NATIONAL NATIVE TITLE TRIBUNAL

RECONSIDERATION OF CLAIM

Section 190E *Native Title Act 1993* (Cth)

Application Name:	**Widi Mob**
NNTT file no:	**WC97/72**
Federal Court of Australia file no:	**WAD6193/98**
Tribunal:	**Deputy President John Sosso**
Place:	**Brisbane**
Date:	**4 May 2010**

Legislation *Native Title Act 1993* (Cth) ss. 61, 62, 123, 186, 190, 190A, 190B, 190C, 190E, 190F, 223

Native Title Amendment Act 2007 – Schedule 2

Cases *Bolton v Western Australia* [2004] FCA 760

Cadbury UK Ltd v Registrar of Trade Marks [2008] FCA 1126

Dieri People v South Australia (2003) 127 FCR 364

Eringa, Eringa No 2, Wangkangurru/Yarluyandi and Irrwanyere Mt Dare Native Title Claim Groups v South Australia [2008] FCA 1370

General Medical Council v Spackman [1943] AC 627

Griffiths v Northern Territory (2007) 165 FCR 391

Gudjala People No 2 v Native Title Registrar (2008) 171 FCR 317

Gudjala People #2 v Native Title Registrar [2009] FCA 1572

Hazelbane v Doepel (2008) 167 FCR 325

Jango v Northern Territory [2006] FCA 318

Joan Margaret Martin/Michael John Marsh; Susan Deconinck WO97/368 [1998] NNTTA 248 (6 October 1998) Member Wilson

Joan Martin/An Feng Kingstream Steel Ltd WO97/446 [1998] NNTTA 249 (6 October 1998) Member Wilson

Kiora v West (1985) 159 CLR 550

Landers v South Australia (2003) 128 FCR 495

Lawson v Minister for Lands and Water Conservation [2002] FCA 1517

Martin v Native Title Registrar [2001] FCA 16

Martin v Western Australia [2001] FCA 16

Martin v Western Australia [2008] FCA 1677

Martin (deceased) v Western Australia (No. 2) [2009] FCA 635

Minister for Immigration v Eshetu (1999) 197 CLR 611

Northern Territory v Alyawarr (2005) 145 FCR 442

Northern Territory v Doepel (2003) 133 FCR 112

Northern Territory v Lane (1995) 59 FCR 332

Powder Family v Registrar, Native Title Tribunal [1999] FCA 913

Quall v Native Title Registrar (2003) 126 FCR 512

Queensland v Hutchinson (2001) 108 FCR 575

Risk v National Native Title Tribunal [2000] FCA 1589

Wakaman People No 2 v Native Title Registrar (2006) 155 FCR 107

Watson v Native Title Registrar (2008) 168 FCR 187

Western Australia v Native Title Registrar (1999) 95 FCR 93

Western Australia v Strickland (2000) 99 FCR 33

Western Australia v Ward (2002) 213 CLR 1

Wharton v Kooma [2003] FCA 790

Wulgurukaba People #1 v Queensland [2002] FCA 1555

Introduction

[1] On 16 December 2009 Susan Walsh, Delegate of the Native Title Registrar, gave notice, pursuant to s.190D(1) of the *Native Title Act 1993* (Cth) ('the Act') of her decision not to accept the Widi Mob native title determination application ('the Widi Mob') for registration pursuant to s.190A of the Act.

[2] On 27 January 2010 Mr. Paul Marsh, the legal representative of the Applicant of the Widi Mob applied, pursuant to s.190E of the Act, for reconsideration of the claim. Such application must, pursuant to s.190E(2), be in writing, be made within 42 days after the s.190D(1) notice is given and state the basis on which the reconsideration is sought.

[3] It will be noted that the 42 day time period commences *after* the notice is given. Therefore, when calculating the 42 days, the first day is the day after the notice is given and not the day of such notice. In this case the application was received within the statutory time period.

[4] Mr. Marsh sets out a number of grounds for seeking the reconsideration. Each of those grounds will be dealt with hereunder. However, for present purposes, I note that the requirement prescribed by s.190E(2)(c) that the application must state the basis for the reconsideration has been met.

[5] An applicant may not seek reconsideration either if an application has already been made to the Federal Court under s.190F(1) for review or if there has been a previous reconsideration request (s.190E(3) and (4)). Neither of these circumstances is present, and as such, the Tribunal is empowered to reconsider the claim.

[6] The reconsideration must be conducted by a single member of the Tribunal – s.190E(5). On 2 March 2010 the President of the Tribunal directed that I be the member to conduct the reconsideration – s.123(1)(cb).

[7] It will be noted that s.190E(1) provides that the applicant may apply to the Tribunal "*to reconsider the claim".* The Member undertaking the reconsideration is not evaluating the decision of the Delegate, but is required to independently assess the claim against the relevant statutory conditions. Nonetheless when seeking a reconsideration the applicant must, pursuant to s.190E(2)(c), state the basis on which the reconsideration is sought. It necessarily follows that a Member undertaking a reconsideration should have regard to the applicant's stated basis for seeking a reconsideration. In doing so a Member will, where appropriate, have regard to the decision of the Delegate. This will be the case if there are elements of that decision which are not contested and with which the Member is in agreement. Furthermore in paying due attention to the basis of the reconsideration, where this involves suggested errors in the reasoning or findings of a Delegate, then it is appropriate that the Member address those issues when making his or her own decision.

[8] It is on this basis that I have had regard to the decision of the Delegate. I have not approached this exercise on the basis that I am reconsidering her Decision, but have referred to

her reasons extensively in order to ensure that the applicant's stated basis for seeking reconsideration is fully addressed.

Background to the Widi Mob native title determination application

[9] The Widi Mob application is of some antiquity. It was first lodged with the Registrar, and entered onto the Register of Native Title Claims on 26 August 1997. Subsequent to the enactment of the 1998 amendments, the Federal Court gave leave for the application to be amended on three occasions between 1999 and 2000: 24 February 1999, 26 August 1999 and 14 January 2000.

[10] The application underwent the registration test on two occasions during this period: 2 May 1999 (with a corrigendum issued on 4 May 1999) and 4 July 2000. On neither occasion was it accepted for registration.

[11] In the first instance the applicant unsuccessfully appealed to the Federal Court – *Martin v Native Title Registrar* [2001] FCA 16. The first Delegate concluded that the application did not meet the registration test conditions in s.190C(4) (authorisation) and s.190B(5) (factual basis). With the exception of one respect relating to the sufficiency of the affidavit in relation to authorisation, French J found no basis for setting aside the decision.

[12] The second registration test was triggered by the amendment of the application on 14 January 2000. The second Delegate again decided that the application not be accepted for registration, although the basis was slightly different than the first registration test decision.

[13] The Widi Mob application was, therefore, removed from the Register, and it has again been the subject of the registration test because of the requirements imposed by the *Native Title Amendment Act 2007* – Schedule 2 Item 90.

[14] The relevant provision of the amending Act commenced on 15 April 2007 and the Widi Mob application was again registration tested, with the Delegate deciding on 24 August 2007 that it not be accepted for registration because it did not satisfy the following conditions: ss.190C(4), 190B(5) and 190B(6).

[15] Consequently, pursuant to s.190F (6), the Federal Court considered whether to dismiss the application.

[16] On 6 October 2008 [Name deleted], the then applicant, passed away.

[17] In *Martin v Western Australia* [2008] FCA 1677 Justice McKerracher was presented with a number of submissions by Mr. Marsh as to why the application should not be dismissed. Those

submissions are set out at [22] of His Honour's judgment. McKerracher J handed down his judgment on 13 November 2008 and decided not to dismiss the application. His Honour provided the following reasons (at [35] – [37]):

> *"On the basis of the history, I am satisfied for the purposes of s 190F(6) of the NTA that the application has not been amended since it was considered by the Delegate. There is no evidence or indication that the application is likely to be amended in a way that would lead to any different conclusion by the Registrar.*
>
> *However, I cannot conclude that 'there is no other reason why the application should not be dismissed'. The Court has now been informed that the applicant has passed away. [Name deleted] has indicated that it is proposed to seek to substitute a replacement applicant but at this stage he has not received further instructions on the matter.*
>
> *I would be disposed to allow a limited time for this to occur. In light of the particular history concerning this application and the fact that the applicant could lodge a fresh application even if this application were dismissed, I would impose reasonably strict time limits for the future conduct of this application."*

[18] By notices of motion filed on 1 May 2009, orders were sought from the Court to replace the deceased applicant with seven named persons and to amend the claimant application. As to the amendments, of particular significance was the amendment of Schedule A, by adding the following words:

> *"provided that any person who is within the description contained in Section 190C(3) of the Native Title Act 1993 (As Amended) whether specifically named in this Schedule or a descendant of a person named in this Schedule is excluded from those persons on whose behalf the claim is brought."*

[19] The notices were opposed by the Badimia native title claimants and the Yamatji Marlpa Aboriginal Corporation (YMAC) (the fourth respondents).

The basis of the opposition was:

(a) the application was not properly authorised by the claimant group;

(b) the claim would be made by a subgroup of a larger community, thereby offending s.61(1); and

(c) the identification of the claimant group in the proposed amendments failed to identify with appropriate certainty the members of the claimant group.

[20] Barker J in *Martin (deceased) v Western Australia (No. 2)* [2009] FCA 635 allowed the applications to replace the deceased applicant and to amend the claimant application.

On the authorisation point, Barker J said (at [76]):

> *"For example, if the original claim group in the claimant application were described as groups 'A plus B' and the evidence discloses that only the 'A' group has authorised an application to replace the current applicant, then the requirements of s.66B(1)(b) are not met. Similarly, if group A makes a claim to vindicate the native title rights and interests held by groups A and B, without having the authority of both groups, then the*

requirements of s 66B(1)(b) are not met. This simply involves an application of the principles to which the above authorities relate."

[21] His Honour had previously set out relevant principles from a number of cases, but, in particular, *Bolton v Western Australia* [2004] FCA 760 and *Landers v South Australia* (2003) 128 FCR 495.

[22] Barker J rejected the argument that the application was not properly authorised. He found that the claim group as "originally" described in the claimant application lodged by the deceased applicant, were identified with reasonable precision, reasonably notified and had the opportunity to participate meaningfully at the authorisation meeting. His Honour also found that the meeting was properly run, with those present having had explained to them the importance and significance of the authorisation. Those present properly determined to adopt a majority voting decision making process. Moreover, His Honour also rejected the contention that the Widi Mob are a subgroup of a larger group. He concluded as follows (at [80]):

"I am therefore quite satisfied that on a plain reading and proper understanding of the evidence before me, this is not a case where some group constituted differently from the claim group described in the original claimant application have authorised the making of the application to replace the deceased current applicant. Nor is it a case where some smaller group purports to vindicate the native title rights and interests of some larger group, of which they are a part, without the larger group's authority. Rather the claim group as described in the claimant application, focused on the relevant issues, provided the relevant authorisation to the proposed applicants to pursue the native title rights and interests they, and they alone claim."

[23] Barker J also dealt with the other proposed amendments. Apart from those to Schedule A set out earlier, various amendments were proposed to Schedules E, F, G, M, O and R.

[24] The fourth respondents submitted firstly that, in effect, the applicants were claiming as a subgroup in respect of, or on behalf of, a wider "Widi Mob" than themselves. It was therefore submitted, on the authority of *Landers v South Australia* (2003) 128 FCR 495 and *Dieri People v South Australia* (2003) 127 FCR 364, that the proposed amended application was defective. In rejecting that submission His Honour said (at [99] – [100]):

"*In my view, the construction or interpretation, placed by the fourth respondents on the proposed amendments of the claimant application, are not correct. As I read the claimant application and the proposed amendments to it, as briefly described above, the reference to the 'Widi Mob' is merely a reference to the claim group and not to any wider group. The expression 'Widi Mob' is therefore simply a convenient way in which the claim group refers to itself and itself alone. The applicants do not purport to be a subgroup of some larger group, and the material currently before the Court does not suggest they are.*

In those circumstances there is no question, as was the case in Dieri People on the material before the Court, that the proposed application is put forward on behalf of some other, larger group, who have not, as a larger group, authorised the making of the amended application."

[25] The second submission of the fourth respondents was that the proposed amended application lacked certainty in that it was not clear who fell within the claim group as described in the amended Schedule A.

[26] His Honour, when dealing with the proviso to Schedule A previously quoted, pointed out (at [106]) that it did not identify by name particular individuals who would fall within Schedule A, but rather those who would be excluded by operation of the proviso. This was not, in His Honour's opinion a material concern. His Honour explained as follows ([108] – [110]):

> *"In the circumstances, the inclusion of the proviso to Sch A of this application is reasonably seen to be a provision that makes it clear that the applicants do not intend to include as a member of the claim group, any person who was a member of the native title claim group for any previous application, if (a), (b) (c) of s 190C(3) apply. In that sense the proviso is a clarifying and incidental provision.*
>
> *In circumstances such as these I do not consider that it is necessary for the applicants to undertake a task that the Registrar may be required later to perform for the purposes of registration, in order to definitively identify every person who is not included within the claim group.*
>
> *What is of key importance in a case such as this, is that the claim group has been defined with sufficient particularity. This is not a case where the claim group is described by reference to the descendents of some long ago apical ancestor. Rather, it is a case where named living (or recently deceased) persons and their biological descendents constitute the claim group. The exception is in respect of any persons who may fall within the description of persons to whom s 190C of the Act applies. In my view, there is no uncertainty about the description of the claim group in the proposed amended claimant application."*

Claim Group Description

[27] The Widi Mob application is stated to be brought on behalf of 25 named persons and their biological descendants: [Names deleted]

[28] However as stated, the application was amended in 2009 to add a proviso to this list. Any person falling within the description contained in s.190C(3) is excluded from the claim group.

Registration Test General Principles

[29] The Registrar is required, pursuant to s.190A(1), to consider any claimant applications made pursuant to ss.63 or 64(4), subject to the proviso outlined in s.190A(1A). If such application complies with the conditions prescribed by ss.190B and 190C the Registrar *must* register the claim on the Register of Native Title Claims – s.190A(6). In other words, *all* of the conditions prescribed by these sections must be complied with as there is no discretion vested in the Registrar to accept a claim if only a majority of the requirements of these provisions are met – per Mansfield J *Quall v Native Title Registrar* (2003) 126 FCR 512 at 518/[17].

[30] When considering a claim, the Registrar *must* have regard to information contained in the application and, where permitted, in any other documents provided by the Applicant, any

information obtained by the Registrar when searching registers of interests maintained by a government and any information provided by a government that is relevant to the matters outlined in ss.190B or 190C – s.190A(3). Importantly, the Registrar, may, in addition, "*have regard to such other information as he or she considers appropriate.*"

[31] So far as the issue of procedural fairness is concerned, the general principle was summed up by Mansfield J in *Hazelbane v Doepel* (2008) 167 FCR 325 (at 332/[25]) as follows: "*When a statute confers a power on a public officer, the exercise of which may affect a third person's rights or interests, that person is entitled to procedural fairness until the entitlement is excluded by express terms or by any necessary implication..The way in which procedural fairness should be provided in any particular circumstance depends upon the nature of the decision of the statutory framework in which it is made.*" In this context, the Registrar is under a duty to accord procedural fairness to the relevant State or Territory – *Western Australia v Native Title Registrar* (1999) 95 FCR 93 (at 103 - 104/[37]), but cf. *Wotjobaluk People v Victoria* [1999] FCA 961, but not, in the normal course, to a competing native title claimant - *Hazelbane v Doepel* at 332/[26].

[32] The Registrar, or her delegate, has a relatively broad discretion to consider additional material where the relevant statutory condition allows it. Starting with the decision of O'Loughlin J in *Risk v National Native Title Tribunal* [2000] FCA 1589 at [24] - [25], the Federal Court has emphasised both the correctness of considering a broader range of material than that specifically prescribed in s.190A(3) but also the risk that the Registrar (or her delegate) could be in breach of her statutory obligations if she ignored such material.

[33] The decision whether to accept or not accept an application for registration is a purely administrative function, the decision depending on whether the application satisfies the statutory criteria prescribed by ss.190B and 190C. – see *Powder Family v Registrar, Native Title Tribunal* [1999] FCA 913 at [26] – [27] per Kiefel J.

[34] In addition, to quote Mansfield J in *Doepel* (at 119/[16]):

> *"the Tribunal's task is defined by those provisions* (i.e. ss. 190A – 190C). *Its task is clearly not one of finding in all respects the real facts on the balance of probabilities, or on some other basis. Its role is not to supplant the role of the court when adjudicating upon the application for determination of native title, or generally to undertake a preliminary hearing of the application."*

[35] The final preliminary matter is the extent to which a Delegate (or member on reconsideration) is bound to adopt a previous decision of a Judge on the same issue. In this matter there is the recent decision of Justice Barker set out earlier.

[36] In one sense the answer to this is very clear. Any administrative tribunal is bound by a finding of law that is relevant to the matters before the decision maker. A Delegate does not

operate in a vacuum, and it would be highly unusual, and generally inappropriate, for an administrative decision maker not to adopt findings of both fact and law by a Judge of the Federal Court which are of direct relevance to the task at hand.

