National Native Title Tribunal

Registration test decision

Application name	Mawadjala Gadjidgar
Name of applicant	Harry Lennard, Frank James Davey, Stephen Dwayne Comeagain, Gail Maria Williams, Phillip Terence McCarthy, Graham James Ejai
State/territory/region	Western Australia
NNTT file no.	WC2011/3
Federal Court of Australia file no.	WAD104/11
Date application made	7 April 2011
Name of delegate	Mia Bailey

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: 23 June 2011

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Mia Bailey

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

Reasons for decision

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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 Mawadjala Gadjidgar claimant application to the Native Title Registrar (the Registrar) on 18 April 2011 pursuant to s. 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

Given that the claimant application was made on 7 April 2011 and has not since been amended, I am satisfied that neither subsections 190A(1A) nor 190A(6A) apply.

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

Registration test

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

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

Information considered when making the decision

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

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

For the purposes of the registration test I have had regard to the information contained in the following documents:

- Form 1 application and accompanying documents; and
- Geospatial assessment and overlap analysis dated 28 April 2011 (Geotrack 2011/0682).

I have also had regard to the documents contained in the Tribunal's case management/delegates file (reference 2011/01173 Vol 01). I have followed Court authority and have only considered the terms of the application itself in relation to the registration test conditions in s. 190C(2) and ss. 190B(2), (3) and (4) – see *Northern Territory v Doepel* (2003) 203 ALR 385; [2003] FCA 1384 (*Doepel*) at [16].

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.

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 (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].

On 20 April 2011 a copy of the application and accompanying documents filed in the Court were provided to the State of Western Australia (the State). The State was provided with an opportunity to make a submission in relation to the registration of the application. No submissions have been received from the State.

Procedural and other conditions: s. 190C

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

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

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

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

Section 190C(2) is framed in a way that 'directs attention to the contents of the application and the supporting affidavits'. I have therefore confined my assessment of this requirement to the details and information contained in the application itself. I am not required to look beyond the application nor undertake any form of merit assessment of the material to determine if I am

satisfied whether 'in reality' the native title claim group described is the correct native title claim group—*Doepel* at [35], [37] and [39].

That said, in seeking to verify that an application contains all the details and information required by ss. 61 and 62, I do need to ensure that a claim 'on its face', is brought on behalf of all members of the native title claim group—*Doepel* at [35].

If the description of the native title claim group in the application indicated that not all persons in the claim group were included, or that it was in fact a subgroup of the claim group, the requirements of s. 190C(2) may not be met and the claim could not be accepted for registration—*Doepel* at [36].

The application contains the information and details pertaining to the persons authorised to make this application. The application sets out the names of the persons comprising the applicant and states that they are entitled to make the application as the people authorised by the native title claim group.

A description of the native title claim group is found in Schedule A of the application, as set out below in my reasons for s. 190B(3). There is nothing on the face of the description in Schedule A, or elsewhere in the application, to indicate that not all persons in the claim group are included or that it is a subgroup of the claim group.

I am satisfied that the application sets out the persons authorised to make this application and the native title claim group in the terms required by s. 190C(2) when considering the requirements of s. 61(1).

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

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

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

The names of the persons comprising the applicant are set out on page two of the application and their address for service is provided in 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).

A description of the persons in the native title claim group is in 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 approved determination of native title, and
(iii) the applicant believes all of the statements made in the application are true, and
(iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and
(v) setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it.

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

The application is accompanied by affidavits from each of the six persons comprising the applicant. Each of the affidavits is dated and witnessed and addresses the matters specified in ss. 62(1)(a)(i) to (v).

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

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

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

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

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

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

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

Schedule B of the application refers to Attachment B, being a written description of the external boundary of the application. Schedule B includes a description of areas within the external boundary that are excluded from the application by way of a list of general exclusions.

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

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

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

Schedule C refers to Attachment C, being a map showing the external boundary of the application area.

Searches: s. 62(2)(c)

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

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

Schedule D of the application states that no searches have been carried out by the current applicant.

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

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

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

Schedule E of the application provides a description of the native title rights and interests claimed in relation to the application area. The description does not consist only of a statement to the effect that the native title rights and interests are all the rights and interests that may exist, or that have not been extinguished, at law.

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

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

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

Schedules F, G and M of the application provide information relevant to the factual basis on which it is asserted that the claimed native title rights and interests exist and for the particular assertions in this section. Further information relevant to the factual basis is found in Attachments F1 to F4 and Attachment M.

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).

Schedule G contains details of activities currently being carried out by members of the native title claim group.

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

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

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

Schedule H indicates that there are no such applications that overlap the application area.

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

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

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

Schedule HA states that the applicant is not aware of any such notifications.

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

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

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

Schedule I refers to Attachment I, being a table showing fifteen s. 29 or equivalent notices, in relation to the application area as at 20 December 2010.

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 in the terms set out in s. 190C(3) is only triggered if all of the conditions found in ss. 190C(3)(a), (b) and (c) are satisfied in relation to the previous overlapping application—*Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*)—at [9]. Section 190C(3) essentially relates to ensuring there are no common native title claim group members between the application currently being considered for registration (the current application) and any relevant overlapping previous application.

On 28 April 2011, the Tribunal's Geospatial Services provided an overlap analysis in relation to the application area (GeoTrack 2011/0682) (Geospatial overlap analysis). The Geospatial overlap analysis, and my searches of the area against the Tribunal's mapping database and the Register of Native Title Claims (the Register), confirm that there are no registered applications in relation to the area covered by the current application. I therefore do not need to consider this condition further.

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(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

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

For the reasons set out below, I am satisfied that the requirements set out in s. 190C(4)(a) are met because the application has been certified by each representative Aboriginal/Torres Strait Islander body that could certify the application.

