National Native Title Tribunal

Registration test decision

Application name	Banjima People
Name of applicant	Alec Tucker, Charlie Smith, Steven Smith, Keith Lethbridge, Maitland Parker, Timothy Parker, Dawn Hicks and Archie Tucker
State/territory/region	Western Australia, Pilbara region
NNTT file no.	WC11/6
Federal Court of Australia file no.	WAD6069/98
Date application made	1 June 2011 (date the combined application was made)
Date application last amended	Federal Court granted leave to amend on 3 June 2011 for amended application filed on 1 June 2011
Date of Decision	5 August 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 am satisfied that each of the conditions contained in ss. 190B and C are met. I accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

Date of reasons: 13 October 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 24 August 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 a delegate of the Native Title Registrar (the Registrar), for the decision to accept the application for registration pursuant to s. 190A of the Act.

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

Application overview

The Registrar of the Federal Court of Australia (the Court) gave a copy of the Banjima People claimant application to the Registrar on 8 June 2011 pursuant to s. 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim and Attachment A sets out my reasons.

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

I note that the application is affected by the following applicable future act notices given under ss. 24 MD and 29:

Tribunal Number	Tenement ID	Notification Date	Notification Type
WL11/60	L47/422	28/04/2011	s24MD
WL11/59	L47/420	28/04/2011	s24MD
WS11/1251	M47/1460	20/04/2011	s29
WS11/1011	E47/2474	6/04/2011	s29
WS11/1010	E47/2473	6/04/2011	s29

Thus, in accordance with ss. 190A(2)(e) and (f), I must use best endeavours to consider the claim in the application by the end of two months after 28 April 2011, being by 28 June 2011. The next applicable date by which I must use best endeavours to consider the claim in the application, is by the end of four months after 6 April 2011. Accordingly, I have made my registration decision on 5 August 2011.

History of the application

- The WC96/61—Innawonga and Bunjima People—WAD6096/98 application was first lodged with the National Native Title Tribunal (the Tribunal) on 4 June 1996 and registered that same day in accordance with the Act as it then stood.

- On 9 November 1999, the application was considered under s. 190A and accepted for registration.
- On 30 September 2005, the application was registered again under s. 190A, following a number of amendments made to the application between the years 2001 to 2005. I understand

that during this period there were requests by the applicant to delay the registration testing of the amended applications due to a number of factors, to which the Tribunal agreed.

- On 24 November 2010, the application was accepted for registration under s. 190A(6A), following the filing of an amended application on 29 October 2010.

- On 15 December 2010, the applicant was replaced by Alec Tucker, Charlie Smith, Keith Lethbridge and Steven Smith pursuant to order of the Court under s. 66B.

- On 15 December 2010, Barker J also ordered:

  > Pursuant to s.67 of the *Native Title Act 1993* (Cth), native title … applications [Federal Court reference numbers for the four pre-combination applications that form the application before me] be heard together in the same proceeding ("Banjima Trial Area proceeding") and, to avoid any confusion, all areas comprised in those four native title … applications be referred to as the "Banjima Trial Area"—WAD6096/98 separate proceeding orders by Barker J on 15 December 2011 at order 1.

- On 3 June 2011, the application was amended by order of the Court in accordance with ss. 64(2) and 66B. The orders stated that the application would take the form of the minute of the proposed amended application filed on 1 June 2011, and be combined with:
  - WC98/62—Martu Idja Banyjima—WAD6278/98;
  - WC10/17—Fortescue Banjima—WAD371/10; and
  - WC10/15—Interim Bunjima—WAD319/10.

- The minute of the proposed amended application (filed on 1 June 2011) included the addition of four new names to the list of persons comprising the applicant—Maitland Parker, Timothy Parker, Dawn Hicks and Archie Tucker.

In short, WC96/61—Innawonga and Bunjima People—WAD 6096/98 is now combined with the three applications listed above to form WC11/6—Banjima People—WAD6096/98[1]. This is the application before me, and which I refer to hereafter as 'the application'.

Registration test

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

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

[1] I note that, in accordance with Tribunal administrative practice, the combination application has been given the new Tribunal reference number, WC11/6. The Federal Court reference number remains the same as the original reference number for the lead application, WAD6096/98.

Information considered when making the decision

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

I have considered the information contained in the following documents:

- WC11/6 Form 1 application and accompanying documents; and
- an overlap analysis and geospatial assessment of the application area undertaken by the Tribunal's Geospatial Services unit on 17 June 2011 (the geospatial assessment).

I have also had regard to the documents contained in the WC11/6 Banjima People case management/delegates files (reference 2011/01545). 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 21 June 2011, the Tribunal wrote to the State of Western Australia (the State) to advise that the registration test would be applied to the application, and to provide it the opportunity to make a submission in relation to the registration of the application.
- On 21 June 2011, the Tribunal wrote to the applicant to confirm that the registration test would be applied to the application.
- On 29 June 2011, the Tribunal wrote to the applicant to advise that the delegate considering the application had reached a preliminary view that the application would benefit from further information in relation to the conditions of the registration test at ss. 190B(5) to (7). The applicant was advised that the delegate would be considering Attachment M to the pre-

combination WC10/17—Fortescue Banjima—WAD371/10 application filed on 29 November 2010 which contains:
    - an anthropological report by Dr Neale Draper, Australian Cultural Heritage Management (ACHM). The report was prepared in relation to the pre-combination WC98/62—Martu Idja Banyjima—WAD6278/98 proceedings, but also filed in support of the pre-combination Fortescue Banjima application.
- In that same correspondence of 29 June 2011, the Tribunal advised the applicant of the delegate's preliminary view that four of the eight accompanying s. 62(1)(a) affidavits may not comply with the requirements of s. 62(1)(a). The applicant was provided the opportunity to address the issues outlined.
- On 23 June 2011, the Tribunal wrote to the State to advise that it would be considering Attachment M to the Fortescue Banjima pre-combination application, as set out above. The State was given the opportunity to provide a submission in relation to this further information. I note that correspondence in relation to the further information that would be considered by the delegate was provided to the State first, so as to allow maximum time should the State wish to provide any comments in relation to it—taking into account the applicable future act affected registration timeframe.
- On 15 July 2011, the applicant advised the Tribunal that four new s. 62(1)(a) affidavits had been filed in the Court, to address the issues regarding four of the eight accompanying affidavits. In that same correspondence, the applicant provided additional material to the delegate, requesting that the delegate consider two witness statements by claim group members, [Name removed] and [Name removed], in support of the registration of the application. These witness statements have been filed in the Court in relation to the WAD6096/98 'Banjima Trial Area proceeding' (which I discuss further below). On 22 July 2011, the applicant re-confirmed its request that the delegate take these two witness statements into account, in considering the application for registration.
- On 22 July 2011, the Tribunal wrote to the State to advise that the delegate would be considering the four new accompanying affidavits and the witness statements filed in support of the application. The State was provided an opportunity to provide comments in relation to those materials.
- On 28 July 2011, the State made a submission by email to the Tribunal in relation to six of the 38 claimed native title rights and interests in the application.
- As the only comments made by the State did not, in my view, appear to be comments that would prevent registration of the application, it was my view that there was no obligation that I provide that submission to the applicant to give them an opportunity to respond.

As no further adverse or additional material was submitted in relation to the application, neither I, nor other officers of the Tribunal were 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 only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss. 61 and 62. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s. 190C(2)—*Doepel* at [16] and also at [35]–[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.

Below is my consideration of the particular parts of ss. 61 and 62 which require the application to contain details/other information or to be accompanied by an affidavit or other documents.

Native title claim group: s. 61(1)

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

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

Section 190C(2) is framed in a way that 'directs attention to the contents of the application and the supporting affidavits'. 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, 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'. That is, if the description of the native title claim group in the application indicates that not all persons in the native title claim group have been included, the requirements of s. 190C(2) under this subsection would not be met— *Doepel* at [35] and [36].

Schedule R of the application refers to an accompanying document at Attachment R—a certification under s. 203BE by Yamatji Marlpa Aboriginal Corporation (YMAC) that the applicant is authorised to make the application. The application is also accompanied by eight affidavits by each of the persons comprising the applicant. All of the deponents affirm that they are authorised by all of the persons in the native title claim group to make the application and to deal with matters arising in relation to it.

Attachment 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 all the persons comprising the applicant are provided at page 2 of the application, and their address for service is given in Part B.

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).

At Schedule A it is stated that the claim is brought on behalf of the people listed in Attachment A, which contains a description of the native title claim group. The description includes a list of the group's ancestors.

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 eight persons who comprise the applicant, addressing the relevant matters under s. 62(1)(a)(i) to (v).

I note that Archie Tucker, Roberta Dawn Hicks and Timothy Parker have each provided two s. 62(1)(a) affidavits. I have considered each of their two affidavits, and am satisfied that together they provide all of the requisite statements under this condition.

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 a description of the external boundary of the application area which is annexed as Attachment B.

Schedule B also contains general exclusions to describe the 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).

Schedule C refers to Attachment C which is a map of the application area.

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 states that the applicant has not carried out any relevant searches.

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 contains a description of the native title rights and interests claimed in relation to particular areas within the application area. These areas are defined on page 2 under 'Definitions'. 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:
> (1) the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (2) there exist traditional laws and customs that give rise to the claimed native title, and
> (3) 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).

Schedules F and G contain a general description of the factual basis upon which it is asserted that the native title rights and interests claimed exist.

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 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, three other applications are listed which have previously been made in relation to the application area. It is noted that these three applications have been combined to form the application before me, such that they no longer exist as separate applications.

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).

Schedule HA refers to Attachment HA which is a table that contains details in relation to notices given under s. 24MD.

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

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

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

Schedule I refers to Attachment I which contains a table providing details of notices given under s. 29.

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 **satisifies** 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 of 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 achieve this state of satisfaction is the date when the application is being considered for the purpose of the registration test—*Risk v National Native Title Tribunal* [2000] FCA 1589 *(Risk)* at [27].

I have considered information from the geospatial assessment, dated 17 June 2011, my searches of the area against the Tribunal's mapping database and the applicant's statements at Schedules H

and O. I have also had particular regard to the Court's orders of 3 June 2011 that WAD6096/98 is amended such that it is combined with:

- WC98/62—Martu Idja Banyjima—WAD6278/98 (MIB);
- WC10/17—Fortescue Banjima—WAD371/10 (FB); and
- WC10/15—Interim Bunjima—WAD319/10 (IB).

This combined application is the amended application before me, now known as Banjima People. It maintains its original Federal Court reference number—WAD6096/98, from when the proceedings were originally referred to as the 'Innawonga and Bunjima People application'.

At Schedule H of the application, the applicant states it is aware of three other applications that have been made in relation to the application area—the MIB, FB and IB applications. It is also stated that the application has been amended to combine with these three other applications, and that:

> The other applications therefore no longer exist as separate applications but rather WAD6096/98 and the above other applications now constitute one and the same (combined) application.

At Schedule O, the applicant states:

> At the time of this Application, and to the best knowledge of the Applicants, no member of the native title claim group is also a member of a previous registered native title application over any part of the Application Area.

The geospatial assessment shows that two of the pre-combination applications overlap the current application and were on the Register of Native Title Claims (RNTC) when the current application was made: WC96/61—Innawonga and Bunjima People—WAD6096/98 and MIB.

