National Native Title Tribunal

Registration test decision

Application name	Yued
Name of applicant	[Name deleted] , [Name deleted] , [Name deleted] , [Name deleted] , [Name deleted]
State/territory/region	Western Australia
NNTT file no.	WC97/71
Federal Court of Australia file no.	WAD6192/1998
Date application made	22 August 1997
Date application last amended	25 June 2010

Name of delegate Renee Wallace

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

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

Date of decision: 3 September 2010

_____

Renee Wallace

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

Reasons for decision

Table of contents

Introduction

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

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

Application overview

The Registrar of the Federal Court of Australia (the Court) gave a copy of the amended Yued claimant application to the Registrar on 5 July 2010 pursuant to s .64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

This application was first lodged with the Registrar on 22 August 1997. Subsequent to this, the application was amended in March and June of 1999. On 21 July 1999, a delegate of the Registrar accepted the claim for registration, pursuant to s. 190A of the Act. The claim has remained on the Register of Native Title Claims since that date.

The Yued application, as amended, and provided to the Registrar on 5 July 2010, was accompanied by an order of Siopis J dated 25 June 2010. The effect of that order was to re-constitute the applicant to **[names deleted]** and to allow the applicant to file an amended application.

The amendments made by this amended application are outlined in Attachment S, and are as follows:

> This application makes the following changes to the amended application filed on 1 July 1999:
>
> 1. A new Schedule A has been inserted, which lists the new set of persons who now comprise the applicant;
>
> 2. New Schedules E, F and G have been inserted;
>
> 3. Schedule H has been amended to reflect changing circumstances;
>
> 4. Schedule HA has been introduced to the application;
>
> 5. Schedules I, K and L have been amended;
>
> 6. A new Schedule M has been inserted;
>
> 7. Schedules N and O have been amended;
>
> 8. A new Schedule R has been inserted, which details the authorisation of the new applicant in November 2008; and
>
> 9. A new version of this schedule has been inserted.

I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim and my reasons are as follows:

- I am satisfied that s. 190A(1A) does not apply as the application was not amended because of an order made under s. 87A by the Federal Court; and

- I am satisfied that s. 190A(6A) does not apply as the effect of the amendments to the application do not fall within the provisions of s. 190A(6A)(d).

Therefore, in accordance with subsection 190A(6) I must accept the claim for registration if it satisfies all of the conditions in 190B and 190C of the Act. This is commonly referred to as the registration test.

The application is affected by a number of s. 29 notices. The earliest closing date for one of those notices is 21 August 2010.

Registration test

Section 190B sets out conditions that test particular merits of the claim for native title. Section 190C sets out conditions about 'procedural and other matters'. Included among the procedural conditions is a requirement that the application must contain certain specified information and documents. In my reasons below I consider the s. 190C requirements first, in order to assess whether the application contains the information and documents required by s. 190C *before* turning to questions regarding the merit of that material for the purposes of s. 190B.

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

Information considered when making the decision

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

I am also guided by the case law (arising from judgments in the courts) relevant to the application of the registration test. Among issues covered by such case law is the issue that some conditions of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider wider material.

For the purpose of the registration test, I have had regard to the information contained in the following:

- Form 1 application;
- Case Management/Delegates file for WC97/71 – Yued, Volumes 1 to 3;
- Affidavit of [name deleted] affirmed 21 June 2010 and Annexure A and B;
- Affidavit of [name deleted] affirmed 30 September 2009 and Annexure A and B;
- Affidavit of [name deleted] affirmed 5 August 2009 and Annexure A to G;
- Affidavit of [name deleted] affirmed 7 August 2009;

- Affidavit of [name deleted] affirmed 6 August 2009;
- Affidavit of [name deleted] affirmed 30 June 2008;
- Undated and unsigned witness statement of [name deleted] (deceased) [name deleted] ;
- Witness Statement of [name deleted] dated 2 September 2005 filed in Federal Court matter WAD6006/03 on 14 October 2005;
- Undated witness statement of [name deleted] filed in Federal Court matter WAD6006/03 on 14 October 2005;
- Geospatial assessment and overlap analysis dated 13 July 2010 (geospatial assessment).

I have *not* considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK, without the prior written consent of the person who provided the Tribunal with that information, either in relation to this claimant application or any other claimant application or any other type of application, as required of me under the Act.

Also, I have *not* considered any information that may have been provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice': see s. 94D of the Act. Further, mediation is private as between the parties and is also generally confidential: see also 94K and 94L.

Procedural fairness steps

As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are made in a fair, just and unbiased way. Procedural fairness requires that a person who may be adversely affected by a decision be given the opportunity to put their views to the decision-maker before that decision is made. They should also be given the opportunity to comment on any material adverse to their interests that is before the decision-maker.

On 20 July 2010, a copy of the amended application was provided to the State of Western Australia. That correspondence also informed the representative for the State of Western Australia that any submission or comment in relation to the registration of this matter should be provided to the Registrar by 10 August 2010.

Also part of that content of procedural fairness in this matter is that when I received further material/information from the applicant on 6 August 2010, I was obliged to provide a copy of that material to a person/s who may be adversely affected and to give that person/s a reasonable opportunity to comment. In my view, this included the State of Western Australia—see *Western Australia v Native Title Registrar* [1999] FCA 1591 at [38]. On 9 August 2010, a copy of the further material/information received from the applicant was sent by the Tribunal to the representative for the State of Western Australia. That letter confirmed that any comment or response to the additional material should be provided to the Tribunal by close of business on 13 August 2010. The short time-frame imposed was a consequence of the application being s. 29 affected.

As at the date of this decision, no such comment or response was received by the Tribunal from the State of Western Australia.

Procedural and other conditions: s. 190C

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

> The Registrar/delegate must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.

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

I note that I am considering this claim against the requirements of s. 62 as it stood *prior* to the commencement of the *Native Title Amendment (Technical Amendments) Act 2007* on 1 September 2007. This legislation made some minor technical amendments to s. 62 which only apply to claims made from the date of commencement of the Act on 1 September 2007 onwards, and the claim before me is not such a claim.

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

It is also my view that I need only consider those parts of ss. 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s. 190C(2)). I therefore do not consider the requirements of s. 61(2), as it imposes no obligations of this nature in relation to the application. I am also of the view that I do not need to consider the requirements of s. 61(5). The matters in ss. 61(5)(a), (b) and (d) relating to the Court's prescribed form, filing in the Court and payment of fees, in my view, are matters for the Court. They do not, in my view, require any separate consideration by the Registrar. Paragraph 61(5)(c), which requires that the application contain such information as is prescribed, does not need to be considered by me under s. 190C(2), as I already test these things under s. 190C(2) where required by those parts of ss. 61 and 62 which actually identify the details/other information that must be in the application and the accompanying prescribed affidavit/documents.

Turning to each of the particular parts of ss. 61 and 62 which require the application to contain details/other information or to be accompanied by an affidavit or other documents:

Native title claim group: s. 61(1)

> The application must be made by a person or persons authorised by all of the persons (the native title claim group) who, according to their traditional laws and customs, hold the

common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.

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

Given the limited nature of the task at s. 190C(2), I have confined my assessment of this requirement to the information contained in the application itself—*Doepel* at [37] and [39]. I am not required to look beyond the application nor undertake any form of merit assessment of the material to determine if I am satisfied whether 'in reality' the native title claim group described is the correct native title claim group—*Doepel* at [37]. That said, in seeking to verify that an application contains all necessary details, as required by ss. 61 and 62, I do ensure that a claim 'on its face, is brought on behalf of all members of the native title claim group'—*Doepel* at [35].

Part A of the application contains the information and details pertaining to the persons authorised to make this application.

Attachment A of the application describes the persons in the native title claim group:

The native title claim group comprises all those persons who are:

1.biological or adopted descendants of any of the following persons:

- [name deleted] , daughter of [name deleted] ;
- [name deleted] ;
- [name deleted] , mother of [name deleted] ; or

2.Biological or adopted descendants of the unions between any of the following couples:

- [names deleted];
- [names deleted];
- [names deleted];
- [names deleted];
- [names deleted];
- [names deleted];
- [names deleted];
- [names deleted];
- [names deleted];
- [names deleted];
- [names deleted];
- [names deleted];
- [names deleted];
- [names deleted];
- [names deleted];
- [names deleted];
- [names deleted];
- [names deleted];

3.Paragraphs 1 and 2 above include the biological descendants of persons adopted in any intervening generation.

4.A person has been "adopted" by another person or persons for the purpose of paragraphs 1 to 3 above if they have been reared from childhood by ("grown up by") that person or persons.

In my view, the application sets out the persons authorised to make the application and the native title claim group in the terms required by s. 61(1).

As such, I am **satisfied** that the application contains all the details and other information required by s. 61(1) for the purpose of s. 190C(2).

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

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

The application **contains** all details and other information required by s. 61(3).

Part B of the application states the name and address for service of the persons who are the applicant. The applicant is identified as five (5) named persons, being [names deleted]

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

> The application must:
> (a) name the persons in the native title claim group, or
> (b) otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

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

While I must ensure that this information is contained in the application, I do not need to be satisfied of the correctness of that information — *Doepel* at [37] and *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 at [34]. Thus, I am not required to ascertain whether the description operates 'effectively to describe the claim group', but I do have to consider whether there is the appearance of a description which meets the requirements of the Act—*Gudjala People 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala [2007]*) at [32].

From the description contained in Attachment A (as detailed above at s. 61(1)), it follows that the provisions of s. 61(4)(b) apply and that the application must contain the details/information that otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

The application sets out the native title claim group in the terms required by s. 61(4).

As such, I am **satisfied** that the application contains all the details and other information required by s. 61(4) for the purpose of s. 190C(2).

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

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

(v) stating the basis on which the applicant is authorised as mentioned in (iv).

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

The application is accompanied by five (5) affidavits from each of the persons jointly comprising the applicant. That is, the affidavits of [names deleted], all sworn 6 August 2009. The application is also accompanied by an affidavit of [name deleted] sworn 18 November 2009.

The affidavits, in my view, all contain the statements required by s. 62(1)(a)(i) to (v).

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

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

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

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

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

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

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

Attachment B of the application contains information about the area covered by the application and any areas within those boundaries that are not covered by the application.

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

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

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

Attachment C of the application contains a map of the application area.

Searches: s. 62(2)(c)

The application must contain the details and results of all searches carried out to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application.

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

Attachment D of the application contains details and results of searches carried out to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application.

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

> The application must contain a description of native title rights and interests claimed in relation to particular lands and waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

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

Attachment E of the application contains a description of the native title rights and interests claimed (an extract of these rights and interests can be seen in my reasons for s. 190B(4)) and does not merely consist of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

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

> The application must contain a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist, and in particular that:
> (i) the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (ii) there exist traditional laws and customs that give rise to the claimed native title, and
> (iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

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

Attachment F of the application contains a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist. It addresses each of the particular assertions at s. 62(2)(e)(i) to (iii).

In my view, any 'genuine assessment' of the details/information contained in the application at s. 62(2)(e) is to be undertaken by the Registrar when assessing the applicant's factual basis for the purposes of s. 190B(5). All that is required at s. 62(2)(e) is that the application contain the details and other information amounting to a 'general description' of the factual basis on which it is asserted that the native title rights and interests claimed exist— *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [92].

The application contains the required details and other information, namely a general description of the factual basis on which it is asserted that the claimed native title rights and interests exist, and meets the requirements of s. 62(2)(e) for the purpose of s. 190C(2).

Activities: s. 62(2)(f)

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

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

Attachment G of the application contains details of activities currently carried out by the native title claim group in relation to the area claimed.

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

> The application must contain details of any other applications to the High Court, Federal Court or a recognised state/territory body of which the applicant is aware, that have been

made in relation to the whole or part of the area covered by the application and that seek a determination of native title or of compensation in relation to native title.

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

Schedule H of the application contains details of other applications, of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application and that seek a determination of native title or of compensation in relation to native title. That is, Schedule H of the application refers to native title determination application WAD 6006 of 2003 being the Single Noongar Claim (Area 1).

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

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

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

Schedule I of the application states that the applicant is not aware of any notices under s. 29 of the Act which have been given and that relate to the whole or part of the area, and for which the notification period has not yet expired.

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

The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:

(a) the previous application covered the whole or part of the area covered by the current application, and
(b) the previous application was on the Register of Native Title Claims when the current application was made, and
(c) the entry was made, or not removed, as a result of the previous application being considered for registration under s. 190A.

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

The requirement that the Registrar be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application, is only triggered if the previous application meets all of the criteria in s. 190C(3)(a), (b) and (c)— see *Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

The Tribunal's Geospatial Services prepared a geospatial assessment and overlap analysis (GeoTrack: 2010/1234) on 13 July 2010 (geospatial assessment). The geospatial assessment identified two (2) applications as per the Schedule of Applications – Federal Court that fall within the boundary of this application as at 13 July 2010. Those applications are; Federal Court Number WAD6193/98 – Widi Mob and Federal Court Number WAD6006/03 – Single Noongar claim (Area

1). I have undertaken a search and see that neither of these applications are on the Register of Native Title Claims (the Register).

