National Native Title Tribunal

Registration test decision

Application name	Betty Peterson & Ors v State of Western Australia (Wunna Nyiyaparli People)
Name of applicant	Betty Peterson, Ernest William Coffin (Jnr.), Marjorie Drage, Ailsa Roy and Stephen Peterson
State/territory/region	Western Australia
NNTT file no.	WC12/1
Federal Court of Australia file no.	WAD22/2012
Date application made	27 January 2012
Date of decision	**30 March 2012**

Name of delegate Stephen Rivers-McCombs

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

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

Date of reasons: 20 April 2012

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Stephen Rivers-McCombs

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

Reasons for decision

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Introduction

This document sets out my reasons, as the Registrar's delegate, for the decision to accept the 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 Wunna Nyiyaparli People claimant application to the Native Title Registrar (the Registrar) on 31 January 2012 pursuant to s. 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

Given that the claimant application was made on 27 January 2012 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

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

As at the date of this decision, the application is affected by one (1) future act notice issued under s. 29. In accordance with s. 190A(2)(f), and the timeframe set by the s. 29 notice, I have used my best endeavours to finish considering the claim by 30 March 2012.

I note that the application was also previously affected by a future act notice issued pursuant to s. 24MD(6B)(c). This notice expired on 20 February 2012. Although I have used my best endeavours to apply the registration test within the shortest possible timeframe, I was unable to test the application by that date.

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

Information considered when making the decision

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

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

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

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

Also, I have *not* considered any information that may have been provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice'—see s. 94D of the Act. Further, mediation is private as between the parties and is also generally confidential—see ss. 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 set out below (for details of the documents submitted for the Registrar's consideration, please refer to Attachment B of these reasons):

- In accordance with s. 66(2), the Case Manager with carriage of this matter sent a copy of the application and accompanying documents to the State of Western Australia (the State) on 6 February 2012. The accompanying letter informed the State of its right to comment on the application.
- By email dated 23 February 2012, the Case Manager provided the State with a copy of additional documents submitted to the Registrar by the applicant's representative on 9 February 2012. The accompanying letter advised the State of its right to comment on the information.

- By email dated 28 February 2012, the Case Manager provided the State with a copy of an additional affidavit received from the applicant's representative on 24 February 2012. The accompanying letter advised the State of its right to comment on the document.
- On 27 February 2012, the Case Manager received submissions in relation to the application from the Yamatji Marlpa Aboriginal Corporation (YMAC). These were made on behalf of the claim group for the Nyiyaparli claimant application (WAD6280/1998; WC05/6), which is overlapped by the claim now falling for consideration.
- By email dated 29 February 2012, the Case Manager provided the applicant with copies of the submissions and accompanying documents received from YMAC. The accompanying letter advised the applicant of its right to comment on the information.
- By email dated 7 March 2012, the Case Manager provided the State with copies of the submissions and accompanying documents received from YMAC. The accompanying letter offered the State an opportunity to comment on the material.
- By email dated 12 March 2012, the State's representative advised the Case Manager that the State did not wish to comment on the material submitted either by YMAC or the applicant.
- On 13 March 2012, the Case Manager received additional documents from YMAC in support of its submissions. These were provided to the applicant's representative by email on 14 March 2012. The accompanying letter informed the applicant of its right to comment on the information.
- The additional documents received from YMAC were also sent to the State by email on 14 March 2012. The accompanying letter requested that the State advise if it wished to comment on the material. By email dated 15 March 2012, the State's representative confirmed that the State did not wish to comment.
- On 19 March 2012, the Case Manager received a fax from [Applicant 1 – name deleted], a member of the applicant for the current claim, which responded to information contained in certain documents provided by YMAC.
- On 20 and 21 March 2012, the Case Manager received submissions from the applicant's representative in response to the material provided by YMAC.
- By email dated 23 March 2012, the Case Manager provided the State with the submissions and accompanying documents received from the applicant's representative. The fax received from [Applicant 1 – name deleted] was also included. By email dated 26 March 2012, the State's representative advised that it did not wish to comment on the material.
- By email dated 26 March 2012, YMAC enquired as to whether it (on behalf of the overlapping Nyiyaparli claimant) was entitled to receive a copy of any response from the applicant to its submissions. By email of 28 March 2012, the Case Manager advised YMAC of my view that the overlapping claimant was not entitled to receive a copy of any additional documents provided by the applicant.

Procedural and other conditions: s. 190C

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

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

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

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

The task at s. 190C(2) in relation to s. 61(1)

As noted above, s. 190C(2) is focussed on whether the application contains the information required by ss. 61 and 62. The limited nature of the task in relation to s. 61(1) was explained by Mansfield J in *Doepel*, where his Honour said:

> Section 190C(2) directs attention to the contents of the application and the supporting affidavits. It seeks to ensure that the application contains 'all details' required by s. 61. ... It also ensures that the claim, on its face, is brought on behalf of all members of the native title claim group: see e.g. *Edward Landers*; *Quall v Native Title Registrar* [2003] FCA 145.
>
> In my judgment, s. 190C(2) relevantly requires the Registrar to do no more than he did. That is to consider whether the application sets out the native title claim group in the terms required by s. 61. That is one of the procedural requirements to be satisfied to secure registration: s. 190A(6)(b). If the description of the native title claim group were to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirement of s. 190C(2) would not be met and the Registrar should not accept the claim for registration—at [35] to [36].

His Honour then went on to make clear that:

> [Section 190C(2)] does not involve the Registrar going beyond the application, and in particular does not require the Registrar to undertake some form of merit assessment of the material to determine whether he is satisfied that the native title claim group as described is in reality the correct native title claim group—at [37].

In accordance with the approach articulated by Mansfield J, I have confined my inquiry at this stage to whether or not the application contains the information required by s. 190C(2) in relation to s. 61(1). I note that this involves me being satisfied that the application appears, *on its face*, to be made by all the members of native title claim group, and not by a subgroup or some other selection of persons which does not include all of the claim group's members.

Submissions of YMAC

As the Registrar's delegate, I have received submissions opposing the registration of the Wunna Nyiyaparli People application from the Yamatji Marlpa Aboriginal Corporation (YMAC). YMAC is the representative Aboriginal/Torres Strait Islander body with responsibility for the application area. It also represents the applicant for the Nyiyaparli claim (WAD6280/98; WC05/6), which is overlapped by the Wunna Nyiyaparli People application now falling for consideration. The submissions assert that the application does not comply with s. 61(1) because the claim group, as defined in the application, does not include all the persons in 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'—s. 61(1). Given the above articulation of the Registrar's task, however, I have not accorded any weight to these submissions for the purposes of assessing the application against the requirements of s. 190C(2).

Consideration of the information contained in the application

The first page of the Form 1 names the persons who jointly comprise the applicant and asserts that they are 'entitled to make this application as persons authorised by the native title claim group'. Attachment R explains how each of those persons is a member of the native title claim group.

The claim group is described at Attachment A as follows:

> 1. The native title claim group comprises the descendants of [Ancestor 1 – name deleted] (born c. 1903), excluding those persons listed in paragraph [2].
>
> 2. The following descendants of [Ancestor 1 – name deleted] are excluded from the native title claim group because they do not have an unbroken chain of filiation to [Ancestor 1 – name deleted] as Wunna Nyiyaparli people:
>
> (a) [Person 1 – name deleted], [Person 2 – name deleted], [Person 3 – name deleted], [Person 4 – name deleted] and [Person 5 – name deleted] (children of [Person 6 – name deleted], son of [Ancestor 1 – name deleted]) and their descendants, because they took their cultural identity from their non-Nyiyaparli mother;
>
> (b) [Person 7 – name deleted] and [Person 8 – name deleted] (children of [Person 9 – name deleted] and grandchildren of [Ancestor 1 – name deleted]) and their descendants, because they took their cultural identity from their non-Nyiyaparli grandmother;
>
> (c) All six children of [Person 10 – name deleted] (daughter of [Ancestor 1 – name deleted]) and their descendants, because all six children took their cultural identity from their non-Nyiyaparli father;
>
> (d) The descendants of [Person 11 – name deleted] (son of [Person 6 – name deleted] and grandson of [Ancestor 1 – name deleted]) because his children took their cultural identity from their non-Nyiyaparli mother; and
>
> (e) [Person 12 – name deleted], [Person 13 – name deleted] and [Person 14 – name deleted] (children of [Person 15 – name deleted] and grandchildren of [Ancestor 1 – name deleted]) and their descendants, because they took their cultural identity from their non-Wunna Nyiyaparli paternal grandfather (i.e., a Nyiyaparli person who did not hold rights to speak for Roy Hill).

Attachment F describes the factual basis on which the applicant asserts that the claimed native title exists. The information contained in the attachment offers some further explanation as to why the individuals listed at paragraph [2] of the claim group description have been excluded from the native title claim group. According to Attachment F:

> 15. The particular native title rights claimed by the native title claim group in relation to the application area are group rights and interests which the members of the native title claim group for this application (who identify themselves as the 'Wunna Nyiyaparli') are recognised as holding under the traditional laws and customs of the Western Desert society. ... They hold these rights as persons with an unbroken chain of filiation to their ancestor [Ancestor 1 – name deleted], a Nyiyaparli man who held rights to speak for Roy Hill.
>
> ...
>
> 23. ... Other Nyiyaparli people have standing permission to access and live in the application area. However, this standing permission confers on them what are more properly characterised as *privileges* rather than *rights*, as the Wunna Nyiyaparli maintain the right to withdraw that permission under the laws and customs of the Western Desert society. (Emphasis in original.)

These laws and customs are also touched upon earlier in the attachment, where it is said that, at the time of European contact, Western Desert people derived 'rights in land ... from filiation to a parent known to have held those rights'—at [4].[1] Under this rule, a break in the chain of filiation

[1] It is also stated that rights could be obtained through incorporation, but that this occurred 'to a much lesser extent'.

to [Ancestor 1 – name deleted] results in a loss of the claimed rights in the Roy Hill area, both for the individual who took a non-Wunna Nyiyaparli identity and for their descendants.

In my view, this information makes clear that, according to the terms of the application, those persons listed at subparagraphs (a) to (e) of Attachment A are not part of the group who hold rights in the claim area under Western Desert laws and customs. Their exclusion, therefore, is consistent with the application being brought on behalf of all of the members of the native title claim group.

Having considered the terms of Attachment A together with the information found elsewhere in the application, I have formed the view that, on its face, the application appears to be made by all the members of the native title claim group. As the application also contains statements to the effect that the applicant persons are members of, and are authorised by, the claim group, the application, in my view, satisfies the condition of s. 190C(2) in relation to s. 61(1).

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

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

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

The persons who jointly comprise the applicant are named, and their address for service provided, in Part B of the Form 1.

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).

For the purposes of s. 190C(2), I need only be satisfied that the application contains either the names of the persons who comprise the claim group or a description of the claim group. I do not, at this stage, consider whether any description given is sufficiently clear; I undertake that assessment when I consider the application against the requirements of s. 190B(3), the corresponding merit condition—*Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 at [31] to [32]. I am also not required, nor permitted, to consider the correctness of any names or description provided—*Wakaman People #2 v Native Title Registrar* [2006] FCA 1198 at [34]; see also *Doepel* at [37].

Attachment A contains a description of the native title claim group. The application therefore includes the information required by s. 61(4).

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 sworn by each of the persons who jointly comprise the applicant. The affidavits are all in the same form and give the information required by s. 62(1)(a)(i) to (v) at paragraphs [2] to [5].

I note that, for the purpose of providing the details required by s. 62(1)(a)(v), paragraph [5] of the affidavits says:

> The basis on which I am so authorised is that I was authorised by a decision made at a meeting of the native title claim group held on 7 May 2011 in Port Hedland, being a decision made in accordance with a process agreed on and adopted by the native title claim group on that date. This was a process whereby decisions were made by majority vote on a show of hands.

While this information is reasonably brief, my view is that it satisfies the requirement of s. 62(1)(a)(v). The note accompanying the provision directs attention to the definition of 'authorised' in s. 251B and to the two (2) types of decision-making process that s. 251B provides for. In my understanding, this indicates that the 'details' required by s. 62(1)(a)(v) must indicate how the applicant is said to be authorised in accordance with the terms of s. 251B. Paragraph [5] of the applicant persons' affidavits identifies the process used as being of the kind mentioned in s. 251B(b), namely one agreed to and adopted by the claim group. It also briefly describes how that process worked and gives the date and location of the meeting. This is sufficient, in my view, to meet the condition of s. 62(1)(a)(v).

In support of this conclusion, I note again that s. 190C(2) is concerned with whether the application contains the required information. The details provided for the purposes of s. 62(1)(a)(v) do not need to satisfy me that the applicant is, in fact, properly authorised. I turn my mind to that question at s. 190C(4)—see *Doepel* at [73] and [87].

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 s. 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).

Attachments B (written description) and C (map) identify the outer boundaries of the claim area. Schedule B describes the areas within those boundaries that are not covered by the application.

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

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

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

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 contains a statement to the effect that no such searches have been conducted.

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

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

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

A description of the native title rights and interests claimed in relation to the claim area is provided at Attachment E. This consists of more than a statement to the effect that the native title rights and interests are all those that may exist or have not been extinguished.

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).

The Full Federal Court in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala (Full Court)*) explained the requirements of s. 62(2)(e) as follows:

> The fact that the detail specified by s. 62(2)(e) is described as 'a general description of the factual basis' is an important indicator of the nature and quality of the information required by s. 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable

> a genuine assessment of the application by the Registrar under s. 190A and related sections, and be something more than assertions at a high level of generality—at [92].

Although the general description must be in enough detail to enable a genuine assessment of the application, I note that, for the purposes of s. 62(2)(e), it does not need to be sufficient to satisfy the corresponding merit condition at s. 190B(5)—*Wulgurukaba People #1 v State of Queensland* [2002] FCA 1555 at [19]; see also *Gudjala (Full Court)* at [90].

I have examined the general description of the factual basis provided at Attachment F. It contains information in relation to each of the assertions described in subparagraphs (i) to (iii) of s. 62(2)(e). It is, in my view, at a sufficient level of detail to enable a genuine assessment of the application at later stages of the registration test.

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).

A list of activities currently carried out by claim group members in relation to the application area is provided at Schedule G.

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).

Two (2) claimant applications are identified by their Court file number at Schedule H. The first is the Nyiyaparli claim, which is represented by YMAC and is referred to above in relation to s. 61(1). This application is currently on the Register of Native Title Claims (the Register) and has been on the Register since 29 November 2005. The second claim identified is a previous application named 'Wunna Nyiyaparli' (WAD25/10). This was withdrawn on 2 August 2010.

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

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

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

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

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

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

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

Schedule I states that the applicant 'is not aware of any such notices'.

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).

I only need to be satisfied that the Wunna Nyiyaparli People claim group does not have members in common with another claim group if there is a previous application to which paragraphs (a) to (c) of s. 190C(3) apply—see *Western Australia v Strickland* [2000] FCA 652 (*Strickland (Full Court)*) at [9]. I note that, in undertaking this assessment, I may have regard to information from outside of the application—*Doepel* at [16]; see also s. 190A(3) which identifies the information which I must, and that which I may, take into account.

