National Native Title Tribunal

Registration test decision

Application name	Yi-Martuwarra Ngurrara
Name of applicant	Josephine Forrest, Benjamin Laurel, Malcolm Moora, Harry Yungabun, Peter Clancy, Bernadette Williams, Mervyn Numbagardie, Elsie Dickens, Dunba Nunju, Claude Forrest and Sammy Costain
State/territory/region	Kimberley, Western Australia
NNTT file no.	WC12/2
Federal Court of Australia file no.	WAD25/12
Date application made	1 February 2012
Name of delegate	Carissa Kok

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

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

Date of decision: 29 February 2012

Date of reasons: 5 March 2012

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Carissa Kok

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

Reasons for decision

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Introduction

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

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

Application overview

The Registrar of the Federal Court of Australia (the Court) gave a copy of the WC12/2—Yi-Martuwarra Ngurrara—WAD25/12 claimant application (the application) to the Registrar on 2 February 2012 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 1 February 2012 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.

On the date that the application was made, part of the area covered by the application was covered by another application, WC97/101—Kurungal—WAD6217/98 (Kurungal application), that was entered onto the Register of Native Title Claims. However, at the date of this statement of reasons, the application before me does not overlap with the Kurungal application or any other application. I discuss this matter further at my reasons below under s. 190C(3).

I note that the native title claim group for the application comprises the same group of people as the native title holding group for the determination area subject of the WC96/32—Ngurrara Part A—WAD6077/98 determination—see *Kogolo v State of Western Australia* [2007] FCA 1703 *(Kogolo v WA),* and the claim group for the WC08/03—Ngurrara (Part B)—WAD281/08 application. The areas subject to this determination and application adjoin the application area before me. I discuss the relevance of this in my consideration of the application before me, particularly in relation to the Ngurrara Part A determination, below at the conditions of ss. 190B(5) and (6).

The application is affected by the following future act notices:

Tenement ID	Notification Date	Notification Type
STP-EPA-0021	2/11/2011	s29
STP-EPA-0020	2/11/2011	s29
E80/4632	2/11/2011	s29
STP-EPA-0030	16/11/2011	s29

In accordance with ss. 190A(2)(b) and (f), this registration decision has been made by the end of four months after the notification days specified in the first three applicable notices listed above.

I note that a delegate of the Registrar made a preliminary assessment on a draft of the application and that this preliminary assessment was provided to the applicant on 16 December 2012.

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 have had regard to the information contained in the following documents:

- WC12/2 Form 1 application and accompanying documents; and
- an overlap analysis and geospatial assessment of the application area undertaken by the Tribunal's Geospatial Services unit on 8 February 2012 (the geospatial assessment).

I have also had regard to the documents contained in the WC12/2 Yi-Martuwarra Ngurrara case management/delegates files (reference 2012/00293). Where I have had particular regard to information in documents within that file, I have identified them in this statement of reasons. I have followed Court authority and have only considered the terms of the application itself in relation to the registration test conditions in s. 190C(2) and ss. 190B(2), (3) and (4)—*Attorney General of Northern Territory v Doepel* [2003] FCA 1384 *(Doepel)* at [16].

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

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

Procedural fairness steps

As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are made in a fair, just and unbiased way. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication—*Hazelbane v Doepel* [2008] FCA 290 at [23] to [31].

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

Procedural and other conditions: s. 190C

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

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

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

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

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

I consider below whether the application and accompanying affidavit/other documents meet the relevant requirements of ss. 61 and 62:

Native title claim group: s. 61(1)

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

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

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

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

Notwithstanding this, in accordance with the requirements of ss. 61 and 62, I do ensure that a claim 'on its face, is brought on behalf of all members of the native title claim group', and does not 'indicate that not all the persons in the native title claim group were included', or, that the claim group is 'in fact a sub-group of the native title claim group'. In my view, and as guided by *Doepel*, in such circumstances the requirements of s. 190C(2) under this subsection would not be met—at [35] and [36].

Schedule A provides information to describe membership of the native title claim group. (I consider the merits of this description at s. 190B(3) below). I have considered this information as well as the application overall and there is nothing on the face of the application that leads me to conclude that the description of the native title claim group does not include all of the persons in the group, or that it is a subgroup of the native title claim group. I am satisfied that the application complies with the requirements of s. 61(1) for the purpose of s. 190C(2).

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

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

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

The application at pages 2 and 3 provides the names of the persons comprising the applicant and their address for service is stated at Part B.

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

> The application must:
> (a) name the persons in the native title claim group, or
> (b) otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

The application contains all details and other information required by s. 61(4).

Schedule A contains a description of the native title claim 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 by each of the 11 persons that comprise the applicant, which each contain the required statements under subparagraphs 62(1)(a)(i) to (v).

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

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

The application contains all details and other information required by s. 62(1)(b) because it does contain the details specified in ss. 62(2)(a) to (h), as identified in the reasons below.

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

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

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

Schedule B refers to Attachment B which contains an external boundary description of the application area. Schedule B also lists general areas within the external boundary of the application area that are not covered by the application.

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

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

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

Schedule C refers to Attachment C which 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).

The applicant at Schedule D states that no searches of the relevant kind have been carried out.

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

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

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

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

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

> The application must contain a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist, and in particular that:
> (1) the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (2) there exist traditional laws and customs that give rise to the claimed native title, and
> (3) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

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

Schedule A, Schedule F, Attachments F to F4 and Attachment M contain a general description of the factual basis on which the applicant asserts the claimed native title rights and interests exist.

Activities: s. 62(2)(f)

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

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

Schedule G contains a list of activities carried out by the claim group over the application area.

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

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

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

At Schedule H which relates to this requirement, the applicant states 'not applicable'.

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

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

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

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

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

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

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

Schedule I refers to Attachment I which contains details in relation to notices of the relevant kind.

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 met—*Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*)—at [9]. Section 190C(3) essentially relates to ensuring there are no common native title claim group members between the application currently being considered for registration (the 'current application') and any relevant overlapping 'previous application'.

In *Strickland FC*, the Full Court interpreted the timing of when the Registrar's consideration under s. 190C(3) is to take place:

> The second question is: when does the phrase "consideration of the previous application under s 190A" when used in s 190C(3)(c) need to take place?
>
> It will be recalled that s 190C(3)(c) stipulates the ingredient that -
>
> *"(c) the entry was made, or not removed, as a result of consideration of the previous application under section 190A."*
>
> It appears that this provision could have two possible meanings:
>
> (1) that the entry in relation to the earlier application is still on the Register and has been tested under s 190A at the time that the Registrar applied the registration test to the current application; or
>
> (2) that the entry in relation to the earlier application is still on the Register and was tested under s 190A before the new application was made.
>
> We agree with the Attorney General's submission that the first suggested interpretation is preferable, as a matter of language and of convenience. As a matter of language, the phrase used in s 190C(3)(b) - "when the current application was made" - does not appear in s 190C(3)(c). As matter of the practical operation of the provision, if it were the case that the previous application had to be considered under s 190A before the current application was made, then no application actually made before 30 September 1998 would ever fail this aspect of the test, since no application was, or could have been, tested before that date. This would mean that the enactment of Item 11 as a transitional provision was unnecessary and futile in respect of the s 190C(3) requirement—*Strickland FC* at [53] to [56].

In this instance, the following facts are relevant to my consideration:

- The application before me is the current application and it was 'made' when it was filed in the Court on 1 February 2012—see *Strickland FC* at [44] and [45].
- The geospatial assessment confirms that when the current application was made (1 February 2012), part of the application area was overlapped by an area subject of another application, WC97/101—Kurungal—WAD6217/98 (Kurungal), that at that time, was entered on the Register of Native Title Claims.

The Kurungal application was amended on 31 January 2012 and its amendments included the removal of the area that is now covered by the current application. However, the entry of the Kurungal application, as it stood prior to 31 January 2012, remained on the Register until such time that the amended Kurungal application was considered for registration under s. 190A. On 9 February 2012, the amended Kurungal application was accepted for registration pursuant to s. 190A(6A). The Register was updated on that same day to reflect (amongst others) the amendment to the area.

As at the date of this statement of reasons, my search of the current application against the Tribunal registers shows that the application area is not overlapped by any other application, registered or not. The entry on the Register of the Kurungal application as it stood prior to its amendment on 31 January 2012 was removed and replaced with a new entry on 9 February 2012 as a result of it being considered for registration under s. 190A(6A). The new entry of the amended Kurungal application on the Register reflects that there is no longer any overlap between the areas covered by the Kurungal application and the current application.

