National Native Title Tribunal

Registration test decision

Application name	Sullivan and Edwards Family Group
Name of applicant	Gary Sullivan, Patrick Edwards and Mervyn Sullivan
State/territory/region	Western Australia
NNTT file no.	WC11/11
Federal Court of Australia file no.	WAD498/11
Date application made	7 December 2011

Name of delegate	Renee Wallace

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

For the reasons attached, I do not accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

For the purposes of s. 190D(3), my opinion is that the claim does not satisfy all of the conditions in s. 190B.

Date of decision: 9 February 2012

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Renee Wallace

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

Reasons for decision

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Introduction

This document sets out my reasons, as the Registrar's delegate, for the decision to not 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 Sullivan and Edwards Family group claimant application to the Native Title Registrar (the Registrar) on 9 December 2011 pursuant to s. 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

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

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

The application is affected by a number of current notices, issued under s. 29 of the Act. In accordance with s. 190A(2), I have used best endeavours to finish considering the claim in the relevant time period specified.

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 not be accepted for registration because it does not satisfy all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment A.

Information considered when making the decision

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

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

For the purpose of the registration test, I have had regard to the information contained in the following:

- Form 1 and attachments;
- Geospatial and overlap analysis dated 20 December 2012;
- Statement of evidence of [Claim Group Ancestor 1 deleted](undated);
- Statement of evidence of Mervyn Sullivan(undated);
- Statement of evidence of Garry Sullivan (undated);
- Letter titled 'History of Laverton Aboriginal People who lived in Laverton since 1800' dated 24 January 1996; and
- One page handwritten Statement of Patrick Edwards (undated).

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

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

Procedural fairness steps

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

On 16 December 2011, pursuant to s. 66 of the Act which requires the Registrar give a copy of the application to certain persons, the case manager for this matter sent a letter to the State of Western Australia (the State) enclosing a copy of the application. That letter informed the State that any submissions in relation to the registration of this claim should be provided by 6 January 2011 and of the proposed date for registration testing, being by 9 February 2012. No submissions from the State were received.

Also on 16 December 2011, the case manager for this matter sent a letter to the applicant informing that the delegate proposed to make the registration test decision on or before 9 February 2012. The applicant was also informed that any additional material or information should be provided to the Registrar by 6 January 2012.

On 6 January 2012, the applicant provided additional material to the Registrar in relation to the registration testing of this application. I formed the view that procedural fairness did not require me to provide the State with an opportunity to address or provide submissions in relation to this additional information. This is because the exercise of my power in this instance was unlikely to adversely affect the interests of the State, given that I cannot accept the claim for registration pursuant to s. 190A—see *Kioa v West* [1955] HCA 81 (*Kioa*) at [38].

On 7 February 2012, I was informed, by the case manager for this matter, of the receipt of adverse information from Central Desert Native Title Services (CDNTS), the representative body for the application area. I informed the case manager that I would not be having regard to this information as I had formed the view that this application does not meet all of the requirements of s. 190C and s. 190B. Given that I did not take this information into account in forming my view in relation to the application, I was not obliged by to provide it to the applicant—see *Kioa* at [38].

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 essentially procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss. 61 and 62. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s. 190C(2)— *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16] and also at [35]–[39]. In other words, does the application contain the prescribed details and other information?

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

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

Native title claim group: s. 61(1)

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

The application contains all details and other information required by s. 61(1)—Part A of the application names the persons authorised to make the application and Schedule A contains a description of the native title claim group.

There are, in my view, some unusual features of this application which require me to set out in more detail my understanding of the requirements of s. 61(1) for the purpose of s. 190C(2).

There is, for instance, some information within the application which, in my view, requires me to consider whether this application is made on behalf of a native title claim group, as that term is defined in s. 61(1).

The requirements of s. 61(1) and the nature of the task at s. 190C(2)

In relation to the requirements of s. 61(1), it is well established that the Act does not permit the making of a native title determination application by a subgroup of the real native title group, nor can the grant of native title be given to a subgroup of the real group—see *Dieri People v South Australia* [2003] FCA 187 (*Dieri People*) at [55] and *Edward Landers v South Australia* [2003] FCA 264 (*Landers*) at [33] following *Ward v State of Western Australia* (1998) 159 ALR 483 at 541, *Risk v National Native Title Tribunal* [2000] FCA 1589 (*Risk*) at [60], *Tilmouth v Northern Territory of Australia* [2001] FCA 820.

Mansfield J in *Landers* at [34] rejected the suggestion that 'native title claim group' in s. 61(1) is simply the group defined by the application and may be a different and smaller group than those who hold the native title. A similar argument had previously been rejected by O'Loughlin J in *Risk,* where his Honour stated that 'A native title claim group is not established or recognised merely because a group of people (of whatever number) call themselves a native title claim group'—at [60].

The intersection of these principles on the requirements of s. 61(1) and the task of the Registrar at s. 190C(2) has also been considered by the Court. In *Quall v Native Title Registrar* [2003] FCA 145 (*Quall*) Mansfield J held that to be satisfied for the purpose of s. 190C(2), being that the application contains the information required by ss. 61 and 62, it is appropriate that the delegate of the Registrar consider whether the application is made on behalf of a native title claim group—at [26].

In *Doepel,* Mansfield J effectively confined the nature of that consideration to the information contained in the application itself. Thus, this assessment does not involve me going beyond the application, nor does it require me to 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 group— *Doepel* at [37] and [39].

Nonetheless, whilst s. 190C(2) may be framed in a way that 'directs attention to the contents of the application' and its purpose is to ensure that the application contains all the details and information required by ss. 61 and 62, if those contents are found to be lacking, this necessarily signifies problems for any consideration to be undertaken by the court in relation to a determination of native title. Thus, at the outset it is important 'to ensure that a claim, on its face, is brought on behalf of all members of the native title claim group'—*Doepel* at at [35].

The information in the application

At Schedule A of the application, the native title claim group is described as:

> The native title claim group (hereafter the 'claim group') on whose behalf the claim is made is the Sullivan and Edwards Family Group.
>
> The Sullivan Family Group are the biological descendants of:

[Claim Group Ancestor 1 deleted]; and

[Claim Group Ancestor 2 deleted]There is some irregularity apparent in this description given the reference to the 'Sullivan and Edwards Family Group' and thereafter the reference is confined to the 'Sullivan Family Group.' However, I do not attribute any significance to this discrepancy.

