National Native Title Tribunal

Registration test decision

Application name	Widi Mob
Name of applicant	Irwin Lewis, Darryl Woods, Errol Martin, Julie Lewis, Bill Lewis, Gregory Martin and Gloria Lewis
State/territory/region	Western Australia
NNTT file no.	WC97/72
Federal Court of Australia file no.	WAD6193/98
Date application made	26 August 1997
Date application last amended	25 July 2011

Name of delegate Renee Wallace

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

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

Date of decision: 12 December 2011

Date of reasons: 16 December 2011

_____

Renee Wallace

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cwlth) under an instrument of delegation dated 24 August 2011 and made pursuant to s. 99 of the Act.

Reasons for decision

Table of contents

Introduction **4**
Application overview 4
The role of an administrative decision maker 5
Registration test 7
Information considered when making the decision 7
Procedural fairness steps 8
Procedural and other conditions: s. 190C **10**
Subsection 190C(2) Information etc. required by ss. 61 and 62 10
Native title claim group: s. 61(1) 10
Name and address for service: s. 61(3) 11
Native title claim group named/described: s. 61(4) 11
Affidavits in prescribed form: s. 62(1)(a) 11
Application contains details required by s. 62(2): s. 62(1)(b) 12
Information about the boundaries of the area: s. 62(2)(a) 12
Map of external boundaries of the area: s. 62(2)(b) 12
Searches: s. 62(2)(c) 12
Description of native title rights and interests: s. 62(2)(d) 12
Description of factual basis: s. 62(2)(e) 12
Activities: s. 62(2)(f) 13
Other applications: s. 62(2)(g) 13
Section 29 notices: s. 62(2)(h) 13
Subsection 190C(3) No common claimants in previous overlapping applications 13
Subsection 190C(4) Authorisation/certification 15
Merit conditions: s. 190B **27**
Subsection 190B(2) Identification of area subject to native title 27
Subsection 190B(3) Identification of the native title claim group 28
Subsection 190B(4) Native title rights and interests identifiable 29
Subsection 190B(5) Factual basis for claimed native title 29
Combined Reasons for s. 190B(5) 30
Subsection 190B(6) Prima facie case 39
Subsection 190B(7) Traditional physical connection 45
Subsection 190B(8) No failure to comply with s. 61A 46
Reasons for s. 61A(1) 47
Reasons for s. 61A(2) 47
Reasons for s. 61A(3) 47

Subsection 190B(9) No extinguishment etc. of claimed native title 47
Reasons for s. 190B(9)(a): 48
Reasons for s. 190B(9)(b) 48
Result for s. 190B(9)(c) 48

Introduction

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

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

Application overview

The Registrar of the Federal Court of Australia (the Court) gave a copy of the amended Widi Mob claimant application to the Native Title Registrar (the Registrar) on 27 July 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 my reasons are as follows:

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

- I am satisfied that s. 190A(6A) does not apply as the Register has not accepted an earlier claim for registration under subsection (6).

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

The Widi Mob claimant application was first lodged with the Registrar, and entered onto the Register of Native Title Claims (Register) on 26 August 1997. It was subsequently removed from the Register after the enactment of the 1998 amendments to the Act. In between that time and now, the Widi Mob application has been amended on a number of occasions. It has also been the subject of consideration by the Registrar, pursuant to s. 190A, against each of the conditions contained in s. 190B and s. 190C. It has not to date been accepted for registration pursuant to s. 190A.

The Court has also considered various issues regarding the application over the period since its lodgement—see *Martin v Native Title Registrar* [2001] FCA 16; *Martin v Western Australia* [2008] FCA 1677 and *Martin (deceased) v Western Australia (No 2)* [2009] FCA 635.

The most recent of those decisions, being *Martin (deceased) v Western Australia (No 2)* [2009] FCA 635 (*Martin [2009]*), dealt primarily with the authorisation of the applicant to make the application in considering a notice of motion to replace the current applicant under s. 66B of the Act. His Honour, Barker J, considered submissions from the fourth respondent to the matter, Yamatji Marlpa Aboriginal Corporation (YMAC) opposing the motion on behalf of the Badimia native title claimants. They raised the following grounds:

- The applicant is not properly authorised and does not comply with the requirements of s. 66B;

- The claim is made by a subgroup of a larger community. This offends the requirements of s. 61(1) of the Act—at [10] to [11].

Various submissions were put by YMAC in relation to the exclusion of certain members from the native title claim group, specifically relating to the inclusion of a formulaic exclusion in the native title claim group description. Concerns were also raised in relation to the notice given to members of the native title claim group about the authorisation meeting. In finding that the applicant was appropriately authorised to make the application, Barker J stated that:

> For my part, the principles underlying the submission of the fourth respondents, as supported by the State, are clear enough. For example, if the original claim group in the claimant application were described as groups "A and B" and the evidence discloses that only the "A" group has authorised an application to replace the current applicant, then the requirements of s. 66B(1)(b) are not met. Similarly, if group A makes a claim to vindicate the native title rights and interests held by groups A and B, without having the authority of both groups, then the requirements of s. 66B(1)(b) are not met. This simply involves an application of the principles to which the above authorities relate.
>
> In my view, however, the evidence before the Court does not support the submission made on behalf of the fourth respondents and supported by the State that this is such a case.
>
> On the proper construction of the authorisation process undertaken, the claim group as originally described in the claimant application, in its unamended form as lodged by the current claimant (now deceased) were identified with reasonable precision, reasonably notified and had the proper opportunity to meaningfully participate in the meeting to consider the motion to replace the current applicant...
>
> Moreover, as explained below, I do not consider the applicants claim the "Widi Mob" are a subgroup of some larger group whose native title right they seek to vindicate.
>
> I am therefore quite satisfied that on a plain reading and proper understanding of the evidence before me, this is not a case where some group constituted differently from the claim group described in the original claimant application have authorised the making of the application to replace the deceased current applicant. Nor is it a case where some smaller group purports to vindicate the native title rights and interests of some larger group, of which they are a part, without the larger group's authority. Rather the claim group as described in the claimant application, focussed on the relevant issues, provided the relevant authorisation to the proposed applicants to pursue the native title rights and interests that they, and they alone claim—*Martin [2009]* at [76] to [80].

Most recently, the Widi Mob application was the subject of a reconsideration decision by a Member of the Tribunal dated 4 May 2010 (Tribunal's reconsideration decision). In that decision, the Member formed the view that the amended application did not satisfy all the conditions contained in s. 190C and s. 190B, namely s. 190C(4) and s. 190B(3).

The role of an administrative decision maker

I have noted that this application has been the subject of a number of Court decisions, most recently the decision of Barker J in *Martin [2009].* Whilst it is appropriate for an administrative decision maker to have regard to such decisions (and, of course such decisions are binding upon

the Registrar or her delegate, in so far as they pronounce the law), I am mindful that the law mandates a requisite standard of conduct and that '[t]he general rule is that a tribunal that is required to decide an issue will be in breach of that obligation if it merely adopts the decision of the judge on the same issue'— *Cadbury Uk Ltd v Registrar of Trade Marks* [2008] FCA 1126 (*Cadbury*) at [18]. I take this statement to be relevant to the role of a delegate of the Registrar in applying the statutory conditions of the registration test.

Thus, it follows that there are certain expectations upon an administrative decision maker, in the course of making a decision and giving weight to findings of a judge. Finklestein J in *Cadbury* made the following pertinent observations:

> A tribunal may also accept as evidence the reasons for judgement given by a judge in other proceedings. But if the tribunal takes the approach that it should not disagree with findings made by the judge then the tribunal has fallen into error...I do not mean to imply that reasons for decision given by a judge are irrelevant to an administrative tribunal. First of all, those reasons may, as I have said, be received into evidence. They must then be given some weight. Indeed, the judge's findings may be treated as prime facie correct. On the other hand, if the judge's findings are challenged, the tribunal must decide the matter for itself on the evidence before it: *General Medical Council v Spackman* [1943] AC 627—at [18].
>
> Of course, when the tribunal is required to decide the matter for itself it is entitled to have regard to the judge's findings. What weight it attaches to those findings will depend on a variety of considerations. Without in any way wishing to be exhaustive, the considerations can include (a) whether the tribunal has available to it more evidence than was before the judge; (b) whether the arguments put to the tribunal were made to the judge; and (c) whether the tribunal is a specialist body with expert knowledge of the subject matter—at [19].

It is clear in submissions of the applicant made on 31 October 2011, and in other documents before me in relation to the registration testing of this amended claim, that the applicant relies upon the findings made by Barker J in *Martin [2009]*. For instance, the applicant submits that '[f]or the reasons noted...the applicant has been duly authorised by the claim group to bring the claim and deal with matters arising in relation to it. This is supported by the decision of Barker J on 12 June 2009 authorising the replacement of the previous applicant with the currently named applicants.' Also, those submissions refer to other matters that the applicant suggests should guide the decision of the Registrar in this instance. In that regard, the applicant states that:

> On 21 July 2011, Barker J made orders to withdraw the Court's motion to dismiss the Widi Mob native title application and to grant leave to make the amendments sought. In doing so, the Court, in addition to being satisfied that the amendments were duly authorised, confirmed its view of the likely outcome of a future registration test. While this is not, as is the case for the 2010 Reconsideration, determinative or binding upon the Tribunal in a future application of the registration test, it is a relevant matter to take into consideration.

