National Native Title Tribunal

Registration test decision

Application name	Whadjuk People
Name of applicant	Clive Davis, Nigel Wilkes, Dianne Wynne, Noel Morich, Trevor Nettle
State/territory/region	Western Australia
NNTT file no.	WC11/9
Federal Court of Australia file no.	WAD242/2011
Date application made	23 June 2011
Date of Decision	**11 October 2011**
Name of delegate	Lisa Jowett

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

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

Date of Reasons: 1 November 2011

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Lisa Jowett

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

Reasons for decision

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Introduction

This document sets out my reasons, as the Registrar's delegate, for the decision to accept the Whadjuk People claimant application (Whadjuk 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 Whadjuk application to the Native Title Registrar (the Registrar) on 28 June 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 23 June 2011 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

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

The application area covers the Perth metropolitan area and surrounds in Western Australia. Two unregistered claimant applications cover the area of the Whadjuk application—Swan River People 2 (WAD24/11) and Single Noongar Claim (Area 1) (WAD6006/03). The Perth metropolitan area has been the subject of previous Court proceedings pertaining to both these unregistered applications. The Single Noongar Claim (SNC) was filed in the Court in 2003 on the basis of the assertion that there exists a single Aboriginal community (the Noongar community) throughout the whole of the south-west of Western Australia. The area covered by the application is largely the same as the South West Representative Area of Western Australia. The Swan River People 2 claim was filed early in 2011, and includes the Perth metropolitan area within the area of its application. Given that each of the three applications rely on some of the same apical ancestors to define the native title claim group, it is clear that some members of the Whadjuk claim group are also members of one or both of the Swan River People 2 and SNC claims.

The applicant is represented by the South West Aboriginal Land and Sea Council (SWALSC).

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.

Attachment B of these reasons lists all of the information and documents that I have considered in reaching my decision.

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

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

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)— *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.

My consideration of each of the particular parts of ss. 61 and 62 (which require the application to contain details/other information or to be accompanied by an affidavit or other documents) is detailed below.

Native title claim group: s. 61(1)

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

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

The nature of the task at 190C(2) is limited to a consideration of whether the application sets out the native title claim group in the terms required by s. 61(1)—*Doepel* at [36]. Subsequently, the

task does not require me to look beyond the contents of the application itself—*Doepel* at [37] and [39].

In assessing the current application and whether it contains the details and information required by s. 61(1), it is not my concern that the native title claim group is the correct native title claim group, but that the claim 'on its face, is brought on behalf of all members of the native title group'—*Doepel* at [35] and [37].

Part A of the application contains the information regarding persons authorised to make this application, listing the names of the applicants, and providing details regarding their authorisation by the native title claim group.

Attachment A of the application provides a description of those persons comprising the native title claim group as the following:

1. biological or adopted descendants of the union between the following couples:
   - Boolabung and Weetang
   - Alice Taylor (Berijan) and Tommy Nettle; or
2. biological or adopted descendants of any of the following persons:
   - Wanetan
   - Doornong
   - Fanny Moderan, the mother of Cecilia Wilkes
   - Tulbak, and
   - John "Jack" Mungar Bennell
3. Paragraphs 1 and 2 above include the biological descendants of persons adopted in any intervening generation.
4. A person has been adopted by another person or persons for the purpose of paragraphs 1 to 3 above if they have been reared from childhood by ("grown up by") that person or persons.

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

Part B of the application states the name and address for service of the persons who are the applicant. The applicant is identified as five (5) named persons, being Clive Davis, Noel Morich, Nigel Wilkes, Trevor Nettle and Dianne Wynne.

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).

Schedule A refers to Attachment A which provides a description of the persons in the group.

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 five persons who comprise the applicant. The affidavits are signed by each deponent and witnessed and make all the statements required of this section.

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

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

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

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

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

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

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

Attachment B of the application contains a description of the external boundaries of the area covered by the application. Schedule B describes those areas not covered by the area 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).

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

Searches: s. 62(2)(c)

> The application must contain the details and results of all searches carried out 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 provides that the applicant is not aware of any searches that have been carried out to determine the existence of any non-native title rights and interests in relation to the land or waters in the area covered by the application.

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

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

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

A description of the native title rights and interests claimed in relation to the area covered by the application is contained in Attachment E. This description (included as an excerpt within my reasoning at s. 190B(4)) consists of more than a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that may not have been extinguished, at law.

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

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

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

Attachment F of the application contains information comprising a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist. The information provided in Attachment F specifically addresses the criteria set out in subsections 62(2)(e)(i) to (iii), demonstrated by headings throughout the Attachment.

In assessing the information provided for the purposes of s. 62(2)(e), I am mindful that the applicant is not required to provide anything more than a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Whilst that description must be more than 'assertions at a high level of generality', any 'genuine assessment' of the information contained in Attachment F is in

my opinion reserved for consideration at s. 190B(5)—*Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [92].

I am of the view that the information contained in the application at Attachment F satisfies the requirements of a general description of the factual basis on which it is asserted that the claimed native title rights and interests exist, and amounts to more than assertions at a high level of generality. Each of the affidavits sworn by those persons jointly comprising the applicant (provided at Attachment R) asserts that the applicant believes all statements made in the application are true.

The application therefore satisfies s. 62(2)(e) for the purposes of s.190C(2).

Activities: s. 62(2)(f)

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

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

Schedule G of the application contains the activities which the native title claim group currently carry out on and in relation to the area claimed.

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

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

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

Schedule H of the application contains information regarding other applications for determinations of native title of which the applicant is aware, and which have been made in relation to the whole or part of the area covered by the application. Schedule H contains details of two such applications, being the Single Noongar Claim Area One (WAD 6006 of 2003) and the Swan River People 2 (WAD 24 of 2011).

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).

Attachment HA of the application contains a notice of the type and nature specified in s. 62(2)(ga), being notification from the Department of Mines and Petroleum (WA) of 'an infrastructure facility associated with mining pursuant to section 24MD(6B)'. Schedule HA of the application provides that this is the only such notice of which the applicant is aware.

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

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

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

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

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

> The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:
>
> (a) the previous application covered the whole or part of the area covered by the current application, and
>
> (b) the previous application was on the Register of Native Title Claims when the current application was made, and
>
> (c) the entry was made, or not removed, as a result of the previous application being considered for registration under s. 190A.

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

The requirement that the Registrar be satisfied 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—see *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 overlapping 'previous application'.

For the purposes of considering the present claim under s. 190A, on 30 June 2011, the Tribunal's Geospatial Services prepared a geospatial assessment and overlap analysis (the geospatial report). The report identifies two [2] native title determination applications that fall within the external boundaries of the current application.

- WAD6006/03—Single Noongar Claim (Area 1), and
- WAD24/11—Swan River People 2.

I note that Schedule O of the current application states that:

> All or most of the members of the native title claim group for this application are also members of the native title claim group for application WAD 6006 of 2003 (Single Noongar Claim Area One). Many members of the native title claim group for this application are also members of the native title claim group for application WAD 24 of 2011 (Swan River People).

The Single Noongar Claim (Area 1) was considered for registration under s. 190A in 2004 and 2007. In both instances it was not accepted for registration and hence has never been on the Register. The Swan River People 2 application was considered for registration under s. 190A in April 2011. It similarly was not accepted for registration and has never been on the Register.

As neither application is a previous application that overlaps the current application in the sense discussed in s. 190C(3)(a) to (c), there is no requirement that I consider the issue of common claim group members between these overlapping applications and the current application.

I am therefore satisfied that the current application meets the requirements of s. 190C(3).

Subsection 190C(4) Authorisation/certification

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

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

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

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

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.

As the application is not certified pursuant to s. 190C(4)(a), it is necessary to consider if the application meets the condition in s. 190C(4)(b); that the applicant is a member of the native title claim group and is authorised by all other persons in the claim group to make the application and deal with matters arising in relation to it.

A note to s. 190C(4) directs the Registrar to s. 251B of the Act, for the meaning of the word 'authorise':

251B Authorising the making of applications

For the purposes of this Act, all the persons in a native title claim group or compensation claim group authorise a person or persons to make a native title determination application or a compensation 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 or compensation claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group or compensation 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 or compensation 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 or compensation 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.

Additionally, in my consideration of the authorisation condition at s. 190C(4)(b) I must also consider the requirements as set out in s. 190C(5):

> If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:
>
> a) includes a statement to the effect that the requirement set out in paragraph 4(b) has been met; and
>
> b) briefly sets out the grounds on which the Registrar should consider that it has been met.

Information considered

In addition to Attachment R to the application and the applicant's s. 62(1)(a) affidavits, I have considered information contained in a number of submissions and affidavits submitted in relation to the authorisation condition (the full extent of which are listed at Attachment B to these reasons):

- Submission and affidavits of [Applicant #1 for overlapping claim] and [Applicant #2 for overlapping claim], 21 July 2011;
- Affidavit of [Applicants' legal representative], affirmed 28 July 2011;
- Submission of [Person making submission], 29 July 2011 ;
- Affidavit of [Applicants' legal representative], affirmed 2 August 2011;
- Submission of SWALSC on behalf of the applicant, 3 August 2011, ;
- Submission of SWALSC on behalf of the applicant, 30 August 2011;
- Affidavits of [SWALSC anthropologist], affirmed 30 August 2011 and 7 October 2011;
- Submission and affidavits of [Applicant #1 for overlapping claim], 13 September 2011.

I note, and discuss in detail below, that three persons made submissions in relation to the registration testing of the Whadjuk application – [Applicant #1 for overlapping claim], [Applicant #2 for overlapping claim] and [Person providing submission]. Their contentions provide information that is potentially adverse to the issue of authorisation.

As noted in my overview of the procedural fairness steps followed in relation to submissions and additional material provided to me, the State of Western Australia (the State) was provided with all of the above material but did not provide any submissions either in response or its own.

The requirements of s. 190C(5)

For the purposes of s. 190C(5)(a), the application must contain a statement to the effect that the requirement set out in paragraph (4)(b) has been met. Attachment R of the application contains a statement that those persons jointly comprising the applicant are members of the native title claim group (paragraph 1) through their descent from ancestors listed at Schedule A, (paragraph 2) and that each person was authorised at a meeting held at Cannington on 26 March 2011,

through a decision-making process agreed to and adopted by the claim group, to make the application (paragraph 3).

I am satisfied that the statements in Attachment R to the application contain the information required by s. 190C(5)(a).

Further information is contained in Attachment R which meets the requirements of s. 190C(5)(b) in that it briefly sets out the grounds on which the Registrar is to be satisfied that the requirements of s. 190C(4)(b) has been met:

> The applicant was authorised to make, and deal with matters arising in relation to, the application by the native title claim group at a meeting of the native title claim group held at Cannington on 26 March 2011 ("the authorisation meeting"), pursuant to a decision-making process which was agreed to and adopted by the claim group at that meeting—at [3].
>
> The authorisation meeting was extensively notified. Notice of the meeting was published in the West Australian Newspaper and twenty-six local papers which are circulated within the application area. In addition, meeting notices were posted to a total of 1953 persons, including all identified descendants of the ancestors named on the notice for who the South West Aboriginal Land and Sea Council had addresses—at [4].

Paragraph 5 states that the decision-making process referred to in paragraph [3] above was a process by which decisions were made by majority vote on a secret ballot.

I am therefore satisfied that the application meets the requirements of s. 190C(5).

In *Doepel*, Mansfield J discusses the interaction between s. 190C(4)(b) and s. 190C(5) and how the Registrar is to be satisfied as to these conditions of the registration test:

> In the case of subs (4)(b), the Registrar is required to be satisfied of the fact of authorisation by all members of the native title claim group. Section 190C(5) then imposes further specific requirements before the Registrar can attain the necessary satisfaction for the purposes of s. 190C(4)(b). The interactions of s. 190C(4)(b) and s. 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s. 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given—at [78].

It is therefore still necessary for me to consider whether I am satisfied that the applicant is authorised pursuant to s. 190C(4)(b), noting that I am not limited to what is in the application on the issue.

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

There are five [5] persons named in the application who jointly comprise the applicant, being Clive Davis, Noel Morich, Nigel Wilkes, Trevor Nettle and Dianne Wynne. Each of these persons has sworn in an affidavit provided for the purposes of s. 62(1)(a) that he or she is a member of the native title claim group. The fact that there is no information to support the assertions made in the affidavits is not a relevant consideration in determining authorisation matters—Doepel at [86] to [87].

Paragraph [2] of Attachment R of the application provides that each of the persons jointly comprising the applicant is descended from an ancestor listed in Attachment A as follows:

(a) Clive Davis is a descendant of John "Jack" Mungar Bennell;
(b) Noel Morich is a descendant of Doornong;

(c) Nigel Wilkes is a descendant of the Mother of Cecilia Wilkes;
(d) Trevor Nettle is a descendant of Tommy Nettle and Alice Taylor; and
(e) Dianne Wynne is a descendant of Tulbak.

As there is a direct correlation between the apical ancestors listed above and the apical ancestors listed in Attachment A, upon which identification of the native title claim group is based, I am therefore 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)—the applicant is authorised by all the other persons in the native title claim group

Information contained in the application

As referred to and quoted above, Schedule R briefly states the grounds on which the applicant's asserted authority is based.

Each of the affidavits of the persons who jointly comprise the applicant affirm:

> I am 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. The basis on which I am so authorised is that I was one of the five persons who were jointly authorised to be the applicant for the application by a decision made at a meeting of the native title claim group held on 26 March 2011 in Cannington, being a decision made in accordance with a process agreed to and adopted by the native title claim group on that date. This was a process whereby decisions were made by a majority vote on a secret ballot—at [5].

Applicant's additional authorisation material

The applicant provided additional material relating to the issue of authorisation on 28 July 2011. [Applicants' legal representative] provides an affidavit, sworn 28 July 2011, in which he identifies himself as the 'legal officer at SWALSC with carriage of this application'—at [1]. He details the process by which authorisation of the applicant for the Whadjuk application was achieved—how it was prepared, notified, advertised by SWALSC and how the meeting of 26 March 2011 was convened and conducted. [Applicants' legal representative] coordinated the authorisation process and the following is a summary of how the authorisation meeting was notified:

- A list was prepared by SWALSC anthropologist [SWALSC anthropologist] of persons said to be descended from the apical ancestors (who had been identified through research conducted by [SWALSC anthropologist]). This list was generated from an extensive genealogical database established by SWALSC in 2002, which is the combined result of sources that include existing databases at the time, genealogies prepared by anthropologists in the 1970s, historical government records and anthropological works, contemporary evidence of Noongar people gathered in the course of SWALSC's interaction and business with the Noongar community—at [1] to [3].
- [Applicants' legal representative] attests that this genealogical database 'is the most substantial and authoritative database on Noongar population yet researched—at [3].