[37] However, just as a Delegate does not operate in a vacuum, neither can a Delegate avoid the statutory responsibility cast upon him or her by adopting a finding by the Court without due regard to the material at hand. A Delegate cannot abdicate responsibility in such a manner.

[38] So much was decided by the House of Lords in *General Medical Council v Spackman* [1943] AC 627 and more recently by Finkelstein J in *Cadbury UK Ltd v Registrar of Trade Marks* [2008] FCA 1126. In the latter case His Honour said (at [19]):

> *"Of course, when the tribunal is required to decide the matter for itself it is entitled to have regard to the judge's findings. What weight it attaches to those findings will depend on a variety of considerations. Without in any way wishing to be exhaustive, the considerations can include (a) whether the tribunal has available to it more evidence than was before the judge; (b) whether the arguments put to the tribunal were made to the judge; and (c) whether the tribunal is a specialist body with expert knowledge of the subject matter."*

[39] A Delegate would be at error not to properly consider the material submitted and obtained. A Delegate cannot avoid providing procedural fairness to persons or weighing the material against the statutory conditions, simply because there have been judicial findings. As Finkelstein J points out, much will depend on the nature of the evidence and submissions put to the decision maker, and, in the context of registration test decisions, the different statutory provisions that must be addressed.

[40] In this matter I place considerable weight on the findings of Barker J to the extent they are relevant to the task I am undertaking, but I do not regard those findings as being determinative of the issues I have to deal with.

Information forming the basis of the Reconsideration

[41] When undertaking a reconsideration, the Member is required to have regard to any information to which the Registrar was required to have regard pursuant to s.190A(3) – (5) as well as any other information which the Member considers appropriate in considering the claim – s.190E(7).

[42] It should be noted that the type of information that the Member is required to have regard is not necessarily as broad as that taken into account by the Delegate. While the Registrar and her Delegates are required to have regard to those classes of information set out in s.190A (3) (a) – (c) there is also a discretion granted to have regard to "*such other information as he or she considers appropriate.*" A Member conducting a reconsideration is not required, necessarily, to

have regard to that supplementary class of information because subsection 190E(7)(a) only obliges the Member to have regard to information which "*the Registrar was required to have regard… in considering the claim.*"

[43] For the purposes of the reconsideration I have been provided, as was the Delegate, with the Tribunal's WC97/72 case management /delegate files. As with the Delegate I have had regard, in particular, to the documents outlined on page 5 of the Registration Test Decision of 16 December 2009.

[44] In addition to the documents enumerated above I have also taken into consideration the Registration Test Decision and the letter of Mr. Marsh seeking reconsideration dated 27 January 2010.

[45] On 15 February 2010 Dr. Louise Bygrave, Senior Registration Delegate, wrote to the applicant of the Widi Mob, care of Mr. Marsh. Dr. Bygrave informed Mr. Marsh that if the applicant wished to provide additional information for the member to consider it should be provided no later than 5 March 2010. No further information was provided by the applicant, or, indeed, any other person.

Non-contested findings of the Delegate

[46] Reconsideration by a Member is a review de novo. Nonetheless it is open to a Member to adopt, where appropriate, the reasons and conclusions reached by a Delegate.

[47] As with the Delegate, I am required to assess the material before me to determine if the Widi Mob application meets the conditions prescribed by ss.190B and 190C. Despite their chronological sequence, the initial focus of attention is s.190C which prescribes conditions about procedural and other matters. Much of the information prescribed by s.190C forms the basis for the application while s.190B prescribes conditions about the merit of a claim. The absence of information prescribed by s.190C (and by reference to ss.61 and 62) in turn may prevent a Delegate from determining if any or all of the merit conditions in s.190B have been satisfied – see s.190E(11)(b) where there is a reference to it not being possible to determine whether the claim satisfies all the conditions of s.190B because of a failure to satisfy s.190C.

[48] In this matter the Delegate was satisfied that the application met a number of the requirements mandated by both ss.190B and 190C. While I have independently considered each of these conditions and formed my own opinion I note, with one exception, Mr. Marsh has not contested these conclusions reached by the Delegate.

Subsection 190C(2)

[49] A Delegate is required, pursuant to s.190C(2) to be satisfied that the native title determination application contains all details and other information, and is accompanied by any affidavit or other document, required by ss.61 and 62.

[50] The Delegate determined that the following requirements mandated by ss.61 and 62 were met:

Provision	*Requirement*
61(3)	Applicant's name and address
62(1)(a)	Affidavit accompanying the claimant application
62(1)(b) and (2)(a)	Identification of boundaries
62(1)(b) and (2)(b)	Map showing boundaries
62(1)(b) and (2)(c)	Searches of non-native title rights and interests
62(1)(b) and (2)(d)	Description of claim native title rights and interests
62(1)(b) and (2)(e)	General description of the factual basis of the claim
62(1)(b) and (2)(f)	Current claim group activities
62(1)(b) and (2)(g)	Details of any other native title determination and compensation applications
62(1)(b) and (2)(h)	Details of s.29 notices.

[51] None of these findings is challenged by Mr. Marsh, and having considered the material before me, I accept and adopt the reasons and findings of the Delegate in relation to each of the above matters.

Subsection 190C(3)

[52] Subsection 190C(3) requires the Registrar to be satisfied that no person included in the native title claim group was a member of any previous overlapping native title claim group. There are seven overlapping native title determination applications, but only three satisfy the conditions prescribed by s.190C(3)(b) and (c). They are Mullewa Wadjari Community WAD6119/98, Yued WAD 6192/98 and Badimia People WAD6123/98.

[53] The Delegate gave careful attention to this matter, and explained at pages 17 - 23 of her decision why she was of the opinion that the application satisfied this condition.

[54] Her conclusion was that the express exclusion in Schedule A of any person who is a member of an overlapping application ensured that the requirement of s.190C(3) was met. She

was of the opinion that the exclusion clause in Schedule A and the statement in Schedule O ensures that there are no members in common between the current Widi Mob application and previous overlapping applications.

[55] Mr. Marsh does not contest the finding of the Delegate but makes submissions about the proper means of interpreting s.190C(3).

[56] Mr. Marsh submits that the words "*the native title claim group for the application"* refers to the written description of that group in the current application. Further the words "*was a member of the native title claim group for any previous application"* refers to a person who "*in fact"* was a member of the native title claim group for any previous application.

[57] Mr. Marsh submitted:

> *"This construction gives effect to the principle of statutory construction that different phrases mean different things, allows recognition that actual membership of a Native Title Claim Group does not always follow 'biological descent' in any particular way and avoids problems arising from latent defects in the description of the Native Title Claim Group in the Previous Application."*

[58] A similar submission was put to the Delegate by Mr. Marsh. The Delegate referred to material supplied by YMAC which identified the former applicant's descendants in the Badimia native title claim group. Mr. Marsh submitted, in effect, that a higher obligation was required of a Delegate, and that overlapping membership must be established as a matter of fact.

[59] The Delegate said at page 22: "*I do not understand the legislation to mean anything other than what it clearly states."*

[60] The approach taken by the Delegate was straightforward and correct. The task of a Delegate is clear, namely: is the Delegate "satisfied" that there is not an overlap in membership between the members of the Widi Mob and any previous overlapping claims. The requirement of an administrative decision-maker being satisfied that a statutory condition is met can be gleaned from the decision of the High Court in *Minister for Immigration v Eshetu* (1999) 197 CLR 611 at 653 – 657.

[61] In approaching this task, the Delegate may be satisfied by reliance on statements made in the Applicant's s.62(1)(a) affidavit, or the Schedule O statement that there are no common members with any previous overlapping application – see generally *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317 at 340/[91].

[62] The Delegate had before her, as have I, material from YMAC which is relevant and probative. The Delegate drew reasonable inferences from the material.

[63] Insofar as M. Marsh has made submissions to the effect that the reasoning and approach of the Delegate when considering the s.190C(3) was in error, I note for the record that I can see no error in the approach of the Delegate and I specifically reject the submission that there is any requirement imposed by s.190C(3) for a Delegate to be satisfied "in fact" of overlapping claim membership. An administrative decision maker makes an "*evaluative judgment*" (*Strickland v Native Title Registrar* (1999) 168 ALR 242 at 255/[44]) which may involve findings or inferences of fact supported by some relevant probative material. The Registrar and her Delegates have an important but limited task. As explained by Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112 at 119/[16]: "*Its task is clearly not one of finding in all respects the real facts on the balance of probabilities, or on some other basis. Its role is not to supplant the role of the court when adjudicating upon the application for determination of native title, or generally to undertake a preliminary hearing of the application.*" The approach to the interpretation of s.190C(3) advanced by Mr. Marsh is strained and artificial, and for the reasons outlined below, unnecessary.

[64] Furthermore, it is clear from the wording of Schedules A and O that there is no cross membership between the Widi Mob claim group and any previous overlapping claim. I am satisfied, for the purposes of s.190C(3), that there is no overlap in membership between the overlapping applications, and I base that conclusion on the clear wording of Schedules A and O. I do not need, for the purposes of being satisfied that the claim meets the requirement prescribed by s.190C(3), to conclude whether there is in fact cross membership between the Widi Mob claim and any prior overlapping claim. The proviso in Schedule A and O removes that possibility for the purposes of s.190C(3).

Subsection 190B(2)

[65] The Registrar must be satisfied that the information and map contained in the application as required by s.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.

[66] The information and map are located in Schedules B and C. I have perused this material and have formed the view, as did the Delegate, that the application satisfies the condition prescribed by s.190B(2). For the purposes of the reconsideration I adopt the reasons outlined in the Delegate's Registration Test Decision at pages 30 – 31.

Subsection 190B(4)

[67] 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.

[68] It will be noted that the wording of the subsection draws attention to the description "*in the application".* Further s.62(1)(b) requires that a "*claimant application"* must contain the details specified in s.62(2). Accordingly, both ss.62(2)(d) and 190B(4) focus on the efficacy of the description as found in the application as distinct from any other external material.

[69] This was also the view of Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112 at 119/[16]. His Honour also provided guidance on the sufficiency of the description. He endorsed (at 139/[99]) "*the test of identifiability as being whether the claimed native title rights and interests are understandable and have meaning."*

[70] In this matter the claimed native title rights and interests are contained in Schedule E. The description is both understandable and has meaning. I adopt the reasons of the Delegate as outlined at pages 34 – 35 of her Registration Test Decision and likewise I am satisfied that the application meets the condition of s.190B(4).

Subsection 190B(8)

[71] The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that, because of section 61A, the application should not have been made.

[72] Section 61A prohibits the filing of a native title determination application where:

(a) there is an approved determination of native title – s.61A(1);

(b) a previous exclusive possession act was done in relation to the area – s.61A(2);

(c) a previous non-exclusive possession act was done in relation to the area and the application claims exclusive native title rights and interests.

[73] The section is specifically worded to be subject to the operation of ss.47, 47A and 47B.

[74] The Delegate (at page 48) was satisfied that the application satisfied the condition of s.190B(8) because:

(a) a search of the application area against the National Native Title Register revealed that no part of it was covered by an approved determination of native title;

(b) Schedule B of the application excludes areas covered by a previous exclusive possession act, except where ss.47, 47A or 47B may apply; and

(c) The qualifications to the claimed native title rights and interests in Schedule E clearly identify that the application does not claim exclusive native title over areas covered

[75] I have independently searched the Register and perused Schedules B and E and have reached the same conclusion as the Delegate.

Subsection 190B(9)

[76] Section 190B(9) provides as follows:

> *"The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:*
>
> *(a) to the extent that the native title rights and interests claimed consist of or include ownership of minerals, petroleum or gas – the Crown in right of the Commonwealth, a State or a Territory wholly owns the minerals, petroleum or gas; or*
>
> *tTo the extent that the native title rights and interests claimed relate to waters in an offshore place – those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place; or*
>
> *(b) in any case – the native title rights and interests claimed have otherwise been extinguished (except to the extent that the extinguishment is required to be disregarded under subsection 47(2), 47A(2) or 47B(2)."*

[77] The Delegate was of the view (page 49) that the application met each of the conditions in s.190B(9):

(a) The application does not claim ownership of Crown minerals, petroleum or gas – Schedules E and Q;

(b) The application does not extend below the high water mark where it abuts, and thus does not extend to offshore places; and

(c) There was no material either before the Delegate, or on reconsideration, that would indicate that the native title rights and interests claimed have been extinguished.

[78] I have reached the same conclusion, and adopt, for the purposes of this reconsideration, the reasons of the Delegate.

Contested findings of the Delegate

[79] In seeking reconsideration of the Delegate's decision Mr. Marsh outlines in his letter of 27 January 2010 a number of areas where he is of the opinion that the Delegate was in error. While a reconsideration is in the nature of a de novo review, nonetheless as previously stated, the reasons of the Delegate are of relevance, and provide the basis for understanding why the reconsideration has been sought.

[80] I will deal hereafter with each of the matters where Mr. Marsh contends that the approach of the Delegate was flawed.

Section 190C(2)

[81] Subsection 190C(2) provides that the Registrar must be satisfied that the application contains all of the details and other information, and is accompanied by any affidavit or other document, required by ss.61 and 62. As the Widi Mob application was made prior to 1 September 2007, the amendments to s.62 effected by the *Native Title (Technical Amendments) Act 2007* are not applicable. For the purposes of this reconsideration I consider s.62 as it stood prior to those amendments.

[82] Again it should be noted that s.190C(2) focuses attention on the "*application".* As Mansfield J pointed out in *Northern Territory v Doepel* (2003) 133 FCR 112 (at 119/[16]): "*Section 190C, dealing with procedural and other matters, largely but not exclusively directs attention to the terms of the application itself. Section 190C(2) is confined to ensuring the application, and accompanying affidavits or other materials, contains what is required by ss 61 and 62."*

[83] The key provision considered by the Delegate was s.61(1) which requires, inter alia, that a native title determination application may only 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."*

[84] The Delegate was not satisfied the application contained the details and information required.

[85] She confirmed that she had confined her consideration to the information contained in the application itself identifying the claim group. Reference was made to the description of the claim group in Schedules A and O.

[86] Schedule A identifies the claim group as 25 named persons and their biological descendants, provided that any person within the description contained in s.190C(3) is excluded from those persons on whose behalf the claim is brought.

[87] Schedule O provides:

> "*The amended the* (sic) *description of the claim group (Schedule A) by which any person caught by Section 190C(3) is excluded from the claim group means that by definition of the claim group there can be no person within the group that falls within those to be described under this Schedule."*

[88] The Delegate, in reaching her conclusion, drew attention to the decision of Mansfield J in *Landers v South Australia* (2003) 128 FCR 495. This case, and the companion decision *Dieri People v South Australia* (2003) 127 FCR 364, concerned a parcel of land that was the subject of two native title determination applications. Both were made on behalf of the Dieri People. In the case of *Landers* Schedule A of the application specifically excluded "*all of those people listed as being the applicant group in the particulars of claim filed in the Federal Court matter No. SG66 of 1999 being the Dieri People Angas Warren and Others, whilst those people's names appear as members of that applicant group.*"

[89] In reaching his conclusion that the *Landers* application failed to comply with s.61(4) Mansfield J made the following observations (at 505):

> *"The term 'native title claim group' in s 253 is referred to as meaning the group mentioned in relation to the native title determination application in s 61(1). It refers to 'all the persons' who authorised the particular applicants to make the claim. In this instance, it is the claim of the Edward Landers group that they were authorised by the Dieri People. But the application does not then identify the Dieri People as the persons on whose behalf the claim is made, but only some of the Dieri People. I think the requirements of s 61(1) and (4) are clear."*

[90] The Delegate referred to the proviso in Schedules A and O, and was of the opinion that it was "*strikingly similar*" to that before Mansfield J in *Landers.* In the Delegate's opinion, the application could not comply with the procedural condition in s.190C(2) relating to s.61(1) because the proviso has the effect of apparently excluding persons who are part of "*the real 'native title claim group'.*" – see page 11 of the Registration Test Decision.

[91] The Delegate then set out at considerable length why, in her opinion, this issue was not sufficiently canvassed or argued before Barker J in *Martin No. 2*.

[92] Mr. Marsh contended that the cases relied upon by the Delegate did not establish that, as a matter of law, an exclusion based on the wording of s.190C(3) must offend s.61(1). That was a question of fact to be decided in each case.

[93] Mr. Marsh further contended that the Commonwealth was bound by the decision of Barker J in *Martin No. 2* and that the Delegate and the Tribunal "*are both administrative manifestations of the Commonwealth and are bound by the decision of the Court.*"

[94] I have already dealt with the suggestion that a finding of the Court in another context must be followed by a Delegate. This aspect of Mr. Marsh's submission is, with respect, incorrect and Mr. Marsh's other submission, which confuses the Commonwealth as a party to litigation and the independent role of a Federal Tribunal, is difficult to comprehend.

[95] However, the first submission of Mr. Marsh has substance and is persuasive.

