National Native Title Tribunal

Registration test decision

Application name	Uunguu Part B
Name of applicant	Albert Puenmora, Keith Nenowatt and Susan Bangmora
State/territory/region	Western Australia, Kimberley region
NNTT file no.	WC11/4
Federal Court of Australia file no.	WAD119/2011
Date application made	19 April 2011

Name of delegate Carissa Kok

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 do not accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

For the purposes of s. 190D(3), my opinion is that the claim does satisfy all of the conditions in s. 190B. Nevertheless I cannot accept the claim for registration because the claim does not satisfy all of the conditions in s. 190C.

Date of decision: 12 August 2011

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Carissa Kok

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 1 July 2011 and made pursuant to s. 99 of the Act.

Reasons for decision

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Introduction

This document sets out my reasons, as the Registrar's delegate, for the decision to not 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 Uunguu Part B claimant application to the Native Title Registrar (the Registrar) on 27 April 2011 pursuant to s. 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

Given that the application was first made on 19 April 2011 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

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.

Overview of the application/related applications

- On 19 April 2011, the WC11/4 [WAD119/11] Uunguu Part B application (the application) was filed in the Court.
- On 27 April 2011, the Court gave a copy of the application to the Registrar under s. 63.
- On 23 May 2011, the Court made a determination in relation to WC99/35 [WAD6033/99] Uunguu (a registered application), that native title does exist—*Goonack v State of Western Australia* [2011] FCA 516 *(Goonack)*. I understand that the determination settled the first part of the Uunguu application. I shall refer to these proceedings hereafter as 'Uunguu Part A'. (I note the information before me shows that both Uunguu Part A and the application before me are made on behalf of the same group.)
- The determination in *Goonack* covered the areas subject of Uunguu Part A, except for one excluded area. The Court ordered that 'in relation to the Excluded Area as described in Schedule One to the Determination, no determination be made ...'—*Goonack* at [2].
- Schedule One to the Determination states that the 'area excluded from the determination comprises all that land comprising Lot 502 as shown on Deposited Plan 56683 (formerly part of Special Lease 3116/11277)'—*Goonack* at Schedule 1.
- As Lot 502 as shown on Deposited Plan 56683 remained subject of the Uunguu Part A application, Uunguu Part A continued to be entered on the Register of Native Title Claims. This lot also comprises the area subject of the application before me—Uunguu Part B. I understand the application was made for technical reasons as stated in the certification at Attachment R.

Registration Test

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

Pursuant to ss. 190A(6) and (6B), the claim in the application must not be accepted for registration because it does not satisfy all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment B.

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.

As required by s. 190A(3), I have had regard to the WC11/4 Form 1 application and accompanying documents filed on 19 April 2011.

I have also had regard to the documents contained in the WC11/4 Uunguu Part B case management/delegates files (reference 2011/01255). Where I have had particular regard to information in documents within that file, I have identified them in this statement of reasons. I have followed Court authority and have only considered the terms of the application itself in relation to the registration test conditions in s. 190C(2) and ss. 190B(2), (3) and (4)—*Attorney General of Northern Territory v Doepel* [2003] FCA 1384 *(Doepel)* at [16].

I have not considered any information that may have been provided to the 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'. Further, mediation is private as between the parties and is also generally confidential (see ss. 94K and 94L of the Act).

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. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication—*Hazelbane v Doepel* [2008] FCA 290 at [23] to [31]. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

On 27 May 2011, the Tribunal advised the applicant and the State of Western Australia (the State) that the registration test would be applied to the application. Both the applicant and the State were given the opportunity to provide further information/submissions in relation to the registration of the application.

As no adverse or additional material has been submitted in relation to this application, neither I, nor other officers of the Tribunal have been required to undertake any further steps in relation to procedural fairness obligations.

Procedural and other conditions: s. 190C

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

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

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

In reaching my decision for the condition in s. 190C(2), I understand that this condition is procedural 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)—*Doepel* at [16] and also at [35] to [39].

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.

My consideration of 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) is detailed below:

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).

Section 190C(2) is framed in a way that 'directs attention to the contents of the application and the supporting affidavits'—*Doepel* at [35].

Thus, I have confined my assessment of this requirement to the details and information contained in the application itself. 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 [35], [37] and [39].

Notwithstanding this, in accordance with the requirements of 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', and does not 'indicate that not all the persons in the native title claim group were included', or, that the claim group is 'in fact a sub-group of the native title claim group'—at [35] and [36]. In my view, and as guided by *Doepel*, in such circumstances the requirements of s. 190C(2) under this subsection would not be met.

Schedule R of the application refers to an accompanying document at Attachment R—a certification in accordance with s. 203BE by Kimberley Land Council (KLC) that the applicant is authorised to make the application. The application is also accompanied by three affidavits by each of the persons comprising the applicant who all swear that they are 'authorised by all of the persons in the native title claim group to make the application'.

Schedule A provides a description of the native title claim group. I consider the merits of this description at s. 190B(3) below.

There is nothing on the face of the application that leads me to conclude that the description of the native title claim group does not include all of the persons in the group, or that it is a subgroup of the native title claim group. I am therefore 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).

The names of the three persons who comprise the applicant are stated on page 2 of the application, and their address for service is found at Part B of the application.

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).

The application does not name persons in the native title claim group. Schedule A contains a description of the persons in the native title claim group—I consider the sufficiency of this description below at s. 190B(3).

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 approved determination of native title, 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) setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it.

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

The application is accompanied by affidavits from each of the three persons who comprise the applicant, each addressing the relevant matters under 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) because it 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).

Schedule B of the application refers to Attachment B which contains an external boundary description of the application area. Schedule B also sets out general exclusions of areas within the external boundary 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).

A map of the application area is found at Attachment C to the application.

Searches: s. 62(2)(c)

The application must contain the details and results of all searches carried out by or on behalf of the native title claim group 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).

Schedule D contains a statement that no searches have been carried out by the current applicant.

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).

Schedule E provides a description of the native title rights and interests claimed in relation to the the application area. The description does not consist only of a statement to the effect that the native title rights and interests are all the 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).

In my view, the application at Schedule F and the materials provided in Attachment M contain a general description of the factual basis upon which it is asserted that the native title rights and interests claimed exist, and also for the particular assertions in the section.

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).

A list of activities carried out by the native title claim group is provided at Schedule G.

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).

At Schedule H it is stated that the application 'WAD6033 of 1999' (WC99/35 Uunguu) has been made in relation to the area covered by the application.

Section 24MD(6B)(c) notices: s. 62(2)(ga)

> The application must contain details of any notification under s. 24MD(6B)(c) of which the applicant is aware, that have been given and that relate to the whole or part of the area covered by the application.

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

At Schedule HA it is stated that there 'are no notifications under paragraph 24MD(6B)(c) of which the current applicant is aware'.

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).

At Schedule I which relates to details of any notices of the relevant kind, the applicant provides reference numbers (which identify an overlapping s. 29 notice).

I note that the Tribunal's Geospatial Services unit (Geospatial Services) provided an overlap analysis and geospatial assessment on 13 May 2011 (the geospatial assessment). This assessment found that the application is not affected by any current s. 29 notices.

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 **does not satisfy** the condition of s. 190C(3).

Section 190C(3) essentially relates to ensuring that there are no common native title claim group members between the application currently being considered for registration and any relevant overlapping application, provided the overlapping application is a previous application in the sense discussed in subparagraphs 190C(3)(b) and (c).

The requirement that the Registrar be satisfied in the terms set out in s. 190C(3) is only triggered if all of the criteria found in ss. 190C(3)(a), (b) and (c) are satisfied in relation to the overlapping application—*Western Australia v Strickland* (2000) 99 FCR 33 (*Strickland)* at [9].