Schedule R of the application refers to Attachment R, being a copy of a certificate from the Kimberley Land Council (KLC). The certificate is signed by [Name Deleted] who is identified as an Executive Director at the KLC and is dated 4 April 2011.

I understand that the KLC is a representative body that is recognised under s. 203AD and has the power under the Act to certify native title determination applications. The Geospatial overlap analysis shows that the application falls entirely within the KLC representative body region and that there are no other s. 203AD recognised bodies or s. 203FE funded bodies for the application

area. The KLC is therefore the only representative body that could certify the application under Part 11.

For the certification to satisfy the requirements of s. 190C(4)(a) it must comply with ss. 203BE(4)(a) to (c), each of which are addressed below. I understand that s. 190C(4)(a) does not require me to 'look behind' or to question the merits of the representative body's certification—*Doepel* at [78], [80] and [81] and *Wakaman People 2 v Native Title Registrar and Authorised Delegate* (2006) 155 FCR 107; [2006] FCA 1198 at [31] and [32].

Section 203BE(4)(a)

This provision requires that the certificate include a statement to the effect that the representative body is of the opinion that the requirements of ss. 203BE(2)(a) and (b) have been met. In summary this relates to all of the persons in the native title claim group having authorised the applicant to make the application and deal with matters arising in relation to it and all reasonable efforts having been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

The certificate includes statements to this effect. I am satisfied that the certificate complies with s. 203BE(4)(a).

Section 203BE(4)(b)

This provision requires that the certificate briefly set out the representative body's reasons for being of the opinion that the requirements of ss. 203BE(2)(a) and (b) have been met.

The certificate briefly sets out the KLC's reasons for being of that opinion under the headings 'Authorisation' and 'Identification of all persons within the native title claim group'. Under the heading 'Authorisation' reference is made to an authorisation meeting held on 8 December 2010, attended by KLC staff, where the applicant was authorised by the Warrwa people in accordance with an agreed to and adopted decision making process.

Under the heading 'Identification of all persons within the native title claim group' reference is made to the steps taken by the KLC over a number of years to identify persons who hold native title within an area that includes the current application. This has included undertaking anthropological and genealogical research and community consultations with the Warrwa native title claim group. Details are also provided of steps taken by the KLC to notify Warrwa people of the authorisation meeting which is said to have been attended by Warrwa people from around Western Australia, who agreed at the meeting that they were sufficiently representative of the Warrwa claim group to make decisions on behalf of Warrwa people.

I am satisfied that the certificate complies with s. 203BE(4)(b).

Section 203BE(4)(c)

This provision requires the representative body, where applicable, to briefly set out what it has done to meet the requirements of s. 203BE(3), which requires the representative body to make all reasonable efforts to achieve agreement between any overlapping claimant groups and to minimise the number of overlapping applications (including proposed applications) of which the representative body is aware. Section 203BE(3) states that a failure to make these efforts does not invalidate any certification of the application by the representative body.

The certificate does not make any statement about what the KLC has done to meet the requirements of s. 203BE(3). I note that there are no overlapping applications filed in the Court and I am not aware of any proposed applications in relation to the relevant area.

My understanding, based on the information before me, is that there are no competing native title claims in the area of this application of which the representative body is aware. The statements in the certificate indicate that the KLC is of the view, based on its research, that the Warrwa native people are the only potential native title holders in the area of this application.

In any event, I am of the view that a certification may comply with the requirements of s. 203BE(4), notwithstanding that it does not set out what the representative body has done to meet the requirements of s. 203BE(3). In this regard I note that s. 203BE(3) provides that a failure by the representative body under that provision does not invalidate any certification of the application by the representative body. Having regard to the provisions of s. 203BE as a whole, it follows in my view that the omission of information in a certification relating to the efforts under s. 203BE(3) similarly does not invalidate the certification under s. 203BE(4).

For these reasons, I am of the view that the certification complies with the requirements of s. 203BE(4), notwithstanding that it does not address what has been done in relation to the requirements of s. 203BE(3).

Conclusion

I am satisfied that the application has been certified under Part 11 by the only representative body that could certify it and that the certificate complies with s. 203BE(4).

Merit conditions: s. 190B

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

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

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

Attachment B contains a written description of the external boundary of the application area by metes and bounds, making reference to native title determination applications, land parcel boundaries, road reserves and coordinate points listed in decimal degrees. Notes relating to the source, currency and datum of data used to prepare the description have been included. Schedule B also lists general exclusions from the area covered by the application.

A map of the claim area is provided as Attachment C to the application. The map is a colour copy of a map, entitled 'Mawadjala Gadjidgar', prepared by Geospatial Services. The map includes:

- The application area depicted by a bold blue outline;
- Surrounding native title determination applications;
- Land tenure thematically mapped and labelled;
- Scalebar, northpoint, coordinate grid, locality diagram and legend; and
- Notes relating to the source, currency and datum of data used to prepare the map.

Section 190B(2) requires that the information in the application describing the areas covered by the application must be sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters. For the Registrar to be satisfied that this can be said, the written description and the map should be sufficiently consistent with each other.

Having regard to the identification of the external boundary in Attachment B and the map showing the external boundary in Attachment C, I am satisfied that the external boundaries of the application area have been described such that the location of it on the earth's surface can be identified with reasonable certainty.

I have also had regard to a Geospatial assessment of the map and written description dated 28 April 2011 which states that the description and map are consistent and identify the application area with reasonable certainty. I agree with that assessment.

Whilst Schedule B contains general exclusions and not a list of tenures, they are sufficient, in my view, to offer an objective mechanism to identify which areas have been excluded from the application area.

In conclusion, I am satisfied that the information and map required by paragraphs 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 areas of the land or waters. The application satisfies the condition of s. 190B(2) as a whole.