The content of the above submissions raise a number of issues for consideration. In that the applicant relies upon the findings of Barker J in *Martin [2009]*, my approach to those findings will be consistent with the principles outlined above in *Cadbury*. I do note, at the outset, that the information before me is in some respects quite different to that which was before Barker J. Further, it is my view that the applicant's reference to the orders of Barker J dated 21 July 2011, as confirming a view of the likely outcome of the registration test, is misguided. An order by the Court to allow the amendment of a claimant application does not, even by implication, confirm

'its view of the likely outcome of a future registration test.' It is the Registrar whose power is invoked upon receipt of an amended application pursuant to s. 64(4) to consider the claim in the application for registration. The Registrar *must* accept the claim for registration if it satisfies all of the conditions in s. 190B and s. 190C (s. 190A(6)). The Registrar *must not* accept the claim for registration if it does not satisfy all of those conditions (s. 190A(6B)).

The further suggestion that the Registrar may be bound by the Tribunal's reconsideration decision is also misguided. Whilst in my view it is appropriate that I have regard to that decision, I do not consider that I am bound by the decision of the Tribunal Member. Nor do I consider that the applicant is entitled to rely on past decisions or practices of the Registrar—see *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala [2007]*) at [16].

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.

Information considered when making the decision

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

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

On 25 August 2011, upon request from the applicant, I prepared a list of documents that had previously been before the Registrar in relation to the registration testing of this application, and which would form part of my consideration. The applicant was also informed, via the letter of 25 August 2011, that I would have regard to the Tribunal's reconsideration decision. On 26 October 2011, the applicant provided to the Registrar approximately twenty (20) affidavits, sworn by the persons comprising the applicant in 2009, 2010 and 2011. These affidavits were also accompanied by orders of Barker J dated 21 July 2011. On 31 October 2011, the applicant provided further affidavits and submissions to the Registrar, which have formed part of my consideration. These documents are identified in my reasons throughout, where I have had specific regard to the information contained within—see also letter to the applicant dated 25 August 2011, letters from Castledine Gregory (solicitor for the applicant) dated 24 October 2011 and 31 October 2011.

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

information, either in relation to this claimant application or any other claimant application or any other type of application, as required of me under the Act.

Also, I have *not* considered any information that may have been provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice'. 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 18 August 2011, the case manager for this matter sent a letter to the State of Western Australia (the State) enclosing a copy of the Tribunal's application summary showing the details of the amended application. That letter informed the State that any submissions in relation to the registration of this claim should be provided by 16 September 2011, and indicated a decision date of 28 October 2011.

On 19 August 2011, the case manager for this matter sent a letter to the applicant informing them of receipt of the amended Widi Mob application. It also provided the applicant with the opportunity to provide additional information by 16 September 2011 and informed the applicant of the proposed decision date of 28 October 2011.

On 8 September 2011, the applicant wrote to the case manager for this matter requesting an extension of time to submit additional material, being until 14 October 2011. A further correspondence by email, superseding this request, was also received on 8 September 2011. It was apparent from this latter correspondence that the applicant was requesting further time, beyond 14 October 2011, by which to provide additional material. These requests required me to consider whether to delay the application of the registration test. On 12 September 2011, I decided that in the circumstances it was appropriate to allow the applicant's requested extension of time, being until 28 October 2011, and to delay the testing of the application to 25 November 2011—see Memorandum dated 12 September 2011. The State was informed of this extension of time on 12 September 2011.

On 26 October 2011 and 31 October 2011 the applicant provided additional material in relation to the registration testing of this application. On 3 November 2011, a letter to the applicant informed of the obligation to provide the State with an opportunity to consider and comment upon this additional material. A letter to the State dated 3 November 2011 contained a list of the documents received from the applicant, and also detailed that the Registrar could impose confidentiality conditions in relation to some of these documents. Given that a number of these documents had previously been filed in the Federal Court, the letter informed the State that those documents

would only be provided upon receipt of a specific request (and that they would not be subject to any confidentiality conditions).

On 10 November 2011, the State confirmed by email that they did not intend to request any of the documents provided by the applicant. They did not seek to have an opportunity to comment or provide submissions in relation to the registration testing of this application.

Procedural and other conditions: s. 190C

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

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

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

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

In reaching my decision for the condition in s. 190C(2), I understand that this condition is essentially procedural 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)— *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16] and also at [35]–[39]. In other words, does the application contain the prescribed details and other information?

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

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

Native title claim group: s. 61(1)

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

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

The application contains all details and other information required by s. 61(1)—see Part A of the application, which names the persons jointly comprising applicant and contains the statement that those person are authorised by the native title claim group; see also Schedule A, which contains a description of the native title claim group.

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)—see Part B of the application.

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

The application must:

(a) name the persons in the native title claim group, or

(b) otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

The application contains all details and other information required by s. 61(4)—see Schedule A of the application.

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

The application must be accompanied by an affidavit sworn by the applicant that:

(i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and

(ii) the applicant believes that none of the area covered by the application is also covered by an entry in the National Native Title Register, and

(iii) the applicant believes all of the statements made in the application are true, and

(iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and

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

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

Schedule S of the application states that a change to the name of one of the persons comprising the applicant has occurred in this amendment to the application, being the correction of a typographical error in the spelling of one of the seven (7) named persons. This, it is submitted, does not have the effect of changing the person who is named and who was authorised.

The application names Irwin Lewis, Darryl Woods, Errol Martin, Julie Lewis, Bill Lewis, Gregory Martin and Gloria Lewis as the persons jointly comprising the applicant—see Part A of the application. Each of these named persons swore affidavits in May 2009, which accompanied a previous amended application. These affidavits are in substantially the same form, and I am satisfied that each sets out the matters required by s. 62(1)(a)(i) to (v) for the purpose of s. 190C(2).

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

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

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

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

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

The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:

(i) the area covered by the application, and

(ii) any areas within those boundaries that are not covered by the application.

The application contains all details and other information required by s. 62(2)(a)—see Schedule B and Attachment B of 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)—see Attachment C of the application.

Searches: s. 62(2)(c)

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

The application contains all details and other information required by s. 62(2)(c)—see Schedule D and Attachment D of the application.

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

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

The application contains all details and other information required by s. 62(2)(d)—see Schedule E of the application.

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

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

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

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

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

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

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

Schedule F of the application contains a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist. The information regarding the claimant's factual basis contained in Schedule F is somewhat general in nature, but it addresses each of the particular assertions at s. 62(2)(e)(i) to (iii). Thus, the application contains all the details and other information required by s. 62(2)(e).

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)—see Schedule G of the application.

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

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

The application contains all details and other information required by s. 62(2)(g)—see Schedule H of the application.

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

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

The application contains all details and other information required by s. 62(2)(h)—see Attachment HA of the application.

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

> The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:
> (a) the previous application covered the whole or part of the area covered by the current application, and

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

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

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

Is there a previous application?

The Tribunal's Geospatial Services prepared a geospatial assessment and overlap analysis (GeoTrack:2011/1323) on 8 August 2011 (geospatial assessment). The geospatial assessment identifies five (5) applications as per the Schedule of Applications—Federal Court that fall within the external boundary of this amended application. I have also undertaken a search of the Tribunal's mapping database to verify that this information is still current at the date of this decision—see overlap analysis dated 12 December 2011.

The geospatial assessment also identifies that four (4) of these applications are on the Register of Native Title Claims (Register). Those applications on the Register are: Federal Court number WAD6119/98—Mullewa Wadjari Community, placed on the Register on 19 August 1996; Federal Court number WAD6192/98—Yued, placed on the Register on 22 August 1997; Federal Court number WAD6002/04—Amangu People, placed on the Register on 3 March 2005; and Federal Court number WAD6033/98—Wajarri Yamatji, placed on the Register on 5 December 2005.

The current application was made on 26 August 1997. As at that date, I am satisfied that two (2) of the above applications were on the Register, being Mullewa Wadjari Community and Yued. I am also satisfied that the entry on the Register, for each of these applications, was made, or not removed as a result of being considered for registration under s. 190A.

On that basis, I have formed the view that the Mullewa Wadjari Community and Yued applications are previous applications for the purpose of s. 190C(3).

Common Claimants

I must be satisfied that no person included in the native title claim group for the current application was a member of the native title claim group for the previous applications identified above.

In forming the view that there are no common claimants between this amended application and the Mullewa Wadjari Community and Yued applications I have had regard to the extracts of the Register pertaining to the two previous applications, the information in the amended application (specifically Schedule O) and the applicant's submissions filed with the Registrar on 31 October 2011.

I am 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 (meeting the requirements of ss.190C(3)(a) to (c)).

Subsection 190C(4) Authorisation/certification

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

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

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

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

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

a) where there is a process of decision–making that, under the traditional laws and customs of the persons in the native title claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group . . . authorise the person or persons to make the application and to deal with the matters in accordance with that process; or

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

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

(a) includes a statement to the effect that the requirement in s. 190C(4)(b) above has been met, and

(b) briefly sets out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

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

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

Section 190C(4)(b) requires that I must be satisfied that the applicant is a member of the native title claim group and is authorised to make the application by all the other persons in the native title claim group. Before examining the requirements of s. 190C(4)(b), I must first consider whether the application contains the information required by s. 190C(5)(a) and (b).

For the reasons set out below, I am **satisfied** that the requirements set out in s. 190C(4)(b) and s. 190C(5)(a) and (b) are met.

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

For the purpose of s. 190C(5)(a), the application must contain a statement to the effect that the requirements of s. 190C(4)(b) have been met.

Schedule R of the application contains statements to the effect that the requirements of s. 190C(4)(b) have been met.

For the purpose of s. 190C(5)(b), the application must briefly set out the grounds on which the Registrar should consider that the requirements of s. 190C(4)(b) have been met. I consider that Schedule R of the application also sets out the requisite information.

The application contains the information required by s. 190C(5).

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

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

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

Background to the applicant's authorisation

As previously stated, this application has a lengthy history. It was most recently the subject of a reconsideration decision by a Member of the Tribunal on 4 May 2010 (Tribunal's reconsideration decision) and also the subject of a decision by the Registrar's delegate on 16 December 2009 (delegate's 2009 registration test decision). I am not bound by either of those decisions, but in my consideration of this amended application I have had regard to the decisions and accompanying reasons. They both disclose a number of issues in relation to the authorisation of the applicant, a summary of which provides context to the material and submissions that the applicant has put before me in relation to this amended application.