Is there an application to which paragraphs (a) to (c) apply?

In considering the current application against the requirements of s. 190C(3), I have had regard to a geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services on 2 February 2012 (the geospatial report). The geospatial report identifies the current claim as falling entirely within the area covered by the Nyiyaparli application (WC05/6; WAD6280/98). I have conducted my own search against the Tribunal's mapping database, which confirmed this overlap. As noted above, the Nyiyaparli application is also identified as an overlapping claim at Schedule H of the Form 1 of the current application. I am, therefore, satisfied that paragraph (a) of s. 190C(3) applies to the Nyiyaparli application.

I am also satisfied that paragraphs (b) and (c) of s. 190C(3) apply to the Nyiyaparli application. I have formed this view on the basis of the information contained in the decision of the Registrar's delegate to register the Nyiyaparli claim and in the application's Register extract. The Register extract shows that the application is currently on the Register and that it has been registered since 29 November 2005. The registration test decision (dated 28 November 2005) shows that the claim was entered on the Register as the result of being considered under s. 190A. My understanding, therefore, is that:

- the Nyiyaparli application was on the Register when the current application was made; and
- its entry was made as the result of being considered under s. 190A.

For these reasons, I am satisfied that the Nyiyaparli claim is a previous application for the purposes of s. 190C(3).

Am I satisfied that the Wunna Nyiyaparli People claim group does not have members in common with the Nyiyaparli claim group?

I note that, as is discussed further below in relation to ss. 190C(4) and 190B(5), the Wunna Nyiyaparli People contend that they are a subgroup of the Nyiyaparli language group. Nonetheless, I am satisfied, on the information before me, that the Wunna Nyiyaparli People claim group does not have any members in common with the claim group for the overlapping Nyiyaparli application.

The Wunna Nyiyaparli People claim group is defined as persons who are descended from, and have an unbroken chain of filiation to, [Ancestor 1 – name deleted]—see the claim group description excerpted above in relation to s. 61(1). The claim group description set out in the Register extract for the Nyiyaparli application states that its claim group is comprised of all the persons descended from a list of apical ancestors. The list of ancestors does not feature [Ancestor 1 – name deleted]. In addition, Schedule O of the Wunna Nyiyaparli People Form 1 says:

> To the best of the knowledge and belief of the applicant, no members of the native title claim group for this application are currently members of the native title claim group for any other application which covers the whole or part of the area covered by this application.
>
> The members of the native title claim group for this application were *previously* members of the native title claim group for the overlapping [Nyiyaparli] application WAD 6280 of 1998, but an amendment made to that application on 10 June 2010 had the effect of *removing them from the claim group for that application*. (Emphasis added.)

The information submitted to me by YMAC shows that they share the understanding that the two (2) claim groups do not have any members in common. For instance, at paragraph [3] of their submission YMAC says: 'The native title claim group as defined [in the Wunna Nyiyaparli People application] does not include the Nyiyaparli people as identified in WAD6280/1998'. The fact that the two (2) applications represent two distinct claim groups is, I note, also consistent with the asserted position in the Wunna Nyiyaparli People application that only the descendants of [Ancestor 1 – name deleted], and not other Nyiyaparli people, hold rights in the claim area under the laws and customs of the native title claim group.

I am, therefore, satisfied that the condition of s. 190C(3) is met.

Subsection 190C(4) Authorisation/certification

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

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

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

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

> Under s. 190C(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 s. 190C(4)(a) or (b) are met, in order for the condition of s. 190C(4) to be satisfied.

Schedule R indicates that the application is authorised in accordance with s. 190C(4)(b) rather than certified. For the reasons set out below, I am **satisfied** that the requirements of s. 190C(4)(b) are met. Before turning to consider those requirements, however, I explain why I consider that the threshold condition of s. 190C(5) is also met.

The application must contain the information described in s. 190C(5)

If an application has not been certified, it must contain the information identified in s. 190C(5). Under s. 190C(5)(a), the application must include a statement to the effect that the requirements of s. 190C(4)(b) are met. Attachment R provides as follows:

> 1. Each of the persons comprising the applicant is a member of the native title claim group for this application.
>
> ...
>
> 4. The persons who comprise the applicant are jointly authorised to make the application, and to deal with matters arising in relation to it.

These statements satisfy the condition of s. 190C(5)(a).

Section 190C(5)(b) requires that the application briefly set out the grounds on which the Registrar (or her delegate) should consider that the requirements of s. 190C(4)(b) are met. In this regard, Attachment R says:

> 5. The basis on which they [the persons comprising the applicant] are so authorised is that they were authorised by the native title claim group at a meeting of the native title claim group held at Port Hedland on 7 May 2011, pursuant to a decision-making process which was agreed to and adopted by the claim group at that meeting.
>
> 6. The decision-making process referred to in paragraph [5] above was a process by which decisions were made by majority vote.

The level of detail required by s. 190C(5)(b) is, I note, reasonably low. According to French J (as his Honour was then), '[t]he insertion of the word "briefly" at the beginning of [paragraph] 190C(5)(b) suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained'—*Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*) at [57], approved by the Full Court in *Strickland (Full Court)* at [77] to [78].

Having considered the information at Attachment R in light of the wording of the section and the comments of French J, I am satisfied that the application contains the necessary information;

namely, that it briefly sets out the grounds on which the Registrar (or her delegate) should consider that the condition of s. 190C(4)(b) has been met.

For the above reasons, I am satisfied that the application contains the information required by s. 190C(5).

Section 190C(4)(b)—information taken into account

In undertaking the task at s. 190C(4)(b), I am not confined to the information contained in the application—*Strickland* at [57], approved in *Strickland (Full Court)* at [77] to [78]. Under s. 190A(3), I must have regard to additional information provided by the applicant or, where reasonably practicable, relevant material provided by the Commonwealth or a state/territory government. I may also have regard to such other information as I consider appropriate. With respect to the breadth of material that the Registrar or her delegate may have regard to, I note that Mansfield J has said:

> The functions and powers of the Native Title Registrar in determining whether to accept an application for registration should not be circumscribed or confined to some form of administrative inquiry in which reliance may be placed only on the information provided by an applicant. *The public significance of the Native Title Register also indicates the Registrar should be entitled to inform himself or herself of matters of significance, and (as contemplated by s. 190A(3) of the ... Act) to receive information from the relevant Commonwealth, State and Territory governments or land councils* [the land council, in the case before his Honour, was the representative Aboriginal/Torres Strait Islander body for the relevant area]—*Quall v Native Title Registrar* [2003] FCA 145 at [22] (emphasis added).

In accordance with the requirements of s. 190A(3)(a), I have had regard to the information contained in the application and to the additional material provided to me on behalf of the applicant. I have also considered it appropriate to take into account the information submitted to me by YMAC. The material relates to matters which are, in my view, relevant to the task at s. 190C(4)(b). In addition, YMAC is the representative Aboriginal/Torres Strait Islander body with responsibility for the application area and also the representative for the underlying Nyiyaparli claim. It would, therefore, seem reasonable to expect that YMAC would have a particular understanding of the Aboriginal group(s) associated with the Wunna Nyiyaparli People claim area.

Among other things, YMAC's submission alleges that the Wunna Nyiyaparli People application is not authorised by all of the persons who need to authorise it. The argument appears to proceed on the basis that the claim group described in application does not include all of the persons who are properly part of the native title claim group. This question regarding the identity of the claim group is of fundamental importance to whether I can be satisfied that the applicant is authorised by all the other members of the native title claim group. The identity of the claim group is, I note, also relevant to whether the applicant persons are members of the claim group. I therefore consider this question before turning to consider whether I am satisfied that the persons comprising the applicant are members of, and are authorised by, the native title claim group as described in the application.

Am I satisfied about the identity of the native title claim group?

The matters raised in YMAC's submissions

In its submission, YMAC contends that, in addition to the claim group described in the Wunna Nyiyaparli People Form 1, there are potentially three (3) groups of people whose authorisation is required by s. 190C(4)(b). YMAC primarily argues that all of the Nyiyaparli people need to authorise the applicant. However, it also suggests that the authorisation of all members of the Western Desert society may be required and that those persons excluded from the claim group at paragraph [2] of Attachment A may also need to authorise the applicant. In particular, YMAC's submission contains the following:

> 8. It is necessary for the claim to be on behalf of, and authorised by, all the persons who hold the relevant native title. This means it must be authorised by all the Nyiyaparli people, not only the selected descendants of [Ancestor 1 – name deleted]. See the line of cases such as *Brown v SA* [2009] FCA 206, *Harrington-Smith v WA* [2007] FCA 31, *Dieri People v SA* [2003] FCA 187 etc.
>
> 9. The Registrar/delegate has to be satisfied that the named native title group in an application truly constitutes the native title claim group. This is not satisfied by the mere assertion that a group of people constitute the claim group. See *Risk v National Native Title Tribunal* [2000] FCA at [60], [62]. There is no basis for such satisfaction, and the Registrar/delegate should not simply accept such assertions when those assertions contradict the other material, the past statements and where there is no satisfactory explanation or details given as to how there is now claimed to be an exclusive Wunna Nyiyaparli claim to the area of the Roy Hill pastoral lease, which cannot be a traditional boundary[.]
>
> 10. Furthermore, the Attachment F of the new Wunna Nyiyaparli claim asserts that the Western Desert [s]ociety occupied the area at sovereignty, but it is obvious that the claim was not authorised by the Western Desert society or all its present members. There is no basis given for suggesting that the Wunna Nyiyaparli claim group are the only successors of that society in the claim area, or the only people who under the laws and customs of the Western Desert society have rights and interests in the claim area.
>
> 11. In addition, the Attachment A excludes various descendants of [Ancestor 1 – name deleted] from the claim group due to allegedly taking a different cultural identity, but no explanation is given as to whether this means that they do not have native title rights and interests in the area. It can be assumed from the Form 1 that they have not authorised the applicants to make and deal with the claim nor agreed to or adopted any process for authorising the applicant to do so.

At paragraphs [4] and [5] of its submission, YMAC states that the wider Nyiyaparli people were not given an opportunity to be involved in the meeting at which the applicant is said to have been authorised. This is supported by signed statements from the YMAC lawyer with carriage of the Nyiyaparli claim, and from certain members of that claim group—statement of [Solicitor 1 – name deleted] (23 February 2012) at [3(a)]; [Person 16 – name deleted](12 March 2012) at [9]; [Person 17 – name deleted] (12 March 2012) at [8]; [Person 18 – name deleted] (13 March 2012) at [9]; [Person 19 – name deleted] (13 March 2012) at [8]. In my opinion, this information would only be relevant if I were to form the view that the wider Nyiyaparli people needed to authorise the applicant for the current application.

The effect of s. 61(1) on the task at s. 190C(4)(b)

As noted above, s. 190C(4)(b) requires the Registrar or her delegate to be satisfied that the applicant is authorised by all the other persons in the native title claim group. For the purposes of a claimant application, s. 253 defines the term 'native title claim group' as meaning the native title claim group mentioned at s. 61(1). The relevant part of s. 61(1) says:

> A person or persons authorised by 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, provided the person or persons are also included in the native title claim group[.] (Emphasis added.)

According to the Court, the effect of s. 61(1) is that the Registrar or her delegate must, at s. 190C(4)(b), be satisfied that the applicant is authorised by all the persons who are said to hold the particular native title claimed under the laws and customs of the claim group. This is distinct from being satisfied that the applicant is authorised by the group identified in the application. The Registrar or her delegate must also be satisfied that the group so identified includes all the persons who are recognised by the claim group's traditional laws and customs as holding the rights and interests claimed—*Wiri People v Native Title Registrar* [2008] FCA 574 (*Wiri People*) at [28] and [35] to [36]; *Risk v National Native Title Tribunal* [2000] FCA 1589 (*Risk*) at [62].

The effect of s. 61(1) can be more fully understood from a brief examination of some of the cases that have dealt with the provision, including those to which YMAC has referred in its submission. In my view, these cases also demonstrate the difficulty with the argument advanced by YMAC.

In *Risk*, O'Loughlin J was asked to review a decision by a delegate of the Registrar to register a claimant application brought on behalf of a family of eight (8) people. This included a finding by the delegate that the requirements of s. 190C(4)(b) had been met. In his decision, O'Loughlin J pointed out two (2) matters which were readily apparent from the claimant application:

- first, that 'although the persons who claimed to be the native title group also claimed to be members of the Dang[g]alaba Clan, they did not claim to be the only members of that Clan'; and
- second, that 'the words "have agreed to be the native title claim group" [which were used in the applicant's authorisation material] seem to suggest the composition of the group is of recent origin and that it was not determined by having regard to "the traditional laws and customs [of the claim group]"'—at [40].

In addition, the applicant's factual basis information indicated strongly that the traditional laws and customs under which the native title rights and interests were claimed recognised the rights of *all* Danggalaba Clan members in the application area. According to a statement previously made by the applicant, the Danggalaba Clan had many more members beyond the eight (8) persons identified as the claim group in the application—at [57].

In this context, O'Loughlin J held that the delegate erred in not satisfying herself 'that those eight people properly constituted a native title claim group'. Moreover, his Honour continued:

> 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. ... [T]he acceptance of a small family group (when it is known that it forms part of a larger community) is inconsistent with the

> philosophy that is to be found in the table to s. 61; that section talks of the persons who, as a group, hold 'the common or group rights and interests'. The eight members of the Quall family may be part of the group but they are not the group. The applicant ... should be seen to be authorised by all persons who relevantly hold the common or group rights and interests—at [60].

His Honour, however, confirmed that the content of the relevant law and custom is the decisive factor in determining whether a group of people 'properly' constitute a native title claim group. These laws and customs may recognise a subgroup of a larger cultural bloc as holding exclusive rights and interests in an area. As his Honour noted, it 'would be open for an applicant, in an appropriate case, to advance an application upon the premise that all [the persons who hold the common or group rights] were limited to eight people—but [the applicant] did not suggest that in his application'—at [62].

Wiri People also involved the Court's review of a registration test decision made by a delegate of the Registrar. In that case, the delegate had found (following *Risk*) that an amended claimant application failed to meet the condition of s. 190C(4)(b) because she could not be satisfied that the applicant was authorised by all the other members of the native title claim group. On review, Collier J held that the delegate's finding in this respect was available on the material before her. In particular, his Honour pointed to the following factors as supporting the delegate's conclusion:

- the description of the native title claim group in the application had been amended so that, in addition to describing the claim group as the 'Wiri People' as it had done previously, it also identified a specific set of apical ancestors whose descendants were said to comprise the Wiri People;
- the representative Aboriginal/Torres Strait Islander body for the region had certified another claim by the Wiri People, which overlapped and competed with the application before the delegate, and which contained a broader description of the Wiri People;
- the delegate had before her anthropological reports that supported the Wiri People being a wider group than the claim group described in the application;
- it was clear from the Tribunal's records that the application before the delegate, and the competing certified claim were two (2) of a number of applications made over a number of years by 'differently described or differently composed groups of Wiri People'; and
- the applicant had been authorised at a meeting of only those persons who came within the (possibly artificial) claim group description ultimately used in the application—at [5], [20] to [21] and [25].