- A complex process of consolidating the list of persons said to be descended from the apical ancestors against the SWALSC membership was then undertaken, resulting in a total of 1953 persons who were to be notified of an authorisation meeting in relation to the proposed Whadjuk application—at [4].
- On 4 March 2011, a notice and full A4 page map was mailed to these 1953 persons, a copy of which is annexed to [Applicants' legal representative] affidavit (Annexure A), the detail of which included the date, location and reason for the meeting (being to authorise a new native title claim over an area described in the notice); an invitation to descendents of those apical ancestors later used to describe the native title claim group for the Whadjuk application, a map of the proposed application area and the contact details of relevant SWALSC staff.
- [Applicants' legal representative] arranged for this notice of the authorisation meeting to be published in weekend editions of The West Australian for 5-6 and 12-13 March 2011 and 24 local papers. A list of the names of the local papers and the dates on which the notices were published is provided—at [5] and Annexure B.

Details about the conduct of the authorisation meeting, which took place in Cannington on 26 March 2011, are also provided in [Applicants' legal representative] affidavit of 28 July 2011:

- The meeting commenced at 10.30am and closed at 4.45pm;
- The attendance lists attached to [Applicants' legal representative] affidavit show 236 person attended the meeting—Annexure E;
- SWALSC staff implemented a process of registration of attendees which sought to ensure that participants recorded their identification according to the ancestors named in the meeting notice and then signed the attendance list and were provided with a voting card—at [6];
- If a person was not able to be linked to one of the named ancestors, that person was told they could not participate in the meeting—at [6] to [7];
- Participants were provided with an agenda and a document outlining the code of conduct for the meeting—Annexure G;
- Participants were informed by SWASLC staff about the background to the making of the claim (Single Noongar Claim proceedings); the current negotiations with the State government; and discussion occurred in relation to the list of named ancestors and the external boundary of the proposed claim as detailed in the meeting notice—at [11];
- Voting and the counting of votes was monitored and supervised by two members of the Noongar community—a Noongar Elder and SWALSC's Cultural Counsel, and a member of the claim group with experience as an election scrutiniser who had no connection to SWALSC staff or the Board, who volunteered not to participate in voting.

[Applicants' legal representative] does not attest in his affidavit to any person or persons expressing any dissent to or dissatisfaction with the steps and processes undertaken to authorise the applicant to make and deal with the proposed application. He shows each of the resolutions has being carried with clear and substantial majorities.

The information in [Applicants' legal representative] affidavit details the process of decision-making followed to authorise the applicant and the resolutions reached as a result:

- Previous Noongar claims had been authorised by a show of hands on the basis that there was no traditional decision-making process to be followed in making decisions of this kind—at [11];
- No person asserted that there existed a traditional decision-making process which must be followed—at [11];
- A call was made for decisions to be made by secret ballot and voted upon, 137 in favour to 33 against—at [11];
- Three resolutions (the detail of which is provided in full[1]) were passed by majority vote:
    - Resolution 1 (new native title application) was carried by 133 votes to 33,
    - Resolution 2 (limits to applicant's authority) was carried 157 votes to 7,
    - Resolution 3 (authorisation of the applicant) was carried 110 votes to 11.

Adverse information from persons who dispute the composition of the native title claim group and the boundaries of the area covered by the application

A. Submissions of [Applicant #1 for overlapping claim] *and* [Applicant #2 for overlapping claim]

[Applicant #1 for overlapping claim] and [Applicant #2 for overlapping claim] are members of the native title claim group and are two of the persons who comprise the applicant for the currently un-registered Swan River People 2 application which overlaps the area covered by the Whadjuk application. [Applicant #1 for overlapping claim] great grandmother (Fanny Moderan) and [Applicant #2 for overlapping claim] great great grandparents (Tommy Nettle and Alice Taylor) are apical ancestors named in Schedule A of the Whadjuk application. [Applicant #1 for overlapping claim] and [Applicant #2 for overlapping claim] are both, therefore, according to its description, members of the native title claim group for the Whadjuk People application.

[Applicant #1 for overlapping claim] provided a submission to the Registrar on 21 July 2011 which included his and [Applicant #2 for overlapping claim] affidavits. He provided a further submission and affidavit to the Registrar on 13 September 201.

The submissions of 21 July 2011 of [Applicant #1 for overlapping claim] and [Applicant #2 for overlapping claim] contest the veracity of the identified apical ancestors used to describe the membership of the native title claim group and the boundaries that establish the area of the Whadjuk application such that:

- the ancestors, John Jack Mungar Bennell, Boolabung & Weetang, Wanetan, Doornong and Tulbak do not have a traditional connection to or association with the area covered by the Whadjuk application2; and

[1] [13], [14] and [16] respectively
[2] Submissions of 21 July and 13 September 2011

- that it is impossible to justify the 'square box' boundaries under traditional law, that the lands of the ancestors were determined by the movements of the Waugal, and should be drawn up according to rivers, hills and water catchment areas3.

[Applicant #1 for overlapping claim] and [Applicant #2 for overlapping claim] also attest in their affidavits to irregularities and a lack of fairness and independence in the way the native title claim group proceeded to authorise the applicant to make and deal with the Whadjuk application at the meeting. [Applicant #1 for overlapping claim] outlines his dissatisfaction with the way the meeting was run:

- The chairing of the meeting did not allow for people to express dissent—at [8] to [10];
- The suggestion to adjourn the meeting to further consider whether the appropriate apical ancestors had been named was 'unilaterally refused' on the basis that the motion to do so was not on the agenda—at [18];
- There was no convincing evidence as to the basis upon which the apical ancestors and the area of the application were decided—[19] to [20];

and how the decision-making process played out:

- No formal decision was made in relation to the appropriate decision-making process to be followed at the meeting—at [21]
- The terms of 'majority vote' was not sufficiently defined—at [25]
- The process, monitoring and outcome of the voting process was irregular, unreliable, and not independent—at [26] to [30].

[Applicant #1 for overlapping claim] is of the view that no decision or resolution was made by 'all the persons' in the native title claim group about the decision-making process that was to be followed to authorise the applicant. He does not believe that the vote to make decisions by secret ballot nor the discussion as to the numbers required for a majority vote to be carried were properly resolved by participants. In this sense, he believes that all the decisions made on the day are therefore invalid[4].

[Applicant #1 for overlapping claim] and [Applicant #2 for overlapping claim] make no submission as to whether the native title claim group was provided with sufficient opportunity to participate in a meeting that was to make decisions in relation to authorising the making of the Whadjuk application.

B. Submissions of [Person making submission]

[Person making submission] letter of 29 July 2011 to the Registrar states that he considers that he and his family are 'native title holders for the metropolitan area' and that he has sought 'inclusion on any new claim to be made over Perth and surrounds'. He is concerned about the 'inadequate composition of the claim group' as it 'does not include all the people who could claim native title

[3] Affidavit sworn 21 July 2011 at [15}
[4] Affidavit of 21 July 2011 —at [21], [23], [25], [31] and [32

in the claim area'. [Person making submission] contends that an ancestor from whom he claims descent, Yagan, should have been included in the list of ancestors used to describe the claim group, and on the basis that he is not, [Person making submission] was excluded from the authorisation process for the Whadjuk application. He provides a number of extracts from texts that place Yagan in the Perth metropolitan area (and Swan Valley) at the time of European settlement. He asserts that his descent therefore makes him a member of any native title claim group for the area and he should therefore be included in any authorisation process for a claim over the Perth metropolitan area.

Submissions by the applicant in response to the adverse material

SWALSC provided a response to [Applicant #1 for overlapping claim] and [Applicant #2 for overlapping claim] submissions in correspondence and affidavits of 3 and 30 August 2011 in which [Applicant #1 for overlapping claim] addresses (amongst other issues) the contention that the decisions made at the meeting of 26 March 2011were not valid. In relation to the conduct of the meeting [Applicants' legal representative] states in his letter.

- The meeting was chaired properly and fairly and afforded participants a right to speak openly—at [3];
- [Applicant #1 for overlapping claim] was able to express his views disputing some of the apical ancestors proposed for the new claim both orally and by distributing a document outlining the grounds for these views—at [4];
- The chair of the meeting communicated to the meeting that if any persons did not agree with decisions being made on the new claim, that position should be asserted by a 'no' vote to the relevant resolutions—at [5];
- An 'independent legal advisor to the meeting' was present as had been the practice at authorisation meetings in other matters, and the meeting was not adjourned in order to give further consideration to the named apical ancestors and external boundaries of the claim on advice received by this advisor —at [5] to [6]; and
- Of the 236 people listed on the attendance sheets, 138 are 'covered by the claim group description for the Swan River People 2 claim—at [8].

He acknowledges that [Applicant #1 for overlapping claim] disputed some of the named apical ancestors and annexes to his affidavit of 2 August 2011 a document [Applicant #1 for overlapping claim] distributed to attendees at the meeting which details some of the historical record that relates to the ancestors which are, in [Applicant #1 for overlapping claim] view, contentious. On this issue, in her letter of 30 August 2011, the Principal Legal Officer for SWALSC, concludes the response to [Applicant #1 for overlapping claim] submissions with a statement that the document is evidence of the fact that:

> . . . the people who attended the authorisation meeting were clearly appraised of any potential controversy regarding the named ancestors to the application, and may accordingly be said to have given their properly informed consent and support for the lodging of the application. . .

In support of the assertion that the group does not have a mandated traditional decision-making process [Applicants' legal representative] refers to his affidavit of 28 July 2011 and the statements

made at [11], summarised above[5]. He cites previous Court decisions concerning the authorisation of previous Noongar claims (for which the rights and interests claimed are held under the same traditional laws and customs as asserted to be held by the claim group for the Whadjuk application), submitting that these decisions are of significant probative value on the question of the existence of a mandatory decision-making process[6]. He also cites the fact that neither [Applicant #1 for overlapping claim] nor [Applicant #2 for overlapping claim] contends that a traditional decision-making process is mandated under Noongar law and custom, either in relation to the Whadjuk application or in respect of the Swan River People 2 application (for which they are also members of the claim group).

[Applicants' legal representative] provides a citation from *Noble v Mundraby* [2005] FCAFC 212:

> the Full Court said the following at [18]:
>
> "Section 251B does not require proof of a system of decision-making beyond proof of the process used to arrive at the particular decision in question. The section accommodates a situation where a native title claim group agrees to follow a particular procedure for a particular decision even if other procedures are normally used for other decisions. Nor does s. 251B require a formal agreement to the process adopted for the making of a particular decision. **Agreement within the contemplation of s. 251B may be proved by the conduct of the parties**." (emphasis added)[7]

Finally, [Applicants' legal representative] makes the following points in relation to the decision-making process:

- The conduct of the parties supports an inference that the decision-making process was one that was agreed to and adopted at the meeting;
- That process involved members of the claim group voting by secret ballot on resolutions put by the Chairperson;
- No person at the meeting objected to the process adopted, including [Applicant #1 for overlapping claim] and [Applicant #2 for overlapping claim]; and
- It is appropriate to draw the inference that decisions were made by a simple majority.[8]

SWALSC anthropologist, [SWALSC anthropologist] addresses [Person making submission] submissions in her affidavit of 30 August 2011. She confirms that there is 'abundant literature recording Yagan as not only being from the claim area, but also living in the claim area in, and after, 1829'and does not dispute that Yagan traditional connection to the area is a well researched and established fact—at [19]. However, extensive research to date has not been conclusive to establish that Yagan had any descendants—at [19]. She addresses the three (3) family trees submitted by [Person making submission] and refers to research material about Yagan that has been conducted in relation to [Person making submission] family. [SWALSC anthropologist] concludes that at this stage the research has only resulted in conflicting and unclear 'evidence of connection between Yagan and [Person making submission] —at [26].

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[5] Letter of 3 August 2011 at [6]
[6] Letter of 3 August 2011 at [7]
[7] Letter of 3 August 2011 at [9]
[8] Letter of 3 August 2011 at [10]

At the start of her affidavit, [SWALSC anthropologist] prefaces her response with comments in relation the process of genealogical research:

> Genealogical research is a complex and time consuming task, and it is to be expected that on-going enquiries may reveal further data or clarification about the ancestors listed in Schedule A—at [2]

[Applicants' legal representative] affidavit of 30 August 2011 also addresses [Person making submission] submissions and attaches a letter of 24 March 2011 to [Person making submission] from SWALSC which outlines the reasons for his exclusion from the native title claim group and thereby the authorisation meeting for the proposed native title claim to be made over the Perth metropolitan area. He concludes by stating that 'if further investigation supports recognition of one or more of your ancestors as ancestors for the Perth Metropolitan area, your family will be offered representation on the Working Party . . . and those ancestors will be included in the claim group description . . . together with a detailed account of their connection to the area, as part of the evidence in support of the claim'.

Who must authorise the applicant to make the application and to deal with matters arising in relation to it?

It is in my view, appropriate that I deal with the issue of who must authorise the applicant to make the application and to deal with matters arising in relation to it. The authority of *Risk v National Native Title Tribunal* [2000] FCA 1589 (*Risk*) is that a consideration of the composition of the native title claim group, as defined in s. 61(1), is required to be undertaken by the Registrar when assessing authorisation under s. 190C(4)(b). O'Loughlin J held that:

> A native title claim group is not established or recognised merely because a group of people (of whatever number) call themselves a native title claim group. It is incumbent on the delegate to satisfy herself that the claimants truly constitute a group.
>
> The task of the delegate included the task of examining and deciding who, in accordance with traditional law and customs, comprised the native title claim group.
>
> The authorisation must come from all the persons who hold the common or group rights and interests —at [60] and [62].