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).

Schedule A describes the native title claim group as follows:

1. The native title claim group consists of people known as the Warrwa people, being those Aboriginal people whose traditional land and waters are situated generally in the district of Derby in the State of Western Australia.

2. The individuals who comprise the Warrwa people's native title claim group are the descendants of the following apical ancestors, including those people adopted in accordance with Warrwa traditional law and custom, see below:

   Warlayakurdang
   Galera
   Topsy Mouwudjala
   Gudayi
   Bobby AhChoo
   Milngangurru
   Djabilangurul (Djabilangurru)
   Bararangudu (Bararangurru)
   Rimarrangudu (Rimarraangurru)
   Binjangudu (Binjangurru)
   Lanjangudu (Lanjangurru)
   Walgananudu (Walganangurru)

3. A child is adopted in accordance with Warrwa traditional law and custom if they are 'grown up' by a person who is or was a descendant of one of the apical ancestors named above. Under Warrwa traditional law and custom that child must have been under 2 years old when they started being 'grown up'.

As Schedule A does not name the persons in the native title claim group, it follows that the requirements of s. 190B(3)(b) are applicable. I must be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

In *Doepel*, Mansfield J held that the focus of this task was 'not upon the correctness of the description...but upon its adequacy so that the members[hip] ...in the identified native title claim group can be ascertained'—at [37].

In *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591(*WA v NTR*) at [67] the Court expressed the relevant question as being whether applying the specified conditions (or rules) 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.

Carr J in *WA v NTR* stated that:

It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently...The Act is clearly remedial in character and should be construed beneficially—at [67].

Describing a claim group by reference to named ancestors was accepted by the Court in *WA v NTR* as satisfying the requirements of s. 190B(3)(b)—at [67].

I am satisfied that the description in Schedule A is clear and would enable, with some factual enquiry, the identification of persons in the claim 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).

Section 190B(4) requires the Registrar to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be readily identified—*Doepel* at [92].

In regard to the task at s. 190B(4), Mansfield J in *Doepel* 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'. His Honour noted 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 following description of the native title rights and interests claimed in relation to the application area is found in Schedule E:

> The native title rights and interests claimed are as follows:
>
> 1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s238, ss47, 47A or 47B apply), the Warrwa People claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world.
>
> 2. Over areas where a claim to exclusive possession cannot be recognised, the Warrwa People claim the following rights and interests:
>
> (a) the right to access the application area;
> (b) the right to travel across the application area;
> (c) the right to camp on the application area;
> (d) the right to erect shelters on the application area;
> (e) the right to live on the application area;
> (f) the right to move about on the application area;
> (g) the right to hold meetings on the application area;

(h) the right to hunt on the application area;
(i) the right to fish on the application area;
(j) the right to take flora and fauna from the application area;
(k) the right to use and maintain the natural water resources of the application area including the beds and bank of watercourses;
(l) the right to gather the natural products of the application area (including food, medicinal plants, timber, stone, ochre and resin) according to traditional laws and customs;
(m) the right to use the application area for social, religious, cultural and spiritual customary and/or traditional purposes;
(n) the right to conduct ceremony on the application area;
(o) the right to participate in cultural activities on the application area;
(p) the right to maintain places of importance under traditional laws, customs and practices in the application area;
(q) the right to protect places of importance under traditional laws, customs and practices in the application area;
(r) the right to conduct burials on the application area;
(s) the right to speak for and make non-exclusive decisions about the application area;
(t) the right to cultivate and harvest native flora according to traditional laws and customs;
(u) the right to cook and light fires for that purpose, on the application area;
(v) the right to light fires for domestic purposes but not for the clearance of vegetation;
(w) the right to uphold, regulate, monitor and enforce customary law;
(x) the right to maintain and transmit cultural heritage of the application area;
(y) the right to regulate among and resolve disputes among the native title holders of the application area.

3. The native title rights and interests are subject to:

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

I am satisfied that the description of the claimed native title rights and interests is sufficient to allow them to be readily identified in the sense that they are described in a clear and easily understood manner.

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.

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

The nature of the Registrar's task at s. 190B(5) was examined by Mansfield J in *Doepel*. It is to 'address the quality of the asserted factual basis' but 'not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence...'—at [17]. I am to assume that what is asserted is true and then consider whether 'the asserted facts can support the claimed conclusions' – *Doepel* at [17]. In other words, if the statements are true, are they sufficient to support the claims set out in subparagraphs (a) to (c)?

The Full Court in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) agreed with Mansfield J's characterisation of the task at s. 190B(5) (at [83] to [85]). The Full Court also said that a 'general description' of the factual basis required by s. 62(2)(e), provided it is 'in sufficient detail to enable a genuine assessment of the application by the Registrar under s. 190A and related sections, and [is] something more than assertions at a high level of generality', could, when read together with the applicant's affidavit swearing to the truth of the matters in the application, satisfy the Registrar for the purpose of s. 190B(5)—at [90] to [92].

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

- 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 — *Doepel* at [17].

The decisions of Dowsett J in *Gudjala [2007]* and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala [2009]*) also give specific content to each of the elements of the test at ss. 190B(5)(a) to (c). The Full Court in *Gudjala FC* did not criticise generally the approach that Dowsett J took in relation to these elements in *Gudjala [2007]*[1], including his 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]*.

In line with those authorities it is, in my view, fundamental to the test at s. 190B(5) that the applicant describe the basis upon which the claimed native title rights and interests are alleged to exist. More specifically, this was held to be a reference to rights vested in the claim group and further that ' it was necessary that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)'—*Gudjala [2007]* at [39].