Accordingly, in my view, the entry relating to the Kurungal application is not on the Register at the time that I have applied the registration test to the current application.

As there is no longer any relevant previous application entered on the Register which covers any part of the area covered by the application before me, the requirement to consider whether there are any common members between the current application and any previous application, is therefore not triggered.

Subsection 190C(4) Authorisation/certification

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

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

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

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

Under s. 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

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

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

Mansfield J states in *Doepel* that the Registrar's function in assessing the limb of s. 190C(4)(a) is simply 'to be satisfied about the fact of certification by an appropriate representative body'—at [78].

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

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

Attachment R to the application contains a copy of a certificate by the Kimberley Land Council (KLC) made pursuant to s. 203BE and signed by its Chief Executive Officer on 19 December 2011.

Section 190C(4)(a) states that an application must be certified by each Aboriginal/Torres Strait representative body (representative body) that could certify the application. Under s. 203BE(1)(a), a representative body can certify an application for a determination of native title where that application relates to areas of land or waters wholly or partly within the area, for which the body is a representative body.

I am satisfied that the application has been certified by all the representative bodies that could so certify, based on the following information:

- the applicant at Schedule K states that the KLC is the only representative body for the application area;
- the certificate by the KLC provides a statement to this same effect (page 1); and
- the geospatial assessment which found that the KLC is the only representative body for the application area.

I turn now to consider whether that certification by the KLC contains the information required by Part 11, with specific regard to s. 203BE(4). It is not my role to examine matters relating to the basis on which the certification was provided, including the sufficiency or legitimacy of the reasons why the certifying body holds the opinions it does—*Doepel* at [80]; *Wakaman People #2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 at [32].

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

> (4) A certification of an application for a determination of native title by a representative body must:
>
> (a) include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (2)(a) and (b) have been met; and
>
> (b) briefly set out the body's reasons for being of that opinion; and
>
> (c) where applicable, briefly set out what the representative body has done to meet the requirements of subsection (3).

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

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

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

The certificate contains statements at part 1 that the KLC is of the opinion that the requirements of ss. 203BE(2)(a) and (b) have been met. I am satisfied that the certificate contains the information required by s. 203BE(4)(a) .

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

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

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

- The KLC undertook steps to notify members of the claim group of the authorisation meeting which included;
  - distributing notices to relevant Aboriginal organisations and communities for public display on notice boards (the notices included an agenda, a claim group description and an indicative map of the proposed application area);
  - providing notice of the meeting to service stations in Fitzroy Crossing for public display[1];
  - notice of the meeting was publically advertised in two newspaper publications prior to the meeting (appearing in two separate editions of each newspaper); and
  - mailing of individual meeting notices to members of the group for which the KLC holds contact details and informing group members directly by word of mouth.
- The decision-making process followed at the authorisation meeting was based on the traditional laws and customs of the claim group. This is supported by an anthropologist who has worked with the group over a number of years.
- KLC staff have observed that this traditional decision-making process has also been followed at other meetings of the group—details of the process are provided in the s. 62 affidavits.

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

- The KLC and its contracted consultants have, over a number of years, undertaken extensive anthropological and genealogical research and community consultations with the group to identify all persons who hold native title rights and interests in an area that includes the application area.
- The native title holders for the determined area that adjoins the application area—see *Kogolo v WA,* are the same persons that comprise the native title claim group for the application.

[1] It is stated in each of the s. 62 affidavits by the persons who comprise the applicant that the authorisation meeting was held at Fitzroy Crossing on 26 and 27 October 2011.

- The process of identifying all of the persons in the claim group has continued with the engagement of an anthropologist who attended the authorisation meeting and undertook further consultation with senior members of the group regarding the claim group description.
- I note that the information I summarise above regarding the steps undertaken by the KLC to notify people of the authorisation meeting also provides details that relate to s. 203BE(2)(b).

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

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

The certificate does not contain any details regarding what the KLC has done to meet the requirements of s. 203BE(3). I note that subsection (3) includes a statement that 'failure by the representative body to comply with the subsection does not invalidate any certification of the application by the representative body'.

I am of the view that the certification by the KLC is valid despite the fact that the KLC has not set out any information pursuant to the requirement of s. 203BE(4)(c). I consider that a failure to address paragraph 203BE(4)(c) is not fatal to the question of whether the application is certified or not because the issue covered in paragraph 203BE(4)(c) does not go to matters of authorisation by the native title claim group of an applicant to make and deal with the application[2].

Conclusion

It is my view that the KLC is the only representative body that could provide the requisite certification, and that the certification satisfies the requirements of s. 203BE(4). As I am satisfied that the requirements of s. 190C(4)(a) are met, the application meets the condition in s. 190C(4).

[2] I note that the certificate by the KLC is signed on 19 December 2011, at which time the Kurungal application area covered part of the (then) proposed application area before me. On 31 January 2012, amendments were made to the Kurungal application which included a reduction in the application area. On 1 February 2012 when the application before me was filed, it did not overlap any other applications on the Schedule of Applications – Federal Court (see geospatial assessment of 8 February 2012).

Merit conditions: s. 190B

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

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

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

When considering s. 190B(2), I am confined to the information in the application—*Doepel* at [122].

Schedule B of the application refers to Attachment B with is an external boundary description of the application area. Schedule B also contains information defining what general areas are excluded from the application.

Attachment B describes the application area as comprising all the land and waters within an external boundary that is described by a metes and bounds description referencing native title determination applications, land parcels, topographic features and coordinate points (referencing the Geocentric Datum of Australia (GDA94), shown to six decimal points). The description was prepared by the Tribunal's Geospatial Services unit (Geospatial) and is dated 14 November 2011.

The description at Attachment B also specifically excludes the areas subject of various native title determination applications and determinations that are clearly identified by name, Tribunal and Federal Court reference numbers and relevant registration/lodgement/determination dates.

Schedule C refers to Attachment C which is a copy of a colour map, titled 'Yi-Martuwarra Ngurrara'. The map was prepared by Geospatial on 14 November 2011 and includes:

- the application area depicted by a bold red outline;
- adjoining native title determinations are shown and labelled;
- surrounding cadastre is shown and labelled;
- selected topographic features are shown and labelled;
- scalebar, northpoint, coordinate grid and location diagram; and
- notes relating to the source, currency and datum of data used to prepare the map.

I have had regard to all of this information as well as the geospatial assessment provided on 8 February 2012. I note that this assessment found that the description and map are consistent and identify the application area with reasonable certainty. I have come to the same view, that the information and map are consistent and sufficiently identify the application area such that I am able to locate the areas covered and not covered by the application on the Earth's surface.

Accordingly, I am satisfied that the condition in s. 190B(2) is met.

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

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

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

Mansfield J stated in *Doepel* that:

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

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

In accordance with *Doepel*, I have confined my consideration to the information contained in the application—at [16].

Schedule A contains a description of the native title claim group which includes the following partial extract :

> The claimant group comprises those Aboriginal people who hold in common the body of traditional laws and customs concerning the claim area. Those people are:
>
> (a) the biological descendants of the following apical ancestors: [a lengthy list of ancestors' names is provided which I have not reproduced here] or
>
> (b) acknowledged by the native title claimants in (a) as having rights and interests in the claim area through a direct relationship by birth/finding and growing up in places ("Ngurrara") within the application area.

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

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

In accordance with the first 'rule' of the description at paragraph (a) of Schedule A, I understand that membership of the claim group comprises persons who are the biological descendants of any

of the apical ancestors named in Schedule A. In my view, this part of the description provides a sufficiently clear and objective method for which to determine whether a person is a member of the claim group.

The basis for the identification of the members of the claim group in accordance with paragraph (b) of Schedule A is supported by the report of [Name of Anthropologist] (prepared January 2006 and amended October 2007) which is provided at Attachment F.1. [Name of Anthropologist]'s report addresses the criteria for membership of the claim group and highlights that it is only people who are 'acknowledged by the native title claimants in (a) as having rights and interests in the claim area' (as defined in paragraph (b) of Schedule A) that can be members of the group.

The report in Attachment F.1 states:

> … An individual's expression of connection to *the [traditional name]* country is not made in isolation from the rest of the community. Proof that a person satisfies the criteria of claim group membership is found in the acceptance of that person by the claim group. As this suggests individuals are able to identify the 'country' of other people identified as '[traditional name] people' or 'belonging to *'the [traditional name]* country'. The 'country' of others in this situation is usually identified with a general reference to a named *[traditional name]* or *[traditional name]* site. The claimants are also able to identify the country of many of their predecessors … Older men and women are most knowledgeable about where their forebears and their peers lived in the desert, who had knowledge of which places, where children were born and grew up. In accordance with the claimants' laws and customs, it is these older claimants who should be asked about such matters, and thus about who satisfies the criteria for membership of the claim group—at [43].