A formulaic exclusion in the native title claim group description for the previous amended application was the subject of some consideration in the delegate's registration test decision and the Tribunal's reconsideration decision, with a divergence in outcome as to the effect this exclusion had on the issue of whether the applicant is a member of the native title claim group and whether the applicant is authorised to make the application. This formulaic exclusion does not form part of the native title claim group description for this amended application.

Further, a clear discrepancy in the native title claim group description between previous versions of the amended application also raised issues around the authorisation of the applicant. In that regard, the Tribunal's reconsideration decision elucidates that:

> ...there is clear evidence that the current claim group description excludes persons who previously were identified as part of the claim group, with no objective basis for this exclusion being given.
>
> The material before me provides a potentially confused picture of who is, or is not, a member of the claim group. It is at least open to me to conclude that certain members of the claim group have been deliberately excluded from the application, and thus the authorisation process has been tainted. I am unable to conclude that all persons who identify as members of the Widi Mob have been given an opportunity to participate in the authorisation process. I am therefore unable to conclude that the current applicant has been authorised to make the application.

Similiar issues regarding this application were also canvassed in the decision of Barker J in *Martin [2009]*. Both the Registrar's delegate in 2009 and the Tribunal Member in 2010 took a contrary view to that of Barker J in relation to the information before them in relation to the authorisation of the applicant.

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

The applicant is jointly comprised of seven (7) named persons, being Irwin Lewis, Darryl Woods, Errol Martin, Julie Lewis, Bill Lewis, Gregory Martin and Gloria Lewis.

Schedule R of the application contains the statement that the applicant is a member of the native title claim group. Further, each of the affidavits of the persons comprising the applicant contains a statement supporting that they are a member of the native title claim group.

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

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

The authorisation material

Schedule R of the application sets out a summary of the applicant's authorisation material, including reference to various affidavits sworn in May and June of 2009, by the persons comprising the applicant, in support of an application to replace the applicant and in support of an order seeking leave to amend the application. It also refers to an affidavit of Errol Martin, sworn 24 June 2011 and filed in support of an application to further amend the claimant application.

It sets out that those documents confirm the following:

- An authorisation meeting was held on 8 April 2009[1] to authorise the named person comprising the Applicant to make the application by the members of the native title claim group to which the application relates.

[1] This date differs from the date that is set out in the affidavits of each of the persons comprising the applicant that were sworn in May and June of 2009. Those affidavits refer to the meeting as taking place on 9 April 2009—see for instance the affidavit of Errol Martin sworn 11 June 2009. I do not attach any significance to this discrepancy.

- This meeting, held in April 2009, was the subject of reasonable prior notice to the members of the native title claim group. At the meeting, it was decided that there was no relevant traditional decision-making process and the members of the claim group agreed to and adopted a decision-making process, where decisions were made by majority.
- A majority of the persons present at the meeting authorised the applicant to bring the application and to deal with matters arising in relation to it.
- Subsequently, a further meeting of the native title claim group was held on 4 April 2011. The purpose of this meeting was to authorise the applicant to make further amendments to the application.
- This meeting, of 4 April 2011, was held after the provision of reasonable notice was given to members of the native title claim group.
- At the meeting, the decision making process was akin to the one adopted previously at the meeting on 8 April 2009 (described above), where decisions were made by majority vote of the members of the native title claim group.
- A majority of members present at the meeting duly authorised the making of the amended application.

The affidavit of Errol Martin, sworn 24 June 2011, also discusses events pertaining to the authorisation of the applicant, in particular the meeting of 4 April 2011. In that affidavit, Mr Martin outlines that:

- The purpose of the proposed meeting included several amendments to the application, namely the reinsertion of previously deleted claim group member names to the native title claim group description, deletion of the proviso (referred to above as the formulaic exclusion) in the native title claim group description and the reduction in the boundaries of the Widi Mob claim area (to the extent of the overlap with the Badimia Claim).
- A notification process was undertaken in relation to the meeting of 4 April 2011. It included public notification, inviting the Widi Mob claim group members. It also included efforts to compile a comprehensive list of claim group members and to personally notify those identified, by post, email and telephone. Approximately 150 members were identified.
- Members of the Widi Mob claim group were given the opportunity to send in proxy voting forms prior to the meeting. In total, forty (40) proxy forms were received (with two (2) being subsequently disregarded as those persons attended the meeting).
- The authorisation meeting on 4 April 2011 was held at Birralee Reserve Hall in Innaloo at 1pm. An attendance register was kept and recorded that 34 members of the Widi Mob attended the meeting.
- Solicitors for the claim explained to the attendees at the meeting the background to the amendments proposed.
- The attendees at the meeting were asked to consider whether there was a traditional decision-making process. The attendees confirmed by vote that there was no such process. They agreed to adopt a process of decision-making as outlined in Annex 1 to the notice of

the meeting received by members of the native title claim group, being that each member has a right to one vote by show of hands with a 50% majority vote carrying the resolution.

- A number of resolutions were made and passed by majority at the meeting. Those resolutions included approving the amendments to the application and also for Errol Martin, [Person 1] and [Person 2] to swear affidavits and to take all necessary steps to implement the resolutions passed at the meeting for the purpose of filing those amendments with the Federal Court and seeking registration.

In the affidavit, Mr Martin also suggests that the authorisation of the applicant is supported by affidavits sworn in May and June of 2009 by the persons comprising the applicant and the orders of the Court dated 12 June 2009 per Barker J confirming the replacement of the applicant with those currently named in the application. He also refers to his own affidavits sworn 17 September 2010, 5 October 2010, 13 October 2010 and 9 December 2010.

The affidavits of Mr Martin that were sworn in September, October and December of 2010, in essence comprise a dialogue with the Court defending a proposed dismissal of the application pursuant to s. 190F(6). In those affidavits, Mr Martin describes the issues that prevented the claim's registration, as per the Tribunal's reconsideration decision. An explanation of what is contained in those affidavits is set out in the affidavit sworn 24 June 2011, where he states that:

> 8. I rely upon what has been said in those affidavits in support of this notice of motion.
>
> 9. I have said that the Applicants had decided to ask the Widi Mob for permission to reinsert the following persons into the Claim group description: [Person 3] (deceased), [Person 4], [Person 5], [Person 6], [Person 7] (deceased) and [Person 8] (deceased) and their biological descendants (Martin December affidavit, paragraphs 22, 24.1).
>
> 10. I have said that it would not be necessary to reinsert the second reference to [Person 9] (being described as the daughter of [Person 10]) as this reference was an error and should have been a reference to [Person 11]. I said that it was not necessary to include [Person 11] name either as she is deceased and died without having had any children (Martin December Affidavit, paragraph 22).
>
> 11. I have said that the Applicants had decided to ask the Widi Mob for permission to delete the proviso included in the last amendments to the Claim group description (Martin December Affidavit, paragraph 24.2).
>
> 12. I have said that the Applicants had decided to ask the Widi Mob for permission to reduce the Widi Mob Claim area to the extent of the overlap with the Badimia Claim...

On 31 October 2011, the applicant provided submissions to the Registrar in relation to the registration testing of this matter. Those submissions set out the material upon which the Registrar should be satisfied that the application meets the requirements of s. 190C(4), including reference to the following:

- Recent amendments were made to the claim on 12 June 2009. These amendments had been the subject of an authorisation meeting on 8 April 2009, where the applicant was duly authorised to make the amended application.

- That authorisation of the applicant (being of the same persons who now comprise the applicant) was accepted in the decision of Barker J dated 12 June 2009 granting leave to amend Schedule A of the Claim by, inter alia, replacing the previously named applicant.
- That original authorisation of the applicant, on 8 April 2009, was broad in scope and was not limited.
- Subsequent authorisation has been obtained on 4 April 2011, where Errol Martin, [Person 1] and [Person 2], for instance, were authorised to do all things necessary to implement specific amendments to the claim. This did not affect the authorisation of the named applicants to the claim that had been previously obtained.

The above summary represents a relatively condensed version of all the material before me as to the authorisation of the applicant. On 26 October 2011, the applicant provided approximately twenty (20) affidavits that are relevant to the authorisation of the applicant to make the application (some sixteen (16) of those affidavits pertain to the purported authorisation of the applicant in April 2009, which was considered by Barker J in *Martin [2009]* and in the Tribunal's reconsideration decision). Further submissions from the applicant pertaining to the issue of authorisation were received on 31 October 2011.

Who must authorise the applicant?

It is the native title claim group, as defined in s. 61(1), who must authorise the applicant to make a claimant application. Accordingly, the native claim group comprises 'all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed'—s. 61(1).

The importance of authorisation, and the ensuing fatality of non-compliance with s. 61(1) was discussed in *Reid v South Australia* [2007] FCA 1479, where his Honour Finn J held that:

> Where the authorisation of s 61(1) is not complied with, the non-compliance is fatal to the success of the application: *Moran v Minister for Land and Water Conservation for the State of New South Wales* [1999] FCA 1637 at [48]; *Strickland* at [56]-[57] (approved in *WA v Strickland* at [77]-[78]; *Drury v Western Australia* [2000] FCA 132;(2000) 97 FCR 169 at [10]; *Daniel v Western Australia* [2002] FCA 1147;(2002) 194 ALR 278 (FCA) at [11]; *De Rose FCA/O'Loughlin J* at [933]. Authorisation ***must be by all the persons who constitute the native title claim group*** [emphasis added] in respect of the common or group rights and interests comprising the particular native title claimed: *Risk v National Native Title Tribunal* [2000] FCA 1589 at [30]; *Dieri People v South Australia* [2003] FCA 187; (2003) 127 FCR 364 at [55] ('*Dieri People*'); *Tilmouth v Northern Territory* [2001] FCA 820; (2001) 109 FCR 240—at [29].