The current application was made for the purpose of s. 190C(3) on 22 August 1997.

The Widi Mob application was made on 26 August 1997. Thus, the Widi Mob application could not have been on the Register when the current application was made and could not be a 'previous application'.

The Single Noongar claim (Area 1) is a combined application. It was combined by order of the Court on 6 October 2003, and includes the Single Noongar claim (WAD6006/03) made on 10 September 2003 and the Combined Metropolitan Working Group claim (WAD142/98) made on 26 March 1999. Further, the Combined Metropolitan Working Group claim (WAD142/98) is also a combination application. It is made up of six separate claims that were combined by order of the Court on 12 April 1999. Of those six applications, four were made prior to 22 August 1997 and were on the Register prior to 22 August 1997 (this being the date the current application was made).

Conceivably each of these applications was on the Register when the current application was made and could have covered the whole or part of the area covered by the current application. For instance, one of those applications is [name deleted] application (WAD143/98). Tribunal records show that this application was made on 16 May 1996 and was on the Register from that date until 12 May 1999. However, I do not intend to explore whether, in fact, any of the applications underlying the Single Noongar claim (Area 1) application is a previous overlapping application in the sense discussed in s. 190C(3)(a) and/or (b). That is because the point in this instance is immaterial as none of these applications combined into the Single Noongar claim could, in my view, meet the criteria of s. 190C(3)(c).

Those requirements were clarified by the Full Court in *Strickland FC*. In order to satisfy s. 190C(3)(c), the entry on the Register *must still* be on the Register as a result of testing pursuant to s. 190A at the time the Registrar is applying the registration test in the current application—at [55] to [56]. As previously outlined, the geospatial assessment indicates that the only application on the Register at this time is the Yued application, namely the current application. My own searches in relation to the Single Noongar claim (Area 1) reveal that it has never been accepted for registration pursuant to s. 190A. It therefore cannot be an application previous to the Yued application as it does not meet all three criteria in subparagraphs (a), (b) and (c) of s. 190C(3).

I am of the view that the application satisfies the condition in s.190C(3).

Subsection 190C(4) Authorisation/certification

Under s. 190C(4) the Registrar/delegate must be satisfied that either:

(a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or

(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

Note: The word ***authorise*** is defined in section 251B.

Section 251B provides that for the purposes of this Act, all the persons in a native title claim group authorise a person or persons to make a native title determination application . . . and to deal with matters arising in relation to it, if:

a) where there is a process of decision–making that, under the traditional laws and customs of the persons in the native title claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group . . . authorise the person or persons to make the application and to deal with the matters in accordance with that process; or
b) where there is no such process—the persons in the native title claim group . . . authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision–making agreed to and adopted, by the persons in the native title claim group . . . in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

Under s. 190C(5), if the application has not been certified as mentioned in s. 190C 4(a), the Registrar cannot be satisfied that the condition in s. 190C(4) has been satisfied unless the application:

(a) includes a statement to the effect that the requirement in s. 190C(4)(b) above has been met, and
(b) briefly sets out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

I must be satisfied that the requirements set out in either ss. 190C(4)(a) or (b) are met, in order for the condition of s. 190C(4) to be satisfied.

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

The application has not been certified. Therefore, I must consider the application against the requirements of s. 190C(4)(b).

The application must contain the information required by s. 190C(5)(a) and (b). Further, I must be satisfied that the applicant is a member of the native title claim group and is authorised to make the application by all the other persons in the native title claim group.

Does the application contain the information required by s. 190C(5)(a) and (b)

For the purpose of s. 190C(5)(a), the application must contain a statement to the effect that the requirements of s. 190C(4)(b) have been met. Attachment R of the application contains the statement that each of the persons who constitute the applicant is a descendent of one or more the apical ancestors and that they were authorised by a meeting of the native title claim group on 22 November 2008 to make this application

I consider that Attachment R of the application contains the information required s. 190C(5)(a).

For the purpose of s. 190C(5)(b), Attachment R also contains the following statements:

1.The decision referred to in paragraph 2 above was made according to a process of decision-making which was agreed to and adopted at the meeting. This was a process whereby:

(a) Nominations of proposed applicants were received from the floor;

(b) A secret ballot was conducted whereby each participant could cast a vote for one of the nominated persons; and

(c) A motion was put to the floor for the six persons who had received the highest number of votes to be "the applicant", this motion being voted on by a show of hands.

There is some discrepancy between the above statement and other information in the application. The applicant, in this application comprises five (5) persons not six (6) persons as indicated in the above statement. That said, the task at s. 190C(5)(b) is limited, in my view, to ensuring that the application briefly sets out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) has been met. The application does this.

I consider that Attachment R of the application contains the information required s. 190C(5)(b).

The requirements of s. 190C(4)(b)

In *Doepel*, Mansfield J discussed the task at s. 190C(4)(b), referring to the requirement that the Registrar must be satisfied as to the 'fact of authorisation'. His Honour formed the view that, while the interface between s. 190C(4)(b) and s. 190C(5) may inform the Registrar, the task at s. 190C(4)(b) is distinct and clearly 'involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given' — *Doepel* at [78].

The reference to s. 251B of the Act must also guide the Registrar when considering the application's ability to comply with s. 190C(4)(b). For the Registrar to be satisfied that the applicant has been duly authorised, the information must 'demonstrate compliance with either of the processes for which the legislature has allowed'—*Evans v Native Title Registrar* [2004] FCA 1070 at [53]. That is, the information must show compliance with a decision making process mandated by the traditional laws and customs of the native title claim group or a decision making process agreed to and adopted by the persons in the native title claim group.

For the purpose of s. 190C(4)(b), I must be satisfied, firstly, that the applicant is a member of the native title claim group and, secondly, that the applicant is authorised by all the other persons in the native title claim group to make this application and deal with matters arising in relation to it.

First limb of s. 190C(4)(b) – that the applicant is a member of the native title claim group

There are five (5) persons who jointly comprise the applicant in this application, namely [names deleted]. Each of those persons jointly comprising the applicant swear in their s. 62(1)(a) affidavits accompanying the application that they are a member of the native title claim group.

I am satisfied that the applicant (jointly comprising the above named persons) is a member of the native title claim group.

Second limb of s. 190C(4)(b) – that the applicant is authorised by all the other persons in the native title claim group

The applicant's authorisation material

The applicant's s. 62(1)(a) affidavits contain the following information pertaining to authorisation:

> 5. I am one of the persons who are authorised by the other persons included in the native title claim group to make, and to deal with matters arising in relation to, the application. The basis on which I am so authorised is that I was authorised by a decision made at a meeting of the native title claim group held on 22 November 2008 in Gingin, being a decision made in

accordance with a process agreed on and adopted by the native title claim group on that date. This was a three-step process whereby:

(a) nominations for people to comprise the new applicant were taken from the floor;

(b) a secret ballot was held by which each meeting participant voted for a single name from the list of nominees, and the votes were then tallied to determine the six nominees who had received the highest number of votes; and

(c) the meeting voted by show of hands to authorise the six persons ascertained through step (b) to be the new applicant.

A substantial amount of material pertaining to authorisation of the applicant was provided to the Tribunal in June 2009, along with a draft of the amended application. The purpose of this was to assist a delegate of the Registrar in providing the applicant with a preliminary assessment. The bulk of that material included draft affidavits, which have now been provided to the Tribunal in executed form. Those affidavits were provided to the Registrar on 6 August 2010.

One of those documents is the affidavit of [name deleted], a legal officer at South West Aboriginal Land and Sea Council (SWALSC), affirmed 5 August 2009. The affidavit was sworn in the context of applying to the Court for orders pursuant to s. 66B, although it appears no orders were made by the Court at that time. That affidavit sets out the following in regard to the authorisation of the applicant in the making of this application:

2. In September 2008, I arranged for SWALSC anthropologist [name deleted] to prepare a list of persons said to be descended from a list of persons who had been identified as apical ancestors for the Yued native title claim group through research conducted by herself, and by her predecessors, [name deleted]...

4. A copy of a meeting notice was posted to 127 people on 21 October 2008, being those people for whom SWALSC had addresses, and who SWALSC had been able to establish as having descent from the named ancestors on the applications...A second version of the meeting notice together with family history forms was posted to an additional 38 people, being those members of SWALSC who had self-identified as Yued on their membership forms, but for whom SWALSC had not been able to establish a link to the named ancestors on the applications.

5. In total 165 notices were sent...

6. To further ensure that as many members of the native title claim group for the application as practicable received notice of the authorisation meeting, I arranged for [name deleted] to place notices in the following newspapers on the following dates: [4 newspapers are named and dates between October and November provided].

8. I attended the authorisation meeting held at the Granville Civic Centre in Gingin on Saturday, 22 November 2008. The registration process for the meeting was conducted by SWALSC staff anthropologist [names deleted], and other SWALSC staff [names deleted] and me...

9. As people entered the meeting venue, they were directed to [names deleted]. If their names were already in the genealogical database, they were asked to sign the attendance book for

> participants. If their names were not already in the database, they were given a simple form, asked to fill in limited genealogical information, sign the form and bring it back. This new information was then cross-references with SWALSC's database to ensure a connection with the named ancestors in the meeting notice.
>
> 10. The meeting commenced at 11:11am...I was present throughout the meeting. The minutes accurately reflect what took place.

Attached and marked A to G to the affidavit of [name deleted], affirmed 5 August 2009, are a number of documents, including:

- a copy of the notice posted by SWALSC to known descendants of the identified ancestors;
- copies of notices for the 22 November 2008 meeting that appeared in four newspapers on 30 October 2008, 5 November 2008 and 10 November 2008;
- a copy of the attendance list for the 22 November 2008 meeting;
- a copy of the form filled out by attendees at the meeting on 22 November 2008 if their name was not already on the SWALSC database;
- a copy of the genealogical form filled out at the meeting by some attendees at the meeting on 22 November 2008;
- a copy of the minutes of the Yued authorisation meeting – Gingin Saturday 22 November 2008;
- a copy of the meeting agenda and code of conduct for 22 November 2008.

The notices sent out to known descendants and the notices that appeared in the newspaper advertisements for the meeting on 22 November 2008, invite the biological and adopted descendants of three (3) named ancestors and the biological and adopted descendants of the unions between sixteen (16) named ancestral couples. There is a slight discrepancy between this information and the native title claim group decided upon at the meeting and ultimately defined in this application. The discrepancy relates to the ancestor couple of [names deleted], who are identified in the application but were not referred to or named in the notices prepared for the meeting.

The discrepancy is referenced in the affidavit of [name deleted], 2 October 2009. In that affidavit, [name deleted] refers to the list of ancestors prepared by her predecessor [name deleted] on 30 June 2008 and details the differences between that list and the list appearing in the notices. Of importance is the setting out of [name deleted] role in preparing for the authorisation meeting on 22 November 2008. In particular, paragraph [10] of the affidavit sets out the process adopted to identify members of the Yued native title claim group for the purpose of ensuring that as many members as practicable received direct notice of the meeting. This, in my view, essentially replicates the information given in the affidavit of [name deleted], affirmed 5 August 2009.

Of the addition of [names deleted], the affidavit of [name deleted] contains the following:

> 11. The revised claim group description approved at the Yued authorisation meeting on 22 November 2008 includes an additional ancestral couple, [names deleted], who were not included in the notices for that meeting. On 17 November 2008, [name deleted] and his wife [name deleted] met with me at SWALSC's office in Cannington to discuss [name deleted]

> connection to the Yued area. They told me that they had contacted SWALSC in relation to the issue, in response to having seen the meeting notice published in the West Australian. [Name deleted] spoke of his MFM [mother's father's mother], [name deleted], who he stated was born at Berkshire Valley near Moora and was raised at New Norcia. [Name deleted] stated that [name deleted] was a Noongar woman from the Yued area...On 19 November 2008, [name deleted] and his wife [name deleted] came in to see me again. I informed them that I had found sufficient evidence to warrant adding [names deleted] to the existing list of Yued ancestral couples...I emphasised to [names deleted] the importance of getting word out to this group about the Yued authorisation meeting on 22 November 2008, and to encourage them to attend that meeting.

[Name deleted] also refers to the events of the authorisation meeting that occurred on 22 November 2008, in particular to the process of cross-referencing all attendees to the genealogical data held by SWALSC. She states that twelve (12) people on the day claimed a direct genealogical link to apical ancestor [name deleted], which could not be immediately established by that data. Those individuals were instructed to fill out the genealogical form demonstrating their claimed connection to the ancestor, [name deleted]. Upon reviewing the information in the form provided by each of those persons, [name deleted] states that she was able to establish the link between them and the relevant ancestor. There was one further person for whom it was not possible to confirm their link to one of the apical ancestors. That person was allowed to stay for the meeting, however, it has subsequently not been possible to verify her descent from one of the named Yued ancestors. According to [name deleted], that person did not speak at the meeting.

A copy of the meeting minutes are attached to the affidavit of [name deleted], affirmed 5 August 2009 and marked 'F'. The meeting minutes reflect that an agreed to and adopted decision making process was followed at the authorisation meeting. That process involved a show of hands to authorise the changes to the apical list and the limits to the authority of the applicant and a secret ballot vote for selecting the applicant.