In my view, the above explanation provides further information that would assist an inquiry into whether a person would fall within the criterion described in paragraph (b) of Schedule A.

Based on the information provided by the application, I consider that the description of the native title claim group provides details that would enable an inquiry into whether a person meets either of the two criteria set out at Schedule A for membership of the group. While the second criterion set out at paragraph (b) may not be as easy to apply, this does not mean that this part of Schedule A does not sufficiently describe how a person can be a member of the group. Additionally, the description provides an external point of reference as a starting point for such an inquiry, being the list of apical ancestors from who claim group members falling under the criterion at paragraph (a), must be descended. Accordingly, with the assistance of further factual inquiry, I am of the view that it would be possible to ascertain whether a person was a member of the group in accordance with the 'rule' at paragraph (b) of Schedule A.

The point that a factual inquiry may be required does not mean that the claim group has not been sufficiently described. I refer to the following observation by Carr J in *Western Australia v Native Title Registrar* [1999] FCA 1591 that:

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

It is therefore my view that the information at Schedule A provides sufficient details so that it can be ascertained whether any particular person is in the native title claim group. As I am satisfied that the application meets the requirements of s. 190B(3)(b), the condition in s. 190B(3) is met.

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

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

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

The test at s. 190B(4) is whether the claimed native title rights and interests are clear, easy to understand and have meaning—*Doepel* at [91], [92], [95], [98] to [101] and [123].

Schedule E of the application contains a description of the claimed native title rights and interests:

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

2. Over areas where a claim to exclusive possession cannot be recognised, the native title claim group claims the following rights and interests:
   (a) the right to travel over, move about and have access to the application area;
   (b) the right to hunt, fish and forage on the application area;
   (c) the right to take, use and enjoy the natural resources of the application area such as food, medicinal plants, wild tobacco, timber, stone, ochre and resin;
   (d) the right to trade in resources of the application area;
   (e) the right to have access to and use and maintain the natural water resources of the application area including the beds and banks of watercourses;
   (f) the right to live on the land in the application area;
   (g) the right to camp on the application area;
   (h) the right to erect shelters and other structures on the application area;
   (i) the right to:
      i. engage in cultural activities;
      ii. conduct ceremonies;
      iii. hold meetings;
      iv. teach the physical and spiritual attributes of places and areas of importance on or in the land and waters; and
      v. participate in cultural practices relating to birth and death, including burial rights;
   (j) the right to have access to, care for, maintain and protect places, sites and areas of importance in the application area;
   (k) the right to speak for and make non-exclusive decisions about the application area;
   (l) the right to light fires for domestic purposes and customary practices;

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

(n) the right to control access to, and use of, the application area by other Aboriginal People who seek access to use of the lands and waters;

(o) the right to share or exchange subsistence and other traditional resources obtained on or from the land or waters (but not for any commercial purpose); and

(p) the right to regulate and resolve disputes among the native title claimants of the application area.

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

In my view, the description of the claimed native title rights and interests contained in the application is clear and understandable. I am satisfied that the description is sufficient to allow the native title rights and interests claimed to be readily identified. Section 190B(4) is thus met.

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 assertions particularised in the three paragraphs of s. 190B(5), as set out in my reasons below.

The nature of the task at s. 190B(5) is to 'address the quality of the asserted factual basis', but 'not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence ...'—*Doepel* at [17].

The Full Court in *Gudjala FC* agreed with this assessment, and also held that a 'general description' (as required by s. 62(2)(e)) could certainly be of a sufficient quality to satisfy the Registrar for the purpose of s. 190B(5)—at [83] and 90] to [92]. The Full Court did say however that 'the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality'—*Gudjala FC* at [92].

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

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

The decisions of Dowsett J in *Gudjala 2007* and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) also give specific content to each of the elements of the test at s. 190B(5)(a) to (c). The Full Court in *Gudjala FC,* did not criticise generally the approach that Dowsett J took in relation to these elements in *Gudjala 2007*[3], including his assessment of what was required within the factual basis to support each of the assertions at s. 190B(5). His Honour, in my view, took a consonant approach in *Gudjala 2009*.

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

Information considered

I have had regard to the following information contained in the application:

- Schedule A—description of the native title claim group;
- Schedule F—general description of the factual basis of the claim;
- Attachment F—'Registration Test Report' by the applicant;
- Attachment F.1—'Ngurrara Native Title Claim WC96/32 Supplementary Consent Determination Report' by [Name of Anthropologist], prepared January 2006 and amended October 2007;
- Attachment F.2—registration test decision in relation to WC08/3—Ngurrara (Part B)—WAD281/08, made on 30 June 2009 by a delegate of the Registrar;
- Attachment F.3—map of the application area, as it is referenced in Attachment F;
- Attachment F.4—affidavit by claim group member, Mr Peter Clancy, affirmed on 21 November 2011;
- Attachment M—affidavit by claim group member, [Name Deleted], affirmed on 27 October 2011; and
- the accompanying s. 62(1)(a) affidavits in which each of the persons comprising the applicant affirms that all of the statements made in the application are true.

The applicant's 'Registration Test Report' at Attachment F contains information relating to the history of the claim group's prior applications. Additionally, the report summarises parts of the

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

factual basis provided to support the application before me, and contains references to the location of particular information it relies upon for the claim in this application. I note that I have had regard to this report in Attachment F, however, I have also made my own assessment of the available factual basis provided to support the applicant's assertions under this condition.

Regarding Attachment F.1, I note that this report by [Name of Anthropologist] was originally provided in relation to the proceedings in WC96/32—Ngurrara Part A—WAD6077/98 (Ngurrara (Part A)), an earlier application made by the same native title claim group for the application before me. The area subject of that earlier application adjoins the Yi-Martuwarra Ngurrara application area. I refer to the report in Attachment F.1 hereafter as 'the [Name of Anthropologist] report'.

I have also considered the consequent Ngurrara (Part A) determination made in favour of the group by Gilmour J in *Kogolo v WA*.

I note that there is an abundance of information before me that, in my view, provides support for the three assertions under this condition. Thus, I have not referenced all of it in my reasoning below but discuss some key parts of the available material.

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).

While [Name of Anthropologist]'s report was prepared in relation to the Ngurrara (Part A) application, there is information within the report that relates also to the application before me. The report makes clear that the claim group's understanding of what country belongs to them encompasses areas that stretch further than only what was claimed and eventually determined in the Ngurrara (Part A) proceedings. This includes references throughout the report that link the claim group and its predecessors to identified locations in the application area.

For instance, [Name of Anthropologist] states in relation to the northern boundary of Ngurrara (Part A) (which is the southern boundary of the application before me), that:

> This boundary also follows the boundaries of old and current pastoral leases. In the claimants' view, the *jila*[4] country extends north of the [Ngurrara (Part A)] Claim Area and includes the *jila-[Special Being/ Snake Being]* sites of [various named sites], the site complex in the [Name of place deleted]... as well as their communities such as [various named communities]. I understand that these areas were not included in the Claim Area because of legal advice given to the claimants—at [25].

The sites and communities named in paragraph 25 of [Name of Anthropologist]'s report are localities in the vicinity of the application area before me, either clearly inside or in its immediate surrounds. This is evident from the map at Appendix A of the report, as well as through my own search of mapping data available on the Tribunal's Geospatial systems.

[Name of Anthropologist] explains the basis for the earlier Ngurrara (Part A) application area, which included criterion that the area claimed encompassed all the *jila-[Special Being/ Snake Being]*

[4] A 'jila' is a 'permanent water source'—[Name of Anthropologist]'s report at [7], including footnote 2 of the report.

rain-making sites. It is stated that this consideration seemed to be dominant and [Name of Anthropologist] quotes a claim group member saying '[a]ll the *jila* gotta be inside [the earlier claimed area]'—at [22].