The relevance of the above to the registration procedures has also been the subject of consideration by the Court, including in *Edward Landers v South Australia* [2003] FCA 264 (*Landers*), where Mansfield J held that:

> The proper identification of the native title claim group is the central or focal issue of a native title determination application. It is the native title claim group which provides the authorisation under s 251B, and it is the group on whose behalf the claim is then pursued and, if successful, in whose favour a determination of native title in then made. ***I do not consider the registration procedures as introduced in Pt 7 of the NT Act in 1998 were intended to detract from that focus*** [emphasis added]—at [35].

Further, it follows from the above principles that a native title claim group is not verified by simply having regard to the way in which the applicant chooses to define the claim group in an application—*Risk* at [34] to [35]. Having said that, it is apparent that the way in which the native title claim group is described in various versions of this claimant application has been the focus of much of the scrutiny and inquiry around the authorisation of the applicant. I have not confined my consideration to such, but I am mindful that any broader deliberation must be approached within the bounds of the Registrar's task at s. 190A and within the ambit of practicality.

The nature of the consideration

The task at s. 190C(4)(b) is such that it involves a consideration by the Registrar of the actual 'identity' of the claimed native title holders, in the sense of being satisfied that the requirements of s. 61(1) are met. It also requires consideration of whether all of those identified persons authorised the applicant to make the application— see for instance *Wiri People v Native Title Registrar* [2008] FCA 574 at [26] to [36].

It is s. 251B that guides the Registrar when examining authorisation in the context of a claimant application. It specifies that *all the persons* in the native title claim group must authorise the applicant to make an application in compliance with either of the processes set out in paragraphs (a) or (b). The identification of the appropriate decision-making process and whether it was complied with is the primary consideration—*Noble v Mundraby* [2005] FCAFC 212 (Noble) at [16].

It is apparent in the material that is before me in relation to the authorisation of the applicant that is said to have occurred at the meetings in April 2009 and April 2011 that an agreed decision-making process was adopted. At both meetings, that decision-making process entailed each member of the native title claim group present having the opportunity to vote, with a resolution to be carried by a majority of votes from members. Thus, it is s. 251B(b) that must guide my consideration of the applicant's authorisation material.

What may be required to satisfy the Registrar that an applicant has been authorised by *all* the persons in the native title claim group, in accordance with s. 251B(b) was the subject of consideration in *Lawson v Minister for Land and Water Conservation (NSW)* [2002] FCA 1517 (*Lawson*). The word 'all' in the context of authorisation pursuant to s. 251B, was afforded 'a more limited meaning than it might otherwise have'. Stone J held, in relation to s. 251B(b), that it is not necessary for each and every member of the native title claim group to authorise the making of an application, but rather '[i]t is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision making process'—*Lawson* at [25].

A reasonable opportunity to participate may be reflected in material demonstrating that an authorisation meeting was well-attended and appropriately advertised or communicated to all members of the native title claim group—*Lawson* at [27]. What is a reasonable opportunity, in my view, will also manifest from the particular circumstances of the matter. For instance, in relation to the authorisation processes undertaken by the claimants in 2009 and 2011, it is apparent that such decisions of the native title claim group are intended to be made via a participatory mechanism, where all members are given the opportunity to partake in the process.

Where authorisation occurs in the context of an organised meeting of the native title claim group, the decison in *Ward v Northern Territory* [2002] FCA 171 (*Ward*), also provides some guidance as to

the kind of information that may be required to satisfy the Registrar that the applicant is authorised in accordance with s. 251B. His Honour stated the following:

> Who convened it and why was it convened? To whom was notice given and how was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded?—at [24].

The applicant's authorisation at the meeting in April 2009

As previously noted above, the issue of the identity of the native title claim group, and its authorisation of the applicant to make the application, was the subject of extensive deliberation in the Tribunal's reconsideration decision (a decision to which I am not bound but which I consider it is appropriate that I have regard to). That decision relates specifically to the purported authorisation of the applicant at the meeting of the native title claim group in April 2009 (which by my understanding of the above material, the applicant continues to rely upon in relation to this amended application). In the Tribunal's reconsideration decision, the Member came to the following conclusions:

- There is clear evidence that the current claim group description excludes persons who previously were identified as part of the claim group, with no objective basis for this exclusion being given;
- He could not be satisfied that all persons who identify as Widi Mob had been given the opportunity to participate in the authorisation process;
- In the face of that clear evidence, he could not accept the conclusions reached by Barker J in *Martin [2009]* that the applicant was authorised by the native title claim group, as described in the original application; and
- The authorisation process was tainted by the exclusion of those persons previously identified as part of the Widi Mob—see Tribunal's reconsideration decision [109] to [165]..

The applicant's own admissions in a number of affidavits sworn in September, October and December of 2010 and June 2011, give further context and cogency to the Tribunal's reconsideration decision. Four of those affidavits were sworn by Errol Martin (dated 17 September 2010, 5 October 2010, 13 October 2010 and 9 December 2010) and one affidavit from [Person 1] (sworn 9 December 2010). On my understanding of the information contained in those affidavits the applicant accepts the following:

- The deletion of seven (7) persons from the native title claim group description in the original claimant application occurred under the second and third amendments to the claim on 26 August 1999 and 14 January 2000, respectively—affidavit of Errol Martin, 17 September 2010 at [16.3] to [16.5];
- There is no reason known to the applicant for the deletion of those persons—affidavit of Errol Martin, 17 September 2010 at [16.5];

- The applicant placed reliance upon how the claim had been prepared by the previous registered applicant and was not aware of the deletion of those seven persons—affidavit of Errol Martin, 5 October 2010 at [19];
- Only after having received detailed advice in the past month has the applicant come to understand the remaining obstacles to registration (including authorisation) and the applicant has since been committed to resolving those matters—affidavit of Errol Martin, 5 October 2010, at [21];
- After undertaking inquiry, six (6) of those deleted persons and their descendents should be included in the native title claim group as they are members of the Widi Mob. The other remaining one of those deleted persons was mistakenly identified and should have been a reference to another named person. That other person, however, died without any children and there is no need to include them in the native title claim group description—affidavit of Errol Martin, 24 June 2011, at [9] and [10]; and
- Those deleted persons are required to authorise the applicant to make the application—affidavit of Errol Martin, 24 June 2011, at [20.2] where reference is made to notifying those persons previously excluded of the proposed authorisation meeting.

It is my view of the above material (being the affidavits sworn in September, October and December 2010 and June 2011) that the applicant does not dispute the findings made by the Member in the Tribunal's reconsideration decision that at least (6) of the identified persons were deleted from the native title claim group for no apparent legitimate reason and that neither they, nor their descendants, were afforded any opportunity to participate in authorising the applicant to make the application at the meeting in April of 2009.

There is also further information before me as to the identity of all the persons in the native title claim group, and which goes to the issue of their being afforded a reasonable opportunity to participate in the authorisation of the applicant to make the application at the meeting in April 2009.

The affidavit of Errol Martin, sworn 24 June 2011 indicates that after undertaking inquiry into the identity of all the persons in the native title claim group, including in relation to the seven (7) deleted persons and their descendants, 153 persons were identified as comprising all the persons in the native title claim group—at [39]. In the affidavit of Errol Martin, sworn 11 June 2009, he states that he believes that a list comprising 79 persons is an accurate reflection of all the persons described in the claim group, and it was to those persons *alone*[2] whom notice of the meeting in April of 2009 was given—at [6] to [17]. It would appear that in comprising this list of persons no regard was had to how the native title claim group was described in the original application. This discrepancy, in my view, is further indicative of a failure to take practical and logical steps to identify all the persons in the native title claim group and to afford them a reasonable opportunity to participate in authorising the applicant to make the application.

[2] See for instance, the affidavit of Errol Martin, sworn 11 June 2009, where he confirms that notice was only given to those 79 persons whose names appeared on the list. This is also confirmed by Barker J in *Martin*, where his Honour recites that 'Errol Leonard Martin then distributed a notice to all persons named in the list at the addresses shown in the list and to others to whom he could hand the notice'—at [26].

The applicant's own submissions and affidavits in support of the authorisation of this amended application, fail to comprehend the incurable nature of the undisputed facts surrounding the authorisation that is asserted to have been given by the native title claim group at the meeting in April 2009. To the extent that the applicant's material seeks to clarify the circumstances surrounding that authorisation meeting in order to validate those obvious failures, that elucidation, in my view, does not circumvent the requirement that it is the native title claim group (as defined in s. 61) which must provide the necessary authorisation under s. 251B of the Act. It cannot be provided by a different or a smaller group of persons—*Landers* at [34] to [35].

It is my view of the material before me that the conduct around authorisation in April 2009 reflects that the applicant was not authorised by all the persons in the native title claim group (as defined in s. 61(1)) as required by s. 251B.

The applicant's authorisation at the meeting in April 2011

In contrast to the above, the material before me suggests that the conduct around authorisation of the applicant in April 2011 is markedly different.