Resolution 1, recorded in the meeting minutes, relates to the description of the native title claim group. That description contains the apical ancestors that are reflected in the application. The minutes record a unanimous vote in favour of expanding the apical ancestor list. Resolution 3, recorded in meeting minutes, relates to the authorisation of the current applicant. The minutes also record a unanimous vote in favour of authorising six persons, being [names deleted] 'or such of them who remain willing and able to act in respect of the application in the future'.

A further affidavit of [name deleted] was affirmed on 30 September 2009. Essentially, this affidavit refers to a change in the native title claim group description that occurred subsequent to the authorisation meeting of 22 November 2008. That change relates to the definition of 'adoption' into the native title claim group. At the meeting on 22 November 2008 and as reflected in the meeting minutes, the resolution relating to the native title claim group description recorded the following definition of adoption as being authorised by the claim group:

> Adoption occurs in the following manner: if a man dies and his brother or cousin marries the widow, any of the widow's children are adopted as the children of the new husband.

The definition of adoption in the application is different. In his affidavit affirmed 30 September 2009, [name deleted] details the reasons for the difference. It is asserted that discussions between SWALSC staff (including lawyers and anthropologists) and members of the Yued claim group led to the view that the above definition does not properly reflect Noongar law and customs

regarding adoption. In essence it was thought that the definition was too narrow. At a meeting held between the Yued working party and the named applicants on 6 August 2009, a unanimous direction was issued that the definition of adoption should be amended to include those persons 'who are reared from childhood by ("grown up by") a Yued person'.

It is further stated in [name deleted] affidavit of 30 September 2009 that a letter informing members of the native title claim group of the change to the definition of adoption, was sent out on 29 August 2009 (a copy of the letter attached and marked Annexure A was provided with the affidavit). The letter was sent to all those persons who had attended the Yued authorisation meeting in November 2008, and for whom SWALSC was able to locate addresses. That amounted to 91 out of a total 155 people. The letter discussed the proposed amendment and invited comment or questions from those persons on the change. [Name deleted] states that he received two (2) inquiries regarding the change and that anthropologist, [name deleted], received one (1) query. It is claimed that each of the three (3) persons inquiring were satisfied with the responses they received in relation to the questions they raised about the change to the definition.

A third affidavit of [name deleted] was affirmed 21 June 2010, and accompanied a copy of the draft application filed with the Court on 22 June 2010. This affidavit is referred to in the orders of Siopis J dated 25 June 2010, in which his Honour ordered the replacement of the applicant and granted the applicant liberty to file the application in its amended form. In that affidavit, [name deleted] states that a letter from [name deleted] was delivered to SWALSC by hand on 19 November 2009. A copy of that letter is attached and marked 'A'. [Name deleted] also details how the application, attached and marked B, differs from the version of the application attached to his affidavit of 30 September 2009. Apart from the absence of [name deleted] as an applicant, the other amendments, in my view, have no bearing on authorisation.

The letter from [name deleted] dated 18 November 2009, attached and marked 'A', indicates that [name deleted] wishes to resign his position as an applicant. He states that he is no longer willing and able to act in relation to the application.

Consideration

For this part of the test at s. 190C(4)(b), I must be satisfied that the applicant is authorised to make this application 'by ***all*** [emphasis added] the other persons in the native title claim group'. It is well settled in law, however, that the word 'all' in the context of authorisation, has 'a more limited meaning than it might otherwise have' — *Lawson v Minister for Land and Water Conservation (NSW)* [2002] FCA 1517 (*Lawson*) at [25]. It is not necessary for each and every member of the native title claim group to authorise the making of an application, but rather '[i]t is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision making process'—*Lawson* at [25].

In *Ward v Northern Territory* [2002] FCA 171 (*Ward*), O'Loughlin J posed a number of questions, the substance of which must be addressed, in the context of examining an authorisation meeting for the purpose of s. 251B. His Honour stated the following:

> Who convened it and why was it convened? To whom was notice given and why was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of

> attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded?—at [24].

Having examined the material on authorisation, I am satisfied that the substance of these questions is answered in relation to the meeting that occurred on 22 November 2008. The affidavit of [name deleted], affirmed 5 August 2009, provides very specific details pertaining to the preparation for the authorisation meeting and the sequence of events that unfolded at that authorisation meeting. The affidavit of [name deleted], affirmed 7 August 2009 also speaks to these issues.

I am satisfied that the material demonstrates that all reasonable steps were taken to advise known members of the Yued native title claim group of the opportunity to participate in the authorisation meeting on 22 November 2008. Both the notices sent out individually, by SWALSC, to those known members of the Yued native title claim group and those notices that appeared in the various newspapers clearly identified that the meeting was open to all members of the Yued People, defining that group with particularity by reference to named apical ancestors.

The absence from those notices of the ancestral couple, [names deleted], was in my view dealt with in an appropriate manner, as detailed in the affidavit of [name deleted]. In particular, [name deleted] took steps that, in my view, were reasonable in the circumstances, in order to ensure that the descendants of this ancestral couple were informed of the meeting. I note that the attendance list for the meeting shows that both [names deleted] being a descendant of [names deleted] attended the meeting. The information in the affidavit material about this matter, in my view, demonstrates the overall transparency of the process undertaken. It details the comprehensive steps carried out to include not only known persons, but to consider the claims of other persons who responded to the public notice and who could provide information/evidence (subsequently verified by the anthropologist) to support the inclusion of other ancestors in the Yued claim group.

From the applicant's material, in particular the affidavit of [name deleted] (affirmed 5 August 2009) and [name deleted], I can also be reasonably satisfied as to who attended the meeting on 22 November 2008 and of their authority to be in attendance and to authorise the applicant. I am also satisfied that those who attended the meeting on 22 November 2008 were broadly representative of the native title claim group. This is demonstrated in the meeting minutes and attendance list. For instance, nominations were made for the secret ballot as to who could potentially comprise the applicant. Those nominations included fifteen named persons, each from various areas within the claim area including Moora, New Norcia, Mogumber, Cataby, Dandaragan and Gingin. It is my understanding that each of those persons nominated was seen to be broadly representative of certain areas and larger family groupings, as were the persons who were subsequently chosen from among those nominated to comprise the applicant.

I accept that at the meeting members of the native title claim group agreed to and adopted a process of decision-making whereby the persons showed their support for a particular resolution either by show of hands or in a secret ballot. Further, I accept that the material shows that the current applicant was authorised at that meeting to make this application.

The general nature and extent of the authorisation given to the applicant, in my view, is reflected in Resolution 2 and Resolution 3, as recorded by the meeting minutes on 22 November 2008. Resolution 2 is recorded as:

> All permutations of the applicant to be authorised today are authorised to make and deal with the claim upon the following conditions:
>
> 1.The applicant is not to make decisions about any area of land or waters without first obtaining informed consent at a properly constituted meeting of the Working Party that has responsibility to speak for the land or waters that will be affected by the decision, or from meetings of the Yued native title claim group.
>
> 2.The applicant will continue to utilise the services of SWALSC.
>
> 3.The applicant will continue to receive legal advice and legal representation from the principal legal officer of SWALSC ("SWALSC PLO"), solicitors employed in his/her office, or persons retained by him/her in the matter. The SWALSC PLO shall remain as the solicitor on the record.
>
> 4. The applicant will do all things reasonably necessary to progress the native title claim, including ancillary matters such as "Future Acts".

Resolution 3, recorded in the meeting minutes states the following in relation to the authorisation of the applicant:

> 1....The current applicant is no longer authorised, and instead [names deleted], or such of them who remain willing and able to act in respect of the application in the future, are authorised to make, and to deal with matters arising in relation to, the application, in accordance with the conditions of our authorisation.
>
> 2.For the purpose of this resolution, the circumstances in which an individual ceases to be willing and able to act in respect of the Yued native title application include, but are not necessarily limited to, the following:
>
> (a) The person has informed SWALSC that s/he no longer wishes to be a member of the applicant;
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (e) ...
>
> 3.For the avoidance of any doubt, it is the decision of this meeting that on each occasion where one or more of the individuals referred to in this resolution cease to be willing and able to act in respect of the application, the remaining one or more persons are collectively authorised to make the application and to deal with matters arising in relation to it, without the need for any further decision by the members of the Yued native title claim group.

There are two events that occurred subsequent to the authorisation meeting on 22 November 2008, which in my view require some consideration in the context of the authorisation of the applicant to make this application. They are:

- the change made to the description of the native title claim group; and
- the absence of [name deleted] as an applicant.

The applicant's authority to change description of the native title claim group subsequent to the authorisation meeting of 22 November 2008

In my view, the decision of the applicant, in consultation with the Yued working party group and SWALSC, to change the definition of adoption in the native title claim group description was a manifestation of their authority to deal with matters arising in relation to the application and was in accordance with the conditions of their authorisation. That said, the change made to the description of the native title claim group raises a number of issues that require me to set out clearly my reasons for reaching that conclusion.

The meeting minutes of 22 November 2008 contain some information on the role of the Yued working party. That information suggests that the role of the working party is clearly intended to focus on progressing the claim and directing the applicant in decisions about that progress. The affidavit of [name deleted], affirmed 30 September 2009, demonstrates how that role was carried out in this instance. [Name deleted] states:

> 5. Subsequently, a meeting of the Yued Working Party and named applicants held at Jurien Bay on 6 August 2009 issued a unanimous direction, which has been recorded in the meeting minutes as follows:
>
> **ACTION: Change definition on amended claim group to include person[s] who are "reared from childhood by ("grown up by") a Yued person".**

In making the decision to amend the definition of adoption, it is my understanding of the material that the applicant consulted with and, it appears, acted upon the direction of the Yued working party in making the change. Even so, had that not been the case, I am of the view that the nature of the applicant's authority was such that they were authorised to amend the application in this way.

In my view, resolution 2 clearly indicates that the applicant's authority extends to include the authority to 'do all things reasonably necessary to progress the native title claim'. While that authority, in some respects, is curtailed by the obligation to consult the working party in relation to some decisions, such as is reflected in resolution 2.1, it is nonetheless intended, in my view, to be wide-ranging.

Further, the general nature and extent of authority bestowed on an applicant in a native title determination application, under the Act, has, in my view, been held to be relatively extensive. For instance, the nature of that authority, pursuant to s. 251B and 62A of the Act, was considered by the Court in *Close on behalf of the Githabul People #2 v State of Queensland* [2010] FCA 828 (*Githabul People*). On that occasion Collier J examined the question of whether the applicant was authorised to bring a notice of motion seeking leave to discontinue the native title determination application, and held that:

> The phrase "all matters arising under this Act in relation to the application" in s 62A is, in my view, unambiguous, and should not read narrowly. ***"All matters" means, in my view, all matters*** [emphasis added], including discontinuance, and the words "in relation to" have been held to be extremely wide although their meaning will be determined by the context... —at [32].

I note that, even though, in that instance, Collier J accepted that a steering committee had been explicitly established by the native title claim group to direct the actions of the applicant, her Honour was unconvinced that the applicant required the direction of the committee in order to bring the notice of motion, concluding that:

> ...even were I not satisfied that Mr Close [the applicant] had authority from the Steering committee of the native title claim group to file the notice of motion...I consider he would have such authority conferred upon him by the operation of s 251B and s 62A of the Act.

While not analogous to the factual matters in the application before me, I am of the view that the principles on authorisation set out by Collier J in *Githabul People* are of broad relevance. I am satisfied that the authority conferred on the applicant, pursuant to s. 251B and s. 62A of the Act, at the authorisation meeting on 22 November 2008, covered the subsequent change to the application made on 6 August 2009.

There is one further issue that requires consideration in regards to the change to the native title claim group description. Given the fact that [name deleted] deposes that the change in the description renders the definition of 'adoption' less narrow, the issue arises as to whether 'all the other persons in the native title claim group' authorised the making of the application. If the definition of adoption is now less narrow, then potentially the group is larger, when taking account of those persons who would now fall within the description of the native title claim group.

In that regard, I have explained in my reasons above why I am satisfied that all reasonable steps were taken to give members of the Yued native title claim group the opportunity to participate in the meeting. Further, the notices inviting members of the Yued native title claim group to the meeting on 22 November 2008 referred to the adopted (with no definition included) and biological descendants of named ancestors. The meeting minutes do not reveal that any person was excluded from voting as a result of not satisfying the definition of adoption as it stood then.

I am also of the view that weight should be given to the fact that the application, in its current amended form, is accompanied by five affidavits of the persons comprising the applicant, in which they swear that they are authorised to make the application.

The absence of [name deleted] *as an applicant*

While [name deleted] was one of the persons authorised, at the meeting held on 22 November 2008, to jointly comprise the applicant, the application does not reflect that [name deleted] is an applicant. The affidavit of [name deleted], affirmed 21 June 2010, sets out the reasons for this.