It would appear from the available information that jila sites are of key significance to the claim group and many of these identified sites are explained as being linked to special Beings throughout [Name of Anthropologist]'s report. As the identified jila sites exist across the application area before me, and it is explained that these areas were not claimed in their earlier application for apparent legal reasons, it is reasonable to infer that the group is linked to the application area by virtue of their described connection to such jila sites/country. Additionally, where [Name of Anthropologist]'s report discusses aspects of the claim group's relationship with their country overall, I accept that such information relates also to the application before me. I note [Name of Anthropologist]'s statement that:

> ... the claimants state that they 'come from the *jila* country'. They also use the term *'jila'* to describe themselves as a people, as in the *'Jila People'*. The claimants also state that they follow *'jila law' ...* In their expression of a common country-based identity as *'jila* people', the claimants do not mean to suggest that any one individual has a specific connection to, or even a specific identification with, all of the named places and areas within the jila country. Rather, the claimants common connection (as *'jila* people') to the [Ngurrara (Part A)] Claim Area ... appears to be a product of the many connections that individuals have to places within what they commonly conceive to be *jila* country, ***which incorporates the [Ngurrara (Part A)] Claim Area***—at [54] and [55] ***(emphasis added)***.

Regarding the group's early ancestors, it is indicated that their forbears would have likely existed in the region of the application area when first European contact/settlement occurred. I note this information from [Name of Anthropologist]'s report:

> From the senior claimants' accounts, the common basis for a great deal of their knowledge of and behaviour at places in the [Ngurrara (Part A)] Claim Area originates in what they were told about their 'country' by their predecessors, among whom were their parents and grand-parents. The claimants talk about learning the '*jila* law', associated with *[Special Being/ Snake Being]*, and the 'law' associated with *[Dreaming/ Dreaming Beings]* like [traditional names for two [Dreaming/ Dreaming Beings] (Two Men). I refer to the latter as '*[Dreaming/ Dreaming Beings]* law'. There are differences between these two 'laws' in the ways the named places associated with each of them are organised in the *jila* country ... I observed the claimants singing the songs of these 'laws' and performing different rituals in their name. By estimate, these claimants would have been born between 1920 and 1940, and their grandparents forty to sixty years prior to that. ***The first explorer to traverse the [Ngurrara (Part A)] Claim Area was Colonel Edgerton Warburton in 1873. Quite likely, some of the claimants' grandparents were living there at the time – about a quarter century before the start of sustained European contact***—at [105] ***(emphasis added)***.
>
> Senior claimants know most of the places and express various kinds of kinship relationships to the people ... appearing on Kaberry's genealogies[5]. Many claimants are the descendants of

[5] Phyllis Kaberry, in 1935 to 1936 conducted an intensive study of people connected to the northern Great Sandy Desert and the pastoral lands incorporating its northern extremes, including at various identified stations in that region (being stations that I have been able to locate in the application area)— [Name of Anthropologist]'s report at [116]

> these people. [Names of two claimants] remembered Kaberry herself. They recalled how she travelled on horse during 'holiday time' from station work with a group of people who were walking from Go Go Station to Christmas Creek to attend initiation ceremonies there. The ... men and women in Kaberry's notes are associated with ninety or so indigenous place-names. ***Some of these individuals could have been born as early as the 1860s or 1870s, well before European pastoral development began.*** The sites are in a region from Billiluna west to Christmas Creek and the St Georges Ranges ... and south into the desert—at [118] to [119] ***(emphasis added)***.

I note that Go Go Station, Christmas Creek and the St Georges Ranges are all localities situated in the application area. [Name of Anthropologist] goes on to explain that:

> The close correspondence between Kaberry's information on sites, mythology and ritual practice lends further substantiation to the traditional basis of key laws and customs of the claimants, particularly as they are tied to the Dreaming. Furthermore, some of Kaberry's informants were senior men in 1935-36. It is likely that they would have been born in the 1860s or 1870s – well before European exploration and settlement in the region ...'—at [124].

In my view, the information in [Name of Anthropologist]'s report is sufficient to support the assertion that the native title claim group have, and the predecessors of those persons had, an association with the area claimed. In the report [Name of Anthropologist] discusses the ways that 'the claimant [sic] group's connection to the claimed area has been maintained in accordance with the continuous acknowledgement and observance of a normative system of law and custom'—at [153]. The report notes that '[i]n the claimants' expressed view of *ngurrara*, a word that can be taken to mean 'home or country', there is an emphasis on sites, constellations of sites and sequential 'tracks' of sites'—at [6].

[Name of Anthropologist] further describes that it is the 'tracks' of the Beings of the Dreaming, and in particular, the most prominent creation Beings that contain many sites organised in a sequential manner. It is this system of organisation that corresponds with songs that are sung as rituals and as such, the 'tracks' can be regarded as song-lines. Various physical features, such as trees, hills, clay pans, arrangements of stones and swampy ground mark the travels of these ancestral Beings. It appears that [Name of Anthropologist] indicates that most tracks of the Beings of the Dreaming do not originate and end solely within the region of the Ngurrara (Part A) determination area. Instead, they 'travel' across the entire region of the group's country which includes the application area—at [7].

In my view, it is clear that the information that [Name of Anthropologist] has recorded from the present day claim group regarding their association with country, is information that has been handed down to them in a substantially uninterrupted way, pursuant to their traditional laws. These relevant details describe how their ancestral Beings, both human and mythological/spiritual (including any that have transformed into one or the other) and their behaviours at the time of creation, are the basis for the system of laws and customs passed to each generation of the Beings' descendants. It would appear that the available information shows that the same set of laws and customs relating to the group's relationship with country has continued to be followed in a similar, if not the same, manner by the current claim group. Members of the group continue to be strictly governed by the same laws and customs of their ancestral and

spiritual forbears which direct their present relationship with country. [Name of Anthropologist]'s report states that:

> The claimants say that they learned these ways of giving names and understanding the order of the places in the *jila* country, from their forebears and other antecedents. The history of occupation of these antecedents and the claimants themselves is inscribed upon the cultural geography so described. For the claimants, this history reveals itself as a series of camp sites, walking tracks, and ceremonial sites, in the stories people narrate about their occupation of the *jila* country. For those sites connected to [the Beings of Dreaming and other special Beings/ancestral snake Beings], the claimants identify their origin as in an epoch long before their time. These sites are said to have been created and named by those Beings. ***The claimants see their role as following and reproducing what the [Dreaming/ Dreaming Beings] and [Special Being/ Snake Being] Beings did***—at [13] and [14] ***(emphasis added)***.

Further, [Name of Anthropologist] discusses that the claim group is 'rather clear' about the proper or correct behaviour that must occur at and in respect of the many places they identify in their country. For example, there are rules about how to behave in those jila where there are special Beings or ancestral snake Beings, and other specific rules that must be followed at creation Being sites, which, for instance, cannot be approached by women. The songs that are sung at creation Being sites must be sung in the correct order according to the travels of that particular Being—at [15].

[Name of Anthropologist] provides much information to support an ongoing association to areas within the application area as well as the group's overall 'jila country' over the period since the area was first settled by Europeans until the present day—see in particular, [Name of Anthropologist]'s report at 'Section five – Continuity of Connection', pp. 73 – 82. For instance:

> When Europeans began to take up pastoral leases in the southern Kimberley they located themselves amongst functioning Aboriginal societies, including the claimants' society, albeit only in the northern margins of the Great Sandy Desert. To some degree the pastoralists' homesteads and cattle runs were incorporated into pre-existing indigenous orbits of occupation, movement and land-use since Aboriginal people were living in the area when the pastoralists arrived. Indigenous movement within that area encompassing … the southern extremes of the pastoral stations was probably unexceptional as regards to *habitual* traditional patterns of occupation and land-use. There are several bases for this view. I obtained a number of accounts indicating that, before the mid 1960s, now senior claimants and their forbears had been living over at least two generations (and perhaps more) in the marginal desert area of the stations while going back and forth into the sandhill country of the north-central [Ngurrara (Part A)] Claim Area with their kin. Accordingly, claimants repeatedly identify sites in both the sandhill country … and the northern *jila* country which encompasses the pastoral stations south of the Fitzroy River and the Christmas Creek …—at [162] and [163].

I refer also to this information below from the affidavit of [Name Deleted], dated 27 October 2011 (contained in Attachment M).

In my view, the affidavit provides comprehensive and particularised information about [Name Deleted]'s personal relationship with the application area, as well as describes the overall claim group's interaction with the area. [Name Deleted] describes with specific detail how he, his family and other members of the claim group are linked to the application area. [Name Deleted] explains that he grew up on the application area and that his mother and stepfather (who raised him) were born in the group's wider country that encompasses the application (from areas

located in the Ngurrara (Part A) determination area, being the 'desert side'). Pursuant to his traditional laws and customs, he has thus inherited rights all over the application area and the group's wider country, through his mother and stepfather.