The date at which the Registrar is to be satisfied in these terms is the date the application is considered for the purpose of the registration test—*Risk v National Native Title Tribunal* [2000] FCA 1589 *(Risk)* at [27].

I have considered the information from:

- the application;
- an extract from the Register of Native Title Claims (RNTC) relating to Uunguu Part A;
- the geospatial assessment; and
- the *Goonack* determination (some relevant details are set out in the 'Application overview').

As I have outlined in the 'Application overview' and in relation to s. 62(2)(g), when Uunguu Part B (the current application) was made, it was covered by another application—Uunguu Part A. This is clear to me from the applicant's statement at Schedule H, and the geospatial assessment which found that Uunguu Part A wholly covers the area of the current application. The information before me also shows that Uunguu Part A was entered on the RNTC when the current application was made, as a result of it having been registered under s. 190A on 30 June 2000. At the date of these reasons, the entry of Uunguu Part A remains on the RNTC.

Accordingly, I am satisfied that Uunguu Part A meets the criteria for being a relevant 'previous application' in the sense defined by ss. 190C(3)(a) to (c). I must therefore be satisfied that there are no members in common between the claim groups for the current and previous applications.

As I have stated in the 'Application overview', Uunguu Part A and Uunguu Part B are made on behalf of the same native title claim group. I note that the applicant submits information to this effect at Schedule O and in the certification provided at Attachment R. I have also had regard to the claim group descriptions for both applications, which show that both applications are made on behalf of persons descended from all the same apical ancestors.

As it is clear from the available information that the native title claim groups for both the current and previous applications are the same group, I cannot be satisfied of the terms required by s. 190C(3). This condition is not met.

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.

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)(a) are met because the application has been certified by each representative Aboriginal/Torres Strait Islander body that could certify the application.

Mansfield J states in *Doepel* that the Registrar's function in assessing the limb of s. 190C(4)(a) is simply 'to be satisfied about the fact of certification by an appropriate representative body'—at [78]. It is not my role to examine matters relating to the basis on which the certification was provided, including the sufficiency or legitimacy of the reasons why the certifying bodies hold the opinions they do—*Doepel* at [80]; *Wakaman People #2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 at [32].

It follows in my view that my task at s. 190C(4) is not to inquire about the fact of authorisation, but is limited to ensuring that:

- the certifying body has power under Part 11 to make the certification; and
- the certification complies with s. 203BE(4)—*Doepel* at [80] and [81].

The application has been certified and a copy of the certification is provided in Attachment R to the application. This certification is made by KLC pursuant to s. 203BE, dated 15 April 2011 and signed by the Acting Chief Executive Director of KLC.

The searches undertaken by the Geospatial Services reveal that KLC is the only representative body for the area covered by the application and thus the only body that could certify.

It is my task to consider if the certification meets the requirements of s. 203BE(4) and for the reasons that follow I am satisfied that it does.

Section 203BE(4) is set out below:

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

The requirements of ss. 203BE(2)(a) and (b) are:

> A representative body must not certify under paragraph (1)(a) an application for a determination of native title unless it is of the opinion that:
> (1) all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and
> (2) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group

Satisfaction of s. 203BE(4)(a)

The copy of the certificate provided at Attachment R contains a statement at paragraph [1] to the effect that the certifying body is of the opinion that the requirements of ss. 203BE(2)(a) and (b) have been met. I am thus satisfied that the certificate contains the information required by s. 203BE(4)(a).

Satisfaction of s. 203BE(4)(b)

I summarise below the information provided in the certification by KLC with regard to s. 203BE(4)(b).

Authorisation of the applicant—s. 203BE(2)(a)

- The traditional decision-making processes of the native title claim group are based on deeply held beliefs which govern the group's connection to country and their rights to speak for country.
- The claim group followed a traditional decision-making process during the authorisation process—this is supported by an anthropologist (who works with the group) and was observed by KLC staff at an authorisation meeting held on 10 February 2010 in Kalumburu.
- At this authorisation meeting the applicant and the (making of the) native title application were authorised in accordance with the group's traditional decision-making process.
- KLC staff have observed that this decision-making process has been followed during other meetings with the claim group.

All reasonable efforts made to describe all persons in the native title claim group— s. 203BE(2)(b)

- KLC staff and KLC's contracted consultants have undertaken extensive anthropological and genealogical research in relation to the claim group over a number of years.
- KLC has conducted community consultations with the claim group for the purposes of identifying all persons who hold native title rights and interests within an area which includes the application area.
- During 2010, a decision was made by the claim group to split their application into Parts A and B for technical reasons. The native title holding group in relation to Part A (which I understand was determined in May 2011) is the same group as the claim group for the application before me (Part B).

Consideration of the above information

The certificate briefly sets out the reasons as to why KLC holds the opinion that the requirements of ss. 203BE(2)(a) and (b) have been met, such that I am satisfied that the requirements of s. 203BE(4)(b) are met.

Satisfaction of s. 203BE(4)(c)

As discussed above in my reasons, the application is overlapped by another application (Uunguu Part A), and both applications are made on behalf of the same native title claim group. In my view, it appears from the certification that it was intended that the application before me would be made, in accordance with the two-staged approach to the settlement of Uunguu Part A. Therefore, it is my view that the representative body is not required to address the matters outlined in s. 203BE(3), as the case before me does not relate to competing claim groups.

To this end, I refer to the wording of s. 203BE(3), with particular regard to subparagraph (a):

> (3) If the land or waters covered by the application are ... covered by one or more applications ... of which the representative body is aware, the representative body must make all reasonable efforts to:

(a) achieve agreement, relating to native title over the land ... between the persons in respect of whom the applications are ... made ...

As there appears to be no dispute between the persons in respect of whom Uunguu Part A and Uunguu Part B are made, relating to their claim to native title in the relevant area, it follows that I do not consider the requirements of s. 203BE(4)(c) applicable.

Conclusion

It is my view that KLC is the only representative body that could provide the requisite certification, and that the relevant certificate satisfies the requirements of s. 203BE(4). I am therefore satisfied that the condition of s. 190C(4)(a) has been met.

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).

When considering this condition, I am confined to the information in the application—*Doepel* at [122].

Schedule B of the application refers to a description of the boundaries of the application located at Attachment B.

Attachment B is titled 'Uunguu Part B; External Boundary Description', and was prepared by Geospatial Services on 8 July 2010. The description identifies the application area as being 'all the land and waters of Lot 502 as shown on Deposited Plan 56683'. There are notes included relating to the source, currency and datum of data used to prepare the description.

Schedule C refers to Attachment C which is a copy of a colour map titled 'Native Title Determination Application Uunguu Part B'. The map was prepared on 8 July 2010 by Geospatial Services and includes:

- the application area depicted by a bold blue outline;
- topographic image as a background;
- land parcel boundaries colour coded and labelled;
- scalebar, northpoint, coordinate grid, locality diagram and legend; and
- notes relating to the source, currency and datum of data used to prepare the map.

Schedule B also provides a list of general exclusions to the application area.

I have had regard to all of this information as well as the geospatial assessment on the application area provided on 13 May 2011. In my view, the written description and map are consistent and sufficiently identify the application area with reasonable certainty.

Accordingly, I am satisfied that the application meets the conditions of s. 190B(2).

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).

Mansfield J stated in *Doepel* that:

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

It follows that the focus of s. 190B(3) is not 'upon the correctness of the description of the native title claim group, but upon its adequacy so that the members [sic] of any particular person in the identified native title claim group can be ascertained'—*Doepel* at [37].