As detailed earlier, the Court orders of 3 June 2011 amended the Innawonga and Bunjima People (WAD6096/98) application and combined it with three other applications to form the Banjima People (WAD6096/98) application. The Innawonga and Bunjima People and MIB pre-combination applications remain on the RNTC to ensure the applicant for those pre-combination applications maintain their statutory right as a registered native title claimant under the Act during the period that the WAD6096/98 amended application is being considered for registration. Both pre-combination applications remain on the RNTC, despite that *in reality*, the applications no longer exist as separate applications by virtue of their combination which gives effect to the amended Banjima People application. These two registered pre-combination applications will remain on the RNTC until a decision is made in relation to the registration of the combined application.

It is for these reasons that, in my view, the Innawonga and Bunjima People and MIB applications are not previous applications in the sense discussed in subparagraphs 190C(3)(b) and (c).

While the relative matters considered by the Court in *Strickland* did not involve pre-combination applications considered under s. 190A, I note that Beaumont, Wilcox, Lee JJ found that:

> It may be noted here, as French J observed in *Bropho v Western Australia* (2000) 169 ALR 365 at 375, that s 64 of the NTA treats combination of applications as a species of amendment of one of them ...—at [6].

In this regard, I note that it would appear to be contrary to the intentions of the Act to apply s. 190C(3) so that the remaining entries of the two pre-combination applications on the RNTC

would prevent the registration of the combined/current application. To this end, I have also considered the Explanatory Memorandum to the Native Title Amendment Bill 1997 (EM) which discusses the resulting s. 190C(3) as follows:

> 29.25 The Registrar must be satisfied that no member of the claim group for the application or amended application is a member of the claim group for a registered claim which was made before the claim under consideration, *which is overlapped by the claim under consideration* [emphasis added] and which itself has passed the registration test ***[subsection 190C(3)]*** [original emphasis]
>
> 35.38 The Bill generally discourages overlapping claims by members of the same native title claim group, and *encourages consolidation of such multiple claims into one application* [emphasis added]—Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth).

The EM speaks in the present tense—'a registered claim which was made before the claim under consideration, *which is overlapped by the claim under consideration*'. As discussed at [35.38] in relation to the condition of s. 190C(3) and overlapping claims, it would also appear that the EM intended for the issue of overlapping applications by members of the same claim group to be resolved by means of combining such applications, so that they may meet the conditions for registration, including under s. 190C(3). I find support here for my view that the two overlapping pre-combination applications remaining on the RNTC are not 'previous applications' in the sense intended by s. 190C(3), and as such should not prevent the application before me meeting this condition.

As it is my view that the current application is not overlapped by any relevant previous applications, I am also of the view that I do not need to be satisfied of the terms under s. 190C(3). This condition is 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.
>
> Under s. 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

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]. In line with *Doepel*, 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 at Attachment R contains a certification by Yamatji Marlpa Aboriginal Corporation (YMAC), made pursuant to s. 203BE and signed by its Chief Executive Officer on 29 May 2011.

Section 190C(4)(a) states that an application must be certified by each Aboriginal/Torres Strait representative body (representative body) that could certify the application. In accordance with s. 203BE(1)(a), a representative body can certify an application for a determination of native title where that application relates to areas of land or waters wholly or partly within the area, for which the body is a representative body. I am satisfied that the application has been certified by all the representative bodies that could so certify, based on the following information:

- the applicant at Schedule K states that YMAC is the representative body for the application area; and
- this is confirmed by the geospatial assessment which found that YMAC is the only representative body for the area.

I turn now to consider whether that certification by YMAC contains the information required by Part 11, with specific regard to s. 203BE(4). 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].

In accordance with s. 203BE(4), I am of the view that the certification provided at Attachment R must contain certain information and opinions. Section 203BE(4) is set out below:

> (4) 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:

> (2) 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:
> (a) all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it;

(b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

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

The certification contains statements at page 1 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)

The certification sets out YMAC's reasons for being of that opinion that ss. 203BE(2)(a) and (b) have been met, as I summarise below.

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

- Through YMAC's work with the claim group, it has observed that the persons comprising the applicant have the authority to make the application and deal with matters arising in relation to it. (Such work involves extensive community consultations, the conduct of meetings, the provision of in-house legal and anthropological services and historical, anthropological and genealogical research in relation to the claim group.)
- YMAC has also observed how decisions are made/instructions are given by the group, through its conduct of meetings and dealings with the group.
- On 16 May 2011, meetings were convened by YMAC with the claim groups for the Innawonga and Bunjima People and MIB pre-combination applications. The purpose of these meetings was to consider, and if appropriate authorise, the amendment of the relevant applications to form the combined Banjima People application.
- Notice of the meetings was provided directly to all members of both these groups and through the Pilbara News. The distribution of this publication covers the main areas where Banjima people live.
- All members of both groups were invited to attend the meetings and over 90 people attended.
- The meeting attendees passed resolutions to authorise the persons comprising the applicant to be the applicant for the combined Banjima People application and to deal with matters arising in relation to it.
- The applicant in both the pre-combination IB and FB applications instructed YMAC to combine those applications with Innawonga and Bunjima People.

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

- YMAC has worked with the group as set out above, and through this work YMAC has made all reasonable efforts to identify and consult with the Banjima claim group.
- The authorisation meetings as detailed above were widely notified and all reasonable efforts were made to ensure all members of the relevant groups attended.
- The combined application occurred by the inclusion of the relevant people and interests of the four pre-combination applications into one (amended) application which is made on behalf of the one combined Banjima People native title claim group .

I am satisfied that the certificate briefly sets out the reasons as to why YMAC 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)

The certification sets out what YMAC has done to meet the requirements of s. 203BE(3). Information is given that YMAC has made all reasonable efforts to achieve agreement between the persons on whose behalf the four pre-combination applications are made, and to minimise the number of applications covering the application area. These efforts included a process of meetings, mediation and negotiation conducted by or with the participation of YMAC. The outcome is the amendment of the Innawonga and Bunjima People application to combine it with the other applications and thus form the Banjima People native title claim.

Conclusion

It is my view that YMAC is the only representative body that could provide the requisite certification, and that the certification satisfies the requirements of s. 203BE(4). I am 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 s. 190B(2), I am confined to the information in the application—*Doepel* at [122].

Schedule B refers to Attachment B which is a description of the external boundaries of the application prepared by the Tribunal's Geospatial Services unit (Geospatial Services) on 20 May 2011.

Attachment B identifies the application area using a metes and bounds description, making reference to cadastral boundaries, existing native title applications and coordinate points listed by decimal degrees. The description specifically excludes five native title applications from the application area, and contains notes in relation to the datum of the data used to prepare the description.

Paragraphs 1 to 4 of Schedule B contain general exclusions to describe those areas within the external boundary which are not covered by the application.

Schedule C refers to Attachment C which is a copy of a colour map titled 'Native Title Determination Application; Banjima (Combination)'. The map was also prepared by Geospatial Services on 20 May 2011 and includes:

- the amended application boundary depicted by a bold blue line and labelled;
- land tenure shown as a background;
- excluded native title determination applications shown and labelled;
- scalebar, northpoint, coordinate grid, legend, locality diagram; and
- notes relating to the source, currency and datum of data used to prepare the map.

I have had regard to all of this information as well as the geospatial assessment of the description and map provided on 17 June 2011. In my view, the written description and map are consistent and sufficiently identify the application area with reasonable certainty.

Section 64(2) provides that where the amendment of an application combines it with another/other applications, the inclusion of any areas covered by the other application(s) is a permissible amendment. The geospatial assessment confirms that the application area has been amended to include areas by combination with other applications and that the area does not include any areas which have not been previously claimed by the pre-combination applications.

Having regard to this assessment, the map at Attachment C and the maps of each of the four pre-combination applications, I have come to the same view as this finding by Geospatial Services.

Accordingly, I am satisfied that the application meets the condition 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 states 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].

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

I have confined my consideration at s. 190B(3) to the information contained in the application—*Doepel* at [16].

Attachment A of the application contains the following description of the native title claim group:

> The native title claim group is composed of those persons who are:
>
> 1. Recognised as descendants of the following ancestors:
>
>   Bob Tucker (Wirilimura)
>   George Marndu
>   Whitehead
>   Yinini (Arju)
>   Gawi
>   Sam Coffin
>   Yidingganin
>   Maggie (Nyukayi)
>   Daisy (Yijiyangu); and
>   Yandikuji; and
>
> 2. Who are members of the Banjima language group.

As the application does not name the persons in the native title claim group in accordance with s. 190B(3)(a), I must therefore 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.

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—at [25] and [27].

In my view, the application provides details which allow an objective and consistent mechanism for ascertaining whether a person is a member of the native title claim group. Based on the two 'rules' by which the claim group is described, I understand that membership of the group comprises people who are the descendants of 10 named apical ancestors and who belong to the Banjima language group.

The apical ancestors from which members of the claim group are descended are clearly identified by name, including reference to some alternative/traditional names.

Turning to the second 'rule' for membership of the claim group, I note that it would appear that establishing whether a person is a member of a language group may not be an easy inquiry. However, when I read this part of the description in conjunction with the requirement of descent from named apical ancestors, I am of the view that it would be possible to ascertain whether a person meets the criteria for membership of the claim group, taking into account this second rule. In my view, such an inquiry under the second rule is assisted by having a starting point of first determining whether persons are descendants of the relevant apical ancestors.

I note that the application provides details that, at sovereignty, there were two mutually intelligible dialects spoken by occupiers of the application area. These dialects represented a common language and those who spoke the dialects shared a common identity called Banjima. Thus, the Banjima language is a common point of identity reference for members of the claim group—Schedule F at [4] and [26].

I refer also to Carr J's comments in *Western Australia v Native Title Registrar* [1999] FCA 1591, where it was observed 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].

Accordingly, it is my view that with the assistance of further factual inquiry, it would be possible to ascertain whether persons belong to the claim group, as that membership is defined by the two descriptors set out in Attachment A. To my mind, the description is not unclear. It may not be easy to apply, but that does not mean that the information provided in the application does not provide sufficient clarity about membership of the claim group.

For the reasons above, I am satisfied that s. 190B(3) 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).

Section 190B(4) 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]:

> The Registrar referred to s 223(1) and to the decision in Ward. He recognised that some claimed rights and interests may not be native title rights and interests as defined. He identified the test of identifiability as being whether the claimed native title rights and interests are understandable and have meaning. There is no criticism of him in that regard—at [99].

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

There are three types of areas within the application area. These areas are categorised as Areas A, B and C and are defined in the application at page 2.

The claimed rights and interests are listed at Schedule E, according to whether or not they are claimed within each of the categorised areas:

> **Subject to laws and customs**
> The native title rights and interests claimed in this Application are subject to and exercisable in accordance with:
>
> 1) the common law, the laws of the State of Western Australia and the Commonwealth of Australia; and
> 2) valid interests conferred under those laws, and
> 3) the body of traditional laws and customs of the Aboriginal society under which rights and interests are possessed and by which the native title claim group have a connection to the area of land and waters the subject of this Application
>
> **Area A rights**
> The Applicant claims the following listed native title rights and interests relating to exclusive possession, subject to any native title rights and interests which may be shared with any other native title claimants, in relation to Area A only:
>
> 1) The right to possess, occupy, use and enjoy the area as against the world;
> 2) A right to make decisions about the use of the area by persons who are not members of the Aboriginal society to which the native title claim group belong;
> 3) A right to control access of others to the area;
> 4) A right to control access of others to the area except such person as may be exercising a right accorded by the common law, statute law of the Commonwealth or the State of Western Australia or a lawful grant by the British sovereign or its successor; and
> 5) A right to control the taking, use and enjoyment by others of the resources of the area.
>
> **Rights in Areas A and C**

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

6) A right to hunt in the area;
7) A right to fish in the area;
8) A right to take traditional resources, other than minerals, and petroleum from the area; and
9) A right to take fauna.