Like the information reported by [Name of Anthropologist], [Name Deleted] talks about rules and practices for how he must and must not interact with country, including that he has the responsibility to look after and protect special places, such as jilas, on the application area. [Name Deleted] describes his ongoing, lifelong connection to the application area and his wider country. This association has occurred through both the maintenance of a traditional livelihood/living off country, as well as through his job as a ranger in the area. Throughout his affidavit, [Name Deleted] consistently explains that his knowledge about rights to/rules for country is information that has been told to him by his 'old people', who themselves were told the same information by their old people. [Name Deleted] follows his traditional laws and customs by continuing to teach the younger generation the same laws and customs about country that were passed to him. Just as it is particularised in [Name of Anthropologist]'s report, [Name Deleted] affirms his belief that the application area has been owned by the group since the time of creation. For example:

> I have been shown a map of the [application area] and know that country well. A copy of the map [of the application area] is ... attached to this affidavit. That country has been our Ngurrara, our home and country since the time of the Dreaming. I know that from the stories [sic] my old people who were told by their old people. As a young person I walked all across our Ngurrara country with the old people. They showed me the special places ... and told me things like where the jilas (water places) are right through that country ... There are many other places. I now look after these places and visit them often. Through the Ranger work I do it makes it easier for me to take the younger boys out and teach them about these places'—Attachment M at [8].

I note that I have referenced other information relevant to this subsection below at my reasons under the condition of ss. 190B(5)(b), 190B(6) and 190B(7).

With regard to that part of the application area (appearing on the map at Attachment C as a long 'triangular sliver') that runs alongside the western boundary of the Ngurrara (Part A) determination area, I note that Justice Gilmour made a determination of native title in favour of the group over the area subject of Ngurrara (Part A)—see *Kogolo v WA*. This is a clear indication of the claim group and its predecessors' association with that relevant part of the application area.

To conclude, I am of the view that altogether there is substantial information in the application to support that an identifiable normative society occupied and used the application area prior to and during the time of first European settlement in that region. The material also provides satisfactory detail to support the present claim group's association with the area, and demonstrates that such association is in accordance with the laws and customs of a pre-sovereign society linked to the area.

On the basis of all the information before me, I can sufficiently build up a picture over time linking the present day claim group and its predecessors to the area claimed, since the time that it was first settled by Europeans. It follows that I am satisfied that there is a sufficient factual basis to support the particular assertion under s. 190B(5)(a).

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

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

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

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

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

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

> A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. But in the context of the *Native Title Act*, "traditional" carries with it two other elements in its meaning. First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are "traditional" laws and customs ... the reference to rights or interests in land or waters being possessed under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty ...– at [46] to [47].

Further, the High Court stated in *Yorta Yorta* that:

> … "traditional" does not mean only that which is transferred by word of mouth from generation to generation, it reflects the fundamental nature of the native title rights and interests with which the Act deals as rights and interests rooted in pre-sovereignty traditional laws and customs—at [79].

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

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

My understanding, in light of the statements in *Yorta Yorta*, is that the factual basis for s. 190B(5)(b) must include a description of how the laws and customs of the claim group are rooted in the laws and customs of a society that existed before the assertion of British sovereignty

(or at least during settlement) in the application area. This approach appears to be supported by comments of the Full Court in *Gudjala FC* at [96].

In the previous section under s. 190B(5)(a), I have outlined some of the material which indicates that there was an identifiable society of people in and around the application area when it was first settled by Europeans. The material before me supports the assertion that the relevant society was comprised of the claim group's predecessors, who observed the laws and customs rooted in the laws and customs of that society as it existed in a pre-sovereign era. With regard to the continuation of that society and its ongoing observation of its pre-sovereignty laws and customs, I am satisfied that the factual basis provided supports an assertion that the Aboriginal society which existed at sovereignty is, in general terms, the same society that exists today. This includes that I am satisfied that the present day claim group abide by substantially the same traditional laws and customs that were acknowledged and observed by their earlier society at sovereignty.

Under s. 190B(5)(a), I also discussed the factual basis provided in support of the traditional basis of the group's laws and customs as belief in '*jila* law' which is associated with spiritual Beings who are tied to the land and members of the group. [Name of Anthropologist] states that the key concept in regard to the group's system of law and custom is the 'Dreaming' or, as the claim group calls it, '[Dreaming/ Dreaming Beings]'. 'The Dreaming constitutes a moral system, and by doing so governs people's behaviour'—[Name of Anthropologist]'s report at [106] and [107]. [Name of Anthropologist] further states that:

> A key characteristic of the Dreaming is that it resists change: it sets things in an enduring form … The Dreaming Beings are seen to bestow upon living human beings the 'necessary and enabling conditions of social conduct'. They introduced various customs and instituted the social order. In these ways, the Dreaming Beings 'live on and exert their influence' on the lives of human Beings—at [108].

The report by [Name of Anthropologist] provides support for the existence of a complex society that dwelt on the lands and waters of the group's 'jila' country which I have explained above encompasses the application area. [Name of Anthropologist] states that the claim group comprises members of 'local groups', associated with one or more ancestral beings, and that 'this fact entitles its members to participate in the system of ritual and myth'. It is this correlation between the association with ancestral beings and the locations of those Beings' relevant tracks and sites that forms one of the bases for where an individual claim group member's particular 'ngurrara' (home and country) is located. Local groups are also defined by their members having been born and grown up in areas connected to specific 'jila' sites. Accordingly, people connected to largely the same 'jila' sites are 'countrymen'. The principles of the group's two interconnected laws, being 'jila' law and '[Dreaming/ Dreaming Beings]' law, provide the system which ensures the 'perpetuation of human society' through male initiation, the arrangement of marriages and an ongoing relationship with the original occupiers of the 'jila' country (the Beings). An aspect of this relationship is the key practice of rainmaking and the 'perpetuation of the conditions of life'—at [71].

It is apparent from the claim group members' accounts recorded by [Name of Anthropologist] that the group's earlier and present traditional society was/is based on a decentralised social structure, members of which would come together for special events and to fulfil the roles given to them in accordance with their traditional laws and customs. It would appear that despite

adaptations owing to history and time, the claim group today continue to follow the laws and customs of their predecessors' society. [Name of Anthropologist]'s report details:

> By the claimants' accounts of life in the desert, people having their own *ngurrara* in the *jila* country would participate at large gatherings for rituals attached to the *[Dreaming/ Dreaming Beings]* Beings. They say that they would gather at … ceremonies and at such times men would be initiated and marriages worked out ... These marriages would establish kinship links over a wider area of jila country. The claimants and their predecessors would also gather for the post-initiatory ceremonies tied to [names of two creation Beings]. I recorded many accounts of travel for [the ceremonies so described above] from senior claimants. Significantly, their recollections locate most of these ceremonies within the *jila* country, at least during the time they lived there with their predecessors … It seems that as more claimants their kinsmen moved to the pastoral stations people from further afield participated in [the ceremonies so described above] with the claimants. Nowadays they are involved in such ceremonies with other Western Desert people …—at [72] and [73].

The report also discusses with much particularised detail, the performance of rainmaking ceremonies as an important feature of the group's traditional laws and customs– at [74] and [121] to [123]. I note that it is also described by claim group member, [Name Deleted] that they (the group) are 'rainmaker people'—see [Name Deleted]'s affidavit contained in Attachment M at [28] (I have extracted this relevant part of the affidavit below at s. 190B(7)).

Furthermore, [Name of Anthropologist]'s report details the way the claim group's behaviour is governed by its members' shared understanding of their common connection to land and its Beings, and specifically the protocols that must be followed concerning 'speaking for' country and obtaining permissions for access. Again, it is the system of laws and customs which is underpinned by the group's 'jila' law and principles of their 'jila' country, which direct how members of the group operate with regard to this aspect of their laws and customs—at [244]–[257].

I note that I have taken into account the determination of native title made by Justice Gilmour over the Ngurrara (Part A) determination area, an area for which the native title holders are comprised of the same persons described in the application before me. The factual basis before me consistently describes that the group's overall country, which they are bound to in accordance with their traditional laws and customs, covers areas wider than the area subject of the Ngurrara (Part A) determination. The information available demonstrates that the group's entire country includes the application area before me; being areas that directly adjoin an area over which the Court has found native title to exist in favour of the group. In my view, that earlier determination made over another part of the group's country provides support for the applicant's assertion under s. 190B(5)(b).