In that regard, the affidavit of Errol Martin, sworn 24 June 2011, sets out that the approach that was taken to identifying all the persons in the native title claim group. This included those persons who had previously been excluded and identified in the Tribunal's reconsideration decision. In that affidavit Mr Martin says that:

> [Person 1], [Person 2] and I put together a list of the Widi Mob that were known to us at the time and their addresses or, where we did not have addresses, those of relatives through whom we could send a notice. These totalled 127 people. This was greater than the members identified in my affidavit of 11 June 2009 filed in these proceedings as:
>
> we have been able since that time to find more people who are members of the Widi Mob and learn of their children's names and addresses; and
>
> we have included in the list those persons who were previously excluded from the Claim group description and their descendants as noted above.
>
> I am told by [Person 2] and I believe that she hand delivered notices of meeting to seven members on 21 March 2011.
>
> I am told by my solicitor and I believe that the remaining 120 notices for members for whom we had postal addresses were sent on 22 March 2011.
>
> I am told by [Person 2] and I believe that she sent emails to 33 members for whom we had email addresses, particularly where they lived interstate or in regional Western Australia, so that they could get the notice as soon as possible, but we still sent copies by post to them.
>
> I am told by our solicitor and I believe that a notice of the meeting was advertised in the West Australian newspaper on Wednesday, 23 March 2011, a copy of which is annexed to this affidavit as Annexure ELM2.
>
> Later that week, Julie Lewis, one of the named Applicants, told our solicitor of 11 more members who had not received notice. These persons were not on our list before because we did not have contact details for them. I am told by our solicitor and I believe that notices were

> posted or emailed to these people by 25 March 2011, and the names and addresses added to our list.
>
> I am told by my solicitor and I believe that another eight Wid members and their addresses were identified, including children of listed members who had reached adult age. I am told by my solicitor and I believe that notices were posted or emailed to them on 30 March 2011, and their names and addresses added to our list.
>
> From 21 March 2011 to 30 March 2011, our list of members grew to 147 people. 146 of the 147 known members on our list were sent prior notice of the meeting by hand delivery, post or email, apart from the general advertisement in the newspaper.

This affidavit of Mr Martin also details the conduct at the authorisation meeting in April 2011. He confirms: the number of members in attendance, the number of proxy votes received, who chaired the meeting, the details of the decision-making process agreed to and adopted by members of the native title claim group and the resolutions passed.

The resolutions that were put to the meeting dealt primarily with the proposed amendments to the application, being the changes to the native title claim group description, deletion of the proviso (formulaic exclusion) to that description and the reduction of the application area to remove the overlap with the Badimia application. A further and final resolution related to permitting Errol Martin, [Person 1] and [Person 2] to swear affidavits to apply for leave from the Court to amend the claim and to undertake all necessary steps to register the claim with the Tribunal—affidavit of Errol Martin, sworn 24 June 2011, at [51] to [63].

No specific resolution passed at the meeting related to the authorisation of the seven persons comprising the applicant to make the application. It is perhaps for this reason that the applicant seeks to rely upon the authorisation meeting that occurred in April 2009. In my view, nothing turns on the fact that no such precise resolution was put to the members of the native title claim group. It is implicit from the native title claim group's authorisation of the amendments to the claim and other resolutions that they were authorising the applicant, as comprised of the seven named persons, to make the application and to deal with all matters arising in relation to it.

Conclusion

I do not consider that I could or ought to reach any definitive view as to the correctness of the native title claim group. In particular, as to whether in addition to the issue of the exclusion of those seven (7) identified persons there remains a residual question of the existence of a much wider group. Below, in my reasons at s. 190B(5), I note the various nuances in the applicant's material that, depending upon the decision-maker, may be subject to quite different interpretation. Such issues are generally of a complex and exacting nature, concluded only after meticulous regard is had to considerable evidence, and I am compelled by the limitations of the Registrar's task—*Doepel* at [16]. Even given that the Registrar is permitted to undertake some analysis of the 'identity' of the native title claim group, it is my view, that in the circumstances particular to this matter, it is appropriate to curtail any further deliberation beyond that which is detailed above.

I am satisfied that the material demonstrates that all reasonable steps were taken to advise members of the Widi Mob native title claim group of the authorisation meeting. I am also satisfied that at the meeting of the claim group on 4 April 2011 the applicant was duly authorised

in accordance with s. 251B(b) to make this application and to deal with all matters arising in relation to it.

Merit conditions: s. 190B

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

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

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

Area covered by the application

Schedule B of the application sets out that the external boundaries of the area covered by the application area as set out in the description at Attachment B and the map at Attachment C.

Attachment B of the application is a metes and bounds description referencing coordinate points, local government authority boundaries, existing native title application boundaries and the mean high water mark. It also includes notes relating to the source, currency and datum of information that was used to prepare the description.

Attachment C is a map of the application area. It includes the application area depicted in a bold outline and hachure. It also includes land parcels that are colour coded and labelled and placenames.

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

I am satisfied that the external boundaries of the application area have been described with sufficient clarity, such that the location of it on the earth's surface can be identified with reasonable certainty.

Areas not covered by the application

The areas not covered by the application are identified in Schedule B of the application. This includes a list of general exclusions.

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

In that regard, I have considered the information in the application provided at Schedule D and Attachment D, containing details of searches carried out by the applicants to determine the existence of any non-native title rights and interests in relation to the land and waters in the application area.

Notwithstanding the above, it is in my view appropriate that the written description contain general exclusions of the kind at Schedule B. As noted in *Daniel* by Nicholson J '...issues of validity in respect of interests may be incapable of concession until the native title determination decides relevant issues'—at [29]. In my view, the written exclusions in Schedule B adequately reflect the state of knowledge of the applicant at this time.

Decision

In my view, both the written description and the map of the application area are clear and identify the area with reasonable certainty. Thus, it is my view 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 the native title rights and interests are claimed in relation to particular land or waters'.

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

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

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

The native title claim group description

The description of the native title claim group appears in Schedule A of the application as follows:

> The claim is brought on behalf of [31 named persons] and their biological descendants.

Consideration of the description

The task of the Registrar in examining a description of the native title claim group for the purpose of s. 190B(3) was the subject of consideration in *Doepel*. Its focus is upon the adequacy of the description to facilitate the identification of the members of the native title claim group, rather than upon its correctness—at [37] and [51].

Invariably a description of the native title claim group will involve the application of conditions or criteria upon which membership to the group is determined. In my view the relevant inquiry for the Registrar (or her delegate), as it was for the Court in *Western Australian v Native Title Registrar* [1999] FCA 1591 (*WA v NTR*), is whether applying the conditions specified will allow for a sufficiently clear description of the native title claim group in order to ascertain whether a particular person is in that group. It may be that I will ascertain that the description is such that it necessitates 'some factual inquiry' be undertaken, '[b]ut that does not mean that the group has not been described sufficiently'—*WA v NTR* at [67].

The description of the native title claim group in Schedule A is such that it includes persons who are the descendants of named persons and their biological descendants.

Describing a claim group in reference to named persons and their descendants is one method that has been accepted by the Court as satisfying the requirements of s. 190B(3)(b)—see *WA v NTR* at [67]. Thus, I too accept that such a method of identifying claim members is compliant with the requirements of s. 190B(3)(b), providing an objective point at which to commence an inquiry about whether a person is a member of the native title claim group.

In my view, the description of the native title claim group is such that it can be ascertained whether any particular person is a member of the group.

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

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

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

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

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

The native title rights and interests claimed appear at Schedule E of the application. The applicant claims the right to possess, occupy, use and enjoy the lands and waters covered by the application, where such a right can be recognised. The applicant also claims a number of non-exclusive native title rights and interests that relate primarily to accessing the application area and conducting certain activities on the application.

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

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

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

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

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

Combined Reasons for s. 190B(5)

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

There are clear principles established by the Court which must guide the Registrar when assessing the sufficiency of a claimant's factual basis. They are:

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

It is, however, important that the Registrar consider whether each particularised assertion outlined in s. 190B(5)(a), (b) and (c) is supported by the claimant's factual basis material. In that respect, the decisions of Dowsett J in *Gudjala [2007]* and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala [2009]*) give specific content to each of the elements of the test at s. 190B(5)(a) to (c). The Full Court in *Gudjala FC,* did not criticise generally the approach that Dowsett J took in relation to these elements in *Gudjala [2007]*[3], including his Honour's assessment of what was required within the factual basis to support each of the assertions at s. 190B(5). His Honour, in my view, took a consonant approach in *Gudjala [2009]*.

Having regard to those decisions, it is, in my view, fundamental to the test at s. 190B(5) that the applicant describe the basis upon which the claimed native title rights and interests are alleged to exist. Accordingly, this was held to be a reference to rights vested in the claim group and further that 'it was necessary that the alleged facts support the claim that the ***identified claim group*** [emphasis added] (and not some other group) held the identified rights and interests (and not some other rights and interests)'—*Gudjala [2007]* at [39]. This, in my view, confirms the need for adequate specificity within the claimant's factual basis material in order to satisfy the Registrar of its sufficiency for the purpose of s. 190B(5).

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

The Law

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

On this aspect of the factual basis, Dowsett J observed that the factual basis must demonstrate that the whole claim group presently have an association with the claim area and that their predecessors also had an association since sovereignty, or at least since European settlement. This, however, should not be taken to mean 'that all members must have such an association at all times' but rather that there be some 'evidence that there is an association between the whole group and the area' and a similar association of the predecessors—*Gudjala [2007]* at [52]; *Gudjala FC* at [90] to [96].

Further, I am to be informed as to the nature of the claimant's association with the application area on the basis of the information provided, but am not obliged to accept broad statements which are not geographically specific—*Martin v Native Title Registrar* [2001] FCA 16 at [26].

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

The bulk of the claimant's factual basis in support of this assertion is contained in a number of affidavits of members of the native title claim group, including:

- affidavit of Joan Martin, sworn 24 August 1998;
- draft (unsigned) affidavit of [Person 12], 14 June 1999;
- affidavit of Joan Martin, sworn 20 July 1999;
- affidavit of Irwin Lewis, sworn 7 December 2009;
- affidavit of [Person 6], sworn 27 October 2011; and
- affidavit of [Person 2], sworn 28 October 2011.

There are also a number of letters and other draft affidavits/statements from claimants and former representatives of the applicant. These documents are dated between 1999 and 2009. Extracts from a book titled 'Joan Martin (Yarrna) A Widi Woman' (Joan Martin book) was also provided to the Registrar on 31 October 2011.