The express wording of the authorisation, namely resolution 3, of the applicant given at the Yued authorisation meeting 22 November 2008 was in fact, in my view, explicit and contemplated a situation where one or more of the persons comprising the applicant was no longer willing or able to act in respect to the application. In his letter dated 18 November 2009, [name deleted] clearly articulates his unwillingness to continue to act in relation to the application.

In any event, I understand the law to be such that, even in the absence of express wording the authorisation of a group of persons to act as an applicant must 'be understood as meaning the authorisation of so many of them as continue to be willing and able to discharge their representative function'—*Doolan v Native Title Registrar* [2007] FCA 192 at [59] and [60].

I am also conscious that the constitution of the current applicant was by order of Siopis J on 25 June 2010. His Honour having considered the affidavit of [name deleted], dated 21 June 2010, ordered that [names deleted] jointly replace the then current applicant.

My decision

I am satisfied that the applicant is authorised by all other persons in the native title claim group to make the application and to deal with matters arising in relation to it.

Merit conditions: s. 190B

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

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

The application **satisfies** the condition of s. 190B(2).

Attachment B of the application contains a written description of the application area. Attachment B describes the external boundary by a metes and bounds description and makes reference to; Local Government Authority boundaries; 12 nautical mile limit; RATSIB boundaries; native title determination application boundaries; coordinate points with reference made to AGD84 Datum.

Attachment B of the application also lists general exclusions of areas within the external boundary description. The use of such a general formulaic approach was discussed in *Daniel for the Ngaluma People & Monadee for the Injibandi People v Western Australia* [1999] FCA 686, in relation to the information required by s. 62(2)(a) and its sufficiency for the purpose of s. 190B(2). Nicholson J was of the view that such an approach 'could satisfy the requirements of the paragraphs where it was the appropriate specification of detail in those circumstances'. His Honour examined the probable state of knowledge of the applicant at the time of filing the application as a factor in determining what may be appropriate in the circumstances—at [32].

I note that Attachment D of the application contains copies of results of searches carried out by the State of Western Australia and the Tribunal in order to determine the existence of any non-native title rights and interests in relation to the land and waters in the area. These results appear to be quite extensive in nature. My view, however, is that having this information does not equate to the applicant having the extensive and expert knowledge that would be necessary to conclusively determine the internal boundaries of the application area. It is my view that Attachment B contains the appropriate specification of detail in these circumstances.

Attachment C of the application includes a monochrome copy of the original map dated 23 February 1998, and includes:

- the application area depicted by hachured polygon;
- generalised land tenure and major towns; and
- scalebar, coordinate grid and notes relating to the source, currency and datum of date used to prepare the map.

The geospatial assessment indicates that the description and map are consistent and identify the application area with reasonable certainty. I agree with the geospatial assessment.

The written description contained at Attachment B of the application is extensive, containing a technical description of that boundary by reference to geographic coordinates in decimal degrees.

The map at Attachment C depicts the application area with bold outline, identifying towns within and surrounding the application area. It includes reference to general land tenure, such as freehold, state forest and vacant crown land.

Having regard to the comprehensive identification of the external boundary in Attachment B and the clarity of the mapping of this external boundary on the map in Attachment C, I am satisfied that the external boundaries of the application area have been described such that there can be reasonable certainty in relation to those particular land and waters.

I am satisfied that the information and map contained in the application as required by ss. 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

Subsection 190B(3)
Identification of the native title claim group

> The Registrar must be satisfied that:
> (a) the persons in the native title claim group are named in the application, or
> (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

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

The nature of the task at s. 190B(3)(b)

From the description of the native title claim group contained in Attachment A (and reproduced above in my reasons at s. 61(1)) of the application it follows that the conditions of s. 190B(3)(b) are applicable to this assessment. Thus, I am required to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

In *Doepel*, Mansfield J held that the focus of this task was to consider 'whether the application enables the reliable identification of persons in the native title claim group'—at [51]. *Doepel* is also authority for the understanding that the Registrar's consideration of s. 190B(3) will not need to go beyond the application—at [16] and [51]: see also *Gudjala [2007]*, where Dowsett J accepted that s. 190B(3) only required the delegate to address the content of the application—at [30].

In my view the question, as it was for the Court in *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591(*WA v NTR*), is whether applying the conditions (or rules) specified in the application will allow for a sufficiently clear description of the native title claim group in order to ascertain whether a particular person is in that group.

The description of the native title claim group in this application describes its members as:

- the biological or adopted descendants of three (3) named individual ancestors;
- the biological or adopted descendants of the unions between seventeen (17) named ancestor couples;
- the biological descendants of persons adopted in any intervening generation.

The description also provides that a person has been adopted by another person or persons if they have been reared from childhood by (grown up by) that person or persons.

I have turned my mind to the question of 'whether the application of the … [rule] describes the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is in that group'. In doing so, it is my view that a description does not necessarily fail because some factual inquiry is necessary. Nor is it fatal that the application of the rule may prove difficult—*WA v NTR* at [67].

Describing a claim group by reference to biological or adopted descent from named ancestors is one method that has been accepted by the Court as satisfying the requirements of s. 190B(3)(b): see *WA v NTR* at [67]. I am of the view that with some factual inquiry it will be possible to identify the persons who fit this description of the native title claim group and I am therefore satisfied that the application meets the condition in s. 190B(3).

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

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

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

In *Doepel,* Mansfield J accepted it was a matter for the Registrar or her delegate to exercise 'judgment upon the expression of the native title rights and interests claimed'. Further, his Honour felt that it was open to the decision-maker to find, with reference to s. 223 of the Act, that some of the claimed rights and interests may not be 'understandable' as native title rights and interests—at [99] and [123].

Primarily, the test is one of 'identifiability', that is 'whether the claimed native title rights and interests are understandable and have meaning'—*Doepel* at [99].

The native title rights and interests claimed appear at Attachment E of the application, and are as follows:

> **The Rights and Interests**
>
> Subject to the above qualifications, the rights and interests claimed in relation to the claim area, including land and waters, are:
>
> (a) rights and interests to exclusively possess, occupy, use and enjoy the area;
> (b) the right to live within the area;
> (c) the right to make decisions about the use and enjoyment of the area;
> (d) the right of access to the area;
> (e) the right to control the access of others to the area;
> (f) the right to use and enjoy resources of the area;
> (g) the right to control the use and enjoyment of others of resources of the area;
> (h) the right to conduct ceremonies within the area;
> (i) the right to maintain and protect places of importance under traditional laws, customs and practices in the area;
> (j) the right to teach and pass on knowledge of the claim group's traditional laws and customs pertaining to the area and knowledge of places in the area;

(k) the right to learn about and acquire knowledge concerning, the claimant group's traditional laws and customs pertaining to the area and knowledge of places in the area;
(l) the right to manage, conserve and look after the land, waters and resources; and
(m) the right to exchange animals and fish located within the claim area with third parties for other things.

In the paragraph preceding this, the applicant lists qualifications that apply to the above claimed rights and interest. I do not feel that it is necessary to consider those qualifications for the purpose of the test at s. 190B(4).

It is my view that the native title rights and interests, claimed in the application, are understandable and have meaning. The description contained in the application is sufficient to allow the native title rights and interests to be readily identified.

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

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

Combined results and reasons for s. 190B(5)

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

I have considered each of the three assertions set out in the three paragraphs of s. 190B(5) in turn before reaching this decision.

The nature of the task at s. 190B(5)

The nature of the Registrar's task at s. 190B(5) was explored by Mansfield J in *Doepel*. It is to 'address the quality of the asserted factual basis' but 'not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence...'—at [17].

The Full Court in *Gudjala FC* agreed with Mansfield J's characterisation of the task at s. 190B(5)—at [83], and also held that a 'general description' (as required by s. 62(2)(e)) could certainly be of a sufficient quality to satisfy the Registrar for the purpose of s. 190B(5)—at [90] to [92]. Further, the nature and quality of the information required for s. 62(2)(e) purposes was held to be indicative of what may satisfy the Registrar for the purpose of s. 190B(5), but '[o]f course the general description must be in ***sufficient detail to enable a genuine assessment*** [emphasis added] of the application by the Registrar under s 190A and related sections … '—*Gudjala FC* at [92].

In my view, the above authorities establish clear principles by which the Registrar must be guided when assessing the sufficiency of a claimant's factual basis. They are:

- the applicant is not required 'to provide anything more than a general description of the factual basis'— *Gudjala FC* at [92].
- the nature of the material provided need not be of the type that would prove the asserted facts —*Gudjala FC* at [92].
- the Registrar is not to consider or deliberate upon the accuracy of the information/facts asserted—*Doepel* at [47].
- the Registrar is to assume that the facts asserted are true, and to consider only whether they are capable of supporting the claimed rights and interests. That is, is the factual basis sufficient to support each of the assertions at s. 190B(5)(a) to (c)—*Doepel* at [17].

The decisions of Dowsett J in *Gudjala [2007]* and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala [2009]*) also give specific content to each of the elements of the test at s. 190B(5)(a) to (c). The Full Court in *Gudjala FC,* did not criticise generally the approach that Dowsett J took in relation to these elements in *Gudjala [2007]*[1], including his Honour's assessment of what was required within the factual basis to support each of the assertions at s. 190B(5). His Honour, in my view, took a consonant approach in *Gudjala [2009]*.

Thus, in line with those authorities, it is in my view, fundamental to the test at s. 190B(5) that the applicant describe the basis upon which the claimed native title rights and interests are alleged to exist. More specifically, this was held to be a reference to rights vested in the claim group and further that ' 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)'—*Gudjala [2007]* at [39].

In that regard, I must be satisfied of the sufficiency of the factual basis provided in support of the assertions at s. 190B(5), and 'be careful not to treat, as a description of that factual basis, a statement which is really only an alternative way of expressing the claim or some part thereof'—*Gudjala [2009]* at [29].

The claimant's factual basis material

Within the claimant's factual basis material, provided at Attachment F, there are a number of references to witness statements that were sworn in a different proceeding, namely the Single Noongar claim (now known as the Single Noongar claim (Area 1)) claimant application (WAD6006/03). In this regard, I note that the Single Noongar claim (Area 1) significantly overlaps the Yued claim area: see geospatial assessment.

The deponents of those witness statements are claimants in both the Single Noongar claim (Area 1) and the Yued claim. Within the witness statements the claimants give details of the laws and customs of the Noongar people and of their association with areas that are within the Single Noongar claim (Area 1), which is much larger but covers almost the entirety of the Yued application area. Some extracts from these witness statements are reproduced in the claimant's factual basis at Attachment F. Copies of the witness statements were also provided to the

[1] See *Gudjala FC* [90] to [96].

Tribunal in June 2009 by the Yued applicant for the purpose of obtaining a preliminary assessment of a draft amended application.

It is clear that the Single Noongar claim (Area 1) has members in common with the Yued claim, although the Single Noongar claim (Area 1) may not be limited to those members and covers a much larger area. The Single Noongar claim group (Area 1), in my view, would appear to be larger than the Yued claim group. At Schedule O of the Yued application it is stated that 'all or most of the members of the native title claim group are also members of the native title claim group for the Single Noongar Claim Area One'.

It appears that both applications rely on the acknowledgement and observance of the traditional laws and customs of a Noongar society to support the factual basis for the assertion in each application that their claimed native title rights and interests exist and also rely on some of the same evidence for this to support the existence of various rights and interests in the area the subject of this application, namely those belonging to the members of the Yued claim group and those belonging to the members of the Single Noongar claim (Area 1) group.

As a delegate of the Registrar, however, it is not my role to create a bar to registration on the basis of the existence of such information. The only potential bar to registration was dealt with in my reasons for s. 190C(3), when considering the issue of common claimants. The task of ultimately resolving the issue of overlapping claims is one that falls to the Court, not to the Registrar— *Doepel* at [43].

For my part, I am only required to examine whether the factual basis provided for this Yued application is sufficient to support the assertions in s. 190B(5). It is asserted that part of that factual basis for this application is contained within the affidavits sworn in the Single Noongar claim (Area 1) application, as detailed in Attachment F of the application. Thus, I may address the 'quality of the asserted factual basis' as contained in those witness statements in support of the claimed rights and interests in this application.

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

The Law

On this aspect of the factual basis, not criticised by the Full Court, Dowsett J directed that one must look for an association 'between the whole group and the area' but without the necessity for each member to have had an association at all times. There must also be material to support an association between the predecessors of the group and the claim area since sovereignty—*Gudjala [2007]* at [52]; *Gudjala FC* at [90] to [96].

Further, I am to be informed as to the nature of the claimant's association with the application area on the basis of the information provided— *Martin v Native Title Registrar* [2001] FCA 16 at [26].

The claimant's factual basis in support of the assertion at s. 190B(5)(a)

The factual basis in support of the assertion at s. 190B(5)(a) contains an outline of the facts relevant to the pre-sovereignty association of the Yued people with the application area.