Section 190B(3) has 'requirements which do not appear to go beyond consideration of the terms of the application'—*Doepel* at [16]. Accordingly, I have confined my consideration to the information contained in the application.

Schedule A of the application contains a description of the native title claim group as extracted below:

> The claim is brought on behalf of those Aboriginal people who are members of the Wanjina Wunggurr Community for their respective communal, group and individual rights and interests in the claim area and who are descended from the occupants of the area at the time of the assertion of British sovereignty, being all the descendants of the following persons:
>
> The people for the Wanjina – Wunggurr Uunguu Part B Claim area are the descendants of
>
> [23 named persons];
>
> [71 named persons], together with the descendants of [named person], who was adopted into the native title claimant group; and
>
> [named person/alternative name], [named person], [named person/alternative name], [7 named persons], [a named couple], [9 named persons] together with [3 named persons], who were adopted into the native title claimant group, and their descendants.

As the application does not name the persons in the native title claim group in accordance with s. 190B(3)(a), I must be satisfied that the requirements of s. 190B(3)(b) are met.

In *Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732 *(WA v Registrar)*, Carr J stated that the test under s. 190B(3)(b) is whether the group is described sufficiently clearly so that it can be ascertained whether any particular person is in the group, i.e. by a set of rules or principles—at [25] to [27]. However, this does not necessarily mean that any formula will be sufficient to meet the requirements of s. 190B(3)(b). It is for the Registrar or her delegate to determine whether or not the description is sufficiently clear and the matter is largely one of degree with a substantial factual element.

In accordance with the 'rules' of the description at Schedule A, I understand that membership of the claim group comprises all the descendants of the named apical ancestors identified in Schedule A.

In my view, the application provides details which would allow for, at any time, an objective and consistent mechanism to ascertain whether a person is a member of the native title claim group. To this end, I note an observation by Carr J in *WA v Registrar* that:

> It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently. It is more likely to result from the effects of the passage of time and the movement of people from one place to another. The Act is clearly remedial in character and should be construed beneficially—at [67].

Therefore, I am of the view that with the assistance of further factual inquiry, it would be possible to ascertain whether persons are a descendant of any of those clearly named ancestors identified in Schedule A, thus meeting the requirement for membership of the group.

For these reasons I find that this condition is met.

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

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

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

My understanding is that this section requires the description of the claimed native title rights and interests to be expressed in a clear and easily understandable manner; that the rights and interests can be understood as 'native title rights and interests' as defined by s. 223 and for the claimed rights and interests to have meaning—*Doepel* at [91], [92], [95], [98] to [101], and [123].

For the purpose of this condition, in line with *Doepel*, I have only had regard to the description contained in the application itself—at [16].

Schedule E of the application provides a description of the native title rights and interests claimed, as extracted below:

1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s238, ss47, 47A or 47B apply), the Wanjina Wungurr community claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world.

2. The native title rights referred to in paragraph 1 include the right to make decisions about the manner of exercise of those rights and interests in relation to the land (and activities pursuant to them)

3. Over areas where a claim to exclusive possession cannot be recognised, the Wanjina Wungurr community claim the following rights and interests:

   (a) the right to enter, travel over and remain on the land;

(b) the right to live and camp on the land (including erecting shelters and other structures for those purposes);

(c) the right to hunt, fish, gather and use the resources of the land including:
(i) sharing and exchanging those resources; and
(ii) manufacturing traditional items from those resources
for personal, domestic and communal needs (including, but not limited to, cultural or spiritual needs) but not for commercial purposes;

(d) the right to light fires for domestic purposes but not for the clearance of vegetation;

(e) the right to take and use water from the land;

(f) the right to engage in cultural activities on the land including:
(i) visiting places of cultural or spiritual importance and protecting those places by carrying out lawful activities to preserve their physical or spiritual integrity;
(ii) conducting ceremony and ritual;
(iii) holding meetings;
(iv) participating in cultural practices relating to birth and death, including burial rights;
(v) passing on knowledge about the physical and spiritual attributes of the Determination Area and areas of importance on or in the Determination Area; and
(vi) maintaining, and protecting from physical harm, places and areas of importance, including for the avoidance of doubt, freshening or repainting images at painting sites.

4. The native title rights and interests are subject to:
(a) The valid laws of the State of Western Australia and the Commonwealth of Australia; and;
(b) The rights (past or present) conferred upon persons pursuant to the laws of the Commonwealth and the laws of the State; and
(c) the traditional laws and customs of the native title claim group.

At paragraphs 1 and 2 at Schedule E, it is my understanding that the applicant claims a right to exclusive possession in those areas where such a right is capable of recognition.

At paragraph 3, it appears that the applicant claims a list of particular non-exclusive native title rights and interests, over areas where exclusive rights and interests are unable to be recognised.

To my mind, the description of the claimed native title rights and interests in the application is clear and easy to understand. I am therefore satisfied that the description is sufficient to allow the native title rights and interests claimed to be readily identified.

I note that I undertake an assessment of whether the rights and interests claimed in Schedule E are native title rights and interests under s. 223(1), below at s. 190B(6).

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

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

The application **satisfies** the condition of s. 190B(5) because the factual basis provided is **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 as guided by Mansfield J in *Doepel* at [132].

In *Doepel*, Mansfield J stated that:

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the 'factual basis on which it is asserted' that the claimed native title rights and interests exist 'is sufficient to support the assertion.' That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts –at [17].

This approach to s. 190B(5) was approved by the Full Court in *Gudjala # 2 v Native Title Registrar* [2008] FCAFC 157 *(Gudjala FC)* at [83]. I also note the following comments by the Full Court in *Gudjala FC*, in relation to s. 190B(5):

> ...it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim–at [92].

It is clearly not my function to adjudicate whether native title exists in relation to the application area or to require evidence from the native title claim group that 'proves directly or by inference the facts necessary to establish the claim'—*Gudjala FC* at [92].

I note that while the Full Court in *Gudjala FC* defined the general nature of the task and outlined the fundamental principles applicable to the test under s. 190B(5)—at [82] to [85] and [90] to [96],

the decisions of Dowsett J in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007)* and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) are also relevant to my consideration.

These two decisions discussed in detail each of the elements of the test at s. 190B(5)(a) to (c). In my view, the Full Court in *Gudjala FC* did not criticise the approach that Dowsett J took in relation to these elements in *Gudjala 2007*, including his assessment of what was required within the factual basis to support each of the assertions at s. 190B(5)—*Gudjala FC* at [90] to [96]. It is my view that Dowsett J took a consonant approach in *Gudjala 2009*.

I have considered the following parts of the application, which in my view relate to this condition:

- Schedule A—description of the native title claim group;
- Schedule F—general description of the factual basis provided in support of s. 190B(5)
- Schedule G – a list of activities carried out by the claim group in the application area; and
- Attachment M which contains:
  - affidavits by claim group members—Jack Karadada, Louis Karadada, Wilfred Goonack and William Bunjuck; and
  - 'The Wunambal Gaambera Healthy Country Plan' (the Uunguu Plan[1]).

On the basis of the above information I will now consider each of the subsections of this condition.

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

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

The court in *Gudjala 2007* indicated that this particular assertion may require the following kinds of information (and I note that this aspect of the decision was not criticised by the Full Court on appeal):

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

I turn firstly to the context in which the application was made, as set out above in the 'Application overview'.