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

The claimant's factual basis material

The information before me in relation to the asserted factual basis on which the claimed native title rights and interests exist is found primarily in Schedule F together with Attachments F1 to F4. Additional information is contained in Schedules G and M and Attachment M.

I also note the claim group description in Schedule A (set out above in my reasons relating to s. 190B(3)) and the description of the application area in Attachments B and C. The map in Attachment C shows the application area being to the north of Derby, within the western region of the Kimberley, between King Sound and Stokes Bay.

Schedule F contains the following statements:

> (a) Warrwa native title claim group and their ancestors have, since the assertion of British Sovereignty over their country had an association with the application area;
>
> (b) Warrwa native title rights and interests derive from and are currently held in accordance with Aboriginal traditional laws and customs specific to the Warrwa people. The traditional laws and customs of the Warrwa people include a custom of title passing by descent.
>
> (c) Warrwa native title continues to be held in accordance with those traditional laws and customs observed by the Warrwa native title claim group.
>
> The Warrwa people and their ancestors had an association with the area:
>
> (a) The Warrwa native title claim group and their ancestors have, since the assertion of British Sovereignty possessed, occupied, used and enjoyed the claim area; and
>
> (b) The association of the Warrwa people with the land and waters of the application area has been recorded from the 17th Century when William Dampier documented sightings and interaction with Aboriginal people around the claim area. [Reference is made to Attachment F1 as containing further information in this regard].
>
> In the Warrwa society there exist traditional laws and customs that give rise to the native title rights and interests:
>
> (a) Native title rights and interests held by the Warrwa people, are pursuant to and possessed under the laws and customs of the claim group, including traditional laws and customs that give rise to rights and interests in land and waters which vest in members of the native title claim group on the basis of:
>
> - Ancestral connection to the area;
> - Traditional religious knowledge of and affiliations to and responsibility for the area;
> - Traditional knowledge of the geography of the area;
> - Traditional knowledge of the resources of the area; and
> - Knowledge of traditional ceremonies of the area.
>
> The Warrwa claim group has continued to hold native title in accordance with the laws and customs of the Warrwa which can be evidenced by the following:
>
> (a) The Warrwa traditional law and custom has been passed by traditional teaching through the generations preceding the present generations to the present generations of persons comprising the native title claim group.

(b) The Warrwa people continue to acknowledge and observe those traditional laws and customs and the rights and interests claimed in this application. Further information is provided in the affidavit of [Name Deleted] (Attachment F2) and the affidavit of [Name Deleted] dated 1st February 2011 (Attachment F3).

(c) The Warrwa people have maintained a connection with the area through their continued acknowledgement and observance of the normative system of laws and customs of the Warrwa people. [Reference is made to Attachment F1 for further information]

(d) The Warrwa people have maintained a close association with the land and waters of the application area and continue to live on the application area and use the application area for traditional activities, such as fishing, the protection of sites and the use of natural resources in the application area. Details are contained in the affidavits of [Name Deleted] (Attachment F2) and [Name Deleted] dated 15th September 2010 (Attachment F4).

Attachment F1 is titled 'Warrwa Anthropological Report'[2] and provides information in support of the factual basis for the assertions in ss. 190B(5)(a) to (c), set out under various headings including historical information, Warrwa language, Warrwa traditional country, cosmology, ceremonies and ritual practice, social organisation and kinship and Warrwa local groups.

Attachment F2 is an affidavit of [Name Deleted], son of [Name Deleted] (one of the apical ancestors listed in Schedule A) dated 9 December 2010.

Attachment F3 is an affidavit of [Name Deleted], one of the persons comprising the applicant, dated 1 February 2011. Attachment F4 is a further affidavit of [Name Deleted] dated 15 September 2010.

Schedule G is a list of activities which members of the claim group are said to have continuously carried out within the application area.

Schedule M states that members of the Warrwa native title claim group have maintained a traditional physical connection with the land and waters of the application area. Details of that connection can be found in Schedule G and Attachments F1 to F4 which are said to show that members of the claim group were born on, live on, camp on and fish on their traditional country which includes the application area. Reference is also made to Attachment M which consists of the same affidavits contained in Attachments F2, F3 and F4.

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

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

In my view the information in Schedules F, G and M is of a high level of generality and does not in itself provide a sufficient factual basis to support this assertion. There is however considerable additional information in the anthropological report in Attachment F1 and the affidavits in Attachments F2 to F4 in support of this assertion.

[2] The document does not include reference to the author or the date of the report.

Attachment F1 provides the following information in support of the assertion that the predecessors of the native title claim group had an association with the area:

- Warrwa is the name of a language group around the area where the township of Derby, established in 1883, is now located.
- It was not until the late 1870s that the area surrounding the claim was opened up for pastoralism.
- In 1886 Gibney records coming across various Aboriginal groups in the Dampierland Peninsula which may have included Warrwa people in the area of Goodenough Bay[3]. Gibney referred to the 'Stokes Bay tribe' which was likely to be the group that Tindale later referred to as the 'Big Warrwa'[4].
- Tindale (1953) found that Big Warrwa's traditional country lay between Derby and Meda[5] and would therefore include the Stokes Bay area. In his research conducted around the southern Kind Sound area, Tindale refers to the Warrwa as being divided into two groups, 'the Little Warrwa to the south of the river and the Big Warrwa between Purula (Derby) and Meda Station.'
- Although there is some variation in the specific delineation of Warrwa territory, from the early 1900s anthropological researchers and linguists have consistently placed Warrwa territory in the southern area of Kind Sound and adjacent mainland.
- Tindale (1974) summarises the ethnographic picture of Warrwa traditional lands as being located on the south-western side of King Sound, stretching around to the eastern side of the Sound to Stokes Bay and extending inland over Meda Station.
- Tindale, in his 1953 genealogies, notes that Warrwa people were at Derby and Meda Station and information in these genealogies suggests that, at that time, groups of Warrwa people were moving between Meda Station and Derby. Information provided by current Warrwa claimants indicates that Meda Station has been a key area for Warrwa people since the turn of the century[6].
- It appears that there are two Warrwa estate groups, with representatives of each in the present claim group:
    - Imarrbula – associated with Meda Station. Ancestors are [Name Deleted], [Name Deleted] and [Name Deleted]. Members include [Name Deleted].
    - Emama Gnuda or Imamangurra - associated with Derby and Point Torment area. Ancestors are [Name Deleted], [Name Deleted], [Name Deleted], [Name Deleted], [Name Deleted], [Name Deleted], [Name Deleted], [Name Deleted] and [Name Deleted]. Members include [Name Deleted].