I refer also to the decision of Collier J in *Watson v Native Title Registrar* (2008) FCR 187; [2008] FCA 574 (*Watson*) at [28] to [36] who agreed that consideration by the Registrar of the authorisation condition in s. 190C(4)(b) requires a consideration of whether the applicant is authorised by a 'native title claim group', as that term is defined in s. 61(1).

The task that I have undertaken earlier in these reasons at s. 190C(2) is necessarily distinct from the task that is now required of me at s. 190C(4). The matters of which I am required to be satisfied are quite different. In relation to s. 190C(2), the Registrar '*must be satisfied as to the contents of the application* [original emphasis] and that it contains the information required by ss 61 and 62 (cf Mansfield J in *Doepel*), whereas in relation to section 190C(4) the Registrar must be satisfied as to the *identity* [original emphasis] of the claimed native title holders including the applicant'—*Wiri People v Native Title Registrar* [2008] FCA 574 (Wiri People) at [29].

It follows that the authorisation of the applicant, with which s. 190C(4)(b) is concerned, must flow from the 'native title claim group'. That definition, by virtue of s. 253, is found in s. 61(1):

> All 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.

It is apparent from all the information before me that there is a dispute amongst some members of the claim group (as well as a person who is not member of the group) as to the correctness of the description that has been set out in Attachment A of the application. Whilst I must be careful to avoid adjudicating upon the description, I do need to 'consider whether the application sets out the native title claim group in the terms required by s. 61'. In doing so, I note that I am not confined to the information in the applicant's s. 62 affidavit or the information contained in the application—see *Wiri People* at [23] and [30].

I have considered all of the information before me, including the submissions and affidavits of the applicant, [Applicant #1 for overlapping claim], [Applicant #2 for overlapping claim] and [Person making submission]. It is my view, that within the information and material provided by the applicant, through its representative, SWALSC, that cogent and clear information is provided as to the composition of the native title claim group and why it comprises 'all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests'. On the basis of the information contained in the affidavits of [SWALSC anthropologist] I am satisfied that the native title claim group described in Schedule A of the Whadjuk application includes all the persons in the native title claim group, as that term is defined in s. 61(1). It does not appear to me that the applicant relies on authorisation by something more or less than the native title claim group so described in Schedule A.

In my view, there is also some relevance in the fact that [Applicant #1 for overlapping claim] (and others) put forward the proposition that the native title claim group was not properly constituted and the group was entitled to vote down the resolutions relevant to this issue but did not do so.

The identity or composition of the claim group is not one that I can decide or resolve in the course of this administrative decision as it is not my role to determine the identity of 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 in the area of this application.

Consideration

It is clear to me from both [Applicant #1 for overlapping claim] submissions and the submissions provided by SWALSC in response, that [Applicant #1 for overlapping claim] (and any of his supporters) were fully informed of the meeting that proposed to authorise an applicant to make and deal with a new native title claim over the Perth metropolitan area. He attended that meeting and, in my view, was extended a reasonable opportunity to express his objections and the grounds for his objections, and in this manner participated in the meeting.

In my view, the decision in *Lawson on behalf of the `Pooncarie' Barkandji (Paakantyi) People v Minister for Land & Water Conservation for the State of New South Wales* [2002] FCA 1517 (*Lawson*) is relevant to these circumstances. Stone J decided that a person/s may be authorised following an agreed and adopted decision–making process where **every reasonable opportunity is extended** to group

members to attend a meeting at which the applicant's authority is to be decided, even though 'all' members of the group do not attend that meeting or vote unanimously to authorise the applicant:

> In s 251B(b) there is no mention of "all" and, in my opinion the subsection does not require that "all" the members of the relevant claim Group must be involved in making the decision. Still less does it require that the vote be a unanimous vote of every member. Adopting that approach would enable an individual member or members to veto any decision and may make it extremely difficult if not impossible for a claimant group to progress a claim. In my opinion the Act does not require such a technical and pedantic approach. ***It 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***—at [25] (emphasis added).

In my view, SWALSC provides detailed information in relation to the methods and level of organisation employed to manage a large number of people—firstly to advise the group of the meeting, and secondly, to ensure that voting irregularities were kept to a minimum. I am satisfied that the meeting of 26 March 2011 was sufficiently notified such that members of the claim group were given every reasonable opportunity to participate in the decision-making process which occurred at the meeting on 26 March 2011.

Section 251B(b) provides that where there is no traditionally mandated process by which decisions are to be made by the native title claim group, authorisation can be achieved by a process of decision-making agreed to and adopted by the persons comprising the native title claim group. As mentioned earlier, paragraph [5] of the statement in Attachment R describes the decision-making process as one 'by which decisions were made by majority vote on a secret ballot'. This assertion is supported and verified by the affidavits sworn by each of the five persons comprising the applicant, provided for the purposes of s. 62(1)(a). Further, there is sufficient information to be drawn from the conduct of the claim group as it is described by [Applicants' legal representative] in his letter and affidavits.

I am of the view that there is not sufficient or relevant material to show that the authorisation meeting was not an open and transparent process as contended by [Applicant #1 for overlapping claim] and [Applicant #2 for overlapping claim]. What is clear is that it was attended by a faction of dissenters who were able to express their dissent and in the knowledge of that dissent, the meeting participants made decisions that authorised an applicant for the new claim. [Applicant #1 for overlapping claim] (as well as some other members of the claim group) is expressing his reservations and ultimately his objection to the making of this application and has gone to considerable lengths to provide an adequate foundation for his opinion. However, based on the outcomes of the decisions made at the meeting, it appears to me that his views are not the views of the majority that passed the relevant resolutions.

I note that of the 236 people listed on the attendance list for the meeting, only 166 persons at most (for Resolution 1) voted on the resolutions. The material before me is mostly silent on why this is so. I do, however, note that in the affidavit of [Applicant #1 for overlapping claim] dated 21 July 2011, he asserts that '[a]s some of the people who registered went home before the voting, some who remained were left holding multiple voting cards'—at [29]. It is not inconceivable that some 60 or 70 people did not participate in the voting or that they may have left in the course of the meeting. This is corroborated in part by the affidavit of [Applicant #1 for overlapping claim] dated 21 July 2011, where he confirms that at least some of the people who registered went home before the voting began. For the first two resolutions, there appears to be about 165-170 people

participating, but for the 3rd resolution, this drops off to 120. It may be that given the meeting went for a substantial length of time, people either left or choose not to vote. [Applicants' legal representative] refers to there being 'substantial majorities recorded for each decision' and this is clearly based on the fact that of those persons who chose to vote, substantial majorities were recorded.

However, I do not believe that this is an indication that the group was not afforded a reasonable opportunity to participate in the decision-making process nor that the applicant was not authorised all of the persons in the native title claim group. There is sufficient information provided in the application and additional material that confirms how decisions were made and which demonstrates the conduct of the group following a particular decision-making process such that I can be satisfied that the decision-making process agreed to and adopted by those who attended the authorisation meeting of 26 March 2011 was followed in accordance with the requirements of s. 251B(b).

In *Ward v Northern Territory* [2002] FCA 171, O'Loughlin J provided useful commentary in the context of examining an authorisation meeting, putting a number of questions forward that need to be addressed—at [24] and [25].

> 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].

In my view, the circumstances of authorisation as outlined in the material provided to me by the applicant, sufficiently answers all of these questions. The information also sets out answers to some additional matters:

- Concerns about the basis on which the apical ancestors are those for the area of the application were made available to persons attending the meeting;
- Extensive research had been conducted in relation to settling those apical ancestors and the external boundary for the proposed application, and that there is potential at a later stage if the research substantiates it for additional ancestors to be included in the description of the claim group;
- The meeting was attended by a substantial number of people and the voting process appears to have been organised to avoid any irregularities;
- Opportunity was provided for those to express their disagreement through the voting process without fear or favour as it was conducted by secret ballot;
- Resolutions were passed in the face of some objections which arose at the meeting; and
- A substantial majority of those who voted was achieved on each of the three resolutions pertaining to authorisation.

I am therefore satisfied that the applicant has been authorised to make and deal with the application by all the other persons in the native title claim group, and as such satisfies the condition in s. 190C(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).

In assessing the current application against s. 190B(2), I am required to be satisfied that the information provided by the applicant for the purposes of ss. 62(2)(a) and 62(2)(b) is sufficient for the particular land and waters, over which native title rights and interests are claimed, to be identified with reasonable certainty. Whilst I may have regard to information beyond the application where clarification is necessary, it is to the terms of the application itself that I am primarily to direct my attention in reaching the required level of satisfaction—*Doepel* at [16] and [122].

Attachment B of the application contains a written description of the external boundary of the application area, referred to as the 'South West Metro Claim'. The information provided is a physical description of the application area which refers to the Low Water Mark, various coordinate points and the boundaries of a number of native title determination applications as reference points.

As required by s. 62(2)(a)(ii), the information in Attachment B also lists three [3] existing native title determination applications, and one native title determination (WAD6009/96 Bodney) which are excluded from the area covered by the application. Such exclusions are consistent with s. 61A(1) which prohibits the making of an application for native title rights and interests over land and/or waters where there has been a previous native title determination, and the procedural requirements regarding overlapping claims in s. 190C(3).

Further information regarding those areas not covered by the area of the application is provided in Schedule B. Schedule B lists a number of general exclusions of areas within the external boundary description, consistent with those classes of areas specifically excluded by the Act. The case law on exclusions for the purposes of s. 62(2)(a)(ii) has confirmed that a general exclusion clause, based on those exclusions identified in the Act, is sufficient to give the certainty required by the statutory scheme for competing interest holders, whilst also reflecting the state of the applicant's knowledge at the time the application is made. (See *Daniels for the Ngaluma People & Monadee for the Injibandi People v Western Australia* [1999] FCA 686 (*Daniels*)). Such a description as that included within Schedule B, taking the nature of a 'class or formula approach', was said to be an approach that 'could satisfy the requirements...where it was the appropriate specification in those circumstances'—at [32].

As there are no searches demonstrating the existence of non-native title rights and interests that have been included within the application, and the applicant is unaware of any such searches having been conducted (as stated in Schedule D of the application), the knowledge of the

applicant at the time the application was made was clearly limited. It is therefore unsurprising that, for the purpose of satisfying s. 62(2)(a)(ii), the applicant has adopted the general exclusion clause approach. As I do not consider that the applicant had expert knowledge regarding the existence of other interests within the application area's external boundaries, I am satisfied that the description contained in Schedule B and Attachment B is of sufficient detail in these circumstances.

Attachment C of the application contains a copy of a map of the application area, entitled South West Metro Claim, created by the Tribunal's Geospatial Services on 22 December 2010. The map includes:

- the application area depicted by a bold dark outline, and labelled "Application Area";
- Bodney Determination Area excluded from the application area;
- surrounding Native title Determinations and Applications;
- topographic background image;
- locality diagram, legend, scalebar, northpoint and coordinate grid; and
- notes relating to the source, currency and datum of data used to prepare the map.

The information contained in Attachment B and Attachment C of the application was prepared by the Tribunal's Geospatial Services. The geospatial report indicates that the description and the map are consistent and identify the application area with reasonable certainty.

Regardless, the application has addressed any potential inconsistencies between the map and the written description in Schedule B, by stating:

Where there is any discrepancy between the map provided at Attachment C and the written description contained in this schedule and in Attachment B the latter prevails.

There are no apparent inconsistencies, as verified by the geospatial report.

The information contained in both Schedule B and Attachment B and the map at Attachment C have been prepared to a relatively significant level of detail. The written description refers not only to existing native title determination applications but also to specific geographic coordinates that frame the external boundary. The map depicts the application area clearly in bold outline and shows a number of geographical reference points, including major towns and national park tenure. The map also depicts the existing Bodney native title determination.

Based on the information provided in both the written description of the application area at Schedule B and Attachment B, and the map in Attachment C, I agree with the geospatial report and am satisfied that, for the purposes of ss. 62(2)(a) and (b), it can be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

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

The Registrar must be satisfied that:

(a) the persons in the native title claim group are named in the application, or

(b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

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

Under this condition, I am required to be satisfied that one of either s. 190B(3)(a) or (b) has been met. The application does not name the persons in the native title claim group but contains a description in Attachment A, which provides a set of rules or criteria by which the group can be defined. Therefore I am required to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

In order to be satisfied of this requirement, the case law affirms that it is only to the application itself that I must turn my mind—*Doepel* at [16] and [51] and *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 at [30]. In *Doepel*, Mansfield J discussed the nature of the delegate's task at s. 190B(3)(b), stating that the focus is 'whether the application enables the reliable identification of persons in the native title claim group'—at [51]. The key issue is identification of group members, and **not** the correctness of the native title claim group in considering s. 190B(3)—at [37], and *Wakaman People 2 v Native Title Registrar and Authorised Delegate* (2006) 155 FCR 107—at [34].

Attachment A of the application provides the description of the native title claim group in the following terms:

1. biological or adopted descendants of the union between the following couples:
   - Boolabung and Weetang
   - Alice Taylor (Berijan) and Tommy Nettle; or
2. biological or adopted descendants of any of the following persons:
   - Wanetan
   - Doornong
   - Fanny Moderan, the mother of Cecilia Wilkes
   - Tulbak, and
   - John "Jack" Mungar Bennell
3. Paragraphs 1 and 2 above include the biological descendants of persons adopted in any intervening generation.
4. A person has been adopted by another person or persons for the purpose of paragraphs 1 to 3 above if they have been reared from childhood by ("grown up by") that person or persons.

The above description lists three criteria by which the native title claim group is to be defined. It is my view that the question in the current situation is analogous to the question faced by the Court in *Western Australia v Native Title Registrar* (1999) 95 FCR 93; FCA 1591 (*WA v NTR*). That question was whether the application of the conditions or rules provided in the application will allow for a sufficiently clear description of the group in order to ascertain whether a particular person is in that group – at [67].

The inclusion of a definition for 'adoption' provides clarification for its use in the claim group description.

In assessing the capacity of the application of the above rules to 'reliably identify' the members of the native title claim group, it is likely that some factual inquiry will be necessary. A description

that demands such factual inquiry to be undertaken to ascertain whether any particular person is in the group was held by Carr J in *WA v NTR* to be adequate for the purposes of s. 190B(3)(b). His Honour commented that the need for factual inquiry 'does not mean that the group has not been described sufficiently' and relied upon the principle established in *Kanak v National Native Title Tribunal* (1995) 61 FCR 103 (at [124]) in stating that the Act is remedial in character and to be construed beneficially—at [63] to [69].