Like the situation before the Court in *Risk*, these facts gave a strong indication that, under the body of law and custom on which the claim was advanced, the community which held the claimed native title rights was larger than the group described in the application. The application, I note, did not contend that the relevant laws and customs recognised only some members of the Wiri People as holding rights in the claim area; the claim was advanced on the basis that all Wiri People held the claimed rights and interests under those laws and customs. Contrary to what was asserted in the application, however, the information before the delegate suggested that the claim had been brought by a subgroup of the Wiri people and, therefore, that only part of the native title claim group had been given an opportunity to participate in the authorisation process.

The cases referred to at paragraph [8] of YMAC's submission do not relate to the application of the registration test. Instead, they relate to a decision regarding the determination of a native title claim (*Harrington-Smith v Western Australia (No. 9)* [2007] FCA 31 (*Harrington-Smith*)) and to applications for the strike-out of claims under s. 84C(1) of the Act (*Brown v South Australia* [2009] FCA 206 (*Brown*) and *Dieri People v South Australia* [2003] FCA 187 (*Dieri People*)). Nonetheless, they reflect a similar approach to s. 61(1) as that taken by the Court in *Risk* and *Wiri People*.

In *Harrington-Smith* and *Dieri People*, the Court was faced with applications where the claimants acknowledged that the community recognised by their traditional law and custom as holding the claimed rights and interests was a group larger than the claim group described in the application. As a result, the Court found, in each case, that the applications failed to comply with s. 61(1) and also that the applicants were not authorised by all the other members of the native title claim group in the way required by s. 251B—*Dieri People* at [56]; *Harrington-Smith* at [1220] to [1225] and [1266].

Similarly, *Brown* also related to a situation where it was clear that the claim group described in the application did not include all the persons who held rights and interests in the claim area under the body of law and custom that formed the basis of the claim. Moreover, this was accepted by the applicant. Justice Besanko therefore found that the application did not comply with s. 61(1)—at [36] to [37]. Nevertheless, I note that Besanko J also made it clear earlier in his reasons that 'it may be that a sub-group of a community sharing traditional laws and customs alone possesses rights and interests in a particular area and *that sub-group may itself constitute a native title claim group*'—at [20] (emphasis added), referring to *Hillig as Administrator of Worimi Local Aboriginal Land Council v Minister for Lands for the State of New South Wales (No. 2)* [2006] FCA 1115 at [60].

Consideration of the Wunna Nyiyaparli People application

YMAC's submissions

As discussed above, YMAC argues that, in accordance with s. 61(1), the native title claim group for the current application includes three (3) groups who are not included in the claim group description at Schedule A of the Form 1. These are, namely:

- the wider Nyiyaparli community (i.e. those persons who are Nyiyaparli but not Wunna Nyiyaparli);
- the non-Wunna Nyiyaparli members of the Western Desert society; and
- those persons expressly excluded from the claim group at paragraph [2] of the description contained in Schedule A.

In arguing that the wider Nyiyaparli community should be seen as part of the native title claim group, YMAC first draws attention to paragraphs [7] to [9] of Attachment F of the current application. Those paragraphs note that the claim area falls within Nyiyaparli country. Speaking in relation to the wider area of Nyiyaparli country, they also state that Nyiyaparli people have maintained an association with their country and continue to hold rights and interests in relation to it. According to YMAC, '[t]he inference that should be drawn is that the [wider] Nyiyaparli people have traditional rights and interests in the claim area and constitute the native title holding group for the area'—at [6].

In support of this submission, YMAC also points to the previous Wunna Nyiyaparli application, which was withdrawn in 2010. There is, I note, a clear link between the two (2) Wunna Nyiyaparli applications in the sense that the three (3) persons who comprised the applicant for the previous claim are all part of the applicant for the current application. Although covering a much larger region, the previous application included the current claim area. The claim group description provided in the previous application also appears to have included a significant portion of the non-Wunna Nyiyaparli element of the Nyiyaparli community. As YMAC argues:

> [T]he previous Wunna Nyiyaparli claim said that members of the Nyiyaparli society used the land and waters covered by [the current] application for the purposes set out in Schedule E [the description of native title rights and interests claimed] in accordance with their traditional laws and customs. Thus, it was claimed that the area which included Roy Hill station (the claim area of the new Wunna Nyiyaparli claim) was Nyiyaparli country and it was all the Nyiyaparli people who held the traditional rights and interests—at [7].

This submission also alludes to a further difference between the previous and current Wunna Nyiyaparli applications, which is that the previous application relied upon the laws and customs of a Nyiyaparli society, rather than the laws and customs of the Western Desert cultural bloc. By contrast, the current application proceeds on the basis that the Wunna Nyiyaparli are a landholding group of the Nyiyaparli people and that the Nyiyaparli people are, in turn, a constituent community of the Western Desert society. I note that YMAC's submissions assert that the Nyiyaparli people form their own society and that they are governed by Nyiyaparli laws and customs, rather than those of the Western Desert. This is supported by signed statements from members of the claim group for the Nyiyaparli application represented by YMAC—[Person 16 – name deleted] (12 March 2012) at [8]; [Person 17 – name deleted] (12 March 2012) at [7]; [Person 18 – name deleted] (13 March 2012) at [8]; [Person 19 – name deleted] (13 March 2012) at [7].

Consideration of YMAC's submissions

In carrying out the purely administrative function of applying the registration test, it is not the role of the Registrar or her delegate to adjudicate upon the identity of a native title claim group. Nonetheless, the Court's decision in *Wiri People* does show that information which contradicts that provided by an applicant may, in some circumstances, prevent the Registrar or her delegate from being satisfied that the applicant's claim group description actually includes all the members of the native title claim group (as that term is defined in s. 61(1)).

The possible inconsistencies between the previous and current Wunna Nyiyaparli applications may seem somewhat curious. The previous application was, however, prepared without the benefit of legal representation. In my view, the weight attached to the adverse inferences that could perhaps be drawn from those potential inconsistencies must, therefore, be rather reduced.

At the same time, the current application clearly explains the traditional law and custom of the Western Desert that recognises the Wunna Nyiyaparli as the landholding group of the Nyiyaparli people which possesses the claimed native title rights and interests—see [4], [15] to [16] and [23] of Attachment F. Support, both for the existence of these laws and customs and for the proposition that the Nyiyaparli form part of the Western Desert society, is provided in extracts from the works of expert anthropologists and in the sworn affidavits of claim group members (this material is set out more fully below, in relation to s. 190B(5)). In my view, this information provides cogent support for the claim that the Wunna Nyiyaparli are a subgroup (of both the

Western Desert society and the Nyiyaparli people) which alone holds the claimed native title rights and interests. It was clearly acknowledged by Besanko J in *Brown* that such a group could form a native title claim group as defined by s. 61(1).

I note that YMAC has not submitted any cogent or probative material which suggests that the laws and customs of the Western Desert recognise either the wider Western Desert society or those persons expressly excluded by the applicant's claim group description as holding the native title rights and interests claimed in relation to the application area.

Based on the information before, I can in my view be satisfied that the claim group described in the current application includes all the persons who form part of the native title claim group, as that term is defined by s. 61(1).

Decision regarding the identity of the claim group

For the reasons set out above, I am satisfied that the group described at Attachment A of the Form 1 includes the entire native title claim group. That group is, namely, the Wunna Nyiyaparli people. I have therefore continued my assessment of the application under s. 190C(4)(b) on that basis.

Below, I set out my reasons in relation to the two conditions of s. 190C(4)(b). These are, namely, that the applicant must be:

- a member of the native title claim group; and
- authorised to make the application, and to deal with matters arising in relation to it, by all the other members of the claim group.

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

Each of the persons jointly comprising the applicant swears in his or her s. 62(1)(a) affidavit that they are a member of the native title claim group. Attachment R also sets out how each of those persons comes within the claim group description at Attachment A—at [2] to [3]. There is no information before me which suggests that the applicant persons are not members of the claim group as it is described in the application. I am, therefore, satisfied that the applicant is a member of native title claim group.

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

The second requirement of s. 190C(4)(b) is that the persons who comprise the applicant are authorised to make the application, and to deal with matters arising in relation to it, by all the other members of the native title claim group.

What it means to be 'authorised' for the purposes of s. 190C(4)(b) is set out in s. 251B as follows:

> ... all 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 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.

Attachment R of the Form 1 states that the applicant was authorised pursuant to a process agreed to and adopted by the claim group—at [5]. In an affidavit submitted directly to the Registrar, the applicant's representative also explains that, at the claim meeting used to authorise the applicant:

> I noted that the claim group was only able to adopt a decision-making process at the meeting, if there was no decision-making process which needed to be followed under their traditional law and customs, in order to do things such as authorising persons to make claims for native title. No-one present suggested that there was any such process which needed to be followed—affidavit of [Solicitor 2 – name deleted] (affirmed on 7 February 2012) at [5].

On this basis, I am satisfied that the claim group's traditional law and custom does not provide an applicable and mandated decision-making process. As a result, my view is that the claim group was entitled to use an agreed to and adopted process. I have therefore assessed the material provided against the requirements of s. 251B(b).

The applicant's authorisation material

As noted above, Attachment R provides only brief details of the process used to authorise the applicant. However, the applicant's representative has provided the Registrar with additional authorisation material in the form of:

- the above-mentioned affidavit of [Solicitor 2 – name deleted], affirmed on 7 February 2012; and
- the affidavit of [Claim group member 1 – name deleted], affirmed on 22 February 2012.

Notification of the authorisation meeting

According to her affidavit, [Claim group member 1 – name deleted] is a member of the claim group and was responsible for arranging notification of the meeting at which the applicant is said to have been authorised (the meeting held at Port Hedland on 7 May 2011). In her affidavit, [Claim group member 1 – name deleted] deposes that the native title claim group is limited to the members of a single extended family. [Claim group member 1 – name deleted] states that she identified 63 persons as comprising 'all of the adult members of the claim group' by using her own knowledge of the family and by 'consulting with other family members such as [Claim group member 2 – name deleted] (a daughter of [Ancestor 1 – name deleted]'s daughter [Claim group member 3 – name deleted])'. According to [Claim group member 1 – name deleted], she was able to obtain the postal addresses of 58 of the adult claim group members identified—at [3].

I note, at this point, that Attachment F of the Form 1 refers to 'the present-day native title claim group' as comprising 'approximately 600 people', including children—at [18]. The apparent discrepancy between Attachment F and [Claim group member 1 – name deleted]'s affidavit is addressed in an affidavit of [Applicant 2 – name deleted] (affirmed on 19 March 2012), which was provided directly to the Registrar on behalf of the applicant. In her s. 62(1)(a) affidavit (affirmed

on 18 January 2012), [Applicant 2 – name deleted] swore to the truth of the information contained in the Form 1. In her affidavit of 19 March 2012, [Applicant 2 – name deleted] says:

> The figure of 600 people cited in Attachment F was only intended to be a very approximate estimate of the total claim group membership, including children. I accept and agree with the precise figure of 63 adults to which [Claim group member 1 – name deleted] deposes in her affidavit. When children are taken into account, I accept that a more accurate estimate of total claim group membership would be in the vicinity of 150 to 200 people—at [5].

In light of this clarification, I have not attached any significance to the estimated claim group population mentioned in Attachment F.

The authorisation meeting is said to have been notified through a combination of word of mouth, written personal notification and public notice. In particular, [Claim group member 1 – name deleted] states that word of the planned meeting began to spread around the family from 'at least late March 2011'—at [4]. [Claim group member 1 – name deleted]'s affidavit indicates that she engaged with other family members in a coordinated effort to verbally notify claim group members of the planned meeting. According to [Claim group member 1 – name deleted]:

> I asked other family members to orally pass on the information about the meeting to their own families, to seek to ensure that everyone concerned knew about it. Family members who assisted with ringing and visiting included [Applicant 1 – name deleted], [Claim group member 2 – name deleted] and [Person 4 – name deleted] and me. These are the ones that I know of; however, I have no doubt that others would have been involved too—at [6].

[Claim group member 1 – name deleted] states that she began sending personal written notice of the meeting to all of the persons for whom she had addresses on 24 April 2011. The notice stated that the reason for the meeting was to authorise persons to make 'a new native title application over land and waters at Roy Hill, Western Australia'. It further identified the claim group for the proposed application in the same way as it is described at Attachment A of the Form 1, although without the specific exclusions listed at paragraph [2].

The notice for the authorisation meeting was posted along with a notice for another family group meeting. This notice indicated that travel allowances were available for those wanting to attend the family group meeting. It also stated that the family group meeting would be held earlier on the same day as the authorisation meeting and at the same venue. It was therefore clear, in my view, that travel allowances were available for those wanting to attend the authorisation meeting. This is confirmed in [Claim group member 1 – named deleted]'s affidavit, where she deposes that 'it was possible to pay mileage (or in some cases, airfares) and accommodation allowances for those claim group members who did not live in Port Hedland [and who wanted to attend the authorisation meeting]'—at [8].

[Claim group member 1 – name deleted] notes that there was a typographical error in the notices for both meetings, as they gave '7 April 2011' as the date of the meetings instead of '7 May 2011'. She also mentions that the venue of the meeting subsequently changed from that identified in the notice, although both venues were in Port Hedland. [Claim group member 1 – name deleted] deposes that, because of the clear error in the advertised date of the meeting, she received 'numerous' telephone calls in response to the notice. When [Claim group member 1 – name deleted] received these phone calls, she was able to give the caller the correct venue and to encourage them to pass the information on to other group members—at [5].

In addition to her efforts to personally notify claim group members of the authorisation meeting, [Claim group member 1 – name deleted] states that she arranged for an advertisement to be published in the 'Public Notices' section of *The West Australian* newspaper on 4 May 2011—at [7]. A copy of the advertisement is attached to [Claim group member 1 – name deleted]'s affidavit. It gave the correct date and location of the meeting, identified the purpose of the meeting, noted the claim group description and gave [Claim group member 1 – name deleted]'s contact telephone number. In my understanding, *The West Australian* has state-wide distribution.[2]

According to [Claim group member 1 – name deleted], the process of personal, verbal notification reached 62 of the 63 known adult claim group members. At paragraph [6], [Claim group member 1 – name deleted] says:

> [Claim group member 4 – name deleted] was the only family member who wasn't able to be contacted due to his unknown whereabouts, however he periodically contacts his mother [Claim group member 5 – name deleted] who informs him of family events. No negative response has subsequently been received from [Claim group member 4 – name deleted] regarding the outcome of the meeting, or the fact o[f] his not being directly notified of it beforehand.

As to the efficacy of the notification process in its entirety, [Claim group member 1 – name deleted] deposes as follows:

> [N]o person has complained to me of having received insufficient notice of the meeting, by reason of the late publication date of the notice in [*The West Australian*], or for any other reason. No claim group member has complained about having missed the meeting due to the typo in the posted notices regarding the month in which the meeting was held, and no family member has complained about having missed the meeting because of having gone to the wrong venue. It is inconceivable that I would not have received considerable flak from any family member who had missed the meeting for either reason; us Coffins are not people who keep quiet about such things!—at [7].