Schedule F of the application refers to the general description of native title rights and interests claimed and, in particular, the factual basis of the claim. This refers to Attachment F of the application. Attachment F of the application is titled 'The Sullivan Family and the Yilka Native Title Claim (WAD297/08)' by Dr Daniel Aime Vachon, August 2011 (Dr Vachon report). It is stated to be a brief report (it is just over two (2) pages in length) concerning a group of Aboriginal persons 'being [Claim Group Ancestor 1 deleted]and her descendants, and their relationship to the Yilka claim area'. In that regard, it sets out that:

> In my view, this group has rights and interests in the Yilka claim area which are based on their observance and acknowledgment of the same laws and customs of the present Yilka claimants. The Sullivan family are not specifically identified in the Yilka claimant group.

This document sets out that the Sullivans are genealogically related to some of the Yilka ancestors 'identified in the Yilka Form 1', although not so that they would be included in the native title claim group description for that application. Nonetheless, they claim under the same system of laws and customs as the Yilka claimants, to enjoy 'the same rights to the Yilka claim area as those set out in the Yilka Form 1'. There are repeated references throughout this document to the 'Yilka Form 1', which is a reference to the Yilka native title claimant application (WAD297/08), identified in Schedule H as an overlapping application to this application.

The document also recites the claim that the 'Sullivan's rights in what is now the Yilka claim area is based on Western Desert traditions and their rights have been recognised for some time'. In that regard, it sets out that:

> ...senior initiated ment (*wati*) knowledgeable of this area have told me that they acknowledge the rights of this group. Two of these men, [Person 1 deleted] (dec) and [Person 2 deleted], are present Yilka claimants (according to the claim group definition) in the Yilka Form 1).

From the above information, I understand that the native title claim group in this application claim the same rights and interests as the Yilka claimants over the same area, which are said to arise under the same laws and customs.

Consideration

The question which falls for my consideration is whether this application, 'on its face', is one made by 'all of the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed'—*Doepel* at [35].

I have indicated that some information in the application, as extracted above, suggests to me that this application may not be made on behalf of a native title claim group, as that term is defined in s. 61(1). In particular, the repeated assertion in Attachment F that the native title claim group enjoy the same rights and interests over the same area as the Yilka claimants (being those defined in the Yilka native title claimant application, but whom are not included in this application) and *pursuant to the same laws and customs*. This is coupled with information asserting close genealogical relations between members of both the Yilka group and the Sullivan and Edwards Family group

including the named apical ancestors, although there is no purported overlap in membership of the native title claim groups.

Given the assertion that the Sullivan and Edwards Family group's rights and interests (being the *same* rights and interests as the Yilka claimants) arise under the same laws and customs of the Yilka claimants, one presumption that naturally flows from those assertions is that those laws and customs are of the *one* group of people and that their rights and interests over the application area are held in common. The way that the applicant has framed the native title rights and interests claimed in Schedule E of the application, however, would suggest an inherent contradiction with that assumption. For instance, the applicant claims the 'right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world,' thus indicative of a competing claim to hold the native title rights and interests exclusively—see Attachment E and Attachment F.

The difficulty, however, with reconciling the information in the application before me with the principles of law set out above and the factual circumstances to which they pertain, is that it does not appear to present a scenario akin to that which has been considered by the Court. For instance, in each of the decisions cited above, where the Court considered whether a native title claimant application was being brought on behalf of a smaller group or a subgroup of a larger group, it is apparent that the circumstances involved applications over the same area with *overlapping members* in the native title claim group for each, and invariably the court formed the view that those rights and interests were held in common. Thus, the smaller group, could not (of itself) 'exclusively enjoy the communal native title' claimed—see *Landers* at [33].

In *Tilmouth*, for instance, O'Loughlin J considered whether 'an acknowledged subgroup' of a wider group could pursue a claim for native title over that wider group's land. His Honour answered in the negative. The reference to 'acknowledged subgroup' and a closer examination of the facts, bear out the disparities with this application. The subgroup was entirely comprised of a smaller portion of members of the wider group—at [4] to [6].

In that regard, it is my view that this application presents a distinct scenario. There are, it is asserted in the application, no members in common between the Sullivan and Edwards Family group and the Yilka group. For the purpose of this task, I cannot go beyond that statement. There is also no assertion within the application that the Sullivan and Edwards Family group are a subgroup of the Yilka group.

Whilst it is curious that the applicant has sought to frame their claim in terms that are so specific to the Yilka claim, and the assertion that their rights and interests arise under the same laws and customs may imply that those rights and interests are held in common, it is in my view inappropriate to form any definitive view or draw any adverse inferences from that information given the limitations of the task at s. 190C(2).

Thus, it follows that I must accept that this application, on its face, is brought on behalf of all members of the native title claim group.

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

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

The application contains all details and other information required by s. 61(3)—see Part B of the application.

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

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

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

My task here is confined to considering the contents of the application for the purpose of s. 190C(2), and deciding whether the application contains a description that appears to meet the requirements of the Act—*Gudjala People 2 v Native Title Registrar* [2007] FCA 1167 at [32].

I consider that Schedule A of the application contains a description of the persons in the native title claim group that appears to meet the requirements of the Act.

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 of each of the three (3) persons jointly comprising the applicant. I consider that each of these affidavits addresses the matters set out in s. 62(1)(a)(i)-(v).

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

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

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

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

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

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

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

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

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

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

Searches: s. 62(2)(c)

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

The application contains all details and other information required by s. 62(2)(c)—Schedule D of the application contains the statement that the applicant has not carried out any searches of the kind referred to in s. 62(2)(c) in relation to the application area.

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

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

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

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

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

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

I have only considered whether the information regarding the claimants' factual basis contained in Attachment F addresses, in a general sense, each of the particular assertions at s. 62(2)(e)(i) to (iii) and have not undertaken an assessment of its sufficiency. Any 'genuine assessment' of the details/information contained in the application at s. 62(2)(e), is to be undertaken by the Registrar when assessing the applicant's factual basis for the purposes of s. 190B(5) — *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [92].

Activities: s. 62(2)(f)

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

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

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

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

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

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

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

The application contains all details and other information required by s. 62(2)(ga)—Schedule HA of the application contains the statement that this is not applicable. I take this to mean that the applicant is not aware of any notification under s. 24MD(BB)(c) that has been given and that relates to the application area.

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

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

The application contains all details and other information required by s. 62(2)(h)— Schedule I of the application contains the statement that this is not applicable. I take this to mean that the applicant is not aware of any notification under s.29 that relates to the application area.

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

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

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

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

Is there a previous application?

The Tribunals's Geospatial Services prepared a geospatial assessment and overlap analysis (GeoTrack:2011/2243) dated 20 December 2011 (geospatial assessment). The geospatial assessment identifies one application as per the Schedule of Applications—Federal Court that falls within the external boundary of this application.

The geospatial assessment also identifies that this overlapping application is on the Register of Native Title Claims (Register). That application is Federal Court number WAD297/08—Yilka (WC08/5), placed on the Register on 6 August 2009.