I refer to the findings below of Justice Gilmour, in relation to the Ngurrara (Part A) consent determination, in which His Honour draws evidentiary support from the same report I have considered in support of the application before me, 'the [Name of Anthropologist] report':

> The continuous connection of the Ngurrara people with Determination Area A is acknowledged by all parties. There is also evidence to support that connection. The Ngurrara Native Title Claim WC96/32 Supplementary Consent Determination Report dated January 2006 by [Name of Anthropologist] (amended in October 2007) ("the Report") describes the enduring connection of the native title claimant group to their country within the claim area and, on the basis of the material contained in the Report, supports their claim to a native title

> right to possession, occupation, use and enjoyment of Determination Area A to the exclusion of all others.
>
> The members of the Ngurrara claim group are the persons who have native title rights and interests in the Ngurrara application area under traditional law and custom, and are descended from the inhabitants of the claim area at the time of settlement. The Ngurrara native title claim group is comprised of those persons, identified by reference to descent and other culturally-relevant heads of connection to country, who are, in accordance with the normative system of traditional law and custom, responsible for the care and maintenance of country within the claim area and for the transmission of that responsibility to successive generations.
>
> The overarching system of *jila* law shared by all members of the Ngurrara claim group is a system unique to the application area, and recognised as such by neighbouring groups. *Jila* law is still recognised and practiced, and by this law the applicants' demonstrate their ongoing connection to the Application area. This ongoing connection is, for example, demonstrated through the maintenance of traditional practices such as painting country. Many of the traditional owners paint the places within their *ngurrara* where they were born/ found and grew up—reasons for judgment in *Kogolo v WA* at [20] to [22].

As I have already explained in my reasons above, it is my view that [Name of Anthropologist] report provides relevant support for the claim group's assertions under ss. 190B(5)(a) and (b), with regard to the specific claims in the application before me. Much of that material discusses aspects of the group's common 'jila' law. In the above extract, His Honour also observes that this 'overarching system' of law is shared by all members of the group. As the group's 'jila' law corresponds with their overall 'jila' country, it is reasonable, in my view, to infer that the statements made by Gilmour J referenced above are also relevant in providing support for the applicant's assertions under s. 190B(5)(b) in the application before me.

I note that, as I have stated above in the introduction to the condition of s. 190B(5), it is my view that there is a wealth of factual material before me that provides support for the assertion under subparagraph (b). Accordingly, I have not discussed all of that information in my reasoning, but I have made reference to some key relevant examples.

In conclusion, I am **satisfied** that all the information I have considered provides a sufficient factual basis to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests.

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

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

It is my view that the assertion in subparagraph (c) is also referrable to the second element of what is meant by the term 'traditional laws and customs' in *Yorta Yorta.* That is, that the native title claim group has continued to hold its native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way—*Yorta Yorta* at [47] and also at [87].

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

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

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

In my view, there is much information before me which identifies that the relevant society at sovereignty comprised a group of people who were the predecessors of the claim group and that the application area falls within the traditional territory of that earlier society. I have already discussed and referenced above in my reasoning at ss. 190B(5)(a) and (b) some of the information available which also supports the assertion under subparagraph (c). In particular, [Name of Anthropologist]'s report (Attachment F.1) and the affidavit by claim group member, [Name Deleted] (Attachment M) contain details to support the applicant's assertion under this subcondition. The information in those documents provides many examples of how the native title claim group have continued to observe and acknowledge the traditional laws and customs of their pre-sovereignty society in a substantially uninterrupted way. I have provided references in my reasons under ss. 190B(5)(a), 190B(5)(b), 190B(6) and 190B(7) which support this.

Having regard to all of the available material, I am satisfied there is a sufficient factual basis for the assertion under s. 190B(5)(c).

Conclusion

I have considered all of the information provided by the applicant in support of the requirements of s. 190B(5). As I am satisfied that there is a sufficient factual basis to support each of the particular assertions under the three subparagraph of s. 190B(5), it follows that I am satisfied that the condition in s. 190B(5) is met.

Subsection 190B(6)
Prima facie case

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

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

Registrar's task at section 190B(6)

I note the following comments by Mansfield J in *Doepel* in relation to the Registrar's consideration of the application at s. 190B(6):

> Section 190B(6) requires some measure of the material available in support of the claim—at [126].
>
> On the other hand, s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s 190B(6)—at [127].
>
> [Section] 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed—at [132].

Following *Doepel*, it is my view that I must carefully examine the asserted factual basis provided for the assertion that the claimed native title rights and interests exist against each individual right and interest claimed in the application, to determine if I consider, prima facie, that they:

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

I elaborate below on these three points:

Right exists under traditional law and custom in relation to any of the land or waters under claim

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

It is not my role to resolve whether the asserted factual basis will be made out at trial. The task is to consider whether there is any probative factual material which supports the existence of each individual right and interest, noting that as long as some can be established, prima facie, the requirements of the section will be met. Only those rights and interests I consider can be established, prima facie, will be entered on the Register pursuant to s. 186(1)(g). An element of that task requires me to consider whether there is some material which supports, prima facie, the possession of the claimed rights and interests under the traditional laws and customs acknowledged and observed by the native title claim group.

Right is a native title right and interest in relation to land or waters

It is my view that s. 190B(6) requires that I consider whether a claimed right can, in fact, amount to a 'native title right and interest', as defined in s. 223(1) and settled by case law, most notably *Western Australia v Ward* [2002] HCA 28 (*Ward HC*), where the High Court held that a 'native title right and interest' must be 'in relation to land or waters'. In my view, any rights that clearly fall outside the scope of the definition of 'native title rights and interests' in s. 223(1) cannot be established, prima facie.

Right has not been extinguished over the whole of the application area

I note there is now much settled law relating to extinguishment which, in my view, I do need to consider when examining each individual right. For example, if there is evidence that the application area is or was entirely covered by a pastoral lease, I could not (unless ss. 47–47B

applies) consider exclusive rights and interests to be established, prima facie, having regard to a number of definitive cases relating to the extinguishing effect of pastoral leases on exclusive native title, starting with *Ward HC.*

My consideration

With these principles in mind I will consider the native title rights and interests described in Schedule E. I note that I identify at the outset whether or not I consider, prima facie, that the claimed right or rights can be established.

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

Outcome: I consider that this claimed right can be established, prima facie.

I use the term 'exclusive possession' when discussing this right, as the applicant has in Schedule E. *Ward HC* is authority that exclusive possession is potentially available to be established, prima facie, in relation to areas where there has been no prior extinguishment of native title or where extinguishment is to be disregarded under the provisions of the Act. I note that the applicant takes account of extinguishment issues by only claiming exclusive possession 'where it can be recognised', including where there has been no extinguishment or any extinguishment is to be disregarded. *Ward HC* states that:

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

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

> [T]he 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.*** It is not a necessary condition of the existence of a right of exclusive use and occupation that the evidence discloses rights and interests that ***rise significantly above the level of usufructuary rights***—at [71] ***(emphasis added).***

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

I have examined the information provided by the applicant in relation to the asserted factual basis for the claim in my reasons at s. 190B(5) and have decided that a sufficient factual basis was provided for the assertion that the claimed native title rights and interests exist, as well as for the particular assertions therein, pertinent to the inquiry at s. 190B(6), 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.

A review of that same material indicates to me that, prima facie, the right of exclusive possession is shown to exist under traditional law and custom over those areas where it has not been extinguished or where any extinguishment must be disregarded. I discuss below the information before me which, in my view, supports, prima facie, the existence of this claimed right.

In 'section six' of the report at Attachment F.1, [Name of Anthropologist] carefully examines the 'traditional' basis for the rights and interests being claimed and how they are exercised by the claimants. In particular, section 6.1 (which totals 18 pages) sets out with great detail, information about the traditional protocols, sanctions and prohibitions relating to their exclusive possession of their country including accessing the land and custodianship. As I have discussed above in relation to the condition at s. 190B(5), the claim group is connected to their 'jila country' through their system of traditional laws and customs, the principles of which are underpinned by 'jila' law. I have also already discussed that the factual basis shows that the group's 'jila' country includes the areas subject of the application before me.