I understand the factual basis to assert that the Yued people are part of a larger society known as the Noongar people and have been since before sovereignty. The facts that are provided in support of this assertion are at Attachment F of the application, and are as follows:

- Prior to 11 June 1829 [when sovereignty was asserted in Western Australia], the Noongar people, including the predecessors of the present members, acknowledged and observed a set of laws and customs relevant to the holding of rights and interests in land. These people constituted the relevant society, as they were united in and by their acknowledgement and observance of a set of laws and customs.
- The Yued people were a part of this larger society, at and prior to 1829, observing the laws and customs of the Noongar people. In particular, they acknowledged and observed laws and customs which enabled them to collectively hold specific rights and interests in relation to the application area.
- The persons listed in Attachment A of the application, as ancestors, are persons who were recorded as being present within Yued country at various dates from the 1830s through to the late 1800's. They also were persons descended from others who were members of the Yued people prior to 1829. In the case of couples, as named in Attachment A, at least one partner of each coupling falls into this category.

Also forming part of the factual basis in support of the assertion that the predecessors of the group had an association with the application area are the affidavits of anthropologists [names deleted].

In his affidavit of 30 June 2008, [name deleted] outlines his methodology in identifying the predecessors of the Yued people. In conducting the exercise of researching the predecessors of the group, [name deleted] was able to identify recurring Yued family names and to produce a list of ancestors for the application area. Annexure A to the affidavit is a list of those names. Also provided with the list is a brief summary of facts pertaining to each identified ancestor's association with the application area and/or the reasons as to why [name deleted] came to the conclusion that the identified person(s) were the predecessors of the Yued native title claim group.

On 7 August 2009, [name deleted] affirmed an affidavit in support of the application. That affidavit sets out the discrepancies between the list of ancestors prepared by [name deleted] and the list that appears in the application (as prepared by [name deleted]). There are essentially six differences, mainly in the form of additions to the list, and [name deleted] sets out the reasons for those additions/changes.

The information on the predecessors of the Yued people, as contained in the above affidavits, records various dates between 1830 and 1900 between which the named persons were recorded as being present within the application area. Further to this, [name deleted] states that in the respect to the identified predecessors, he has formed the view that they:

(a) are descended from Aboriginal persons who were living within the application area prior to 11 June 1829; and

(b) have living descendants who culturally identify as members of the Yued people, being the native title claim group (as properly-described) for this application.

Attachment F refers to the undated witness statement of Yued woman [name deleted] (deceased) [name deleted] who was born at Mogumber [in the application area] in 1944. I have an unsigned copy of that statement, in which [name deleted] (deceased) states that she is an applicant on the Single Noongar claim and the Yued claim. There is no indication as to whether this undated and unsigned statement was prepared for the purpose of the Single Noongar claim (Area 1) or the Yued claim. It would appear, in my view, to form part of the material sworn in the Single Noongar claim (Area 1). In that statement [name deleted] (deceased) sets out the following:

> 6. I was raised by [names deleted].
>
> 7. My mother [name deleted] comes from New Norcia and is also buried there.
>
> 8. [Name deleted]'s father's mother, [name deleted], came from the Wyening mission which is near New Norcia.
>
> 9. My father, [name deleted] comes from New Norcia and he lived and is buried there.
>
> 10. My grandfather, my father's father, [name deleted], was also called [name deleted] ...He also lived in New Norcia.
>
> 14. I remember travelling around my country with my parents following work. We lived, worked and camped all through New Norcia, Mogumber, Watheroo, Tooday, Calingiri, Wogan Hills, Goomalling, Northam and Yerecoin. We used to stop at Calingiri and Woddington Reserves.
>
> 15. When I was younger I spent a lot of time at [place name deleted] which is an old camping place right near New Norcia. There were nine or ten Noongar camps there. It is a very special place because I grew up there and I can still feel the atmosphere of the old people sitting around.
>
> 16. My family and I also lived at the Wyening Mission, which was a farm run by the New Norcia monks. My father told me lots of old Noongars used to live here.
>
> 17. I also lived in Moora and Toodyay.
>
> 28. I know about a few special places in New Norcia. As I grew up and moved around my country I came to learn about some of these places from my aunties and other relatives. My aunties told me about [place name deleted] near New Norcia where there was a corroboree (dancing, ceremony) ground.
>
> 30. My nan, and other old people that I grew up with, told me where the Noongars camped along the river at New Norcia.

In a witness statement dated 2 September 2005, and filed in the Single Noongar claim (Area 1) application, [name deleted] states the following about her and her family's association with the claim area:

> 19. I am a Noongar woman. This is because my mother and my father are Noongar and my ancestors are Noongar. This means that I have the right to speak for the area in which my ancestors came from.

> 23. ...I feel that all of Yued country is my heartland, although I feel special association to Moora (D,7), Dandaragan (C,7) Miling and also Dalwallinu (E,6). There are also other places in Yued country that are special to my family. Your heartland country is where you belong and where you have the right to speak for. When I speak about my heartland country, this is how I feel about the country, my ancestors have lived in this country and I have grown up in that country, it is dear to my heart. Yued country runs from north of Jurien (B,6), across to near Dalwallinu (E,6) and down to north of Perth.
>
> 24. My children will inherit those ties to the Yued area through me, this is the Noongar way.
>
> 25. I was born in Moora and used to travel around all of Yued country when I was younger with my family. We would travel through Moora, Dalwallinu, Three Spings (C,5) (which [is] approximately 30 kilometres north of the northern Single Noongar Claim boundary) and Carnamah (C,5)...We would also go hunting at Guilderton (B,8) at the mouth of the Moore River, Regans Ford (which is approximately 5 kilometres south of Cataby (C,7) and Neergabby (which is between Gingin (C,8) and Guilderton). You could say that this was my family's run. This is because it is the area that I have lived in my whole life and I will always visit this area. My family has always been here, it wasn't like we camped here once, we have always camped along this run.

Attachment F of the application also refers to an undated witness statement of Yued elder [name deleted] filed in the Single Noongar claim (Area 1) proceeding on 14 October 2005. In that witness statement [name deleted] details his association with the application area, including those parts that are common to both applications. He states that his mother, [name deleted] was Noongar and he spent a lot of time as a child moving around their country with her. His grandmother and grandfather were both Noongar and they lived at Wyening and New Norcia. His great grandfather was [name deleted] and he worked and lived all through Mingenew and Gingin.

On 6 August 2009, [name deleted] affirmed an affidavit, filed in the Federal Court in the Yued application (WAD6192/1998). In that affidavit, [name deleted] refers to his witness statement filed 14 October 2005 filed in the Single Noongar claim (Area 1) proceeding, stating:

> 2.I refer...to my discussion in that statement regarding the various activities which I identified as being activities which I then undertook within the Yued application area. I confirm that I am still carrying out each of those activities, pursuant to the laws and customs of the Noongar people.

Consideration

I am satisfied that the factual basis is sufficient to show the association 'between the whole group and the area'—*Gudjala [2007]* at [52]. I explain below the pertinent reasons as to why I have formed this view.

The affidavits of [names deleted] set out their reasons, respectively for identifying the list of Yued ancestors as those predecessors of the group associated with the application area at the time of sovereignty or immediately after. There is also some information relevant to the link between the claim group and those predecessors. For instance, [name deleted] asserts that he is of the opinion that those identified ancestors have descendants who continue to identify as members of the Yued people, namely those members of the native title claim group for this application.

To the extent that there is some divergence in the information contained in those affidavits, it is not my role to balance and weigh such material, I am only required to be satisfied that there is a factual basis sufficient to support the assertion in s. 190B(5)(a) —*Doepel* at [47].

I am satisfied that the information contained in the affidavits of [names deleted] , along with the information contained in Attachment F of the application, is sufficient to support the assertion that the predecessors of the group had an association with the application area, at or around the time of sovereignty. This invites the inference that the association of the Yued People dates back to pre-sovereignty times. In a sense the material makes that inference explicit, in that [name deleted] sets out his opinion that the named predecessors are descended from persons who were associated with the Yued application area prior to 11 June 1829 [that is, prior to sovereignty].

In my view, there is a clear identification of the native title claim group and their association with the area covered by this application. The factual basis also provides details of the pre-sovereignty society of which the Yued People were a part and gives some details of the native title claim group's continuing association with the claim area, since the time of sovereignty. This is primarily contained in the witness statements.

While these witness statements were sworn in a separate matter, my understanding is that each deponent clearly identifies as a member of the Yued native title claim group and appears to distinguish Yued country. There are numerous and varied references to places that fall within the application area and that demonstrate their association with those areas. While, equally they identify as a member of the Single Noongar claim (Area 1) native title claim group asserting rights in the same area, in assessing the adequacy of the claimant's factual basis, I need only consider the witness statements to the extent that they provide a factual basis in support of the assertions at s. 190B(5) for this application.

The witness statements extracted in Attachment F of the application and provided to the Tribunal can, in my view, be considered as providing some tangible examples of how the whole group and its predecessors are associated with the area over the period since sovereignty. For instance, [name deleted] who was born in 1939 talks about his own association with the application area as well as the association of his predecessors, including his parents, grandparents and great grandparents. He also speaks of the continuing association of members of the group, including his children and grandchildren.

My decision

I am satisfied that the information I have reviewed provides a factual basis sufficient to support the assertion that the claim group as a whole have, and the predecessors of those persons had, an association with the area.

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

In *Gudjala [2007]*, Dowsett J recognised the importance of understanding the meaning attributed to 'native title' pursuant to s. 223 of the Act, in order to examine the factual basis provided in support of the assertion at s. 190B(5)(b) (and similarly at s. 190B(5)(c)). That meaning, with its

focus upon rights and interests in relation to land and waters and the current possession of such rights and interests 'under traditional laws and customs by claimants who, pursuant to such laws and customs presently have a connection with the land or waters in question,' provides guidance to the Registrar or her delegate when examining the factual basis in support of this assertion—*Gudjala [2007]* at [26], where Dowsett J outlined his understanding of the principles drawn from *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors* (2002) 214 CLR 422;[2002] HCA 58 (*Yorta Yorta*). Again, this aspect of the decision of Dowsett J was not criticised by the Full Court: see *Gudjala FC* at [90] to [96].

This understanding, largely restated in *Gudjala [2009],* led his Honour to form the following views in relation to the test at s. 190B(5)(b):

- identification of an Indigenous society at sovereignty is the starting point, as it 'is impossible to identify a system of laws and customs as such without identifying the society which recognizes and adheres to those laws and customs'—*Gudjala [2007]* at [66] and *Gudjala [2009]* at [36].

- there must be some link 'between the claim group and claim area,'—*Gudjala [2007]* at [66] and *Gudjala [2009]* at [40].

- for laws and customs to be traditional 'they must have their source in a pre-sovereignty society and have been observed since that time by a continuing society'—*Gudjala [2007]* at [63] and *Gudjala [2009]* at [37].

- such laws and customs that exist now may not be identical to those that existed prior to sovereignty but must 'have their roots in the pre-sovereignty laws and customs'—*Gudjala [2009]* at [22].

Pre-Sovereignty society

It is asserted at Attachment F of the application that the Noongar people, who included the predecessors of the Yued native title claim group, constituted a society at a time prior to 11 June 1829. These people shared laws and customs, which they acknowledged and observed. The Yued people who formed part of this society also acknowledged and observed the same laws and customs. The following are the asserted facts in relation to the features of the pre-sovereignty society, including:

- relatively large areas of land were owned by particular small groups of people, whose members inherited their right of ownership. This included the Yued people;
- these areas were owned in the sense that they were the property of the relevant group, although people from other groups were permitted to access the area for certain purposes, such as food-gathering or particular occasions, such as ceremonies;
- rights and interests in land extended to areas referred to as 'runs'; and
- adaptation meant that rights and interests in land could be acquired by matrilineal affiliation as well as patrilineal affiliation.

It is claimed that even after contact, the Yued people did not suffer much practical interference with their ability to acknowledge and observe the laws and customs of the Noongar people in

relation to the application area. This was, in part, due to the relatively low number of European settlers. There was some disturbance to the Yued people after 1900, however it is asserted that despite this they were able to continue their acknowledgement and observance of the traditional laws and customs of the pre-sovereignty society.

Providing the link between this information on the pre-sovereignty society and the native title claim group is the assertion that the transmission of laws and customs was continued from each generation to the next. The facts pertaining to this assertion are provided in the witness statements of current claimants and the affidavits of anthropologists [names deleted]. For instance, the anthropologist's affidavits contain information on the identity of the predecessors of the Yued native title claim group and their association with the application area. They also provide the link between the current claimants and those predecessors.

Further details of the link between the current claimants and the pre-sovereignty society are provided within the witness statement, including:

- The witness statement of [name deleted] (filed on 14 October 2005 in the Single Noongar Claim proceeding) in which he states that 'My mother is [name deleted] and she was a Noongar woman...Her mother was [name deleted] and her father was [name deleted] [named predecessor in Attachment A]. They were both Noongars...My great grandfather, my mother's father was [name deleted] ...My children are [names deleted]...My sons are Noongar because I am Noongar and I brought them up that way'—at [7] to [11].
- The witness statement of [name deleted] (dated 2 September 2005 and filed in the Single Noongar Claim proceedings) in which she states that 'I am a Noongar woman. This is because my mother and father are Noongar and my ancestors are Noongar...I was told by my mother and father that I was Noongar when I was younger...My mother's side, the [name deleted], are from the areas around Mogumber (D,8) and New Norcia (D,7). My great grandfather, [name deleted] [identified as the son of apical pair [names deleted] in the affidavit of [name deleted], sworn 30 June 2008] was born in Dandaragan (C,7) and spent most of his life around the areas of Dandaragan, New Norcia and Moora (D,7)'—at [19] to [21].

