need to ask for my permission first. I have responsibility for looking after the many cultural sites within this area—[name deleted], 18 April 2002, [8].

To conclude, and having regard to all of this information, I am satisfied that, prima facie, the exclusive rights can be established.

> **Rights in Areas A and C***
> The Applicant claims the following listed native title rights and interests in relation to Areas A and C, but not Area B:
>
> 9. A right to hunt in the area;
> 10. A right to fish in the area;
> 11. A right to take fauna; and
> 12. A right to take traditional resources, other than minerals and petroleum from the area.
>
> *Area C is defined in the application to mean land and waters within the application area that is not included in Areas A and B above.

Outcome: I consider all of these rights to be prima facie established.

There is a wealth of information from [name deleted] and [name deleted] in which they describe hunting, fishing, foraging and using the resources of their country, pursuant to the traditional laws and customs which have been passed to them and which they pass to their children under the Mangunpa laws which govern their relationship with their Nyiyaparli country.

> **Rights in Areas A, B* and C**
> The Applicant claims the following listed native title rights and interests in relation to Areas A, B and C:
>
> 13. A right to be present on or within the area;
> 14. A right to make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;
> ~~15. A right to invite and permit others to have access to and participate in or carry out activities in the area;~~
> 16. A right of access to the area;
> 17. A right to live within the area;

18. A right to erect shelters upon or within the area;
19. A right to camp upon or within the area;
20. A right to move about the area;
21. A right to engage in cultural activities within the area;
22. A right to conduct and participate in ceremonies and meetings within the area;
23. A right to visit, care for and maintain places of importance and protect them from physical harm;
24. A right to take flora (including timber);
25. A right to take soil;
26. A right to take sand;
27. A right to take stone and/or flint;
28. A right to take clay;
29. A right to take gravel;
30. A right to take ochre;
31. A right to take water;
32. A right to manufacture traditional items from the resources of the area;
33. A right to trade in the resources of the area; and
34. A right to maintain, conserve and protect significant places and objects located within the area.

*Area B is defined in the application to mean land and waters which are a "nature reserve" or "wildlife sanctuary" (as those terms are defined in the *Wildlife Conservation Act 1950* (WA)) created before 31 October 1975.

Outcome: I consider all of these rights to be prima facie established. I rely again on the very affidavits from [name deleted] and [name deleted] which speak eloquently and extensively about the existence of these rights and interests under Nyiyaparli traditional laws and customs.

Rights in Areas A

15. A right to invite and permit others to have access to and participate in or carry out activities in the area

Outcome: I consider that this right is prima facie established over Area A and refer to the material considered by me above in relation to the rights specifically claimed over that area. However, it is my view that this right cannot be prima facie established over Areas B and C due to its controlling or exclusive nature. In this regard I note that Areas B and C indicate that there may have been extinguishment of rights of an exclusive nature, having regard to the definitions that have been provided of Areas A, B and C.

Conclusion

As I consider that, prima facie, all but one of the claimed native title rights and interests can be established, the requirements of this section are met.

Subsection 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 be expected to currently 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 the 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 a holder of a lease.

The application **satisfies** the condition of s. 190B(7).

I have taken the phrase 'traditional physical connection' to mean a physical connection in accordance with the particular traditional laws and customs relevant to the claim group—'traditional' in the *Yorta Yorta* sense. I note also that at [29.19] of the explanatory memorandum to the *Native Title Amendment Act 1998*, it is explained that the connection described in s. 190B(7) 'must amount to more than a transitory access or intermittent non-native title access'.

In my view, the affidavits from [name deleted] and [name deleted], recounted in my reasons at ss. 190B(5) and s. 190B(6), provides satisfactory evidence of the requisite traditional physical connection.

These men clearly belong to the native title claim group. They describe their deep and abiding connection with their Nyiyaparli country pursuant to their law, the Mangunpa, and how this regulates their relationship with country and what they can and cannot do there. They tell of these things being passed to them from their Nyiyaparli ancestors and passing this to their own children. They know the special places on their country and its stories and songs. There are places on their country that have special significance and they do what their law tells them when visiting these places.

On the basis of the extensive affidavits from [name deleted] and [name deleted], I am satisfied that they are members of the native title claim group and that they currently have, or previously had, a traditional physical connection with the land and waters covered by the application.

Subsection 190B(8)
No failure to comply with s. 61A

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s.61A (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.

Section 61A provides:
(1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.
(2) If :
(a) a previous exclusive possession act (see s. 23B) was done, and
(b) either:
    (i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a state or territory and a law of the state or territory has made provision as mentioned in s. 23E in relation to the act;

a claimant application must not be made that covers any of the area.

(3) If:

(a) a previous non-exclusive possession act (see s. 23F) was done, and

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a state or territory and a law of the state or territory has made provision as mentioned in s. 23I in relation to the act;

a claimant application must not be made in which any of the native title rights and interests confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.

(4) However, subsection(2) and (3) does not apply if:

(a) the only previous exclusive possession act or previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and

(b) the application states that ss. 47, 47A or 47B, as the case may be, applies to it

The application **satisfies** the condition of s. 190B(8). I explain this in the reasons that follow by looking at each part of s. 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

Reasons for s. 61A(1)

Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title.

In my view the application **does not** offend the provisions of s. 61A(1). I note that a search of the application area against the National Native Title Register reveals that no part of it is covered by an approved determination of native title.

Reasons for s. 61A(2)

Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply.

In my view the application **does not** offend the provisions of s. 61A(2). Any areas over which there is a PEPA and in respect of which ss. 47, 47A or 47B do not allow extinguishment to be disregarded, have been excluded from the application area: see paragraph 2 of Schedule B.

Reasons for s. 61A(3)

Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, unless the circumstances described in s. 61A(4) apply.

In my view the application **does not** offend the provisions of s. 61A(3). Schedule E expressly states in paragraph 4 that there is no claim to native title rights and interests which confer possession, occupation, use and enjoyment to the exclusion of others over areas subject to valid previous non-exclusive possession acts.

Subsection 190B(9)
No extinguishment etc. of claimed native title

The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:

(a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or

(b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or

(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 ss. 47, 47A or 47B.

The application **satisfies** the condition of s. 190B(9), because it **meets** all of the three subconditions, as set out in the reasons below.

The application **satisfies** the subcondition of s. 190B(9)(a). Schedule Q states that the application does not make any claim for ownership of minerals, petroleum or gas wholly owned by the Crown.

The application **satisfies** the subcondition of s. 190B(9)(b). The application is located inland of the coastline and does not extend to offshore places.

The application **satisfies** the subcondition of s. 190B(9)(c). Paragraph 3 of Schedule B identifies that the application excludes land or waters where the native title rights and interests have otherwise been wholly extinguished.

[End of reasons]

Attachment A
Summary of registration test result

Application name	**Nyiyaparli People**
NNTT file no.	**WC05/6**
Federal Court of Australia file no.	**WAD6280/98**
Date of registration test decision	**11 August 2010**

Test condition	Subcondition/requirement	Result
s. 190C(2)		**MET**
s. 190C(3)		**MET**
s. 190C(4)		**MET**
	s. 190C(4)(a)	**MET**
	s. 190C(4)(b)	**NA**
s. 190B(2)		**MET**
s. 190B(3)		**MET**
	s. 190B(3)(a)	**NA**
	s. 190B(3)(b)	**MET**
s. 190B(4)		**MET**
s. 190B(5)		**MET**
s. 190B(6)		**MET**
s. 190B(7)(a) or (b)		**MET**
s. 190B(8)		**MET**
s. 190B(9)		**MET**

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