Rights in Areas A, B and C

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

10) A right to occupy the area;
11) A right to use the area;
12) A right to enjoy the area;
13) A right to be present on or within the area;
14) A right to make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;
15) A right to make decisions about the use of the area by persons who are not members of the Aboriginal society to which the native title claim group belong;
16) A right to invite and permit others to have access to and participate in or carry out activities in the area;
17) A right of access to the area;
18) A right to live within the area;
19) A right to erect shelters upon or within the area;
20) A right to camp upon or within the area;
21) A right to move about the area;
22) A right to engage in cultural activities within the area;
23) A right to conduct and participate in ceremonies and meetings within the area;
24) A right to visit, care for and maintain places of importance and protect them from physical harm;
25) A right to take flora (including timber);
26) A right to take soil;
27) A right to take sand;
28) A right to take stone and/or flint;
29) A right to take clay;
30) A right to take gravel;
31) A right to take ochre;
32) A right to take water;
33) A right to control the taking, use and enjoyment by others of the resources of the area including those referred to in paragraphs 25 - 32 (inclusive) other than minerals and petroleum and any resource taken in exercise of a statutory right or common law right, including the public right to fish;
34) A right to manufacture traditional items from the resources of the area;
35) A right to trade in the resources of the area; and
36) A right, in relation to any activity occurring on the area, to:
    (i) maintain
    (ii) conserve; and/or
    (iii) protect;

significant places and objects located within the area, by preventing, by all reasonable lawful means, any activity which may injure, desecrate, damage, destroy, alter or misuse and such place or object;

37) A right, in relation to any activity occurring on the area, to:
(iv) maintain
(v) conserve; and/or
(vi) protect;

significant ceremonies, artworks, song cycles, narratives, beliefs or practices by preventing, by all reasonable lawful means any activity occurring on the area which may injure, desecrate, damage, destroy, alter or misuse any such ceremony, artwork, song cycle, narrative, belief or practice;

38) A right, in relation to any activity occurring on the area, to:
(i) prevent any use or activity which is unauthorised in accordance with traditional laws and customs;
(ii) prevent any use or activity which is inappropriate in accordance with traditional laws and customs

in relation to significant places and object within the area or ceremonies, artworks, song cycles, narratives, beliefs or practices carried out within the area by all reasonable lawful means, including by the native title holders providing all relevant person by all reasonable means with information as to such uses and activities, provided that such persons are able to comply with the requirements of those traditional laws and customs while engaging in reasonable use of the area and are not thereby prevented from exercising any statutory or common law rights to which that person may be entitled.

In summary, I understand the rights and interests claimed are as follows:

Area A rights

Five rights of an exclusive nature are claimed in those areas where such rights may be capable of recognition (identified in the definition of Area A). These rights are claimed subject to any native title rights and interests that may be shared with any other native title claimants.

Rights in Areas A and C

Four non-exclusive rights and interests are claimed over these areas.

Rights in Areas A, B and C

Twenty-nine exclusive and non-exclusive rights are claimed in relation to all the areas.

In my view, the description of the claimed native title rights and interests in the application is clear, understandable and has meaning. I note that I undertake an assessment of whether the rights and interests claimed in the application are native title rights and interests under s. 223(1), below at the condition of s. 190B(6).

I am therefore satisfied that the description is sufficient to allow the native title rights and interests claimed to be readily identified.

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

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

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).

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

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*.

Information considered

I have considered the following information which in my view relates to this condition:

- Schedule A—description of the native title claim group;
- Schedule F—general description of the factual basis of the claim;
- the accompanying s. 62(1)(a) affidavits in which each of the persons comprising the applicant swears to the truth of all the statements made in the application;
- the witness statements of [Name removed] made on 26 May 2011 and [Name removed] made on 24 May 2011—filed in support of the WAD6096/98 'Banjima Trial Area' proceeding before the Court[2]; and
- Attachment M of the pre-combination WC10/17—Fortescue Banjima—WAD371/10 (FB) application last amended on 15 March 2011, containing an anthropological report by Dr Neale Draper, Australian Cultural Heritage Management (the Draper report). The report was prepared in relation to the pre-combination WC98/62—Martu Idja Banyjima—WAD6278/98 (MIB) proceedings, but also filed in support of the pre-combination FB application.

I note that on 15 December 2010, Barker J made orders in relation to the WAD6096/98 Banjima Trial Area proceeding, to the effect that:

- the pre-combination applications that now comprise the application before me would be heard together in the same proceeding and all the areas comprised in those applications would be referred to as the 'Banjima Trial Area'; and
- the evidence in each of those applications 'shall be evidence in each other application'—at orders 1 and 2.

In my view, all of the abovementioned material is relevant to my consideration of the Banjima People application because it contains information that pertains to one or some of the applications that are combined to form Banjima People. With particular regard to the Draper report, I note that all the available information shows that the MIB and FB pre-combined native title claim groups are comprised of the same people, and that the external boundaries of both pre-combination application areas are identical.

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).

[2] On 15 July 2011, the applicant provided a request in writing to the case manager that it wished the Registrar to consider these witness statements in support of the registration of the application. On 22 July 2011, the request was reconfirmed in writing by the applicant.

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

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

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

In my view, there is much information before me that provides support for the applicant's assertion under subparagraph 190B(5)(a). I discuss below some key examples:

At Schedule F, the applicant gives the following information about the claim group and its predecessors' association with the application area since the time of European settlement of the area in the 1880s (see paragraph 16 below). While, in my view, some of these assertions may be considered general in nature, other parts of Schedule F do provide more factual detail to support the assertion under s. 190B(5)(a). For instance, there is information about how country group areas are identified, the necessity for ritual qualifications in order to speak for country and that the exercise of rights to use country relies upon a claim group member's knowledge of the area and its resources.

I extract below the relevant details from Schedule F:

> At sovereignty
>
> 1. At sovereignty, the area covered by the application was occupied and used by Aboriginal people.
> 2. The occupation and use of the area covered by the application was done as of right under a body of laws acknowledged and customs observed by those people.
> 3. Under that body of laws and customs, the Aboriginal people who occupied and used the area covered by the application at sovereignty possessed rights and interests in relation to and had a connection with the land and waters of the area covered by the application .
> 4. The Aboriginal people who occupied and used the area covered by the application at sovereignty comprised a single society who identified as Banjima, who spoke dialects of a common Banjima language and who acknowledged and observed the same body of laws and customs relating to rights and interests in land and waters.
>
> ...
>
> 6. The persons who spoke and were identified with the Banjima language or with a particular dialect of the Banjima language were not a land owning group or groups but were made up of component groups whose members had rights to one or more areas within the area covered by the application ("country groups").
>
> ...
>
> 8. Members of the country groups exercised rights over loosely defined areas or country and exercised rights to sites of spiritual significance in their country.
> 9. Rights to land were also gained through cognatic descent.
> 10. Other mechanisms, apart from descent, also played a role in the acquisition of rights in country including place of birth and a totemic attachment related to such an event.

11. Members of several country groups exercised rights in relation to sites and areas of spiritual importance within the area covered by the application. Such rights were differentiated and subject to realisation through gaining ritual and social maturity.
12. Country group areas were identified by general reference to areas or dominant landmarks, like major hills, creeks or pools. While those references provided an indication of the proprietorship of areas of country, there were not ordinarily definitive boundaries as might be drawn as lines on a map.
13. Residence groups were necessarily composed of members of two or more country groups, since country groups were exogamous.
14. Members of residence groups exercised rights across several different country group areas.
15. The members of the native title claim group are the descendants of the persons who occupied the area covered by the application at sovereignty.

Sovereignty to the present

16. The area covered by the application was first impacted by White settlement in the early 1880s. Up until that time the system of laws and customs as it existed at sovereignty had remained substantially unaffected by European influences.

...

21. Place of birth is not of itself a determinant of rights to country, although it may serve as a means to bolster existing rights. It may also provide a basis whereby a person should be afforded respect in matters that relate to that country.
22. The area covered by the application is considered by the native title claim group to be redolent with spirituality, commemorated by senior male members through mytho-ritual traditions, including the Wardirba. The right to rehearse the spirituality and manage its geographic and physical manifestations rests with those ritually qualified to do so. Those who have gained this qualification, usually but not exclusively with respect to ancestral country, are spoken of as having the right "to speak for country". To "speak for country" is to have the legitimate authority to make decisions about the future of the country with respect to its physical as well as spiritual future and these decisions are understood by members of the native title claim group to take priority over the exercise of rights of other members of the native title claim group to use the land and waters within the area covered by the application.
23. The exercise of rights to use country within the area covered by the application requires knowledge of the country and its resources. In order to use country safely, those exercising rights must know of the spiritual potentialities of the country, particularly its dangers. Accordingly, use rights are potential until such time as they can be realised through acquisition of knowledge of the country in which they are to be exercised.
31. Members of the native title claim group have extensive knowledge of narratives and sites associated with mythic beings and the area covered by the application. This includes the story of two brothers known as [Name removed], the [Name removed]or long necked turtle story, the [Name removed]site associated with three women who were sisters, and various narratives associated with the mythological warlu or serpent.

...

33. Members of the native title claim group regularly hunt, fish and gather within the area covered by the application.
34. Members of the native title claim group regularly visit and camp within the area covered by the application.

These details are further particularised in the information contained in the Draper report and the witness statements by [Name removed] and [Name removed]. In my view, all the available material is very extensive; it would be unnecessary to detail all of it here for the purposes of my task under this subcondition. I note that it appears that the Draper report provides similar information to that personally given by [Name removed] and [Name removed].

Witness statement by [Name removed] made on 24 May 2011

[Name removed] (age mid-fifties) gives detailed information about his family ancestry, including that he has grandparents and great grandparents who are named apical ancestors of the group in Attachment A of the application before me, and/or apical ancestors named in two of the pre-combination applications[3]. [Name removed] states that his father's father's father was [Name removed], his father's father was [Name removed], [Name removed] ('[Name removed] ' in Attachment A) and his father's mother's was [Name removed]. [Name removed] talks about where these apical ancestors, being his direct ancestors, are buried, and which particular areas of the application area belonged to them. Information is provided about where he and some of his family were born, and [Name removed] describes how he and his family inherit their identity as Banjima people—at [2] to [18].

The places which [Name removed] references are all localities that I am able to identify as falling within the group's country/the application area; having regard to the maps provided in the Draper report and/or elsewhere in the materials available.

[Name removed] talks about how, from the time he was born on Mulga Downs Station (in the application area), despite being schooled/growing up in township areas away from their country/the application area, he and his family continually returned to visit their country. [Name removed]'s father worked both on his traditional country in the application area but also had to move away at times to find employment. [Name removed] describes being brought back to country during the school holidays to camp and meet up with family and friends out on country—at [23] to [29]. During these times, he learned about special places in their country:

> All our Banjima family took us and showed us all the gorges and places in our country, when they showed us our country they told us the names in Banjima. The [Name removed] and [Name removed] were there and other Banjima families too—witness statement by [Name removed] at [30].

[Name removed] also learned about the boundaries of his country from his father as they travelled around together, as well as where ceremonial/law grounds were located. [Name removed] was taught this by his father and other older Banjima family members. They told him where special places in Banjima country were—at [34] to [35].

There is detailed information throughout [Name removed]'s witness statement about law/ meeting grounds, how he, his brother and cousin were rangers in Karijini National Park, the establishment of a community, country boundaries, the spiritual significance of waterholes/water sources and other special or dangerous places, as well as shared areas of country/law grounds between Banjima people and other groups—at [45] to [48], [53], [54], [63], [64], [79] to [85], [93], [96] to [100] to [109].