Process used at the authorisation meeting

In his affidavit of 7 February 2012, [Solicitor 2 – name deleted] deposes that he conducted the authorisation meeting held in Port Hedland on 7 May 2011. He states that, as participation at the meeting was restricted to members of an extended family generally familiar with one another, no special registration process was used. An attendance list is, however, attached to [Solicitor 2 – name deleted]'s affidavit. This records 33 individuals as having attended the authorisation meeting. According to [Solicitor 2 – name deleted], those persons who did attend the meeting, but did not come within the claim group description, either 'left without incident' or remained present without participating. These persons, I note, are said to be limited to 'several' individuals who, although descendants of [Ancestor 1 – name deleted], had taken a non-Nyiyaparli identity, and to '[a] couple' of spouses of claim group members—at [3].

[Solicitor 2 – name deleted] deposes that, by show of hands, the meeting resolved unanimously:

- to make decisions by majority on show of hands;

[2] This understanding is informed by http://ratecard.thewest.com.au/circulation-a-readership.

- to make a native title determination application over the area covered by the present application and on behalf of the claim group as described at Attachment A of the application; and
- to authorise seven (7) named persons, 'or those of them who remain willing and able to act in respect of the application in the future', to make, and to deal with matters arising in relation to, the application. It was also noted in this resolution that '[t]he applicant is given a broad discretion as to when the application should be filed'—at [4].

Five (5) of the seven (7) individuals originally authorised now comprise the applicant for the filed application. Attached to [Solicitor 2 – name deleted]'s affidavit is a letter dated 26 May 2011 and signed by one of the persons initially authorised as a member of the applicant, in which the author writes that she is 'no longer willing and able to act as an applicant'. In his affidavit, [Solicitor 2 – name deleted] deposes that, on 29 July 2011, he also received from that same person an email attaching a letter signed by another of the persons originally authorised. [Solicitor 2 – name deleted] quotes the letter as saying: 'This is my letter of resignation as a Wunna Nyiyaparli Applicant'. [Solicitor 2 – name deleted] notes that this person confirmed their resignation in a telephone conversation with him on 2 August 2011—at [8].

Consideration of the applicant's authorisation material

In *Lawson v Minister for Land and Water Conservation for the State of New South Wales* [2002] FCA 1517, Stone J observed that it is clear from the terms of s. 251B that an applicant does not need to be authorised by literally 'all' the other members of the native title claim group. According to her Honour, the fundamental requirement, when an application is said to have been authorised using an agreed to and adopted process, is that 'the claim group are given every reasonable opportunity to participate in the decision-making process'—at [25]. Similarly, in *De Rose v State of South Australia* [2002] FCA 1342, O'Loughlin J commented that the word 'all' should be 'taken to mean "all" those who are reasonably available and who are competent to express an opinion'—at [928].

I understand from [Claim group member 1 – name deleted]'s comment that word began to 'spread' around the family from late March 2011 that the process of verbal notification began up to a month before [Claim group member 1 – name deleted] posted the written notices. I also infer from the nature of the information contained in the written notices that the verbal notification of the meeting gave claim group members the date of the meeting, its planned location in Port Hedland (although the venue subsequently changed), the reason for the meeting and a description of the invited group. From [Claim group member 1 – name deleted]'s affidavit, it appears that this information was directly communicated to all but one of the adult members of the claim group, who could not be contacted.

The conversations which [Claim group member 1 – name deleted] had with claim group members who inquired about the apparent error in the written notice would have served to confirm the date of the meeting and to update its location. As both the initially proposed venue and the one ultimately used were in Port Hedland, this late shift in venue is unlikely, in my view, to have affected the ability of any claim group member to attend the authorisation meeting. This appears to be confirmed by [Claim group member 1 – name deleted] at paragraph [7] of her affidavit.

In light of the information provided by [Claim group member 1 – name deleted], and the relatively small size of the claim group, I am satisfied that [Claim group member 1 – name deleted] organised a comprehensive process of personal notification of the meeting. In my view, this was sufficient to give all of those claim group members who were reasonably available, and competent to express an opinion, a reasonable opportunity to participate in the decision-making process. The notice published in *The West Australian* three (3) days before the meeting simply extended that opportunity further.

Having considered the information contained in [Solicitor 2 – name deleted]'s affidavit, I am also satisfied that the meeting of claim group members authorised the applicant to make the application in accordance with an agreed to and adopted process. In this regard, I note that the meeting agreed by consensus to make decisions by majority, on a show of hands, and that the five (5) persons who now comprise the applicant were authorised using that process. Although two (2) of the persons originally authorised have since 'resigned' their roles, I am satisfied that the terms of the authorisation allow the remaining five (5) persons to continue to act as the applicant.

Outcome

For the reasons set out above, I am satisfied that the condition of s. 190C(4)(b) is met.

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).

The description of the external boundaries of the application area is provided at Attachment B to the Form 1. The attachment is titled 'Proposed Wunna Nyiyaparli Roy Hill External Boundary Description' and contains a metes and bounds description referencing cadastral parcels. The areas within the external boundary which are not covered by the application are described by way of a set of general exclusions listed at Schedule B.

A map of the claim area's external boundary is found Attachment C. It contains a colour tenure map, dated 31 August 2010 and titled 'Proposed Wunna Nyiyaparli Roy Hill'. The map features:

- the application area depicted by a bold blue outline;
- land tenure shown and labelled;
- topographic features shown and labelled;
- scalebar, northpoint, coordinate grid, legend and locality diagram; and
- notes relating to the source, currency and datum of data used to prepare the map.

The geospatial report (referred to above in relation to s. 190C(3)) concludes that '[t]he description and map are consistent and identify the application area with reasonable certainty'.

I have compared the written description of the application area against the map at Attachment C and am satisfied that they are consistent. I am also satisfied that they clearly identify the area's location on the earth's surface. The cadastral parcel boundaries used to define the claim area are each identified in the written description. Those parcels are then clearly shown on the map.

I am also satisfied that the general exclusions listed at Schedule B identify with a sufficient level of certainty those areas that fall within the external boundaries of the claim area, but which are not covered by the application. The effect of these exclusions is principally to exclude from the claim area any parts where native title has been extinguished. These acts are defined by reference to the *Native Title Act 1993* (Cwlth) and to the relevant state legislation.

These kinds of general exclusions were discussed in *Daniel for the Ngaluma People & Monadee for the Injibandi People v Western Australia* [1999] FCA 686. Nicholson J held that s. 62(2)(a) (and the corresponding merit condition at s. 190B(2)) must be 'applied to the state of knowledge of an applicant as it could be expected to be at the time the application ... is made'. At this stage, his Honour observed, it may well be appropriate to use a 'class or formula approach' if, for example, the applicant had no tenure information—at [32]. The statements at Schedules D and L of the

Form 1 indicate that the applicant either has no tenure information or has very little. In the absence of that information, the applicant has appropriately used formulaic, but precisely described, exclusions in the way contemplated by Nicholson J.

I am satisfied that the application meets the condition of s. 190B(2).

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 applicant has elected to describe the claim group, rather than to name its members. The claim group description is found at Attachment A to the Form 1. It is set out in full above in relation to s. 61(1) (page 9 of these reasons).

Section 190B(3)(b) requires the applicant to describe the claim group using a set of rules or principles that can be used to determine whether any particular person is a member of the group—see *Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732 at [25]. Undertaking this assessment may require some factual inquiry. However, the difficulty of any such inquiry does not affect the adequacy of a claim group description for the purposes of s. 190B(3)(b) so long as the criteria of membership are clear—*Western Australia v Native Title Registrar* [1999] FCA 1591 (*WA v Registrar*) at [67]. I also stress that the focus of s. 190B(3)(b) is solely on whether the description is sufficient to identify the members of the claim group. The condition is not concerned with whether the claim group described in the application is in any sense the 'correct' native title claim group—*Doepel* at [37] and [51].

In *WA v Registrar*, the Court accepted that a description which defined a claim group as the descendants of identified apical ancestors provided a sufficiently clear criterion—at [67]. The claim group description at Attachment A of the current application defines the claim group as comprising the descendants of [Ancestor 1 – name deleted]. Certain persons who are descended from [Ancestor 1 – name deleted] are then specifically excluded from the group on the basis that they or their ancestors chose to adopt a non-Wunna Nyiyaparli identity. While this exclusion is based on the voluntary selection of cultural identity, all of the descendants of [Ancestor 1 – name deleted] who are excluded from the claim group are either named or identified as the descendants of named persons. In my view, this method of describing the claim group provides a similar level of clarity to that accepted by the Court in *WA v Registrar*.

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

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

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

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

At s. 190B(4), the Registrar or her delegate must be satisfied that the native title rights and interests claimed are identifiable in the sense that they 'are understandable and have meaning'— *Doepel* at [99]. I note that I have not, at this point, turned my mind to whether or not the rights and interests claimed are native title rights and interests as defined in s. 223(1). In my view, that assessment is part of considering whether the native title rights and interests claimed can be established, prima facie. I have therefore considered that question in my assessment at s. 190B(6).

The description of the native title rights and interests claimed is found at Attachment E. It provides a follows:

> **The Qualifications**
>
> The applicants claim in relation to the claim area, including land and waters, the native title rights and interests set out below ('**[T]he Rights and Interests'**) subject to the following qualifications.
>
> (i) To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants.
>
> (ii) To the extent that the native title rights and interests claimed may relate to waters in an offshore place, those rights and interests are not to the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under international law in relation to the whole or any part of the offshore place.
>
> (iii) The applicants do not make a claim to native title rights and interests which confer possession, occupation, use and enjoyment to the exclusion of all others (being the rights listed below in paragraphs (b), (d), (f) and (j) under the heading '**The Rights and Interests**') in respect of any areas in relation to which a previous non-exclusive possession act, as defined in section 23F of the *NTA* [*Native Title Act 1993* (Cwlth)], was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia, and a law of that State has made provision as mentioned in section 23I in relation to the act.
>
> (iv) Paragraph (iii) above is subject to such of the provisions of sections 47, 47A and 47B of the *NTA* as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing but which include such areas as may be listed in Schedule L.
>
> (v) The native title rights and interests claimed are subject to any valid rights created under the common law or a law of the State or the Commonwealth.
>
> **The Rights and Interests**
>
> Subject to the above qualifications, the rights and interests claimed in relation to the claim area, including land and waters, are:
>
> (a) the right to live within the area;

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

(c) the right of access to the area;

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

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

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

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

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

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

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

In my opinion, this list of rights and interests is readily identifiable in the sense that it is understandable and has meaning. I note that the reference to 'resources' at paragraphs (e), (f) and (j) is fairly general in nature and of potentially wide import. However, it is, in my view, reasonable to infer from the phrase 'resources of the area' at paragraphs (e) and (f) that the application is referring to natural resources found within the claim area, such as plant life and animals. Such a right is, in my opinion, sufficiently understandable. I infer that 'resources' has the same meaning when used at paragraph (j).

I am satisfied that the application meets the requirement of s. 190B(4).

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

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

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

I have considered each of the three (3) assertions set out in the three (3) paragraphs of s. 190B(5) in turn before reaching this decision. Before setting out my reasons in relation to each of those paragraphs, however, I address the weight that must, or must not, be accorded to the pieces of information before me. I also set out my approach to the task at s. 190B(5) generally.

The information before me

In addition to the Form 1, the applicant's representative has provided the Registrar with two (2) sets of documents which contain information relevant to the requirements of s. 190B(5). The first is comprised of affidavits sworn by the following persons:

- [Applicant 3 – name deleted] (affirmed on 17 January 2012);
- [Applicant 1 – name deleted] (affirmed on 23 January 2012);
- [Applicant 2 – name deleted] (affirmed on 21 November 2011;
- [Person 20 – name deleted] (affirmed on 12 December 2011);
- [Person 21 – name deleted] (affirmed on 8 November 2011); and
- [Person 22 – name deleted] (affirmed on 8 November 2011).

[Applicant 3 – name deleted] and [Applicant 2 – name deleted], and [Applicant 1 – name deleted], are each members of the applicant. [Person 20 – name deleted] and [Person 22 – name deleted], and [Person 21 – name deleted], each appear to be persons who are personally associated with members of the claim group.

In response to the submissions received from YMAC (discussed, in part, above in relation to ss. 190C(2) and 190C(4)), the Registrar received a fax from a member of the applicant, [Applicant 1 – name deleted], dated 19 March 2012. I note that this appears to be written in his personal capacity, and not on behalf of the applicant as whole; however, it does contain information relevant to the task at s. 190B(5) and it is, in my view, therefore appropriate to have regard to the document.

In addition to [Applicant 1 – name deleted] response to YMAC's submissions, the applicant's representative submitted the second set of documents to the Registrar on behalf of the applicant. This set of documents includes submissions from the applicant's representative, [Solicitor 2 – name deleted] (dated 21 March 2012). It also contains affidavits affirmed by the following individuals:

- [Claim group member 6 – name deleted] (affirmed on 10 March 2012);
- [Applicant 2 – name deleted] (affirmed on 19 March 2012);
- [Claim group member 3 – name deleted] (affirmed on 19 March 2012);
- [Claim group member 7 – name deleted] (affirmed on 10 March 2012);
- [Solicitor 2 – name deleted] (affirmed on 20 March 2012); and
- [Anthropologist 1 – name deleted] (affirmed on 20 March 2012).

In addition to these, the applicant's representative provided the Registrar with a copy of a registration test reconsideration decision made, in relation to an unrelated claimant application, by Deputy President John Sosso under s. 190E of the Act.[3] Paragraphs [14], [15] and [23] of

[3] Wiradjuri-Warrabinga (United Clans of North East Wiradjuri) (NSD457/2010; NC10/1), reconsideration decision dated 6 October 2010.

[Solicitor 2 – name deleted]'s submissions refer to the reconsideration in support of two (2) arguments:

- first, that I should not attempt to adjudicate between the competing Nyiyaparli and Wunna Nyiyaparli People claims; and
- second, that I should not accord any significant weight to the signed statements of Nyiyaparli claim group members provided by YMAC.

For the reasons set out below, I have formed the view that I cannot attach any weight to YMAC's submissions in relation to s. 190B(5). The reconsideration decision does not, in my opinion, assist me in forming that view nor does it contain any other information relevant to the assessment of the current application against the requirements of s. 190B(5).

Paragraphs [18] to [25] of YMAC's submission point to supposed gaps in the factual basis material contained in the applicant's Form 1. They also refer to other information that is said to contradict or demonstrate the falsity of the factual basis information provided by the applicant. The documents containing this apparently adverse information have also been forwarded to the Registrar by YMAC. In particular, YMAC has submitted:

- statements signed by [Person 16 – name deleted] and [Person 19 – name deleted], and [Person 17 – name deleted] and [Person 18 – name deleted], referred to above in relation to s. 190C(4);
- affidavits from [Person 19 – name deleted] and [Person 16 –name deleted], which were filed with the Court in response to the previous Wunna Nyiyaparli claim (each respectively affirmed on 18 March 2010);
- affidavits from members of the applicant for the current claim, filed in relation to the previous Wunna Nyiyaparli application and in response to the Nyiyaparli claim represented by YMAC;[4]
- an article by [Anthropologist 1 – name deleted], titled *The Coffin Family of Redcliffs Station, Pilbara, Western Australia* (2005) <[reference deleted]>; and
- the transcript of an interview conducted with [Ancestor 1 – name deleted], titled *Roy Hill Station 1903-1921: Red Cliff Station 1920's View of Aboriginal and White Society* (conducted by [Person 23 – name deleted], J.S. Battye Library Oral History Programme, July 1978).