Describing a claim group by reference to biological or adopted descent from named ancestors is one approach that has been accepted by the Court as satisfying the requirement of s. 190B(3)(b). Additionally, the fact that the application of the conditions of that descent may prove difficult is not fatal to the application—*WA v NTR* at[63] to [69].

It is my view that the rules and conditions used to describe members of the claim group, with some factual inquiry, can be reliably applied to identify the persons in the native title claim group, such that it can be ascertained whether any particular person is in that group.

I am therefore satisfied that the application meets the requirements of s. 190B(3).

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

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

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

Attachment E of the application contains the description of native title rights and interests claimed in relation to the application area, as required by s. 62(2)(d). The description includes five [5] qualifications to which the claimed rights and interests are subject. The rights and interests claimed are described as follows:

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

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

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

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

(m) the right to manage, conserve and look after the land, waters and resources by way of removing carbon dioxide from the atmosphere surrounding the land and waters; and

(n) the right to manage, conserve and look after the land, waters and resources by way of avoiding the emission of methane or nitrous oxide.

In considering whether the description provided is sufficient to allow the native title rights and interests to be readily identified, it is only to the terms of the application itself that I am required to turn my mind. The case of *Doepel* provides some helpful guidance on the delegate's task at s. 190B(4). Mansfield J held that the task 'was a matter for the Registrar to exercise his judgment upon the expression of the native title rights and interests claimed'. In exercising this judgment, I am able to consider the description of native title rights and interests in Attachment E and any qualifications together, in order that those rights and interests claimed can be 'properly understood'—*Doepel* at [16] and [123].

In essence, the test of 'identifiability' in s. 190B(4) is 'whether the claimed native title rights and interests are understandable and have meaning'—*Doepel* at [99].

In reading the rights and interests listed in Attachment E, together with and subject to the qualifications provided, I am of the view that the native title rights and interests claimed can be 'properly understood', and that there is 'no inherent or explicit contradiction' in the description which prevents me from reaching the level of satisfaction required by s. 190B(4)—*Doepel* at [123].

I am satisfied that the description contained in the application is sufficient to allow the native title rights and interests to be readily identified, as required by s. 190B(4).

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.

For the application to meet this merit condition, I must be satisfied that a sufficient factual basis is provided to support the assertion that the claimed native title rights and interests exist and to support the particularised assertions in paragraphs (a) to (c) of s. 190B(5). In *Doepel*, Mansfield J states that:

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

Information considered

I have had regard to the following material in respect of my consideration of the factual basis condition (all are listed in detail at Attachment B to these reasons):

- Attachment F of the application;
- Witness statements, filed in relation to the Single Noongar Claim (WAD6006/2003 and WAD6012/2003) Federal Court proceedings, of:
    - [SNC Witness #1] (nee [SNC Witness #1 maiden name]),
    - [SNC Witness #2]
    - [SNC Witness #3] (deceased)
    - [SNC Witness #4];
    - [SNC Witness #5]
    - [SNC Witness #6] (deceased)
- Affidavit of [Deponent #1];
- Affidavit of [Deponent #2];
- Submissions of [Applicant #1 for overlapping claim], 21 July 2011 and 13 September 2011;
- Affidavits of [Applicant #1 for overlapping claim], 21 July 2011 and 13 September 2011;
- Affidavit of [Applicant #2 for overlapping claim], 21 July 2011;
- Submission of [Person making submission], 28 July 2011;
- Annexure B to the affidavit of [Applicants' legal representative], affirmed 2 August 2011—information on the named apical ancestors for the Whadjuk application, distributed at the authorisation meeting by [Applicant #1 for overlapping claim];
- Affidavits of [SWALSC anthropologist], affirmed 30 August 2011 and 7 October 2011;

- Letters to the Tribunal case manager from the Principal Legal Officer (PLO) for SWALSC, 30 August 2011 and 7 October 2011; and
- Extracts from 2004 Kingsley Palmer anthropological report for the Single Noongar Claim.

I note that much of the information I have before me has been partly or mostly formulated from material that formed part of the Southern Noongar Claim (WC03/6—WAD6006/03) and its proceedings in the Court in 2005[9].

I consider below the matters raised in the third party submissions by [Applicant #1 for overlapping claim], [Applicant #2 for overlapping claim] and [Person making submission] and come to a view about the weight to afford it, taking into consideration the response to the submissions of the applicant.

Content of the adverse material

On 21 July 2011 and 13 September 2011[10] [Applicant #1 for overlapping claim] made submissions and provided sworn affidavits to the Registrar in relation to the registration testing of the Whadjuk application. The material before me confirms the following relevant information in respect of [Applicant #1 for overlapping claim]:

- He is a descendent of one of the Aboriginal people described in Schedule A of the Whadjuk application, being Fanny Moderan, mother of Cecilia Wilkes —affidavit sworn 21 July 2011, and
- He is a member of the native title claim group and an applicant for the underlying, unregistered Swan River People 2 application (WC11/2—WAD24/11)—affidavit sworn 21 July 2011 and an extract of the RNTC.
- Based on the above, it is clear that [Applicant #1 for overlapping claim] must also be a member of the native title claim group for the Whadjuk application.

In summary, [Applicant #1 for overlapping claim] asserts the following in relation to the factual basis for the Whadjuk application:

- the application relies on statements made in support of a claim (the Single Noongar Claim) that covers a much wider area than that of the Whadjuk application;
- the description of traditional laws and customs contained in the Whadjuk application does not refer specifically to the area described in Schedule B of the application; and
- Attachment F of the Whadjuk application only provides evidence to suggest that the apical ancestors were members of a wider Noongar society and are not specifically associated with the area described in Schedule B of the application.

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[9] *Bennell v Western Australia* [2006] FCA 1243. Also the subject of appeal to the Full Federal Court in *Bodney v Bennell* [2008] FCAFC 63.

[10] [Applicant #1 for overlapping claim] correspondence to the Registrar on 13 September 2011 included a submission and affidavit in relation matters to do with the Swan River People 2 (WAD24/11) and the Yued People (WAD6192/98). I have assumed these were submitted in error and have not taken any of their information into account as they do not appear to be relevant to the Whadjuk application. His correspondence relevant to the Whadjuk application includes a submission on those apical ancestors who, in his view, do not have traditional association with the claim area, and affidavit setting out information in relation to the name 'Whadjuk'.

[Applicant #1 for overlapping claim] submissions of July and September provide extensive references to historical records and Noongar oral history with regard to six [6] of the nine [9] named Whadjuk apical ancestors: John Jack Mungar Bennell, Boolabung & Weetang, Wanetan, Doornong and Tulbak . It is his view that none of these persons had a traditional association with the area covered by the Whadjuk application. The material he presents is gathered and researched from a multiple of sources:

- anthropological and genealogical reports—Lois Tilbrook (1983), Neville Green (1989), Norman Tindale (1939),
- the genealogies, papers and records of informants kept by Daisy Bates in the first half of the 20th century,
- writings and observations of early settlers, early government officials, regional and state newspapers of Western Australia,
- records of the Benedictine Mission in New Norcia, Western Australia
- references and records held by the Battye Library of Western Australia
- family histories and academic dissertations, and
- records of births, deaths and marriages kept by both the State of Western Australia and the New Norcia archives.

For example, in relation to John Jack Mungar Bennell [Applicant #1 for overlapping claim] submits that:

- there are uncertainties as to the origins of John Jack Mungar Bennell in the historical record,
- State records and anecdotal evidence is not unequivocal in relation to his place and date of birth and death and thereby his origins (and the country for which he had rights); and in any event,
- the traditional association of John Jack Mungar Bennell and his descendents is certainly not the area covered by the Whadjuk application but rather in the Brookton/Pingelly district outside the boundary.

The tenor and content of [Applicant #1 for overlapping claim] submissions is generally the same for the other apical ancestors he submits as not having a traditional association with the area of the Whadjuk application. Fanny Moderan, the mother of Cecilia Wilkes, and Tommy and Alice Taylor (Berijan) do not appear to be in contention. [Applicant #1 for overlapping claim] does not suggest that there are further ancestors that have not been included in the description.

In his affidavit of 21 July 2011, [Applicant #1 for overlapping claim] also asserts that the boundaries of the Whadjuk application are not in accordance with the traditional laws and customs of the native title claim group.

In his affidavit of 13 September 2011, [Applicant #1 for overlapping claim] sets out his understanding of the Noongar meaning of the name 'Whadjuk'.

Both of [Applicant #1 for overlapping claim] submissions were provided to the applicant and the State for comment as part of procedural fairness processes (refer to the steps followed during this

process at Attachment C of these reasons). The State made no submission in response and the applicant provided particularised responses through affidavit evidence from an anthropologist employed by SWALSC and correspondence from its PLO (the documents of which are detailed above and at Attachment B to these reasons).

The combined effect of the correspondence and evidence of the anthropologist is the assertion that, for all the apical ancestors identified by [Applicant #1 for overlapping claim] as contentious, there are many and varied sources and evidence to *corroborate* their traditional connection and association with the claim area. This assertion is said to be based on the research conducted by the anthropologist since October 2010, as well as, from what I infer in [Applicants' legal representative] affidavit of 28 July 2011, over a long period of previous research and record keeping by SWALSC:

> SWALSC maintains an electronic genealogical database, which contains material relating to the Noongar population of the South West of Western Australia. The database was started in 2002 by SWALSC researchers by importing genealogical material from existing databases. Such sources included genealogies prepared by anthropology student Helen Henderson in the late 1970s, which are held in the Battye Library, genealogies of Noongar people throughout the south-west prepared by anthropologist Dr. Lois Tilbrook in the late 1970s with the aid of sixteen research assistants (which were exhibited at regional centres all over the south west, where Noongar people commented and corrections were made), as well as anthropological works authored by Daisy Bates and Norman Tindale. Historical records from the variously named government 'Native Welfare Departments' such as 'Family History Cards' and what were called 'Personal files' were utilised to provide detailed and authoritative evidence on such details as places and dates of birth, death, marriages and work, parentage and children. To provide contemporary evidence on current day claimants SWALSC initiated what is called a Family History Form in September 2003, whereby claimants enter the details of their family relating to their ancestors and descendants . . . the information contained on the forms is entered into the genealogical database and can be connected to the research material already present—at [2].

As referred to earlier in these reasons under the authorisation condition, [Person making submission] has made submissions on the association of Yagan to the area covered by the Whadjuk application. SWALSC has provided grounds for the exclusion of Yagan from the list of ancestors used to describe the native title claim group which I have also detailed above. The circumstances illustrate the complexities of anthropological research to which [SWALSC anthropologist] alludes.

Consideration of the adverse material

There would appear to be an abundance of conflicting and ambiguous information in respect of some of the named apical ancestors listed at Schedule A of the application, that is, John Jack Mungar Bennell, Boolabung & Weetang, Wanetan, Doornong and Tulbak . There also appears to be contention regarding the boundaries of the application area and the exclusion of an ancestor (Yagan) to the native title claim group.

I have considered all of the material in the application and additional material provided by the applicant, by [Applicant #1 for overlapping claim], [Applicant #2 for overlapping claim] and [Person making submission] and the applicant's response to these various submissions and affidavits. There is historical material, records and evidence, oral history and anecdotal evidence

that can be used, in my view, to form the basis for argument on both sides. As stated in [SWALSC anthropologist] affidavit of 30 August 2011, this bears out the notion that genealogical research is a complex and time consuming task, and that archival records are not without human error, ambiguity, inconsistencies or inaccuracies—at [2].

My task pursuant to s. 190B(5) is relatively confined – I am required to consider the asserted facts as they are presented by the applicant, and assuming they are true, I must assess whether or not they support the claimed assertions. The Full Court in *Gudjala FC* said:

> … the applicant is not required to provide evidence of the type, which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim—at [92].

Justice Mansfield in *Doepel*[11] considers the issue of contrary information about an application during the process of registration:

- Is the Registrar to note the inconsistency of information in different documents, and so simply not be satisfied of the accuracy of the information in the application?
- Is the Registrar to undertake some form of hearing to reach a state of satisfaction about which application accurately describes the native title claim group? If so, how is the inquiry to be conducted? Issues would then arise as to whether the Registrar's satisfaction requires the Registrar to make findings of fact, and whether the process of doing so involves the normal principles of procedural fairness to be proffered to potentially affected persons or groups...

His Honour states that there is no indication of a legislative intent for the Registrar to "embark upon some general fact finding exercise, balancing and weighing conflicting evidence, to determine whether to accept a claim for registration". This reinforces the premise that the Registrar's function under s 190A is to determine whether the requirements of ss 190B and 190C are satisfied and not to consider the accuracy of the information in the application[12].

The adverse information outlined above (and in relation to the authorisation condition) seeks to undermine the asserted factual basis of the claim made in the Whadjuk application. However in assessing the factual basis under s. 190B(5), keeping in mind the statements of the Court in the *Gudjala FC* and *Doepel* decisions, it is clearly not for me to supplant the role of the Court to evaluate and weigh the material before me. Therefore in my view, the disputed issues [Applicant #1 for overlapping claim] and [Person making submission] annunciate in relation to the area of the Whadjuk application and the identity of the apical ancestors are issues appropriately considered by the Court and not by the Registrar (or her delegate) in the context of the test at s. 190A. The seemingly different versions of historical events will ultimately be decided by the Court at a future point in time.

Therefore, as it is not for me to weigh up the evidence and as the applicant swears to the truth of the information contained in the application, I have approached my consideration of the factual basis for the claim by assessing the adequacy of the alleged facts to support the assertion that it is

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[11] *Doepel* at [47]

[12] Second Reading Speech of the Attorney-General, Hansard, House of Representatives, 9 March 1998, p 7841998 amendments to Part 7 of the NT Act— *Doepel* at [47].

the native title claim group *as it is described in Schedule A* (and not some other group) who hold the native title rights and interests in the application area. I also accept that the area covered by the application as described in Attachment B is the area in relation to which native title rights and interests are claimed by the native title claim group.