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[3] It would appear that some of the apical ancestors' names have alternate spelling, where they are referenced between the pre-combination applications, the application before me and associated materials.

For instance, [Name removed] describes one of the most significant places to Banjima people, which he knows about personally and that is special to him in accordance with the group's traditional laws and customs:

> [Traditional place name] is a place of great significance to us [sic] we do not talk publicly about [traditional place name]. This helps to protect it. We teach the younger generation about [traditional place name] in our Law and ceremony ... There is a Dreamtime story for this place. Under our Laws and customs we all have to look after this Dreaming ... It would be a breach of our Laws and customs, to disturb any part by taking dirt or rocks from the area of [traditional place name] or to walk over it. There are consequences ... for such a breach and it would cause serious hurt and distress to the ... Banjima and ... people. On the map ... is the boundary of [traditional place name]. I know this because I took part in the survey where we marked these boundaries. I was taught about this area from my old Banjima people[.] My father, Uncle [Name removed][,] Uncle [Name removed][,] Uncle [Name removed][,] Uncles [Names removed] [sic] also [Name removed] (my marli [Name removed][']s dad) and my Gaja [Name removed] and others. I went out with other members of the claim group on heritage surveys to map a boundary for the [traditional place name]... comprises three separate hills [sic] is associated with three women who were sisters. [Traditional place name] is part of restricted men's business and I know that there is also restricted women's business to do with this area as well ...—witness statement by [Name removed] at [100] to [106].

[Name removed] says that he knows about all particular significant sites because he was told about them by his preceding elders who were associated themselves with places in the application area:

> I know about all these sites because my father, grandfather and their fathers before them would travel all through Weeli Wolli, and to Area C, Hope Downs, through to Pil's Creek, Lamb Creek, [traditional name] old station, Dignams (Rangers Quarters), [traditional name] (5 Mile and nearby gorges [)], then through gorges, down to the Fortescue [river] and back to Mulga Downs. I learned about this from Uncle [Name removed], who was shown it by Uncle [Name removed] while they were dogging on horseback through this area. Uncle [Name removed] was my oldest father's brother due to the kinship teaching and obligations he had the responsibility to teach [Name removed]as his grandson who then passed it on down to us—witness statement by [Name removed] at [110].

When I read this statement together with the map at Attachment C and the maps accompanying the Draper report, I can see that the track described by [Name removed] covers a large area; stretching from southeast to northwest of the application area.

Witness statement by [Name removed] made on 26 May 2011

[Name removed], being [Name removed]'s brother (four years apart), provides similar information about his family history and their association with the application area, including that his direct ancestors are named apical ancestors for the claim group—at [1] to [18]. He also notes that their father, [Name removed], was born around 1910—at [3].

[Name removed] talks about how in 2009 he retired after 23 years as a ranger, living and working in Karindji National Park; the available maps show that approximately one third of this park lies within the application area. After retiring he spent a lot of time in his country with his 'old people that were still alive', at Youngaleena (an established community within the application area). Those old people included his uncles ([Name removed]), the [Name removed] brothers and other

families; it is indicated to me that such people were key elders for the group—at [34]. I note that the names/family name that [Name removed] references here (at [34]) of such 'old people', appear to be the same names of persons identified as key elders or older claim group members, or families who also descend from the named apical ancestors. Such persons are referenced throughout the Draper report and by [Name removed] —such as in the witness statement by [Name removed] at [4] to [7] and [44].

[Name removed] also gives very detailed information about the various landmarks across the application area that form Banjima country. [Name removed] names and describes many localities across the application area, identifying the boundaries of the area, as well as stating which places are not Banjima country but belong to other groups—at [50] to [66]. For instance:

> We went to [traditional name of landmark] Gap with the Court last year during the preservation evidence. The Court pulled up before the Gap. This is the southern limit of the Fortescue Banjima country that I know. I can't talk for that country to the south—witness statement by [Name removed] at [55][4].

[Name removed] talks about the location of burial grounds in the application area, stating that he still goes to find the grave of his grandmother, [Name removed], who is a named apical ancestor for the group—at [72] to [74].

There is much information about places within the group's country (which I have been able to locate in the application area) which are significant to the claim group such as law grounds, spiritual being places, healing places and travel routes. [Name removed] describes with specificity, how they interact with those places, and how they look after and respect them. He talks about a place he was shown when he was young, the [traditional name] claypan south of the Mulga Downs homestead. In his witness statement, [Name removed] also provides a table of 21 places, identified by their Banjima and English names. The table includes descriptions about what some of those places mean to him/the group, such as burial grounds, country markers, locations of engravings, camping areas and spirit dwellings[5]—at [85] to [95].

[Name removed] also provides many examples about his use and knowledge of the natural resources available in his country, including by giving accounts of how and where he has hunted and collected certain bush foods, as well as where he has camped—at [104] to [116]. Again, the places [Name removed] references are areas I can see marked on the maps of Banjima country provided with the Draper report.

The Draper report

In my view, this anthropological report also provides a very comprehensive factual basis in support of this subcondition; including information that is consistent with the details provided in the witness statements by the [Name removed]brothers. The report also contains other information to support the claim group and their predecessors' association with the area.

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[4] The locality identified by [Name removed] by its traditional name, is an area which I can see is situated along/in the vicinity of the southern boundary of the group's country/application area—as marked on Map 1-1 attached to the Draper report.

[5] I have been able to locate many of these places identified in the table, in the maps of Banjima country provided with the Draper report.

Dr Draper refers to historical accounts about when the relevant area was first settled by Europeans. For example, while the earliest recorded incursions of Europeans in the general region occurred during the 1860s, such as one recorded European expedition in the upper Fortescue in 1861, it is around 1880 which seems to be when large-scale pastoral stations were making 'serious incursions into the region'—at [31] and [32].

The report provides a historical account which states that the Hamersley Range (which runs diagonally northwest through to the southeast of the application area) and 'upper Ashburton' were the province of a 'whole tribe of hill natives' living a traditional lifestyle in 1892— [31].

An account by [Name removed] is contained in both his witness statement at [110] and the Draper report at [48]. [Name removed] recalls how his father, grandfather and earlier forbears had all travelled through a certain route, naming particular locations. The route (or track) had been shown to them by their uncle, who had in turn been shown it by his uncle, while they were dogging on horseback through the area. It is noted that at this time during the field research exercise, both [Name removed] and [Name removed] had their own grandchildren there with them to also teach them about the track—at [48].

Oral testimony by claim group members is recorded throughout the Draper report, provided through many extracted statements and personal accounts by claim group members, transcribed from audio-visual recordings of interviews and ethnographic surveys conducted by ACHM. For example, one discussion captures claim group members, [Name removed] and [Name removed], speaking about the [Name removed] (the pair of Creation Ancestors), who were the first two people to 'go through the law', and brought the law (Wardilba) to the Banjima people. These Creation Ancestors are specially associated with the three peaks called [traditional place name] (the three sisters), located in the application area's southeast—the Draper report at [53]. (Both [Name removed] and [Name removed] reference this landmark as a key spiritual place for the group in their witness statements.)

I refer also to the table inserted at paragraph 101 of the Draper report, which provides an extensive list of detailed historical accounts, statements from claim group members and police records of the claim group's association with the application area from the early 1900s until 2009. The material in the Draper report also demonstrates how the claim group's over-arching law and belief system, the Wardilba/Wardirba[6] directly connects claim group members to their specific country, as reflected in this statement:

> ... the Wardilba ritual is a central element which specifically relates the owners and performers of this song cycle and rituals to specific country by virtue of the specific mythological sites referred to ... and other specific geographic features with cultural significance, especially Weeli Wolli Creek (the boundary with the Nyiyarpali People), the Fortescue River and Fortescue Marsh, which has a boundary with Nyiyarparli upstream (to the east) and with Yindjibarndi downstream (to the west). In addition, the exclusive possession and knowledge of sacred objects and related songs and rituals specifically associated with the claim area and its prominent cultural features and associations with particular spirit ancestors, as well as the use of these sacred objects in ceremonies among their own group and neighbouring groups, has been traditionally regarded and is still regarded as proof of the exclusive right to speak for the

[6] Where the spelling of this term alternates within my reasons, this reflects the source from which I have referenced the term in that relevant part of my reasons.

> country concerned. These sacred objects are regarded by MIB people as "title deeds" to the land ...—the Draper report at [98].

Consideration

In my view, the information before me is sufficient to support the assertion under this subcondition. Many of the examples given by the [Name removed] brothers in their witness statements are made with reference to places located inside the application area. Given that effective sovereignty for the relevant region is understood to be around the 1880s (as stated in Schedule F and the Draper report), this indicates that [Name removed] and [Name removed]'s grandparents (and their generation) would have been born around the time that the area was first settled by Europeans. Having regard to referenced apical ancestors by both [Name removed]brothers in their witness statements, and the named apical ancestors in the application and pre-combination applications, I infer that the apical ancestors for the claim group lived prior to, and at the time that European settlement first occurred in the application area.

As I have discussed above, most of the places referenced in the material I have considered are shown to be within Banjima country. Where the information references boundaries between Banjima country and country belonging to other groups, this also appears consistent with maps of the application area and neighbouring application areas, which I have generated using the Tribunal's mapping database. When I consider the range of factual materials available, I am able to identify the claim group's area of country, and can see that their association with the area stretches across the application area, but clearly within its external boundary,

In considering all the available information, I am able to sufficiently build up a picture over time linking the present day claim group members and their predecessors to the area claimed, since it was first settled by Europeans around the 1880s. In my view, there is an abundance of relevant material to support the applicant's assertion under s. 190B(5)(a).

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

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

This subsection requires that I be satisfied that the material before me provides a sufficient factual basis for the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group and that these give rise to the claimed native title rights and interests.

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' to mean:

> ... 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 ...

Yorta Yorta defines 'traditional' in the context of the phrase 'traditional laws and customs'. That is:

> A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. But in the context of the *Native Title Act*, "traditional" carries with it two other elements in its meaning. First, it conveys an

> understanding of the age of the traditions: 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].

Further, the High Court stated that:

> … "traditional" does not mean only that which is transferred by word of mouth from generation to generation, it 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].

In *Gudjala 2007,* Dowsett J characterised the requisite asserted facts to be provided in support of the assertion in s. 190B(5)(b) along the following lines:

- that the laws and customs currently observed must have their source in a pre–sovereignty society and have been observed since that time by a continuing society—at [63];
- that there existed at the time of European settlement a society of people living according to a system of identifiable laws and customs, having a normative content—at [65], [66] and [81];
- there is explanation of the link between the claim group described in the application and the area covered by the application, a process which may involve, in the case of a claim group defined using an apical ancestry model, 'identifying some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage'—at [66] and [81].

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 laws and customs of a society that existed before the assertion of British sovereignty (or at least during settlement) in the application area. This approach appears to be supported by comments of the Full Court in *Gudjala FC* at [96].

The information in Schedule F of the application provides an overview of the claim group's traditional laws and customs, including setting out certain aspects of those laws and customs as they pertain specifically to Banjima people. Some of this information has already been extracted above in relation to s. 190B(5)(a), and the following is also relevant to the requirements of s. 190B(5)(b):

> 4. ...
> Particulars
> (a) At sovereignty, there were two dialects spoken in the area covered by the application;
> (b) Each of the two dialects was associated with particular parts of the area covered by the application, although the two parts merged or overlapped;
> (c) The two dialects were mutually intelligible and represented a common language;
> (d) The speakers of the two dialects shared a common identity called Banjima;
> (e) There was inter-marriage and consociation between speakers of the two (Banjima) dialects.
> 5. The Banjima people shared other commonalities including:
> (a) The practice of common rituals that included both circumcision and subincision.