The current application was made on 7 December 2011. As at that date I am satisfied that the Yilka application was on the Register. I am also satisfied that the entry on the Register for that application was made, or not removed as a result of being considered for registration under s. 190A—see registration test decision dated 6 August 2009.

On that basis, I have formed the view that the Yilka application is a previous application for the purpose of s. 190C(3).

Common Claimants

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

In forming the view that there are no members in common between this application and the Yilka application, I have had regard to information in the application, the extract of the Register for the Yilka application and information in the Tribunal's case management database for the Yilka application.

The claim group description for this application confines the membership of the group to the biological descendants of [Claim Group Ancestor 1 deleted] and [Claim Group Ancestor 2 deleted].

The claim group description for the Yilka application is more complex. I have had regard to both the extract from the Register and the Tribunal's case management database in order to accurately reflect the content of that description. The extract from the Register for the Yilka claim states that the persons claiming to hold native title are:

> Rights or interests in relation to land and waters are possessed by a person:
>
> (a) who has a connection to the land and waters, through:
>
> (i) his or her own birth and/or long association or holding senior ritual authority; or
> (ii) the birth and/or long association of one or more of his or her ancestors,

by which the person, or another on his or her behalf, claims or is claimed to possess rights or interests in relation to the land and waters; and

(b) in respect of whom that claim is accepted generally under WDCB laws and customs.

People who possess those rights and interests
Clause: 83
The persons who, under the traditional laws and customs referred to in (24), (26)-(35) above, possess rights and interests in relation to the claim area are the persons referred to in Order 2 of the Determination sought.

The Tribunal's case management database contains the details of Order 2, to which the description above refers, being:

The persons referred to in Order 2 are:

(a) the descendants of [Ancestor 1 deleted], [Ancestor 2 deleted] and [Ancestor 3 deleted], [Ancestor 4 deleted], [Ancestor 5 deleted], [Ancestor 6 deleted], [Ancestor 7 deleted] and [Ancestor 8 deleted]; and

(b) [Person 3 deleted] and any other or others who, in accordance with traditional laws and customs, have a connection to the Determination Area by which they claim country, through their own birth on, long association with, or the holding of senior ritual authority with respect to places on, the Determination Area and in respect of whom that claim is recognised according to traditional laws and custom.

There is, in my view, contrary information in the application which goes to this issue of common membership between this application and the Yilka application.

Schedule O of the application contains the statement that to 'the best knowledge of the Applicants, no member of the native title claim group is also a member of a previous registered native title application over any part of the application area.' Attachment F of the application also contains the statement that '[t]he Sullivan Family are not specifically identified in the Yilka claimant group.'

Nonetheless, my reading of the description contained above for the Yilka native title claim group, (specifically at Order 2, subsection (b)) and my consideration of information in this application, primarily at Attachment F, suggests to me that there is a real possibility of common membership.

By virtue of the description of the Yilka claimants at Order 2, subsection (b), it is inclusive of those persons who 'have a connection to the Determination Area by which they claim country, through their own birth on, long association with, or the holding of senior ritual authority with respect to places on, the Determination Area and in respect of whom that claim is recognised according to traditional laws and custom.'

Upon my understanding of the information contained at Attachment F of the application, the Sullivan and Edwards Family group claim to be persons who would fall within that very description. That is, they claim to be persons who have a connection to the claim area (being the identical claim area to that which is covered by the Yilka claim) through their own birth on, or long association, with that area. It is also asserted that this claim is recognised pursuant to the same laws and customs of the Yilka claimants.

Given, however, that the information before me on this issue is somewhat unclear, I have decided that I should not draw a conclusion adverse to the applicant.

Whilst the statement at Schedule O of the application is not a conclusive statement as to the absence of common claimants, one could reasonably expect the applicant to be aware of the existence, and cognisant of the obligation to disclose, an overlapping application with members in common.

There is no information before me as to how the description of the Yilka native title claim group would, in effect, operate. Thus, it is impossible for me to conclude that it does result in common members.

Given the above, I am satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application (meeting the requirements of ss.190C(3)(a) to (c)).

Subsection 190C(4) Authorisation/certification

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

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

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

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

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

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

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

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

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

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

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

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

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

For the reasons set out below, I am not satisfied that either ss. 190C(4) or 190C(5) are satisfied.

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

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

Part A of the application contains the statement that '[t]he [a]pplicants [sic] are entitled to make this application as the person authorised by the native title claim group at a meeting held in Kalgoorlie, Western Australia on 31 October 2011'. The affidavits of each of the three (3) persons comprising the applicant also contain a similar statement in relation to their authorisation.

There is, however, no statement within the application or attached documents regarding the applicant's membership to the native title claim group. In my view, the Registrar has no discretion to consider that this requirement is met in the absence of the requisite statement.

The application does not contain the statement required by s. 190C(5)(a).

The affidavits of each of the three (3) persons comprising the applicant contain the statement that:

> I was authorised to make the application at a meeting of the native title claim group held at Kalgoorlie on 31 October 2011. The process of decision making complied with in authorising the applicant to make the application and to deal with matters arising in relation to a [sic] [was a] traditional decision making process. That process involved the members of the native title claim group who were present at the meeting reaching a consensus.

I take this statement to be for the purpose of s. 190C(5)(b). It follows, however, in my view, that in the absence of any statement regarding the applicant's membership to the native title claim group in compliance with s. 190C(5)(a), the application cannot meet the requirements of s. 190C(5)(b).

Section 190C(4)(b)

Satisfying the requirements of s. 190C(5) is a necessary precondition that must be met before the Registrar can be satisfied of the requirement of s. 190C(4)(b)—*Doepel* at [78]. Thus, it follows from my conclusion above that I cannot be satisfied that the requirements of s. 190C(4)(b) have been met.

In the event, however, that I am incorrect in my conclusion that the absence of the statement of the applicant's membership to the native title claim group is fatal to satisfying the requirements

of s. 190C(5)(a) and s. 190C(5)(b), I provide the following reasons in relation to the ability of the application to satisfy s. 190C(4)(b).

Satisfying the requirements of s. 190C(4)(b)

For the purpose of s. 190C(4)(b), I must be satisfied, firstly, that the applicant is a member of the native title claim group and, secondly, that the applicant is authorised by all the other persons in the native title claim group to make this application and deal with matters arising in relation to it.

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

I also note that for the purpose of this task I am not confined to the information contained in the application—*Doepel* at [16].

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

There are three (3) persons who jointly comprise the applicant in this application, being Gary Sullivan, Patrick Edwards and Mervyn Sullivan. As described in Schedule A, this application is made on behalf of the Sullivan and Edwards Family Group, who are the descendants of [Claim Group Ancestor 1 deleted] and [Claim Group Ancestor 2 deleted].