I note this information from [Name of Anthropologist]'s report (section 6.1) in relation to the right to possess, occupy, use and enjoy:

> The claimants identify the oral tradition of *jila* law and its physical expression as *jila* country as a unique and essential feature of their society. In the words of the claimants, [names of two claim group members]: *'[Special Being/ Snake Being]* never come from some place else. *[Special Being/ Snake Being]* first man bin [sic] walking around this land. Just like we, walking up and down this land. The *jila* men who became *[Special Being/ Snake Being]* are said by the claimants to have preceded the beings associated with *[Dreaming/ Dreaming Beings]* law … these *[Dreaming/ Dreaming Beings]* Beings are part of a broader, regional system of Dreaming tracks and narratives that spread throughout the Western Desert. It is the distinctive nature and physical basis of the interaction of *jila-[Special Being/ Snake Being]* with *[Dreaming/ Dreaming Beings]* that is unique and exclusive to *jila* country …The claimants' right to possess [the Ngurrara (Part A)] Claim Area is fundamentally and physically manifest in their unique relationship with the *[Special Being/ Snake Being]* and their exclusive ability to communicate and engage with these Beings … This unique ability to approach and interact with the sentient and dynamic elements of the landscape is evident in the claimants' detailed knowledge about the characteristics and vitality of individual *[Special Being/ Snake Being]*, their eponymous *jila* …; their knowledge of the oral traditions of each *jila-[Special Being/ Snake Being]* site; their capacity to speak to and control *[Special Being/ Snake Being];* their ability to conduct rain-making ceremonies at these sites—[Name of Anthropologist]'s report, section 6.1 at [187] to [190].

I note that [Name of Anthropologist] in the extract above makes reference to the area subject of the Ngurrara (Part A) determination. As I have discussed above, the group's understanding of

the extent of their entire 'jila' country, is an area broader than the area determined in the Ngurrara (Part A) determination, and which includes the application area before me. Further, as I have already identified, the factual basis shows that the group's 'jila' law/country encompasses the application area, within which 'jila-[Special Being/ Snake Being]', 'jila' and '[Special Being/ Snake Being]' sites are located. Thus, it is my view that where the information in [Name of Anthropologist]'s report provides support for the group's exclusive possession of their 'jila' country in accordance with their 'jila' laws, including where references may be made specifically to the group's earlier claimed/determined areas, this kind of information also provides support for the same right claimed in this application before me.

For example:

> As far as the claimants are concerned, occupation of the *jila* country is not merely a matter of applying their specialised knowledge of the physical environment to exploit its natural resources … the claimants must also possess the knowledge and skills to engage with its cultural features, including the *[Special Being/ Snake Being]* snakes and the physical signs left behind by the travelling *[Dreaming/ Dreaming Beings]* Beings. As the claimant, [name of claim group member], explains … *Jila* is a danger for old people too. They got to talk to that animal properly: 'you gotta give us water, don't be tight'. Speaking of *jila* [name of specific 'jila'], [two named claim group members] further elaborate: Big *jila, [Special Being/ Snake Being]*in water. Can't see im [sic]. Chuck im [sic] water, chuck im [sic] clouds, rain clouds. He get lighting, thunder. We tell him: 'Don't get up yet. Stop. Countrymen sit down.['] *Jila* people got to tell im [sic]. Good water, women can drink …the claimants' occupation requires that due care and consideration is given to the sentient beings that inhabit this landscape – human beings, *[Special Being/ Snake Being]* and the *[Dreaming/ Dreaming Beings]* Beings. For example, when approaching the site known as [specific name for site] claimants state that they have to 'look straight ahead, can't look from side to side or snake might get you'. Occupation of other places within the *jila* country … is also dictated by the claimants' laws and customs regarding age and gender—[Name of Anthropologist]'s report, section 6.1 at [202] to [205].

I note also that the information in [Name of Anthropologist]'s report demonstrates that, according to the group's laws and customs, the right to control access of others to the land 'is firmly based upon *jila* law, specifically the belief that the original occupiers of the *jila* country … continue to exist…as a kind of self-willed Being called *[Special Being/ Snake Being]*'—at [248].

It is asserted that the '[Special Being/ Snake Being]':

> [C]an have a concrete effect on human beings. Thus, by the claimants' accounts, people fear them, can be made well by them, can be forced from a place by them, can be injured or killed by them. The claimants also say that they can speak to the snake and make it 'quiet' ... People who know a particular *[Special Being/ Snake Being]* and are countrymen with it are able to go safely to the area of the *jila* where it lives. Such countrymen can introduce others like *jila* 'visitors' and 'strangers' to the snake and thereby protect them from harm by this Being' … the claimants' exercise of their right to control the access of others who are not claimants is mediated by them. It is an effective means of control in respect of other Aboriginal people because, … Aboriginal people generally believe that Beings of the Dreaming … can 'live on and exert their influence' on the lives of human beings … This general belief is held, for instance, by the claimants' neighbours to the south, … and their neighbours to the north, … who were 'strangers' to the *[Special Being/ Snake Being] …*— [Name of Anthropologist]'s report at [249] and [250].

A part of the claim group's traditional laws and customs pertaining to the protocols for access is that not just any member of the group can directly control access. Such control is exerted 'only by a certain kind of the claimants' countrymen'. For instance, visitors wishing to seek permission to visit the area of a 'jila [Special Being/ Snake Being]' must ask the countrymen of that particular Being/snake (persons who personally know that Being/snake) to introduce them to it. [Name of Anthropologist]'s report also discusses examples in support of the group's exclusive possession of their country in the context of the power of *[Special Being/ Snake Being]* to affect non-Aboriginal or European people. That is, the group believes that non-Aboriginal people who contravene the laws of the group in relation to the application area will also be subject to the actions of *[Special Being/ Snake Being].* Several accounts of such occurrences are set out in [Name of Anthropologist]'s report, whereby non-Aboriginal people who have not been properly introduced to the Being/snake for an area have met with consequences meted by the relevant *[Special Being/ Snake Being].* This includes a record from a time 'soon after the Second World War' which relates to a police patrol seeking out 'cattle-killers' on the southern margin of Cherrabun Station (in the application area). It is recounted that a *[Special Being/ Snake Being]* created extreme weather conditions to scare away the police patrol from approaching particular sites—[Name of Anthropologist]'s report at [251], [254] and Inset G (pp. 105 to 106).

I note that the affidavit evidence from [Name Deleted] (Attachment M) personally demonstrates some of the anthropological information reported by [Name of Anthropologist], regarding examples in support of the group's exclusive possession of their country, as that right is held under their traditional laws and customs.

For instance, [Name Deleted] and his family can camp anywhere they like on their country, so long as they observe the relevant rules in relation to 'jila' sites. If [Name Deleted] sees people on his country that should not be there, he has to 'ask them to leave'. Whether persons are 'blackfella or whitefella', under the group's traditional laws and customs, all outsiders must seek permission before entering the group's country. If outsiders entered without permission, they would be subject to the group's traditional laws and they might have to be punished. If [Name Deleted] did not prevent strangers from damaging special places, he too would be subject to traditional punishment from his old people. He and his family could also get sick. [Name Deleted] explains that if you go to a water hole without first dealing with the Being/snake there, 'there will be trouble'. When [Name Deleted] goes camping out on country and finds a 'jila', the old men will have to lead the way and sing to the Being/snake. Only then will visitors be safe; if these rules are not followed, then the Being/snake 'will take you down to the bottom with him'—Attachment M at [7], [11], [12], [16] and [17].

Again, I note that on 9 November 2007, Justice Gilmour made a determination of exclusive possession in favour of the group over areas that directly adjoin the application area—*Kogolo v WA* at [4(a)] of the determination. In my view, this finding by the Court indicates support for the group's claimed right to exclusive possession in the application area.

In my view, there is much information before me to support the claim group's claimed right to exclusive possession in the application area, where that right can be recognised. Based on all the available information, it is clear that the roles and responsibilities of the claim group in relation to the exclusive possession of their 'jila' country are dictated by their traditional laws and customs. Further, it is under these laws and customs that they possess the rights to 'speak for country' and

to be asked permission for entry; rights 'that are expressed in common law terms as a right to posses [sic], occupy, use and enjoy land to the exclusion of all others'—*Ward HC* at [88].

On the basis of all the information before me, I am satisfied that, prima facie, the right to exclusive possession can be established.

I now consider the non-exclusive rights and interests claimed at paragraph 2 of Schedule E.

Based on the available information, it is my view that there is much material before me to support the possession of those rights below that I consider can be established, prima facie. In particular, I note the comprehensive information in [Name of Anthropologist]'s report and the personal accounts in [Name Deleted]'s affidavit describing how the claimed rights are demonstrated. As there is an abundance of relevant material, I provide only some references to examples that, in my view, support the possession of the particular claimed rights. I have grouped together those rights where similar factual information is provided to support that they can be established, prima facie.