(b) The performance of ceremonies at dalu sites to increase natural species.
(c) The utilisation of sacred paraphernalia.
(d) A belief in dangerous spirits that could cause death and in specially qualified men who could affect cures.
(e) A shared belief in a creative period of the Dreaming.
(f) The operation of a 4-section system, whereby all persons were accorded at birth one of four named sections.

...

7. Country groups were composed of members who traced descent from common ancestry, usually in the male line.

...

17. The native title claim group have continued, substantially uninterrupted since sovereignty, to acknowledge and observe a body of laws and customs which are rooted in the laws and customs of their pre-sovereignty past. Particulars of those laws and customs are provided in paragraphs 18-34 below.
18. Under Banjima laws and customs as presently acknowledged and observed, rights to country are gained primarily via cognatic descent.
19. Intrinsic to the Banjima principle of descent is the concept of ancestral family or bajarli.
20. Rights are primarily exercisable in respect of relatively defined areas of country (called "Yurlu") associated with bajarli.

...

22. The area covered by the application is considered by the native title claim group to be redolent with spirituality, commemorated by senior male members through mytho-ritual traditions, including the Wardirba. The right to rehearse the spirituality and manage its geographic and physical manifestations rests with those ritually qualified to do so. Those who have gained this qualification, usually but not exclusively with respect to ancestral country, are spoken of as having the right "to speak for country". To "speak for country" is to have the legitimate authority to make decisions about the future of the country with respect to its physical as well as spiritual future and these decisions are understood by members of the native title claim group to take priority over the exercise of rights of other members of the native title claim group to use the land and waters within the area covered by the application.

...

24. Under Banjima law and custom as presently acknowledged and observed, persons who do not belong to the country and cannot assert rights to it are identified by the use of the word manjangu. Such persons should not access and use the area covered by the application without the permission of appropriate members of the native title claim group who can speak for that country.
25. Strangers who are ignorant of country may fall foul of spiritual danger of which they are ignorant. In granting permission, a member of the native title claim group who can speak for the country affords a stranger some protection against this danger by instruction and ritual introduction.
26. The Banjima language is a common point of identity reference for the members of the native title claim group who claim native title rights and interests in the area covered by the application.

27. As referred to in paragraph 22 above, members of the native title claim group also acknowledge and observe a mytho-ritual religious observance called "Wardirba". It is a series of songs and accompanying exegesis, sung in connection with male rituals. It is understood to relate directly to the area covered by the application through the association of the various subjects of the songs (mostly natural species) with named places in the countryside.
28. Much of the information about Wardirba (and associated rituals) is esoteric and restricted in its dissemination to ritually qualified men. Women do not generally discuss any matters relating to Wardirba.
29. The traditions of the Wardirba in the area covered by the application are differentiated by the language or dialect of the song and the country each celebrates. Nevertheless, the two Banjima versions of Wardirba are conceived of as being part of one Banjima law.
30. Members of the native title claim group have a special relationship with a natural species; an animal, reptile or fish. This totemic association develops from events which are believed to have accompanied or marked their mother's recognition that she was pregnant. The natural species is referred to as an individual's marlyi.
31. Members of the native title claim group have extensive knowledge of narratives and sites associated with mythic beings and the area covered by the application. This includes the story of two brothers known as [Name removed], the [Name removed] or long necked turtle story, the [Name removed] site associated with three women who were sisters, and various narratives associated with the mythological warlu or serpent.
32. Members of the native title claim group continue to practice circumcision rituals. This is sometimes referred to as 'marlu-lu business' or more generally as 'the Law' or 'initiation'. It is commonly practiced at a number of different centres round the Pilbara, including at Youngaleena within the area covered by the application.

Witness statement by [Name removed] made on 24 May 2011

[Name removed] states that he became Banjima 'by following his father, and him following his father and so on'. The women in his family 'are Banjima because they inherit this through their father and are taught the law, culture and customs by their grandparents'—at [18]. [Name removed] tells of how he remembers his father talking about 'the big ceremony', when young men become men and Aboriginal people from all over the region would visit and take part in the ceremonies—at [36].

[Name removed] talks about how all the songs and ceremonies of their law and culture have 'been handed down to [Name removed] and [Name removed], who 'are now the keepers of the song lines and the special sacred objects'. This knowledge has been handed down from their forefathers and [Name removed] continues the tradition by teaching the young people today—at [45]. [Name removed] says he 'went through the Law' in 1974 (aged 18). All of his five sons followed him by also going through Banjima Law; his eldest son 'went through' 20 years ago and his youngest son went through 11 years ago. 'Once you go through the Law you are expected to go back every year'. One day his sons will put his grandsons through the Law—at [42], [45], [49] and [50].

There is much information throughout [Name removed]'s witness statement about the traditional laws and customs of the claim group. These laws and customs relate to interaction between top and bottom end descent families (such as through intermarriage), men and women's business, the kinship system, authority and principles of gaining rights (through the Wardirba), the spiritual

significance of land and water and creation origins—at [75] to [78] and [86] to [93]. [Name removed] states that 'young people are still brought up in the traditional ways', and that the 'main feature of the Banjima Law and culture is respect for the land'—at [94].

[Name removed] states that the Banjima people still practice and sing their Wardirba which has been handed down from generation to generation and which is connected to their country. 'We were taught this from our old people. My father[,] [names of eight uncles/other significant elders from the [Name removed], [Name removed]and [Name removed]families] and others'—at [95]. [Name removed] talks about dangerous and significant places in their country, the knowledge of which has been taught to him. This includes the key [traditional place name] site referenced above in his witness statement at [100] to [106] and:

> There is a place, a cave we call [traditional name/alternative traditional name] where there are special beings, the [traditional name/alternative traditional name]. They are the Keepers ... This is a very significant [traditional word for danger] site. It belonged to my Uncle [Name removed] as a boss or keeper for the place. I would generally avoid it because of how serious it is. Because it is in my country and I was taught about it, if I wanted to go there I could, but I would have to be careful about how I approached it—at[99].

[Name removed] also says that he knows about certain special sites because his father, grandfather and the forbears before them, all travelled through them. '[Name removed] was my oldest father's brother [and] due to the kinship teaching and obligations he had the responsibility to teach [Name removed] as his grandson who then passed it on down to us'—at [110].

Witness statement by [Name removed] made on 26 May 2011

As described in Schedule F, persons in the claim group are associated with a totem, a relationship which is developed by a relevant event that accompanied or marked their mother's recognition that she was pregnant. [Name removed] explains how when his mother was pregnant with him, she ate a goanna from Mulga Downs country; therefore his totem is the goanna—at [8].

[Name removed] provides similar information to his brother [Name removed]. He learnt about the significant places in Banjima country by travelling around country with his parents and other older family members and elders. [Name removed] describes how when he was young there were always certain family groups that remained on certain stations because 'that's where they belonged and they stayed there whether there was work or not because it was their traditional country before station times'. He also talks about past events where he saw other claim group members going through the Law, and that his father and brothers were the 'gaja' (older brothers) that helped put them through the Law. He explains how his mother was the mother (in kinship terms) for putting another claim group member through the Law—at [12] to [16].

[Name removed] gives detailed information about the four kinship skin groups which determine who are the bosses and who are the workers during Law ceremony time. He names all the persons according to their skin groups, who he remembers were present when he went through the Law at age 17. It would also appear that marriage is traditionally determined according to kinship terms, as he describes that the arranged marriage between he and his wife is based on that his wife's kinship group 'was straight' for him, following his mother—at [10] and [25] to [30].

There is much detail provided by [Name removed] about the continuation of Banjima laws and customs and what they entail—at [35] to [48]. In particular I note this information about hierarchy, the Wardirba and Banjima language:

> When we talk about stories in our Banjima Law on the men's side we talk about those things together amongst ourselves. There is hierarchy in the Law. The fathers speak and give direction and sons follow and carry them out—at [38].
>
> Wardilba is a very important Law. In the old days people would kill each other. Even today it causes a lot of fights and arguments—at [42].
>
> I speak Banjima. I learned it when I was young growing up with my parents and extended family and still continue to speak Banjima today. I taught my children and continue to teach my grandchildren ... Banjima language. Your language gives you your ancestral identity and connects you with your [traditional name for country], making you [traditional words meaning 'belonging to your country']. That gives you your Law, culture, customs and way of life—at [46] to [49].

In my view, the information contained in Schedule F and the witness statements provides a sufficient factual basis for the assertion in this subcondition. The Draper report contains similar information in parts, however it also contains relevant anthropological and historical information.

The Draper report provides details about the continuation of Banjima law and custom, as it is practised in accordance with set rules. For instance:

> Our [traditional word for grandfathers/great-grandfathers] ... is the biggest [traditional word for boss] going in this country, and that's our grandfather. And right, when our fathers, they fathers put our fathers through the law, it just get passed down like that – son, father, son – right down to my son. And to be, ***to be put through that Banyjima law, it has to follow that same path. And that's how come we bosses now*** [emphasis added]— [Name removed] recorded in an interview with Dr Draper at [63].

Consideration

Having regard to all the information before me, I am of the view that it is sufficient to support the assertion under s. 190B(5)(b). In Schedule F it is asserted that the Aboriginal people who used, occupied and had a connection to the application area at sovereignty, did so by a right held under a body of laws acknowledged, and customs observed. At sovereignty, these Aboriginal people comprised a single society, observing the same body of laws and customs and who spoke two dialects of a common Banjima language. This society thus shared a common identity known as Banjima.

At the time of sovereignty and until the present, Banjima people have shared many commonalities governed by their central system of law and custom, particulars of which are described in Schedule F at [4] to [14] and[18] to [32]. In my view, these details, such as how rights to country are acquired and exercised, support the premise that a structured, normative society existed in the application area at sovereignty. It is stated that members of the present native title claim group are the descendants of the occupants of the application area at sovereignty. I note that the claim group description at Attachment A provides that persons in the native title claim group must be descended from certain named ancestors and be members of the Banjima language group. This is consistent with the description of the society at sovereignty provided in Schedule F

(which identifies that speakers of the two dialects of Banjima language shared a common identity).

Schedule F also contains information about the Wardirba. This appears to be the fundamental customary/ritual observance acknowledged by the whole claim group, albeit restricted in its dissemination mostly by ritually qualified men. The Wardirba essentially comprises a series of songs and accompanying spiritual interpretations, which relate directly to the application area through the association of the song subject (usually a natural species) with named places in the area. While the Wardirba is differentiated by the language or dialect and the specific country it relates to, both Banjima versions of the Wardirba are conceived of one Banjima law. Members of the claim group each have a special totemic relationship with a natural species, referred to as an individual's 'marlyi'. The claim group also have extensive knowledge about narratives and sites associated with mythic beings and the application area, including the story of the two brothers, the long necked turtle, the [significant traditional name place] site and its associated story and the mythological serpent—Schedule F at [22] and [27] to [31].

I note that some of the material identifies some distinctions between 'top-end' and 'bottom-end' local descent groups of Banjima people. However, as my task is to consider the combined application as it stands before me, I accept those relevant statements in Schedule F that the native title claim group is comprised of persons who identify with one common Banjima identity (sharing common rituals/beliefs), who identify with dialects of one language and whose different versions of Wardirba are conceived as being bound together under one Banjima law. It is asserted by the applicant that this is how it has continued from the structure of the single Banjima society associated with the application area at sovereignty—see in particular Schedule F at [4] and [17].