[96] The correct approach for applying s.190C(2) has changed over time. However, since *Northern Territory v Doepel* (2003) 133 FCR 112 a settled practice has developed. The correct approach was articulated by Mansfield J as follows (at 124/[37]):

> *"My view that s 190C(2), relevantly to the present argument, does not involve the Registrar going beyond the application, and in particular does not require the Registrar to undertake some form of merit assessment of the material to determine whether he is satisfied that the native title claim group as described is in reality the correct native title claim group…. Its focus also is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified claim group can be ascertained. It, too, does not require any examination of whether all the named or described persons do in fact qualify as members of the native title claim group. Such issues may arise in other contexts, including perhaps at the hearing of the application, but I do not consider that they arise when the Registrar is faced with the task of considering whether to accept a claim for registration."*

[97] As His Honour explains, it is not the role of the Registrar or a Delegate to engage in a form of merit assessment. Rather, the Delegate is required to focus their attention on the application itself and form a view whether the native title claim group as described in Schedule A is either a subgroup of a wider claim group or has excluded persons who would otherwise be members of the claim group. In short the task of a Delegate is relatively straightforward and narrow in focus.

[98] In this regard the Delegate should have focused on the following finding of Barker J in *Martin (deceased) v Western Australia (No 2)* [2009] FCA 635 at [108]:

> *"the inclusion of the proviso to Sch A of this application is reasonably seen to be a provision that makes it clear that the applicants do not intend to include as a member of the claim group, any person who is a member of the native title claim group for any previous application if (a), (b), (c) of s 190C(3) apply. In that sense the proviso is a clarifying and incidental provision."*

[99] There is nothing on the face of the application that would indicate that the Widi Mob concede that they are part of a larger claim group. There is nothing on the face of the application, following the reasoning of Barker J, which would indicate that members of the claim group are being deliberately and consciously excluded. Rather, on its face, Schedules A and O have a proviso which could be categorised as precautionary. It is intended, on any plain reading, to avoid problems with the application of the registration test. In part, as discussed in the context of s.190C(3), it has operated as intended.

[100] The Delegate was also not satisfied that the application contained the details and other information required by s.61(4) for the purposes of s.190C(2).

[101] Subsection 61(4) requires that an application names the persons in the claim group or describes them sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

[102] Again, basing her decision on *Landers* the Delegate was of the view that the application did not comply with s.61(4).

[103] Barker J in *Martin No. 2* said (at [106]):

> *"The primary individuals who are said to be within the claim group (or in the case of deceased persons, those ancestors whose biological descendants are within the group) are clearly stated. The proviso does not identify by name particular individuals who may fall within Sch A but who are excluded by operation of the proviso. However, in my view, in this case this is not a material concern."*

[104] His Honour later said (at [110]): "*What is of key importance in a case such as this, is that the claim group has been defined with sufficient particularity."* While I am not bound by His Honour's decision, nonetheless I think it has particular resonance and relevance to the task at hand. Barker J was of the view that the claim group description defined the class of persons with sufficient particularity. His Honour further was of the view that the proviso was a facilitatory tool, and, on its face, it was not clear that any particular person, group of persons or families were being excluded from the claim group.

[105] I too am of this view. The task of a Delegate when considering an application pursuant to s.190C(2) is not to go beyond the words of the application and accompanying documents. It is, in my opinion, a mistake to inject into the analysis of s.190C(2) information or reasoning that is based on material that is relevant either to merit testing or other provisions.

[106] Moreover, the task of a Delegate when dealing with s.190C(2) in the context of s.61(4) is "*dealing with a matter of procedure"*. A Delegate needs to be satisfied that there appears "*to be a description which satisfies the requirement of the Act, without ascertaining whether or not it operated effectively to describe the claim group."* - per Dowsett J *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 at [31] and [32].

[107] The concerns of the Delegate are matters that should be addressed when dealing with s.190C(4)(b), and this approach was usefully explained by Collier J in *Watson v Native Title Registrar* (2008) 168 FCR 187 at 196/[31] and by Dowsett J in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 at [31] and [32].

[108] **I am 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.

Subsections 190C(4) and (5)

[109] Subsection 190C(4) requires the Registrar, or her Delegate, to be satisfied either that an application has been certified by a relevant representative Aboriginal/Torres Strait Islander

body or that the applicant is a member of a 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.

[110] As the application is not certified the Registrar or her Delegate must deal with two issues:

(a) Is the applicant a member of the claim group?; and

(b) At the time of the registration test (or, in this case, the reconsideration) do the members of the claim group authorise the applicant to make the application and deal with matters in relation to it?

[111] There is an important difference in the wording of this subsection compared with s.190C(2). A Delegate is not limited in assessing compliance to the wording of the application. The scope of the inquiry required by the Registrar or her Delegate is also clarified by s.190C(5). That subsection provides that where an application has not been certified, the Registrar *"cannot be satisfied that the condition in subsection (4) has been satisfied unless the application"* includes a statement to the effect that s.190C(4)(a) has been met and briefly sets out grounds on which the Registrar should consider it has been met.

[112] The type of information that a Delegate can, and possibly should, have regard to is explained by Collier J in *Watson v Native Title Registrar* (2008) 168 FCR 187 at 193/[17]:

> *"The information which the Registrar or his delegate can consider in making a decision as to whether the claimant application should be accepted is defined broadly by s 190A(3), and includes not only information contained in the application and other documents provided by the applicant (s 190A(3)(a)), but also any information obtained by the Registrar as a result of any searches conducted by the Registrar of registers of interests (s 190A(3)(b)). The breadth of the information the Registrar can take into account pursuant to s 190C(4)(b) was recognised by the Full Court in Western Australia v Strickland 99 FCR at 52."*

[113] As highlighted at [110] the focus of my inquiry is the question of authorisation. The difference in approach between the first and second limbs of s.190C(4) was summarised by Mansfield J in *Doepel* as follows (at 134/[78]):

> *"The contrast between the requirements of subs (4)(a) and (b) is dramatic. In the case of subs (4)(a), the Registrar is to be satisfied about the fact of certification by an appropriate representative body. In the case of subs (4)(b), the Registrar is required to be satisfied of the fact of authorisation by all members of the native title claim group. Subsection 190C(5) then imposes further specific requirements before the Registrar can attain the necessary satisfaction for the purposes of s 190C(4)(b). The interactions of s 190C(4)(b) and (5) may inform how the Registrar is to be satisfied of the condition imposed by s 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given."*

[114] The first issue before me is whether the requirements of s.190C(5) have been met. The Delegate referred to Schedule R of the application which in turn makes reference to the material

filed with the Federal Court in support of the s.66B application that was before Barker J. The Delegate considered the affidavits filed by the seven persons collectively comprising the Applicant in support of their claimed authority from the claim group. The Delegate concluded that, in aggregate, this information satisfied the requirements of s.190C(5). Having likewise considered the material I have come to the same conclusion.

[115] As Mansfield J explained in the above quote from *Doepel* satisfying the requirements of s.190C(5) does not relieve a Delegate from the inquiry required by s.190C(4)(b). Two issues need to be addressed. The first is whether the applicant is a member of the claim group.

[116] The Delegate considered the sworn affidavits of each of the persons collectively comprising the Applicant, and was satisfied on the basis of that material that [Names deleted] are members of the native title claim group. For the reasons outlined by the Delegate at page 25 of her Decision, I am likewise satisfied that each of these persons is a member of the claim group.

[117] However the Delegate was not satisfied that either were members of the claim group. In coming to that conclusion the Delegate referred to the affidavits of both gentlemen wherein they deposed to be the sons of the former applicant [Name deleted] (Affidavit of [Name deleted] sworn 1 May 2009 at para 1 and Affidavit of [Name deleted] sworn 6 May 2009 at para 1). While acknowledging that they would be members of the claim group on the basis of their biological descent from a person named in Schedule A, nonetheless, in her opinion, because of the proviso to Schedule A, it "*appears to exclude the offspring of the former applicant on the basis that they are members of the native title claim group for the previous Badimia application.*" (at page 25).

[118] In reaching that conclusion the Delegate relied on information provided by YMAC that there are members in common between the Widi Mob and Badimia applications. The Delegate also found that the Badimia application was a previous application for the purposes of the application of the registration test.

[119] The YMAC submission, which is dated 2 November 2009 and was forwarded by Ms. Louhana Lloyd, was set out at some length by the Delegate at pages 19 – 20 of her Decision. In summary, YMAC claimed that [Name deleted] belonged to the [Name deleted] family and was the child of [Name deleted] and [Name deleted]; and that she married a Badimia man named [Name deleted]. Further, YMAC claimed that the children of this union are recognised as Badimia People and included in the Badimia claim group.

[120] In essence, then, the Delegate, relying on information provided by YMAC about the previous applicant and her children, formed the view that the abovementioned persons formed

part of the Badimia claim group and were thus excluded from the Widi Mob by the explicit proviso to both Schedules A and O.

[121] In his response Mr. Marsh raises a number of issues.

[122] First, he submits that the Delegate assumed that surnames in common demonstrate "*biological decendency. This is not necessarily so. There is no evidence to support the assumption."*

[123] Second, he submits the Delegate relied upon evidence in a submission from a third party. Mr. Marsh claims that there should be no third party involvement, and, in addition, no reasonable opportunity was provided to challenge the evidence presented. In short, he submits there was a denial of procedural fairness insofar as the Delegate relied on that evidence.

[124] Finally, he submitted that more than falling within the definition of the claim group is required to be a member of the claim group. Both deny they are Badimia and deny ever being consulted about being included in the Badimia claim group.

[125] I will deal firstly with the suggestion that there should be no third party involvement in this process. All of the case law on this provision emphasises the breadth of the information which a Delegate can, and sometimes should, take into account.

[126] This submission ignores the invitation given to the Registrar by s.190A(3), namely that she "*may have regard to such other information as he or she considers appropriate."* These are words of wide import, and it would not be sensible to read them down in the artificial manner that Mr. Marsh submission leads.

[127] Clearly, Delegates are required to consider the information before them, including information proffered by third parties. The only issue which a Delegate need consider in the context of such information is whether it is relevant, or to use the wording of s.190A(3),"appropriate" to the matter at hand.

[128] This then leads to the next submission that the Delegate failed to provide procedural fairness to Mr. Marsh's clients.

[129] There is an overarching requirement placed on administrative decision makers to act fairly when making a decision which affects rights, interests and legitimate expectations - see *Kioa v West* (1985) 159 CLR 550. The content of the procedural fairness requirement differs according to the circumstances of each case and the particular statutory regime the decision making is operating within. One aspect of the obligation, however, is that a person be given

adequate opportunity to present their case, including the right to comment on, and challenge, adverse material which a decision maker may otherwise rely upon.

[130] Some assistance on this point is provided by Dowsett J in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (at [15]). This aspect of His Honour's decision was not disturbed by the Full Federal Court, and provides helpful guidance:

> *"The decision to accept or reject an application is a purely administrative function, the decision depending upon whether or not such application satisfies the prescribed criteria. The Act does not suggest that the NT Registrar is to receive submissions as to any proposed decision. If anything, subs 190A(5A) suggests to the contrary. To impose such a requirement would, in my view, imply a similar requirement in many other statutory registration schemes. This would be a considerable extension of the law. "*

[131] However, as His Honour then went to say (at [23]): "*it would be, to say the least, undesirable that the NT Registrar or a delegate take into account information derived from other applications without affording the applicant an opportunity to comment upon it."*

[132] As pointed out, the Delegate relied upon a submission from YMAC dated 2 November 2009. On 3 November 2009 Ms. Asha Sackville, a case manger with the Tribunal, emailed the Delegate and informed her of the submission and indicated that in order to comply with procedural fairness obligations she would seek written consent from YMAC to disclose the submission to Mr. Marsh, and, if consent was granted, forward to the applicant for their right of reply.

[133] On 10 November 2009 Ms. Sackville wrote to Ms. Lloyd informing her that the YMAC submission had been provided to the Applicant with an opportunity to provide comment by 2 December 2009. On the same day Ms. Sackville wrote to Mr. Marsh enclosing a copy of the YMAC letter as well as a list of the documents the Delegate was considering and informing him of perceived defects in the information provided. The applicant was given until 2 December 2009 to provide any additional information or submissions for the consideration of the Delegate.

[134] On 13 November 2009 Mr. Marsh replied enclosing copies of the affidavits filed in the Federal Court. Finally on 2 December 2009 Mr. Marsh again wrote to the Tribunal outlining his response to various matters outlined in the letter of 10 November 2009, specifically addressing the issues raised by YMAC in its letter of 2 November 2009.

[135] Mr. Marsh was given a copy of the YMAC letter. He was, on behalf of the Widi Mob, provided three weeks to reply. During that time the opportunity to respond was availed of, and two responses were sent. In these circumstances it cannot be said that the Delegate failed to give the Applicant a reasonable opportunity to challenge the evidence.

[136] The Delegate acted fairly and properly. Procedural fairness was afforded, and Mr. Marsh had the opportunity to present his client's case in response to the material provided by YMAC. Moreover, even if the Delegate had not provided Mr. Marsh with procedural fairness, he has since been afforded the opportunity, in the context of this reconsideration, to outline his client's case, and has availed himself of that opportunity.

[137] This now leads to the submission that both are in fact, members of the claim group, are not excluded by the Proviso to Schedule A, and that the Delegate should have been so satisfied.

[138] The substance of the Delegate's reasons for coming to the conclusion about are set out at pages 19 to 23 of her Decision.

[139] The Delegate refers firstly to the YMAC submission which, so far as is relevant, I set out below:

> *"… In our submission, there are common members between the Widi Mob application on the one hand and the Amangu and Badimia overlapping applications on the other.*
>
> *We provide the following information as evidence that there are common claimants as between the Amangu and Badimia claims and the amended Widi Mob claim.*
>
> 1. *The ancestry of the late [Name deleted] is depicted in Yamatji Marlpa Aboriginal Corporation genealogies as descending from [Name deleted]), the mother of [Name deleted], who is an Amangu apical ancestor. The parents of [Name deleted] are listed as [Name deleted], a non-Aboriginal man, and [Name deleted], an Aboriginal woman who was the daughter of [Name deleted] and [Name deleted]. [Name deleted] is listed as the daughter of [Name deleted]*
> 2. *[Name deleted] was the son of [Name deleted], of Tarraminda, who was from around Mingenew, which is in the Amangu claim area. [Name deleted] and [Name deleted] had a child named [Name deleted] and she married [Name deleted]. [Name deleted] is the mother of the late [Name deleted].*
> 3. *[Name deleted] married a Badimia man named [Name deleted]. Their children are recognised as Badimia people and are welcome within the Badimia native title claim. The Badimia connection reports acknowledge that [Name deleted] descendants are included in the claim group. They are listed in YMAC records as being, [Names deleted]. [Names deleted] are listed as applicants on the Widi Mob claim.*
>
> *It therefore follows that YMAC considers that many of the claimants in the Widi Mob claim group have an ancestral or familial link to the Amangu and/or Badimia claim group genealogies, and that on this basis, the Widi Mob claim cannot be found to satisfy the requirements for registration. In particular, in our submission, the Widi Mob claim fails to satisfy the condition in s 190C(3) of the NTA."*

[140] In addition to the YMAC submission, the Delegate also referred to a statement of the deceased Applicant dated 1 February 1999 provided for the purposes of registration testing, together with a genealogical chart which is marked as annexure "C" and which was prepared on behalf of the deceased applicant with the assistance of [Name deleted] Those documents support the contention that the deceased applicant was the daughter of [Names deleted]. [Name deleted], in turn, is depicted as the daughter of [names deleted].

[141] It should be noted, that the Widi Mob rely on their descent from [Name deleted] (Affidavit of [Name deleted] sworn 7 December 2009 at paras 6 – 7), and not [Name deleted] who was the child of [Names deleted]. Consequently I do not, in the context of s.190C(4)(b) draw any adverse inferences from the material supplied by YMAC so far as it relates to any suggestion of Amangu ancestry.

[142] What the Delegate actually had before her was an uncontested genealogy. There is no dispute about who the ancestors of the deceased applicant were. In addition, in his letter of 2 December 2009 Mr. Marsh did not address this question in any substantive way. In short, when the Delegate reached her conclusion that the two sons of the deceased applicant were not members of the claim group by virtue of the proviso to Schedule A, she was relying on the unchallenged assertions of YMAC. It is important to note that the Delegate said (at page 22): "*It is telling in my view that the applicant does not in any way refute the genealogical information in the YMAC submission, nor do they provide any information to support that the offspring of the former applicant and [Name deleted] do not belong to the Badimia native title claim group.*" In my opinion the Delegate reached the right conclusion based on the material before her, but I am confronted with a somewhat different situation.

[143] The first submission of Mr. Marsh is somewhat difficult to fathom. I proceed on the assumption that he submits that the fact that the genealogy referred to by YMAC has within it the same surnames as the two [Name deleted] brothers, does not demonstrate a biological linkage. As I said, I do not really understand this submission, as the material relied upon by the deceased applicant in 1999 correlates exactly to the genealogical linkages suggested by YMAC. Any suggestion to the contrary by Mr. Marsh would undercut much of the material the Widi Mob has relied upon in Federal Court proceedings for the past decade.

[144] The second submission is that the [Name deleted] brothers identify as members of the Widi Mob, are accepted as such by other members of the claim group and do not identify as Badimia. In fact Mr. Marsh informs the Tribunal that the [Name deleted] brothers deny they are Badimia and deny they were ever consulted about being included within the claim.

[145] The problem that Mr. Marsh faces is the clear wording of the proviso to Schedule A which excludes from the claim group any person who is a member of a claim group for any previous application.