Consideration of the findings of the Federal Court in the Single Noongar Claim (SNC)

As noted above, a substantial portion of the information furnished in support of this application for the purpose of its consideration under s. 190A was assembled for the purposes of the SNC proceedings in the Court. As noted in the Application Overview in these reasons, the SNC was the subject of two Court decisions—*Bennell v Western Australia* [2006] FCA 1243 (*Bennell*) and *Bodney v Bennell* [2008] FCAFC 63 (*Bodney v Bennell*).

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].

In its submission of 7 October 2011[13] the applicant has quoted from and referred at length to the decision of Wilcox J in *Bennell* which found that the Noongar People were part of a pre-sovereignty society that had had a continuous existence and vitality since 1829. The Full Court then found in *Bodney and Bennell* that Wilcox J had applied the wrong test but made no factual findings as to that pre-sovereignty society's continuity and the claimants' connection to the area. It is my view that in these circumstances neither decision is of particular relevance or assistance to my consideration of the factual basis for this new claim over the area.

In considering a claim under s. 190A, the Registrar must have regard to information contained in the application and in any other documents provided by the applicant (s. 190A(3)(a)) and in line with *Doepel* (as referred to above) it is not appropriate for me to attempt to go behind the factual material presented by the applicant and the asserted facts put forward.

Assessing the sufficiency of the factual basis

[13] Letter from the PLO of SWALSC

My consideration of the factual basis for the claim made in this application is guided by principles outlined in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; (2002) 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*):

- traditional laws and customs are ones that a society passes on from one generation to another;
- laws and customs arise out of, and go to define, a particular society, that is a body of persons united in, and by, its acknowledgement and observance of a body of laws and customs;
- traditional laws or customs are derived from a body of norms or normative system that existed before sovereignty;
- rights and interests are rooted in pre-sovereignty traditional laws and customs; and
- it must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout the period since sovereignty was asserted as a body united by its acknowledgement and observance of the laws and customs.

That these principles from *Yorta Yorta* guide consideration of the condition in s. 190B(5) was discussed by Dowsett J in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 07*)—at [26]. I note that the review of that decision by the Full Court in *Gudjala # 2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) did not criticise this approach. I also note that the later decision by Dowsett J in *Gudjala #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 09*) again points to the principles in *Yorta Yorta* as guiding the Registrar's consideration of the condition in s. 190B(5).

In assessing the sufficiency of the claimant's factual basis, I have applied the principles articulated by Dowsett J in *Gudjala 07,* which was not criticised by the Full Court in *Gudjala FC*. In that decision, his Honour, states that 'the factual basis must be capable of demonstrating that there are traditional laws and customs acknowledged or observed by the Native Title claim group, and giving rise to the group's claim to Native Title rights and interests'—at [62], [71], [72] and [96].

To ascertain whether there were relevant traditional laws and customs at sovereignty and a society defined by recognition of those laws and customs:

- the starting point must be the identification of an indigenous society at the time of sovereignty,
- though it is not necessary to show that apical ancestors were members of such a society (as the apical ancestors are used only to define the claim group), but
- at some point the applicant must explain the *link between the claim group and the claim area* (emphasis added), and
- this process will certainly involve the identification of some *link between the apical ancestors and any society existing at sovereignty*, even if the link arose at a later stage (emphasis added)—at [66].

The test in s. 190A involves an administrative decision—it is not a trial or hearing of a determination of native title pursuant to s. 225, and therefore it is not appropriate to apply the standards of proof that would be required at such a trial or hearing. It is not the task of the delegate to make findings about whether or not the claimed native title rights and interests exist. It is not the role of the delegate to reach definitive conclusions about complex anthropological issues pertaining to the applicant's relationship with their country as that is a judicial enquiry.

I refer only to those statements in the material before me that are pointedly relevant to each of the assertions.

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

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

This subsection requires me to be satisfied that the factual material provided is sufficient to support the assertion that the native title claim group has, and its predecessors had, an association with the area of the application. While it is not necessary for the factual basis to support an assertion that *all* members of the native title claim group have an association with the area *all* of the time, it is necessary to show that the claim group *as a whole* has an association with the area—*Gudjala 07* at [51] and [52].

In my view, the material does not articulate a particular group as having an association with the area covered by this application, but rather a Noongar society, comprising of people who identify particularly for the area, and have done so since first European contact and throughout European settlement.

> The Aboriginal persons listed in Attachment A hereto are persons who were born at various dates ranging from approximately the 1820s through to the 1840s[14], were recorded as having had an association with the application area, and who were themselves descended from persons who were members of the Noongar people immediately prior to 11 June 1829. Further, the majority of those persons were descended from persons who were in occupation of the claim area immediately prior to 11 June 1829—Attachment F at [10].

Association with the area of the predecessors of the claim group

Attachment F to the application states that European settlement of the area covered by the application commenced in the late 1820s—[26] and provides numerous references to ethnographic material and historical records of the observations and interactions of early settlers in the area with most assertions and statements extensively footnoted. Key assertions are also made in respect of rights to land waters that support the proposition that the claim group's predecessors had an association with the area.

Attachment F also sets out the birth dates and places and general areas of association for each of the apical ancestors named in Schedule A:

- Boolabung , b. 1820s-1840s and Weetung —Perth and potentially Gingin;
- Tommy Nettle , b. 1861 and Alice Taylor , b. 1860—Perth and for their offspring, Gingin

[14] Letter of 30 Aug SWALSC – noted that the dates are incorrect as JJMB was born 1851 and Alice & Tommy 1860s.

    - Ollie Nettle (daughter)—Guildford, Bassandean, Swan River, Beechborough, Bayswater, Kalamunda;
- Wanetan , b. Early 1800s—New Norcia records identify as being associated with the claim area;
- Doornong , b. Before 1829—Bates reference as a Ballarruk man of Guildford;
- Fanny Moderan , b. 1862/64—Recorded as being from Canning or Guildford;
- Tulbuk , b. 1830s—New Norcia archives record as 'native of this colony of Swan River; and
- John Jack Munger Bennell , b. 1851—numerous sources and evidence corroborating his traditional connection and association with the claim area.

The six witness statements made in relation to the SNC contain the most comprehensive information in respect of previous association with the claim area. Each of these individuals who make statements provided to me in support of this application has identified their descent from an apical ancestor listed Schedule A:

- [SNC Witness #2] traces her ancestry back to John 'Jack' Mungar Bennell (her grandmother's father);
- [SNC Witness #1] traces her ancestry back to Boolabung & Weetung (her grandmother's parents);
- [SNC Witness #6] (deceased) traces his ancestry back to Alice Taylor (Berijan) and Tommy Nettle (his grandmother's parents);
- [SNC Witness #5] traces her ancestry back to Olive Nettle (daughter of Alice Taylor (Berijan) and Tommy Nettle);
- [SNC Witness #4] traces his ancestry back to Yurleen (daughter of John 'Jack' Mungar Bennell); and
- [SNC Witness #3] (deceased) is the brother of [SNC Witness #4] and from this I infer they have the same ancestry (Yurleen being their great grandmother).

[Deponent #1] and [Deponent #2] also attest in their affidavits to their ancestry, claiming descent from John Jack Mungar Bennell and Tulbuk respectively.

[SNC Witness #2] states Fanny Yurleen Bennell (her paternal Grandmother) was born in King's Park area [8] and grew up along the Swan River [42]; her paternal grandfather was born in the Perth area [10]; Yurleen told her about birthing practices and a women's place at King's Park [43]; John 'Jack' Mungar Bennell (her great grandfather) would get water from the spring at King's Park and set fish traps at South Perth [44]. Ms Garlett also states that 'Noongars used to travel along trails' ... trail of Black Hill ... Swan River to Guildford, travelling along the Swan River to Midland, then on to Quairading, Bruce Rock, Corrigin, Kondinin and then right out to Hyden—[40].

[SNC Witness #1] states that her mother told her that her home was around the Guildford and Upper Swan areas [6]; her paternal grandmother was raised around the Toodyay, Midland and

Swan Valley area [9]; her parents used to travel down to Swan Valley from New Norcia for big meetings and for work, always returning to the area around Swan Valley [15].

[SNC Witness #6] (deceased) states that 'The Perth people always came back to Perth and they never forgot the Perth places' [28]; he has rights to the country around Perth because his grandmother was from a Swan River family [44]; people had meetings and ceremonies at Success Hill reserve, with one of the last ones being held in 1946 in Perth. [SNC Witness #6] talks of the old people who would travel and camp through areas around Perth, that people would come from different areas to meet up in Perth [44].

The statements made by these members of the claim group about their ancestors in the majority refer to areas inside the claim area.

The claim group's current association with the area of the application

Attachment F to the application states the dispossession of the indigenous population residing in the area is noted but it is stated at [31] that by the 1900s the population had 'survived and adjusted', maintaining a 'distinct cultural life/culture' and establishing a manner of living that 'enable them to pursue their social, cultural and economic life according to traditional principles' [32].

Again the six witness statements made in relation to the SNC contain the most comprehensive information in respect of the claim group's current association with the claim area. Whilst these statements refer to people's association with many areas that fall outside the boundaries of the claim area, on balance it appears that there they have a current association with area within the boundaries of the application.

[SNC Witness #1] states that she is a Noongar woman and was brought up Noongar way in Noongar country—at [13]:

- When [SNC Witness #1] was little, her family used to travel from New Norcia to Perth and the Swan Valley—at [7];
- [SNC Witness #1] feels 'most comfortable' down at Swan River around Midland. It's where she always wants to return to. She feels safe and protected by spirits around Midland and her children feel safe here. It's her children's country as their ancestors are there looking out for them—at [21];
- Upper Swan and Midland were also special to [SNC Witness #1] father and he inherited the rights to speak for the country and she has responsibility and to speak for her family and the country around Upper Swan and Midland—at [23], [24]; and
- her parents had a variety of camps in the Swan Valley, Guildford and Midland areas, making shelters with branches and kangaroo skins—[71].

[SNC Witness #2] statement makes substantial reference to association outside of the claim area but she makes the following assertions that support an association with the Whadjuk application area:

- She used to travel along the 'Black Hill' trail, from the Swan River at Guildford, along the river to Midland (all inside the application area), then Quairading, Bruce Rock, Corrigin, Kondinin and out to Hyden (all outside the application area)—at [40];

- King's Park and along the Swan River is special to her family, and her daughter has protested about development at the Swan Brewery to protect the site, as it is Fanny/Yurleen's country—at [44] and [45];
- Point Walter is special to her family and was Fanny/Yurleen's camping ground. [SNC Witness #2] still visits there with her grandchildren and passes stories told to her by Fanny/Yurleen's onto them—at [48];
- [SNC Witness #2] relates a considerable amount of cultural knowledge regarding places around the Swan River and Perth Metro areas.

[SNC Witness #3] (deceased) referred to his 'run' being the metro area to areas outside of the boundaries of the application, his connection to the metro area 'as this is where the history of the family line started from' [12] and [14]. He regularly went to Gnangarra for hunting and bush medicine (near Perth) and has been shown the hunting places by 'the old fellas'. He talked about the *wagyl* and its main place in the Swan River [20].

[SNC Witness #6] (deceased) grandmother was Olive Nettle [10] who was an important lady in the Perth metro area whose father was born at a place called Dog Soak (located where the Perth Railway Station now stands). This place and the swamps around Perth are sacred sites because his family connections to these areas [13]. His country was the northern side of the Swan River and his family has not moved out of this area [25], he felt safe in the area from Perth to Moora and knew where 'our' boundaries are [29]. Though he lived at Mogumber he went to Perth 'about once a week' to visit and check on sites and fish with family and grandchildren near Belmont and Guildford Point [26]; he knew all the special places around Perth because this knowledge had been passed onto him by his parents and grandparents [47]. He also referred to the swamps and lakes around the Perth airport area and South Guildford where he fished and hunted for turtles [62]; he had knowledge about the *wagyl* and its presence in the Swan River, Lake Monger and other swamps throughout the Perth area and he was told about the *wagyl* by his grandmother and father.

[SNC Witness #5] is also a grandchild of Olive Nettle, she grew up in camps around Perth and travelled with her family between Perth and Moora (outside the application area) [14], She includes Perth in the areas to which she has connection and identifies as her country [15]. She was taught about the special places around Perth by her grandmother and father [19]; about the *warkarl*, its presence in the Swan River and its sacredness to Noongar people [22] and that her rights to country come from through her father and are passed onto her children and grandchildren [16].

[SNC Witness #4] has done heritage work for the past 10 years in the Perth metro area [7]; he has knowledge and rights in the Perth area and his association is through his descent from Yurleen [24] in addition to areas outside of the application area. He makes extensive references to sites and areas of significance to Noongar people in the Perth area, sites representative of his family's totem, camping areas, initiation and birthing places, the rivers and waterways and the stories of the *wagyl* [55] to [65]. He hunts on the outskirts of Perth and lists his knowledge of hunting practices and food uses [75] to [76].

Although the above persons refer to many and varied areas that fall outside the boundaries of the application area relating to places where their families and ancestors were born, lived and travelled to and from the Perth metro area, in my view, there is a clear link between the

association of the current claim group with the application area and that of its predecessors. There is some substantiation for this kind of movement of people throughout the South West of Western Australia provided in the extract of Kingsley Palmer's Anthropologist's Report for the Single Noongar Native Title Claim (Palmer's report):

> . . . ritual activity was shared between South West groups and that this ensured that individuals built up a network of friends and acquaintances, and developed extensive geographic knowledge . . . There is some evidence from the early literature that people travelled widely over the South West (see, for example P. and I Crawford 2003, 16-17) . . . that Aboriginal people might travel 'forty or fifty miles' to visit neighbours . . .—at page 41-42.

In my view, the facts support the assertion that the claim group's connection to the land and waters of the application area has its origins in the preceding generations' association with the area. I am satisfied that the factual basis is sufficient to support the assertion that the native title claim group has and its predecessors had an association with the area.

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

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

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

Justice Dowsett considered the requirements of s. 190B(5) when he addressed the adequacy of the factual basis underlying an applicant's claim in *Gudjala 09*. His Honour makes statements about the assessment of the adequacy of a general description of the factual basis of the claim, which in summary I take to mean that:

- assertions should not merely restate the claim, and
- there must be at least an outline of the facts of the case.