Additional information provided by the applicant to the Registrar on 6 January 2012 confirms that Gary Sullivan and Mervyn Sullivan are the sons of [Claim Group Ancestor 1 deleted] and Patrick Edwards is the son of [Claim Group Ancestor 2 deleted].

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

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

The applicant's authorisation material

The applicant's material in support of authorisation consists primarily of the statements made in the affidavits of each of the persons comprising the applicant. Those affidavits contain the following:

> 1. I am one of the persons authorised by all the persons in the native title claim group to make this application as the applicant and to deal with matters arising in relation to it.
>
> 2. I was authorised to make the application at a meeting of the native title claim group held at Kalgoorlie on 31 October 2011. The process of decision making complied with in authorising the applicant to make the application and to deal with matters arising in relation to a [sic] [was a] traditional decision making process. That process involved the members of the native title claim group who were present at the meeting reaching a consensus.

The nature of the consideration at s. 190C(4)(b)

The task at s. 190C(4)(b) is such that it involves a consideration by the Registrar of the actual 'identity' of the claimed native title holders, in the sense of being satisfied that the requirements

of s. 61(1) are met. It also requires consideration of whether all of those identified persons authorised the applicant to make the application— see for instance *Wiri People v Native Title Registrar* [2008] FCA 574 (*Wiri People*) at [26] to [36].

It is s. 251B that guides the Registrar when examining authorisation in the context of a claimant application. It specifies that *all the persons* in the native title claim group must authorise the applicant to make an application in compliance with either of the processes set out in paragraphs (a) or (b). For the Registrar to be satisfied that the applicant has been duly authorised, the information must 'demonstrate compliance with either of the processes for which the legislature has allowed'—*Evans v Native Title Registrar* [2004] FCA 1070 at [53]. That is, the information must show compliance with a decision making process mandated by the traditional laws and customs of the native title claim group or a decision making process agreed to and adopted by the persons in the native title claim group. Thus, the identification of the appropriate decision-making process and whether it was complied with is the primary consideration—*Noble v Mundraby* [2005] FCAFC 212 (Noble) at [16].

In my consideration of this requirement I am also conscious of the significance that has been conferred upon the requirements of s. 251B. The Court has frequently endorsed the fundamental importance of obtaining proper authorisation from the native title claim group to make a native title determination application, and has acknowledged the role of the Registrar in giving due regard to its importance for the purpose of considering whether an application meets the requirements of registration—see for instance *Landers* at [35].

In that regard, I do not consider that it is a requirement that could ordinarily be met by the mere inclusion of formulaic-like statements accompanied by negligible detail as to the basis upon which the applicant asserts to be authorised.

Who must authorise the applicant?

An applicant must be authorised by a 'native title claim group'. That term is given its meaning by s. 61(1). Accordingly, the native claim group comprises 'all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed'—s. 61(1).

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

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

It also follows from the above principles that a native title claim group is not verified by simply having regard to the way in which the applicant chooses to define the claim group in an application—see for instance, *Risk* at [34] to [35].

Above in my reasons I discussed the requirements of s. 61(1), for the purpose of s. 190C(2), and formed the view that the application contained the requisite information. In that regard, I noted the various inferences that, depending upon the decision-maker, may be drawn from the information in the application as to the identity of the claimed native title holders. Such issues are generally of a complex and exacting nature, concluded only after meticulous regard is had to considerable evidence. Thus, any consideration of such is necessarily constrained by the provisions of the registration test and should not attempt to resolve issues that would properly fall to the Court when hearing an application for determination—*Doepel* at [16].

That said, I consider that the task at s. 190C(4)(b) is quite distinct from s. 190C(2), requiring the Registrar to be 'satisfied as to the identity of the claimed native title holders including the applicant' —*Wiri People* at [29]. It follows that it is appropriate that I give some consideration to this issue of the identity of the claimed native title holders, before reaching a view in relation to the authorisation of the applicant.

Above I noted at Attachment F that the applicant asserts that the Sullivan and Edward Family group, as described in Schedule A of the application, enjoys the same rights and interests in the application as those described in the Yilka Form 1 (which is a reference to the overlapping Yilka claim). It is also asserted that those rights and interests arise pursuant to the same laws and customs of the Yilka claimants. However, the factual basis material at Attachment F asserts that '[t]he Sullivan family are not specifically identified in the Yilka claimant group.'

On 6 January 2012, the applicant provided additional material to the Registrar for the purpose of the registration test. That material primarily consists of statements from a number of claimants, being [Claim Group Ancestor 1 deleted], Mervyn Sullivan, [Person 4 deleted] and Patrick Edwards. In each of these statements, the claimants refer to themselves as the 'Wangkayi people', who it is asserted have an association with the application area. The content of these statements is not entirely clear to me. Aside from these statements, there is no reference in the application to 'Wangkayi' or 'Wangkayi people.' However, it is clear from the information in these statements that the 'Wangkayi people' are not confined to the persons described in Schedule A of the application. Further, this material speaks to the association of this wider group of 'Wangkayi people' with the application area. For instance, in the statement of [Claim Group Ancestor 1 deleted] she speaks of her brother [Person 5 deleted] (who is identified in Attachment F of the application as an apical ancestor of the Yilka claim) and his association with the application area. [Person 5 deleted] does not fall within the description of the native title claim group for this application.

The information contained in these statements coupled with the factual basis material in Attachment F of the application, in my view, raises considerable uncertainty around the identity of the claimed native title holders.

Am I satisfied that the applicant is authorised to make this application and to deal with matters arising in relation to it by all the persons in the native title claim group?

From the limited material before me in relation to the authorisation of the applicant, I understand that an authorisation meeting was held on 31 October 2011, where some members of the native title claim group are stated to have attended and utilised a traditional decision making approach, being a decision making process by consensus, to authorise the applicant to make the application.

Thus, it is my view that the applicant asserts to be authorised, by all the other persons in the native title claim group, in accordance with the process described in s. 251B(a).

I turn now to consider what may be required to satisfy the Registrar that an applicant has been authorised by all the persons in the native title claim group, in accordance with s. 251B(a).

It is well settled in law, that the word 'all' in the context of authorisation pursuant to s. 251B, has 'a more limited meaning than it might otherwise have.' In *Lawson v Minister for Land and Water Conservation (NSW)* [2002] FCA 1517 (*Lawson*), Stone J held in relation to s. 251B(b) that it is not necessary for each and every member of the native title claim group to authorise the making of an application, but rather '[i]t is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision making process'—at [25].