[146] The question I have to address is not a subjective one focused on which claim group the [Name deleted] brothers identify with. Clearly if this was the focus of my inquiry I would conclude that they identify as members of the Widi Mob and are members of that claim group.

[147] The question I am confronted with is an objective one, namely are the [Name deleted] brothers members, by virtue of claim group description, of any other overlapping previous application(s)?

[148] The Delegate concluded that the deceased applicant and her offspring fell within the Badimia claim group. The Delegate said (at p.22):

> *"In my view the information from YMAC outlines relevant probative material indicating that the former applicant had children with [Name deleted], a Badamia man…*
>
> *I have considered the entry for the Badamia application on the Register of Native Title Claims. The Badamia native title claim group is described as 'those Aboriginal people biologically descended from the following deceased ancestors', including a person named [Name deleted].*
>
> *I have no reason to doubt that there is a biological link from the Badamia ancestor to [Name deleted] to [Name deleted] and thus to the children he had with the former applicant (or indeed any of the other 12 ancestral lines named in the Badamia application) in light of the YMAC information that this is so and the absence of the applicant responding with cogent information that they are not members of the Badamia native title claim group."*

[149] I have some difficulties with the approach of the Delegate. She assumes that [Name deleted] is a direct descendant of the Badimia ancestor [Name deleted].

[150] The Badimia native title claim is stated to be brought on behalf of those Aboriginal people biologically descended from named deceased ancestors. One of the named deceased ancestors is [Name deleted].

[151] I can find no evidence in the files before me to show the lineage of [Name deleted]. I have been presented with no evidence showing the relationship of [Name deleted] to [Name deleted]. Indeed, there is no evidence before me of the Badimia ancestry of [Name deleted] other than the statement of YMAC.

[152] In short all I have before me is information provided by YMAC.

[153] On the other hand I have the statements of Mr. Marsh that his clients deny being Badimia and do not identify as Badimia and, inferentially as I read it, challenge the biological descendancy relied on by the Delegate. It is the last point which is critical in this context. Even if Mr. Marsh's clients do not identify as Badimia, if they fall within the Badimia claim group description they would, by virtue of the Proviso in Schedule A be excluded from the Widi Mob native title determination application.

[154] The question I need to answer is whether it is safe for me to proceed on the basis of the YMAC statement without supporting evidence, having regard to the denials by Mr. Marsh.

[155] I have formed the view that it is not safe to do so. If a Delegate is not satisfied that any of the persons who collectively comprise the applicant is not a member of the claim group, then this opinion must be founded on some factual basis. In this matter all that is before me is a letter from YMAC which makes assertions not supported by accompanying evidence. Clearly the statements of YMAC sound convincing, and on their face they are logical. However they are denied by the sons of the former applicant, and I believe that I am required to make my assessment "*with a degree of flexibility consistent with the beneficial nature of the legislation*" – *Northern Territory v Lane* (1995) 59 FCR 332 at 336. When faced with two opposing points of view, either of which could be correct, it is my view that, in the normal course, the point of view supportive of the application should be preferred. I am therefore satisfied, on the basis of the material before me, that [Names deleted] are members of the Widi Mob claim group.

[156] This then leaves the second limb of s.190C(4)(b), namely whether the applicant has been properly authorised by all the other persons in the native title claim group.

[157] The Delegate was not satisfied about authorisation because:

- The formulaic exclusion added to the claim group description resulted in the exclusion of persons who participated in the 2009 authorisation process; and
- The application omits persons previously identified as part of the claim group.

[158] So far as the first of the reasons advanced by the Delegate, she based this on the assumption that the formulaic exclusion in Schedule A excluded the offspring of the former applicant. The Delegate outlines at length her reasons at page 27 of the Decision.

[159] If I had formed the same view about the exclusion of the former applicant and her children from the claim group I would have reached the same conclusion and for the same reasons as the Delegate. However, I have formed a different conclusion, and I am satisfied that the formulaic exclusion has not, prima facie, resulted in the exclusion of persons who participated in the 2009 authorisation process.

[160] It is clear from the Delegate's reasoning at page 28 of her Decision that she has based much of her approach on the YMAC information, including using it as a basis for limiting the possible impact of the decision of Barker J. However, as I have said previously, I believe she has elevated the YMAC information to a probative level above which it can be placed. As uncontested information it is of undoubted value, but when challenged, without other material to support it, it cannot be given too high a status in registration testing. I appreciate this is information from a representative body, and a body established to represent claimant groups and who would have expert views on claim groups and their members. So much is common

knowledge for any person working in the native title environment. But the views of a representative body, though important, do not take on the value of primary evidence if challenged and if then not supported by primary material.

[161] The next issue raised by the Delegate is whether the claim has been amended to omit persons previously identified as part of the claim group.

[162] The Delegate pointed out (at page 26) that the claim group is comprised of an extended family network all of whom are descendants of a common set of grandparents.

[163] The Delegate compared the genealogical chart attached to the former applicant's affidavit dated 1 February 1999 with the amended applications filed on 4 March 1999 and 24 December 1999 (the Delegate refers to 14 January 2000, but this was the date the amended application was heard by the Court). The description of the persons in Schedule A of the 4 March 1999 application comprised 32 identified persons, including the deceased applicant, her seven siblings and 24 cousins. However the amended application of 14 January 2000 excluded seven of those persons from the claim group description.

[164] The Delegate (at page 28) explained that the claim group is asserted to comprise all of the grandchildren of [Names deleted] and their descendants. The exclusion of the seven grandchildren and their descendants was not explained.

[165] I set out now, at length, the conclusions reached by the Delegate (at page 29):

> *"The significance of this information is that it indicates a contraction in the membership of the native title claim group in 2000 to exclude a number of individuals who are otherwise part of the Widi Mob native title claim group. The excluded individuals are [Name deleted] (the former applicant's brother), [Names deleted], (the former applicant's cousins, being the children of [Names deleted] (the former applicant's cousin and child of [Names deleted]). The removal of their names from schedule A of the application effectively resulted in the removal also of their descendants, despite the evidence in the former applicant's affidavit that the native title claim group comprised not only herself, her siblings and cousins, but their descendants as well, who are all in turn descended from [Names deleted].*
>
> *In my view, there is a real risk that the native title claim group described in the application in January 2000 and before its amendment earlier this year did not include all the relevant persons entitled to participate in the application as part of the native title claim group. The authorisation of the new applicant to make the application and to deal with matters arising in relation to it was therefore, in my view, compromised even before the authorisation events earlier this year. I note that this information does not appear on the face of the application now being considered for registration and is thus not available to me under s.190C(2)."*

[166] In response, Mr. Marsh states that the assumption of the Delegate "*is entirely without foundation. There are many explanations for the contraction which are still consistent with including the required persons.*" Mr. Marsh also draws my attention to the findings of Barker J.

[167] The Delegate quite properly pointed out what is, on its face, a problem for the registration of the claim. Mr. Marsh inferentially concedes that the Delegate is correct in her analysis that there has been a contraction of the claim group. Having perused the documents this is a concession that would have to be made.

[168] The only additional point I would make is that while the Delegate referred to the amended applications filed on 4 March 1999 and 24 December 1999, I have also had regard to the additional amended application filed on 22 July 1999 and heard by DDR Jan on 26 August 1999. The omission of the seven abovementioned persons was originally effected by the amended application filed on 22 July 1999, and this omission was maintained in the amended application filed on 23 December 1999.

[169] Mr. Marsh does not explain why the claim group description has been narrowed. He says that there are many explanations that would be consistent with a Delegate being satisfied that the claim has been authorised by all persons in the claim group. Perhaps that is the case, but he does not outline any of these explanations. It is not the role of the Delegate, or the Member on reconsideration, to speculate on possible scenarios that would be consistent with the submission of Mr. Marsh. All a Member undertaking a reconsideration is required to do is look at the material and information before them and reach a logical and objective conclusion.

[170] Mr. Marsh reliance on the judgment of Barker J, however, requires more detailed consideration.

[171] His Honour sets out at paragraphs [15] to [82] detailed information and findings relating to authorisation. He deals at some length (at paragraphs [19] – [54]) with the steps that were undertaken prior to the authorisation meeting of 9 April 2009 to alert members of the claim group of the meeting. After dealing with submissions that the amended application would exclude persons from the claim group and related issues, His Honour said (at [80]):

> *"I am therefore quite satisfied that on a plain reading and proper understanding of the evidence before me, this is not a case where some group constituted differently from the claim group described in the original claimant application have authorised the making of the application to replace the deceased current applicant. Nor is it a case where some smaller group purports to vindicate the native title rights and interests of some larger group, of which they are a part, without the larger group's authority. Rather the claim group as described in the claimant application, focused on the relevant issues, provided the relevant authorisation to the proposed applicants to pursue the native title rights and interests that they, and they alone claim."*

[172] The term "original application" in His Honour's judgment is a reference to the native title determination application as filed in 1998 (see [2] of the judgment).

[173] As is pointed out above, the claim group as currently described in Schedule A of the native title determination application is, in fact, differently constituted to that described in the

original application. The evidence before me is clear and I am therefore, unfortunately unable to adopt the conclusion reached by Barker J.

[174] Three Federal Court decisions are of particular relevance and assistance in this context: *Ward v Native Title Registrar* [1999] FCA 1732, *Risk v National Native Title Tribunal* [2000] FCA 1589 and *Watson v Native Title Registrar* (2008) 168 FCR 187.

[175] In *Ward* Carr J affirmed the decision of a Delegate who took account of adverse information provided by 11 persons who claimed that they were members of the claim group but had not been consulted about authorizing anyone to deal with the application. Carr J made the following finding (at [37] – [38]):

> *"37 In my opinion, it was up to the delegate to decide what weight she would give to the matters raised by the eleven deponents. She decided that they were sufficient to prevent her from being satisfied that the applicants had been authorised by all members of the native title claim group. I think that such a conclusion was clearly open to her in the circumstances. The eleven deponents had gone on oath to say that they were members of the native title claim group. There was no affidavit or other evidence to the contrary from the applicants, only an assertion from their solicitors. Furthermore, as the delegate noted, there was no means whereby she could reject the deponents' claims to be members of the native title claim group.*
>
> *38 I find that in reaching her conclusion on the question of authorisation there was no reviewable error on the delegate's part."*

[176] In short, when reviewing the Delegate's decision under s.190C(4)(b) Carr J found the Delegate was not in error in not being satisfied where there was evidence that not all members of the claim group had been consulted in the decision to authorise the Applicant. This, I should add, is a different issue to the question whether all members of the claim group have authorised an applicant. The answer to that question is in the negative based on *Lawson v Minister for Lands and Water Conservation* [2002] FCA 1517 and *Wharton v Kooma* [2003] FCA 790. The issue is not whether all members of the claim group have authorised the applicant, but whether all members of the claim group have been provided an opportunity to so authorise the applicant. In this matter, it is clear that some persons originally identified as members of the claim group have been excluded from the claim, and thus disenfranchised from the authorisation process.

[177] In *Risk* O'Loughlin J held that the Delegate had erred in accepting a claim for registration where it was clear from the application itself that the claim group description of the Danggalaba Clan was itself not exhaustive of the all the members of that Clan. There was a further issue as to whether the Clan was part of a wider claim group. O'Loughlin J made the following observations (at [60]):

> "*A native title claim group is not established or recognised merely because a group of people (of whatever number) call themselves a native title claim group. It is incumbent on the delegate to satisfy herself that the claimants truly constitute such a group. I cannot, with respect, accept these passages in the delegate's reasons. In the first place, it seems to assume that a family, which is known to be part only of a community,*

is entitled to claim native title, even though other members of the community (who in the case before the delegate have not been identified) have, for one reason or another, not been included in the application."

[178] As with *Risk*, it is clear from the wording of the current claim group description that persons previously identified as part of that group, have been excluded. No good reason has been advanced as to why this occurred. Prima face, based on the precedent of *Risk,* a Delegate would be constrained from being satisfied that the requirements of s.190C(4)(b) were met in such circumstances.

[179] Finally, in *Watson* the Court dealt with an amended claim which contained a new claim group description identifiable as the descendants of ten sets of apical ancestors. In the earlier description five sets of apical ancestors were identified with a number of individuals excluded from the claim group.

[180] The Delegate found that the identity or composition of the Wiri People native title claim group was an intractable dispute of many years standing. She noted that there were a number of Wiri applications had that been filed over the years by differently described or composed groups of Wiri People. The evidence about the identification of native title holders was contentious and uncertain, and the Delegate was unable to be satisfied that the group described in the application was the whole of the native title claim group.

[181] Collier J found no error was made by the Delegate in reaching her conclusion.

[182] Again this case is of relevance to the matter at hand, because there is clear evidence that the current claim group description excludes persons who previously were identified as part of the claim group, with no objective basis for this exclusion being given.

[183] In reaching my decision I have had regard to s.251B which sets out the requirements for authorising the making of native title determination applications. Relevantly, it requires all persons in a native title claim group to authorise a person or persons to make the application and related matters. I have also had regard to the requirements of s.61(1) namely that an applicant must be "*authorised by all 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."* – see also the definition of "native title claim group" in s.253.

[184] The material before me provides a potentially confused picture of who is, or is not, a member of the claim group. It is at least open to me to conclude that certain members of the claim group have been deliberately excluded from the application, and thus the authorisation process has been tainted. I am unable to conclude that all persons who identify as members of

the Widi Mob have been given an opportunity to participate in the authorisation process. I am therefore unable to conclude that the current applicant has been authorised to make the application. In this regard I agree with the Delegate (at page 30) that the exclusion of some of the grandchildren of [Names deleted] in 1999 without some proper explanation of why this occurred, constitutes a fatal bar to the Registrar being able to be satisfied pursuant to s.190C(4)(b).

[185] In the circumstances, then, I am **not satisfied** that the applicant is authorised to make the application pursuant to s.190C(4)(b).

Subsection 190B(3) – Identification of native title claim groups

[186] This subsection requires that the Registrar must be satisfied that the persons in the native title claim group are named in the application or are described sufficiently clearly so it can be ascertained whether any particular person is in that group.

[187] Subsection (3) has, therefore, two limbs. The Delegate was not satisfied pursuant to either limb.

[188] So far as the first limb, she referred to the proviso in Schedules A and O, and concluded that while the claim was brought on behalf of 25 named individuals others were necessarily not named.

[189] So far as the second limb is concerned she concluded (at page 33): "*In my view the clearly stated contraction <u>in the application</u> to the membership of the 'native title claim group' so as to remove any impediment to registration posed by s.190C(3) is not permitted by s.61(1) and s.61(4). It follows in my view that this fatally affects the merits of the identification of the native title claim group for the purposes of s.190B(3).*"

[190] Mr. Marsh, on behalf of the applicant, sought reconsideration under this subsection for the following reasons:

> *"The Delegate revisits the same arguments that have been commented on above in this part of her reasons. The comments above apply. The matter was considered and determined by Barker J in Martin No 2.*
>
> *The test set by s190B(3) is: "…described sufficiently clearly so it can be ascertained whether a particular person is in that group…"*
>
> *The delegate concludes that the description fails in that regard because it does not include all the persons.*
>
> *The delegate has answered the wrong question. Who it described is irrelevant to whether the description is sufficiently certain."*

[191] Before dealing with the substance of Mr. Marsh's submission I will address some preliminary issues about the proper manner to approach the registration testing of an application pursuant to s.190B(3).

[192] Section 190C focuses the Delegate, when registration testing a claim, on procedural and other matters. In contrast, s.190B prescribes conditions about the merits of a claim. Generally, s.190C dealing, as it does with procedural issues, mostly, but not exclusively, focuses the Delegate's attention to the application and related documents. On the other hand s.190B generally allows a Delegate to consider a much broader range of material, provided it is relevant and procedural fairness has been afforded.

[193] Nonetheless as Mansfield J pointed out in *Doepel* (at 119/[16]): "*Section 190B also has requirements which do not appear to go beyond consideration of the terms of the application: s 190B(2), (3) and (4).*" He later also added (at 128/[51]): "*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.*"

[194] Accordingly, when undertaking an assessment pursuant to s.190B(3) a Delegate should focus their attention on the wording of the application and any accompanying affidavits or other documents. Supplementary materials aimed at clarifying what is manifest from the wording of the application should not be taken into account, as the focus of the assessment is the wording of the application itself.

[195] In addition, a Delegate is not required to determine the correctness of the description of the claim group. Both limbs are drafted in a manner that focuses the Delegate on a factual rather than a conceptual inquiry. This was explained by Mansfield J in *Doepel* in the following way (at 124/[37]):

> *"Its* (ie s.190B(3)) *focus also is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any of any particular person in the identified native title claim group can be ascertained. It, too, does not require any examination of whether all the named or described persons do in fact qualify as members of the native title claim group. Such issues may arise in other contexts, including perhaps the hearing of the application, but I do not consider that they arise when the Registrar is faced with the task of considering whether to accept a claim for registration."*

[196] Turning now to the first limb of s.190B(3), this requires the Registrar or her Delegate to be satisfied that the persons in the native title claim group are named in the application. As I read it, this requires that the application list all the persons who comprise the native title claim group. In this matter it is clear that not all of the members have been named. Instead the application is said to be brought on behalf of 25 named persons and their biological descendants. Further, the proviso to Schedules A and O potentially excludes even from that list

[197] The second limb focuses the attention of a Delegate on the description of the persons in the claim group so that it is possible to ascertain whether any particular person is part of the claim group.