In my view, the law is clear that the Registrar or her delegate cannot accord any weight to this kind of 'adverse' information for the purposes of the task at s. 190B(5). I refer to the comments of Mansfield J in *Doepel*, where his Honour held that s. 190B(5):

> ... requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; *but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests*. ... The role is *not* to test whether the asserted facts will or may be proved at the hearing, *or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts*—at [17] (emphasis added).

[4] These are, namely, the affidavits of [Applicant 3 – name deleted] (two (2) of which were affirmed on 9 June 2010, and one (1) of which was affirmed on 23 August 2010), and [Applicant 4 – name deleted] (two (2) of which were affirmed on 11 June 2010, and one (1) of which was affirmed on 23 August 2010).

Justice Mansfield's comments were, I note, approved by the Full Federal Court in *Gudjala (Full Court)*—at [83]. In its decision, the Full Court also confirmed that, for the purposes of s. 190B(5), '[t]he applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim'—at [92].

The Court's decisions in *Doepel* and *Gudjala (Full Court)* make plain, in my view, that I must assess the factual basis asserted by the applicant as if it were true. There is no scope for me to give weight to material provided by a third party, which might contradict or cast doubt on the probative value of the information presented by the applicant. As a result, the reasons set out below focus on the material provided on behalf of the applicant and proceed on the basis that the facts asserted in the documents are true. I note that I have placed weight on the information provided by the applicant's representative in response to the submissions of YMAC. This, in my view, is consistent with the comments of Mansfield J and the Full Court, as the documents contain factual information provided on the applicant's behalf in support of the claim.

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

As mentioned above, s. 190B(5) requires that the Registrar or her delegate to assess the applicant's factual basis against the requirements of the section on the basis that the asserted facts are true. Having said that, however, the factual information must be sufficient to support the particular assertions described in paragraphs (a) to (c) of s. 190B(5). In this respect, I refer to the Court's comments in *Gudjala (Full Court)*. There, the Court highlighted the link between ss. 62 and 190B in the following way:

> It is tolerably clear that what the assessment [under s. 190A] entails is informed by what is required of an applicant to commence an application. ... Accordingly, the statutory scheme appears to proceed on the basis that the application and accompanying affidavit, if they, in combination, address fully and comprehensively all the matters specified in s. 62, might provide sufficient information to enable the Registrar to be satisfied about all matters referred to in s. 190B. This suggests that the quality and nature of the information necessary to satisfy the Registrar will be of the same general quality and nature as the information required to be included in the application and accompanying affidavit—at [90].

The Court then outlined the requirements of s. 62(2)(e), which corresponds to the merit condition of s. 190B(5):

> The fact that the detail specified by s 62(2)(e) is described as 'a general description of the factual basis' is an important indicator of the nature and quality of the information required by s. 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s. 190A and related sections, and be *something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based*—at [92] (emphasis added).

In light of these statements from the Full Court, I have been careful not to require more than a general description of the factual basis of the claim. Nonetheless, I note that, although the wording of s. 62(2)(e) informs the standard set by s. 190B(5), an application which has met the requirement of s. 62(2)(e) will not necessarily pass at s. 190B(5). As the Court mentioned in

Gudjala (Full Court), an application may fail at the merit conditions of the registration test if the material required by s. 62 is not furnished 'fully and comprehensively'—at [90].

With respect to the level of factual detail needed to meet the requirements of s. 190B(5), I have also had regard to the decisions of Dowsett J in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*). In particular, I note that in those decisions Dowsett J:

- cautioned that the Registrar 'must be careful not to treat, as a description of the factual basis, a statement which is really only an alternative way of expressing the claim or some part thereof'—*Gudjala 2009* at [29]; and
- held that s. 190B(5) requires 'that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)'—*Gudjala 2007* at [39].

In my view, these comments from Dowsett J underscore the need for an applicant's factual basis material to contain a certain level of particularity: it must contain details which can be understood as applying, or having relevance, to the particular native title claimed by the particular group over the particular area covered by the application.

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

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

The requirements of s. 190B(5)(a)

With respect to the assertion contained in paragraph (a) of s. 190B(5), Dowsett J has held that the factual material must be sufficient to support the assertions:

- that the predecessors of the claim group have had an association with the claim area over the period since sovereignty; and
- that the claim group as a whole presently has an association with the area, although it is not a requirement that all members must have such an association at all times—*Gudjala 2007* at [52].

I also note that, in considering whether the applicant's factual basis is sufficient to support these two (2) limbs of the s. 190B(5)(a) assertion, I am not obliged to accept 'very broad statements' that, for instance, have no 'geographical particularity'—*Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [26].

Below, I set out the reasons for why I have formed the view that the applicant's factual basis information is sufficient to support both limbs of the s. 190B(5)(a) assertion. I deal first with the material that is relevant to the asserted association of the claim group's predecessors with the claim area. I then turn to the current association of the claim group.

First limb of s. 190B(5)(a)—that the claim group's predecessors have been associated with the application area since sovereignty

The Crown asserted sovereignty over Western Australia on 11 June 1829. Attachment F of the Form 1 identifies [Ancestor 1 – name deleted], the ancestor from whom the members of the claim group are descended, as being born at Roy Hill station c. 1903. The applicant does not assert that the claim group are necessarily the direct biological descendants of persons who were associated with the application area at sovereignty. Instead, the applicant relies on the claim group's identity as Nyiyaparli people, and their membership of the Western Desert society, to establish the necessary link to persons who were associated with the claim area in the period from sovereignty until the birth of [Ancestor 1 – name deleted]—see Attachment F at [12].

Association via membership of a society

Paragraph [12] of Attachment F refers to the Full Court's decision in *De Rose v South Australia* [2003] FCAFC 286 (*De Rose (Full Court)*) in support of the proposition that the applicant will not need to establish a direct biological link to the persons associated with the claim area at sovereignty in order to obtain a favourable determination of native title. In particular, the applicant draws my attention to paragraphs [196] to [200]. The Court concludes this passage as follows:

> There is ... nothing in the definition of 'native title' in s. 223(1) of the [Act] that incorporates a requirement of a biological link between the claimants and the holders of native title at sovereignty. Native title rights and interests in relation to land must be possessed under the traditional laws acknowledged and traditional customs observed by the Aboriginal peoples (s. 223(1)(a)) and the Aboriginal peoples, by those laws and customs, must have a connection with the land (s. 223(1)(b)). ... [Section 223(1)] does not purport to limit native title rights and interests to those which have passed to the biological descendants of the Aboriginal people who held those rights and interests at sovereignty. Claimants may rely on other means of acquiring native title rights and interests, provided that traditional laws acknowledged and customs observed allow for those means of acquiring the rights and interests—at [200].

In my opinion, it follows from this that, for the purposes of s. 190B(5)(a), the term 'predecessors' must be interpreted to include the predecessors of the society to which the claim group belong, rather than simply the group's biological ancestors. In my view, it could not have been intended that a claim could potentially fail at s. 190B(5) for lack of biological descent from the persons associated with the area at sovereignty, while also succeeding, on the same facts, to obtain a positive determination of native title. In forming this view, I have had regard to the Explanatory Memorandum for the Native Title Amendment Bill 1997, which stated that the purpose of the registration test was merely to ensure that registered claims had merit—at [29.2].

Although discussed further in relation to s. 190B(5)(b) below, I note at this point that a 'society' in this context is 'understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs'—*Yorta Yorta Community v Victoria* [2002] HCA 58 at [49] (*Yorta Yorta*).

As mentioned in my reasons at s. 190C(4), the application is advanced on the basis that those persons who have an unbroken chain of filiation to [Ancestor 1 – name deleted] are the Nyiyaparli people who hold the exclusive ownership rights in the Roy Hill area. They are, therefore, said to be a local landholding group of the Nyiyaparli people who are known as the

Wunna Nyiyaparli. The Nyiyaparli are, in turn, said to be a language group which is governed by the laws and customs of the wider Western Desert cultural bloc, which is, in the sense described in *Yorta Yorta*, the relevant society—Attachment F at [12], [15] to [16] and [22] to [23].

With this in mind, and in light of my above comments in relation to *De Rose (Full Court)*, my view is that the applicant's factual basis material must be sufficient to support the following two (2) assertions:

- that the claim group are members of the Nyiyaparli language group and that the Nyiyaparli are part of the Western Desert cultural bloc; and
- that members of the Nyiyaparli language group, or at least the Western Desert society more generally, have been associated with the application area over the period since sovereignty.

I deal with each of these issues in turn, below.

I note [Solicitor 2 – name deleted]'s submission that the applicant is entitled to rely on the Full Court's decision in *De Rose (Full Court)* for the proposition that the Western Desert constitutes 'a "society" for native title purposes'—submission of [Solicitor 2 – name deleted] at [34]. In *De Rose (Full Court)*, the Court proceeded on the basis that the Western Desert cultural bloc had existed since sovereignty as a community of persons united in their observance of a body of law and custom, noting at paragraph [236] that the issue was not the subject of challenge by the parties. In addition, I am cognisant of other decisions where the Court has recognised the Western Desert cultural bloc as a 'society' in this sense—see, for example, *Jango v Northern Territory* [2006] FCA 318 at [352]; *Lennon v South Australia* [2011] FCA 474 at [19].

The claim group's relationship with the Nyiyaparli language group and the Western Desert society

As noted above, the applicant relies on the claim group's identity as Nyiyaparli people, and their membership of the Western Desert society, in order to establish a link to the persons who were associated with the application area at sovereignty. In my view, it is therefore necessary that there is a factual basis which supports the assertion that the claim group (the Wunna Nyiyaparli) are members of the Nyiyaparli language group and that the Nyiyaparli are, in turn, part of the Western Desert society. I first set out the information which, in my view, supports the identification of Nyiyaparli people as part of the Western Desert cultural bloc. I then deal with the information relating to the recognition of the claim group as Nyiyaparli people.

<u>The Nyiyaparli people as members of the Western Desert society</u>

The main information supporting the association of the Nyiyaparli language group with the Western Desert society is set out at paragraphs [2] to [7] of Attachment F. In particular, those paragraphs contain excerpts from a 1966 manuscript of anthropologist [Anthropologist 2 – name deleted], titled *Social structure and acculturation of Aborigines in the Western Desert*. The manuscript is said to mainly address fieldwork undertaken by the author at Jigalong Mission between 1963 and 1965. Jigalong Mission, it is noted, 'was located in Nyiyaparli country, approximately 80 miles south-west of the claim area'—Attachment F at [3].

I note that, having identified Jigalong using the Tribunal's mapping system, it appears to me that the mission was likely located approximately 80 kilometres to the south-east of the claim area. In my view, I can infer from this that the references in Attachment F to 'miles' and to the 'south-

west' are typographical errors and that they are intended to refer to 'kilometres' and to the 'south-east', respectively.

[Anthropologist 2 – name deleted] describes the boundaries of the Western Desert society as extending 'across western South Australia into central and central-northern Western Australia (south of the Kimberleys) and south-western Northern Territory', while also including 'most of the hill country in north South Australia'—Attachment F at [2]/[Anthropologist 2 - name deleted] manuscript at 32 to 33. While this is a very general description of the Western Desert region, I infer from the fact that [Anthropologist 2 - name deleted] conducted the bulk of his research for the manuscript in the area around Jigalong Mission that he considered that area to be part of the Western Desert.

As to the law and custom of the Aboriginal groups in the Western Desert, [Anthropologist 2 - name deleted] says:

> ... [the region's] delineation as a distinct cultural area; its Aboriginal inhabitants share a common language (with dialectical variations), social organization, relationship to the natural environment, religion and mythology and aesthetic expression. The term Western Desert, then refers, both to a cultural bloc and a geographical entity—Attachment F at [2]/[Anthropologist 2 - name deleted] manuscript at 32 to 33.

Paragraph [3] of Attachment F notes that the persons referred to by [Anthropologist 2 - name deleted] as the 'Jigalong people' are comprised of a large number of Western Desert tribal groups, including the Nyiyaparli. As to the relationship between the 'Jigalong people' and other constituent groups of the Western Desert community, [Anthropologist 2 - name deleted] wrote:

> The Jigalong people have linguistic ties with their neighbours in Wiluna, Nullagine and Moolyella [Marble Bar], because the dialects spoken at those places are mutually intelligible variants of the Western Desert language. However, besides speaking similar dialects, they also share, in large measure, the same Law: there are strong social and cultural similarities that exist between neighbouring groups of people, who have the same type of kinship system and similar belief systems and religious organization—Attachment F at [3]/[Anthropologist 2 - name deleted] manuscript at 163.

The 'cultural and linguistic affinities' between the Nyiyaparli and other groups forming part of the 'Jigalong people' are also briefly touched on by [Anthropologist 2 - name deleted] in a passage extracted at paragraph [7] of Attachment F. In addition, I note that [Applicant 1 – name deleted]'s affidavit of 23 January 2012 refers to his 'dealings with members of the wider Western Desert people' as indicating that the wider Western Desert community continues to hunt in accordance with the same law and custom as the Nyiyaparli—at [5] to [6] (the facts supporting the membership of [Applicant 1 – name deleted], and other claim group members, of the Nyiyaparli people are discussed below).

In my view, this information is sufficient to support an assertion that the Nyiyaparli people share the same, or substantially the same, body of law and custom as the wider Western Desert society. It follows that the information supports the proposition that the Nyiyaparli were, and are, part of the Western Desert cultural bloc.

The claim group as Nyiyaparli people

Attachment F states that [Ancestor 1 – name deleted] 'was generally identified within the Western Desert society as a Nyiyaparli man whose traditional country was Roy Hill'—at [10]. Paragraph

[11] of the attachment notes that the members of the applicant believe [Ancestor 1 – name deleted] to have 'obtained his Nyiyaparli identity through his parental grandmother, a woman about whom little is presently known, aside from the fact that she was Aboriginal, and that her name was [Ancestor 2 – name deleted]'. Alternatively, it is suggested that [Ancestor 1 – named deleted] was incorporated into the Nyiyaparli people pursuant to the traditional law and custom of the Western Desert. On this point, it is deposed by anthropologist [Anthropologist 1 – name deleted] that, if [Ancestor 1 – name deleted] did not have Nyiyaparli heritage, then the fact of his half-brothers' acceptance as Nyiyaparli Law men would indicate that he was 'most likely' accepted as Nyiyaparli as well—affidavit of [Anthropologist 1 – name deleted] at [4]. I gather from [Anthropologist 1 – name deleted] use of the phrase 'traditional affiliation' that this would, in his opinion, have been in accordance with Western Desert traditional law and custom.