The affidavits in Attachments F2 to F4 provide the following information in support of the assertion that the claim group have, and their predecessors had, an association with the area:

[Name Deleted] states that:

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[3] Goodenough Bay is to the north west of the application area.

[4] In Tindale's unpublished journal of his 1953 fieldwork.

[5] Meda is located approximately 40 km east of Derby.

[6] Meda Station falls outside the area of this application but the Warrwa people have made a native title determination application over an area of land within Meda Station which was accepted for registration on 13 October 2010 (WC10/12; WAD262/2010).

- his father was [Name Deleted], a Warrwa man and his father's mother was a Warrwa woman named Gudayi[7]. Gudayi's country was Point Torment area and she died at Point Torment Station[8] - at [2] to [3];
- he was born at Moola Bulla Station (near Halls Creek) and was brought to Derby by his mother and father when he was about 11 or 12 years old. He was told stories about Warrwa country and learnt some Warrwa language – at [1] and [8];
- he would go with his mother and father to Meda Station, on Warrwa country, to visit his brothers. They used to camp at Gowarlgowari, a tidal creek at the mouth of the May River and go to nearby Butler Lake – at [9];
- there are special places on Warrwa country like Gowarlgowari, Mirlala (on the May River near Meda Station), Bindjangurru (near Point Torment lighthouse) and Lungunbagurdany (Brandy Bore). All of these places have bugararri or Dreaming so it's important that they are kept safe. As Warrwa men he, together with [Name Deleted], must look after these places and make sure they are not harmed - at [11].

[Name Deleted] (affidavit dated 1 February 2011) states that:

- he was born in 1951 in Derby – at [1];
- he is Warrwa through his mother's side and can trace this back to [Name Deleted] and his wife, [Name Deleted] [9] - at [2];
- his great grandmother, [Name Deleted], was named after a place on Warrwa country called Blue Holes which is between Point Torment and Meda – at [3];
- his mother was born sometime in the late 1920's on Meda Station. Some of his old relatives like his grandmother's grandfather, [Name Deleted], must have been alive before 'whitefellas' came to Warrwa country – at [6];
- Warrwa country takes in both the sea-side and the fresh water side. [Name Deleted] is the name of the Warrwa family group from Derby area and Murrangarnarda is the name of the Warrwa family from Point Torment area down to Meda, following the river inland. Imardbla is for the people of Meda area and the fresh water side – at [7] – [8];
- some of his brothers and sisters and his children and grandchildren are connected to both sides of Warrwa families and both areas of Warrwa country – at [11];
- his connection to the old people for the country gives him the right to be owner for the whole area around Point Torment. As owners he and his sister know the names of the old Warrwa people for that country and teach those names to their children who will take over as owners when they are gone – at [12];
- Murrangarnarda was also the place where people went to after a close relative died. These camping places were all over Point Torment area. You had to live there for a year and could only eat food from the sea, his mother told him that she did that – at [17].

[Name Deleted] (affidavit dated 15 September 2010) states that:

- His 'rai' (spirit child) is One Tree near Butlers Lake called Walgara. When his mother and father were at the stock camp there, when he was a little boy, he bit his brother on the leg as a 'ngardi' spirit. His mother and father saw the spirit of a kangaroo – at [22];

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[7] [Name Deleted] and [Name Deleted] are included in the list of apical ancestors in Schedule A.

[8] Point Torment is within the application area.

[9] Both [Name Deleted] and [Name Deleted] are part of the apical ancestors listed in Schedule A.

- they know all the good billabongs and hunting grounds on Meda and Kimberley Downs. His family hunt and fish there through all the different seasons and fish all along the May River. There is a good hunting spot along the May River at the old police camp near Mundamah (Poulton's Pool). He helped the old people build the yard there as a kid during his holidays from the mission and camped and hunted with his mother's older brother and [Name Deleted] all around that place when he was a child – at [29];
- when his mother was a young girl she travelled on foot from Meda, following the May River all the way to Bulmaningada for ceremony (law business). They would follow the traditional route all the way to the law ground, talking to family spirits and camping at named places along the way – at [30].

Based upon the information described above, I am satisfied that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(a).

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 referred to the importance of understanding the meaning attributed to 'native title' under s. 223 of the Act, in order to examine the factual basis provided in support of the assertion at s. 190B(5)(b) (and similarly at s. 190B(5)(c))—*Gudjala [2007]* at [26]. In this regard, Dowsett J outlined his understanding of the principles drawn from *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*). This aspect of the decision of Dowsett J was not criticised by the Full Court on appeal —*Gudjala FC* at [90] to [96].

Dowsett J's examination of *Yorta Yorta* led him to form the view that a necessary element of this aspect of the factual basis is the identification of the relevant Indigenous society at the time of sovereignty or, at the very least, the time of first contact. Once identified, it follows that the factual basis must reveal the existence of laws and customs with a normative content that are associated with that society. That is, it is necessary to provide a factual basis sufficient to support an assertion that the 'relationship between the laws and customs now acknowledged and observed in a relevant Indigenous society, and those which were acknowledged and observed before sovereignty' can be demonstrated—*Gudjala [2007]* at [26], [66] and [81].