[198] The Delegate in reaching her decision referred to the decision of Carr J in *Western Australia v Native Title Registrar* (1999) 95 FCR 93. In that case the relevant claim group was described as (at 108/[64]):

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 2.

[199] Carr J held that these so called "Three Rules" sufficiently described the claim group so that it could be ascertained whether any particular person was in that group. His Honour said (at 109/[67]):

> *"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… 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…The Act is clearly remedial in character and should be construed beneficially."*

[200] In this matter, putting to one side for the moment the provisos in Schedules A and O, it is clear that the claim group description meets the standard enunciated by Carr J. The claim group is defined by the descendants of named persons. From that description it is possible, empirically, to determine whether a particular person is or is not a member of the Widi Mob claim group. A Delegate reading such description and undertaking a factual inquiry would be satisfied that the second limb of s.190B(3) had been met. See also the analysis of Kiefel J in *Wakaman People No 2 v Native Title Registrar* (2006) 155 FCR 107 at 118 -119/ [34] – [35].

[201] The Delegate also quoted in an extended form, Mansfield J from *Doepel* (at [37]) but then stated that this matter was different from that considered by His Honour in that certain members of the claim group have been omitted from the claim group by virtue of the provisos.

[202] While I am in agreement with the Delegate's conclusion, I have reached that destination in a slightly different manner.

[203] The only question which needs to be answered is this: does the claim group description allow with sufficient clarity the identification of members of the claim group? The simple answer to this question must be in the negative.

[204] It is impossible for any person to ascertain at any given point of time whether a particular person or persons is a member of the claim group because of the operation of the provisos. This is not a case of engaging in the incorrect exercise of qualitatively determining if the claim group description is appropriate or correct.

[205] At any given point of time it is possible, having regard to the status of external overlapping applications, that any number of the descendants of the named ancestors may be excluded from the claim group. Their inclusion or exclusion is activated by events possibly out of their control. Moreover the scope of the claim group, necessarily, is liquid to the point of being endemically uncertain. In these circumstances I am unable to be satisfied that the requirements of s.190B(3) have presently been met, or if the claim group description remains unaltered, could ever be met.

[206] The Delegate and Mr. Marsh both referred to the decision of Barker J. As previously noted, I have considered very closely the judgment of His Honour, and given it, wherever possible and appropriate, the deference I believe an administrative decision maker should give to this close a judicial authority.

[207] In that regard I note that Barker J after finding that the proviso in Schedule A was merely a clarifying and incidental provision went to hold (at [109]):

> *"In circumstances such as these I do not consider that it is necessary for the applicants to undertake a task that the Registrar may be required later to perform for the purposes of registration, in order to definitely identify every person who is not included in the claim group."*

[208] A clear reading of his judgment illustrates that Barker J was alive to the distinction between the legal task he was undertaking, and the task that the Registrar or her Delegate would be required to undertake under different statutory provisions. His Honour's findings on the provisos are not determinative of the assessment that either the Delegate, or a Member on reconsideration, has to undertake pursuant to s.190B(3).

[209] The task I have to fulfill is relatively simple, and the answer, having regard to the plain words of the application is also straightforward. There is no need to distinguish the decision of Barker J, as it is not inconsistent with the task I have to undertake.

[210] As noted, the claim group description is inherently uncertain, fluid and problematic. The focus of s.190B(3)(b) is being satisfied that there is a claim group description which enables, at any time, the objective ascertainment of whether a particular person is or is not within that group. Obviously membership of a claim group changes over time with the birth and death (and, where relevant, adoption) of persons. However, the claim group description should, despite these changes, enable the ascertainment at any given point of time whether a person is or is not a member of the claim group by means of a stable, clear and objective formula. In this matter, the membership of the Widi Mob can be determined by events over which the members of the Widi Mob have no control, namely the filing of overlapping applications and litigation. This is an inherently unsatisfactory situation, particularly as members of the claim group could be disenfranchised at any given time by circumstances beyond their control or their desire. This is the very antithesis not only of a stable claim group but also of a sensible resolution of native title interests over land and waters. It is a legal construct designed to achieve a particular result. In part this goal has been achieved, but in the broader picture it presents an insurmountable barrier in terms of the requirements of s.190B(3).

[211] Consequently I am **not satisfied** that the application meets the condition of s.190B(3).

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

[212] Subsection 190B(5) requires the Registrar to be satisfied that the factual basis on which it is asserted that native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

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

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

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

[213] Before dealing with the decision of the Delegate, and the grounds adduced by Mr. Marsh for seeking reconsideration, I will briefly set out the legal principles that guide the Registrar or her Delegate when making an assessment pursuant to s.190B(5).

[214] The Registrar's task pursuant to s.190B(5) is relatively narrow. The Registrar is to consider the asserted facts, and, assuming they are true, assess whether they support the claimed assertions.

[215] The Registrar "*is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may be ultimately adduced to establish the asserted facts*" per Mansfield J in *Doepel* at 120/[17] endorsed by the Full Federal Court in *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317 at 338/[83].

[216] Prior to the Full Court decision, there was a series of Federal Court judgments that suggested that the Registrar would need to be presented with some additional information or evidence to support the assertions, and that the assertions alone in the application would not suffice. Further, those judgments also suggested that whilst there was a correlation between s.190B(5) and s.62(2)(e), the latter provision only referred to a "*general description*" whereas the former provision "*may require more, for the Registrar to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to suggest a wider consideration, of the evidence itself, and not some summary of it*" per Kiefel J *Queensland v Hutchinson* (2001) 108 FCR 575 at 584/[25] and *Wulgurukaba People #1 v Queensland* [2002] FCA 1555.

[217] The correct approach to interpreting s.190B(5) has now been determined by the Full Court in *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317. The Full Court considered the interaction between ss.62 and 190A, the former mandating the requirements for commencing an application and the latter establishing the registration test regime. The Court held (at 340/[90]) that:

> "*… the statutory scheme appears to proceed on the basis that the application and accompanying affidavit, if they, in combination, address fully and comprehensively all the matters specified in s 62, might provide sufficient information to enable the Registrar to be satisfied about all matters referred to in s 190B. This suggests that the quality and nature of the information necessary to satisfy the Registrar will be of the same general quality and nature as the information required to be included in the application and accompanying affidavit.*"

[218] The Court then dealt with the nature and quality of the information required by s.62, and in particular the details required by s.62(2)(e). It should be noted that the matters referred to in s.62(2)(e)(i), (ii) and (iii) are worded almost identically to s.190B(5). The Court said (at 340-341/[92]):

> "*The fact that the detail specified by s 62(2)(e) is described as 'a general description of the factual basis' is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required 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. The applicant is not required to provide evidence that proves directly, or by inference the facts necessary to establish the claim."

[219] The Court (at 341/[93]) went on to observe that if the primary Judge "*approached the material before the Registrar on the basis that it should be evaluated as if it was evidence furnished in support of the claim … then it involved error.*"

[220] Nonetheless, a Delegate, or member on reconsideration, must be provided with more than mere restatements of the claim. This was explained by Dowsett J in *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 as follows (at [29]): "*it would not be sufficient for an applicant to assert that the claim group's relevant laws and customs are traditional because they are derived from the laws and customs of a pre-sovereignty society, from which the claim group also claims to be descended, without any factual details concerning that pre-sovereignty society and its laws and customs relating to land and waters. Such an assertion would merely restate the claim. There must be at least an outline of the facts of the case.*"

[221] The Delegate specifically dealt with the information contained in Schedule F of the application. Outlined below is this information:

"*<u>Association of the Widi Mob with the Application Area</u>*

Members of the Claim Group have and do engage in one or more of the activities described in Schedule E Clause 2 (a) to (n) (the activities) with the result that the Widi Mob as a group engage in all the activities mentioned from time to time in the application area.

The present members of the claim group have been told of their obligations and responsibilities in relation to the activities and their country (the application area) by persons recognized by Widi laws and customs as elders or as having special knowledge. This includes persons who are of the previous generation and the generation before that. These persons have themselves claimed to be instructed in these matters by previous generations.

The presence of persons recognized as Widi Mob in the general area of the Application Area is recorded in records and accounts since early contact with white people.

<u>The Traditional laws and Customs that give rise to the Claimed Native Title</u>
The Widi Mob is defined as a traditional group by the laws and customs by which a person is recognized as Widi. Those laws and customs have been passed down from previous generations extending to before white settlement.

The recognition carries the expectation, by others in the group, that the person so recognised will observe Widi laws and customs. It also carries with it the entitlement to be treated by others as Widi. There is a mutual recognition of each other as Widi.

The Application area is the area over which before white contact Widi Mob as a group asserted the right, in accordance with their laws and customs, to exclusive use of the land and its resources.

Before white contact that use included everything used in traditional life. Some uses such as cutting and making spears and making stone tools have not survived. The following activities are traditional uses that have survived and have been passed from generation to generation.

(a) access the application area;

(b) *camp on the application area;*

(c) *erect shelters on the application area;*

(d) *live on the application area;*

(e) *move about the application area;*

(f) *hold meetings on the application area;*

(g) *hunt on the application area;*

(h) *fish on the application area (including on inland waters);*

(i) *conduct ceremonies on the application area;*

(j) *participate in cultural activities on the application area;*

(k) *store sacred or secret items in the area and to retrieve and use those objects on the application area;*

(l) *gather medicinal plants on the application area*

(m) *maintain and protect places of importance under traditional laws, customs and practices on the application area;*

(n) *visit and observe features of the landscape of cultural significance on the application area;*

(o) *visit features of the landscape of cultural significance and teach the cultural, religious and mythical significance of such features on the application area;*

(p) *control access to and use of the application area by other Aboriginal people or Torres Strait Islanders who seek access to or use of the lands and waters in accordance with traditional laws and customs."*

[222] The Delegate was of the view (at page 36) that the information contained in Schedule F did not rise above assertions at a high level of generality nor was it in sufficient detail to enable a genuine assessment of the application against this condition of the registration test.

[223] The Delegate then (at page 36) outlined various other material furnished to the Registrar over the past decade. I have also perused this material. The Delegate was of the view that the information available did not assist in providing a sufficient factual basis for the assertion that the claimed native title rights and interest exist, nor for the particular assertions in paragraphs 190B(5)(a) to (c). The Delegate then provided detailed reasons in relation to each of paragraphs (a) to (c).

[224] Mr. Marsh made two submissions.

[225] First, that to the extent that the Delegate relied on the s.190C(3) exclusion clause, his previous submissions were relied upon.

[226] Second, that the Delegate had mistaken the recital of evidence for the pleading of the case. Mr. Marsh submitted that the facts set out in the amended claim would, if proved, establish the claim, and that was all that was required.

[227] I will deal, firstly, with the Delegate's finding that the material in Schedule F would, of itself, not satisfy the requirements of s.190B(5).

[228] My analysis of the various authorities on s.190B(5) also lead me to the conclusion that the material contained in Schedule F, on its own, could be categorised, to quote French J in *Martin v Western Australia* [2001] FCA 16 at [23], when dealing with an earlier form of this application, as "*diffuse and general and would be unlikely, in the ordinary course, to satisfy the Registrar that it supported the assertions set out in s 190B(5).*" In that case French J considered an earlier formulation of Schedule F which was somewhat shorter than the current application. Nonetheless, despite the difference between the two, the material in the current Schedule F is still in the nature of generalities and would not meet the test as outlined by the Full Federal Court in *Gudjala.*

[229] However, I have before me, as did the Delegate, additional material, and a Delegate, or Member on reconsideration, is not limited to the statements set out in the application - *Martin v Western Australia* at [23]. The question which needs to be answered is whether the information in the application supplemented by the other material considered by the Delegate (as outlined at page 36), in aggregate, would enable me to be satisfied that the conditions enumerated in s.190B(5) have been met.

Subparagraph 190B(5)(a)

[230] The first paragraph of s.190B(5) requires me to be satisfied that there is a factual basis for the assertions that the native title claim group have, and the predecessors of such persons had, an association with the area.

[231] The Delegate was not satisfied. She opined that the information in Schedule F in relation to this assertion was generic and vague. She then referred to various affidavits including that by [Name deleted], and indicated that it went some way towards addressing the deficiencies identified in previous registration test decisions and by French J in *Martin.*

[232] In *Martin* French J referred to the decision of the relevant Delegate who was satisfied about ancestral association but not current association because he could not find a basis for a connection between the members of the native title claim group and all of the areas under claim. I now set out at some length the findings of French J on this point (at [24] – [26]):

> *"In this case the delegate found references in the statements provided by various members of the claim group to their association with particular areas concentrated around the centre of the claim area. Other more outlying areas were cited by the applicant as places of significance for Widi people or meeting places for elders from all over the Gascoyne/Murchison area but not necessarily those with which claim group members have maintained an association. The delegate also noted that the only place referred to within the additional area added to the claim in October 1997 was Three Springs. Overwhelmingly the places mentioned in the*

statements are those surrounding the towns of Morawa, Koolanooka and Perenjori. There was not evidence of association with the coastal areas claimed around Dongara, which was particularly relevant as the original claim was expanded to include that area. The very limited anthropological references similarly did not refer to that area. Additionally, no information was provided regarding association with the northern and eastern parts of the claim ….

[25] … The delegate was said to have erred in his failure to infer that the relevant association extended to all of the area of land and waters claimed. He was said to have misdirected himself as to the meaning of the word "association" by limiting it to a 'physical presence' at a place which he then required to be demonstrated by the evidence of an individual's personal attendance and requiring a repetitive physical presence in relation to each of the areas.

[26] I do not read the delegate's reasons as having so narrowly construed the concept of association. He looked to the positive material put before him asserting a factual basis for association and found that it disclosed association only with particular areas. If it be the fact that that material disclosed only physical association, that does not mean that he has wrongly construed the nature of the association that may be sufficient for the purpose of the recognition of native title. There was simply a lack of material to support an association, physical or spiritual, with the entire area claimed. He was not obliged to accept the very broad statements contained in Schedule F which have no geographical particularity. In my opinion the delegate did not err in his approach to the application of the condition in s190B(5)(a)."

[233] The reasoning of French J is not inconsistent with later Federal Court authority, and, in particular, the findings of the Full Federal Court in *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317. It should be noted that Dowsett J in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 stated (at [52]): "*I do not mean that all members* (of the claim group) *must have such association at all times. However, there must be evidence that there is an association between the whole group and the area."* In short, the test is not that there is evidence before the Delegate that each of the members of the claim group have an association, as described by French J, over the whole area, but, that cumulatively, there is material before a Delegate that shows an association between the whole group and the whole area of the claim. Further, Dowsett J also observed (at [52]): "*Similarly, there must be evidence as to such an association between the predecessors of the whole group and the area over the period since sovereignty."* This analysis of Dowsett J was not disapproved of by the Full Federal Court.

[234] I turn now to the affidavit of [Name deleted] sworn on 7 December 2009. As the Delegate pointed out there is information in the affidavit, particularly at paragraphs 5 to 15 which address, in part, the type of issues which need to be considered pursuant to paragraph (a).

[235] [Name deleted] deposes (at para 3) that he was born in Morawa on 21 April 1939, and that his Aboriginal grandfather [Name deleted] (who passed away in about 1929) lived generally in the Mingenew and Dongara area (at para 6). He further deposed that "*by the time I was a young teenager, I had travelled with my mother, and usually with other Widi people, over the general extent of Widi country"* (para 9). [Name deleted] deposes that he was taught that it ran on a line from the coast just south of Dongara east to Wubin, then to Paynes Find, then Mount Magnet, Tallarang Peak and Mullawa and back to the coast south of Geraldton (para 10). I have carried

out my own searches of these localities and they are consistent with covering the whole area claimed by the Widi Mob.

[236] [Name deleted] also deposed "*that the area northeast of Mingenew and along the Irwin River to Mullawa was particularly good country to camp in and was of special importance to my mother"* (para 11). [Name deleted], his mother "*was born alongside the Irwin River at a place just west of Gutha"* (para 12). [Name deleted] deposes that many people in the Widi Mob worked on farms "*but whenever the opportunity arose people would visit culturally important places, carry out ceremonies, go camping and hunting and gather bush foods and medicine"* (para 14). He also deposes (at para 15) that his mother and father lived in places such as Morawa, Koolanooka, Bowgada and Perenjori "*and lived on farms where my father worked. All these places are in Widi traditional country* (para 19).

[237] [Name deleted] further deposed that he had "*travelled extensively through Widi country with my mother"* (para 19) visiting places such as "*the Irwin River, Koolanooka Hills, Ballaranga Ranges, the Coal Seam and all of the main towns in Widi Country"* (para 20)

[238] The affidavit of [Name deleted] goes some way towards filling the gaps in the material about the association of members of the Widi claim group to the area of the application. The Delegate acknowledged this in her decision (at page 38). The key issue, however, is whether the material in [Name deleted] affidavit can, in combination, with all of the other material, satisfy the requirement of s.190B(5)(a).

[239] I have formed the view that the affidavits and statements in aggregate demonstrate that the Widi Mob as whole, presently has, and the predecessors of those persons had, an association with the whole of the land and waters currently claimed.