The extracts from the Joan Martin book give context to the asserted association of the Widi Mob with the application area dating back to pre-sovereignty. The extracts include reference to the predecessors of the native title claim group and to the nature of the society that is claimed to be the repository of the group's traditional laws and customs as recited by Joan Martin, including:

> Widi was made up of different tribes, groups and that's where you get your skin groups, the ones you're allowed to marry and the ones you're not.
>
> The genealogies really start with Ginny of Irwin and Tom Phillips...They lived on the Irwin River.
>
> My Mum's father was known as Tom, and Ginny of Irwin was the great-grandmother [Tom's mother]. She came from the Irwin River...They were all full-blooded people and belonged to the Wageral tribe or thereabouts.
>
> They said she [Ginny] was about seventy four when she died on 23 May 1925, so she must have been born around 1851. I'm not aware of her Aboriginal name but the old feller – the old great-grandfather of mine – he was known as *maluka*. His son, young Tom, was *Ullamarra*.

> My grandfather and great-grandfather were very high in the law there, so they had a great big space all over the place in that area, as people when around to check on the law ground and the sacred sites, everything like that, and they knew everybody. They'd go from groups of people that belonged to the same tribe, all around in the large area [around Morawa and Widi country in general]. People all spoke the same language.
>
> All that area that I named, my grandfathers walked that country. My mother did too. They stayed mostly around Mullewa. That was their home ground. They'd come back to Mullewa. It was like walkabout. Morawa was where I was born, not knowing what it was all about though. Dongara, Mingenew, Mullewa, Perenjori – all that there it's really familiar.

The extracts from the Joan Martin book give a general history of the Widi Mob as told by Joan Martin, dating back to her grandparents and great-grandparents. She also provides details of her own association with the area and that of other members of the Widi Mob.

This kind of information setting out the history of the claim group's association is also evident in the affidavits of Joan Martin, sworn in August 1998 and July 1999, where she sets out that she was born in the heart of Widi country, at Morawa. She has a continuing traditional connection to the land and waters of the application area through descent from her mother (who was born at Gutha) and through her mother's father (who was born and buried in the application area in Minenew). She is informed of the nomadic lifestyle of her predecessors, which took them across country. She cites various places within the application area that are of importance to the native title claim group, including:

> Many tribal gatherings were held on the Widi territory where songs familiar to the mob were sung and young people were initiated all through the area.
>
> Tallerang Peaks, which is part of the Widi peoples' area, has a long history with our people.
>
> Many Aboriginal babies were born in a special cave at Tallerang and it was always a tribal camping and meeting ground for surrounding mobs where all the important Elders and Special People met from all over the Gascoyne/Murchison area. These meetings took place in turn in different places but Widi mob also had their own meetings.
>
> Brandy Hill was another such area as well as Gullewa, Warridar and Rothsay.
>
> Mt Gibson was another place of significance and most of all Koolanooka Hills extending to what we now know as Blue Hills.
>
> My Ancestors and direct relatives and I were born and raised in the Morawa District. We lived in camps in the bush, living basically on traditional food only for many years before World War II.

The affidavit of Irwin Lewis, born in 1939 in Widi country, gives details of the association of his predecessors as well as his own association with the application area. His grandfather, Tom Phillips, lived generally in the Mingenew and Dongara area and was the minder of Widi country. His mother had been taught about Widi country by her parents and, in turn, she told him about the country and the laws and customs. He recites some of the boundaries for Widi country, being 'from the coast just south of Dongara east to Wubin, then to Paynes Find and then to Mt Magnet then to Tallarang Peak and Mullawa and back to the coast south of Geraldton.' His mother was born alongside the Irwin River, at a place just west of Gutha and he was named after the Irwin

River. As a child, he travelled extensively throughout Widi country and lived from time to time in areas such as Morawa, Koolanooka and Bowgada (all within the traditional boundaries of Widi country). He has taught his own children about Widi country and the laws and customs.

In forming a view in relation to the claimant's factual basis in support of this assertion, I have also had regard to the affidavits of [Person 6] and [Person 2], sworn in October 2011. These affidavits set out details of their own association and that of their descendants.

Consideration

When analysing the requirements of s. 190B(5), Dowsett J, in *Gudjala [2007]* held that it was necessary to address within the factual basis 'the relationship which all members claim to have in common in connection with the relevant land'. This, in my view, correlates with the prerequisite that the factual basis support the claim that it is the 'identified claim group', and not some other, which holds the rights and interests in the relevant land. Further, his Honour stated that the fact that some members of the claim group and their relevant predecessors are, or may have been, associated with the application area, does not automatically lead to the conclusion that all members and their predecessors are associated— [39], [40] and [51].

Within the claimant's factual basis there is a clear identification of the native title claim group, being those who share a common descent from the identified predecessors, Ginny of Irwin and her son Tom Phillips who were, it is asserted, Widi people associated with the application area. The factual basis also provides some details of the pre-sovereignty society of which it is asserted that the members of the native title claim group were part of, albeit in relatively limited detail. There is factual material pertaining to the asserted association of these predecessors with the application area dating back to around the 1850s. There is further explanation, and the setting out of factual details, pertaining to the relationship and association that these predecessors had with the application area.

There is also a factual basis relevant to the native title claim group's asserted continuous association with the application area since that time. This is primarily demonstrated through examples, originating from one or more members of the claim group, of how the whole group and its predecessors are associated with the area over the period since at least around the time of European contact. There is also some history of the claim group's association provided within the extracts from the Joan Martin book.

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

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

In *Gudjala [2007]*, Dowsett J formed his understanding in relation to what is required to support this assertion in reference to the decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors* (2002) 214 CLR 422;[2002] HCA 58 (*Yorta Yorta*)—*Gudjala [2007]* at [26].

Thus, in forming my view on this aspect of the claimant's factual basis, I also have had regard to the principles that can be drawn from the decision in *Yorta Yorta* in understanding the requirement that the factual basis be sufficient to support the assertion 'that there exist traditional

laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests', including that:

- 'A traditional law or custom is one which has been passed from generation to generation usually by word of mouth or common practice'—at [46].

- '[T]he origins of the content of the law or customs concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty...'—at [46].

- '[T]he normative system...is a system that has had a continuous existence and vitality since sovereignty'—at [47].

- 'When the society whose laws and customs existed at sovereignty ceases to exist, the rights and interests in land to which these laws and customs gave rise, cease to exist'—at [53].

- '[D]emonstrating some change to, or adaptation of, traditional law or custom or some interruption of enjoyment or exercise of native title rights or interests in the period between the Crown asserting sovereignty and the present will not *necessarily* be fatal to a native title claim'—at [83].

In having regard to the above, I do not suggest that I will be considering the ability of the claimants' factual basis to make out these requirements. Rather, they may offer a guide as to the kind of factual information that is sufficient to support this assertion, such as outlining facts that show some relationship between an identified normative system and the traditional laws and customs of the native title claim group. In the context of the registration test (and explicitly the task at s. 190B(5)(b)), Dowsett J in *Gudjala [2007]* held that the factual basis material must be capable of demonstrating that there are traditional laws and customs, acknowledged and observed by the native title claim group and that give rise to the claimed native title rights and interest—at [62] and [63].

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

The claimant's factual basis at Schedule F of the application asserts that the Widi Mob is a traditional group defined by its laws and customs. Those laws and customs have been passed down from previous generations, extending to a time before white settlement.

In support of that assertion, the factual basis material sets out the following:

> My family comes from the Midwest and goes back probably to the beginning of time. It comes from Dongara, from the west coast and Jindi up to the boundary of the north, to somewhere further down the coast down south. Anyway it goes east after Dongara, Eneabba down from there to the east, Cue to the north-east, and somewhere near Lake Darlot, and probably close to Coolgardie. All the tribal people from there spoke the same language.
>
> Wageral was the name of the tribe (or group) my mother came from. With other groups in the area they were called the Widi group, because they spoke the same language. All these smaller tribes with different names, they all spoke the same language and they all had the one law, and all the people were related in their own way.

> Widi was made up of several groups, many small bands of Aboriginal people that knew the country so well. When the Widi Mob broke up into different areas, it was huge. It goes right to the coast from where I was, in our country. And they had to break it all up through the laws you know, different places. They had a big meeting and all the elders went.
>
> They broke it up so different elders looked after each area. My grandfather used to travel from the camp at the Irwin River all around the Paynes Find area.
>
> Tindale [anthropologist, Norman Tindale] was the first to map the Widi people. If you look at a Tindale map you'll see that he was the first one to map the boundaries. Tindale talked to thousands of people here.
>
> Eventually the Badimaia moved in there [north east of the Widi], and they took on the language. Now even today there are Wadjari people, Badimaia and other different groups all speaking mixed languages. But most of our languages are Widi, the words and names of things.
>
> Whatever law they're talking about was Widi law because Widi people – the language spoken and the connections – were right from the coast.
>
> What we believe is the people along that Dreaming track own the country. That's why I know we come from Cue. The Dreaming track comes from there. The sacred sites and everything have never been Badimaia or Wadjari or anything. That's our Dreaming track and it goes right through to Dongara, Three Springs, Carnamah.
>
> The Widi, as mapped by Tindale, lived traditionally.
>
> Mullewa, Kockatea and other towns in a line south through Perenjori lie directly on Tindale's circumcision boundary, which is also the territorial boundary between Widi to the east and the 'Amangu' to the west. The Widi are not discussed under that name...but appear to have been subsumed under the broader term, Watjarri (Howie-Willis 1994b:1162). Joan Martin maintains that the Amangu and the Widi are identical. As Joan points out, Tindale (1974:239) refers to 'my sole [Amangu] informant'—extracts from Joan Martin book.