In my view the information in Schedules F, G and M is of a high level of generality and does not in itself provide a sufficient factual basis to support this assertion. There is however considerable additional information in the anthropological report in Attachment F1 and the affidavits in Attachments F2 to F4 in support of this assertion.

Attachment F1 provides the following information in support of the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claimed rights and interests:

- as discussed above under s. 190B(5)(a), the report refers to various ethnographic sources describing the extent of Warrwa traditional country which, despite some variation in boundaries, support the claim area falling within Warrwa country;
- reference is made to research by Capell (1952 -53) in relation to Warrwa (and Nyikina) land based beliefs, including the widespread concept of 'rai' (spirit children). The claimants

continue to express a belief in rai. Details are provided of a land based oral tradition connected to the Point Torment and Derby areas of particular significance for Warrwa claimants. There are several sites in the claim area specifically connected to this tradition and the claimants are obliged to ensure the integrity of these sites;

- in terms of social organisation and kinship, reference is made to Bates' (1985:99) description of the Warrwa following a 'Northern Coastal class' or four 'class' or section system and to Tindale's genealogical research (1953) as indicating that the Warrwa constituted a vibrant society in the early 1950's and that the operation of Warrwa laws and customs were sufficiently prescriptive and flexible to accommodate non-Warrwa on Warrwa country;
- [Name Deleted] and his family state that they are members of a Warrwa group (Emama Gnunda) specifically associated with the peninsula that encompasses Derby and the Aboriginal community of Mowanjum, as well as the peninsula that terminates at Point Torment;
- Barber and Glaskin (1994) found that Emama Gnunda is likely to be the name of a land holding or estate group of Warrwa and that the principles of land ownership rest with localised groups that are 'presumptively patrilineal', with the possibility that factors such as long term residence, location of graves of relatives and conception and quickening have an influence on ownership;
- the report concludes that while 'there has not been specific and detailed ethnographic fieldwork with Warrwa people by previous anthropologists, there are numerous references in the literature to Warrwa people and Warrwa-identified individuals, language, laws and customs. There is a strong consistency between the ethnographic record and contemporary depictions of Warrwa traditional lands. There are numerous examples of consistency of Warrwa laws and customs as recorded in the literature and the contemporary observations of laws and customs of the Warrwa people. There is an ongoing connection to the claim area and the exercise of native title rights and interests in the claim area.'

The affidavits in Attachments F2 to F4, described in part above under s. 190B(5)(a), in my view support these conclusions. The deponents describe their Warrwa identity through their relationship to one or more of the apical ancestors named in Schedule A and describe in some detail their traditional connection to the claim area.

The anthropological report places the claim area within the accepted traditional country of the Warrwa people as documented since the early 1900's. Tindale, in the mid 1900's, documented the existence of a Warrwa traditional society within the claim area.

In my view the affidavit material, together with the report in Attachment F1, describe in sufficient detail the existence of traditional laws and customs observed by the claim group and how those laws and customs have been passed down through the generations from the Warrwa society that existed at the time of first contact with the claim area.

Having regard to this material, I am satisfied that the factual basis provided is sufficient to support the assertion described by 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.

The factual basis must be sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed. Thus, the factual basis must provide information which addresses on what basis it is asserted that 'the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty'—*Yorta Yorta* at [47].

In *Gudjala [2007]* Dowsett J held that this requirement 'implies a continuity of such tenure going back to sovereignty, or at least European occupation as a basis for inferring the position prior to that date'—at [82].

The information provided in the application, as discussed above under ss. 190B(5)(a) and (b), identifies that the relevant society at the time of first contact was the Warrwa people and that the application area falls within the traditional territory of that society. The affidavits, together with the anthropological report in Attachment F1, provide details of how the claim group have continued to acknowledge and observe the traditional laws and customs of that society.

Having regard to this material, examples of which are referred to above, I am satisfied that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(c).

Subsection 190B(6)
Prima facie case

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

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

Nature of the task

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

- It is a prima facie test and 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'—at [135].
- It involves some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed'—at [126], [127] and [132].

In undertaking this task I must have regard to the relevant law as to what is a native title right and interest as defined in s. 223(1) of the Act. I must therefore consider, prima facie, whether each right and interest claimed:

- exists under traditional law and custom in relation to any part of the application area;
- is a native title right and interest in relation to land or waters;
- has not been extinguished over the whole of the application area.

I will now consider each of the rights and interests claimed in Schedule E of the application and will group some of the rights together where there is supporting information common to multiple rights:

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

In *Western Australia v Ward* [2002] HCA 28 (*Ward HC*), the majority considered that the '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' and conveys 'the assertion of rights of control over the land' – at [89] and [93].

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

> ...the 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 – at [71].

And further:

> If control of access to country flows from spiritual necessity because of the harm that "the country" will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive... The question of exclusivity depends upon the ability of the appellants effectively to exclude from their country people not from their community... – at [127].

There is some material in the affidavits in support of a right under traditional law and custom to control access to Warrwa country. In his affidavit dated 9 December 2010 [Name Deleted] states that:

> I was told by my father and other old Warrwa people that when strangers came into Warrwa country they would see the old people first. They would hug them to show respect and that they were all friendly. They call it ngambal and Warrwa people would do that to strangers to give them clearance on Warrwa country. It shows that they will be responsible if that stranger gets into trouble. He can go back to his country then in good health... – at [12].

In his affidavit dated 15 September 2011 Harry Lennard states that:

> In the old days people used to walk on foot without any shoes so you would recognise people by their footprint. If they saw a big footprint that was probably Wilungoo people as they were big people. We could see that people who were not Warrwa had been to our country... – at [3].