[240] The affidavit of [Name deleted] demonstrates that he, and other members of the claim group, have lived and travelled over the whole of the area of the claim. The affidavit also demonstrates to my satisfaction, that he and other members of the claim group have a physical and spiritual association with the claim area.

[241] I read this affidavit in the context of the information provided by [Names deleted] and other Widi people. Much of that information is set out in my discussion of s.190B(5)(b) hereafter. However, I infer from the statements of these persons that they, and their ancestors, travelled over the area of the current claim and had an association with the claim area.

[242] Although the information before me is not copious, and I accept that in this matter a Delegate could also form the view that the material is not sufficient, I have read this information and interpreted it in a beneficial manner. I have done so particularly in light of the approach of the Full Federal Court in *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317. In

particular I refer to the following finding (340-341/[92]): "*what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required 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. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim.*"

[243] It should be noted, that it is not the role of a Delegate, or Member on reconsideration, to undertake a forensic analysis of the material and to engage in an exercise that only a Federal Court judge can undertake. The evidence does not have to be extensive. I do not have to engage in an exercise of weighing its probative value. All a Member has to do is ascertain if it is provided and weigh it according to the facts deposed therein.

[244] On this basis **I am satisfied** that the factual basis provided is sufficient to support the assertion described by s.190B(5)(a).

Subparagraph 190B(5)(b)

[245] Subparagraph 190B(5)(b) requires that the factual basis support the assertion 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.

[246] It will be noted that the wording of s.190B(5)(b) is almost identical to paragraph 223(1)(a) which is part of the section defining native title rights and interests. In undertaking a s.190B(5)(b) assessment, therefore, close attention needs to be placed on the relevant authorities explaining the operation of s.223(1)(a). Of most significance in this regard is the decision of the High Court in *Yorta Yorta Community v Victoria* (2002) 214 CLR 422. I adopt for the purposes of this reconsideration the statements of law found at paragraphs [46] – [47] and [86] – [87] of the lead judgment.

[247] Of further assistance is the useful summary of the *Yorta Yorta* principles by Dowsett J in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 at [26]. This analysis was not overturned by the Full Federal Court on appeal, and I adopt it for the purposes of this aspect of the reconsideration.

[248] In summary I need to be satisfied, pursuant to s.190B(5)(b), that I have material before me that would establish a factual basis that the traditional laws and customs currently acknowledged and observed by the claim group are rooted in the traditional laws and customs of a society in existence at sovereignty over the area of the claim and which has continued in existence in a substantially uninterrupted form since sovereignty to the present day.

[249] Of direct relevance in this context is the analysis and findings of French J in *Martin v Native Title Registrar* [2001] FCA 16, which, as previously noted, involved a consideration by the Court of this application a decade ago. French J made the following observations (at [27] – [28]):

> "27 … *He* (the delegate) *referred to the assertion in Schedule F that the possession, occupation, use and enjoyment of the area under the claim had been pursuant to and possessed under the laws and customs of the claim group which had been passed by traditional teaching from preceding generations to the present generation of persons comprising the native title claim group. He referred to 'evidence provided by the applicant in support of the assertion identified above'. Reference was made to a Statement of Reasons and Decision by Tribunal member, Kim Wilson, in the objection proceeding WO97/368 and, in particular, an affidavit of the applicant referred to in that Statement. It was noted also that the Objector's Contentions from the same objection proceedings detailed the spiritual connection between the claimant group and the land. The delegate said, however:*
>
> > *'32. On balance on the evidence provided, I am not satisfied that there exist traditional laws acknowledged by, traditional customs observed by the members of the claim group which give rise to the native tile rights and interests claimed by the claim group.*
> >
> > *33. While information is provided about a community from which the claimant group and their predecessors derive their rights and interests – the Widi People – there is little information about the relationship of the claim group and the predecessors of the claim group to the 'Widi People'. It is not apparent, for example, whether the claim group comprises the entire group identified as Widi or whether they are a subgroup of a wider Widi group.*
> >
> > *34. It follows that the applicant has not detailed how the traditional laws acknowledged by, and traditional customs observed by the Widi group give rise to the native title rights and interests claimed by this particular claim group.'*
>
> *The delegate also found that from the information provided it was unclearas to whether the laws and customs referred to related to the land and waters where native title rights and interests were claimed. At par 36 he said:*
>
> > *'In summary, the applicant has not provided information demonstrating the existence of laws and customs acknowledged and observed by a community of people which in turn entitles this particular claim group to claim the native title rights and interests identified in this application and in relation to the particular land and waters claimed in this application.'*
>
> *28 The complaint made of the delegate's approach was that he erred in law by misdirecting himself that the statements in Schedule F of the application were mere 'assertions' upon which no probative value could be placed. He was said also to have misdirected himself as to the questions raised for him by s 190B(5)(b). The relevant questions, it was said, are:*
>
> > *(a) Are there traditional laws and customs observed by the claim group;*
> >
> > *(b) Do they give rise to the claimed native title rights and interests?*
>
> *In para 25 of his reasons, however, the delegate accurately identified the questions which he had to answer. It was said that he had converted them to 'misconceived questions' about the relationship between the 'Widi People' and the claim group and its predecessors, whether the claim group was the entire Widi group or a sub-group of it and whether the traditional laws and customs of the Widi group were the traditional laws and customs of the claim group. These questions were said not to arise because the evidence of the claim group members which was considered consistently equated its predecessors with the Widi people from whom they claimed to have inherited their native title interest in the claim area and learnt of the traditions and customs of the area. And if they were wrong about that, it was said that was not an issue which the decision-maker needed to resolve in considering whether they had satisfied the requirements of s 190B(5)(b). The critical*

finding of the delegate was that there was little information about the relationship of the claim group and its predecessors to the Widi people. This consideration was involved in his analysis of whether he could be satisfied that there was a factual basis supporting the primary assertion referred to in s 190B(5)(b). He was entitled to take the view that he did that the factual basis laid out did not support the conclusion that was necessary. He was not obliged to accept every general assertion in Schedule F as disclosing a factual basis for the matters of which he had to be satisfied. In my opinion the delegate did not err in coming to the conclusion he did in relation to this condition."

[250] The Delegate also referred to the above authorities, in particular, to the analysis of Dowsett J in *Gudjala.* There is no error, in my opinion, with her analysis and statement of the law as it applies to s.190B(5)(b).

[251] Having then correctly set out the legal basis for her assessment, she said (at page 40):

"I have considered the schedule F description and the additional information provided by the applicant, including the affidavits by the former applicant and the more recent affidavit by Irwin Lewis. However it is my view that these materials ultimately fail to provide a sufficient factual basis for this particular assertion. Although there is some information in the affidavits by the former applicant and the current applicant describing their ancestral links with parts of the area under claim and their life-long attachment to and conduct of activities of a traditional nature in that area, I am of the view that none of this material ultimately describes how these things are asserted to be currently rooted in a society of people living according to a system of identifiable customs, having a normative content, being a society that operated in relation to the application area at the time of European settlement."

[252] A Delegate, when reaching their decision whether the information before them provides a sufficient factual basis to be satisfied of a s.190B(5)(b) assertion, inevitably engages in a weighing exercise. Is the cumulative weight of the material relevantly before the Delegate sufficient to allow a positive assessment? To some extent such an exercise involves issues of personal discretion, insofar as there are sometimes difficult decisions to be made and a reasonable person assessing the material in such circumstances could go in either direction.

[253] It appears that the gravamen of Mr. Marsh's submission is that the Delegate has applied too high a standard, and that applying the standard mandated by the Full Federal Court in *Gudjala* a Delegate should have been so satisfied.

[254] The Full Federal Court in *Gudjala* did indicate that it is necessary for a Delegate to be satisfied that at sovereignty there was an indigenous society in the claim area observing identifiable laws and customs (at [96]). The Full Court also held (at [93]) that it would be an error to approach a s.190B(5) assessment "*on the basis that it should be evaluated as if it was evidence furnished in support of the claim."*

[255] In reaching my conclusion I have regard to the fact that the Schedule F now before me is much more detailed than that considered by French J in *Martin.* As previously stated, it is, by itself, expressed in a level of high generality and alone would not meet the standard required by

[256] The affidavit of [Name deleted] affirmed on 24 August 1998 and quoted in full by Member Wilson in *Joan Margaret Martin/Michael John Marsh; Susan DeConinck* [1998] NNTTA 248 and *Joan Martin/An Feng Kingstream Steel Ltd* [1998] NNTTA 249 contains the following pertinent information:

> *"1. I was born in the heart of Widi country which my Ancestors frequented for centuries. My mother was born on the banks of the Irwin River near Gutha. Her family and grandparents before here were born into the Widi mob and within the boundaries of the Widi peoples' traditional land.*
>
> *2. I was informed by my Ancestors that their nomadic lifestyle took them across country to visit other small groups in the area and they became familiar with neighbouring relatives.*
>
> *3. The older lawmen of the Widi mob had to make regular trips to keep check on sacred sites and update ancient paintings. These paintings recorded our being and stories familiar to the Widi people.*
>
> *4. My family and I have painted these stories.*
>
> *5. Many tribal gatherings were held on the Widi territory where songs familiar to the mob were sung and young people were initiated right through the area.*
>
> *6. Tallerang Peaks, which is part of the Widi peoples' area, has a long history with our people. Many, many Aborigines became lawman (stet) from here.*
>
> *7. Many Aboriginal babies were born in a special cave at Tallerang and it was always a tribal camping and meeting ground for surrounding mobs where all the important Elders and Special People met from all over the Gascoyne/Murchison area. These meetings took place in turn in different places but Widi mob had their own meetings. …*
>
> *12. I, and other members of the Widi people use Aboriginal law as a guideline for our daily lives. We follow a traditional lifestyle and have maintained contact with the land. With my sisters and brothers, I am custodian of the Morawa District. The laws and culture of the Widi people include traditional stories and beliefs concerning the land, which are handed down by the custodians to my descendants. I express those stories through paintings and craft in the traditional style. I believe these ties with the Widi people are never-ending and will always be followed. …*
>
> *14. (stet) The country of the Widi people is home to me and ownership was handed down to all Widi people and their descendants.*
>
> *15. I am a direct descendant of [Names deleted] (my Great Grandparents), who are buried in the Morawa District. My Grandparents are [Names deleted].*
>
> *16. My Ancestors and direct relatives and I were born and raised in the Morawa District. We lived in camps in the bush, living basically on traditional food only for many years before World War II. …*
>
> *19. I also have the right to practice Aboriginal law and ceremonies and bury my deceased relatives."*

[257] This information was supplemented by [Name deleted] in an affidavit affirmed on 20 July 1999. In this affidavit [Name deleted] gave the following information:

> *"1. I was born at Morawa on 2 March 1941, and have a continuing traditional connection to the land and waters the subject of this application on the basis of my descent, through my mother [Name deleted]), who*

was born at a town called Gutha, from my Mother's father, [Name deleted], who died at Mingenew in 1935, and his Mother,[Name deleted], who was born on the Irwin River in 1851, of parents from that area. …

4. My Mother's brother, [Name deleted], and his descendants are also connected to the claim area by means of the same ancestors... he and his sons, [Names deleted] remain law-men with a traditional connection to their father's country in the area of this claim. …

8. During my lifetime, within the claim area, I have been taught to eat porcupine, beet honey, kangaroo, emu, natural gum, bungarra, various native birds, cogalas (wild pears), yams, quondongs and berries and been on expeditions within the claim area to track and hunt and collect such foods when they were in season. I have been taught by my mother how to skin, cook and eat a kangaroo in the way her ancestors did it. I have also watched my mother grind grain with a grinding stone in the manner her ancestors taught her.

9. I was also taught about traditional medicines and cures for different illnesses using plants obtainable from within the claim area."

[258] I have also considered the statement of [Name deleted] which was taken on 14 June 1999 and was verified by his solicitor Mr. Greg McIntyre in a letter to the Tribunal of 29 August 1999:

"1. I was born at the Mora Hospital on 4 March 1955. My mother [Name deleted] was also born at the Morawa Hospital. My Grandmother, [Name deleted] was born at the top end of the Irwin River near Wilroy. …

7. I was told by my Grandmother that her father [Name deleted] run was from Mingenew to Bowgafda to Paines' Find, to Kirkalocka, to Mullewa and back to Mingenew.

8. I have been told by my Grandmother and older peple that hundreds of Widi people died at Tobraddin Station near Dongara, and so Widi people do not spend any time there since.

9. When I worked on the stations I used to hunt for kangaroo and collect bush tucker, such as kagula (bush banana) and culyu (wild potato).

10. As I traveled from town to town I would shoot kangaroos and collect bush tucker, such as quondongs, on the way.

11. Morawa was the number one place for porcupines. I learnt from my Grandmother how to pick them up and cook them in the ashes, burning their quills off, or boil them in water and scrape the quills off.

12. My Grandmother showed us where she got emu eggs and I have learnt to carve emu eggs. I have been to Yalgoo to collect emu eggs.

13. My Grandmother… taught me about bush medicine in Morawa. …

16. My cousins [Names deleted], my sons and I run the law for the claim area. We have been initiated into a powerful stage of the law called 'Womelu'.

17. There is a law ground in the Medali Range (information about the law ground is then provided) … .

18. There is a law ground at Canna. I have been there for bush tucker, such as quondong, curarra and bardi grubs.

19. I have been taught by various members of my family that there are burial sites of my ancestors (he then names the places) … .

21. I know songs about the claim area, and place names are taken from the language I was taught by my ancestors. For example 'murawa' (Morawa) means small handed kangaroo."

[259] In addition to this unsigned statement, I have also perused [Name deleted] written statement of 4 May 1999 in which he refers to other family members [Names deleted] and states:

"We are all lore men having completed tribal ceremony." He also stated: *"I am the family of this Area. I have collected traditional food and medicine in this area all my life. My 3 sons whom have also followed the physical and spiritual connection to these lands and have also completed tribal ceremonys and are Lore Men."* I have also perused the written statements of [Names deleted], both also of 4 May 1999.

[260] The cumulative weight of these, and other materials before me, establishes to my satisfaction, that there is a factual basis for the assertion that at sovereignty there was a Widi society the members of whom continue to acknowledge traditional laws and observe traditional customs. I am not required to go beyond the statements, or to question their veracity. Less still am I required to apply to this material the scrutiny which the Court needs when making a s.13 determination. My task is very limited, and the scope of my inquiry is focused.

[261] I note, in particular, the thrust of the Full Court's direction in *Gudjala.* Plainly it is not the role of a Delegate to engage in a "second guessing" exercise or to impose on an Applicant too high a duty. Instead all a Delegate need do is look at the material, whether positive or prejudicial, and form a view in accordance with the statutory mandate. In doing so a Delegate should not analyse material with a view to ascertaining its probative strength or weakness.

[262] Accordingly, **I am satisfied** that the factual basis provided is sufficient to support the assertion described by s.190B(5)(b).

Subparagraph 190B(5)(c)

[263] The final paragraph of s.190B(5) requires a consideration of whether there is a factual basis that the native title claim group have continued to hold the asserted native title in accordance with traditional laws and customs.

[264] There is a clear linkage between this paragraph and s.190B(5)(b). If a Delegate was not satisfied that the factual basis supported the assertion in s.190B(5)(b), then a Delegate could not be satisfied pursuant to s.190B(5)(c) - *Martin v Native Title Registrar* [2001] FCA 16 at [29].

[265] The Delegate was not satisfied, and her reasons are set out below:

> *"In my view, the applicant's factual basis materials are ultimately lacking for this particular assertion for the reasons outlined in relation to the assertion in subparagraph 190B(5)(b). I am also of the view in relation to this particular assertion that there is not enough material that identifies how the ancestral links and traditional activities described in the affidavits of the former applicant and the current applicant are derived from a society of people living according to a system of identifiable laws and customs, having a normative content, being a society that operated in relation to the application area at the time of European settlement."*

[266] In order for a Delegate to be satisfied that there is a factual basis for s.190B(5)(c) there must be some material which addresses those matters outlined by Dowsett J in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 at [63], [65] and [66].

[267] Unlike the Delegate I have formed the view that the cumulative weight of all of the material before me provides a sufficient basis to be satisfied that the Widi People continue to hold their asserted native title in accordance with traditional laws and customs.

[268] I note that Schedule F lists 16 traditional activities and uses that are asserted to have survived from the Widi pre-sovereignty society and which have been passed down from generation to generation. I infer from this assertion that there is some material which assists towards establishing a factual basis for the assertion that the current laws and customs currently observed have their source in a pre-sovereignty society which has been observed in the intervening years, and continues to be observed. Likewise I believe that the material in Schedule F goes some way towards establishing a factual basis that there existed at sovereignty an indigenous society of people in the claim area living according to a system of identifiable laws and customs.

[269] As previously stated, the material in Schedule F would not be sufficient of itself to establish a factual basis as required by s.190B(5)(c), however such a basis can be established when the assertions in Schedule F are supplemented by the material I have previously outlined.