The statements, affidavits and other material from the claimants contain references to laws and customs of the Widi Mob. These documents suggest that such laws and customs have been handed down by the predecessors of the group. The draft affidavit of [Person 12], for instance, explains the teachings of his mother and grandmother. He says that he was told by his grandmother 'that her father Tommy Phillips' run was from Mingenew to Bowgada, to Paines' Find, to Kirkalocka, to Mullewa and back to Mingenew.' He was also taught by elders of the group about sacred sites, burial grounds, songs about the claim area and placenames that are taken from the language of his ancestors.

Irwin Lewis, in his affidavit of 7 December 2009, talks about how his mother told him about Widi country and the laws and customs, teachings that she had learned from her parents. He was taught about hunting and gathering food the proper way. His mother and other senior Widi people taught him, as well as other Widi children, about bush knowledge and skills. He says that 'we were taught to look after the land and to preserve it and never destroy it.' He was also taught about places of special cultural significance. Born in the application area in 1939, he states that:

> By the time I was a young teenager, I had travelled with my mother, and usually other Widi people, over the general extent of Widi country.
>
> My mother and other senior people in the Widi Mob taught me and other Widi children of about my age many things about our traditions and the bush knowledge and skills.
>
> I was taught about places of special cultural or mystical significance to Widi people and of their significance in cultural and kinship matters. This often, but not always, involved a topographical feature such as a hill, rock or lake.

The more recent affidavit of [Person 6], sworn 25 October 2011, also contains details of her knowledge of traditional law and customs relevant to the Widi Mob, including the following:

> My brothers [Person 13] and [Person 14] have been through the law. I am not sure if my dad had been through the law. My mother had been through the law as well. There is a different process for men and women.
>
> I know other Widi people who have gone through the law, like [Person 12] and [Person 15].
>
> A lot of groups knew each other before white settlement. At that time, if you were in someone else's traditional country, then you could get speared.
>
> The rules around marriage were that you couldn't marry into your own family, so they had wife stealing so that you could marry someone from a different group.
>
> This is how colour or skins came about. A skin group means where you come from, where your traditional country is. Just because people were taken from their traditional country didn't mean that they didn't still have a connection to their country and an obligation to protect their country, their language and culture.
>
> We still keep up going through law today and skin groups. Mum wouldn't be known as just anyone, she kept her skin tribe, her identity, her obligations to country, no matter where she was. It was the same for my dad, he kept his Widi identity.

Consideration

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

- that the factual basis demonstrate the existence of a pre-sovereignty society and identify the persons who acknowledged and observed the laws and customs of the pre-sovereignty society—at [37] and [52];
- that if descent from named ancestors is the basis of membership to the group, that the factual basis demonstrate some relationship between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived—at [40];
- that the factual basis contain some explanation as to how the current laws and customs of the claim group can be traditional (that is laws and customs of a pre-sovereignty society relating to rights and interests in land and waters). Further, the mere assertion that current laws and customs of a native title claim group are traditional, is not a sufficient factual basis for the purposes of s. 190B(5(b)—at [52], [55] and [69]; and

- that the factual basis contain some details of the claim group's acknowledgement and observance of those traditional laws and customs pertaining to the claim area—at [74].

It is apparent from the information before me that the nature and extent of the relevant pre-sovereignty society remains contentious. There are, for instance, some references in the extracts of the Joan Martin book, which upon my understanding allude to a wider group of people who are identified as Widi, encompassing various tribes and/or smaller groups that form part of the relevant pre-sovereignty society. These kinds of facts do not appear to accord with the way in which the claim has been structured. Upon my understanding of the native title claim group, all the members of the Widi Mob (as defined in the application) are descendant from a set of ancestral grandparents. The facts would suggest that they are all identified as part of the one tribal group, which raises the question around the existence of the other tribal groups to which Joan Martin refers as being Widi.

It is an issue that has previously been the subject of some deliberation, including by the Court in the decision of Barker J in *Martin*, where his Honour held that the reference to 'Widi Mob' is not to any wider group outside of those defined in the claimant application. It is the way 'in which the group refers to itself and itself alone.' Further, his Honour observed that the applicants do not purport to be a sub-group of a wider group and that the material before the Court did not suggest that they were—*Martin* at [99].

In that regard, the material before me is obviously, in some respects, quite different to that which was before Barker J in *Martin*. The applicant, for instance, has provided to the Registrar additional factual basis material. Nonetheless, I have previously stated that this issue of the extent and nature of the relevant pre-sovereignty society and the native title claim group is not one that the Registrar should attempt to resolve. Here, I am confined to the task of considering whether the claimant's factual basis material is sufficient to support the assertion at s. 190B(5)(b).

In my view, the factual basis material does identify the pre-sovereignty society, being the body of persons who are said to be Widi. That term 'Widi' is said to encompass different tribes and groups in the area that all spoke the same language. The factual basis material asserts that '[t]he presence of persons recognised as Widi Mob in the general area of the application area is recorded in records and accounts since early contact with white people.' The material also identifies the relevant predecessors of the native title claim group, being Ginny of Irwin and Tom Phillips.

It is apparent, however, from the factual basis material that not much is known about the nature of the relevant society as it existed in pre-sovereignty. The history of the claim group begins around the 1850's with the birth of Ginny of Irwin, which according to the factual basis material is around the time of European contact with the application area. The Joan Martin book recites that '[m]y Mum's father was known as Tom, and Ginny of Irwin was the great-grandmother [Tom's mother]. She came from the Irwin River. The name Phillips came from one of the white settlers' names. They called them Ginny and Tom Phillips. They were all full-blooded people and belonged in the Wageral tribe or thereabouts.'

This information, in a broad sense, provides the link between the group's predecessors and the relevant pre-sovereignty society. Nonetheless, of itself, it is of a relatively tenuous kind, in that it provides quite limited detail of the asserted factual link between the predecessors and the pre-sovereignty society. In such instances it may be appropriate to draw favourable inferences in

relation to the claimant's factual basis material. For instance, it may be acceptable to infer the existence of a pre-sovereignty society 'simply because it clearly existed shortly thereafter and has continued since', this kind of inference may be appropriate where clear details of a claim group's continuous history since sovereignty or shortly thereafter are provided, and which may demonstrate the traditional content of the claim group's laws and customs—*Gudjala [2009]* at [30].

In my view, those asserted facts regarding the pre-sovereignty society and the relevant predecessors are given further substance when considered with all the other information, including details of the claimant group's acknowledgement and observance of asserted traditional laws and customs and how such laws have been passed down from generation to generation. In that regard, I observe that some of the affidavit and other material before me is derived from claimants who were born in the early to mid 1900s and they speak directly to their own knowledge of the group's identified predecessors and the traditional laws and customs.

I have noted that there are some limitations to the factual basis. Nonetheless, it is my view that the claimant's factual basis does provide some explanation of how current laws and customs of the claim group can be traditional. That is, within the factual basis there is a clear claim of the continuous existence of the laws and customs of the Widi Mob, coupled with details of the group's predecessors and the relevant laws and customs. The affidavits and other material provide examples of how such laws and customs have been continuously acknowledged and observed. It is my view that this invites the kind of favourable inference to which Dowsett J referred in *Gudjala* [2009]—at [30].

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

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

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

In addressing this aspect of the test in *Gudjala [2009]*, Dowsett J considered that where the claimant's factual basis relied upon the drawing of inferences, that:

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

In forming my decision in relation to this requirement I have considered my reasons above in relation to s. 190B(5)(b) and have also drawn upon the following information contained in the claimant's factual basis material:

- the material outlines some asserted facts pertaining to the identified pre-sovereignty society and its laws and customs as well as the predecessors who acknowledged and observed those laws and customs;
- by implication the material sets out some of the relevant laws and customs of the pre-sovereignty society and gives some details in relation to the content of those laws and customs;

- the factual basis material explains the links between the predecessors of the native title claim group and the relevant pre-sovereignty society;
- there is some factual basis material pertaining to the continued observance of the relevant traditional laws and customs by the native title claim group.

The relatively limited nature and extent of the factual basis material is such that it calls for the making of an inference of continuity. Again, whilst I acknowledge those limitations, I am of the view that it is open to me to infer a sufficient factual basis to support the assertion that the native title claim group has continued to hold native title rights and interests in the application area, in accordance with the traditional laws and customs of the identified pre-sovereignty society.

I am satisfied that there is a factual basis sufficient to support this assertion.

Subsection 190B(6)
Prima facie case

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

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

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

In considering the application against the requirements of this section, the test is that I must consider that, prima facie, the right or interest is established. Thus, 'if on its face a claim is arguable**,** whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'—*Doepel* at [135].

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

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

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

The 'critical threshold question' for recognition of a native title right or interest under the Act 'is whether it is a right or interest 'in relation to land or waters'—*Western Australia v Ward* [2002] HCA 28 (*Ward HC*), Kirby J at [577]; remembering '[t]hat the words 'in relation to 'are of wide import'—*Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group* [2005] FCAFC 135 (*Alyawarr FC*).

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

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

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

The application area has been described so as to exclude any areas in which native title rights and interests have been extinguished: see Schedule B (2(c)) of the application.

I now consider each of the rights and interests as claimed in Schedule E of the application. I note that in some instances I have grouped certain rights and interests together. Further, my reasons at s. 190B(6) should be considered in conjunction, and in addition to, my reasons and the material outlined at s. 190B(5).

Exclusive rights and interests

1. *Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where section 238 of the Native Title Act applies) the Widi Mob claim the right to possess, occupy, use and enjoy the lands and waters covered by the application (the application area) as against the whole world.*

In *Western Australia v Ward* [2002] HCA 28 (*Ward HC*), the majority considered that '[t]he expression "possession, occupation, use and enjoyment … to the exclusion of all others" is a composite expression directed to describing a particular measure of ***control over access to land***' [emphasis added]. Further, that expression (as an aggregate) conveys 'the assertion of rights of control over the land', which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country'—at [89] and [93].