In support of [Ancestor 1 – name deleted]'s acceptance as a Nyiyaparli person, Attachment F refers to an affidavit of [Person 20 – name deleted] (affirmed on 12 December 2011), who is identified as a Njamal man and a member of the Western Desert society. A copy of the affidavit has also been provided to the Registrar on behalf of the applicant. In it, [Person 20 – name deleted] deposes that he grew up with [Ancestor 1 – name deleted]'s daughters. He then says:

> When I was growing up, it was generally acknowledged in my presence by the other Njamal people and Nyiyaparli people with whom I mixed that [Ancestor 1 – name deleted] was a Nyiyaparli man from Roy Hill. ...
>
> I remember that my own father, [who was a] Njamal man, told me that [Ancestor 1 – name deleted] was a Nyiyaparli from Roy Hill. I cannot recall any other specific individuals who told me this, but there must have been others, because I have always regarded it as an accepted fact that he was Nyiyaparli—at [2] to [3].

[Applicant 2 – name deleted]'s affidavit of 21 November 2011 also recalls [Person 20 – name deleted] saying to the family in October 2010 that [Ancestor 1 – name deleted] was '*Nyiyaparli through his father*. I knew him very well. I have always known your family as Nyiyaparli'—at [3] (emphasis added). A similar sentiment is also expressed in a second affidavit of [Person 20 – name deleted] (affirmed on 10 October 2011), which is attached to the affidavit of [Applicant 2 – name deleted].

Further information supporting both the acceptance of [Ancestor 1 – name deleted] as Nyiyaparli during his lifetime, and the continued recognition of his descendants as Nyiyaparli, is provided at paragraph [11] of Attachment F and in affidavits provided on the applicant's behalf. At paragraph [11], Attachment F points to affidavits sworn, around August 2005, by members of the applicant for the overlapping Nyiyaparli claim. These are said to have contained statements to the effect that the Nyiyaparli people included 'those persons who, through traditional law and custom, have been incorporated as the Nyiyaparli people, in particular, descendants of [Ancestor 1 – name deleted]'.

A number of the additional affidavits of claim group members describe how they were taught about their Nyiyaparli identity. Some of their affidavits (and the affidavits of individuals personally associated with claim group members) also refer to other Nyiyaparli people acknowledging [Ancestor 1 – name deleted]'s descendants as being Nyiyaparli. The affidavit of [Applicant 3 – name deleted] (affirmed on 17 January 2012) provides an example in relation to both of these matters. [Applicant 3 – name deleted] says that her father, [Ancestor 3 – name

deleted], would always tell her and her siblings that they were Nyiyaparli people, and that they should introduce themselves to 'the old people' with the name 'Wunnagnuthagnuthada'. This would identify them as the grandchildren of [Ancestor 1 – name deleted] and as 'the Nyiyaparli from Roy Hill'—at [1].

As to the second matter, [Applicant 3 – name deleted] deposes:

> I have always been welcomed at meetings concerning Nyiyaparli business, regardless of whether [or] not the meetings related to native title matters. I have consistently publicly identified myself at these meetings as being a Nyiyaparli person. I have never been contradicted when I have done this, nor have I been subjected to any avoidance or lack of warmth from other Nyiyaparli people in response to my public self-identification as Nyiyaparli. On the basis of the matters discussed above in this paragraph, I am firmly of the belief that I am accepted by the Nyiyaparli community as being a Nyiyaparli person—at [3].

In addition to [Applicant 3 – name deleted]'s affidavit, I also refer to [Applicant 2 – name deleted]'s affidavit of 21 November 2011. [Applicant 2 – name deleted] is a daughter of [Ancestor 1 – name deleted]. In her affidavit, she deposes that two (2) of the persons who comprise the applicant for the wider Nyiyaparli claim—[Person 16 – name deleted] and [Person 19 – name deleted] —spoke at her son's funeral in 2007, saying words to the effect of: 'A Nyiyaparli person from the Nyiyaparli language group is being buried here today'—at [11].[5] Attached to [Applicant 2 – name deleted]'s affidavit is an affidavit sworn by [Person 19 – name deleted] on 11 May 2007, which was filed in relation to proceedings concerning the location of the burial of [Applicant 2 – name deleted]'s son. In it, [Person 19 – name deleted] deposes:

- that [Applicant 2 – name deleted] was 'a member of the Aboriginal Niapali [Nyiyaparli] language group of which I am an Elder'; and
- that '[t]he deceased ... was an Aboriginal person of the Niapali [Nyiyaparli] language group. I know this because [he] was my cousin'—at [1] and [9].

In my view, the above information provides strong support for the proposition that, in accordance with Western Desert traditional law and custom, [Ancestor 1 – name deleted] was accepted as a Nyiyaparli person, and that his descendants have continued to be so accepted. The information indicates that his acceptance as a member of the Nyiyaparli language group could either have been through his paternal grandmother or through his incorporation into the claim group. That, in my opinion, is sufficient. I do not, in my view, need to determine which one of these routes, in fact, led to [Ancestor 1 – named deleted]'s acceptance as Nyiyaparli.

The following section sets out the reasons for which I am satisfied that the claim group's predecessors were associated with the application area. As discussed earlier, 'predecessors' in this context must be understood as including the predecessors of the society to which the claim group belongs. For the reasons set out above, I am satisfied that there is a factual basis which is sufficient to support the assertion that the claim group are members of the Nyiyaparli language group and that the Nyiyaparli form part of the Western Desert society. In my view, it is therefore only necessary that the applicant's factual material support an assertion that members of either

[5] In support of this, see also the affidavits of [Person 22 – name deleted] and [Person 21 – name deleted] at [3], respectively.

the Nyiyaparli or possibly the wider Western Desert cultural bloc have been associated with the application area over the period since sovereignty.

Association of the claim group's predecessors with the application area

Below, I discuss the factual basis material which, in my view, is sufficient to support the asserted association of the claim group's predecessors with the claim area:

- prior to the birth of [Ancestor 1 – name deleted] c. 1903; and
- over the period following his birth.

Association of the claim group's predecessors prior to [Ancestor 1 – name deleted]'s birth

I note that the majority of the factual material provided on the applicant's behalf is directed at supporting the assertion that the predecessors of the Nyiyaparli language group were associated with the claim area over the period between sovereignty and [Ancestor 1 – name deleted]'s birth. Some information also goes to supporting the association of the Western Desert society more generally with the area. This approach is, in my view, consistent with the contention that the Wunna Nyiyaparli are simply a local landholding group of the Nyiyaparli language group. It is also, for the reasons given above, capable of providing the necessary support for the first limb of the s. 190B(5)(a) assertion.

Attachment F asserts that the application area 'falls within Nyiyaparli country'—at [7]. It refers to a map at Attachment F1 which is said to depict the boundaries of Nyiyaparli country. The Roy Hill pastoral lease, which provides the boundaries of the current application, sits in the northern part of the centre of the identified region. I have compared the region shown at Attachment F1 with the area of the wider Nyiyaparli claim already on the Register. The boundaries appear to be largely similar, except that part of the western boundary of the Nyiyaparli claim lies about 50 kilometres east of the boundary depicted at Attachment F1.

In my opinion, the applicant's factual basis information supports an inference that the Nyiyaparli—or, at least, members of Western Desert society—have, since sovereignty been associated with the broader area of Nyiyaparli country identified by the applicant. This is principally supported by the information contained in [Anthropologist 2 - name deleted]'s 1966 manuscript and the 1997 report of anthropologist [Anthropologist 3 - name deleted], which is extracted in [Solicitor 2 –name deleted]'s submissions. Strong support for a more specific association of Nyiyaparli people with the application area is then provided in the affidavit of [Anthropologist 1 – name deleted]. This information is discussed, in turn, below.

As mentioned above, I have inferred that [Anthropologist 2 - name deleted] considered the area around Jigalong Mission to form part of the region occupied by the Western Desert society. Jigalong lies about 20 kilometres inside the eastern boundary of the Nyiyaparli country identified at Attachment F1. More specifically in relation to the area around Roy Hill, [Anthropologist 2 - name deleted] describes the 'Jigalong people' as having 'neighbours' to the north at Nullagine—Attachment F at [3]/[Anthropologist 2 - name deleted] manuscript at 163. Nullagine lies approximately 40 kilometres directly to the north of the area of Nyiyaparli country depicted at Attachment F1 and 55 kilometres north of the application area. In addition, [Anthropologist 2 - name deleted] describes a 'fairly well-defined route' travelled by Western Desert groups as an 'integral part of traditional life'. He states that the route included a track from Port Hedland,

down through Moolyella (Marble Bar), to Nullagine and then on to Jigalong—Attachment F at [5]/[Anthropologist 2 - name deleted] manuscript at 164. The application area sits in-between Nullagine and Jigalong. This indicates, in my opinion, that the region with which the Western Desert society was associated extended over the area covered by the claim.

The manuscript of [Anthropologist 2 - name deleted] provides important information regarding the time depth of this association. I note that the manuscript includes material regarding the existence of some migration by Nyiyaparli, and other Western Desert, people away from their traditional country in the 1900s. For example, [Anthropologist 2 - name deleted] explains that, by the time of his arrival at Jigalong Mission, most Western Desert people were 'congregated in Missions, stations and settlements in the desert, around the periphery, or even further afield in the towns'—Attachment F at [4]/[Anthropologist 2 - name deleted] manuscript at 39. Also, it is further noted that Nyiyaparli people were attracted to settlements established on the fringes of their country relatively early on at some point, it appears, in the late-1800s or early-1900s—Attachment F at [7] to [8]/[Anthropologist 2 - name deleted] manuscript at 63.

Notwithstanding this relatively early migration, however, [Anthropologist 2 - name deleted] signals clearly his view that the Aboriginal population around Jigalong in the 1960s had lived, and in many ways continued to live, a largely traditional life. This included maintaining a sense of association with their traditional country. In particular, [Anthropologist 2 - name deleted] is quoted as saying that, through their 'mythology and ritual', the various tribal groups resident at Jigalong Mission maintained:

> ... close spiritual ties with their original 'home' countries. The myths that each person knows best concern the ancestral travels and exploits that took place in the country that he himself once lived in, and the main waterhole routes and physical features of that country are embodied in his store of mythology—Attachment F at [5]/[Anthropologist 2 - name deleted] manuscript at 215.

In addition, [Anthropologist 2 - name deleted] also states his opinion that, even in the 1960s, most Western Desert people in the area around Jigalong Mission had had, or still maintained, the same kind of physical association with their country as their predecessors. In particular, the extracted passages from [Anthropologist 2 - name deleted]'s manuscript suggest:

- that most adult Aboriginal people resident at Jigalong had 'spent at least part of their early life in the desert, where they engaged in semi-nomadic hunting and gathering at subsistence level'—Attachment F at [4]/[Anthropologist 2 - name deleted] manuscript at 146; and
- that the 'well-defined route' mentioned above reflected the continuation of a practice that existed before the arrival of European settlement in the region around the claim area—see Attachment F at [5]/[Anthropologist 2 - name deleted] manuscript at 2 of Abstract, 61 to 62, 128, 164.

[Anthropologist 3 - name deleted]'s report is titled *Report to the Gumala Aboriginal Corporation on Elements of Native Title Interests in the Vicinity of Hammersley Iron's Yandicoogina Project*. Yandicoogina is only about 40 kilometres west of the claim area and is well within the broader region of Nyiyaparli country identified by the applicant. [Anthropologist 3 - name deleted]'s report indicates that, in his opinion, three (3) Western Desert groups, including the Nyiyaparli, had been in occupation of the region around the Yandicoogina project area since before the arrival of European settlement. His report concludes that since then the groups have continued to

recognise the various associations that they and their members have with the various parts of the region under the law and custom of their predecessors—submission of [Solicitor 2 – name deleted] at [20]/[Anthropologist 3 - name deleted] report at 12 and 45. In my view, the report therefore further supports the proposition that, at the time of European settlement, and in the period since then, the region surrounding the claim area was occupied by members of the Western Desert society.

I note that the information provided by the applicant does not explicitly identify an approximate date of European settlement in the region around the claim area, although [Anthropologist 3 - name deleted] expressly refers to 'the period prior to European settlement' while [Anthropologist 2 - name deleted] describes the process of settlement in the region. From [Anthropologist 2 - name deleted]'s reference to settlements only having been on the fringes of Nyiyaparli country prior to 1907, I can infer, in my view, that settlement is unlikely to have occurred on any significant scale in the region before the mid-to-late-1800s at the earliest—see Attachment F at [7]/[Anthropologist 2 - name deleted] manuscript at 63.

With this in mind, the information contained in [Anthropologist 1 – name deleted]'s affidavit provides further, and strong, support for the proposition that at the time of European settlement the region occupied by the Nyiyaparli people included the area now covered by the Roy Hill pastoral lease. At paragraph [6] of his affidavit, [Anthropologist 1 – name deleted] comments that there are 'several traditional Nyiyaparli names for areas around Roy Hill Station'. He then identifies two (2) such areas within the station boundary as being registered sites with the Western Australian Department of Indigenous Affairs. One site, which appears to relate to [location deleted], is classified as 'Repository/cache, artefacts/scatter' and the other, which seems to relate to [location deleted], as 'Ceremonial, mythological'.

[Anthropologist 1 – name deleted] states that, in 1966, the linguist/anthropologist [Anthropologist 4 – name deleted] recorded the traditional stories related to each of these sites from [Person 24 – name deleted], [Ancestor 1 – name deleted]'s half-brother. [Person 24 – name deleted], I note, was born c. 1899 and is said by [Anthropologist 1 – name deleted] to have been an initiated Nyiyaparli law man and a holder of rights in Nyiyaparli country—at [2]. In his submission, the applicant's representative clarifies that [Person 24 – name deleted], as well as [Ancestor 1 – name deleted]'s other half-brother, are understood to have also held rights in the Roy Hill area during their lifetimes. Unlike [Ancestor 1 – name deleted], however, they are said to have no living descendants who can claim an unbroken chain of filiation to the rights holders—at [24].

Having considered [Anthropologist 1 – name deleted]'s affidavits, it is reasonable to infer, in my view, that the sites discussed by [Person 24 – name deleted] were significant to his Nyiyaparli predecessors and, therefore, that those predecessors were also associated with the application area. Given the approximate period of European settlement identified above, and the more general information in the work of [Anthropologist 2 - name deleted] and [Anthropologist 3 – name deleted], it is also reasonable, in my opinion, to infer from there that the association had been maintained since sovereignty. For the reasons discussed earlier, it is sufficient that this information supports the Nyiyaparli language group's association with the claim area, although the ownership rights that [Person 24 – name deleted] is said to have held specifically in Roy Hill may indicate that he was also identified as a member of the Wunna Nyiyaparli subgroup.

I note that I have obtained the birth date of [Person 24 – name deleted] from the 2005 report by [Anthropologist 1 – name deleted], which was submitted to the Registrar by YMAC. In my view, it is appropriate for me to give weight to information contained in that report where it does not contradict the factual basis material provided on behalf of the applicant, and where it aids in the understanding of that information. In this regard, I note that the submission of [Solicitor 2 – name deleted] argues only that, in the light of [Anthropologist 1 – name deleted]'s affidavit, I should not draw the negative inferences which YMAC suggests I should draw from the report—submission of [Solicitor 2 – name deleted] at [42].