As I discuss in my reasons above, the native title claim group for the overlapping application, Uunguu Part A, is the same group for the application before me. On 23 May 2011, areas covered

[1] The Uunguu Plan was prepared in March 2010 for Wunambal Gaambera Aboriginal Corporation (WGAC) by: Wunambal and Gaambera people, the Wanjina Wunggurr Uunguu Traditional Owners of Wunambal Gaambera Country, and written from their information by Heather Moorcroft, Planning Consultant, Bush Heritage Australia; Bevan Stott, Project Consultant, WGAC; and Linguist, Thomas Saunders—the Uunguu Plan at the second physical page of the document (not pages labelled 'Page ii' or 'Page 2').

by the group's wider country, (previously also comprising the Uunguu Part A application area) were the subject of a consent determination that native title exists—*Goonack*.

On 13 July 2011, I conducted a search of the application area against the Uunguu Part A determination/application areas, on the Tribunal's mapping database. The results generated show that the application before me covers a small area situated within the group's larger country; areas over which the court has made a determination of native title in favour of the group in this application. I note that the application before me covers the same area, as that part of Uunguu Part A (the group's wider country claim) which was excluded from the Uunguu Part A determination—*Goonack* at Schedule 1.

Accordingly, I understand the application area to comprise a small part (a single lot, as discussed above at s. 190B(2)), of the group's larger area of country. Thus, it is my view that material which provides a sufficient factual basis to support the claim group and their predecessors' association with their wider country, also provides support for their association with the application area. To this end, as the group's native title has been determined to exist in relation to their wider country, I am also of the view that this finding by the court provides support for the group's assertion under s. 190B(5)(a), regarding this application.

In my view, Schedules F and G of the application provide general details about the claim group's assertions in support of this subcondition, including statements to the effect of the requirements outlined by *Gudjala 2007* (set out above).

For instance, it is asserted that the claim group and their predecessors have had an association with the application area since the assertion of British sovereignty in the area, through their possession, occupation, use and enjoyment of the area under the group's traditional laws and customs. It is stated that the group's traditional laws and customs have been passed down through the generations by traditional teaching. Some general examples are given to describe how the group is associated with the area; through ancestral connections, conception and birth in the area, as well as by traditional knowledge of the geography, resources and ceremonies of the area. A general list of the group's activities carried out in the application area is provided in relation to the continued exercise of their native title rights and interests in the area.

These details are further supported by the more particularised information in the affidavit evidence and the Uunguu Plan at Attachment M to the application. I discuss below key examples of the factual basis upon which the applicant relies to support the assertion in s. 190B(5)(a). (I note that other relevant examples of information are extracted in my reasons under s. 190B(7).)

In my view, each of the affidavits provides relevant material to support this subcondition. Each of the deponents affirm that they grew up in the bush in their country, or returned to their country for periods of time. All the deponents talk about how they were taught by their families to gather, fish and hunt for foods from their country in their traditional ways. Information is provided about the group's stories of creation ('Lalai'/'Lalayi' or 'Dreamings'[2]), as passed down to them through the generations, and that are the continued foundation for how the group interacts with their country. Details are given about country (including specific places) belonging to claim group members and their families, and how relationships between the group, their country and

[2] 'The Lalai story', the Uunguu Plan, page 4—at [1].

Dreamings bind together their overall system of society, such as in the affidavits by Wilfred Goonack at [3], [5] to [9], [26]; and Louis Karadada:

> My uncle's Dreaming is the salt water rushing in. That is at Cassini Island. My mother, ... her Dreaming is the saltwater Wanjina and her place is Mantilii and Wiyangari. Whitefellas call that Montaliver [sic] Islands—at [11].
>
> All the Wanjina people who follow that Law with Wanjina and Wunggurr [the creator beings[3]] have to help each other. We all know those Laws from our old old people ... We all have our Wanjina for our country and the Wunggurr and Kangaroo travelled all over this land ... They all made the Law for our country—at [21].

I note the assertion by the applicant at Schedule A, that the group's apical ancestors were the occupants of the application area at the time of British sovereignty. The list of named ancestors provided appears extensive; totalling 119 persons. Having regard to the details provided by the affidavit deponents, it is my view that the material shows an association between the group's predecessors and their country. In particular, some of the affidavit material references certain named apical ancestors of the group, and describes their association with the area. Supporting material includes:

Wilfred Goonack in his affidavit talks about why certain areas within his country belong to him; because of his predecessor's association with that country. He also identifies one of the named apical ancestors of the group identified in Schedule A, as being his grandfather. For example (I note that in Schedule A, the following identified ancestor's name is spelt slightly differently, being 'Awololaa', but it appears to me that both referenced names refer to the same person):

> We all had the one mother and one father and one grandfather from my father. His name was Aowlolaa and he had five brothers all my grandfathers too. They were all the ... mob. All the law bosses for Mitchell Plateau. That is why this is my country too, from my old old people. We follow the father and the grandfather for country. We get our symbols from our grandfathers, the symbols for ... country—affidavit of Wilfred Goonack at [10] and [11].

Mr Goonack also talks of how he and his family/community are all linked together, and to their country, by their biological and spiritual ancestors' association with the area. Again, he names (three) apical ancestors listed in Schedule A, as his grandfathers[4]. I note that from the manner in which Mr Goonack describes his 'grandfathers', I infer that he refers either to his biological grandfather(s) and/or other significant preceding family members. In any event, regardless of their particular familial relationship to Mr Goonack, it appears to me that they are preceding relations considered by him to be very important and directly linked to his ancestry:

> My grandfather, Buungguuluu, carried the cloud from there and put it down at ... which is near the Lawley River and the road to Mitchell Plateau. There is a cave there today with all the Wanjina painting on it. That is my grandfather. I walked around with that old man, he carried me on his neck ... My grandfather left his image there and then kept walking to Lawley River where there are more Wanjina sitting down in the caves in their country ...we are all one together under Wanjina and Wunggurr ... We all got the one Law and we all know that Law ... we have to follow which way the Wanjina was walking over the country. We are all connected

[3] Ibid.

[4] I note that the ancestor named in Wilfred Goonack's affidavit as 'Buungguuluu' appears to me to be the same person named as an apical ancestor in Schedule A as 'Bunngnguuluu'.

> by those Dreamings, like Angaarambuu, my grandfather, his Dreaming came from Lumerii where the Wunggurr started up ... My grandfather made the rivers and pushed up the hills travelling to Mitchell ... Another grandfather, Buunduunguu, his Dreaming is from ... country near Roe River ... the Bream that jumped through near Hunter River. That is how we are all family, the Wanjina and Wungurr joins us up—affidavit of Wilfred Goonack at [36] to [39].

Mr Goonack also references another grandfather who is named as an apical ancestor in Schedule A, when he talks about where this ancestor is buried within the group's country. He states that this grandfather, 'Old Angaarambuu' has his grave in Mitchell country, and that 'he was like a King for all the Mitchell mob'—affidavit of Wilfred Goonack at [47].

Louis Karadada identifies that the country belonging to his grandmother who 'died a long time ago' was 'on top of Mitchell River'. His grandmother's name was Biljimbirii (another named apical ancestor from Schedule A)—affidavit of Louis Karadada at [17].

Jack Karadada talks about being born in his country and that he is a traditional owner for his country from his father and his grandfather. That country is 'all around Cape Voltaire', and his children have got that country from him too. Mr Karadada states that '[w]e follow our fathers for country and we have to look after our mother's side too if our uncles had no kids'—affidavit of Jack Karadada at [3] and [5].

I note that the affidavit material contains references to many placenames which I have been able to locate within the group's wider country—having regard to the Tribunal's mapping database and the maps provided in the Uunguu Plan. Such references relate to places of birth/death, the source of Dreamings, a person's specific country, special places and their stories, and places associated with creator beings. These localities stretch across the group's wider country (inside the Uunguu Part A determination area) and include: Cape Voltaire, Vansittart Bay, Cassini Island, Montaliver [sic] Islands, Bigge Island (and nearby mainland), Prince Regent (River), Mudge Bay, Mitchell Plateau, Mitchell Falls, Crystal Head, Lawley River, Roe River, Hunter River and Parry Harbour.