[270] It could be said that the material before me is slight, and if presented to the Court in support of the application would be manifestly inadequate. It could also be said that the material has a number of problems with it, such that in a trial environment serious issues could be raised. However, these matters are not relevant when applying this aspect of the registration test. The Registrar is required only to be satisfied of certain matters, and following the elucidation of the law by the Full Federal Court, it also clear that it is inappropriate to apply an overly forensic and strict approach when determining if a factual basis can be established pursuant to s.190B(5).

[271] In this context **I am satisfied** that the factual basis provided is sufficient to support the assertion described by s.190B(5)(c).

Effect of the exclusion clause on the factual basis

[272] The Delegate also dealt at some length (pages 41 – 43) with the effect, as she perceived it, of the operation of the proviso in Schedule A on the factual basis. She quoted at length Dowsett J in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167. One of the passages she quoted of His Honour's judgment was as follows (at [39]):

> *"Subsection 190B(5) of the Act refers to the factual basis upon which it is asserted that the claimed Native Title rights and interests exist. This is clearly a reference to the existence of rights vested in the claim group. Thus it was necessary that the Delegate be satisfied that here was an alleged factual basis sufficient to support the assertion that the claim group was entitled to the claimed Native Title rights and interests. In other words, it was necessary that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)."*

[273] The Delegate was of the view (page 42) that the Applicant's factual basis must identify the relationship between "*its asserted native title claim group, the area covered by the application and the claimed native title rights and interests."* In particular the Delegate was concerned that the Applicant explain how the provisos in Schedules A and O operate under the traditional laws and customs of an indigenous society existing in the application area at sovereignty and with a continuous vitality since that time.

[274] In support of this proposition the Delegate referred to various findings of Lindgren J in *Harrington-Smith v Western Australia (No 9)* (2007) 238 ALR 1. The Delegate referred to two sets of passages from His Honour's judgment ([1220] – [1223] and [2475]) which I have read, together with broader passages which put those quotations into perspective. The point Lindgren J is making, and which is not contested, is that where the Dieri Mitha and Edwards Landers type of situation arise, as Mansfield J determined, it is impossible for such claims to pass the registration test. In short, where a Delegate is confronted with an application, which on its face, indicates that the claim group is part of a broader group, such a claim cannot satisfy the relevant requirements of ss.190B and 190C.

[275] The Delegate then made the following observations regarding the findings of Barker J *Martin (deceased) v Western Australia (No 2)* [2009] FCA 635 (at page 43):

> *"I have considered the view expressed by Barker J in Martin No 2 at [99] that the references in the proposed amended application to the 'Widi Mob' are to be read as 'merely a reference to the claim group and not to any wider group'. His Honour went on to say, 'the expression 'Widi Mob' is therefore simply a convenient way in which the claim group refers to itself and itself alone' – at [99]. In His Honour's view, by amending the application in the way proposed, the applicants, 'do not purport to be a subgroup of some larger group, and the material before the Court does not suggest they are' – at [99].*
>
> *I think that the task I have under s. 190B(5) is different to that before His Honour and it would be erroneous for me to adopt those comments as satisfying me that the particular requirements imposed on the applicant by this registration test decision are thereby met. It is to be noted that His Honour's decision was not concerned with whether the application contained a different factual basis for the assertion that the claimed native title rights and interests exist and for the particular assertions in either of s. 62(2)(e)(i) to (iii) or s. 190B5(a) to (c). Further it does not appear from His Honour's reasons that the issue was put to him on the basis of the findings in Harrington-Smith."*

[276] The Delegate also referred to the YMAC letter of 2 November 2009 which "*reveals that current members of the Widi Mob native title claim group also have genealogical connections or ancestral*

links with the overlapping Amangu and Badamia native title claim groups, such that I can not be satisfied that there are no common members under s.190C(3)."

[277] I have previously dealt with this issue in another context. However, for present purposes I will again deal with the Delegate's reasoning as it formed part of Mr. Marsh's reconsideration request.

[278] The decision of Barker J is clear and directly relevant to this task I am performing. Whether Barker J was referred to Lindgren J's decision or not, His Honour made specific findings about the amended application which are, at the very least, persuasive. I am not convinced that it is desirable to attempt to distinguish Barker J's findings in the manner that the Delegate has done. Certainly I find nothing in His Honour's decision, that places any barriers on me reaching an independent conclusion on whether this application meets the factual basis required by s.190B(5). In short, I accept for the purposes of this reconsideration, that the operation of the proviso in Schedules A and O does not raise a fatal barrier to the Applicant being able to establish a factual basis for the claimed native pursuant to s.190B(5). I accept that the proviso is, to paraphrase Barker J, a facilitatory tool, and that there is nothing in the wording of the application that would automatically activate the Edward Landers type of response.

[279] I do note that if I did not have before me such a recent and directly relevant Federal Court authority I would have been more inclined to adopt the approach of the Delegate. But, as noted, I do not believe in this respect, it is appropriate to engage in an artificial exercise of attempting to distinguish what is a very clear and relevant authority on this very application.

Combined result for s.190B(5)

[280] The application **satisfies** the condition of s.190B(5) because the factual basis provided is sufficient to support the assertions in s.190B(5)(a) – (c) as set out in my reasons above.

Subsection 190B(6)

[281] This subsection requires that the Registrar must consider that, prima facie, at least some of the native title rights and interests claimed can be established. The implications of this requirement are explained in the Note to the subsection which states that if the claim is accepted for registration, the Registrar must, under paragraph 186(1)(g), enter on the Register of Native Title Claims details of only those claimed native title rights and interests that can, prima facie, be established. It is only those registered rights and interests that can be taken into account in a "right to negotiate" process or by the arbitral body pursuant to s.39.

[282] "Native title rights and interests" are defined by s.223. There is, of course, a difference between those rights and interests that are claimable, and those which can be established.

[283] Of assistance when making an assessment pursuant to this subsection is the following explanation by Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112 (at 145/[126] – [127]):

> *"126 Clearly the requirements upon registration imposed by s 190B should be read together. Section 190B(6) requires the Registrar to consider that, prima facie, at least some of the native title rights and interests claimed can be established. It is necessary that only the claimed rights and interests about which the Registrar forms such a view are those to be described in the Native Title Register: see s 186(1)(g). It is therefore clear that a native title determination application may be accepted for registration, even though not all the claimed rights and interests, prima facie, can be established. Section 190B(6) requires some measure of the material available in support of the claim.*
>
> *127 On the other hand, s.190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interest are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s.190B(6)…"*

[284] The Delegate (at page 45), having found that there was an insufficient basis to support the assertion that there existed traditional laws and customs observed by the claim group, was not satisfied about native title rights and interests being established. However, she also indicated that there was an additional problem in this regard. She referred to the fact the description of the claimed native title rights and interest in Schedule E paragraph 1 which was the exclusive right to possess, occupy, use and enjoy the application area against the whole world over those areas where it had not been extinguished. The Delegate also referred to the asserted right in Schedule 1 paragraph 2(p) to control access to, and use of, the application area by indigenous persons who seek access or use in accordance with traditional laws and customs.

[285] The Delegate made the following observations (at pages 45 - 46):

> *"It seems to me, for the reasons I have provided in relation to s.190B(5), that these rights and interests are particularly vulnerable under this section. This is because none of the material in schedule F or elsewhere in the application or in the other additional information before me, explains how such an exclusive or controlling right is derived in the traditional laws and customs of a pre-sovereignty Indigenous society in relation to the application area."*

[286] In reaching her conclusion on the question of exclusive rights and interests the Delegate referred to, and quoted from, the Full Federal Court decision of *Griffiths v Northern Territory* (2007) 165 FCR 391.

[287] Mr. Marsh, when seeking the reconsideration, referred to paragraph 83 of the Full Court *Gudjala* decision, and, in addition, made the following submission:

> *"The Delegate's assessment of the Amended Main Application under this section is wrong and her reasons are inadequate. The facts set out in the Amended Main Application satisfy the requirements of this subsection."*

[288] The particular part of the Full Court decision relied upon is set out below:

> *"His Honour went on to discuss the requirement that the Registrar consider whether the factual basis upon which it is asserted that the claimed native title rights and interests exist is sufficient to support the assertion. His Honour said (at [17]) the words that we set out at [57] above, and which we find it convenient to repeat:*
>
> > *'Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the 'factual basis on which it is asserted' that the claimed native title rights and interests exist 'is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests, but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing or to assess the strength of the evidence which may be ultimately adduced to establish the asserted facts.'*
>
> *We respectfully agree with and adopt that characterisation of the criterion set out in s 190B(5). See also Martin v Native Title Registrar [2001] FCA 16 at [22] (French J)."*

[289] As will be noted Mr. Marsh's reliance on paragraph 83 of the Full Court decision focuses attention on s.190B(5) and not s.190B(6). While, as previously discussed, the two provisions are inextricably intertwined, the task required of a Delegate when assessing s.190B(6) is of a different type than that required when assessing s.190B(5). The Full Court, in fact, quoted from Mansfield J in *Doepel* and endorsed his approach to the interpretation of these two provisions – see *Gudjala* at [82].

[290] As previously discussed, I am satisfied of the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. Nonetheless it clear from the findings of Mansfield J in *Doepel* that either a Delegate, or a Member on reconsideration, must carefully examine the factual basis for the assertion the claimed native title rights and interests exist against each of the claimed individual rights and interests.

[291] In particular, I need to be satisfied that the claimed rights and interests:

- Exist under traditional law and custom in relation to the land and waters under claim;
- Are native title rights and interests in relation to the claimed land and waters; and
- Have not been extinguished.

[292] Subsection 190B(6) requires the Registrar to consider whether *prima facie* at least some of the claimed rights and interests can be established. As Mansfield J explained in *Doepel* (at 119/[16]): "*the claim may be accepted for registration even if only some of the native title rights and interests claimed in the application can be established."*

[293] Mansfield J also provides helpful guidance on the proper understanding of the term "*prima facie".* His Honour said (147/[135]): "*if on its face a claim is arguable, whether involving*

disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis." Consequently, it is not the role of the Registrar to resolve disputed questions of fact or law, rather the task of the Registrar or her Delegate is to ascertain if an asserted native title right or interest is arguable. In doing so Mansfield J also noted (at 146/[132]): "*s 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed."*

Exclusive Rights and Interests

[294] I will deal firstly with the exclusive rights and interests claimed. Schedule E of the application sets out the claimed native title rights and interests. Paragraph 1 provides as follows:

> "*The native title rights and interests claimed are:*
>
> *[1] Over areas where a claim to exclusive possession can be recognized (such as areas where there has been no prior extinguishment of native title or where Section 238 of the Native Title Act applies) the Widi Mob claim the right to possess, occupy, use and enjoy the lands and waters covered by the application (the application area) as against the whole world."*

[295] Of assistance in this context are the findings of the Full Federal Court in *Griffiths v Northern Territory* (2007) 165 FCR 391. The Full Court (French, Branson and Sundberg JJ) held (at 429/[127]):

> *"The question of exclusivity depends upon the ability of the appellants effectively to exclude from their country people not of their community. If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorized entry and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have, in our opinion, what common law will recognise as an exclusive right of possession, use and occupation."*

[296] In order to found a claim for exclusive possession the applicant must provide evidence that according to their traditional laws and customs they are, to quote the Full Court in *Griffiths* the "*gatekeepers"* for the claimed land and waters. In this matter, as the Delegate correctly pointed out, there is no evidence of such an exclusive or controlling right which is derived from the laws and customs of a pre-sovereignty society and which has continued with vitality since that time. In the absence of such evidence the claim for the exclusive rights and interests cannot be established.

[297] Result: exclusive rights and interests claimed not established

Non-exclusive rights and interests

[298] Paragraph 2 of Schedule E lists various non exclusive rights and interests from paragraph (a) to (p). I will deal with all of these claimed rights and interests, but group them into clusters where appropriate.

Access to the application area (a); and
Move about the application area (c).

[299] These claimed rights and interests are supported by the following direct evidence:

- Affidavit of [Name deleted] affirmed 24 August 1998

  Paragraph 2 (*I was informed by my Ancestors that their nomadic lifestyle took them across country to visit other small groups in the area and they became familiar with neighbouring relatives*)

  Paragraph 3 (*The older lawmen of the Widi Mob had to make regular trips to keep check on sacred sites and update paintings*)

  Paragraph 16 (*My Ancestors and direct relatives and I were born and raised in the Morowa District)*

  Paragraph 18 (*The rights I have inherited from my Ancestors include – the right to live and enter upon the land*)

- Statement of [Name deleted] dated 3 February 1999

  "*I have had a continuous association with the Morowa and surrounding areas, have lived in Morawa continuously for thirty years. Since leaving Morowa I have continued my association with the region, by returning to the area for important ceremonies*…)

- Statement of [Name deleted] dated 4 February 1999

  "*I have never lost my affiliation and tribal ties to the Widi land, and visit the district on a regular basis."*

- Statement of [Name deleted] (undated but circa February 1999)

  "*As a young boy we often travelled north from Morawa to Mullewa –Yalgoo – Mt Magnet – Cue – Meekatharra Wiluna to visit relations and my people…. I grew up in Morawa and never really left that district… As I said before, I resided in Morawa and moved extensively within an area bounded by Mullewa, Yalgoo, Mt Magnet, Paynes Find and Wubin".*

- Statement of [Name deleted] (undated but circa February 1999)

  "*As a child we lived in camps on the outskirts of towns, Morawa, Koolanooka and Perenjori and it was our home and that of other tribe members and our ancestors…whilst growing up I was able to work and live in this area from Warredah Station to Paymes Find, Ninghan Station, to Mount Magnet and Murrum Station to Sandstone, Meekatharra and Gabbyong Station and a farm a few miles out of Three Springs on the Morawa road."*

- Statement of [Name deleted] (unsigned, but taken on 3 June 1999 by [Name deleted])

Paragraph 2 "*I lived in Morawa most of my life until I was 10 years of age*"

Paragraph 3 "*I travelled all over the area of the claim, including the towns of Morawa, Yalgoo,Mingenew, Three Springs, Perenjori and Carnamah, Dalwallinu and Mullewa, and to Rothsay and Paines Find, where my mother grew up."*

Paragraph 5 "*I have worked at Mellenbye Station, Barnong Station, and Kadji Station and visited family at Yuin Station, Gabyon Station, Carlaminda Station, Wagga Wagga Station, Bunnawarra Station, Muralgarra Station, Badja Station, Lochada Station and Thundelarra Station."*

- Affidavit of [Name deleted] sworn on 7 December 2009

  Paragraph 9 "*By the time I was a young teenager, I had travelled with my mother, and usually with other Widi People, over the general extent of Widi country*";

  Paragraph 14 "*Many people in the Widi mob worked on farms but whenever the opportunity arose, people would visit culturally important place..."*

  Paragraph 19 "*I travelled extensively through Widi country with my mother*."

[300] Having considered this material, I am of the opinion that these claimed rights and interests are **established**

Camp on the application area (b)
Erect shelters on the application area (c)
Live on the application area (d)
Hold meetings on the application area (f)

[301] These claimed rights and interests are supported by the following direct evidence:

- Affidavit of [Name deleted] affirmed on 24 August 1998

  Paragraph 5 "*Many tribal gatherings were held on the Widi territory..,"*

  Paragraph 7 "*Many Aboriginal babies were born in a special cave at Tallerang and it was a tribal camping and meeting ground for surrounding mobs where all the important Elders and Special People met from all over the Gascoyne/Murchinson area. These meetings took place in turn in different places but Widi mob had their own meetings."*

  Paragraph 16 "*We lived in camps in the bush..*

- Statement of [Name deleted] dated 4 February 1999
- "*There can be no doubt that a Widi tribe occupies land within the now designated boundaries of Morawa, Mingenew, Irwin and Mullura Shires."*

- Statement of [Name deleted] (undated but circa February 1999)

  "*I have taken my children back to learn where I grew up and the history around it as well as to camp …"*

- Affidavit of]Name deleted] sworn on 7 December 2009

  Paragraph 11 "*The area northeast of Mingenew and along the Irwin River to Mullawa was particularly good country to travel and camp in and was of special importance to my mother*"

  Paragraph 14 "*Many people in the Widi mob worked on farms but whenever the opportunity arose, people would…go camping… I was aware those activities were being done.*"

  Paragraph 25 "*I recall that other family members talked about catching fish along the Irwin River and where makeshift houses had been built many, many years before and that were used at various times of the year.*"

[302] Having considered this material, I am of the opinion that these claimed rights and interests are **established**.

Hunt on the application area (g)
Fish on the application area (including on inland waters) (h)
Gather medicinal plants on the application area (l)

[303] These claimed rights and interests are supported by the following direct evidence:

- Affidavit of [Name deleted] affirmed on 24 August 1998

  Paragraph 16 "*My Ancestors and direct relatives and I were born and raised in the Morawa District. We lived in camps in the bush, living basically on traditional food only for many years before World War II*"

  Paragraph 18 "*The rights I have inherited from my Ancestors include the right to collect food, timber, stone, ochres, resin or grasses and bush medicine within the Widi area.*"

- Affidavit of [Name deleted] affirmed on 20 July 1999

  Paragraph 8 "*During my lifetime, within the claim area, I have been taught to eat porcupine, beet honey, kangaroo, emu, natural gum, bungarra, various native birds, cogalas (wild pears), yams, quondongs and berries and been on expeditions within the claim area to track and hunt and collect such foods when they were in season. I have been taught by my mother how to skin, cook and eat a kangaroo in the way her ancestors did it. I have also watched my mother grind grain with a grinding stone in the manner her ancestors taught her.*"

  Paragraph 9 "*I have also been taught about traditional medicines and cures for different illnesses using plants obtainable from within the claim area.*"

- Statement of [Name deleted] dated 4 February 1999

  "The visits I make (i.e. to the claim area) *are not only for hunting and fishing…"*

- Statement of [Name deleted]

  "I have taken my children back to learn about where I grew up and the history around it as well as …hunt and fish."