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

> [T]he question whether the native title right of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usfructuary or proprietary. ***It depends rather on the consideration of what the evidence discloses about their content under traditional law and custom*** [emphasis added]—at [71].

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

In the affidavit of [Person 6], sworn 25 October 2011, she states that '[a] lot of groups knew each other before white settlement. At that time, if you were in someone else's traditional country, then you could get speared'. This statement in the material is of a relatively broad nature and is not accompanied by any further information of specificity. Whilst it invokes the idea of territoriality being a feature of the traditional laws and customs of the group, this reference is not given any further substance in the material before me. Even considered with all the other information before me, it is my view that it fails to carry the requisite assertion of a right to control access. But for this reference in the material, there is in my view no information of specificity before me that goes to establishing this claimed right, being the right to control access to the land and waters of the application area under the traditional laws and customs of the native title claim group.

Given that, I do not consider that this right is established, prima facie.

Outcome: not established

Non-Exclusive rights and interests

2. *Over areas where a claim to exclusive possession cannot be recognised, the Widi Mob claims the following rights and interests:*

To –

(a) access the application area;

(b) camp on the application area;

(c) erect shelters on the application area;

(d) live on the application area;

(e) move about the application area;

In my view the claimant's factual basis material evidences that there are traditional laws and customs acknowledged and observed by the native title claim group that relate to and regulate the above native title rights and interests.

Joan Martin talks about how her predecessors accessed, lived on and moved about the application area. She says that:

> My mother was born south of Mullewa on the Irwin River as her ancestors before her. She had a tribal upbringing in every sense until the authorities took her away to Moore River settlement along with her brothers...
>
> My mother went back to her country to continue her aboriginal learning and this included the initiation process. She taught me, and my family about big sacred sites close to her birthplace (Tallering Peaks). My mother said that this place was known for its significance to the Aboriginal culture of the Widi and other tribes...
>
> My great grandfather and Jinny walked the country from where they lived on the Irwin River right through to Mt Gibson, Lake Moore and Kirkalocka and Paynes Find area.

> They told the stories of that area to my mother Jane Phillips when she was a child. My mother passed these stories on to all her children.
>
> We were told the dreaming of our people and where to find a whole lot of significant sites. We were told to look after those places and to return there at times and also to clear the water holes so the water could stay clear.
>
> I know stories for north, east and west of my mother's birth place and we are the living proof that our tribe existed from before white settlement—draft statement of Joan Martin, May 2004.

In his draft statutory declaration (undated) and draft affidavit (undated), [Person 17] says that he was born in the application area in 1936. As a child he travelled extensively with his parents to places in the application area. His mother told him many stories connected with the land. He has a strong spiritual connection with the land where he lived for many years. He has often camped in the bush and lived off Aboriginal land. He still returns to the application area all the time.

[Person 16], in her draft affidavit (undated) states that she was born in Morawa in 1943. She was raised in a camp on the outskirts of Morawa. She has travelled extensively through the country where her ancestors walked. She has also worked and camped across that country, including areas around Paynes Find, Mount Gibson and Mount Magnet.

[Person 6] says in her affidavit that they were taught how to build shelters from gum trees and other plants and how to make fires.

Outcome: established, prima facie.

(f) hold meetings on the application area;

(i) conduct ceremonies on the application area;

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

In my view, the claimant's factual basis establishes, prima facie, that these rights exist under the traditional laws and customs of the native title claim group.

In that regard, [Person 6], in her affidavit, recalls that when she was a child she went to corroborees (a traditional meeting, where dancing and ceremonies would take place) on the application area. She also says that:

> Karara Hill is important to Widi people as it is a site of sacred women's business. It is a birthing place because of the water that would flow there and that is in the underground cave.
>
> From the site you can look over Mongers Lake, a salt lake which is a site of sacred men's business, which has an island in it.

Joan Martin in her affidavit, sworn 24 August 1998 says that many tribal gatherings were held on Widi country 'where songs familiar to the mob were sung and young people were initiated all through the area.' She also sets out that:

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

Outcome: established, prima facie.

(g) hunt on the application area;

(h) fish on the application area;

(l) gather medicinal plants on the application area;

The affidavit of Irwin Lewis contains information pertaining to the above, including:

> My mother taught me and my brothers and sisters and many other Widi children traditional skills.
>
> She taught us about hunting and gathering food and the proper way to prepare food including goannas, porcupines, galahs and parrots, pigeons and emus. We gathered bardi grubs and gathered sugar gum.
>
> My mother used stone fish traps on the Irwin River. This particular activity was Women's Business and I was not involved in the detail of this.
>
> I recall that older family members talked about catching fish along the Irwin River and where makeshift houses had been built many, many years before and that were used at various times of the year.

In her affidavit, [Person 6] also sets the following in relation to these claimed native title rights and interests:

> I remember going out to find bush foods like bush onion, bush tomato, celery from river reeds. We would eat binba, which is like a toffee from an acacia tree. We would eat fish and turtle as well, but we would only take one turtle. We took only what we needed, not all the turtles. We knew that we had to leave some to survive for the future.
>
> We would use the red gum from the river gum and use that for washing sores, like a disinfectant. I gathered that with my mother when we needed it. And we would go and find witchety grubs as well to eat. You can get them from acacia trees and gum trees as well.

It is my view that this kind of information in the material provides a prima facie basis establishing that these native title rights and interests exist under the traditional laws and customs of the native title claim group.

Outcome: established, prima facie

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

There is no information in the material before me that goes directly to supporting the existence of this right under the traditional laws and customs of the native title claim group.

Outcome: not established

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

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

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

In his affidavit Irwin Lewis says that he was taught to look after the land and to preserve it. He was taught about the geographical features of the land and about places of special cultural/mystical significance.

In their affidavits, [Person 2] and [Person 6] convey that they have been taught about the cultural significance of different places and sites on the application area. [Person 6] refers to the obligations to protect Widi country, artefacts and the landscape 'especially the waterholes which are the signs of the passing of the water snake. The water snake is very important to the Widi mob.'

[Person 12], in his affidavit states that he has been taught about the burial sites of his ancestors in the claim area. He also knows of over 200 documented sites of significance in the application area. He knows songs about the claim area and place names.

Outcome: established, prima facie

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

There is, in my view, limited material that goes to supporting this claimed right of exercising control over access to and use of the application area by other Aboriginal people or Torres Strait Islanders who seek access to or use of the application area. Furthermore, this right, as expressed is not without difficulty. The apparent tension of the expression of such a right as non-exclusive was considered in *Ward HC* in the joint judgment, with the Court concluding that:

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

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

Of those authorities, I would note the limiting or qualifying nature of the expression used. In my view, the nature and extent of the right to control access through the right to grant or refuse access has in those cases, as a non-exclusive right, been limited or qualified in its expression and meaning by reference to such decisions binding only those Aboriginal persons who will recognise such decisions or, more specifically, the native title holders.

It is not apparant in the way that this right is expressed that it is being limited to the native title holders, but rather would operate to exclude all Aboriginal and Torres Trait Islander people, albeit in accordance with the traditional laws and customs of the native title claim group.

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

Outcome: not established

Subsection 190B(7)
Traditional physical connection

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

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

This section requires that the evidentiary material be capable of satisfying the Registrar of a particular fact(s), specifically that at least one member of the claim group 'has or had a traditional physical connection' with any part of the claim area. While the focus is necessarily confined, as it is not commensurate with that of the Court in making a determination, it 'is upon the relationship of at least one member of the native title claim group with some part of the claim area'—*Doepel* at [18].

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

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

There are a number of examples within the claimant's material that, in my view, demonstrate the required traditional physical connection of at least one member of the native title claim group, including the affidavit of Joan Martin, sworn 24 August 1998:

> I was born in the heart of Widi country which my Ancestors frequented for centuries. My mother was born on the banks of the Irwin River near Gutha. Her family and Grandparents

before her were born into the Widi mob and within the boundaries of the Widi peoples' traditional land.

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

I, and other members of the Widi people use Aboriginal law as a guideline for our daily lives. We follow a traditional lifestyle and have maintained contact with the land. With my sisters and brothers, I am a custodian of the Morawa District. The laws and culture of the Widi people include traditional stories and beliefs concerning the land, which are handed down by the custodians to my descendants.

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

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

Section 61A provides:

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

(2) If :

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

(b) either:

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

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

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

(3) If:

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

(b) either:

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

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

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

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

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

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

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

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

Reasons for s. 61A(1)

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

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

The geospatial assessment states that no determinations as per the National Native Title Register fall within the external boundary of this amended application. I agree with this assessment. I have also undertaken a search of the Tribunal's mapping database to confirm this information.

Reasons for s. 61A(2)

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

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

Schedule B of the application contains general exclusions to the application area, including any area covered by a previous exclusive possession act.

The above exclusions, as contained in the application, are sufficient to satisfy me that the application is not made over areas covered by a previous exclusive possession act.

Reasons for s. 61A(3)

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

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

Schedule E(1) of the application provides that the claim to native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others are only made over areas where a claim to exclusive possession can be recognised. This is subject to the circumstances described in s. 61A(4), as provided at Schedule B of the application.

On that basis, I am satisfied that the application does not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done.

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

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

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

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

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

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

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

Schedule Q of the application confirms that a claim is not being made to ownership of minerals, petroleum or gas wholly owned by the Crown.

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

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

Schedule P of the application confirms that no claim is made to any offshore place.

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

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

Schedule Bof the application provides for a number of categories of areas of land and waters to be excluded from the application area, namely those where native title rights and interests have been extinguished.

The application does not disclose, and I am not otherwise aware, that the native title rights and interests claimed have otherwise been extinguished.

[*End of reasons*]