In my view, the recent witness statements made by brothers [Name removed] and [Name removed] provide specific information about how the claim group's laws and customs are 'traditional' in the *Yorta Yorta* sense. That is, they describe how the laws and customs have been consistently transmitted between generations since the group's country was settled by Europeans until the present time. I note again, that it appears from the available information that [Name removed]'s father was directly descended from the group's apical ancestors; both his father's parents are named as apical ancestors in Attachment A. As discussed above, it is my view that based on the materials before me, an inference can be made that the apical ancestors lived during and/or prior to settlement in the application area.

There are rules under the claim group's kinship system which provide for social organisation based on the four moieties (skin groups or colours). The Draper report states that the kinship system comprises part of the group's Wardirba Law. The teaching of cultural knowledge within families and between generations is allocated according to these moieties, whereby the oldest 'brother' within each moiety group is always the 'boss'. Information is passed down this way, and [Name removed] states that it is this system that informs claim group members of 'the way you conduct your business in your country' and 'goes right back'—Draper report at [66].

Again, I note that there is material before me which may suggest that top and bottom end Banjima local descent groups may potentially comprise separate societies, or be perhaps sub-groups of a wider group. It would appear that the available material points to some ambiguity as to whether the asserted laws and customs of the claim group are those belonging to a single

society, or perhaps two sub-groups which observe an overarching, shared set of common laws and customs such that they together form a wider society.

I make this observation based on the information available, including my acknowledgement that historically, the pre-combination applications have made claim to native title on the basis of descent from some distinct apical ancestors/on behalf of some different persons and/or in relation to (partly) different areas of country[7]. I understand these areas to traditionally belong to either 'top' or 'bottom' end Banjima people. I note that despite certain distinctions, it is clear that some shared ancestors and overlapping country existed between all the pre-combination applications (which is reflected in the decision to make the combined application).

Nonetheless, the application before me combines both top and bottom-end Banjima people, and provides in Schedule F, a general description of the factual basis upon which the applicant relies to support the assertion that the Banjima native title claim group is comprised of a single society with a common set of traditional laws and customs. As I have also noted above, the truth of all the statements made in the application is sworn to by each of the persons comprising the applicant in their s. 62(1)(a) affidavits.

In my view, regardless of whether the native title claim group is made up of persons who acknowledge and observe the laws and customs of a *single* normative pre-sovereignty society or not, for the purposes of this condition, this is not an issue for me to conclusively determine. The nature of the group's laws and customs is a matter to be considered by the Court. As I have stated above, my function under the condition of s. 190B(5) 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'—*Doepel* at [17].

It is also my view that 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. To this end, it is not my role to make an assessment about, or to require evidence from the claim group that 'proves directly or by inference the facts necessary to establish the claim'—*Gudjala FC* at [92].

Notwithstanding this, and to assist my understanding of the nature of the group's laws and customs, I have had regard to parts of the Draper report that reference certain conclusions drawn by another anthropologist. These conclusions include the statement below and support that the traditional laws and customs of the native title claim group are the laws and customs shared by persons comprising a single society:

> I note that Palmer (2010) seems to find their ethnographic evidence in this regard convincing - that there is a single, combined Banjima society which includes both groups to meet these criteria.
>
> [Quoting Palmer (2010)] It is my conclusion, based on these data and the opinions I have developed from them, that the two sub-groups of the Banjima share a common law and culture. They are internally differentiated by reference to their respective dialects and ritual style and, to some extent, by reference to country with which members of each group claim affiliation. Yet, so it seems to me, the differentiation is an intra-mural one. The over-arching

[7] I note that three of the four pre-combination applications were made over areas comprising the same external boundary.

> cultural precepts exemplified by language, shared cultural and ritual practice provide strong evidence for concluding that the Banjima together share common law and custom. The Banjima and its component sub-groups can therefore be considered to comprise a single society or community ...—the Draper report at [111].

This information is consistent with the assertion made by the applicant in Schedule F.

In my view, all that I am required to be satisfied of, is whether there is a sufficient factual basis to support that the claim group acknowledge and observe the laws and customs of their pre-sovereignty society, no matter what the nature of that society (or societies). For the reasons above I am satisfied that this is the case such that s. 190B(5)(b) is met.

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).

It is my view that the assertion in subparagraph (c) is also referrable to the second element of what is meant by the term 'traditional laws and customs' in *Yorta Yorta.* That is, that the native title claim group has continued to hold its 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 also at [87].

The decision in *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; and
- that there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement—at [82].

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

In my view, there is much information before me which identifies that the society at sovereignty was the Banjima people and that the application area falls within that traditional territory of that pre-sovereignty society. Schedule F of the application, the witness statements by [Name removed] and [Name removed], and the Draper report provide many examples of how the native title claim group have continued to observe and acknowledge the traditional laws and customs of their pre-sovereignty society in a substantially uninterrupted way. I have provided references in my reasons under ss. 190B(5)(a), 190B(5)(b) and 190B(6) which support this.

Having regard to all of the available material, I am satisfied there is a sufficient factual basis for the assertion under this subcondition.

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.

As I set out under s. 190B(5), it is my view that there exists 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.

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 decide 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.

I turn now to consider each of the claimed rights and interests in Schedule E.

Right to possess, occupy, use and enjoy the application area as against the whole world (exclusive possession)

> **Area A rights**
> The Applicant claims the following listed native title rights and interests relating to exclusive possession, subject to any native title rights and interests which may be shared with any other native title claimants, in relation to Area A only:
>
> 1) The right to possess, occupy, use and enjoy the area as against the world;
> 2) A right to make decisions about the use of the area by persons who are not members of the Aboriginal society to which the native title claim group belong;
> 3) A right to control access of others to the area;
> 4) A right to control access of others to the area except such person as may be exercising a right accorded by the common law, statute law of the Commonwealth or the State of Western Australia or a lawful grant by the British sovereign or its successor; and
> 5) A right to control the taking, use and enjoyment by others of the resources of the area.

Outcome: all established

Ward HC is authority that exclusive possession is potentially able to be established, prima facie, in relation to areas where there has been no previous extinguishment of native title or where extinguishment is to be disregarded under certain provisions of the Act. Having regard to the definition of 'Area A' in the application (page 2), it would appear that the applicant claims rights of an exclusive nature at 1 to 5 listed above. It is also stated in *Ward HC* that:

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

In my view, the claimed rights described at 2 to 5 under 'Area A rights' are subsumed in the global right listed at 1, being the 'right to possess, occupy, use and enjoy the area as against the whole world'; otherwise known as 'exclusive possession'. To this end, I refer to the finding in *Sampi v State of Western Australia* [2005] FCA 777 that:

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

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

> . . . 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"—*Griffiths v Northern Territory* [2007] FCAFC 178 *(Griffiths)* at [71] (*emphasis added).*

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

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

In considering this condition, I have examined the same materials that in my view, provide a sufficient factual basis to support the applicant's assertions under s. 190B(5). Having regard to the witness statements by [Name removed] and [Name removed] and the Draper report, it appears that prima facie, exclusive possession by the claim group over areas where that right is capable of recognition, is shown to exist under the group's traditional laws and customs. I refer to the following examples of information which in my view supports, prima facie, the existence of exclusive possession:

Witness statement by [Name removed]

- When [Name removed] was travelling around country with his father as he growing up, his father would show him all the places and tell him all the names of their Banjima country, as well as other people's country. 'Dad was very clear as to where our countries boundaries were and where other people's country began'—at [34].
- Together with his brother ([Name removed]) and his cousin, as rangers in the Karijini National Park, they restricted tourists entering places important to the claim group—at [54].
- There are dangerous/significant places on country, such as places at which a spirit lives. 'You would have to go with who belongs to it', otherwise 'you could get sick or die'. [Name removed] knows of a cave called [traditional name] where there are spiritual beings; a very significant site which belonged to his uncle as the boss or keeper for the place. [Name removed] would generally avoid it because of how 'serious' it is, but because it is in his country and he was taught about it, if he wanted to go there, he could—at [97] to [99].
- Keepers for the [traditional name] site do not even take their own people to [traditional name] place which is a key site of significance connected to a special Dreamtime story. The group do not take people there as this protects the integrity of the area. There are consequences for people who breach Banjima laws and customs in relation to this place—at [100] to [104].

Witness statement by [Name removed]

- [Name removed] has extensive knowledge about the boundaries of Banjima country and references these boundaries in detail, in relation to natural landmarks and the boundaries of other groups' country at [50] to [68].
- In the 'old days', it was only by permission that Aboriginal people could hunt and fish in certain areas. [Name removed] knows the places he can go to camp and hunt. He knows the laws about advising the right people for country that they wish to enter their country. 'If you are a senior man you have to talk to someone at that same level in the Law'. While [Name removed] knows that he must respect other people's country, it is expected that this will be reciprocated to him and his people. 'Other people have to ask us if they want to disturb the country, take resources, bury someone, or put a boy through the Law in our country ... In my Banjima country I am free to go anywhere. I know the country'—at [79] to [82].
- The main thing for country is the Law. [Name removed] knows he has the right to have a law ground in his own country to put Banjima young men through.
- Rights to country carry with them a responsibility for visitors to the area, and to look after country. 'We have to tell visitors to our country about these things' (dangerous places) so that visitors do not get hurt by them. There are special places where people can get spiritual powers; such as a hill in Banjima country where people can go to get healing powers. 'But if a stranger who didn't know the country when they went there they could get very sick and even die.' However, strangers could visit this area, so long as they were accompanied by someone who knows the country. [Name removed] knows the traditional rules for visiting special (including healing) places. He looks after them now, as he has been handed down that responsibility by his now deceased elders—at [85] to [87].
- [Name removed] has the right to take food from anywhere in his country. [Name removed] would hunt and collect traditional foods all the time, as one of the people given the responsibility by his old people to travel all over Banjima country to look after and check up on special places—at [104] to [107].

I note these examples from the Draper report which also support the applicant's claim to exclusive possession:

[Name removed], a deceased elder, asserted his traditional ownership of the land, stating:

> The land from the Yandicoogina iron ore mine right through to the Weeli Wolli Creek belongs to us. That is Punjima country. Aboriginal people have got their blocks of land like the stations. They have boundaries, rivers, hills. I own the land to the gorges up to Mount Bruce—at [49].

With regard to the Wardirba/Wardilba songline, as it is derived from the group's Creation Ancestors, the material shows that this is intricately connected to the claim group's assertion of where their country's boundaries are located and which country belongs to them:

> ... travelling ancestors brought traditional law to people as they travelled from the west coast eastwards - Injibarndi, then Gurama, then Banyjima, then Nyiyarparli - then on to the desert people ... All of the people along the way know the song line and the song cycle, and each group possesses and sings its own portion of the song as it crosses their country - this is done literally at joint ceremonies, where the legitimacy of each group's law and status is demonstrated by their knowledge of their specific portions of the overall songs and ceremonies—at [53] to [54].

The claim group's asserted exclusive possession in the application area is based on their traditional laws and customs, which include a deeply held belief that their specific country was given to them by their Creation Ancestors. This is evident from the oral testimony recorded between Dr Draper and elders of the claim group. I extract below a small part of the lengthy, detailed discussion captured in the Draper report at [162][8]:

> ND: The religions have got stories about how their law started. In a way that you could tell whitefellas, how far back does your law go, where does it come from? How did it start?
> [Initials for Name]: Well, if it's there written down over there in the guguda ... it's been there before our time.
> ...
>
> [Initials for Name]: And it's in the munta.
> [Initials for Name]/[Name removed]?: In the munta, in the rocks.
> ND: It's in the munta, it comes ... from the country itself?
> ?: From the country.
> [Initials for Name]: Mangunma –
> ...
>
> [Initials for Name]: - mangunma is the one that give us the country –
> ...
>
> [Initials for Name]: ... Mangun first, give us the country ... Wati Kutjara come along give us the language. And the name of the country ... And the songs ...—at [162] (page 55).