Also, within the factual basis, are the facts pertaining to the asserted link between the pre-sovereignty society and the claim area. That link is made in the affidavits of [names deleted] where they detail the association of each of the named predecessors with parts of the area covered by the application. It is also reflected in the witness statements of [name deleted] (deceased), [names deleted], where each details the association of their ancestors with the application area.

Traditional laws and customs

It is asserted that the laws and customs of the pre-sovereignty society have been transmitted continuously from each generation to the next, with the witness statements providing illustrations of how this transmission has occurred. Many of those laws and customs transmitted are claimed to relate to rights and interests in the application area.

Laws and customs regarding occupation, access and the right to speak for country

It is asserted that in the pre-sovereignty context, the laws and customs of the Noongar people dictated that certain areas of land were owned by smaller groups within that society, such as the Yued people.

At Attachment F of the application, it is asserted that the acknowledgement and observance of Noongar laws and customs relating to land among the Yued people in the early contact era was recorded by Bishop Dom Salvado. The following extract from the '*The Salvado Memoirs'* is reproduced:

> [T]hey possess general laws, maintained by tradition and handed down from father to son; and any head of a family has the right to punish breaches of these laws severely, even though the culprit be a stranger...[E]ach family regards one particular district as belonging exclusively to itself, though the use of it is freely shared by nearby friendly families. But, if an enemy or stranger is caught there, he is put to death by the owner.

In his witness statement, [name deleted] relays the following in regard to the Noongar relationship with their country and the laws and customs governing that relationship:

> 49. The right thing to do is to ask permission before you go onto country that is not your own.
>
> 50. I am considered a custodian by other Noongars in the area because information has been passed on to me from the old people. I am considered an elder because I'm older and I've been doing things through the years [the] traditional way and I lived with the old people in the bush.
>
> 51. I live in my country and I know stories for my country. I know my country and that is why I am connected to it and can speak for it.
>
> 54. I remember coming to the Jurien Bay area when I was young, and I now I [sic] still come back here and show the young ones all the camp sites and teach them the ways of my land.

[Name deleted], in her witness statement, talks about the laws and customs of the Noongar people as they relate to the right to speak for country, stating:

> 27. When my parents passed away, the right to speak for our family's country was passed on to my siblings and I. This is the way it works with Noongars. My parents passed on stories about special places to me and my siblings and now I pass that information to my children.
>
> 28. My children have the right to speak for the Moora area, even though some of them were born in Northam (E,9). This is because I was born in Moora and my mother was born in Mogumber Mission. This is the Noongar way, you inherit the right to speak for an area through your ancestors.
>
> 29. My parents told me that not everyone can speak for all areas. I wouldn't speak for other areas, even if they are in Noongar country. This is because the right to speak for country comes from where your family was born and lived, where you have lived and hunted and where you feel welcome and comfortable.
>
> 31. I do not have to ask permission if I am hunting in Yued country. This is because it is my country. Outsiders, including Noongars from other areas should ask permission, this is just what I've been told by my parents.

> 32. Outsiders should ask permission, they should, this is something that has always happened over the years. If they didn't ask permission, it would be looked upon badly...[t]here would be repercussions later down the line, like they might get sick.

[Name deleted] (deceased), in her witness statement, states that she believes that other Aboriginal people are allowed to come to her country but that permission is required. If, for instance, she wanted to go into other Noongar country, she also would need to ask permission as it shows respect for other Noongar's country. She states that she was passed knowledge and information about the Noongar laws and customs from her grandfather, grandmother, mother and father.

Laws and customs regarding spirits, stories and cultural activities and sacred sites and areas of significance

There is material within the witness statements regarding the continuous transmission of knowledge and information pertaining to stories and places of significance within Yued country.

[Name deleted] (deceased), in her witness statement relays the following in relation to how she gained knowledge of such laws and customs:

> 28. I know about a few special places in New Norcia. As I grew up and moved around my country I came to learn about some of these places from my aunties and other relatives.
>
> 30. My Nan, and other old people that I grew up with, told me where the Noongars camped along the river at New Norcia. This was before Bishop Salvodo came to New Norcia. That old camping place is right near the Monastery and is important to Noongars from New Norcia.
>
> 42. I have been passed information through my grandfather, and my Nan and my mother and father. My uncles and aunties would tell us kids stories too. My Nan passed on stories to all her grannies (grandchildren).
>
> 43. It is very important for me to educate the kids about Noongar culture and traditions
>
> 57. My Nan and my aunties and uncles would talk about the spirits of my family and ancestors. They told me that they could feel them. This is one of the reasons New Norcia is important to me and why I feel connected to the land there. My ancestor's spirits are still there.
>
> 59. My Nan and aunties and uncles told me about feeing [sic] the spirits of ancestors and I can feel them too.

[Name deleted], in her witness statement, also relays the following in relation to special places and stories:

> 36. I learned from my parents and uncles and aunties and my cousins by watching them and listening to them. I also teach my kids about Noongar life and pass on stories that the old people told me and correct them when they do things wrong.
>
> 50. when I traveled [sic] with my parents when I was younger around Yued country, we would stop and camp at places like [place name deleted]...and [place name deleted] Reserve site... along the way and my father would tell use stories about some of the places.
>
> 51. My father told me about a place at [place name deleted] (D,6). He said the [name deleted] was there. This is a healing place and is important for the [name deleted] family.

> 52. Not everyone can tell the story of [name deleted]. I have the right to tell the story because my father told me the story and I have lived there and I have visited these places with my father.

In his affidavit sworn 6 August 2009, [name deleted] states that he and his sons look after particular sites of significance to the Yued people.

Laws and customs regarding hunting and gathering

In his witness statement, [name deleted] says the following about the Noongar ways of getting and preparing food and medicine:

> 71. There are proper ways of getting and preparing your food.
>
> 74. You cook [name deleted] on their backs in the coals. You cannot use metal objects on them, only your hands. I was taught by my uncles.
>
> 75. If a woman eats certain parts of the [name deleted] it is good, it will be alright for you and maybe you will have kids because of it. It is a very old way. I found out about these things when sitting eating and talking with my family and I have shown my sons this way.
>
> 78. It is not right to kill a carpet snake, they are spiritual. I was told this by the older people.
>
> 86. If the tree is damaged the gum is nice to eat. Only men can pick off the gum. But you cannot damage the tree to get the gum you can only get it if it has been damaged naturally.
>
> 89. My mother showed me how to get various types of food like shellfish, mullet, spearfish, cobbler and whiting. I would go out on my *boodja* (country) with my mother whenever I could and she would show me the proper way to collect and hunt for food.
>
> 90. I show my sons and nephews lots of different bush foods and how to survive...I also tell them about the spiritual side of being Noongar – about the trees and such.

Consideration

My understanding of the factual basis for the assertion in subparagraph 190B(5)(b) as to the relevant pre-sovereignty society and continuity of laws and customs of that society is as follows:

- The claimants assert that in the period prior to 11 June 1829 the Noongar people constituted a society, of which the Yued people were a part. The identified predecessors of the Yued people were associated with the land and waters that form part of the application area. The factual basis in support of this assertion includes some reference to historical record contained in Attachment F of the application. It also includes the information contained in the affidavits of [name deleted] and [name deleted], in which the predecessors of the Yued people are identified and their association with the application area detailed.
- The claimants also assert that rights and interest in land were held under the normative system of the wider Noongar people. That system operated to enable ownership by smaller land-holding groups, such as the Yued people. It would appear to be the claimant's assertion that such ownership to those groups was exclusive, although there

was some freedom of movement over their land by other Noongar people. The factual basis in support of this assertion includes some reference to historical and contemporary record contained in Attachment F, including the observations recorded by Bishop Dom Salvado who, it is stated, was in the area from 1846 to 1900.

- The assertion that the laws and customs of contemporary members are those that have been transmitted continuously from each generation to the next is claimed to be supported by the factual basis contained within the witness statements and the affidavit of current claimants.

The way in which I am to treat the material in support of the factual basis has been foreshadowed in my reasons above. I am to assume that the facts asserted are true—*Doepel* at [17]; *Gudjala FC*—at [82] to [85].

I must, however, in applying the test at s. 190B(5)(b), be guided by the fundamental requirement that the factual basis 'demonstrate both a pre-sovereignty society having laws and customs, from which the laws and customs of the claim group are derived, and continuity of the pre-sovereignty society, including its laws and customs'—*Doepel [2009]* at [33].

In *Doepel [2009],* Dowsett J discussed some of the factors that may guide the Registrar in assessing the asserted factual basis, including:

- that the factual basis identify the persons who acknowledged and observed the laws and customs of the pre-sovereignty society—at [37];
- that if descent from named ancestors is the basis of membership to the group, that the factual basis demonstrate some relationship between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived—at [40]; and
- that the factual basis contain some explanation as to how the current laws and customs of the claim group can be traditional—at [55].

In that regard, the material before me does demonstrate that some information is known about the society as it existed at the time of sovereignty in 1829. That is, at that time the Yued people were part of the wider Noongar people society, from which they derived their rights and interests in land. Further, the material (including the affidavits and witness statements) identifies the ancestors of the native title claim group who acknowledged and observed the laws and customs of that society, namely those predecessors of the Yued people as named in the application at Attachment A.

There is, in my view, also some explanation contained in the material as to how the current laws and customs of the claim group can be asserted to be traditional, in that they are derived from the pre-sovereignty society. Essentially, this material is contained in the witness statements and affidavits which include examples from current claimants as to how the laws and customs of the claim group have been handed down from generation to generation. It also contains their assertions that the Yued people continue to acknowledge the laws and customs of the Noongar society. They provide examples of the teachings of their predecessors.

That said, the factual material before me is such that it calls for a number of inferences to be made from the available material. Given the claimant's factual basis, as outlined above, it is apparent that not much is known of the identified society as it existed in the pre-sovereignty context. That,

of itself, does not necessarily suggest that the claimant's factual basis will be insufficient to support the assertion at s. 190B(5)(b), as it may be that other matters are known 'which assist in demonstrating the traditional nature of the claim group's laws and customs'—*Doepel [2009]* at [31].

In terms of drawing inferences from such material, there are a number of authorities that demonstrate how this has been done in the context of determination proceedings before the Court. While not suggesting that the test at s. 190B(5) is at all commensurate to the evidentiary burden in such cases, they do demonstrate the general task of inferring such factual matters. For instance, in *Gumana v Northern Territory* (2005) 141 FCR 457; [2005] FCA 50, Selway J stated that:

> ...where there is a clear claim of the continuous existence of a custom or tradition that has existed at least since settlement supported by creditable evidence from persons who have observed that custom or tradition and evidence of a general reputation that the custom or tradition has 'always' been observed then, in the absence of evidence to the contrary, there is an inference that the tradition or custom has existed at least since the date of settlement— at [201].

As previously stated, it is not my role to assess or test the credibility of the material before me or to weigh it against any contradictory information. I am satisfied that within the material there is a clear claim of the continuous existence of the laws and customs of the Noongar society from a time at least since settlement. In fact, the claim within the application is that the laws and customs of the Noongar society have existed since a time immediately prior to sovereignty. The material also demonstrates how such laws and customs have been acknowledged and observed by current claimants and their predecessors, thus inviting the inference that they have been observed since at least the date of settlement. I am comfortable making that inference. There is also the assertion that such laws and customs give rise to the Yued people's native title rights and interests in the application area. I am satisfied that there is a factual basis sufficient to support this assertion.

My decision

The material and information presented in the application, in my view, equates to a sufficient factual basis, supportive of the assertion that there was a pre-sovereignty society relevant to the Yued native title claim group, from which the traditional laws and customs, giving rise to the claim to native title rights and interests, have been derived.

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

This part of the test is concerned with whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed. In my view, this assertion relates to the continued holding of native title through the continued observance of the traditional laws and customs of the group.

In essence, my view is that this element of the test equates with what the majority in *Yorta Yorta,* identified as the second element in their understanding of the word 'traditional', where it appears in s. 223(1)(a), in the context of native title being possessed under the traditional laws and customs of the relevant peoples. It 'requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty'—at [47].

In addressing this aspect of the test in *Gudjala [2009]*, Dowsett J considered that:

> Clear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity'—at [33].

For the reasons detailed above at s. 190B(5)(b), I am satisfied that the factual basis is sufficient to support this assertion.

Subsection 190B(6)
Prima facie case

> The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.

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

The nature of the task at s. 190B(6)

The pertinent point in considering the application against the requirements of this section is that the test is prima facie. Thus, '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'—*Doepel* at [135].

The test is said to involve some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed'—*Doepel* at [126], [127] and [132].