Whilst the decision of Stone J speaks principally to the requirements of s. 251B(b) (in contemplation of the replacement of an applicant pursuant to s. 66B), when examining authorisation in the context of s. 251B(a), it may be appropriate to draw parallels. For instance, on the basis of the information before me, it is open to me to infer that the traditional decision making process utilised would seem to contemplate that all members of the native title claim group be given at least an opportunity to participate in reaching a consensus decision at a collective gathering.

A reasonable opportunity to participate, in such circumstances, may be reflected in material demonstrating that an authorisation meeting was well-attended and appropriately advertised or communicated to all members of the native title claim group—*Lawson* at [27]. What is a reasonable opportunity, in my view, will also manifest from the particular circumstances of the matter.

Where authorisation occurs in the context of an organised meeting of the native title claim group, the decision in *Ward v Northern Territory* [2002] FCA 171 (*Ward*), may also provide some guidance as to the kind of information that may be required to satisfy the Registrar that the applicant is authorised in accordance with s. 251B. His Honour, O'Loughlin J observed that details as to notice of the meeting given to members of the claim group, those persons who attended the meeting and the authority of those who attended, the agenda, and the particular resolutions or decisions made at the meeting were the kinds of pertinent facts that may be required—at [24].

Having considered all of the information in the application and other documents before me, I cannot be satisfied that all the members of the native title claim group were afforded a reasonable opportunity to participate in authorising the applicant to make the application.

The foremost difficulty in assessing the applicant's authorisation, in this instance, stems from the fact that there is little from the information before me that I can deduce about the actual conduct around the authorisation of the applicant in this matter. It is clear that on 31 October 2011 a meeting was held and some members of the native title claim group are stated to have attended and reached a consensus decision via a traditional decision-making process. However, there are no details as to, whom notice of this meeting was given, those persons who attended the meeting or the overall conduct of the meeting. I consider that the authorisation material is notably lacking in providing meaningful detail as to the applicant's authorisation to make this application.

I also consider that there is a more fundamental and ultimately fatal issue with the applicant's authorisation. This flows from the uncertainty as to the identity of the claimed native title holder.

It is my view, that on the basis of the information in the application and the additional statements (to which I have referred above), it is open to me to conclude that the description in Schedule A is not of a 'native title claim group', as that term is defined in s. 61(1). I do not suggest that it is my role to resolve or determine issues around the identity of the claimed native title holders. The material in the application and other documents (provided by the applicant) is simply such that I cannot be satisfied of compliance with s. 61(1).

It follows from the above that I cannot be satisfied that the authorisation said to have occurred at the meeting on 31 October 2011 flowed from 'all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed...'—see s. 61(1).

Thus, I am not satisfied the applicant 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.

Merit conditions: s. 190B

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

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

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

Area covered by the application

Schedule B of the application refers to Attachment B as containing the description of the area covered by the application.

Schedule C of the application refers to Attachment C as containing a map of the application area.

Part 1 of Attachment B describes the external boundaries of the application area as a metes and bounds description, referencing portions of the boundaries of reserves 25051, 20396, 25050 and 22032.

Attachment C of the application contains a map of the application area, which depicts the application area in a thick green line.

The geospatial assessment identifies a technical error with reference to reserve 25051. Further, it notes that whilst the map adequately displays the boundaries of the application area, no legend to the map is supplied. Notwithstanding these observations, the geospatial assessment states that the description and map are consistent and identify the area covered by the application with reasonable certainty.

The requirements of ss. 62(2)(a)(i) and 62(2)(b) necessitate the inclusion of information describing the area covered by the application and 'a map showing the boundaries of the area mentioned in subparagraph (a)(i)'. In my view, these requirements are satisfied by the description at Attachment B and the map at Attachment C.

I am satisfied that the external boundaries of the application area have been described such that its location can be identified with reasonable certainty.

Areas not covered by the application – internal boundaries

Schedule B of the application lists general exclusions to the application area.

Whilst this information at Schedule B contains only general exclusions and not a list of tenures, it is in my view sufficient to offer an objective mechanism to identify which areas fall within the categories described.

The use of such a general formulaic approach for this purpose has been previously accepted by the Court. In *Daniel for the Ngaluma People & Monadee for the Injibandi People v Western Australia* [1999] FCA 686, in relation to the information required by s. 62(2)(a) and its sufficiency for the purpose of s. 190B(2), Nicholson J was of the view that such an approach 'could satisfy the

requirements of the paragraphs where it was the appropriate specification of detail in those circumstances'. His Honour examined the probable state of knowledge of the applicant at the time of filing the application as a factor in determining what may be appropriate in the circumstances—at [32].

In that regard, I have considered the information in the application, and am satisfied that these general exclusions are appropriate.

Attachment B of the application also contains more specific exclusions to five (5) water reserves.

Decision

In my view, both the written description and the map of the application area are clear and identify the area with reasonable certainty.

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

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

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

The information in the application regarding the identification of the native title claim group

Schedule A of the application (also extracted above in my reasons) contains the following description of the native title claim group:

> The native claim group (hereafter the 'claim group') on whose behalf the claim is made is the Sullivan and Edwards Family Group.
>
> The Sullivan Family Group are the biological descendants of:
> [Claim Group Ancestor 1 deleted]; and

[Claim Group Ancestor 2 deleted]The nature of the task at s. 190B(3)(b)

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

Whilst there is some distinction between s. 190C(2) and s. 190B(3) when assessing the information required by s. 61(4), the task of the Registrar remains relatively constrained when considering the sufficiency of the description for the purpose of s. 190B(3)(b), including not going beyond the terms of the application—see *Doepel* at [37] and [51]; *Gudjala [2007]* at [31] and [32].

Above, in my reasons I formed the view that, for the purpose of s. 190C(4)(b), the information in the application and other material before me raises considerable uncertainty around the identity of the claimed native title holders, which prevents my being satisfied that the applicant is authorised by all the persons in the native title claim group. I consider, however, that the nature of the task at s. 190C(4)(b) permits a more robust assessment of the information. This vigour, with

which the Registrar may assess the authorisation of the applicant, does not necessarily extend to include the assessment of the adequacy of the description for s. 190B(3).

In that regard, I consider it appropriate to assess the description of the Sullivan and Edwards Family claim group without regard to the conclusions I formed in relation to s. 190C(4).

Consideration of the description

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

I noted above in my reasons that there is some inconsistency in the wording of the description, being the reference to the 'Sullivan and Edwards Family Group' and thereafter the reference to the 'Sullivan Family Group'. Nonetheless, it is my understanding that the description of the native title claim group in Schedule A is such that it includes those who are the biological descendants of two named persons.

Describing a claim group in reference to named ancestors is one method that has been accepted by the Court as satisfying the requirements of s. 190B(3)(b)—see *WA v NTR* at [67]. The description in this instance employs a similar method of identifying claim members. It is my view that this method complies with the requirements of s. 190B(3)(b), providing an objective point at which to commence an inquiry about whether a person is a member of the native title claim group.