In my view, there is much information provided by the affidavits to support that the claim group and their predecessors have/have had a traditional association with the application area.

The applicant also provides information at Attachment M in the Uunguu Plan to further support the assertion that predecessors of the claim group have had a traditional association with their country, including the application area, since the time of settlement in the area. (I note the Uunguu Plan also contains an abundance of detail to particularise the group's ongoing, current association with their country.) In my view, statements provided which support both the current group and their predecessors' association include these summaries below.

- 'This Country has been home to us Wunambal and Gaambera people for many thousands of years. Like our ancestors we call this country 'our Uunguu' – our living home'. The claim group's population presently numbers around 400 persons who today still live in the Kimberley region (in which their traditional country is located), albeit mainly in nearby Kimberley towns. One family group do live on their traditional country at Kandiwal on Ngauwudu (Mitchell Plateau). 'We live in two worlds'—the Uunguu Plan at page 3.

- The claim group believes all the land, sea, heavens and all things in their country were made by their creators, Wanjina and Wunggurr. They put the Law in place for everything. Each

Wanjina had a job to make the country—Wanjina are man, woman, and the group's ancestors—the Uunguu Plan at page 4.

- Further comprehensive details are provided regarding the creation stories of the group's overall universe; the 'Lalai story'. It is in the Lalai that the Law for caring for country was made. The country is 'like a bible' to the claim group—the Uunguu Plan at page 4.

- The rock art found in stone country is there for a purpose—in the Lalai, the group's creators left their images in paintings found in caves and overhangs. All paintings have a song and a story, and are like history books for the claim group. The group make regular visits to their rock art to maintain their culture and to look after it; these places are considered their ancestors' places—the Uunguu Plan at page 21.

- All the islands in the group's country are special places which include areas of burial sites, rock art, stone arrangements, middens or significant Lalai (creator being/story) places. In 'the past' some of the group's ancestors lived on the islands. Some had permanent water, like on Bigge Island[5], but other ancestors had ways to collect water where no permanent springs existed. The islands and travel routes were important to their ancestors' wunan (traditional sharing and business) trading systems. The group's old people made rafts or dug-out canoes from special trees to sail the tides and currents to travel between the mainland and islands—the Uunguu Plan at page 23. It would appear to me that this kind of information has been handed down over time to the current group by their pre-contact ancestors.

When I consider all the information provided by the affidavits and the Uunguu Plan, I am able to be satisfied that the materials show that the current claim group and their predecessors have had an ongoing association with their country since a time prior to settlement in the area. In forming this view, I have taken into account the details provided about the group's physical and spiritual relationship with country, and the continuous handing down of traditional laws and customs in relation to country. These include the passing from generation to generation, of rights to country, and Dreamings related to special places and beings from the time the group's Uunguu (world) was created, until the present era. From all this information, with particular regard to the group's laws and stories of creation (which still today govern how persons in the group interact with country), I am able to infer that the current claim group and their predecessors' association with the application area has continued since the time of settlement in the area.

For the reasons set out above, it is my view that the condition of s. 190B(5)(a) is met.

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

I am **satisified** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(b).

In *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*) the High Court discussed the meaning of the term 'traditional' in the context of s. 223(1), which defines 'native title or native title rights and interests' as follows:

[5] As referenced above, this island is located within the group's wider country.

> ... the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
> (a) the rights and interests are possessed under the traditional laws acknowledged and the traditional customs observed by the Aboriginal peoples or Torres Strait Islanders ...

The High Court stated that the term 'traditional' in this context reflects the 'fundamental nature of the native title rights and interests with which the Act deals as rights and interests rooted in pre sovereignty traditional laws and customs'—at [79].

I also refer to the High Court's comments about the meaning of the term 'traditional laws and customs' in s. 223(1):

> ... the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are "traditional" laws and customs ... the reference to rights or interests in land or waters being possessed under traditional laws acknowledged and traditional customs observed by the peoples concerned, 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 [46] to [47].

My understanding, in light of these statements in *Yorta Yorta*, is that the factual basis for s. 190B(5)(b) must include a description of how the laws and customs of the claim group are rooted in the traditional laws and customs of a society that existed at the time of European settlement of the application area. This approach appears to be supported by comments of the Full Court in *Gudjala FC* at [96].

I have also had regard to the decision of Dowsett J in *Gudjala 2009*, where His Honour discussed what is required to show the continuity of a claim group's traditional laws and customs as they are derived from the group's predecessors' pre-sovereign society—at [29] to [33].

In accordance with the decision in *Gudjala 2009,* it is necessary to 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—*Gudjala 2009* at [33].

In my view, much of the information I have considered in relation to s. 190B(5)(a), also provides support to demonstrate that the claim group's present day laws and customs are derived from their ancestors' pre-sovereign society. I refer to these relevant parts of my reasoning above which discuss:

- the group's stories of creation, including how their creator beings made the group's world/country, Dreamings and Law;
- that these stories have been passed down to the present day group from their 'old old people' (who I infer are the group's pre-sovereign ancestors); and
- that it is these stories that continue to form the system which governs how the group practice and maintain their traditional laws and customs. (It is in the key 'Lalai story' that the group's country and Laws were made—their country is 'like a bible' to them, as described in the Uunguu Plan at page 4.)

I note also that the affidavit deponents talk in detail and extensively about the Wanjina Law, which I understand to be the central system that binds the claim group and their country together. From the information contained in the affidavits in relation to how the group's Wanjina Law (as it was made by the group's creation ancestors) governs them, it is my view that these particular details provide a factual basis demonstrating the connection between the present laws and customs of the claim group, and the laws and customs of their pre-sovereignty society.

The applicant provides general statements in support of this subcondition, including details that the group's traditional laws and customs 'include a custom of title passing by descent'—Schedule F at paragraph 1(c).

These assertions in Schedule F are supported by the many specific details contained in the affidavit evidence and the Uunguu Plan. As it is my view that much of that material referred to at ss. 190B(5)(a), 190B(5)(c), 190B(6) and 190B(7) also demonstrates support for the assertion in s. 190B(5)(b), I refer below only to some examples about other traditional laws and customs of the group. In this regard, I note that it is my view that the material before me shows that the group and their predecessors' connection to country is closely interrelated with their system of traditional laws and customs.

Some key examples of information relevant to s. 190B(5)(b):

There are rules for everything under the group's traditional laws and customs; rules that were passed down from the 'first people'. These include how to take and prepare fauna for food, and when/where to make fires—affidavit of Wilfred Goonack at [52]; and the Uunguu Plan at page 11, 14, 25 and 27.

The extract immediately below provides particulars relating to the applicant's statement at Schedule F about the custom of title passing by descent:

> Leyiyo country is from my father and my grandfather. My country covers the Islands too and the saltwater and all the reef. My brother, ... and I look after all this country ... from our mother, uncle and our mother's grandfather ...—affidavit of Louis Karadada at [9].
>
> I can talk my language, Wunambal and I can talk [four other traditional languages] too. All my old people were like that too ... I lived a bushman life until I got married ... We would celebrate together and sing songs for country. Old people would tell us stories for the Wanjina and Uungud and tell us the rules for the Law ... From a little boy my mother and grannies would tell me ... 'don't you steal another man's wife' ... When we were older we had to live separate from the families, all the young boys together to learn the Law from the old men. We had to travel all over our country to learn. In that bush camp one young fella made a mistake and he stole a wife and her husband came with spears to kill him ...—affidavit of Wilfred Goonack at [2] and [16] to [19].
>
> We have got different laws that the Wanjina gave to us. From the first generation to the new generation we follow those rules. Like the rule for the proper way to marry. You can't marry anyway you have to follow the Law ... In the beginning there were two blokes ... and they made the rules. They said that Wodoi had to marry Jurngunn and that Jurngunn had to marry Wodoi, they could not marry themself [sic]. We still do that today ... We can't get a wife from those mobs, that is against the Law— affidavit of Wilfred Goonack at [40] and [41].