2. Over areas where a claim to exclusive possession cannot be recognised, the native title claim group claims the following rights and interests:
   (a) the right to travel over, move about and have access to the application area;
   (b) the right to hunt, fish and forage on the application area;
   (c) the right to take, use and enjoy the natural resources of the application area such as food, medicinal plants, wild tobacco, timber, stone, ochre and resin;
   (d) the right to trade in resources of the application area;
   (e) the right to have access to and use and maintain the natural water resources of the application area including the beds and banks of watercourses;
   (f) the right to live on the land in the application area;
   (g) the right to camp on the application area;
   (h) the right to erect shelters and other structures on the application area;
   …
   (l) the right to light fires for domestic purposes and customary practices;
   …
   (o) the right to share or exchange subsistence and other traditional resources obtained on or from the land or waters (but not for any commercial purpose); …

Outcome: I consider that all of these above claimed rights can be established, prima facie.

Some examples of the information before me that supports the possession of these rights is contained in Attachment M at [7], [8], [10], [15] to [20], [22], [24], [25] and [27] to [29], and [Name of Anthropologist]'s report at [258] to [262].

   (i) the right to:
      i. engage in cultural activities;
      ii. conduct ceremonies;
      iii. hold meetings;
      iv. teach the physical and spiritual attributes of places and areas of importance on or in the land and waters; and
      v. participate in cultural practices relating to birth and death, including burial rights;

Outcome: I consider that all of these above claimed rights can be established, prima facie.

Some examples of the information before me that supports the possession of these rights is contained in Attachment M at [4], [8], [13] to [16], [21] to [23], [26] and [28].

> (j) the right to have access to, care for, maintain and protect places, sites and areas of importance in the application area;
> (k) the right to speak for and make non-exclusive decisions about the application area;
> …
> (n) the right to control access to, and use of, the application area by other Aboriginal People who seek access to use of the lands and waters;

Outcome: I consider that all of these above claimed rights can be established, prima facie.

Some examples of the information before me that supports the possession of these rights is contained in Attachment M at [8] to [12], [14] to [18], [21] to [23] and [29], and [Name of Anthropologist]'s report at [87] to [103], [244] to [253] and [256].

> ~~(m) the right to uphold, regulate, monitor and enforce customary law;~~
> ~~(p) the right to regulate and resolve disputes among the native title claimants of the application area.~~

Outcome: I **do not** consider that these two claimed rights above can be established, prima facie.

Having regard to the common law principles set by the courts, it is my view that neither of these two rights claimed at subparagraphs 2.(m) and (p) of Schedule E, can be established, prima facie.

In *Neowarra v State of Western Australia* [2003] FCA 1402 *(Neowarra)*, Justice Sundberg disallowed the claimed right to '*[u]phold and enforce the traditional laws and customs of the … community'*, stating that this right 'is a right in relation to people and not in relation to land or waters'—at [488].

I note that s. 223(1) provides that native title rights and interests must (amongst other criteria as set out in ss. 223(1)(a) and (b)) be rights and interests ***in relation to land or waters,*** and are rights and interests recognised by the common law of Australia. In my view, the right claimed at 2.(m) of Schedule E is expressed in very similar terms as the right considered by His Honour in *Neowarra.* Accordingly, I am not satisfied that the right at 2. (m) can be established, prima facie.

Similarly, in the case of *Neowarra,* Sundberg J considered the claimed right to *'[r]esolve disputes concerning the claim area'*. While His Honour noted in relation to this claim that the 'evidence does not establish the existence of this right', he found that even if it had, 'what I have said in [488] would apply to this claim'. That is, that the claimed right to resolve disputes concerning the claim area is a right in relation to people and not in relation to land or waters—at [488] and [490].

With regard to the right claimed at subparagraph 2.(p) of Schedule E, I take the same view as Justice Sundberg in *Neowarra*, given that the relevant right in that case which His Honour considered (as I have discussed above), is, in my view, drafted in very similar terms as the right I am considering at 2.(p) of Schedule E. It follows that, I am not satisfied that this right can be established, prima facie.

Conclusion

I have considered all of the available information and on the basis of that information, I am satisfied that, prima facie, at least some of the native title rights and interests claimed in the application can be established. The condition in s. 190B(6) is met.

Subsection 190B(7)
Traditional physical connection

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

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

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

In my view, the affidavit by [Name Deleted], dated 27 October 2011 and provided in Attachment M, provides sufficient material in support of the requisite traditional physical connection.

[Name Deleted] states in his affidavit that he is a member of the native title claim group—at [1].

Throughout the affidavit, [Name Deleted] describes with much detail, his lifelong abiding connection with his country pursuant to his traditional laws and customs, including how these laws regulate his relationship with country and binds him to it. Additionally, [Name Deleted] specifies that the application area forms part of his country:

> I have been shown a map of the *Yi-Martuwarra Ngurrara* native title claim area and know that country well. A copy of the map is marked "Map A" and attached to this affidavit. That country has been our *Ngurrara*, our home *and* country since the time of the Dreaming. I know that from the stories [sic] my old people who were told by their old people. As a young person I walked all across our *Ngurrara* with the old people—at [8].

The 'Map A' that [Name Deleted] references is a copy of the same map of the application area that is contained in Attachment B to the application. [Name Deleted] also talks about his personal/the claim group's connection to country with reference to specific places located in the application area, such as Old Cherabun Station and the Aboriginal communities of Djugerari (where [Name Deleted] was raised) and Yakanarra.

A part of his physical relationship with country entails a responsibility to look after and protect country overall, as well as significant sites. The way [Name Deleted] does this is governed by the claim group's traditional laws and customs. [Name Deleted] talks about the rules and stories for the claim group's country which direct how they should interact with it. It is clear from [Name Deleted]'s affidavit that all the relevant laws and customs that relate to his physical relationship with country were passed down to him by his forbears. In turn, he continues to teach his children and other young people about those same laws and customs of the group.

[Name Deleted] explains how he uses/interacts with his country in accordance with traditional laws and customs with many examples. For instance, he collects, hunts and fishes for food as well as prepares it in the traditional way, as he was shown by his 'old people'. [Name Deleted] also talks about an aspect of the group's traditional physical connection to country, being 'rainmaking':

> The old people also used to burn to make rain. We are 'rainmaker' people and this is one of the techniques they used to make rain. I know this because we still practice 'rainmaking'. Only a few people hold this knowledge and it gets passed down to others when the time is right. It is the men that are 'rainmakers'—[Name Deleted]'s affidavit at [28].

On the basis of the extensive information given by [Name Deleted], I am satisfied that at least one member of the native title claim group currently has, or previously had, a traditional physical connection with the land and waters covered by the application.

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

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

Section 61A provides:

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

(2) If:

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

(b) either:

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

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

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

(3) If:

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

(b) either:

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

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

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

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

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

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

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

Reasons for s. 61A(1)

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

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

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

Reasons for s. 61A(2)

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

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

The application excludes any areas covered by a PEPA—at Schedule B. The applicant also claims the benefits of ss. 47 to 47B where applicable in the application area—at Schedules B and L.

Reasons for s. 61A(3)

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

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

At Schedule E, the applicant makes a claim to native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others only over areas where such a claim can be recognised (such as areas where there has been no prior extinguishment of native title or where extinguishment is to be disregarded under ss. 23B and/or 47 to 47B).

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).

At Schedule Q which relates to any claim by the native title claim group to the ownership of minerals, petroleum or gas wholly owned by the Crown, the applicant states '[n]one'.

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

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

The native title rights and interests claimed are not made over any offshore areas.

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

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

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

[End of reasons]

Attachment A

Summary of registration test result

Application name	**Yi-Martuwarra Ngurrara**
NNTT file no.	**WC12/2**
Federal Court of Australia file no.	**WAD25/12**
Date of registration test decision	**29 February 2012**

Section 190C conditions

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

Section 190B conditions

Test condition	Subcondition/requirement	Result

Test condition	Subcondition/requirement	Result
s. 190B(2)		**Met**
s. 190B(3)		**Overall result:** **Met**
	s. 190B(3)(a)	**N/A**
	s. 190B(3)(b)	**Met**
s. 190B(4)		**Met**
s. 190B(5)		**Aggregate result:** **Met**
	re s. 190B(5)(a)	**Met**
	re s. 190B(5)(b)	**Met**
	re s. 190B(5)(c)	**Met**
s. 190B(6)		**Met**
s. 190B(7)(a) or (b)		**Met**
s. 190B(8)		**Aggregate result:** **Met**
	re s. 61A(1)	**Met**
	re ss. 61A(2) and (4)	**Met**
	re ss. 61A(3) and (4)	**Met**
s. 190B(9)		**Aggregate result:** **Met**
	re s. 190B(9)(a)	**Met**
	re s. 190B(9)(b)	**Met**
	re s. 190B(9)(c)	**Met**

[End of document]