Further, in *Doepel,* Mansfield J noted that this section is one that permits consideration of material that is beyond the parameters of the application and requires the Registrar to:

> [C]onsider whether 'prima facie' some at least of the native title rights and interests claimed in the application can be established. By clear inference, the claim may be accepted for registration even if only some of the native title rights and interests claimed get over the prima facie proof hurdle—at [16].

Native title rights and interests

In undertaking the task at s. 190B(6), I must have regard to the relevant law as to what is a native title right and interest, specifically the definition of native title rights and interests contained in s. 223(1) of the Act. That is, I must examine each individual right and interest claimed in the application to determine if I consider, prima facie, that they:

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

The 'critical threshold question' for recognition of a native title right or interest under the Act 'is whether it is a right or interest 'in relation to land or waters'—*Western Australia v Ward* (2002) 213 CLR 1 (*Ward HC*), Kirby J at [577]; remembering '[t]hat the words 'in relation to 'are of wide import'—(*Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group* [2005] FCAFC 135 (*Alyawarr FC*)).

In the interests of brevity, I do not intend to examine this 'threshold question' separately in respect to each native title right and interest claimed. Having examined each of the native title rights and interests set out in the application, it is my view that, prima facie, each is a right or interest 'in relation to land or waters.'

As to the other requirements for native title rights and interests, this was put succinctly by the majority in *Yorta Yorta* (referring primarily to s. 223(1)(c) but alluding to the requirements of s. 223(1)(a)):

> Native title ***owes its existence and incidents to traditional laws and customs*** [emphasis added], not the common law. The role of the common law is limited to the recognition and protection of native title. That recognition and protection ***depends on native title not having been extinguished*** [emphasis added]and its not having incidents that are repugnant to the common laws... requires examination of whether the common law is inconsistent with the continued existence of the rights and interests that owe their origin to Aboriginal law or custom—at [110].

There is no information before me to suggest that any claim has been made over areas where native title rights and interests have been extinguished.

The native title rights and interests claimed by the applicant have been reproduced in my reasons at s. 190B(4). I now consider each of those rights and interests as claimed. I note that in some instances I have grouped certain rights and interests together. Further, my reasons at s. 190B(6) should be considered in conjunction, and in addition to, my reasons and the material outlined at s. 190B(5).

Exclusive rights and interests

(a) rights and interests to exclusively possess, occupy, use and enjoy the area.

The Law

In *Ward HC* the majority considered that '[t]he expression "possession, occupation, use and enjoyment … to the exclusion of all others" is a composite expression directed to describing a particular measure of ***control over access to land***' [emphasis added]. Further, that expression (as an aggregate) conveys 'the assertion of rights of control over the land', which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country'—at [89] and [93].

In *Griffiths v Northern Territory of Australia* [2007] FCAFC 178 (*Griffiths FC*), the Full Court explored the relevant requirements to proving that such exclusive rights are vested in a native title claim group, stating:

> [T]he question whether the native title right of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usfructuary or proprietary. ***It depends rather on the***

consideration of what the evidence discloses about their content under traditional law and custom [emphasis added]—at [71].

Further, the Full Court in *Griffiths FC* was of the view that control of access to country could flow from 'spiritual necessity', due to the harm that would be inflicted upon those that entered country unauthorised—at [127].

My decision

A review of the material outlined within the application indicates to me that, prima facie, this exclusive right claimed by the native title claim group is shown to exist under traditional laws and customs over areas where they have not been extinguished.

It is asserted in the claimant's factual basis that at sovereignty the Yued people acknowledged and observed the laws and customs of the Noongar people. It is stated that those laws and customs dictated that large areas of land were owned by certain small groups of people, such as the Yued people. These rights are claimed to have been held exclusively even though people from other groups, particularly those of the wider Noongar people, were permitted access from time to time. Further, the factual basis states that the Yued people occupied the application area in accordance with these laws and customs and, accordingly, they collectively held the rights and interests in this land.

There is some reference within Attachment F of the application to historical material that details the laws and customs of the Noongar people relevant to exclusive rights and interests in land which were held by the smaller land-holding groups, such as the Yued people. This includes the reference to the records of Bishop Dom Salvado, in which he reports on the distribution of land between smaller family groupings and the importance of exclusivity. While those smaller groupings had freedom of movement within their own territory, he observed that 'if an enemy or a stranger is caught there, he is put to death'.

There is, in my view, material and information within the claimant witness statement, that provides a factual basis in support of the assertion that this exclusive right existed under the traditional laws and customs of the group, including:

- the witness statement of [name deleted] in which she states 'I do not have to ask permission if I am hunting in Yued country. This is because it is my country. Outsiders, including Noongars from other areas should ask permission, this is just what I've been told by my parents. Yamajti people should also ask...If they didn't ask permission...[t]here would be repercussions later down the line, like they might get sick'—at [31] and [32]; and
- the witness statement of [name deleted] in which he states 'It is very important for Noongar people to have their own water holes. This is very strong and people didn't like outsiders moving in without asking permission...The right thing to do is to ask permission before you go onto country that is not your own. All the Noongars that have come up to [place name deleted] have told me or rung me up'—at [47] and [49].

In contemporary times, the material/information asserts that the laws and customs regarding such rights and interest have maintained prominence within the Noongar people and continue to be acknowledged and observed by the Yued native title claim group. For instance, strangers not belonging to Yued country, even though they may be part of the wider society of Noongar

people, are required to ask permission to enter Yued country or spiritual sanctions will be visited upon them.

I consider that this right can, prima facie, be established.

Outcome: prima facie established.

Non-exclusive rights and interests

While not explicitly framed as non-exclusive rights and interests, I am of the view that the rights and interests in Attachment E ranging from (b) to (m) are to be considered as claimed over areas where a claim to exclusive possession cannot be recognised. I now consider each of those rights and interests.

(b) the right to live within the area; and

(d) the right of access to the area.

In my view the claimant's right to live within the area and the right of access to the area is documented within the factual basis material. That material suggests that these rights, prima facie, exist under the traditional laws and customs of the group.

As detailed above in my reasons at s. 190B(5), the factual basis demonstrates that the Yued people have acknowledged and observed the laws and customs of the Noongar people as they relate to occupation and access of the application area.

The affidavit material of [names deleted] provide a factual basis to support the association of the predecessors of the group with the application area, including many of them living and working in the area at various times. Further, the witness statements of claimants also demonstrate that the predecessors of the group have lived on and accessed the application area.

[Name deleted], in her witness statement, indicates that she was born in Moora [in the application area] and that she used to travel all around Yued country with her family. She details a number of places within or close to the application area with which she has a particular association, including Moora, Dalwallinu, Three Springs, Dandaragan, Miling, Cataby, Guilderton and the Moore River. She claims that this is her family's run as it 'is the area that I have lived in my whole life and I will always visit this area'—at [23] to [25].

Outcome: Prima facie established.

(c) the right to make decisions about the use and enjoyment of the area

I have assumed that it is implicit in the application that the claimed right to make decisions about the use and enjoyment of the area is made over only those areas where a claim to exclusive possession cannot be recognised. That is because the native title rights and interests claimed in subparagraph (a) cover any claim to exclusive rights and interests that may exist in the claim area. Further, the qualifications [exclusions] contained in Attachment E would appear to confine the area and/or circumstances where this right is claimed. For instance qualification (iii) in Attachment E is such that exclusive native title rights and interests are not claimed in respect to areas where there have been previous non-exclusive possession acts.

There is some material/information in the application and witness statements to support the existence of the claimant's right to make decisions about the application area , however, this right,

as expressed is not without difficulty. There is some discussion within the authorities as to whether such a right is one that is capable of recognition as non-exclusive[2].

The apparent tension of the expression of such a right ['a right to make decisions about the use and enjoyment of the land'] as non-exclusive was considered in *Ward HC* in the joint judgment, with the Court concluding that:

> It is necessary to recognise that the holder of a right, as against the whole world, to possession of land, may control access to it by others and, in general, decide how the land will be used. But ***without a right of possession of that kind, it may greatly be doubted that there is any right to control access to land or make binding decisions about the use to which it is put*** [emphasis added]. To use those expressions in such a case is apt to mislead—at [52].

In *Attorney General of the Northern Territory v Ward* [2003] FCAFC 283 (*Ward FC*), the Court in making a consent decision recognised 'a right to make decisions about the use and enjoyment of land by Aboriginal people who will recognise those decisions and observe them pursuant to their traditional laws and customs' as a non-exclusive right and held that it was not inconsistent with the existence of pastoral lease entitling the lessee to determine who has access to the area—at [27]. Also in *Jango v Northern Territory of Australia* [2006] FCA 318 (*Jango*), Sackville J considered that he was bound by the Full Court in *Ward FC* and held that a non-exclusive right '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' could be recognised—at [571]. A number of consent determinations have also recognised a similarly expressed right[3].

In my view, the above authorities demonstrate that the nature and extent of the right to make decisions about the use and enjoyment of the area has, as a non-exclusive right been limited or qualified in its expression and meaning by reference to such decisions binding only those Aboriginal persons who will recognise such decisions or, more specifically, the native title holders.

In contrast, the claimed right to make decisions about the use of enjoyment of the area in this application is not limited or qualified in that way. Thus, while *Ward FC* and *Jango* make the distinction from the decision in *Ward HC*, that distinction does not apply in this instance as the circumstances are not analogous. There is a clear difference in how the right is expressed in this application as compared to *Ward FC* and *Jango*.

In reference to the expression of such rights, the High Court in *Ward HC* observed that it would be neither appropriate nor sufficient to convey the nature and extent of a right or interest in terms equivalent to an exclusive claim where 'those rights and interests that are found to exist do not amount to a right, as against the whole world'—at [51]. While this observation was made in the context of a determination of native title, specifically the requirements of s. 225, I am of the view that this principle is applicable to the registration test and the rights and interests claimed. Where it is clearly not the intention of the applicant to claim the right or interest as an exclusive claim

---

[2] See for instance *Ward v State of Western Australia* [2006] FCAFC 283 at [27]. This was followed in *Jango v Northern Territory* [2006] FCA 318.

[3] See for instance *Mundraby v Queensland* [2006] FCA 436 and *Yankunytjatjara/Antakirinja Native Title Claim Group v The State of South Australia* [2006] FCA 1142.

against the whole world, then it should not be expressed in those terms. That is because the expression of the right or interest explicitly contradicts the intended nature of the right or interest.

I understand that in claiming the right to make decisions about the use and enjoyment of the area, it is likely that this right is intended to only apply to those persons bound by the laws and customs of the Noongar people. There is some material within the factual basis that would suggest this. By qualifying in Attachment E that certain exclusive rights and interests are not claimed in respect to certain areas (namely areas in relation to which a previous non-exclusive possession act has been done), those qualifications confine the area and/or circumstances where a right such as this is claimed. However, those qualifications do not limit the extent to which this right can be exercised or possessed.

Given that the right to make decisions about the use and enjoyment of the area, as expressed, would not be confined in its exercise or possession, then I consider that *Ward HC* is applicable. In my view, to use the expression that the native title claimants have the right to make decisions about the use and enjoyment of the area [but without a right of possession as against the whole world] 'is apt to mislead'—*Ward HC* at [52].

I am not satisfied, that in this instance the right to make decisions about the use and enjoyment of the area can be prima facie established in relation to areas where a right to exclusively possess, occupy, use and enjoy is not claimed.

Outcome: not prima facie established.

(e) the right to control the access of others to the area

Again, I have assumed that it is implicit in the application that the claimed right to control the access of others to the area is made over only those areas where a claim to exclusive possession cannot be recognised. That is, this right to control the access of others is, in my view, claimed as a non-exclusive right.

As referred to above, the High Court authority of *Ward HC* is such that it suggests that the right to control the access of others is only capable of recognition as an exclusive right, stating that '...without a right of possession...[as against the whole world], it may be greatly doubted that there is any right to control access to land'—at [52].

There is some authority where a distinction has been made. For instance in *De Rose v South Australia* [2002] FCA 1342 (*De Rose*), O'Loughlin J acknowledged the authority of *Ward HC* but indicated a willingness to recognise the non-exclusive rights to grant access to the application area to Aboriginal persons governed by the laws and customs of the native title holders and to refuse access to the application area to Aboriginal persons governed by the laws and customs of the native title holders—at [553], although no determination of native title was subsequently made by his Honour in that matter. The consent decision in *Mundraby v Queensland* [2006] FCA 436 recognised the non-exclusive right to 'make decisions in accordance with traditional laws and customs concerning access thereto and use and enjoyment thereof by aboriginal people' bound by the laws and customs of the native title holders.

Of those authorities, I would again note the limiting or qualifying nature of the expression used. In my view, the nature and extent of the right to control access through the right to grant or refuse access has in those cases, as a non-exclusive right, been limited or qualified in its

expression and meaning by reference to such decisions binding only those Aboriginal persons who will recognise such decisions or, more specifically, the native title holders.

In contrast, the claimed right to control access of others to the area in this application is not limited or qualified in that way. I am of the view that the distinction made in *De Rose* is not applicable as the circumstances are not analogous. There is a clear difference in how the right is expressed in this application as compared to *De Rose*.