Association of the claim group's predecessors following the birth of [Ancestor 1 – name deleted]

For the period following [Ancestor 1 – name deleted]'s birth, the applicant's factual material focuses on [Ancestor 1 – name deleted]'s own association with the claim area. The information is principally contained in the affidavits of [Person 20 – name deleted] and claim group members. As with [Anthropologist 1 – name deleted]'s 2005 report, I have given some weight at this point to information contained in the 1978 interview of [Ancestor 1 – name deleted] submitted by YMAC. Specifically, I note that, in the interview, [Ancestor 1 – name deleted] states that he worked on Roy Hill station from a young age and that the station covered '[o]ver a million acres'—at 27. That converts to about 4,000 square kilometres, the approximate size of the current claim area. I have therefore inferred that, although the area is reasonably large, references to 'Roy Hill' or 'Roy Hill station' in the affidavits mentioned below are references to that entire area. In this regard, I also note the comment in [Solicitor 2 – name deleted]'s submission that '"Roy Hill" is used in the application and in claimant affidavits as a colloquial description of Roy Hill [itself] and the surrounding area which is their traditional country'—at [11].

It will be noted that this information from the interview is not inconsistent with the factual basis material provided by the applicant. Nor is it inconsistent with the position taken by the applicant's representative in response to YMAC's submissions, which is simply that I should not give weight to the particular 'admissions' of [Ancestor 1 – name deleted] highlighted by YMAC—submission of [Solicitor 2 – name deleted] at [41]. These relate to the home country of [Ancestor 1 – name deleted] parents and to the level of [Ancestor 1 – name deleted] interest in Nyiyaparli, or Western Desert, law and custom.

Attachment F states that [Ancestor 1 – name deleted] moved away from the claim area at the age of 18, eventually settling at Marble Bar where he stayed until his death in 1984. Marble Bar is approximately 130 kilometres north of the application area. The affidavit material submitted on the applicant's behalf offers a basis to support [Ancestor 1 – name deleted] continued association with the application area over the period following his relocation. For instance, the affidavits contain the following information:

- [Person 20 – name deleted] (b. 1929) states that it was always understood that [Ancestor 1 – name deleted] was a Nyiyaparli man from Roy Hill. The significance of the phrase 'from Roy Hill' is explained as follows:

> When I describe him as being '*from Roy Hill*', I mean to indicate that this was his traditional country, as opposed to merely indicating that he was born there. I describe myself as being '*from Nullagine*', even though I was born at Roy Hill, because I identify Nullagine as being my own traditional country—at [2] (emphasis in original).

I infer from this, and from the affidavit material outlined below, that [Ancestor 1 – name deleted], and others, considered Roy Hill his traditional country for the entirety of his lifetime.

- [Claim group member 6 – name deleted] (b. 1960), [Ancestor 1 – name deleted]'s grandson, states that he grew up near his grandfather just outside of Marble Bar. [Claim group member 6 – name deleted] then deposes that:

> From as young as I can remember up to the age of ten, he would take me out to Roy Hill; we would hunt and camp there. When we were at Roy Hill, he would indicate the country all around and say 'This is all our country!'—at [3].

- [Applicant 1 – name deleted], another of [Ancestor 1 – name deleted]'s grandsons, describes his father taking him to Marble Bar to visit his grandfather, and then down through the Roy Hill area to show the children their country—at [3]. This indicates, in my view, that [Ancestor 1 – name deleted] passed on knowledge regarding his association with Roy Hill both to his son, [Ancestor 3 – name deleted], and also to his grandson. While [Applicant 1 – name deleted] does not identify his birth date, I note that he does state that his father was born in 1933. By my estimation, [Applicant 1 – name deleted] was therefore likely born in the 1950s or 60s.

In my view, this kind of information provides a sufficient factual basis to support the assertion that the claim group's predecessors maintained an association with the application area up until the beginning of the claim group's own association. In addition, I refer again to the comment of [Anthropologist 1 – name deleted] that in 1966 [Ancestor 1 – name deleted]'s half-brother could still describe traditional stories regarding Roy Hill to the anthropologist/linguist [Anthropologist 4 - name deleted]. This provides further support for the assertion.

Decision regarding the first limb of the s. 190B(5)(a) assertion

For the reasons set out above, I am satisfied that there is a sufficient factual basis to support the first limb of the assertion described in s. 190B(5)(a); namely, that the claim group's predecessors have been associated with the application area over the period since sovereignty.

Second limb of s. 190B(5)(a)—that the claim group is associated with the claim area

Paragraph [20] of Attachment F states, in a reasonably general way, that members of the claim group 'have visited, camped, passed on stories relating to rights in country, attended Nyiyaparli meetings and engaged in activities to protect sites of significance within the claim area'. Further, it is said that '[c]laim group member [Claim group member 8 – name deleted] presently lives and works within the application area ... [and has] also participated in heritage work on Roy Hill'. The general description of activities undertaken by claim group members is reflected in Schedule G.

The relatively general information contained in the Form 1 is supported with further detail in the affidavits of claim group members. By way of example, those affidavits include the following information:

- As noted above, [Claim group member 6 – name deleted] describes being taken to the Roy Hill area by his grandfather, [Ancestor 1 – name deleted], to hunt and camp. He also indicates that this involved learning about his association with that country as Nyiyaparli person descended from [Ancestor 1 – name deleted]. With respect to his more recent

association with the area, [Claim group member 6 – name deleted] states that, upon moving to Port Hedland from the Northern Territory in 2006, he began working for the [name of organisation deleted]. According to [Claim group member 6 – name deleted], this work has helped him to maintain his association with the claim area:

> After giving me some induction work, [name of organisation deleted] started sending me out to do cultural heritage work; I did that work through until December 2011. I would go out for periods ranging from five to fourteen days. I was frequently sent to Roy Hill. When I went to Roy Hill, I felt at home. I recognised places that I had been with my grandfather as a child—at [6].

- Also as mentioned above, [Applicant 1 – name deleted] describes travelling to Roy Hill to learn about country when he was young. On these trips, he camped within the claim area, was told stories about country and 'shown ... places at Roy Hill where his father was raised'. According to [Applicant 1 – name deleted], he still travels to Roy Hill to go hunting and to teach his sons in the same way he was taught. [Applicant 1 – name deleted] also talks about being taught by his father to always describe himself as 'Wunnagnuthagnuthada', which would identify him as being a Nyiyaparli person who held rights to speak for the Roy Hill area—at [3] to [6].
- In their respective affidavits of 19 March 2012 and 27 January 2012, [Applicant 2 – name deleted] (b. 1941), a daughter of [Ancestor 1 – name deleted], and [Applicant 3 – name deleted] (b. c. 1956), a granddaughter, also recall how they were taught by older people in their family about their association with Roy Hill, and were told to identify themselves as 'Wunnagnuthagnuthada'. Wunnagnuthagnuthada, [Applicant 2 – name deleted] notes, is a hill in 'the vicinity of Roy Hill'. It is also the full version of the abbreviation 'Wunna', which is used to identify those Nyiyaparli people who are said to hold the right to speak for Roy Hill—at [7].

In my view, it is reasonable to infer that this affidavit material speaks to the relationship that claim group members have generally with the claim area. The affidavit of [Claim group member 3 – name deleted] (b. 1946) offers particular support for this inference. According to [Claim group member 3 – name deleted]:

> As the youngest living member of the senior generation of the native title claim group for this application, I am in regular contact with all branches of the family. On the basis of what I have learned through this regular contact, I am able to say that all members of the claim group identify as Wunna Nyiyaparli whose traditional country is Roy Hill, and that most members have (or have previously had) a physical connection with that country, whereby they visit, camp, hunt on that country. They do so (or have previously done so) in accordance with the law under which they claim it as their country, by virtue of their descent from my father [[Ancestor 1 – name deleted]]. As recently as five years ago, I went hunting for kangaroos at Roy Hill, together with one of my granddaughters, [Claim group member 9 – name deleted]—at [5].

I note that the material before me does not contain an especially great amount of detail in relation to the exact locations within the claim area where claim group members undertake their various activities. This may have made it somewhat difficult to be satisfied, on the information before me, that there was a sufficient factual basis to support a purely physical association with the broader claim area. However, in my view, it is clear from the material that a sense of spiritual or cultural association with Roy Hill has also been passed down to the claim group. [Ancestor 1 – name deleted]'s 1978 comment regarding the total size of Roy Hill station shows, in my opinion, that

this spiritual or cultural sense of association encompasses the entirety of the country covered by the claim. As a result, I am satisfied on the basis of the above information that the claim group, as a whole, has at least a spiritual or cultural association with the broader claim area, if not also a physical association.

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

For the reasons given above, I am satisfied that there is a sufficient factual basis to support the assertion that the claim group have, and their predecessors had, an association with the application area.

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

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

The requirements of s. 190B(5)(b)

Section 190B(5)(b) requires that there is a factual basis which is sufficient to support the assertion that there exist traditional laws acknowledged, and traditional customs observed, by the claim group that give rise to the claim to native title rights and interests. The wording of s. 190B(5)(b) is, I note, almost identical to that of paragraph (a) of the definition of 'native title rights and interests' found in s. 223(1). As the approach of Dowsett J in *Gudjala 2007* demonstrates, it is necessary to apply s. 190B(5)(b) in light of the case law regarding s. 223(1)(a). In this respect, the High Court's decision in *Yorta Yorta*, and it's discussion of the meaning of the word 'traditional', is of particular importance—see *Gudjala 2007* at [26] and [62] to [66].

According to the High Court's decision in *Yorta Yorta*, a law or custom is 'traditional' where:

- it 'is one which has been passed from generation to generation of a society, usually by word of mouth and common practice'—at [46];
- the origins of the content of the law or custom concerned can be found in the normative rules of a society which existed before the assertion of sovereignty by the Crown—at [46];
- the normative system has had a 'continuous existence and vitality since sovereignty'—at [47]; and
- the relevant society's descendents have acknowledged the laws and observed the customs since sovereignty and without substantial interruption—at [87].

As noted earlier, the term 'society' in this context is 'understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs'—*Yorta Yorta* at [49].

In my view, I must therefore be satisfied that there is a sufficient factual basis:

- to identify the society that existed before, or at the time of, sovereignty and from which the claim group is descended;
- to support the assertion that the laws acknowledged and customs observed by the claim group derive from the society's normative system; and

- to support the assertion that those laws and customs have been acknowledged and observed without substantial interruption since sovereignty, having been passed down through the generations to the claim group.

In addition, the factual basis must show how the traditional laws and customs of the group give rise to the claimed native title rights and interests—*Gudjala 2007* at [39]. This, however, need only be in a general sense because the assessment of whether the factual material is sufficient to support each of the specific rights or interests claimed is the task undertaken at s. 190B(6)—*Doepel* at [126] to [127].

The factual material supporting the assertion described by s. 190B(5)(b)

Some of the material which supports the s. 190B(5)(b) assertion has already been discussed in relation to s. 190B(5)(a). In particular, I note that:

- The Court has recognised the Western Desert cultural bloc as comprising a society in the sense described in *Yorta Yorta*—see, for example, *De Rose (Full Court)* at [236]; *Jango v Northern Territory* [2006] FCA 318 at [352]; *Lennon v South Australia* [2011] FCA 474 at [19].
- [Anthropologist 2 - name deleted]'s 1966 manuscript describes the 'Jigalong people', who included the Nyiyaparli, as forming part of the larger Western Desert society—see Attachment F at [3]/[Anthropologist 2 - name deleted] manuscript at 163.
- [Anthropologist 2 - name deleted] states in his manuscript that the 'Jigalong people' had continued to 'maintain close spiritual ties with their original "home" countries' through to the 1960s by handing down their 'mythology and ritual'—Attachment F at [5]/[Anthropologist 2 - name deleted] manuscript at 215.

[Anthropologist 2 - name deleted]'s manuscript, the claim group affidavits and [Anthropologist 3 - name deleted]'s 1997 report also offer further support for the assertion described by s. 190B(5)(b). I refer first to [Anthropologist 2 - name deleted]'s manuscript and [Anthropologist 3 - name deleted]'s report. The passages extracted from [Anthropologist 2 - name deleted]'s manuscript in Attachment F make clear his view that the 'Jigalong people' in the 1960s were continuing to acknowledge and observe the body of law and custom that existed before European settlement in the area. In addition to the above-mentioned passage regarding the continued spiritual association with their home countries, [Anthropologist 2 - name deleted] writes:

> [This] study shows that Aborigines tend selectively to accept certain alien material goals which are not perceived as threatening their Law, while rejecting alien non-material elements disconsonant with their own. ... Through the operation of their Law, Jigalong Aborigines maintain their in-group solidarity, cultural identity and some degree of political autonomy, despite alien control and domination—Attachment F at [5]/[Anthropologist 2 - name deleted] manuscript at 2 of Abstract.

The passages of [Anthropologist 2 - name deleted]'s manuscript quoted at paragraph [5] of Attachment F then go on to make the following points:

- 'There is little evidence to suggest that migration to [Jigalong Mission] has weakened traditional kinship structure'—[Anthropologist 2 - name deleted] manuscript at 128.
- Until about the mid-1950s, Aboriginal employees on stations in, and around the fringes of, the Western Desert 'lived in bush camps, hunted in their spare time, and maintained a minimum of contact with their employers outside the work situation'. Graziers would

also generally not 'try to interfere with or alter traditional culture as long as "their" Aborigines worked as directed'—[Anthropologist 2 - name deleted] manuscript at 61 to 62.

- Traditional law continued to play a major role in the lives of men, who would, for example, hold 'many meetings, large and small, formal and informal, in or near the camp (or in "men's country" where only they can go) at any hour of the day or night, on a wide variety of topics concerning the Law'. Women and children would participate in many of the ceremonies organised by the men—[Anthropologist 2 - name deleted] manuscript at 150.
- The various 'Law centres' in the area continued to meet at least once a year to hand on song lines and perform the associated rituals. This included travelling along the 'fairly well-defined route' discussed above in relation to s. 190B(5)(a)—[Anthropologist 2 - name deleted] manuscript at 164 and 169.

While [Anthropologist 2 - name deleted]'s manuscript supports the proposition that the wider Nyiyaparli community was continuing, in the early 1960s, to acknowledge and observe the same body of Western Desert law and custom that existed prior to European settlement, [Anthropologist 3 - name deleted]'s report gives an indication of the traditional law and custom governing rights in land. In the passages extracted at paragraph [20] of [Solicitor 2 – name deleted]'s submission, [Anthropologist 3 - name deleted] says of the 'Aboriginal tradition' of the Nyiyaparli (and other Western Desert groups in the Yandicoogina area):

> Due to the harsh nature of the environment in the Project Area the practical realities meant that [prior to European settlement] a given group of Aboriginal people needed the *exclusive* rights to hunt and gather *over a relatively large area of land* in order to ensure that they will have reasonable prospects of obtaining sufficient food and other resources to survive. Aboriginal tradition in the area recognises a group of people as having the rights to make use of an area to the exclusion of others.
>
> Under Aboriginal tradition one group of people may be recognised as having exclusive ownership rights over a particular area of land. It must be recognised that, in the context of the broader social structure, those owners would typically be expected to grant permission to kinsm[e]n within certain categories to come into and utilise the land for various purposes. *A close kinsman whose rights to utilise land depend upon obtaining permission from those with ownership rights is not, under Aboriginal tradition, regarded as an owner of the land*—[Anthropologist 3 - name deleted] report at 12 (emphasis added).