Schedule E states that these 'rights and interests relating to exclusive possession' are 'subject to any native title rights and interests that may be shared with any other native title claimants in relation to Area A only'.

I refer to determinations made by the Court where the framing of a claim to exclusive possession has been recognised over areas of country possessed/shared by native title holders from different groups. In these cases, however, whether such a determination was possible or not, was largely governed by whether the evidence demonstrated that the relevant country is shared in accordance with traditional (pre-sovereignty) laws and customs. I note for example, the determination by French J in *James on behalf of the Martu People v Western Australia* [2002] FCA 1208 *(Martu)*, where it was held that a part of the determination area would be a shared area between two groups of native title holders, being the Martu People and the Ngurrara People. The native title rights and interests determined in that shared area included the right to possess, occupy, use and enjoy the determination area to the exclusion of all others—*Martu* at [11], the determination schedule (see in particular at [1], [4] and [5]) and the third schedule.

There is information before me which supports that certain areas of country have been and are traditionally understood as shared country between the Banjima and other groups. For example, I refer to [Name removed]'s statement in relation to the Weeli Wolli area, which is shared country between Banjima and Nyiyiparli people. Together, they have been 'working for years along the Weeli Wolli'—witness statement by [Name removed] at [107].

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[8] ND refers to Dr Neale Draper; [Name removed] refers to [Name removed]; [Initials for name] refers to [Name removed]; and [Initials for Name] refers to [Name removed].

In the Draper report there is further information about the common acceptance and understanding between claim groups regarding shared areas. The laws about shared country were handed down to the Banjima and other people, by each group's ancestors. The Fortescue River is shared between the Banyjima and the Nyiyarparli. It is very important to both groups and provides for the sharing of law and camping places. It is stated that the 'Weeli Wolli Creek is the accepted common boundary between the two groups, as taught by the old people'—the Draper report at [79].

On the basis of the material before me, I am satisfied that prima facie, the exclusive rights claimed at 1 to 5 under 'Area A rights' in Schedule E can be established.

Non-exclusive rights

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

6) A right to hunt in the area;
7) A right to fish in the area;
8) A right to take traditional resources
9) A right to take fauna.

Outcome: all established

I note that Area C is defined in the application (page 2) to be all the area within the application area not included in Areas A or B. I understand the applicant's claim at Schedule E to mean, that while a claim to exclusive possession is already made in relation to Area A, the above four non-exclusive rights and interests are also claimed in Area A in the event that exclusive possession may not be able to be recognised over all or certain parts of Area A.

In my view, there is a wealth of information in the Draper report, as well as relevant details in the witness statements by the [Name removed] brothers to support the possession of these four rights by the claim group. The materials demonstrate that members of the claim group have hunted, fished and collected natural items from their country pursuant to their traditional laws and customs, which have been passed to them and which they pass down to their children and other younger members of the group. The Banjima laws and customs, including the key Wardirba Law, govern the relationship between claim group members and their Banjima country.

Rights in Areas A, B and C

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

10) A right to occupy the area;
11) A right to use the area;
12) A right to enjoy the area;
13) A right to be present on or within the area;
14) A right to make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;
~~15) A right to make decisions about the use of the area by persons who are not members of the Aboriginal society to which the native title claim group belong;~~

~~16) A right to invite and permit others to have access to and participate in or carry out activities in the area;~~
17) A right of access to the area;
18) A right to live within the area;
19) A right to erect shelters upon or within the area;
20) A right to camp upon or within the area;
21) A right to move about the area;
22) A right to engage in cultural activities within the area;
23) A right to conduct and participate in ceremonies and meetings within the area;
24) A right to visit, care for and maintain places of importance and protect them from physical harm;
25) A right to take flora (including timber);
26) A right to take soil;
27) A right to take sand;
28) A right to take stone and/or flint;
29) A right to take clay;
30) A right to take gravel;
31) A right to take ochre;
32) A right to take water;
~~33) A right to control the taking, use and enjoyment by others of the resources of the area including those referred to in paragraphs 25 - 32 (inclusive) other than minerals and petroleum and any resource taken in exercise of a statutory right or common law right, including the public right to fish;~~
34) A right to manufacture traditional items from the resources of the area;
35) A right to trade in the resources of the area; and
36) A right, in relation to any activity occurring on the area, to:
    (i) maintain
    (ii) conserve; and/or
    (iii) protect;

    significant places and objects located within the area, by preventing, by all reasonable lawful means, any activity which may injure, desecrate, damage, destroy, alter or misuse and such place or object;

~~37) A right, in relation to any activity occurring on the area, to:~~
~~(iv) maintain~~
~~(v) conserve; and/or~~
~~(vi) protect;~~

~~significant ceremonies, artworks, song cycles, narratives, beliefs or practices by preventing, by all reasonable lawful means any activity occurring on the area which may injure, desecrate, damage, destroy, alter or misuse any such ceremony, artwork, song cycle, narrative, belief or practice;~~

~~38) A right, in relation to any activity occurring on the area, to:~~
~~(i) prevent any use or activity which is unauthorised in accordance with traditional laws and customs;~~
~~(ii) prevent any use or activity which is inappropriate in accordance with traditional laws and customs~~

~~in relation to significant places and object within the area or ceremonies, artworks, song cycles, narratives, beliefs or practices carried out within the area by all~~

~~reasonable lawful means, including by the native title holders providing all relevant person by all reasonable means with information as to such uses and activities, provided that such persons are able to comply with the requirements of those traditional laws and customs while engaging in reasonable use of the area and are not thereby prevented from exercising any statutory or common law rights to which that person may be entitled.~~

Outcome: mostly established (excluding the rights at 15, 16, 33, 37 and 38)

I note that Area B is defined by the application (page 2) as areas which are a 'nature reserve' or 'wildlife sanctuary' (as those terms are defined in the *Wildlife Conservation Act 195*0 (WA) created before 31 October 1975).

I consider all of these rights above excluding those claimed at 15, 16, 33, 37 and 38, to be established, prima facie. I rely again on the very detailed material contained in the Draper report and from the witness statements by [Name removed] and [Name removed]. In my view, the information before me provides sufficient material to support the possession of these particular rights and interests under Banjima traditional laws and customs—some of which I have referenced in relation to s. 190B(5).

On 28 July 2011, the State of Western Australia (the State) provided a submission by email to the Registrar in relation to the registration of the application. The State contended that the claimed rights at 15, 16, 33, 36, 37 and 38 under this subheading should not be registered pursuant to s. 186(1)(g) in their present form. The State's view was that this 'is because each of these rights allows native title holders to control access of others to areas, notwithstanding that they are claimed in Areas B and C where "exclusive" native title rights cannot exist', and that 'the native title claimants are purporting to claim "qualified" exclusive rights in areas where exclusive rights have been extinguished'. The State submitted that prima facie, none of these six rights 'can be established pursuant to the principles set out by the Full Federal Court in *Northern Territory v Alyawarr* (2005) 145 FCR 442 at [141]-[148] and by the High Court in *Ward HC* at [52] and [192]'.

As I have stated above, it is my view that the nature of the State's comments would not prevent registration of the application, such that there was no obligation for me to provide those comments to the applicant for an opportunity to respond to the comments (see above at the 'Procedural fairness steps').

I agree with the State that prima facie, the rights claimed at 15, 16 and 33 cannot be established because these particular rights make claim for the group's control over what other people could do in relation to all of the application area, as well as whether other people could be permitted to access the area. I am guided by Court authorities that have found that where such rights are claimed in areas where native title has been partially extinguished such that exclusive possession is unable to be recognised, these rights are not capable of recognition. In my view, this is the case before me as these three rights are claimed also in relation to Areas B and C; areas over which it is indicated that partially extinguishing acts have occurred. I have had regard to the case law relied upon by the State and agree with the relevant principles they refer to in their submission of 28 July 2011. For instance:

> It is necessary to recognise that the holder of a right, as against the whole world, to possession of land, may control access to it by others and, in general, decide how the land will be used.

> But ***without a right of possession of that kind, it may greatly be doubted that there is any right to control access to land or make binding decisions about the use to which it is put*** [emphasis added]. To use those expressions in such a case is apt to mislead—*Ward HC* at [52].

With regard to the particular claimed right at 16 (to *invite and permit* others to have access ...):

> The pastoral leases ... denied to the native title holders the continuation of a traditional right to say ***who could or*** who could not come onto the land in question [emphasis added] —*Ward HC* at [192].

In the joint judgment of Wilcox, French and Weinberg JJ in *Northern Territory v Alyawarr* (2005) 145 FCR 442 *(Alyawarr),* his Honours followed the principles set by *Ward HC*, stating that:

> Having regard to what was said in the High Court it seems that the right to control access cannot be sustained where there is no right to exclusive occupation against the whole world. The underlying rationale for that conclusion is that particular native title rights and interests cannot survive partial extinguishment in a qualified form different from the particular native title right or interest that existed at sovereignty ... In this respect the appeal should be allowed and pars 3(e) and 3(f) deleted from the determination save as to the area ... where prior extinguishment can be disregarded because of the application of s 47B of the NT Act—at [148][9].

With specific regard to the claimed right at 33, I refer also to the decision in *Neowarra v Western Australia* [2003] FCA 1402, where Sundberg J held that the right to control the use and enjoyment of others of resources of the claim area 'asserts an entitlement to control access to the land and the use to be made of the land' and was inconsistent with the pastoral leases that existed in the area of the claim. Of the argument put by the applicant that the decision of *Ward HC* was not applicable as it did not address the issue of resources, Sundberg J stated that '[w]hat is said in *Ward [HC]* in relation to control of access and use is applicable to the presently asserted right, even though their Honours were not directing themselves to resources'—at [479].

I note that the claimed rights at 15, 16 and 33 are not limited or qualified such that they pertain only to control over/making decisions in relation to the application area with regard to other Aboriginal people who are governed by the traditional laws and customs, acknowledged and observed by the native title claim group. To the contrary, the particular claimed right at 15 specifies that it refers to making decisions about the use of the area by persons who are *not* members of the Aboriginal society to which the claim group belong[10].

It is therefore my view that the claimed rights at 15, 16 and 33 are not established, prima facie, in relation to areas where a right to exclusive possession cannot be recognised.

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[9] Annexure B to the decision in *Alyawarr* sets out the determined rights at 3(e) and 3(f) as being:
(e) the right to make decisions about access to the land and waters by people other than those exercising a right conferred by or arising under a law of the Northern Territory or the Commonwealth in relation to the use of the land and waters; and
(f) the right to make decisions about the use and enjoyment of the land and waters and the subsistence and other traditional resources thereof, by people other than those exercising a right conferred by or arising under a law of the Northern Territory or the Commonwealth in relation to the use of the land and waters.

[10] See *De Rose v South Australia* [2002] FCA 1342 at [553]; and *Mundraby v Queensland* [2006] FCA 436—at [para 3(c)(ii)].

I note that while the applicant also makes claim to these three rights in Area A, where rights of an exclusive nature may be capable of recognition, it is my view that it is open to me to read the claimed rights as they are framed (as a whole); without an obligation to discretely interpret them. To this end, I take the claimed rights at 15, 16 and 33 to be made as they are phrased; that is, in all areas 'in relation to Areas A, B and C'. Accordingly, as I am unable to consider that these rights are established, prima facie, in Areas B and C, I do not consider them established, prima facie, in Area A. (It would appear in any event that the claim to exclusive possession made in Area A, as a global right, would also encompass the claimed rights at 15, 16 and 33 in relation to Area A.)