> ... If the person is a chief then they are buried on a platform. If they are an old man or woman then they are buried under a pile of stone and children are buried in the ground in a grave— affidavit of Wilfred Goonack at [48].
>
> I know how to talk to the Wanjina in the caves to make sure that they know it is country men who are visiting. If a stranger goes to their cave then they get wild and send too much rain. They have to hear you call out in language and introduce yourself ...We have to make smoke too so that they know us. We still do that when we visit our Wanjina places. That is the Law for all of us for this country— affidavit of William Bunjuck at [10].
>
> I never went to school only bush school, our Law ... We were trained by older men and we learnt not to make trouble ... I follow those ideas from all the old old people and that is how we hold that Law ... I have got the marks on my body from that Law. They are the marks that the Wanjina put on the crocodile ... You have to get whiskers before you can get those marks. Old people used rock to make a knife ... We put ashes on them to stop the bleeding—affidavit of William Bunjuck at [11] to [13].

I note that regarding the task at s. 190B(5)(b), Dowsett J stated in *Gudjala 2009*, that the 'relevant enquiry is as to laws and customs acknowledged and observed by an existing claim group, laws and customs acknowledged and observed by a pre-sovereignty society and the connection between those societies and between the laws and customs, attributable to them—at [27].

In this regard, it is my view that the affidavit of Wilfred Goonack provides particularly relevant information. As I have discussed above at s. 190B(5)(a), Mr Goonack talks about his 'grandfathers' (actual grandfathers or other significant preceding family members), Buungguuluu, Angaarambuu and Buunduunguu (all named apical ancestors of the group), and the laws and customs that they acknowledged and observed—affidavit of Wilfred Goonack at [36], [38] and [39].

Mr Goonack also speaks throughout his affidavit about having learned laws and customs from his elders, as he has continued to teach to his grandchildren and other young people. He states that symbols from the Wanjina and Wunggurr/Dreaming are passed from grandfather to father to son, and that he still follows the laws and rules given to him by the Wanjina.'We copy the Wanjina. What Laws they had we follow that way'—affidavit of Wilfred Goonack at [31] to [33] and [40].

I note that Mr Goonack states he thinks he is over 70 years old (paragraph 9 of his affidavit), such that it would appear he was born in the 1930s (the affidavit is sworn in 1999). Thus, I can make the inference that the ancestors Mr Goonack has referenced as his grandfathers were born in the late 1800s, leading me also to infer that the apical ancestors of the group also were born and/or existed around that same era. As it is understood that European settlement in the Kimberley region first occurred during the 1880s, it would appear from Mr Goonack's affidavit that his grandfathers were part of a society that existed before and around the time the area was first settled by European people.

In my view, there is substantial information provided to support the assertion under s. 190B(5)(b). From the materials before me, I am able to sufficiently build up a picture over time which shows that the claim group's traditional laws and customs are rooted in the laws and customs of a normative society, that existed in the application area prior to the time of European settlement in

the area. In this regard, I am of the view that the claim group's laws and customs are 'traditional' in the *Yorta Yorta* sense.

Thus, I am satisfied that the factual basis is sufficient to support the assertion in s. 190B(5)(b).

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

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

I am of the view that this subsection requires me to be satisfied that the factual basis is sufficient to support the assertion that the claim group has continued to hold their native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way—*Yorta Yorta* at [47] and [87].

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

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

In this regard, I refer to my reasons above which outline the factual basis provided in support of ss. 190B(5)(a) and (b). In my view, much of that information is also relevant to this subcondition. I note also the details provided by these particular extracts from the affidavit evidence:

> I am a Lawman and I know the Dreaming, the Law and the old ways for my people. I lived a bushman life. We still follow that today never mind we live in towns and the kids go to school they can still learn from us—affidavit of Jack Karadada at [7].
>
> What stories we have from the country is not a new idea. Our old people knew what was here then, from the early days ... The first people that had been studying this land, our land, are our old people and we got the word from those old old people before they died ... When the first people passed away then the second people would put the story to the next people and this story would keep coming like that from one generation to the next generation. On and on like this to another generation ... to all the young people coming out now ... We tell them to come to the country to visit the places and to learn. That is how we are doing it and how these stories came to us from the first people—affidavit of Louis Karadada at [23].

Having regard to all the material before me, I am satisfied that there is a sufficient factual basis to support the applicant's assertion that the claim group have continued to hold their native title in accordance with their traditional laws and customs. The condition in s. 190B(5)(c) is met.

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 established, prima facie, are identified in my reasons below.

The claimed native title rights and interests are extracted above under s. 190B(4).

I note my findings above at s. 190B(5) that the applicant has provided a sufficient factual basis to support the assertion that there exist traditional laws acknowledged, and customs observed, by the native title claim group that give rise to the claimed native title rights and interests. As discussed in my reasons at s. 190B(5)(a), it is my view that where the factual basis provided supports the claim group's connection to their wider country, such material is also relevant to supporting assertions made in relation to the application area. Therefore, I have considered information relating to the group's wider country in assessing whether I am satisfied that prima facie, at least some of the native title rights and interests claimed in the application before me can be established.

General comments

I refer to the following comments from *Doepel* about the nature of the test at s. 190B(6):

> It is a prima facie test and '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'—at [135].

It involves some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed'—at [126], [127] and [132].

Following *Doepel,* I am of the view that I must examine the asserted factual basis provided against each individual right and interest claimed at Schedule E to determine if I consider, prima facie, that they:

(i) exist under traditional law and custom in relation to any of the land or waters under claim

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

It is not my role to decide whether the asserted factual basis will be made out at trial. My task is to consider whether there is any probative factual material that supports the existence of each individual right and interest. I note that provided some rights and interests can be established, prima facie, then the requirements of this section will be met. An element of that task requires me to consider whether there is some material which supports, prima facie, the existence of the claimed rights and interests under the traditional laws and customs acknowledged and observed by the claim group.

(ii) are native title rights and interests in relation to land or waters (s. 223(1))

I am of the view that the condition of s. 190B(6) requires that I consider whether a claimed right can amount to a 'native title right and interest' as defined in s. 223(1), having regard to relevant case law. In particular, I note that *Western Australia v Ward* [2002] HCA 28 *(Ward HC)* is authority that a 'native title right and interest' must be 'in relation to land or waters'. Therefore, it is my view that any rights which clearly fall outside the scope of the definition of 'native title rights and interests' in s. 223(1) cannot be established, prima facie.

(iii) have not been extinguished over the whole of the application area

I note that there is now considerable settled case law relating to extinguishment which I understand to be relevant when examining each individual claimed right and interest. For example, *Ward HC* is authority that if there is evidence that the application area is or was entirely covered by a pastoral lease, I could not (unless ss. 47–47B applies) consider exclusive rights and interests to be established, prima facie.

Claimed right to possess, occupy, use and enjoy the application area as against the whole world (exclusive possession)—established

As set out above at s. 190B(4), the applicant claims this exclusive right over areas where it has not been extinguished. As discussed above in relation to *Ward HC*, unless ss. 47–47B applies, where partially extinguishing acts have occurred over the whole of the application area, the exclusive right cannot be established, prima facie.