In Dowsett J's view, factual details are required about the pre-sovereignty society and its laws and customs relating to land and waters—at [29]. Therefore, the factual basis for the claim is required to address whether or not the relevant traditional laws and customs have their origin in a pre-sovereignty normative system with a substantially continuous existence and vitality since sovereignty.

Attachment F of the application makes detailed factual assertions regarding the existence of the pre-sovereignty Noongar society that has continued through the generations to the present day, including that:

- some of the laws and customs which were acknowledged and observed by the Noongar people immediately prior 1829 have been handed down from one generation of the Noongar people to the next;
- this has been achieved by both word of mouth (including through the telling of stories) and practical instruction, especially those laws and customs relating to rights in land; and
- laws and customs have been continuously acknowledged by each generation of Noongar people (including the present generation)—at [7].

Information is then set out detailing the impact of European settlement and the means by which the Noongar people preserved their law and custom despite being alienated from some of their lands and consequently deprived of access to food resources. By the 1900s, it is asserted the Noongar people had adapted 'creatively' to the restrictions imposed by European settlement. Throughout the period from 1829 to the present, it is stated 'The rights and obligations of the Aboriginal people in relation to land were held under the normative system of the wider Noongar people)—at [5].

Attachment F contains asserted facts about the nature of the Noongar pre-sovereignty society:

> Immediately prior to 11 June 1829, the Noongar people, including the predecessors of the present members of the native title claim group, acknowledged and observed a set of laws and customs which governed, *interalia*, the holding of rights in relation to land, the use and exploitation of resources and the protection of sites of significance throughout an area in the south-west of Western Australia that includes the whole of the application area for this application [1];
>
> Relatively large areas of land were 'owned' by particular small groups of people, whose members inherited their right of 'ownership' [2];
>
> Rights in land extended to areas which Daisy Bates called "runs" which were sometimes geographically substantial [4].

Extracts of records made during early European settlement are provided, for example in relation to what was observed about Noongar rights and interests in land:

> The acknowledgment and observance of Noongar laws and customs within the application area by the predecessors of the native title claim group was the same as that recorded in the early contact era by James Browne, in a passage which provides analysis of Noongar land law and...
>
> > *"[E]ach tribe occupies its own separate division of territory. The district thus occupied is again subdivided into vaguely defined portions, every family or individual of the tribe having its or his recognised tract of country. This property descends in the family, from one to another, and is considered in every way private property, and the proprietors of such are boastful and proud of their hunting grounds in proportion to their extent and nature. . . ."*
>
> Footnote 84 : Browne J, "The Aborigines of Australia", unpublished conference paper, 1856, at page 9. The passage relates specifically to an area of Noongar country located outside the claim area, but the description applies equally to the claim area itself—Attachment F at [25].

The extracts from Palmer's report provide further historical and anthropological detail on the South West Noongar society, including how it was named, permission rules, knowledge and use of resources, sites of significance, spiritual beliefs and stories, language, inter-group co-operation and movement, marriage and social customs. His conclusions are based on field work and data analysis and accounts of claimants:

> Noongar traditional belief accommodates a close relationship between a person and the natural world . . . and that relationship is passed on through descent to subsequent generations—at page 162.

While the evidence Mr Palmer presents in his report appears to be primarily based on field work and data gathered on the contemporary society, it details traditional laws and customs that

members of the current Noongar society acknowledge and observe by virtue of those laws and customs having been passed down to them through the preceding generations.

In my view, the material before me does provide some information on what is known about the Noongar society as it existed at the time of sovereignty in the South West of Western Australia. While the information largely pertains to a wider Noongar society, statements are included in the application that direct me to regard the asserted facts as relevant to the area covered by the Whadjuk application. The affidavits of [SWALSC anthropologist] [15] and Attachment F identify the ancestors of the native title claim group who acknowledged and observed the laws and customs of the pre-sovereignty society. There is also information providing the link between those ancestors and the area covered by the application (as I have referred to above).

The factual material provided in support of the application is supplemented by the witness statements of claim group members. The statements of these members of the claim group are particularly strong in the way they demonstrate some of the traditional laws acknowledged and customs observed by themselves and the wider claim group. Each person attests to their descent from at least one of the apical ancestors listed at Attachment A and each talks about the continuing exercise of rights and interests by the claim group, the practice of which have been passed down to them through their Elders. The witness statements demonstrate and illustrate aspects of Noongar traditional law and custom, in respect of the area of the application, by relaying considerable information pertaining to family and ancestors, rules in relation to land and belonging to an area, special places and stories, spirits, hunting, fishing and foraging and the passing on of knowledge.

As is clear by the birth dates of the apical ancestors provided in the application and subsequent material, at least five were possibly born post-sovereignty, that is, after 1829. In my view, given what is said about the timeframes in which these ancestors were associated with the area of the Whadjuk application, enough information is provided in the application about the circumstances shortly after first European contact. This would be sufficient, I believe, for an 'inference of continuity' that the society in which they existed was the same as that which prevailed at first European contact. In this sense I refer to *Gudjala 2009*:

> . . . that the claim group is a modern manifestation of a pre-sovereignty society, and that its laws and customs have been derived from that earlier society. Such an inference may be available notwithstanding the absence of any recorded history of the society and the way in which it has continued since the earlier "snapshot" of the society—at [31].
>
> . . . the necessary link between the pre-European contact society and its laws and customs, and the claim group and its laws and customs, may be inferred primarily from continuity, without necessarily resorting to a close examination of the societies and their laws and customs. The evidence of actual events will demonstrate continuity. Even if the history commences shortly after first European contact, it may be reasonable to assume that such a stable society was unlikely to have arisen in the period between contact and the commencement of historical records—at [32].

Witness statements and the anthropological material clearly invite an inference that there has been continuous existence of the laws and customs of Noongar society for the time before

[15] Dated 2 and 30 August 2011 sworn and provided in response to the submissions of [Applicant #1 for overlapping claim] and [Person making submission].

sovereignty in South West Western Australia and in particular since first European contact. The witness statements demonstrate how the claim group has handed down is laws and customs from generation to generation, in the sense defined in *Yorta Yorta*.

Rights to Noongar country

[SNC Witness #2] statement refers in the majority to stories, law and custom for areas outside of the claim area – showing the wider Noongar system – encompassing geographical areas of Meredin, Bruce Rock, Kwolyin—[24] to [27], [33] to [39] but states:

> Different Noongar people have rights and responsibilities to different areas within Noongar country: There are places in Noongar country that I am not allowed to go—at [31]

[SNC Witness #1] also refers to rights to country, having inherited her rights because she 'was born Noongar'[25]. She lives on Noongar country and has been taught Noongar ways, it is her responsibility to speak for her family's country:

> You have to have learnt about the country through your family to speak for it. You don't just get the right to speak because you are Noongar— at [27].

[SNC Witness #6] (deceased) provided details in his statement about Noongar rules for land and that his right 'to claim in the Perth area comes from his grandmother':

> You cannot claim land unless your parents and their parents and their parents were from that area and they passed on to you knowledge about that area—at [47].

[SNC Witness #4] refers to being Noongar [19] and belonging to an area and the knowledge he has of the boundaries of his areas and his 'run' [21] to [26].

Special places, spirits and stories

Palmer's report refers to the Noongar 'belief that the natural world is replete with a variety of spirit beings . . . some that are understood to be the spirits of Noongar ancestors who have died over the years that stretch back in memory and beyond . . . that contemporary Noongar culture is strongly informed by a diverse set of beliefs in a pantheon of beings that comprise the spirit world —at page 155 – 156. All of the witness statements illustrate the day to day acknowledgement of and respect for the spiritual world and how it influences their association with the land and waters of their country.

[SNC Witness #2] talks of belief in the *wagyl* that is present in the Swan River and influences the movement and conditions of the river, and how children were warned where and when not to swim [46] to [47]; she refers to Noongar medicine men and the bad spirits [54] which are a part of Noongar storytelling; but also of spirits (*wudartji*) that follow and protect Noongar people in their country and that their stories have been told to her by her family.

Both [SNC Witness #2] and [SNC Witness #1] refer to the messages of birds about death and illness ([SNC Witness #2], [61] and [SNC Witness #1], [44]) and the spirits of the old people (*wirrin*) [59].

[SNC Witness #4] states that he has known about the spirits since he was child and that his children know of them [78]; they come at night time, they are strong and protect as well as punish people [83]; the spirits govern the taking and eating of resources from the land and waterways

[84]. He speaks of his belief in the *wagyl* and its presence in the river and waters [89] and that you must throw sand in the river to make peace with the *wagyl* [95].

[SNC Witness #6] (deceased) has related creation stories [52] and has referred to sites in the Perth area associated with Noongar stories about country [56]; ceremonial and meeting sites, hunting and birthing places that have long been associated with Noongar custom and rules about access and prohibition to country [66].

Noongar ways (family, marriage, knowledge and use of resources)

[SNC Witness #2] talks of practices relating to the death of family or community members, of not saying the name of the deceased [63]. [SNC Witness #1] states that funerals are held quite a long time after the person has passed away [55], that Noongar people are buried on their country [57]. [SNC Witness #4] states that in the old days a camp where someone had died would be smoked overnight [70] and that 'sorry time' is a time to patch up old disagreements [72].

[SNC Witness #2] speaks of rules to ensure that people marry the right way and that families can only marry into certain other families [67]. [SNC Witness #1] states that rules for marriage are still being taught today [46] to make sure people don't marry the 'wrong way' [45] and to keep families close [46].

[SNC Witness #6] (deceased) referred to the 'old days' when there were special meetings and ceremonies relating to family matters [71], of a strong kinship system [72]; and the level of respect that must be showed to Elders [76]. [SNC Witness #2] states that she cannot make a decision on her own, that she must talk with other elders and reach a consensus, that Elders make the decisions and have the authority and this is always respected [69].

All of the witness statements provide detail on their use and knowledge of the resources of the land and waters of the application area. [SNC Witness #1] states that Noongar law has rules about hunting and sharing of food, not to take more than you need, to share with the old people [62]. [SNC Witness #2] talks about living off the land, that different families have their own areas for hunting and that you cannot go hunting on someone else's country without permission [77]; of certain rules about how to hunt, prepare and cook what you have hunted [78] and that it is Noongar law that you must always share what you have [82].

The statements of [SNC Witness #6] (deceased) and [SNC Witness #4] provide extensive detail on what resources have been traditionally hunted, how they were taught to catch and kill turtles, porcupine, kangaroos, emu, goanna and the repercussions for not hunting and preparing food the 'proper way'. They have been taught the way to hunt and the rules for food by their fathers and grandparents and teach these now to their own children and grandchildren.

The affidavits support and illustrate the statements and assertions found in the schedules of the application. They clearly articulate that members of the claim group possess rights and interests under their traditional laws and customs by virtue of those laws and customs being handed down to them by their ancestors. It is also clear that there was a society at sovereignty in respect of the area covered by the application, defined by recognition of laws and customs, and from which the claim group's current traditional laws and customs are derived—*Gudjala 09* at [66].

The material provides a sufficient factual basis for the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group and that these give rise to the native title rights and interests it claims.

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

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

This subsection requires that I be satisfied that there is sufficient factual basis to support the assertion that the native title claim group continues to hold native title in accordance with its traditional laws and customs.

Attachment F contains many statements that assert the continuity of the native title claim group's traditional laws and customs. The witness statements illustrate and, in my view, demonstrate that these laws and customs have been 'passed from generation to generation by traditional modes of oral transmission, teaching and common practice', and continue to be acknowledged and observed today among the current generations of the claim group.

Continued acknowledgement and observance has been possible because the members of the claim group and their predecessors have continued to live and travel through the South West of Western Australia and in particular to reside in and return to the Perth metropolitan area covered by the Whadjuk application. They have continued to practise their traditional laws and customs and adhere to the processes that regulate their association with and responsibilities to their country. Any disruptions to the claim group's continuity is said to be mitigated by the absorption by neighbouring groups of territory where 'land holding units ceased to exist', 'pursuant to Noongar laws of succession' such that 'physical removal - even lengthy physical removal - from the application area did not prevent identification with country, or the transmission of laws and customs relating to rights in land - being handed down from one generation to the next'—at [36] and [37].

Information in Attachment F acknowledges the disruptions caused by European settlement for Noongar society and the people particularly associated with the Perth area and its surrounds:

> Despite the restrictions placed on the exercise of native title rights and interests in this era, the acknowledgement and observance of laws and customs by members of the Metro people was able to continue throughout this period. The Aboriginal people of the Metropolitan area established a modus vivendi that enabled them to pursue their social, cultural and economic life according to traditional principles—at [32].

The witness statements provided in support of the factual basis of the claim illustrate the resulting accommodation of the Noongar people with the effects of European settlement to demonstrate the assertions made in Attachment F, for example, that:

> 'surviving laws and customs of the Noongar people were able to be (and in fact have been) continuously acknowledged and observed in relation to the application area by the Aboriginal people of the Metropolitan area from immediately prior to 11 June 1829 through to the present—at [33].

[SNC Witness #2] states that she remembers the 'old fellas' telling stories about places and animals in the area [37]; and her grandmother telling her stories about the *wagyl* and teaching her about the special places and practices in the metro area [42]. She passes the stories about the *wagyl* (in the Swan River) onto her children and their children

> I don't go swimming now, but if I did I would throw some sand into the water before I went in. I think the *wagyl* would recognise me—at [47]

She was taught Noongar language by her grandmother and she has taught her children and grandchildren Noongar language [76]. [SNC Witness #2] looks after her country having been taught her obligations by her parents and grandmother and she passes this knowledge onto her own children and grandchildren.

She was taught how to live off the land by her predecessors, how to hunt and prepare food in the Noongar way, and how to respect the animals and stories associated with them. For example, the process of treating kangaroo and possum skins was taught to [SNC Witness #4] by her father who was taught by his mother, and she now teaches it to her children and grandchildren [85]:

> My grandmother Yurleen told me stories about the fish that her father used to catch around Heirisson Island. The women used to dig up yams and gather bardis out of the wattle trees to share with other children. The men used to set fish traps. I've seen fish traps along the river at the old Swan Brewery site. There were many stones around when the tide came in the fish were caught and the men would then spear the fish. The fish was wrapped in wet paper bark for cooking on ashes—at [90].