I am of the view that there is sufficient information before me to **establish, prima facie,** a claim to exclusive possession.

I find that the following non-exclusive claimed rights are **established, prima facie**:

> 2. Over areas where a claim to exclusive possession cannot be recognised, the Warrwa People claim the following rights and interests:

(a) the right to access the application area;
(b) the right to travel across the application area;
(c) the right to camp on the application area;
(d) the right to erect shelters on the application area;
(e) the right to live on the application area;
(f) the right to move about on the application area;

The affidavits of [Name Deleted] and [Name Deleted] in Attachments F2 to F4 provide sufficient information to prima facie establish the above claimed rights and interests. For example, as noted above under s. 190B(5), both deponents talk of themselves, their families and their ancestors living within, moving about and travelling across the claim area.

[Name Deleted] refers to his mother as a young girl travelling on foot from Meda, along the May River, to Bulmaningada, for law business, following the 'traditional route' and camping at named places along the way (at [30] of affidavit dated 15 September 2010) .

[Name Deleted] refers to camping with his family at the mouth of the May River and at Butler Lake (at [9]). [Name Deleted] refers to the camping places 'all over Point Torment area' where people would camp after a close relative had died (at [17] of affidavit dated 1 February 2011).

(g) the right to hold meetings on the application area;
(m) the right to use the application area for social, religious, cultural and spiritual customary and/or traditional purposes;
(n) the right to conduct ceremony on the application area;
(o) the right to participate in cultural activities on the application area;

There is sufficient information in the affidavits of [Name Deleted] and [Name Deleted] to establish, prima facie, these claimed rights. For example, [Name Deleted] describes his mother travelling to Bulmaningada for ceremony and law business (at [30] of affidavit dated 15 September 2010).

In his affidavit dated 1 February 2011, [Name Deleted] states that Murrangarnarda and other parts of Warrwa country are places for which there is a 'big Law for initiation' (at [18]) and as noted above, Murrangarnarda was the place where people went to camp in certain traditional ways after the death of a close relative (at [17]).

(h) the right to hunt on the application area;
(i) the right to fish on the application area;
(j) the right to take flora and fauna from the application area;
(k) the right to use and maintain the natural water resources of the application area including the beds and bank of watercourses;
(l) the right to gather the natural products of the application area (including food, medicinal plants, timber, stone, ochre and resin) according to traditional laws and customs;
(t) the right to cultivate and harvest native flora according to traditional laws and customs;

There is sufficient information in the affidavits of [Name Deleted] and [Name Deleted] to establish, prima facie, the above claimed rights.

[Name Deleted] states that:

- his family would collect bush tucker at places along the May River, at Butler Lake and Doctor's Creek, including barulu (catfish), Walja (barramundi) and shellfish – at [9].

- they would use plants for medicine, like murga (ti-tree) for back-ache and the bark of the gawlol to prevent itches. On the Point Torment side they would crush the bark of the red mangrove and sand and stir it into the water to make it easier to catch fish and would use the leaves of the bilan tree to prepare kangaroos and turkeys for cooking on the fire – at [10].

[Name Deleted] (affidavit dated 1 February 2011) states that:

- he has a special connection to the 'creepy crawlies' in the mud flats, mangroves and creeks from Point Torment to Derby and each has a Warrwa name. They catch them by hand when in season and know the proper way to cook them – at [14];
- he knows the 'Law of hitting the trees at Nganjalingan (on the May River)' to get fish. This is a tradition to pay homage to the old man for that country, Garluggardar – at [14];
- there is a secret place at Point Torment beach heads near Junun where he goes with his children and other family members to catch 'creepy crawlies'. There is a place called Chillingun where there used to be a bore called Circle Well. If you didn't know of this well you would die of thirst – at [16].

[Name Deleted] (affidavit dated 15 September 2010) states that:

- he was taught to hunt with a spear by his father and to make spears and womeras by his uncle – at [23];
- they used to make spears from bamboo and wongai (wattle tree) and use resin from Spinifex. The spear head was made from Quartz or old bottles. The spear head was sometimes secured with sinew from the kangaroo leg – at [25] to [26];
- he learnt to use flood waters to trap game. His family hunted and fished all along the May River throughout the different seasons, catching catfish, barramundi, bream and fresh water prawns. During the wet season they would hunt Barni (goanna) – at [28] to [29].

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

There is sufficient information in the affidavits of [Name Deleted] and [Name Deleted] to establish, prima facie, the above claimed rights. For example, [Name Deleted] states that there are special places on Warrwa country like Gowarlgowari, Mirlala (on the May River near Meda Station), Bindjangurru (near Point Torment lighthouse) and Lungunbagurdany (Brandy Bore). All of these places have bugararri or Dreaming so it's important that they are kept safe. As Warrwa men he, together with [Name Deleted] and [Name Deleted], must look after these places and make sure they are not harmed - at [11].

(r) the right to conduct burials on the application area;

[Name Deleted] (affidavit dated 15 September 2010) describes how he was told of [Name Deleted] (his great grandmother's husband), a Lardingua man who married into Warrwa, lived on Warrwa country and followed Warrwa law, being buried in a gundading (tree top burial), being a burial for 'bosses' – at [11].

In my view there is sufficient information to establish, prima facie, this claimed right.

(u) the right to cook and light fires for that purpose, on the application area;

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

[Name Deleted] refers in his affidavit to cooking kangaroo and turkey in the 'proper way' in the coals of a fire – at [10]. [Name Deleted] (affidavit dated 1 February 2011) refers to cooking mud crabs and shell fish in the 'proper way' using mangrove branches – at [14]. I infer that this would involve the lighting of a fire.