The map at Attachment C shows that the tenure of the application area is presently 'Unallocated Crown Land'. I note the applicant also claims the benefit of ss. 47 to 47B as applicable to the application area—at Schedules B, E and L of the application. Based on the available information, it would appear that any prior extinguishment of exclusive rights may be disregarded due to the applicability of s. 47B.

I turn now to consider whether the factual basis provided is sufficient to support the applicant's claim to exclusive possession—Schedule E at [1] and [2]. (Noting that it is my view that the right specified at [2] is a right inherent in the the right of exclusive possession as claimed in [1][6].)

I refer to joint judgment of French, Branson and Sundberg JJ in *Griffiths v Northern Territory* [2007] FCAFC 178 *(Griffiths)* who stated the following in relation to what is required to prove the existence of exclusive rights and interests:

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

[6] Schedule E at [2] reads: 'The native title rights and interest referred to in paragraph 1 include the right to make decisions about the manner of exercise of those rights and interests in relation to the land (and activities pursuant to them)'.

The Full Court in Griffiths indicates that what is required to prove exclusive rights is to show how, pursuant to the traditional laws and customs of the pre-sovereignty society, the group may effectively 'exclude from their country people not of their community', including by way of 'spiritual sanction visited upon unauthorised entry' and as the 'gatekeepers for the purpose of preventing harm and avoiding injury to country'—at [127]. The Court stated that it is:

> ... important to bear in mind that *traditional law and custom*, so far as it bore upon relationships with persons outside the relevant community *at the time of sovereignty*, would have been framed by reference to relations with indigenous people—at [127] (*emphasis added).*

In my view, Attachment M (the affidavit evidence and the Uunguu Plan) contains relevant information to support the applicant's claimed right of exclusive possession. There are references in these materials about country being traditionally owned by/belonging to claim group members and their ancestors, including through these examples from the affidavits below.

- The claim group were given their country from their ancestors, as that country was made and passed to them from their original creator beings:

  > Every place has a name and they are our Uunguu. Whitefellas call it a homeland ... The Wanjina are our dreamtime. We come from the Wanjina ... The Snake made all the rivers so we could have water ... Uungolan is the name of my uunguu at Mitchell Plateau today ... This is the country for all my family mob ... We all had the one mother and one father and one grandfather from my father ... They were all the ... mob. All the bosses for Mitchell Plateau. That is why this is my country too, from my old old people. We follow the father and grandfather for the country—affidavit of Wilfred Goonack at [5] to [7], [10] and [11].

- The claim group's country is their country only. Surrounding areas are owned by other groups whose creation stories and Law are distinct from those of the claim group:

  > Our other neighbours are all the Gwiinii people. They have got their own Lalayi or Dreaming. They don't have that Wanjina Law. They have got their own country and they made their own claim ... We agreed with that because we follow a different Law—at [22].

- The claim group knows the law and rules for country, including which places are dangerous for strangers and how to look after country the right way. Outsiders should consult claim group members prior to conducting things such as burning, and to ensure their safety before visiting:

  > 'Mitchell Falls is a dangerous place. One Wunggurr lives there and he can get wild sometimes ... That is why they should talk to us, because we know the country ... Some people make fires at the wrong time too. I have seen them make fires but they put that fire in the wrong place. We know how to burn the country, that is our Law and we learnt that from the first people who passed that to the [sic] each generation to us today ... There are a lot of things that we know [sic] our country and the Law for our country and whitefellas should talk to us first—affidavit of Wilfred Goonack at [51] and [52].

- Claim group members are the proper owners for special places in their country because they know what to do in relation to these places, in accordance with traditional laws and customs:

> I know how to talk to the Wanjina in the caves to make sure that they know it is country men who are visiting. If a stranger goes to their cave then they get wild and send too much rain. They have to hear you call out in language and introduce yourself. I can take anyone because they know me. I call out ... and they know that it is the proper owner for that place. We have to make smoke too so that they know it is us. We still do that when we visit our Wanjina places. That is the Law for all of us for this country—affidavit of William Bunjuck at [10].

- Even though they may live in towns today, claim group members continue to visit, protect and look after their country, and must still be asked permission from outsiders to enter:

> We still have to make sure that the miners and pearlers and tourist mobs don't walk around anywhere on the sea side and the land. They should really ask the owners first—affidavit of Jack Karadada at [24].

> I left that country ... when the ... war started ... I showed that army the Montaliver Islands where they made an airstrip. That is still my country. I still visited my country ... We have to look after the country ... any kind of stranger has to ask us to visit our country—affidavit of Louis Karadada at [30] to [32].

The Uunguu Plan also contains statements about:

- the group's country having been home to them for many thousands of years;
- that their Uunguu (country) is the only place the group and their ancestors have called home because it was made for them by their creators; and
- the rules under their system of traditional law and custom which direct how the group interact with, and look after their country as its traditional owners.

Having regard to all the material before me, I am of the view that there is sufficient information to support that prima facie, the claimed right to exclusive possession can be established.

Claimed non-exclusive rights—established

As outlined above at s. 190B(4), over areas where exclusive possession cannot be recognised, and where non-exclusive rights and interests have not been extinguished, the applicant claims a set of non-exclusive rights and interests. I set out below each of these claimed rights and interests, and references to information which, in my view, supports the existence of that particular claimed right or interest.

There appears to be much material available to support the possession of these claimed non-exclusive rights and interests. Therefore, the references set out below are provided as examples and not an exhaustive list of all the relevant details before me.

(a) the right to enter, travel over and remain on the land;

Result: established

I consider this claimed right to be established, prima facie, by the material before me. I have formed this view on the basis that it would appear that all the rights listed at (b) to (f) are incidents of the claimed right at (a). As I am of the view that all of these incidental rights can be established, prima facie, (as set out below) it follows that I find the more broadly framed right at (a) to also be established, prima facie.

(b) the right to live and camp on the land (including erecting shelters and other structures for those purposes);

Result: established

The affidavit of Jack Karadada contains many accounts describing how he and his family have traditionally lived and camped on country—at [7], [8], [10], [11], [15], [16], [17] and [19].

The Uunguu Plan also provides relevant details such as how the 'old people used bark from barrurru (stringybark) to build shelters, humpies or houses'—page 19 at [5].

(c) the right to hunt, fish, gather and use the resources of the land including:
(i) sharing and exchanging those resources; and
(ii) manufacturing traditional items from those resources
for personal, domestic and communal needs (including, but not limited to, cultural or spiritual needs) but not for commercial purposes;

Result: established

Both the affidavit evidence and the Uunguu Plan contain many references to hunting, fishing, gathering and the use of natural resources, including details about the sharing and exchange of those resources. For example:

> ... My father and I would kill that kangaroo with a spear and then we would carry it back on our shoulders. We would dig a big pit and singe the meat. Cut off the tail, grind it with a rock and eat it. When we were satisfied we'd cover the meat in the hole ... and share it out with the mob. We give some to all of them—affidavit of Jack Karadada at [16].

Information is also given about claim group members moving about country looking for different foods to eat, visiting other families and sharing with them their caught foods in accordance with sharing Law. This Law relates to the sharing of all things like food, ochre, stones and pearl shell; 'Like a trade we were doing it, one fella have to give to another one like that'. (I infer from the reference to 'trade' that this would have involved the exchange of natural items)—affidavit of Jack Karadada at [11] to [20]. The Uunguu Plan also details how the group's ancestors had a traditional sharing and trading business between their families and neighbours—page 23 at [3].