With regard to the claimed right listed at 36, I have not taken the same view as the State, which submits that this right should not be registered because prima facie, it cannot be established.

The State contends that the right described at 36 would allow the native title claim group to 'control access of others to areas, notwithstanding that they are claimed in Areas B and C where "exclusive" native title rights cannot exist'. The State relies upon the same principles (in *Ward HC* and *Alyawarr)* in relation to this claimed right, as it does regarding those rights at 15, 16 and 33 discussed above. However, in my view, the particular principles the State refers to may not be applicable in this case. To this end, I note that in *Alyawarr,* Wilcox, French and Weinberg JJ stated the following in relation to the non-exclusive right to protect sites of importance:

> 137 The Northern Territory submitted that the right to protect sites under traditional laws and customs necessarily involves the assertion of a right to control access and to exclude others from the land. The native title rights and interests recognised could not include elements allowing for the exclusion of others. The historical grant of pastoral leases in the area had extinguished the right to exclude and control access to the land so removing the very substance of the right to protect sites.
>
> 138 The applicants submitted that the word 'protect' does not, in ordinary usage, imply the exercise of control over the matter or thing being protected. The right could include protecting places from environmental damage or degradation and seeking to prevent unwitting damage or disturbance by animals or people. None of these activities, it was said, would necessarily involve any control over access to the land by others.
>
> 139 The learned trial judge said (at [322]):
> 'I do not regard the use of the word 'protect' as inappropriate. It contemplates conduct in relation to places and areas of importance which may fall well short of controlling access to those places in a way which is inconsistent with previously granted rights, and the exercise of the right to be recognised is subject to the prevailing activities under the exercise of other rights: s 44H of the NT Act. It is a right which I consider exists independently of the *Northern Territory Aboriginal Sacred Sites Act* (NT).'
>
> 140 One answer to the Northern Territory objection is that the rights determined in par 3 are expressly stated in par 4 to be not exclusive of the rights and interests of others in relation to the land (other than the land covered by the townsite of Hatches Creek). In *Ward FC 2*, the Full Court considered a submission by the Commonwealth that the word 'protect' would give native title holders an entitlement to exclude others from the land. The Court there said (at [25]):
>
> > 'We do not agree. The notion of protection of significant Aboriginal sites is well understood. It may involve physical activities on the site to prevent its destruction,

> but it also extends to control of ceremonial activities. Particularly having regard to the existence of subclause (e), we do not think the words would be read as implying a general control of access.'
>
> Notwithstanding the decision of the Full Court in *Ward FC 2*, counsel for the Northern Territory pressed for a formulation of par 3(d) which would make clear the limitation on the scope of the right to protect. However, the determination read as a whole does not allow ambiguity of the kind propounded in connection with the word 'protect'. His Honour has not been shown to have erred in this matter. The right as formulated in par 3(d) of the determination should stand—*Alyawarr* at [137] to [140].

The right included in the *Alyawarr* determination at paragraph 3(d) was framed in the manner set out below. I note that the framing of the rights in that determination included 'the right to conduct activities incidental to them':

> (d) the right to have access to, maintain and protect places and areas of importance on or in the land and waters, including rock art, engraving sites and stone arrangements[.]

In *Attorney-General of the Northern Territory v Ward* [2003] FCAFC 283 *(Ward FC 2),* the relevant right was framed as follows:

> (d) the right to have access to, maintain and protect the sites of significance on the land of the NT determination area—*Ward FC 2* determination at [para 5(d)].

It would appear that the joint judgment in *Alyawarr* deals with a right framed in similar terms to the right I am considering in this case, and also refers to another similarly termed right considered in *Ward FC 2* on remittal from the High Court in *Ward HC.* Therefore, I am of the view that it is these particular principles set by *Alyawarr* at [136] to [140] and *Ward FC 2* at [24] and [25] which I should rely upon in considering the claimed right at 36[11].

Accordingly, it is my view that prima facie, the right described at 36 can be established based on the materials before me, as I have stated above with regard to the other rights and interests claimed in Areas A, B and C which I consider are established, prima facie.

Rights claimed that are not in relation to land or waters—37 and 38 of 'Rights in Areas A, B and C'

The State also submitted that the claimed rights listed at 37 and 38 should not be registered on the basis that they would allow the claim group 'to control access of others to areas, notwithstanding that they are claimed in Areas B and C where "exclusive" native title rights cannot exist'. While I agree with the State that prima facie, they cannot be established and thus should not be registered, I have come to a different view as to why that is.

In my view, both these claimed rights above are not native title rights and interests in relation to land or waters in accordance with s. 223, but rather, imply claims to rights of an intellectual

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[11] I refer also to these determinations by the Court which recognised non-exclusive rights framed in similar terms to the claimed right in Schedule E at 36: *Hayes on behalf of the Thalanyji People v State of Western Australia* [2008] FCA 1487 at [para 5(e)]; *Eringa, Eringa No 2, Wangkangurru/Yarluyandi and Irrwanyere Mt Dare Native Title Claim Groups v The State of South Australia* FCA 1370 [2008] at [para 9(k)]; *Ngadjon-Jii People v State of Queensland* [2007] FCA 1937 at [para 3.2 (iv)]; and *De Rose v State of South Australia (No 2)* [2005] FCAFC 110 at [para 3 (j)].

property nature—*Ward HC* at [57] to [60]; *Daniel v Western Australia* [2003] FCA 666 at [300] and [301].

Therefore, I am not satisfied that prima facie, the claimed rights at 37 and 38 can be established.

Conclusion

For the reasons above, I am satisfied that prima facie, at least some of the native title rights and interests claimed in the application can be established. 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).

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

In my view, the witness statements by [Name removed] and [Name removed] referred to in my reasons at ss. 190B(5) and s. 190B(6), provide satisfactory material in support of the requisite traditional physical connection.

These men clearly belong to the native title claim group. They describe their lifelong abiding connection with their country pursuant to their law, including how their laws regulate their relationship with country and binds them to it. A part of their physical relationship with country entails a responsibility to look after and protect country overall, as well as significant sites; how they do this is governed by their traditional laws and customs. Both the [Name removed]brothers talk about the rules and stories for their country which direct how they should interact with it. They also recount that such rules and stories were passed down to them, and that they continue to pass them down to their children and grandchildren. They know in detail, about the special places belonging to them on their country. There are many accounts throughout the witness statements and in the Draper report about the generational succession of men 'going through the law', which involves intricate and complex ceremony held on their country, as well as travelling circuits across country during law meeting times. [Name removed] and [Name removed]

describe how they personally have been involved in law ceremonies at significant sites used for law grounds.

On the basis of the extensive information given by [Name removed] and [Name removed] and in the Draper report, I am satisfied that members of the native title claim group currently have, or previously had, a traditional physical connection with the land and waters covered by the application.

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

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

Section 61A provides:

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

(2) If:

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

Both the geospatial assessment and my own searches of the application area confirm that there are no determinations of native title in relation to 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).

Schedule B at paragraph 2 excludes from the application area any land or waters covered by PEPA as defined by s. 23B.

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).

Schedule E states that native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others (exclusive possession) are claimed only in relation to Area A. My understanding, in summary, is that Area A comprises only those areas in relation to which there has either been no prior extinguishment of native title or extinguishment is to be disregarded. Therefore, it does not appear that the claim to exclusive possession is made in areas over which PNEPAs have been done, subject to any areas in relation to which the relevant extinguishment must be disregarded.

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).

The applicant excludes any claim to minerals, petroleum or gas wholly owned by the Crown—at Schedule Q.

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

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

The application does not cover any offshore areas, as stated by the applicant at Schedule P.

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

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

There is nothing before me to indicate that any of the native title rights and interests claimed have been otherwise extinguished.

[End of reasons]

Attachment A
Reasons for ss. 190A(1A) and 190A(6A)

Subsection 190A(1A)

Despite subsection (1), if:

(a) The Registrar is given a copy of an amended application under subsection 64(4) that amends a claim; and

(b) The application was amended because an order was made under section 87A by the Federal Court; and

(c) The Registrar has already considered the claim, as it stood before the application was amended;

The Registrar need not consider the claim made in the amended application

Subsection 190A(1A) **does not** apply to this claim for the reasons given below.

The application has not been amended pursuant to an order under s. 87A by the Court. Therefore, s. 190A(1A) is not applicable in this case.

Subsection 190A(6A)

The Registrar must accept the claim (the **later claim**) for registration if:

(a) a claim (the **earlier claim**) was made in an application given to the Registrar under section 63 or subsection 64(4) (the **earlier application**); and

(b) the Registrar accepted the earlier claim for registration under subsection (6) of this section; and

(c) the later claim was made in an application given to the Registrar under subsection 64(4) that amends the earlier application; and

(d) the Registrar is satisfied that the only effect of the amendment is to do one or more of the following:

(i) reduce the area of land or waters covered by the application, in circumstances where the information and map contained in the application, as amended, 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;

(ii) remove a right or interest from those claimed in the application;

(iii) change the name in the application of the representative body, or one of the representative bodies, recognised for the area covered by the application, in circumstances where the body's name has been changed or the body has been replaced with another representative body or a body to whom funding is made available under section 203FE;

(iv) change the name in the application of the body to whom funding was made available under section 203FE in relation to all or part of the area covered by the application, in circumstances where the body's name has been changed or the body has been replaced by another such body or representative body;

(v) alter the address for service of the person who is, or persons who are, the applicant.

Subsection 190A(6A) **does not** apply to this claim for the reasons given below.

As noted above in the 'Application overview', the application before me is an amended application, given to the Registrar under s. 64(4) of the Act. The original application was first made on 4 June 1996 when it was lodged with the Tribunal and registered on that day in accordance with the Act as it then stood. The application was subsequently considered for registration under s. 190A(6) twice, as set out in the 'Application overview'.

As the application was registered in accordance with s. 190A(6) on 30 September 2005, and has remained on the RNTC since that time, the requirements of ss. 190A(6A)(a), (b) and (c) are met. I note that the application was also later accepted for registration under s. 190A(6A) on 24 November 2010.

I must now consider whether s. 190A(6A)(d) is satisfied. That is, I must be satisfied that the only effect of the relevant amendments is to do one or more of the things set out in ss. 190A(6A)(d)(i) to (v).

I have had regard to the application and find that a number of amendments have been made, including to combine the application with three other applications. The other amendments include changes to the descriptions of:

- the native title claim group;
- the native title rights and interests claimed; and
- the factual basis provided in support of the claimed native title rights and interests.

I am therefore of the view that the application does not satisfy the requirements of s. 190A(6)(d) because I am unable to be satisfied that the only effect of the amendments is to do one or more of the things set out under s. 190A(6A)(d)(i) to (v).

Accordingly, my view is that s. 190A(6A) is not applicable in this case and the application should be considered for registration in accordance with s. 190A(1).

Attachment B
Summary of registration test result

Application name	**Banjima People**
NNTT file no.	**WC11/6**
Federal Court of Australia file no.	**WAD6096/98**
Date of registration test decision	**5 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)		**Aggregate result:** **Met**
		s. 62(2)(a)	**Met**
		s. 62(2)(b)	**Met**
		s. 62(2)(c)	**Met**
		s. 62(2)(d)	**Met**
		s. 62(2)(e)	**Met**
		s. 62(2)(f)	**Met**
		s. 62(2)(g)	**Met**
		s. 62(2)(ga)	**Met**
		s. 62(2)(h)	**Met**

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

Section 190B conditions

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

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