As such, my reasons for finding that this right is not, prima facie, established are similar to those above in relation to the right claimed at (c). Where it is clearly not the intention of the applicant to claim the right or interest as an exclusive claim against the whole world, then it should not be expressed in those terms. That is because the expression of the right or interest explicitly contradicts the intended nature of the right or interest.

Again, I understand that in claiming the right to control the access of others to the area, it is likely that this right is intended to only apply to those persons bound by the laws and customs of the Noongar people. There is some material within the factual basis that would suggest this. By qualifying in Attachment E that certain exclusive rights and interests are not claimed in respect to certain areas (namely areas in relation to which a previous non-exclusive possession act has been done), those qualifications confine the area and/or circumstances where a right such as this is claimed. However, those qualifications do not limit the extent to which this right can be exercised or possessed.

Given that the right to control the access of others to the area, as expressed, would not be confined in its exercise or possession, then I consider that *Ward HC* is applicable. In my view, to use the expression that the native title claimants have the right to control the access of others to the areas [but without a right of possession as against the whole world] 'is apt to mislead'—*Ward HC* at [52].

I am not satisfied, that the right to control access to the application area can be prima facie established in relation to areas where a right to exclusively possess, occupy, use and enjoy is not claimed.

Outcome: not prima facie established

(f) the right to use and enjoy resources of the area

(m) the right to exchange animals and fish located within the claim area with third parties for other things

The right to use and enjoy the resources of the area and the right to exchange those resources is evidenced in the material. That material suggests that those rights exist under the traditional laws and customs of the native title claim group.

The claimant's factual basis contains details of these rights being exercised by members of the native title claim group, in accordance with the traditional laws and customs of the group.

In his witness statement, [name deleted] states that there are proper ways to get and prepare food. He gives details about the different ways of collecting and preparing food, including rules that apply to such activities. He also states:

> 87. There are so many things to eat in my country. I can get plenty of food from [place name deleted] and the surrounding areas, like Kangaroo, duck, mullet, abalone, crayfish, octopus, squid and du fish. My boys and I do lots of fishing off the reefs at [place name deleted] and we

> also fish off the beach. We do not have to ask anyone's permission to get food or other resources from our country.
>
> 88. As a family we hunt and camp all through our country and I teach all my kids and grandchildren like at *Yakkan Dwerly* (or Turtle Lake).
>
> 89. My mother showed me how to get various types of food like shellfish, mullet, spearfish, cobbler and whiting. I would go out on my *boodja* (country) with my mother whenever I could and she would show me the proper way to collect and hunt for food.
>
> 90. I show my sons and nephews lots of different bush foods and how to survive. I also take groups of younger children, for example, out to the swamp at [place name deleted] to show them how to make *Kodja* (an axe). I also tell them about the spiritual side of being Noongar – about the trees and such.
>
> 94. There are the wattle beans that come into seed after winter and Christmas. The see is broken up and can be mixed with water to make biscuits. I saw my mother and other old people do it and now I show the younger kids.

In the affidavit of [name deleted], affirmed 6 August 2009, [name deleted] states that he exchanges fish and grey kangaroos from the Yued area with Yamatji people for emus and red kangaroos.

Outcome: prima facie established.

(g) the right to control the use and enjoyment of others of resources of the area

Again, as with all the rights listed from (b) to (m) in Attachment E, I have assumed that it is implicit in the application that the claimed right to control the use and enjoyment of others of resources of the area is claimed as a non-exclusive right.

For reasons commensurate to those above, given in relation to the rights claimed at (c) and (e) of Attachment E, I am not satisfied, that the right to control the use and enjoyment of others of resources of the area can be prima facie established in relation to areas where a right to exclusively possess, occupy, use and enjoy is not claimed.

In *Neowarra v Western Australia* [2003] FCA 1402, Sundberg J held that the right to control the uses and enjoyment of others of resources of the claim area 'asserts an entitlement to control access to the land and the use to be made of the land' and was inconsistent with the pastoral leases that existed in the area of the claim. Of the argument put by the applicant that the decision of *Ward HC* was not applicable as it did not address the issue of resources, Sundberg J stated that '[w]hat was said in *Ward* in relation to control of access and use is applicable to the presently asserted right even though their Honours were not directing themselves to resources.'—at [479].

Thus, I consider that *Ward HC* is also applicable in regard to this claimed right. In my view, to use the expression that the native title claimants have the right to control the use and enjoyment of others of resources of the area [but without a right of possession as against the whole world] 'is apt to mislead'—*Ward HC* at [52].

Outcome: not prima facie established

(h) the right to conduct ceremonies within the area;

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

(l) the right to manage, conserve and look after the land, waters and resources

The factual basis is sufficient to support the assertion that the native title claim group have traditional laws and customs regarding cultural activities and protecting and maintaining areas of significance. Further, the material within the factual basis suggests that the above rights, prima facie, exist under those traditional laws and customs.

In his witness statement, [name deleted] refers to the place where his son was married, stating '[t]here might have been some bad spirits there...So we smoked the area before the wedding to clear bad spirits'—at [25]. He and his family worry about what happens to their country. He does heritage surveys to ensure that the land is looked after. He has also consulted with bodies to ensure that projects in the area do not cause too much damage to the country—at [109] to [114].

[Name deleted] (deceased), in her witness statement, says that she knows about special places around New Norcia. She learned about these places from her aunties and relatives as she was growing up. Her aunties told her about [place name deleted] near New Norcia where a *corroboree* (dancing, ceremony) ground is. Her grandmother and other relatives also told her about the places where the Noongars camped along the river at New Norcia. She says that she tells her grandchildren about those places and that they should not remove anything from them. It is important to her that such places are maintained and looked after. She did a lot to make sure such places were protected from disturbance —at [28] to [35].

Outcome: prima facie established.

(j) the right to teach and pass on knowledge of the claimant group's traditional laws and customs pertaining to the area and knowledge of places in the area;

(k) the right to learn about and acquire knowledge concerning the claimant group's traditional laws and customs pertaining to the area and knowledge of places in the area

It is my view that these rights are evidenced in the material. That material also suggests that these rights exist under the traditional laws and customs of the group.

In her witness statement, [name deleted] talks about how she has learnt about the laws and customs of the Noongar people and also how her children have been taught about such things. She states that:

> 36. I learned from my parents and uncles and aunties and my cousins by watching them and listening to them. I also teach my kids about Noongar life and pass on stories that the old people told me and correct them when they do things wrong.
>
> 37. My children have been told all the information that I know. It is quite personal and I will pass on the stories that my parents passed on to me. Noongars know and will accept and respect this rule if they have been taught well.
>
> 38. Children are sent all around Noongar country, not just the *Yued* regions, to learn different things from different relatives. My son [name deleted] has learnt from his uncles [names deleted] and his Pop (my sister's husband) (brother-in-law) who is called [name deleted].

> Sometimes [name deleted] will go bush with them and sometimes they will sit around and talk. My husband is also Noongar and he passes on information on to my son.

[Name deleted] (deceased), in her witness statement, indicates that the old people she grew up around passed on to her the knowledge and stories of the Noongar people, including her father, grandmother, grandfather, uncles and aunties. She states that it is important to her that she educate the Noongar children about the culture and traditions.

Outcome: prima facie established.

Subsection 190B(7)
Traditional physical connection

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

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

This section imposes 'some measure of substantive (as distinct from procedural) quality control upon the application'. It requires that the evidentiary material be capable of satisfying the Registrar or delegate of a particular fact(s), specifically that at least one member of the claim group 'has or had a traditional physical connection' with any part of the claim area—*Doepel* at [18]. Although, the focus must necessarily continue to be one that is confined, as:

> 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—*Doepel* at [18].

I also hold the understanding that the term 'traditional,' as used in this context, should be interpreted in accordance with the approach taken in *Yorta Yorta—Gudjala [2007]* at [89]. In interpreting connection in the 'traditional' sense as required by s. 223 of the Act, the members of the joint judgment in *Yorta Yorta* felt that:

> [T]he connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs … "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty—at [86].

In my view, within the material in the application, there are numerous and specific references to members of the native title claim group providing evidence of the requisite traditional physical connection. For instance the witness statement of [name deleted] contains information indicating that he and his family have continued to live on, and access, the application area, pursuant to the

traditional laws and customs of the Noongar people. [Name deleted] also provided an affidavit, affirmed 6 August 2009, in which he stated that he continues to carry out the activities detailed in his prior witness statement within the Yued application area. Further, he confirms that those activities are carried out pursuant to the laws and customs of the Noongar people. In that affidavit [name deleted] also details the continuing association of his sons.

Thus, I am satisfied that at least one member of the native title claim group currently has, or previously had, a traditional physical connection with any part of the land or waters covered by the application.

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

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s.61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Section 61A provides:

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

(2) If :

(a) a previous exclusive possession act (see s. 23B) was done, and

(b) either:

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

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

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

(3) If:

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

(b) either:

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

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

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

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

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

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

The application **satisfies** the condition of s. 190B(8). I explain this in the reasons that follow by looking at each part of s. 61A against what is contained in the application and accompanying

documents and in any other information before me as to whether the application should not have been made.

Reasons for s. 61A(1)

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

In my view the application **does not** offend the provisions of s. 61A(1).

The geospatial assessment indicates that no determinations as per the Register fall within the external boundary of this application as at 13 July 2010. I agree with this assessment.

Reasons for s. 61A(2)

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

In my view the application **does not** offend the provisions of s. 61A(2).

Attachment B of the application, excludes from the application area 'any areas in relation to which a previous exclusive possession act, as defined in section 23B of the NTA, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia, and a law of that State has made provision as mentioned in section 23B in relation to the act as at the time of the Registrar's consideration'.

The above is made subject to the provisions of ss. 47, 47A and 47B.

In my view, the above statement, as contained in the application, is sufficient to show that the application is not made over areas covered by a previous exclusive possession act.

Reasons for s. 61A(3)

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

In my view, the application **does not** offend the provisions of s. 61A(3).

Attachment E of the application excludes any claim to native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done. This is made subject to the provisions of ss. 47, 47A and 47B.

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

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

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

(b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
(c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss. 47, 47A or 47B.

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

Reasons for s. 190B(9)(a):

The application **satisfies** the subcondition of s. 190B(9)(a).

Schedule Q of the application states that the applicant does not claim ownership of minerals, pretroleum or gas wholly owned by the Crown.

Reasons for s. 190B(9)(b)

The application **satisfies** the subcondition of s. 190B(9)(b).

Schedule P of the application states that the applicant does not claim exclusive possession of all or part of an offshore area.

Result for s. 190B(9)(c)

The application **satisfies** the subcondition of s. 190B(9)(c).

There is no information in the application before me to suggest that it is made over areas where the native title rights and interests have otherwise been extinguished. I am not otherwise aware that the native title rights and interests claimed have been extinguished.

Each of the affidavits accompanying the application, in accordance with s. 62(1)(a) contain the affirmation that the native title rights and interests claimed have not been extinguished in relation to any part of the area covered by the application.

[End of reasons]

Attachment A
Summary of registration test result

Application name	**Yued**
NNTT file no.	**WC97/71**
Federal Court of Australia file no.	**WAD6192/98**
Date of registration test decision	**3 September 2010**

Section 190C conditions

Test condition	**Subcondition/requirement**		**Result**
s. 190C(2)			**Aggregate result:** **Met**
	re s. 61(1)		**Met**
	re s. 61(3)		**Met**
	re s. 61(4)		**Met**
	re s. 62(1)(a)		**Met**
	re s. 62(1)(b)		**Aggregate result:** **Met**
		s. 62(2)(a)	**Met**
		s. 62(2)(b)	**Met**
		s. 62(2)(c)	**Met**
		s. 62(2)(d)	**Met**
		s. 62(2)(e)	**Met**
		s. 62(2)(f)	**Met**
		s. 62(2)(g)	**Met**
		s. 62(2)(h)	**Met**

Test condition	Subcondition/requirement	Result
s. 190C(3)		**Met**
s. 190C(4)		**Overall result:** **Met**
	s. 190C(4)(a)	**N/A**
	s. 190C(4)(b)	**Met**

Section 190B conditions

Test condition	Subcondition/requirement	Result
s. 190B(2)		**Met**
s. 190B(3)		**Overall result:** **Met**
	s. 190B(3)(a)	**N/A**
	s. 190B(3)(b)	**Met**
s. 190B(4)		**Met**
s. 190B(5)		**Aggregate result:** **Met**
	re s. 190B(5)(a)	**Met**
	re s. 190B(5)(b)	**Met**
	re s. 190B(5)(c)	**Met**
s. 190B(6)		**Met**
s. 190B(7)(a) or (b)		**Met**
s. 190B(8)		**Aggregate result:** **Met**
	re s. 61A(1)	**Met**
	re ss. 61A(2) and (4)	**Met**
	re ss. 61A(3) and (4)	**Met**

Test condition	Subcondition/requirement	Result
s. 190B(9)		**Aggregate result:** **Met**
	re s. 190B(9)(a)	**Met**
	re s. 190B(9)(b)	**Met**
	re s. 190B(9)(c)	**Met**

[End of document]