Many examples are given in the Uunguu Plan about the different natural resources used to manufacture traditional items, such as using warrgarli (wattle) to make spears and barrurru (stringybark) for paintings, baby cradles, water buckets and food bags. Plants are also used as blankets or plates, or to make medicines, tools, weapons, art and crafts—page 19 at [1] to [5]. As referred to above at ss. 190B(5)(b) and 190B(7), the affidavit material states that rocks were traditionally used to make spears and knives.

(d) the right to light fires for domestic purposes but not for the clearance of vegetation;

Result: established

I have inferred from the many examples in the affidavit material about the traditional cooking of foods, that the lighting of domestic fires would have occured. There are also some specific references to the 'singeing' of meat, roots and yams in food preparation, such as in the affidavit of Jack Karadada at [17].

The Uunguu Plan also describes how 'fire is medicine for our people', as smoke 'from burning helps with congestion and blocked noses'—page 11 at [3].

(e) the right to take and use water from the land;

Result: established

The affidavit by Jack Karadada refers to particular islands at which he and his family camped because of the fresh water (and good foods) available—at [10].

The Uunguu Plan also provides information about Yawal (waterholes) giving the claim group drinking water, and water being collected traditionally by using certain plants like paperbark. Where there is no water or the available water looks dirty, claim group members 'dig a filter for clean water'—page 17 at [1].

(f) the right to engage in cultural activities on the land including:
  (i) visiting places of cultural or spiritual importance and protecting those places by carrying out lawful activities to preserve their physical or spiritual integrity;
  (ii) conducting ceremony and ritual;
  (iii) holding meetings;
  (iv) participating in cultural practices relating to birth and death, including burial rights;
  (v) passing on knowledge about the physical and spiritual attributes of the Determination Area and areas of importance on or in the Determination Area; and
  (vi) maintaining, and protecting from physical harm, places and areas of importance, including for the avoidance of doubt, freshening or repainting images at painting sites.

Result: established

In my view, there is an abundance of information which describes the group's possession of these claimed rights listed at (f), some of which are already referenced above at s. 190B(5). For instance, one example is given in the Uunguu Plan which describes regular visits by claim group members to protect and maintain special rock art sites. I note that with regard to the particular right described at (f)(vi), there are specific details about how only certain people are allowed to refresh rock paintings. This 'has to be done the proper way with ochres'—the Uunguu Plan at page 21.

Other examples are also located in the affidavits of Wilfred Goonack at [17], [20] to [24], [45], [48] and [49]; Louis Karadada at [28] and [31]; and William Bunjuck at [10], [13] to [15], [19] and [22].

Conclusion

For the reasons set out above, I am of the view that there is sufficient information to satisfy me that, prima facie, all of the native title rights and interests claimed in the application can be established. It follows then that this condition is met.

Subsection 190B(7)
Traditional physical connection

The Registrar must be satisfied that at least one member of the native title claim group:

(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or

(b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
   (i) the Crown in any capacity, or
   (ii) a statutory authority of the Crown in any capacity, or
   (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

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

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

As 'traditional physical connection' is not defined in the Act, I take this phrase to mean that physical connection should be in accordance with the particular traditional laws and customs relevant to the claim group. I am also guided by the High Court's decision in *Yorta Yorta* about the meaning of 'traditional', as outlined in my reasons for s. 190B(5) above. I note also that [29.19] of the explanatory memorandum to the *Native Title Amendment Act 1998* indicates that parliament intended that the connection described in s. 190B(7) 'must amount to more than a transitory access or intermittent non-native title access'.

In my view there is an abundance of information before me to support the assertion that members of the claim group have/had a traditional physical connection with the application area, including that they live or have lived on their country. To this end, it is my view that much of the material referenced at my reasons under ss. 190B(5) and (6), is also relevant to the requirements of this condition[7].

I extract below some examples of the kind of information I have had regard to, in considering the application against s. 190B(7).

> We would be happy in the bush life ... We would hunt for tucker and camp out and then we would visit another country for more tucker ... We might camp a couple of days and eat kangaroo. My father and I would kill that kangaroo with a spear and then we would carry it back on our shoulders ...—affidavit of Jack Karadada at [16].

> I still teach my family about Mitchell country and how to hunt for turtle, fish and kangaroo. They know where to find bush tucker and how to dig for yams and roots. They are teaching their own children today ...—affidavit of Wilfred Goonack at [26].

> I was taught by my father and mother and uncles and old old people how to live off the land and look after country. I know how to burn the country to make the grass grow and to spear the kangaroos. We used to use bushman spear, not glass or iron but rock from the country to live off the land. Tommy hawk and spear and canoe we made from the country, our country—affidavit of William Bunjuck at [9].

[7] I note again that due to the context of why the application was made/that the application area comprises a single lot, where material satisfies me that claim group members have/have had a traditional physical connection with their wider country, I am also of the view that this material is sufficient to show a traditional physical connection with the specific area covered by the application.

Based on all the available material, I am satisfied that these three persons are members of the native title claim group and currently have or previously had a traditional physical connection with the application area.

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 in relation to an area; and

(b) either:

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

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

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

(3) If:

(a) a previous non-exclusive possession act (see s. 23F) was done in relation to an area; and

(b) either:

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

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

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

(4) However, subsection(2) or (3) does not apply to an application if:

(a) the only previous exclusive possession act or previous non-exclusive possession act concerned 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 section 47, 47A or 47B, as the case may be, applies to it.

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

Reasons for s. 61A(1)

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

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

The geospatial assessment and my own searches of the application area against the Tribunal's mapping databases have found that no determinations overlap any part of the application area.

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 (PEPA), unless the circumstances described in subparagraph (4) apply.

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

The applicant at Schedule B specifically excludes from the application area, any areas in relation to which a PEPA was done, subject to any areas to which ss. 47 to 47B may apply. In any event, there is nothing before me to indicate that the application covers any areas over which a PEPA has been done.

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 (PNEPA) 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).

Having regard to the material available, the application does not appear to claim any rights of an exclusive nature over any areas where a PNEPA was done. I refer in particular to the information given by the map provided at Attachment C (that the application area entirely covers Unallocated Crown Land), and details in Schedule E (statements to the effect that exclusive native title rights and interests are not claimed over areas subject to a PNEPA).

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).

In my view, the applicant does not claim any of the prohibited resources under this subparagraph. This is confirmed by the information at Schedule Q, where the applicant states '[n]one', in relation to 'details of any claim by the ... group of ownership of minerals, petroleum or gas wholly owned by the Crown'.

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

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

At Schedule P, the applicant states '[n]one', in relation to 'details of any claim by the ... group of exclusive possession of all or part of an offshore place'. In any event, the application does not appear to cover any offshore places.

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

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

Having regard to all the information before me, there is nothing which indicates that any of the native title rights and interests claimed in the application have been extinguished.

[End of reasons]

Attachment A
Summary of registration test result

Application name	**Uunguu Part B**
NNTT file no.	**WC11/4**
Federal Court of Australia file no.	**WAD119/11**
Date of registration test decision	**12 August 2011**

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)		**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)(ga)	**Met**
		s. 62(2)(h)	**Met**
s. 190C(3)			**Not Met**

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

Section 190B conditions

Test condition	Subcondition/requirement	Result
s. 190B(2)		**Met**
s. 190B(3)		**Met**
	s. 190B(3)(a)	**N/A**
	s. 190B(3)(b)	**Met**
s. 190B(4)		**Met**
s. 190B(5)		**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)		**Met**
	re s. 61A(1)	**Met**
	re ss. 61A(2) and (4)	**Met**
	re ss. 61A(3) and (4)	**Met**
s. 190B(9)		**Aggregate result:** **Met**
	re s. 190B(9)(a)	**Met**
	re s. 190B(9)(b)	**Met**
	re s. 190B(9)(c)	**Met**