[SNC Witness #1] mother taught her about the spirits and the sacred places, the places where men were prohibited [32]; she has learnt about her obligations to respect and look after the country, the places that should be avoided and to pass on her knowledge of country to her children and grandchildren.

[SNC Witness #6] (deceased) stated that 'no-one told him he was Noongar, he just knew by the way his family spoke to each and did things like hunting and fishing [22] that his father's father had travelled throughout their country and passed on knowledge of areas good for hunting, fishing camping [29] to [42]. [SNC Witness #6] statement documents Noongar rules for land passed down to him by his grandmother Ollie Nettle [47]; areas that are significant for spiritual reasons and the rights and obligations of Noongar people to protect and speak for these areas—swamps, parks, parts of the Swan River [57]. [SNC Witness #6] grandmother was 'married the Noongar way' [67] and rules for family and marriage were passed down to him by his elders such that he is now a 'tribal man' and Noongar elder [76]. [SNC Witness #6] passed on knowledge and stories to his children and grandchildren about the Noongar spirits, how they protect people and must be respected and acknowledged [84]; he was taught and continues to pass on the stories of the *wagyl* and the places where it is found [89].

[SNC Witness #4] explains the rules for passing information on—that information about places and people goes to the people with connection to country [35]; and states that he was around his older cousins who knew information from his father and his father's father and they taught him ([SNC Witness #4]) things [36]; and he is passing information on to his children and grandchildren and his brother's ([SNC Witness #3]) children [37].

All of the witness statements are replete with examples of Noongar knowledge, custom and law in relation to the Perth metro area that has been passed onto the current generation by previous generations and that they continue to pass onto the coming generations. This information includes, but is not limited to, rules and practices that govern access to country, hunting and gathering, spiritual beliefs, marriage, birth and death, sharing of resources and respect for elders; as well as rights and obligations in relation to sites of significance and their associated stories, belonging to country.

Palmer's report concludes a section entitled *Continuity of Connection: Economic and Spiritual Connection with the Country* with the following paragraph:

> Occasional and opportunistic utilisation of natural resources, with limited economic benefit, would appear however to be a continuing part of Noongar culture and to have some importance as an activity which typifies the following of a Noongar life-style . . . the knowledge has been passed on from generation to generation and has become a commodity quite separate for the practice of which it was formerly a part—at page 233.

His conclusion is based on evidence from data collected in relation to economic utilisation of natural resources and traditional Noongar knowledge and understanding of those resources.

It is my understanding of the claimant's factual basis that continued acknowledgement and observance has been possible because the members of the claim group and their predecessors have continued to live and travel through the areas of their country which include the Perth metro area and surrounds (albeit to differing degrees). They have continued to practise their traditional laws and customs and adhere to the processes that regulate their association with and responsibilities to the particular areas for which they have rights responsibilities.

There is sufficient information before me to support the assertion that the native title claim group continues to hold native title in accordance with its traditional laws and customs.

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.

Under s. 190B(6) I must be satisfied that, prima facie, at least one of the native title rights and interests claimed by the native title group can be established. I refer to the comments made by Mansfield J in *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'—*Doepel* 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'—*Doepel* at [126], [127] and [132].

As mentioned above in relation to the requirements of s. 190B(5), the registration test involves an administrative decision and is not a trial or hearing of a determination of native title pursuant to s. 225. Therefore it is not appropriate to apply the standards of proof that would be required at such a trial or hearing. It is not my role to draw definitive conclusions from the material before me about whether or not the claimed native title rights and interests exist, only whether they are capable of being established prima facie.

I note that, in my view, as set out above at s. 190B(5), the application provides a sufficient factual basis to support the assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claim to native title rights and interests.

Exclusive rights

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

Established

The majority decision of the High Court in *Western Australia v Ward* (2002) 191 ALR 1 (*Ward HC*) 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]. *Ward HC* is authority that, subject to the satisfaction of other requirements, a claim to exclusive possession, occupation, use and enjoyment of lands and waters can be established, prima facie.

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:

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

The Full Court stressed at [127] that it is also:

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

I note that the application, at Attachment E, makes the following statement:

> The applicants do not make a claim to native title rights and interests which confer possession, occupation, use and enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in section 23F of the *Native Title Act 1993* (Cwlth) ("the NTA"), was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia, and a law of that State has made provision as mentioned in section 23I in relation to the act—at (iii).

That a right to exclusive possession is possessed under Noongar traditional laws and customs is referred to in Palmer's report:

> My assessment of the information collected during field work and set out in the data sheets is that Noongar people consider that it is a land owner's right to have free use of and access to his or her own land. Conversely, those who do not share rights in the land should seek permission before they enter or use that land—at page 207.

Based on accounts from members of the claim group (in the SNC), Mr Palmer articulates rights of

access to country which include the following features:

- a Noongar person must keep to his or her own area, and not go outside it;
- a Noongar person does not need permission to be in his or her own area, but others, including other Noongar people, should ask first;
- a person who is not a Noongar and who wishes to visit Noongar country, should always ask first.

The witness statements demonstrate and provide a factual basis to support the assertion that an exclusive right existed and continues to exist under Noongar traditional law and custom, including in respect of the area covered by the Whadjuk application. All the statements talk about rights they have to Noongar lands and in particular to their own areas and how rights have been handed down to them from their parents, grandparents and great grandparents. This material has been extensively referred to above under the conditions of s. 190B(5).

[SNC Witness #6] (deceased) stated that Noongar people know where their country is and that they should not let people come onto their country unless they have permission; that he has the right to speak for the Perth area (as well as other areas outside the boundaries of this application) [43] [45]. [SNC Witness #2] states that Noongar law says that you shouldn't go hunting on someone else's country without asking permission [77]. [SNC Witness #4] talks of Noongar rules that mean you must speak to the right people for the area when you hunt, and people who can tell you where you can and cannot go and that people still follow the rules when they come to Perth [13]. [SNC Witness #4] and his brother ([SNC Witness #3]) refer to the spiritual sanctions that are likely to occur if permission is not sought and provided, particularly in respect of places that are *wirrnitj*—you may get sick or something bad may happen to you.

The material before me supports the assertion that there is an obligation to seek permission and have permission sought by others to enter Noongar country, including those areas covered by the application over which such a right exists and can be recognised.

Non-exclusive rights

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

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

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

Not Established

The claim to exclusive possession, made by the applicant at (a) of Attachment E, is confined to those areas where it can be recognised (i.e. where previous non-exclusive possession acts have not been done). As the rights which make up exclusive possession are a right to control access and a right to make binding decisions about the use of the country (*Ward HC* at [52]) it would appear that the above rights (c), (e) and (g), have been distilled out of the wider construction of the right to 'possess, occupy, use and enjoy to the exclusion of all others'. Therefore on this basis I am interpreting the framing of the above rights to be rights claimed only in those areas where the claim to exclusive possession cannot be recognised and are therefore claimed non-exclusively.

There is extensive Court authority on whether such rights are capable of recognition as non-

exclusive[16] and in claiming the rights without a right to possession as against the whole world would be 'apt to mislead'—*Ward HC* at [52].

It may be that the claim to these non-exclusive rights is limited to the control of access and the making of binding decisions in relation only to other Aboriginal persons who recognise the traditional laws and customs of the native title claim group for the Whadjuk application[17]. However, as they are currently framed, based on the authorities, these rights cannot be established, prima facie.

(b) the right to live within the area

(d) the right of access to the area

Established

The witness statements provide numerous examples of activities to demonstrate that the claim group's past and current association with the application area has involved and currently involves the claimed rights (as referred to above under the condition of s. 190B(5)(a)). Such activities include fishing, camping, collecting the resources of the land and waters, residing permanently in the claim area, attending gatherings and meetings, teaching young people about Noongar country and visiting and maintaining sites of significance. It is clear that members of the claim group regularly spend time in the claim area and access to the land and waters is in pursuit of these activities.

People have regularly camped in the area ([SNC Witness #4], [SNC Witness #1], [SNC Witness #6]) for long periods of time and younger generations are taken out on the claim area camping to fish and learn about Noongar country, law and custom. People regularly travel through and hunt in the bush and waterways of the metro area; live in the area and can trace the past residence of their predecessors (including some of the ancestors named in Schedule A) to places and sites in the Perth metropolitan area.

I am satisfied there is sufficient material in the application, additional material and the witness statements to establish prima facie that the above rights and interests exist under the native title claim group's traditional laws and customs.

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

Established

All the witness statements refer to:

- their own and their ancestors hunting, gathering and fishing on the land and waters of the application area;
- members of the claim group taking and using the resources—hunting, preparing and cooking kangaroo, echidna, emu, possum, gathering bush foods;
- gathering traditional food, grinding seeds to make damper and colleting edible berries ;

[16] See for instance *Ward v State of Western Australia* [2006] FCAFC 283 at [27]. This was followed in *Jango v Northern Territory* [2006] FCA 310.

[17] A similar right was established in *Attorney-General of the Northern Territory v Ward [2003] FCAFC 283* and in *De Rose v State of South Australia (No 2) [2005] FCAFC 110*.

- traditional Noongar ways of hunting and preparing bush food was taught to them by their parents and grandparents;
- treating and using the skins of kangaroos and possums to make rugs and coats;
- recalling predecessors hunting for goannas, bobtails, turtles and kangaroos, eating food from the land; and
- The use of emu oil and goanna fat, vegetation and flowers in bush medicine practice.

I am satisfied there is sufficient material in the application, additional material and the witness statements to establish, prima facie, that this right exists under the native title claim group's traditional laws and customs.

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

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

Established

All of the witness statements and information in Palmer's report identify areas and sites of importance to the claim group and their place in Noongar traditional law and custom. It is clear that there are cultural and spiritual activities associated with visiting, maintaining and protecting these places. There are swamps and waterways, meeting places, men's and women's places, totemic sites and areas associated with the mythological figure and story of the *wagyl*, all of which Noongar people have obligations to protect and maintain.

The witness statements speak of the cultural and spiritual activities aligned with fishing, hunting, gathering and storytelling and document extensively the past and present activities of members of the claim group associated with the conduct of ceremonies, meetings of Noongar groups, cultural practices and activities that relate to stories and sites.

I am satisfied there is sufficient material in the application, additional material and the witness statements to establish, prima facie, that the above rights and interests exist under the native title claim group's traditional laws and customs.

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

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

Established

The witness statements document extensively the past and present practices of teaching and acquiring knowledge of Noongar traditional law and custom as it relates to places within the application area. [SNC Witness #1] has inherited rights to Noongar country, she has been taught Noongar ways and she teaches her children about Noongar ways, now that all her brothers have passed away and she is the eldest remaining it is her responsibility to speak for her family's country [25]. It is clearly stated in the witness statements that Noongar people regularly, and have always taken, take their grandchildren out to the bush to teach them where to find and how to collect the traditional bush foods, shown them what can be eaten and not eaten, how to hunt kangaroos and *gilgies* (yabbies), how to respect the presence of the *wagyl* in the Swan River and

other waters; where the places are that were special to Noongar ancestors and how important it is to maintain and continue to share traditional knowledge, law and custom.

I am satisfied there is sufficient material in the application, additional material and the witness statements to establish, prima facie, that the above rights and interests exist under the native title claim group's traditional laws and customs.

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

Established

The information in the application and witness statements and additional material demonstrates that the right exists under the traditional law and custom of the Noongar people. The right is expressed through the activities and practices of members of the claim group—for example:

> ... I am an elder with traditional rights to this country. I want to look after the water animals because they are part of my culture. We have to protect the swamps because all the swamps are filters—[SNC Witness #6] (deceased) at [54].

People have rights in relation to the area under their traditional law and custom which entail their participation organisations involved in cultural heritage, site preservation, development consultations:

> I look after the country and it is a part of me. My parents taught me about my obligations to the land and to respect it and look after it. Because I have this obligation, I am a member of a number of Aboriginal committees that make decisions about the land and I teach other Noongar people about our country ...— [SNC Witness #2] at [74].

Noongar traditions and customs regulate hunting and fishing such that people only take what they need and this has been passed on to them by their ancestors and is what they teach their children and grandchildren:

> When I take by grannies out fishing I tell them they are only allowed to catch a certain amount of fish. Once they have their share, they have to stop because it is important to take care of the land— [SNC Witness #6] (deceased) at [66].

Food gathering and preparation is also governed by Noongar traditions that ensure the conserving of resources, the protection of habitat, respect for animals. The *wagyl* is integral to Noongar relationships to land and water – respect shown to its presence and to the places to which it belongs results in peace and harmony in the land and waters. There are ramifications when the laws are not followed about how much food to take, how to kill and prepare animals, what season to take – people can get sick, will have no luck hunting in the future.

> "When you go hunting in some places, you should always leave the first kangaroo for the *mamari's*, otherwise they will follow you home. You can only kill animals if you need to for meat. That is Noongar law—[SNC Witness #1] at [62].

I am satisfied there is sufficient material in the application, additional material and the witness statements to establish, prima facie, that the above right exists under the native title claim group's traditional laws and customs.

(m) the right to manage, conserve and look after the land, waters and resources by way of removing carbon dioxide from the atmosphere surrounding the land and waters; and

(n) the right to manage, conserve and look after the land, waters and resources by way of avoiding the

emission of methane or nitrous oxide.

Established

I am satisfied that the right to manage, conserve and look after the land, waters and resources can be established, prima facie, to exist under the traditional laws and customs of the Noongar people for the area covered by the Whadjuk application. In my view it is arguable that the above rights are modern manifestations or adaptations of the practices involved in managing conserving and looking after the land, waters and resources.

[Deponent #2] attests in his affidavit to maintaining environmental balance by way of taking different parts of trees as opposed to the whole of the tree, controlled 'cool' burning to allow plant regeneration:

> In the present day, with the knowledge Noongars possess of the dangers posed by greenhouse gases, our right and responsibility to maintain an appropriate environmental balance extends to carrying out activities aimed at removing carbon dioxide from the atmosphere surrounding the land and waters of our country, and avoiding the emission of methane or nitrous oxide within our country—at [6].

I am satisfied there is sufficient material in the application , additional material and the witness statements to establish prima facie that the above rights and interests exist under the native title claim group's traditional laws and customs.