- Statement of [Name deleted]

  Paragraph 9 "*When I worked on the stations I used to hunt for kangaroo and collect bush tucker, such as kagula (bush banana) and culyu (wild potato)."*

  Paragraph 10 "*As I travelled from town to town I would shoot kangaroo and collect bush tucker, such as quondongs, on the way*"

  Paragraph 13 "*My Grandmother had one kidney and she survived on bush medicine. She taught me about bush medicine in Morawa.*"

  Paragraph 14 "*My mother grew up around Paines' Find. I have been there shooting and camping. It is a good place of medicine and kangaroos. A cancer medicine is made out of a maroon bush from there. It is also a good place to find the black current bush.*"

- Affidavit of [Name deleted] sworn on 7 December 2009

  Paragraph 14 "*Many people in the Widi mob worked on farms but whenever the opportunity arose people would…go…hunting and gather bush food and medicine. I was aware those activities were being done,*"

  Paragraphs 21 and 22 "*My mother taught me and my brothers and sisters and many other Widi children traditional skills. She taught us about hunting and gathering food and the proper way to prepare food, including goannas, porcupines, galahs and parrots, pigeons and emus. We gathered bardi grubs and gathered sugar gum.*"

  Paragraph 24 "*My mother used stone fish traps on the Irwin River. This particular activity was Women's Business and I was not involved in the detail of this.*"

  Paragraph 25 "*I recall other family members talked about catching fish along the Irwin River….*"

[304] Having considered the material I am of the opinion that these claimed rights and interests are **established**.

Conduct ceremonies (i)
Participate in cultural activities on the application area (j)

[305] These claimed rights are supported by the following direct evidence:

- Affidavit of [Name deleted] affirmed on 24 August 1998

  Paragraph 5 "*Many tribal gatherings were held on the Widi territory where songs familiar to the mob were sung and young people were initiated all through the area.*"

  Paragraph 19 "*I also have the right to practice Aboriginal law and ceremonies and bury my deceased relatives.*"

- Statement of [Name deleted] dated 3 February 1999

  "Since leaving Morawa I have continued my association with the region by returning to the area for important ceremonies i.e. funerals"

- Statement of [Name deleted] dated 4 February 1999

  "During my early childhood I was shown certain tribal places of significance. Many of these places can still be located, although most are situated on farming properties. The tribal and ceremonial grounds I refer to are not all within the Shire of Morawa…The visits I make are not only for hunting and fishing but are to visit the grave of my father, uncles and aunties…In addition to my visits, I always endeavour to attend funerals of my friends."

- Affidavit of [Name deleted] sworn 7 December 2009

  Paragraph 33 "*I learned about the location and use of clay, ochre and other materials which are used for ceremonial purposes and of course I knew the location of water in the bush.*"

[306] The evidence about conducting ceremonies and cultural activities is fairly limited. However, the various statements and affidavits are replete with references to traditional law and customs, and the ongoing observance of such laws and customs. For example [Name deleted] deposed (at para 12): "*I, and other members of the Widi people use Aboriginal law as a guideline for our daily lives. We follow a traditional lifestyle and have maintained contact with the land."* It is in this context that I evaluate the evidence of the conducting of ceremonies and participating in cultural activities. As will be seen the ceremonies both [Names deleted] refer to are funerals. I do not, however, when evaluating the evidence infer that the only traditional ceremonies conducted, or cultural activities engaged in, are funerals, even though both of these persons obviously regard such practices as extremely significant. Moreover, I also infer that the funeral ceremonies do have a traditional element, and are not just the attending of a non-traditional funeral service. It will be noted that [Name deleted] evidence is more extensive and I infer from her affidavit that ceremonies and cultural activities were conducted on the claim area, and members of the claim continue to conduct such ceremonies and engage in such activities.

[307] Consequently, having considered all of the direct evidence, I am of the opinion that these claimed rights are **established**.

Maintain and protect places of importance under traditional laws, customs and practices on the application area (m)

[308] This claimed right is supported by the following direct evidence:

- Affidavit of [Name deleted] affirmed on 24 August 1998

  Paragraph 3 "*The older lawmen of the Widi mob had to make regular trips to keep check on sacred sites and update ancient paintings. These paintings recorded our being and stories familiar to the Widi people"*

  Paragraph 4 "*My family and I have painted these stories.*"

  Paragraph 21 "*I ask, as a custodian of my traditional lands, that no-one should be permitted to remove any stones etc.' attached to sacred sites relevant to the customs of the Widi mob without my permission.*"

- Statement of [Name deleted]

  Paragraph 16 "*My cousins [Names deleted], my sons and I run the law for the claim area. We have been initiated into a powerful stage of the law called 'Womelu'"*

  Paragraph 17 "*Thee is a law ground in the Medalli Range on Barnong Station, South of Gullewa. There are red, white, blue, dark grey, yellow, black and anothersecret ochre there which are used for ceremonial painting. There are also bush medicines, bus tucker, springs, and paintings there. It is a dangerous place for any other groups to go. If the wrong people went there they could die.*"

  Paragraph 18 "*There is a law ground at Canna…*"

  Paragraph 19 "*I have been taught by various members of my family that there are burial sites of ancestors…"* (he then names the various sites)

- Affidavit of [Name deleted] sworn 7 December 2009

  Paragraph 32 "*I was taught about places of special cultural or mystical significance to Widi people and their significance in cultural and kinship matters. This often, but not always, involved a topographical feature such as a hill, rock or lake.*"

  Paragraph 36 "*I regard myself as a Widi person and am regarded by many as being a senior man in the Widi group.*"

> Paragraph 37 "*I have taught my children about Widi traditional customs and law and I know that they take an active role in Widi cultural matters and caring for the country.*"

[309] Having considered the direct evidence set out above, I am of the opinion that this claimed right is **established**.

Store sacred or secret items in the area and to retrieve and use those objects on the application area (k)

[310] A perusal of the direct evidence leads me to the conclusion that there is insufficient material that would establish such a right. There are statements which, if given a very liberal interpretation, and then clustered, may perhaps in a very general way, support this claimed right. However, that is not the test which applies when a Delegate or a Member on reconsideration considers if, prima facie, the relevant native title right or interest can be established. The ordinary meaning of the phrase "prima facie" is "*at first sight; on the face of it, as appears without investigation" – North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at [615] – [616].

[311] There is no direct evidence which, at first sight, or on its face supports the claimed right. Only by an exercise of sifting through statements and affidavits, and in effect constructing a case could such a right possibly be considered. Neither a Delegate nor a member is required, to, in effect, act as an advocate for an Applicant. Indeed, such an approach would be inappropriate and inconsistent with the task at hand.

[312] Having considered all of the material the claimed right is **not established**.

Visit and observe features of the landscape of cultural significance on the application area (n)
Visit features of the landscape of cultural significance and teach the cultural, religious and mythical significance of such features on the application area (o)

[313] There is support for these claimed rights and interests in the Affidavit of Irwin Tasman Lewis at paragraphs 30 -33 and 37, the Statement of [Name deleted] at paragraphs 16 – 21 and the Affidavit of [Name deleted] at paragraphs 7 -12. In part, or whole, these statements are set out in this decision.

[314] One question which does arise is whether it is possible to recognise the claimed non-exclusive right to teach the cultural, religious and mythical features of the landscape of the application area.

[315] A perusal of recent consent determinations leads me to the view that such a right can be established provided it can be characterised as a right in relation to land and waters pursuant to

s. 223(1)(b) of the Act, and not in the nature of incorporeal rights not recognised by the common law – see *Western Australia v Ward* (2002) 213 CLR 1 at [59] – [60]. One recent example is *Eringa, Eringa No 2, Wangkangurru/Yarluyandi and Irrwanyere Mt Dare Native Title Claim Groups v South Australia* [2008] FCA 1370 where the Court determined that one of the recognised native title rights and interests was "*(j) the right to teach on the Determination Area the physical and spiritual attributes of locations within the Determination Area."*

[316] Having perused the direct evidence before I am satisfied that the claimed native title rights are **established**.

Control access to and use the application area by other Aboriginal people or Torres Strait Islanders who seek access to or use of the lands and waters in accordance with traditional laws and customs (p)

[317] The right asserted is cast in extremely broad terms. It is not a right limited to persons who are governed by the traditional laws acknowledged and traditional customs observed by the Widi Mob, but rather is a blanket assertion governing all Aboriginal People and Torres Strait Islanders.

[318] This issue was dealt with by the Full Federal Court in *Northern Territory v Alyawarr* (2005) 145 FCR 442. The Full Court considered two asserted native title rights, namely:

> *"(e) the right to make decisions about access to the land and waters by people other than those exercising a right conferred by or arising under a law of the Northern Territory or the Commonwealth in relation to the use of the land and waters;*
>
> *(f) the right to make decisions about the use and enjoyment of the land and waters and the subsistence and other traditional resources thereof, by people other than those exercising a right conferred by or arising under a law of the Northern Territory or the Commonwealth in relation to the use of the land and waters."*

[319] The applicants conceded that the right to exclude all others from the claim area had been extinguished by the grant of pastoral leases. The Full Court said (at [148]):

> *"There are dicta in the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ in Ward HC which militate against the applicants' contentions….their Honours said at [62] that without a right, as against the whole world, to possess the land 'it may greatly be doubted that there is any right to control access to the land or make binding decisions about the use to which it is put'. Having regard to what was said in the High Court it seems that the right to control access cannot be sustained where there is no right to exclusive possession against the whole world. The underlying rationale for that conclusion is that particular native title rights and interests cannot survive partial extinguishment in a qualified form different from the particular native title right or interest that existed at sovereignty. The rights set out in pars 3(e) and (f) of the determination do not resemble the holistic right of exclusion which went with exclusive possession and occupation at sovereignty. In this respect the appeal should be allowed and pars e(e) and (f0 deleted from the determination save as to the area of the Hatches Creek townsite where prior extinguishment can be disregarded because of the application of s 47B of the NT Act."*

[320] Later, the Full Court also said (at [151]):

> *"Although par 5(e) of the determination in Ward FC2 had the sanction of the Full Court in that case, it is not without difficulty. There is a risk hat it may be seen as creating a criterion for exclusion based in part upon Aboriginality. In any event it does not appear in this case that there are persons other than the native title holders who are bound by their traditional laws and customs. The position would be different were the native title holders a subset of a wider society incorporating other groups bound by the same traditional laws and customs."*

[321] In *Jango v Northern Territory* [2006] FCA 318 Sackville J referred to the above quote and said (at [571]):

> *"The Full Court in the Alyawarr Case suggested that par 5(e) of the determination in Ward (FC) (no 2) is not 'without difficulty' (at [151]). However, their Honours seemed to accept that a determination in that form would be justifiable 'where the native title holders were found to be a subset of a society comprising the Western Desert Bloc'. Since that is the (hypothetical) position in the present case I would conclude that any native title rights to make decisions about the use or enjoyment of the Application Area by Aboriginal people who are governed by the traditional laws and customs of the Western Desert Bloc were not extinguished by pastoral leases."*

[322] The right to control access in paragraph (p) is focused on indigenous people generally, and there are no words of limitation. The wording is clearly contrary to the findings of the Full Court in *Alyawarr.* In these circumstances the proposed right in paragraph (p) is **not established**.

Conclusion

[323] As I consider, prima facie, some of the claimed native title rights and interests can be established the requirements of s.190B(6) are **met**.

Subsection 190B(7)

[324] Subsection 190B(7) provides that the Registrar must be satisfied that at least one member of the native title claim group:

(a) Currently or previously had a traditional physical connection with any part of the claim area; or

(b) Previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the claim area but for things done (other than the creation of an interest in relation to the claim area) by:

  (i) The Crown in any capacity;

  (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.

[325] Of particular assistance in making an assessment under this subsection are the observations of Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112. His Honour said (at 120/[18]):

> *"Section 190B(7) imposes a different task upon the Registrar. It does require the Registrar to be satisfied of a particular fact or particular facts. It therefore requires evidentiary material to be presented to the Registrar. The focus is, however, a confined one. It is not the same focus as that of the Court when it comes to hear and determine the application for determination of native title rights and interests. The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190b(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration."*

[326] "Traditional" physical connection "*should be taken as denoting, by the use of the word 'traditional', that the relevant connection was in accordance with laws and customs of the group having their origin in pre-contact society"* – per Dowsett J, *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 at [89].

[327] The Delegate, although noting that the former Applicant and one of the current persons collectively comprising the current Applicant had provided affidavits describing their life-long attachment to, and practice of traditional activities in parts of the application area, nevertheless was of the view (at page 47) "*the application cannot satisfy the merit condition in the absence of a sufficient factual basis for the assertions around the existence of traditional laws and customs giving rise to the claim to hold native title in the application area. I am not satisfied that the material I have reviewed shows that any member of the group currently has or previously had a traditional physical connection."*

[328] Mr. Marsh submitted that the Delegate's assessment of the amended application was wrong and her reasons inadequate. He further submitted that the facts set out in the amended application satisfied the requirements of this subsection.

[329] I have reached a different conclusion to the Delegate.

[330] There is ample material before the Tribunal that various members of the claim group maintain a physical connection with at least part of the land and waters comprising the claim area.

[331] Apart from the affidavit of the deceased applicant [Name deleted] of 20 July 1999 there are also signed statements of [Names deleted] each of 4 May 1999 speaking of their ongoing physical connection with the relevant land and waters.

[332] [Name deleted] spoke of his collection of traditional food and bush medicine and relating to the gaining of that knowledge through named deceased ancestors. [Name deleted] spoke of the claim area and how he and other family members went to it on a spiritual and physical basis

gathering bush food and bush medicine. [Name deleted] also recounted how he had collected traditional food and bush medicine from the claim area all of his life.

[333] This information is, importantly, supplemented by the affidavit of [Name deleted] sworn on 7 December 2009. I set out below relevant extracts from this affidavit:

> *"3. I was born in Morawa on 21 April 1939. …*
>
> *5. From the time of my earliest recollection, I was aware that I and other Aboriginal People around me were Widi people and the area in which we lived was part of Widi country. …*
>
> *8. My mother told me that her parents had told her about Widi country and customs and laws. She taught those things to me.*
>
> *9. By the time I was a young teenager, I travelled with my mother, and usually with other Widi people, over the general extent of Widi country. …*
>
> *19 I travelled extensively through the Widi country with my mother.*
>
> *20. The places we visited included the Irwin River, Koolanooka Hills, Ballaranga Ranges, the Coal Seam and all the main towns in Widi Country.*
>
> *21 My mother taught me and my brothers and sisters and many other Widi children traditional skills.*
>
> *22. She taught us about hunting and gathering food and the proper way to prepare food including goannas, porcupines, galahs and parrots, pigeons and emus. We gathered bardi grubs and gathered sugar gum."*

[334] Leaving aside any other material, the affidavit of [Name deleted] establishes that he, at the very least, had a previous physical connection with some of the land and waters comprising the claim area. However, as previously noted, there is also supplementary material from other members of the claim group which indicate an ongoing physical connection to the claim area.

[335] The nature of the physical connection is *traditional* in the sense explained by Dowsett J.

[336] The Delegate although accepting that there was evidence of physical connection to the claim area, was unable to be satisfied pursuant to s.190B(7) because she had not been satisfied of the factual basis for the claimed native title pursuant to s.190B(5).

[337] In my opinion, if a Delegate was to find that a factual basis could not be established for any of the assertions in s.190B(5), then, prima facie, there would be an insurmountable barrier to being satisfied that a *traditional* physical connection could be made out. The Delegate in reaching her conclusion followed a logical and, to my mind, legally correct path. I am not so constrained as the Delegate, insofar as I am satisfied that the Applicant has made out a factual basis for the assertions in s.190B(5). It follows, that the evidence before me of past and current traditional physical connection to the claim area meets the standard required by s.190B(7).

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

Conclusion

[339] I reaffirm that this is a fresh and original decision as to whether or not, in my view, the claim meets all of the conditions for registration specified in ss.190B and 190C of the Act.

[340] I conducted a reconsideration of the claim made in this application against each of the conditions contained in ss.190B and 190C in accordance with s.190E of the *Native Title Act 1993*.

[341] For the reasons outlined above, I give notice that the Native Title Registrar should not accept the claim for registration pursuant to s.190E of the *Native Title Act 1993*.

[342] For the purposes of s.190E(11) my opinion is that the claim does not satisfy all of the conditions outlined in ss.190B and 190C.

[343] In particular, I have formed the view that the Native Title Registrar should not accept the claim for registration because I am not satisfied pursuant to the following provisions:

(a) Subsection 190C(4) - Identity of claimed native title holders; and

(b) Subsection 190B(3) - Identification of native title claim groups.

John Sosso
Deputy President