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

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

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

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

In *Doepel,* Mansfield J accepted it was a matter for the Registrar or her delegate to exercise 'judgment upon the expression of the native title rights and interests claimed'. Further, his Honour considered that it was open to the decision-maker to find, with reference to s. 223 of the Act, that some of the claimed rights and interests may not be 'understandable' as native title rights and interests—at [99] and [123]. In that regard, however, I will undertake an examination of the rights and interests with reference to s. 223 when considering the condition at s. 190B(6).

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

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

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

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

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

The application **does not satisfy** the condition of s. 190B(5) because the factual basis provided is **not sufficient** to support each of the particularised assertions in s. 190B(5), as set out in my reasons below.

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

Combined Reasons for s. 190B(5)

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

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

- the applicant is not required 'to provide anything more than a general description of the factual basis'— *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [92].
- the nature of the material provided need not be of the type that would prove the asserted facts —*Gudjala FC* at [92].
- the Registrar is not to consider or deliberate upon the accuracy of the information/facts asserted—*Doepel* at [47].

- the Registrar is to assume that the facts asserted are true, and to consider only whether they are capable of supporting the claimed rights and interests. That is, is the factual basis sufficient to support each of the assertions at s. 190B(5)(a) to (c)—*Doepel* at [17].

It is, however, important that the Registrar consider whether each particularised assertion outlined in s. 190B(5)(a), (b) and (c) is supported by the claimants' factual basis material. In that respect, the decisions of Dowsett J in *Gudjala [2007]* and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala [2009]*) give specific content to each of the elements of the test at s. 190B(5)(a) to (c). The Full Court in *Gudjala FC,* did not criticise generally the approach that Dowsett J took in relation to these elements in *Gudjala [2007]*[1], including his Honour's assessment of what was required within the factual basis to support each of the assertions at s. 190B(5). His Honour, in my view, took a consonant approach in *Gudjala [2009].*

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

Preliminary issue

As referred to above, there is an interrelationship between the native title claim group defined in s. 190B(3) and the rights and interests identified in s. 190B(4). It is the nature of that interrelationship which must be the subject of explanation for the purpose of s. 190B(5)—*Gudjala [2007]* at [41].

I have noted above in my reasons that it is not my role to resolve or determine issues around the identification of the native title holders. Essentially, issues of that kind and also the question of whether the asserted facts support the native title rights and interests claimed are to be reserved for the hearing in this matter—*Doepel* at [17] and [37].

I understand that the Registrar's task at s. 190B(5) is confined to assessing the quality of the asserted facts, but only to the extent 'of ensuring that, if they are true, they can support the existence of those claimed rights and interests'—*Doepel* at [17].

It follows that my view as to the uncertainty of the identity of the native title claim group should not instinctively lead me to conclude that the claimants' factual basis is not sufficient for the purpose of s. 190B(5). There is difficulty, however, in assessing the quality of the asserted facts in this instance, which primarily flows from the way in which the applicant has chosen to describe the basis upon which the claimed rights and interests are alleged to vest in the native title claim group. That description essentially asserts the existence of a larger group of people in whom the native title rights and interests in the claim area reside, and ultimately in my view fails to sufficiently describe the basis upon which the Sullivan and Edwards Family group hold the identified native title rights and interests.

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

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

The Law

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

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

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

The Dr Vachon report contains some information that goes to the association of the native title claim group with the application area, including:

> It was in the course of fieldwork for the Wongatha claim that I first met [Claim Group Ancestor 1 deleted]. I interviewed [Claim Group Ancestor 1 deleted] and various members of her extended family on several occasions. I travelled on the Yilka claim area with members of the Sullivan family and with senior and younger initiated men. I recorded the details of many sites in the Yilka claim area: their *tjukurrpa* ('Dreaming') significance, their value in terms of resources and resource use; the contemporary and past associations of the Sullivans and others with these places.
>
> I received information on early persons associated with the Yilka claim area, including [Claim Group Ancestor 1 deleted] mother and other close relatives. I have evidence to show that the Sullivan family is closely related to [Person 5 deleted], being one of the 'apical ancestors' identified in the Yilka Form 1. The Sullivans are also genealogically-related to another Yilka apical ancestor, Marnupa: [Claim Group Ancestor 1 deleted] mother's mother (*kaparli*) is the sister of Marnupa's mother.
>
> Place of birth has been recorded by previous anthropologists as a key avenue to rights and interests in land in the Western Desert. It usually establishes a 'my country' relationship. In Appendix 2 to the O'Connor & Christensen report, they produce a number of genealogies of 'persons demonstrating birth-related links with the Cosmo Newberry region'. One of the genealogies is that of the Sullivan family. This would strongly suggest that the Sullivan's rights in what is now the Yilka claim area is based on Western Desert traditions and their rights have been recognised for some time.
>
> According to [Claim Group Ancestor 1's] son, Mervyn Sullivan, his family continues to enjoy its traditional rights in the Yilka claim area. Mervyn and his family reside in the Cosmo Newberry community.

The applicant provided the Registrar with additional material, including statements from [Claim Group Ancestor 1 deleted], Mervyn Sullivan, [Person 4 deleted] and Patrick Edwards. In the statement, [Claim Group Ancestor 1 deleted] refers to herself as a 'Wangkayi' person and she

talks about her association, and the association of the 'Wangkayi people, with the claim area. It is not abundantly clear, however, whether the reference in this statement to the 'claim area', is a reference to the land and waters that fall within this application area. Notably, many of the areas that [Claim Group Ancestor 1 deleted] speaks to are not in the application area, falling outside of the external boundaries of the application area. In her statement, she sets out that:

> I was born in the bush on 16 May 1922 in Laverton [outside of the application area].
>
> I speak and understand Wangkayi. I say that I speak Mantjila Nangana way. That's the way old Tjinintjarra mob speak. My kids can understand it, but don't usually speak it.
>
> My mother told me that she came to Laverton when she was a teenager. She said that she found a body in a cave at Marntjal.
>
> My mother told me that they lived in a number of different camps at the edge of Laverton.
>
> One of my first memories was when I was about two years of age. I remember that I was in a bough-shed near Mt Margaret [outside of the application area]...
>
> All the Wangkayi were there for *tulku* [ceremony], they all took off again. We were all camped out bush on the road going to Cameron Well (site 24) and the men were going off for ceremonies.
>
> After I was born, I remember my father Mungkurti was at Rungi Station (near Windara townsite, site 212) [outside of the application area].
>
> We walked from Talintji to Lake Rason, and to the south of Warburton [outside of the application area] with my mother and Maratipu. We came back through Lake Yeo. My brother, [Person 5 Deleted] (chart 3, dec) came too. He was about three or four. A lot of other Wangakayi people were with us – about 16 people. Included in this group were Thatiyala and his wife, Pangku and his wife, my uncle Yangkaltjanu and his two wives (chart 3) – Lula and Ngantiri (chart 3), and that old man, Yarri. We left in early winter. By the time we came back to Laverton it was summer.
>
> We came back from Kalgoorlie and I then went to Cosmo Newberry [sic] [in the application area]...My mother stayed in Laverton with my brother. From Cosmo Newbery we went and camped at Puntitjarra (site 174). It was winter time. We went by horse and sulky. We camped there for a month or so.
>
> My mother told me that she was born at Kaarnka, south-east of Minnie Greek. There are two places called Kaarnka. The other one is east of Warburton.
>
> My mother told me that her sister, Yampi (chart 3, dec) and her brother Yangjultjanu/Jack Anderson (chart 3, dec) were also born at Kaarnka.
>
> My mother told me that her country includes Paruta and Mapa. She knew all those places and she knew the *tjukurr* for them. She told me that her country also included Laverton, White cliffs, Yamarna, Talintji rockhole, Lake Yeo, Lake Rason to Neale Junction, and Pirlpirr or Minnie Creek – it has men's sacred story – to Wartu or Rutter's Grave.
>
> I take that country from my mother. I grew up there. I know the country.

> My son, Mervyn, travelled around a lot every weekend. He'd go out to Lake Yeo. My son, [Person 6 deleted], did all the road to Neale Junction. My daughter, [Person 7 deleted], goes out to Lake Yeo. My son, [Person 8 deleted], goes to Pt Salvation, to Mt Shenton and Cosmo Newberry. That's their country from me and their grandmother.

Both the statements of Mervyn Sullivan and [Person 4 deleted] contain similar information pertaining to the Wangkayi people and their association with the claim area. As with the statement of [Claim Group Ancestor 1 deleted], it is not abundantly clear that references to the 'claim area' are exclusively to the land and waters within this application. These statements also speak primarily to areas that are outside of the application area. As with the above statement, however, there are references to places within the application area coupled with details of quite extensive travel by members of the Wangkayi people.

In the brief one page handwritten statement of Patrick Edwards, he states that his mother is [Claim Group Ancestor 2 deleted] and that she was born at Cosmo Newbery (in the application area). He also says that he is a Wongatha man and that he speaks and understands Wangkayi. He has lived and worked at Cosmo Newbery since he was a young child.

Consideration

In *Gudjala [2007]* Dowsett J provides an explanation of the factual basis to which s. 190B(5) refers:

> Subsection 190B(5) of the Act refers to the factual basis upon which it is asserted that the claimed Native Title rights and interests exist. This is clearly a reference to the existence of rights vested in the claim group. Thus it was necessary that the Delegate be satisfied that there was an alleged factual basis sufficient to support the assertion that the claim group was entitled to the claimed Native Title rights and interests—at [39].
>
> ...Identification of the claim group, the claimed rights and interests and the relationship between the two are not totally independent processes. The identified rights and interests must belong to the identified claim group. Subsection 190B(5) requires a description of the alleged factual basis which demonstrates that relationship. The applicant may not have been obliged to identify the relationship between the claim group and the relevant land and waters in describing the claim group for the purposes of subs 190B(3), but that step had to be undertaken for the purposes of subs 190B(5)—at [41].

I also understand that when analysing the requirements of s. 190B(5), Dowsett J, in *Gudjala [2007]* highlighted the necessity to address within the factual basis 'the relationship which all members claim to have in common in connection with the relevant land'. This, in my view, similarly correlates with the prerequisite that the factual basis support the claim that it is the 'identified claim group', and not some other, which holds the rights and interests in the relevant land. The relevance of these principles when examining the factual basis in support of the assertion at s. 190B(5)(a) is obvious. To understand any asserted association with the application area it is at first necessary to identify the persons who are the subject of such association, being the native title claim group and its predecessors.— [39], [40] and [51].

It may reasonably be supposed that the reference to the claim group, and its identification, will stem primarily from the description in the application. However, I also assume that an assessment of the alleged facts, upon which that identified claim group asserts to be entitled to the rights and interests claimed over the area, must chiefly disclose the link between that group,

the application area and the basis upon which they assert the rights and interests vest in the claim group—*Gudjala [2007]* at [40].

The difficulty with the claimants' factual basis in support of this assertion has been foreshadowed above.

Each of the statements of the claimants provided in support of the application directly and indirectly assert that it is the Wangkayi people who are associated with a large area of country, including the application area. The information in those statements is that the Wangkayi people are not confined to the persons described in this application, being the Sullivan and Edwards Family group. The information in the Dr Vachon report provides that the Sullivan family are associated with the application area. However, the details of the nature of this association are not provided, although it is asserted that this association is pursuant to the same laws and customs of the Yilka claimants—see Attachment F.

It is my view that the application and supporting material does not provide a sufficient factual basis that goes to supporting the assertion that the Sullivan and Edwards Family group are associated with the application area. For the most part, it provides a factual basis that goes to supporting the assertion that the Wangkayi people (who are not defined in the application) are associated with the application area and entitled to the native title rights and interests claimed.

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

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

Thus, in forming my view on this aspect of the factual basis, I also have had regard to the principles that can be drawn from the decision in *Yorta Yorta* in understanding the requirement that the factual basis be sufficient to support the assertion 'that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests', including that:

- 'A traditional law or custom is one which has been passed from generation to generation usually by word of mouth or common practice'—at [46].
- '[T]he origins of the content of the law or customs concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty...'—at [46].
- '[T]he normative system...is a system that has had a continuous existence and vitality since sovereignty'—at [47].
- 'When the society whose laws and customs existed at sovereignty ceases to exist, the rights and interests in land to which these laws and customs gave rise, cease to exist'—at [53].

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

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

Consideration

Given my conclusion above in relation to s. 190B(5)(a), it also follows that I cannot be satisfied that the claimants' factual basis is sufficient to support the assertion that there are traditional laws and customs acknowledged and observed by the native title claim group that give rise to the native title rights and interest claimed. Nonetheless, I also provide the following observations in relation to the factual basis in support of this assertion.

The bulk of the factual basis material in support of this assertion has been outlined in my reasons above. As noted above, there is a reference in the Dr Vachon report to the 'Western Desert traditions', upon which he states that the claimants' rights and interests are based. I understand this to be the relevant pre-sovereignty society upon which it is asserted that the rights and interests of the claim group arise. The additional statements provided in support of the application speak to the rights and interests of the Wangkayi people with some details of laws and customs provided, although there is no evident reference to Western Desert traditions.