I am of the view that there is sufficient information to establish, prima facie, these claimed rights.

(x) the right to maintain and transmit cultural heritage of the application area;

In *Ward HC* the High Court found that a claimed right to maintain, protect and prevent the misuse of cultural knowledge was not a native title right and interest in relation to land or waters within the meaning of s. 223(1) of the Act (at [60]). The High Court stated that:

> ...it is apparent that what is asserted goes beyond that [for example, respecting access to sites where artworks on rock are located or ceremonies are performed] to something approaching an incorporeal right akin to a new species of intellectual property ...The "recognition" of this right would extend beyond denial or control of access to land held under native title – at [59].

In my view the rights as expressed in subparagraphs (w) and (x) can be distinguished from that in *Ward HC* as they do not include a claim to protect or prevent the misuse of cultural knowledge or cultural heritage. They demonstrate the requisite connection to land or waters by linking the claimed right to being conducted within the application area. Although the High Court in *Ward HC* referred to the imprecision of the term 'cultural knowledge', they acknowledged that the traditional laws and customs that are manifested at, for example, sites where artworks are located or ceremonies performed, goes to the requirement for a connection to land or waters in s. 223(1)(b).

I am therefore prepared to accept this right as being a native title right and interest within the meaning of s. 223(1).

There are various references throughout the affidavits of [Name Deleted] and [Name Deleted] to the passing down through the generations of cultural knowledge and cultural heritage in relation to the claim area. For example, as set out above, information is provided about traditional ceremonial and cultural practices involving initiation rituals and observance of Warrwa law, the passing on of knowledge of traditional methods of making weapons, hunting and preparing bush tucker.

I am of the view that there is sufficient information to establish, prima facie, this claimed right.

I find that the following non-exclusive claimed rights are **not established**, prima facie:

(s) the right to speak for and make non-exclusive decisions about the application area

In my view this right is not capable of being established non-exclusively, on the authority that such a right is 'subsumed in that global right of exclusive occupation'— *Sampi v State of Western Australia* [2005] FCA 777 at [1072]. I refer also to the reasoning in *Ward HC* at [88] that:

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

I also note that in *Neowarra v State of Western Australia* [2003] FCA Sundberg J 1399 was of the view that 'the right to speak for country involves a claim to ownership' and could only be recognised in relation to areas of exclusive native title rights and interests —at [494].

I am therefore not satisfied that the right to speak for and make non-exclusive decisions about the application area can be established, prima facie, in relation to areas where a right to exclusively possess, occupy, use and enjoy is not claimed.

(w) the right to uphold, regulate, monitor and enforce customary law

The decision of *Neowarra v State of Western Australia* [2004] FCA 1092 indicates that this is a right in relation to people and not in relation to land or waters and as such is not capable of being recognised under s. 223.

(y) the right to regulate among and resolve disputes among the native title holders of the application area

A similarly framed right was held to be part of the laws and customs of the native title holders rather than a right or interest in relation to land or waters—*Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group* [2005] FCAFC 135 at [165], and as such is not capable of being recognised under s. 223.

Subsection 190B(7)
Traditional physical connection

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

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

(b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:

(i) the Crown in any capacity, or

(ii) a statutory authority of the Crown in any capacity, or

(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

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

I understand the phrase 'traditional physical connection' to mean a physical connection in accordance with the particular traditional laws and customs relevant to the claim group, being traditional as discussed in *Yorta Yorta*.

I refer to the affidavits of [Name Deleted] and [Name Deleted] in Attachments F2 to F4, discussed above under ss. 190B(5) and 190B(6). I am satisfied that both these persons are members of the native title claim group, via descent from ancestors named in Schedule A. Both deponents provide strong evidence of their traditional physical connection to the application area and to their acknowledgement and observance of the traditional laws and customs of the Warrwa People.

I am satisfied that [Name Deleted] and [Name Deleted] currently have a traditional physical connection with the land or waters covered by the application.

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

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

Section 61A provides:

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

(2) If :

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

(b) either:

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

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

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

(3) If:

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

(b) either:

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

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

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

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

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

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

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

Reasons for s. 61A(1)

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

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

The Geospatial overlap analysis shows that there are no determinations of native title in relation to any part of the application area.

Reasons for s. 61A(2)

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

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

Schedule B excludes from the application any areas subject to 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).

There is no express statement in the application to the effect that the applicant is not claiming exclusive native title rights and interests over areas subject to previous non-exclusive possession acts. However, in my view it is clear from the wording of the claimed rights and interests in Schedule E that there is no intention to claim exclusive native title over areas subject to previous non-exclusive possession acts. Schedule E clearly claims exclusive native title only in relation to those areas where a claim to exclusive possession can be recognised, such as areas where there has been no prior extinguishment or where ss. 238, 47, 47A or 47B apply. In relation to areas where exclusive possession cannot be recognised, the rights claimed in Schedule E are limited to rights and interests of a non-exclusive nature.

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 indicates that no such claim is being made to the ownership of minerals, petroleum or gas.

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

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

Schedule P indicates that no claim is being made to exclusive possession of any offshore place.

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

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

Schedule B excludes from the application any area in relation to which native title rights and interests have otherwise been wholly extinguished.

[End of reasons]

Attachment A
Summary of registration test result

Application name	**Mawadjala Gadjidgar**
NNTT file no.	**WC2011/3**
Federal Court of Australia file no.	**WAD104/11**
Date of registration test decision	**23 June 2011**

Section 190C conditions

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

Test condition	Subcondition/requirement		Result
		s. 62(2)(h)	Met
s. 190C(3)			Met
s. 190C(4)			Overall result: Met
	s. 190C(4)(a)		Met
	s. 190C(4)(b)		N/A

Section 190B conditions

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

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

[End of document]