Conclusion

I have considered the rights claimed in the application against existing law in relation to whether or not they are capable of being recognised and whether the application provides sufficient information to establish, prima facie, their existence. I am satisfied, having considered the information before me, that some of the rights claimed in this application can be established prima facie. Therefore the rights to be registered on the Register of Native Title Claims are as follows:

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

(b) the right to live within the area;

(d) the right of access to the area;

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

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

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

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

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

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

(m) the right to manage, conserve and look after the land, waters and resources by way of removing carbon dioxide from the atmosphere surrounding the land and waters; and

(n) the right to manage, conserve and look after the land, waters and resources by way of avoiding the emission of methane or nitrous oxide.

Subsection 190B(7)
Traditional physical connection

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

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

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

(i) the Crown in any capacity, or

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

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

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

Under s. 190B(7), I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application. This condition 'can be seen as requiring some measure of substantive (as distinct from procedural) quality control upon the application'—*Gudjala FC* at [84].

In *Doepel*, Mansfield J also considers the nature of the Registrar's task at s. 190B(7):

> Section 190B(7) imposes a different task upon the Registrar. It does require the Registrar to be satisfied of a particular fact or particular facts. It therefore requires evidentiary material to be presented to the Registrar. The focus is, however, a confined one. It is not the same focus as that of the Court when it comes to hear and determine the application for determination of native title rights and interests. The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration—at [18].

Sufficient material is provided in the affidavits of the persons comprising the applicant to show that the native title claim group has a traditional physical connection with the land and waters of the application area. The material is referred to and quoted extensively in my consideration for both ss. 190B(5) and 190B(6), above.

[SNC Witness #4] has lived, worked and travelled across the application area throughout his life. He has rights and obligations inherited through his father and his father's father. He regularly goes hunting on the application area and does not have to ask permission to do so, taking his children, nieces and nephews with him. [SNC Witness #6] (deceased) was told by his father and uncle of the places and stories in the Perth area which are significant to Noongar people including the Swan Brewery site (where the *wagyl* rests), the swamps and lakes and bushlands. All of the witness statements document traditional practices and association with the area of the

application through hunting, fishing, caring for sites and passing on the stories of Noongar beliefs.

I am satisfied that at least one member of the claim group currently has a traditional physical connection with parts of the application area.

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

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

Section 61A provides:

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

(2) If :

(a) a previous exclusive possession act (see s. 23B) was done, 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 47B, as the case may be, applies to it.

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

Reasons for s. 61A(1)

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

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

The geospatial report confirms that there is one native title determination that falls within the external boundary of the current application: WC95/9—Bodney—WAD6009/96. The description at Attachment B of the application specifically excludes the Bodney determination from the area covered by this application and the map at Attachment C also indicates that the area of the Bodney determination is excluded from the area covered by this application.

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 at paragraph 2(b) excludes from the area covered by the application any area in relation to which a previous exclusive possession act, as defined in s. 23B, has been done.

Reasons for s. 61A(3)

Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act 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 under provides a qualification at paragraph (iii) that states the application does not make a claim to native title rights and interests which confer possession, occupation, use and enjoyment to the exclusion of all others in respect of any areas which have been subject to previous non-exclusive possession acts.

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 states that the applicant does not make a claim for ownership of minerals, petroleum or gas wholly owned by the Crown. Attachment E, under the list of qualifications to which the claimed native title rights and interests are subject, makes the same statement.

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

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

Schedule P states that the applicant does not claim exclusive possession of all or part of an offshore place. Attachment E, under the list of qualifications to which the claimed native title rights and interests are subject, makes the same statement.

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

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

Schedule B provides that the application does not include any area in relation to which native title rights and interests have otherwise been wholly extinguished.

There is no information within the application before me that suggests native title rights and interests have been claimed over any area where native title rights and interests have otherwise been extinguished. I have not otherwise been made aware in the course of considering the present application that such rights and interests have been extinguished. Each of the affidavits sworn for the purposes of s. 62(1)(a) by the persons jointly comprising the applicant, affirms that the applicant believes that 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.

[End of reasons]

Attachment A
Summary of registration test result

Application name	**Whadjuk People**
NNTT file no.	**WC11/9**
Federal Court of Australia file no.	**WAD242/11**
Date of registration test decision	**11 October 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)		N/A
	s. 190C(4)(b)		Met

Section 190B conditions

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

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**

Attachment B
Documents and information considered

The following lists **all** documents and other information that I have considered in coming to my decision about whether or not to accept the application for registration.

1. The Whadjuk People native title determination application filed in the Federal Court on 23 June 2011;
2. Claimant Application Summary for WC11/2—Swan River People 2—WAD24/11;
3. Claimant Application Summary for WC03/6—Single Noongar Claim (Area 1) —WAD6006/03, including:
    i. Attachment A1, List of Noongar Apical Ancestors;
    ii. Attachment A2, List of Noongar Family names - Noongar family names identified through consultations with Noongar community members and SWALSC full council representatives, April –May 2003;
    iii. Attachment A3, List of additional Noongar Family names - Additional family names identified by SWALSC researchers, 30 May 2003.
4. Map 1—Single Noongar Claim Area #1 WAD6006/03 as attached to Claimant Application Summary for WC03/6—Single Noongar Claim (Area 1) —WAD6006/03
5. The Tribunal's Geospatial Services 'Geospatial Assessment and Overlap Analysis' (the geospatial report) for 30 June 2011, being an expert analysis of the external and internal boundary descriptions and mapping of the application area and an overlap analysis against the Register, Schedule of Applications, determinations, agreements and s. 29 notices and equivalent.
6. Additional material provided to the delegate by SWALSC on 19 July 2011
    i. Witness statement of [SNC Witness #1] (nee [SNC Witness #1 maiden name]), dated 6 September 2005, filed in relation to the Single Noongar Claim (Area 1) (WAD6006/2003)and the Single Noongar Claim (Area 2) (WAD6012/2003) Federal Court proceedings;
    ii. Witness statement of [SNC Witness #2], undated, filed in relation to the Single Noongar Claim (Area 1)(WAD6006/03) and the Single Noongar Claim (Area 2) (WAD6012/03) Federal Court proceedings.
7. Additional material provided to the delegate by SWALSC on 15 July 2011:
    i. Affidavit of [Deponent #1], affirmed 16 June 2010, filed in relation to Federal Court proceedings in *Albert Corunna & Ors & Ors on behalf of the Swan River People* (WAD152/2010);
    ii. Affidavit of [Deponent #2], affirmed 16 June 2011.
8. Submission of 21 July 2011 by [Applicant #1 for overlapping claim], which included:

i. Affidavit of [Applicant #1 for overlapping claim], sworn 21 July 2011;

ii. Affidavit of [Applicant #2 for overlapping claim], sworn 21 July 2011;

iii. Submission to the Registrar regarding the factual basis of the WC11/9 Native Title Application by [Applicant #1 for overlapping claim], dated 21 July 2011; and

iv. Additional Information relating to WC11/9, undated.

9. Affidavit of [Applicants' legal representative], affirmed 28 July 2011, including:

i. Annexure A—Notice of authorisation meeting;

ii. Annexure B—Copies of published notices;

iii. Annexure C—Photograph;

iv. Annexure D—Individual information form;

v. Annexure E—Attendance list (of participants at the 26 March 2011 authorisation meeting);

vi. Annexure F—Photographs;

vii. Annexure G—Agenda of 26 March 2011 authorisation meeting, code of conduct; and

viii. Annexure H—Photograph.

10. Submission of 29 July 2011 by [Person making submission], including:

i. NNTT Claimant Application Summary for WC98/55—Kevin Miller—WAD6271/98 (discontinued claim);

ii. Five [5] extracts from unidentified published texts and notes regarding [Person making submission] ancestor, Yagan;

iii. Three [3] family trees documenting [Person making submission] family's descent from [Person making submission] through his mother;

iv. Death Certificate of [Mother Person making submission].

11. Submission of 3 August 2011, by SWALSC on behalf of the applicant in response to [Applicant #1 for overlapping claim] submission of 21 July 2011, including:

i. Affidavit of Applicants' legal representative], affirmed 2 August 2011, including resolutions reached at 26 March 2011 authorisation meeting (Annexure A), copy of a document distributed by [Applicant #1 for overlapping claim] at the meeting relating to some of the apical ancestors listed at Schedule A of the Whadjuk People application (Annexure B).

12. Submission of 30 August 2011, by SWALSC on behalf of the applicant in response to submissions of [Applicant #1 for overlapping claim] (21 July 2011) and [Person making submission] (29 July 2011), including:

i. Affidavit of SWALSC anthropologist [SWALSC anthropologist], affirmed 30 August 2011;

ii. Affidavit of [Applicants' legal representative], affirmed 30 August 2011, including a letter sent to [Person making submission] by SWALSC on 24 March 2011 (Annexure A).

13. Submission of 13 September 2011 by [Applicant #1 for overlapping claim], including:
    i. Information in relation to the northern boundary of the Whadjuk People application as it overlaps with the Yued application (WAD6192/98);
    ii. Affidavit of [Applicant #1 for overlapping claim], sworn 13 September 2011, in relation to the Yued boundary;
    iii. Information in relation to Whadjuk People genealogies, and
    iv. Affidavit of [Applicant #1 for overlapping claim] affirmed 13 September 2011, in relation to the name 'Whadjuk'.
14. Submission of 7 October 2011, by SWALSC on behalf of the applicant in response to 13 September 2011 submission of [Applicant #1 for overlapping claim] and a request of the delegate for additional information, including:
    i. Letter to the Tribunal Case Manager from the PLO for SWALSC, dated 7 October 2011;
    ii. Affidavit of [SWALSC anthropologist], sworn 7 October 2011;
    iii. Screen-grab from the Federal Court's website;
    iv. Extracts from Anthropologist's Report, Kingsley Palmer, dated December 2004, in relation to the Single Noongar Native Title Claim (WAD6006 of 2003 & WAD6012 of 2003);
    v. Witness statements filed in relation to the Single Noongar Claim (Area 1) (WAD6006/2003) and Single Noongar Claim (Area 2) (WAD6012/2003) Federal Court proceedings;
    vi. [SNC Witness #3] (deceased) filed 27 October 2005;
    vii. [SNC Witness #4] filed 27 October 2005;
    viii. [SNC Witness #5] filed 1 November 2005; and
    ix. [SNC Witness #6] (deceased) filed 14 October 2005.

Attachment C
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:

#	**Date**	**Author**	**Document type**	**Procedural fairness (provided to/date)**
1	15 July 2011	[Deponent #2]	• Affidavit, affirmed 16 June 2010	• State of Western Australia, 2 August 2011
2	15 July 2011	[Deponent #1]	• Affidavit, affirmed 16 June 2011	• State of Western Australia, 2 August 2011
3	19 July 2011	[SNC Witness #1] (nee [SNC Witness #1 maiden name])	• Witness Statement, dated 6 September 2005	• State of Western Australia, 2 August 2011
4	19 July 2011	[SNC Witness #2]	• Witness Statement, undated	• State of Western Australia, 2 August 2011
5	21 July 2011	[Applicant #1 for overlapping claim]	• Affidavit, sworn 21 July 2011 • Submission to the Registrar regarding the factual basis • Additional Information relating to WC11/9	• State of Western Australia, 2 August 2011 • SWALSC, 28 July 2011
6	21 July 2011	[Applicant #2 for overlapping claim]	• Affidavit, sworn 21 July 2011	• State of Western Australia, 2 August 2011 • SWALSC, 28 July 2011
7	28 July 2011	[Applicants' legal representative]	• Affidavit, affirmed 28 July 2011 in relation to authorisation, including Attachments A-H	• State of Western Australia, 16 August 2011
8	29 July 2011	[Person making	• NNTT Application summary for WC98/55 – WAD6271/98	• SWALSC, 2 August 2011

		submission]	(discontinued claim) • Five [5] extracts from unidentified published texts and notes regarding [Person making submission] ancestor, Yagan; • Three [3] family trees documenting [Person making submission] family's descent from [Person making submission] through his mother; • Death Certificate of [Mother of Person making submission].	• State of Western Australia, 16 August 2011
9	13 September 2011	[Applicant #1 for overlapping claim]	• Affidavit, affirmed 13 September 2011, in relation to the name 'Whadjuk' • Affidavit, sworn 13 September 2011, in relation to the Yued (WAD6192/98) boundary	• SWALSC, 14 September 2011 • State of Western Australia, 23 September 2011
10	13 September 2011	[Applicant #1 for overlapping claim]	• Information in relation to Whadjuk People genealogies • Information in relation to the northern boundary of the Swan River People 2 application as it overlaps with the Yued application (WAD6192/98)	• SWALSC, 14 September 2011 • State of Western Australia, 23 September 2011

The State of Western Australia (the State) did not provide make any submissions in relation to the testing of the Whadjuk application. I note that the applicant, through its representative, SWALSC, made a final submission on 7 October 2011, in response to [Applicant #1 for overlapping claim] submissions of 13 September 2011 which included some additional information relevant to the factual basis conditions of my consideration under s. 190A. I did not provide this information to the State on the basis that it had made no previous submissions.

In my view, no expectation was created by the Tribunal by correspondence or communication with [Applicant #1 for overlapping claim], [Applicant #2 for overlapping claim] and [Person making submission] that they would be given procedural fairness, and therefore be entitled to receive the applicant's response to their submissions. *Hazelbane v Doepel* [2008] FCA 290 at [25]–[28] (*Hazelbane*) is authority that the Registrar is not required to afford procedural fairness to the applicant of an overlapping registered native title claim when making a registration decision on any 'competing' claim, unless, as occurred in that case, the actions of Tribunal staff or the Registrar gave rise to a legitimate expectation on the part of the overlapping applicant that they would be told when the decision is to be made and offered an opportunity to make submissions before the decision.

In my view, the statutory scheme governing the Registrar's registration testing of claimant applications and the subsequent notification of applications to a range of persons (including 'any persons whose interests may be affected by a determination in relation to the application'—

s. 66(3)(a)(vii)) *after* the registration test decision is made, as required by s. 66(6), has curtailed the ordinary rules of procedural fairness—*Hazelbane* at [23] to [31].

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