In relation to the requirements of s. 190B(5)(b), Dowsett J in *Gudjala [2007*] observed the need to identify a pre-sovereignty society 'having a normative content'. Furthermore, where the native title claim group was defined in reference to apical ancestors, the necessary process would also entail 'the identification of some link between the apical ancestors and any society existing at sovereignty'. This principle was restated by Dowsett J in *Gudjala [2009]*, where his Honour held that 'there must be some connection between them [being the named apical ancestors of the native title claim group] and the relevant pre-sovereignty society from which the claim group asserts that it has derived its native title rights and interests'. His Honour also noted the obvious deficiencies in a factual basis that failed to identify any such connection, stating that '[b]ecause the applicant does not demonstrate any connection between the apical ancestors and a pre-existing society and its laws and customs relating to land and waters, ***there is no explanation as to how current laws and customs of the claim group can be traditional*** [emphasis added]'—*Gudjala [2007]* at [65] to [66] and *Gudjala [2009]* at [40] and [54].

There is little explanation in the factual basis material of how the purported native title claim group's rights and interests arise under the traditional laws and customs of the relevant pre-sovereignty society.

Even accepting that the Dr Vachon report contains opinions and suppositions of an expert nature, of itself the assertion that the genealogies of the Sullivan family suggest that their rights and interests arise under the Western Desert traditions, does not provide a factual basis sufficient to support the assertion at s. 190B(5)(b).

Alternatively, the claimants' statements, which contain the assertion that they are Wangkayi people, do not provide any clarification as to how current laws and customs of the claim group are said to arise under the normative system of a pre-sovereignty society. These statements provide some information suggesting that certain laws and customs of the Wangkayi people have been taught to them, primarily by their parents, but inferentially by their grandparents and other persons. There is, however, in my view, no information within that material providing a basis for my inferring that it is sufficient to support the assertion that these laws and customs are those of the relevant pre-sovereignty society. If there is some relationship between the Wangkayi people, who feature in these statements, and the Western Desert traditions (to which the Dr Vachon report refers), there is no elucidation of that relationship and how it gives rise to the native title rights and interests of the Sullivan and Edwards Family group.

Thus, the asserted link between the relevant society, being that body of persons who follow the Western Desert traditions, the native title claim group and their predecessors, is simply unfathomable from the claimants' factual basis material.

In making the above observations I do not believe that I am weighing and testing conflicting information, I simply do not understand the purported relationship between these various assertions being put by the applicant. Furthermore, there is simply a lack of information relevant to the asserted connection between the Sullivan and Edwards Family group and any pre-sovereignty society. I am not satisfied that the factual basis is sufficient to support the assertion that there are 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.

My decision

The factual basis is not sufficient to support the assertion at s. 190B(5)(b).

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

This part of the test is concerned with whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed. In essence, my view is that this element of the test equates with what the majority in *Yorta Yorta,* in constructing the definition of native title, identified as the second element in their understanding of the word 'traditional'. It '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 [47].

Given my conclusion above in relation to s. 190B(5)(b), it must follow, in my view, that I cannot be satisfied that the factual basis is sufficient to support the assertion in s. 190B(5)(c).

Subsection 190B(6)
Prima facie case

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

The application **does not satisfy** the condition of s. 190B(6). I consider that none of the claimed native title rights and interests can be established, prima facie.

Given my conclusion, formed above at s. 190B(5)(b), that the factual basis is not sufficient to support the assertion that there exist traditional laws and customs that give rise to the claimed native title, it follows, in my view, that the application cannot satisfy this requirement. I note that this, in my view, is consonant with the approach taken by Dowsett J in *Gudjala [2007]* and *Gudjala [2009]* —at [87] and [82] respectively.

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 **does not satisfy** the condition of s. 190B(7).

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

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

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

As to how this understanding of 'traditional' may feature in the task of the Registrar at s. 190B(7), Dowsett J in *Gudjala [2009]* observed that '[i]t seems likely that such connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs'—at [84].

Given my specific conclusions above at s. 190B(5)(b) I am not satisfied that any asserted physical connection by a member of the native title claim group, set out in the factual basis material, could be 'in exercise of a right or interest in land or waters held pursuant to traditional laws and customs'—see *Gudjala [2009]* at [84].

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

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

Section 61A provides:

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

(2) If :

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

(b) either:

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

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

(3) If:

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

(b) either:

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

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

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

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

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

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

Reasons for s. 61A(1)

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

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

The geospatial assessment states that no determinations of native title fall within the external boundaries of this application area. I agree with this assessment. I have also undertaken a search of the Tribunal's mapping database to confirm this information—see overlap analysis dated 7 February 2012.

Reasons for s. 61A(2)

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

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

Schedule B of the application contains a number of general exclusions, including areas covered a previous exclusive possession act (subject to the circumstances described in subparagraph (4)).

Reasons for s. 61A(3)

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

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

At Schedule E of the application, the applicant claims the right to exclusive possession over areas where such a right can be recognised. This is subject to the circumstances described in s. 61A(4).

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

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

> The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:
>
> (a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
>
> (b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
>
> (c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss. 47, 47A or 47B.

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

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

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

Schedule Q of the application states that no claim is being made over minerals, petroleum or gas where they are wholly owned by the Crown.

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

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

Schedule P of the application states that no claim of exclusive possession is being made in relation to all or part of an offshore place.

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

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

Schedule B of the application provides for a number of categories of areas of land and waters to be excluded from the application area, namely those where native title rights and interests have been extinguished, except to the extent that extinguishment is to be disregarded pursuant to ss. 47, 47A and 47B.

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

[End of reasons]

Attachment A
Summary of registration test result

Application name	Sullivan and Edwards Family group
NNTT file no.	WC11/11
Federal Court of Australia file no.	WAD498/2011
Date of registration test decision	09/02/2012

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

Test condition	Subcondition/requirement		Result
		s. 62(2)(h)	Met
s. 190C(3)			Met
s. 190C(4)			Overall result: Not Met
	s. 190C(4)(a)		N/A
	s. 190C(4)(b)		Not Met

Section 190B conditions

Test condition	Subcondition/requirement	Result
s. 190B(2)		Met
s. 190B(3)		Overall result: Met
	s. 190B(3)(a)	N/A
	s. 190B(3)(b)	Met
s. 190B(4)		Met
s. 190B(5)		Aggregate result: Not Met
	re s. 190B(5)(a)	Not Met
	re s. 190B(5)(b)	Not Met
	re s. 190B(5)(c)	Not Met
s. 190B(6)		Not Met
s. 190B(7)(a) or (b)		Not Met
s. 190B(8)		Aggregate result: Met
	re s. 61A(1)	Met
	re ss. 61A(2) and (4)	Met

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

[*End of document*}