This explanation of Western Desert law and custom is, in my view, entirely consistent with the applicant's assertion that the claim group ultimately holds the right to speak for Roy Hill and to exclude members of the wider Nyiyaparli people from the application area. In addition to this, the applicant's representative also cites the following comments of [Anthropologist 3 - name deleted], in which he appears to confirm that Western Desert law and custom recognises local subgroups as holding exclusive rights in land:

> At a formal level Inawongga, Bandjima and Nyiabali [Nyiyaparli] people recognise that individuals have rights of ownership of defined tracts of land. They discuss land ownership in terms of areas which are owned by language groups. *Language groups are, in turn, made up of local groups which are also said to own definable areas of land*—[Anthropologist 3 - name deleted] report at 45 (emphasis added by applicant's representative).

As noted above, the Nyiyaparli people are described in the material before me as a language group—see Attachment F at [22].

Also as discussed earlier, Attachment F states that the local Nyiyaparli subgroup with ownership rights over the Roy Hill area is comprised of those persons who have an unbroken chain of filiation to [Ancestor 1 – name deleted]. [Solicitor 2 – name deleted]'s submission makes clear the applicant's position that [Ancestor 1 – name deleted]'s half-brothers, and possibly others, had rights in the Roy Hill area, but that none of the living descendants of those persons have an unbroken chain of filiation to those persons—at [24]. I first address the material relating to the 'traditional' nature of the rule of filiation before turning to the information which supports the recognition of the claim group as holding the claimed rights and interests in the Roy Hill area.

The concept of 'filiation' is discussed, in a general sense, in [Solicitor 2 – name deleted]'s affidavit of 20 March 2012, where he describes how the concept was explained to him by anthropologist [Anthropologist 5 – name deleted]. [Solicitor 2 – name deleted] comments that he has found the concept:

> ... very helpful in making sense of the instructions I was being given by members of the claim group for this application, regarding the self-identification of descendants of [Ancestor 1 – name deleted] and other people with Nyiyaparli descent. Essentially, the thesis as advanced by [Anthropologist 5 – name deleted] and others is that the inheritance of rights in country under Aboriginal law and custom in Australia is determined not by the mere fact of biological descent from an ancestor who held those rights, but by positive identification with a parent who holds or held those rights—at [2].

Paragraph [4] of Attachment F asserts that, at the time of European contact, members of the Western Desert society held rights in land through filiation to a parent known to have held those rights. More important in my view, however, is that a number of the claim group members emphasise the fact that either they, or the other members of the claim group, positively identify themselves as 'Wunna Nyiyaparli' or as 'Wunnagnuthagnuthada'—see, for example, the affidavit of [Claim group member 3 – name deleted] at [5]; [Claim group member 6 – name deleted] at [1]. They also depose that they were taught of the need to identify themselves as such in order to assert their rights to speak for Roy Hill—see, for example, the affidavit of [Applicant 3 – name deleted] (affirmed on 17 January 2012) at [1]. The following passage from [Claim group member 3 – name deleted]'s affidavit strongly indicates in my view that Western Desert law and custom is understood as allowing, or perhaps requiring, its members to positively choose their line of filiation:

> I am aware that my paternal grandmother [Ancestor 2 – name deleted] was a Karriyara woman. However, to the best of my knowledge and belief, my father never identified himself as Karriyara. He never spoke any Aboriginal language other than Nyiyaparli. I have never identified as Karriyara. To the best of my knowledge and belief, no other member of the native title claim group for this application has ever identified as Karriyara. We identify as Wunna Nyiyaparli—at [3].

In relation to whether local subgroups of the Nyiyaparli language group hold exclusive rights in specific tracts of land, Attachment F quotes Nyiyaparli Elder [Person 19 – name deleted] to the effect that individual Nyiyaparli people can only speak for their own land, and not for anyone else's—at [15].[6] As to the proposition that the claim group is the group that holds exclusive rights

[6] Quote from *Warri Nyiyaparli Connection Report* (DVD produced by Canvas Productions, 2007).

in the claim area, support is found primarily in the affidavits provided on behalf of the applicant. Principally, these contain the following pieces of information, which have been discussed above:

- [Person 20 – name deleted] deposes in his affidavit of 12 December 2011 that, in his understanding, it has always been acknowledged by Njamal and Nyiyaparli people (both of which are said to be part of the Western Desert cultural bloc) that the 'traditional country' of [Ancestor 1 – name deleted] and his descendants was Roy Hill.
- [Claim group member 6 – name deleted] states that [Ancestor 1 – name deleted], his grandfather, would take him out to Roy Hill to hunt and camp, and that 'he would indicate the country all around, and say "This is all our country!"'—at [3].
- [Applicant 3 – name deleted] and [Applicant 2 – name deleted], and [Applicant 1 – name deleted], each describe being taught that as Wunnagnuthagnuthada or Wunna Nyiyaparli, Roy Hill was their traditional country. [Applicant 1 – name deleted] makes plain in his affidavit that this meant that they held the right to speak for Roy Hill—at [1].

In addition to the above, [Solicitor 2 – name deleted]'s affidavit of 7 February 2012 and the fax of 19 March 2012 received from (and signed by) [Applicant 1 – name deleted] also contain statements from [Applicant 1 – name deleted] to the effect that it is widely recognised by Western Desert people in the region that only Wunna Nyiyaparli people can claim the right to speak for the claim area—affidavit of [Solicitor 2 – name deleted] at [10]; fax of [Applicant 1 – name deleted] at 1.

Also relevant to the s. 190B(5)(b) assertion is information provided by the applicant which speaks to the general knowledge of Western Desert law and custom of the claim group and their predecessors. In this regard, Attachment F states that [Ancestor 1 – name deleted] 'was an initiated member of the Western Desert society'. Although his 1945 exemption from the *Native Administration Act 1905-1941* (WA) was conditional upon his withdrawal from the Aboriginal community, it is said that 'he continued to meet surreptitiously with other members of the Western Desert society to discuss Law business (he was observed doing so on one occasion by his grandson [Person 25 – name deleted] ... late at night, in the early 1970s)'—at [14]. Paragraph [21] of Attachment F further mentions that seven (7) members of the claim group have been initiated under the laws and customs of the Western Desert, including [Applicant 1 – name deleted] In his affidavit, [Applicant 1 – name deleted] notes that his son has also 'gone through the law'—at [5].

[Applicant 1 – name deleted] and other claim group members also recall generally learning about and practicing Nyiyaparli, or Western Desert, law and custom. [Applicant 1 – name deleted], for example, says that when his father would take him to Roy Hill he would tell stories about the 'Night time people' and light a fire at night 'so that when any of the old spirits from the area came close, they could see us, and know who we were'. He also talks about how his father taught him to hunt at Roy Hill 'according to Nyiyaparli ways' and says that he has taken his son hunting in the area to teach him how to hunt and so that he would 'know his traditional country, so that he could speak for it'—at [5]. In relation to the continued acknowledgement and observance of law and custom regarding hunting by the wider community, [Applicant 1 – name deleted] states that '[t]hrough my dealings with members of the wider Western Desert people, I am aware that these hunting practices continue to be transmitted from generation to generation of the wider Western Desert people'—at [6].

By way of further example, [Applicant 3 – name deleted]'s affidavit of 17 January 2012 contains the following:

> Since I was approximately 12 years old, my father, [Ancestor 3 – name deleted], taught me the oral history of the Nyiyaparli people in general, and of our family in particular. He would explain to me how each person was related. As young adults, my siblings and I would ask about the younger people and he would explain to us who they were and how they were related to us.
>
> ...
>
> I grew up with a Nyiyaparli father and Nyiyaparli aunties and uncles. My Nyiyaparli father (as well as my non-Nyiyaparli mother) taught me who I am, where I come from and who my people are and about other elders. I grew up with our father and mother who instilled not only the laws of deep respect for our elders, our father showed respect for the land and the laws of our people and some of the customs which females can be taught. We couldn't look into the eyes of our traditional elders when speaking to them, and women had their womens' [*sic*] business and men practiced and carried the law. We watched our father practice certain customs, when we were with him and other extended family members, and when we would go places with him. Our father observed the law and practiced the customs.
>
> The customs which can be taught to Nyiyaparli women to which I refer ... above include ways of cooking, ways of dancing and caring for young men at lore ceremonies after they have been initiated.
>
> I have taught the laws and customs referred to above to my daughters and granddaughters. Through my dealings with members of the wider Nyiyaparli people, I am aware that these laws and customs continue to be transmitted from generation to generation of the wider Nyiyaparli people—at [4] and [6] to [8].

Consideration of the material supporting the s. 190B(5)(b) assertion

I refer to the passage above where I said that, for the purposes of s. 190B(5)(b), an applicant's factual basis material must be sufficient to:

- identify the relevant pre-sovereignty society;
- support the assertion that the laws acknowledged and customs observed by the claim group derive from that society's normative system;
- support the assertion that those laws and customs have been passed down through the generations, without substantial interruption, to the claim group; and
- explain how the traditional laws and customs of the group give rise to the claimed native title rights and interests.

The relevant pre-sovereignty society is clearly identified at the Western Desert cultural bloc. Some of the Court decisions that have recognised the Western Desert as a society which has existed since sovereignty are cited above.

In *Gudjala 2009*, Dowsett J held that, where membership of a society is said to arise via descent from apical ancestors, the information must support an association between those persons and the society. Later in his reasons, his Honour clarified that this connection could be either through being 'born into a society which had existed prior to [European settlement]' or by 'subsequently [becoming] members of such a society in accordance with its laws and customs'—at [40] and [55].

In my view, these comments apply equally in a case such as the present, where membership of the relevant society is said to arise through an unbroken filial link to an ancestor.

As mentioned in my reasons regarding s. 190B(5)(a), there is in my view a sufficient factual basis to support the proposition that the Nyiyaparli people form part of the Western Desert society. The applicant identifies two (2) ways in which [Ancestor 1 – name deleted] may have become a member of the Nyiyaparli language group of the Western Desert society: either through his paternal grandmother or via incorporation under the traditional law and custom of the Western Desert. The applicant's representative has provided material which supports both of those alternatives. As noted earlier in these reasons, however, I do not, in my opinion, need to form a view as to the route by which [Ancestor 1 – name deleted] acquired his identity as a Nyiyaparli person. For the reasons given in relation s. 190B(5)(a), I am satisfied that there is a sufficient factual basis to support an assertion that [Ancestor 1 – name deleted] was accepted as a Nyiyaparli person pursuant to the traditional law and custom of the Western Desert cultural bloc.

I am also satisfied that the there is a sufficient factual basis to support the assertion that the traditional laws and customs of the Western Desert recognise the claimed rights and interests in the claim area of the Wunna Nyiyaparli people. This has particular support, in my view, when the extracted passages of [Anthropologist 2 - name deleted]'s manuscript in Attachment F are read together with the affidavits of claim group members and of [Person 20 – name deleted]. The affidavits from claim group members include statements to the effect that the deponents have been taught by [Ancestor 1 – name deleted] or his children that, under Western Desert law and custom, they have the right to speak for the Roy Hill area. [Person 20 – name deleted], who was born in 1929, deposes that the traditional country of [Ancestor 1 – name deleted] has been recognised as Roy Hill. In his 1966 manuscript, [Anthropologist 2 - name deleted] records his opinion that, at that time, the 'Jigalong people' were continuing to acknowledge and observe a body of law and custom that was essentially unchanged since European settlement.

In light of [Anthropologist 2 - name deleted]'s conclusions, I am of the view that it is reasonable to infer that the law and custom passed down by [Ancestor 1 – name deleted] (and his children), and touched upon by [Person 20 – name deleted], reflects law and custom that was acknowledged and observed by Western Desert people at sovereignty. In my opinion, this inference is further supported by the extracts from [Anthropologist 3 - name deleted]'s report, which express his expert opinion that the Nyiyaparli (and their Western Desert neighbours) continue to recognise land holding rights based on laws and customs that existed prior to European settlement. Moreover, this system of rights appears to be entirely consistent with the other factual basis material supplied by the applicant. In addition, the inference has support, in my view, from the affidavits of claim group members in which they depose to being taught, and to passing on, other Western Desert laws and customs not related to land holding. In my opinion, this reinforces the idea that the claimed rights and interests derive from a body of law and custom that existed at sovereignty and which continues to be acknowledged and observed.

For the reasons set out above, I am satisfied that there is a sufficient factual basis to support the assertion described by s. 190B(5)(b).

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

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

Section 190B(5)(c) requires that the factual basis is sufficient to support the assertion that the native title claim group have continued to hold the native title in accordance with the traditional laws and customs referred to in paragraph (b) of s. 190B(5). In my opinion, this assertion reflects the continuity requirement contained in the *Yorta Yorta* definition of 'traditional' laws and customs. This requires continuity of the 'tenure' held under the relevant law and custom 'going back to sovereignty, or at least European occupation'—*Gudjala 2007* at [82].

With respect to this requirement, Dowsett J said in *Gudjala 2009* that information which supports the existence of 'a [pre-sovereignty] society and acknowledgement of its laws and customs shortly after first European contact, and continuity thereafter, may satisfy [the requirement] ... directly'—at [33]. Where there is a slight gap between European occupation and the period covered by the available material, his Honour's approach, in my view, leaves open the possibility that continuity over that time may be inferred where there is sufficient support from the information regarding the post-settlement history—see [30] and [33].

As mentioned above, my view is that the information before me indicates that any significant European settlement likely began in the region around the claim area some time after sovereignty, probably in the mid-to-late-1800s. I note that the affidavit material provided on the applicant's behalf speaks only to laws and customs that have been passed down by [Ancestor 1 – name deleted], who was born c. 1903, and by his children. However, as explained in my reasons at s. 190B(5)(b), I am satisfied that when this material is read together with the 1966 findings of [Anthropologist 2 - name deleted], in particular, it invites the inference that these laws and customs were rooted in those of the Western Desert society as it existed prior to European settlement. In my opinion, this in turn supports the inference that they had been acknowledged and observed since sovereignty. As to the continued acknowledgement and observance of those laws and customs since the birth of [Ancestor 1 – name deleted], see the information from the affidavits of claim group members discussed above.

I am satisfied that there is a sufficient factual basis to support the assertion described in s. 190B(5)(c)

Combined result for s. 190B(5)

The application meets the condition of s. 190B(5).

Subsection 190B(6)
Prima facie case

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

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

The submissions of YMAC and the nature of the s. 190B(6) assessment

YMAC reiterates the requirements of s. 190B(6) at paragraph [14] of its submission and notes that, as with s. 190B(7), some evidence is required to support the claimed rights and interests. The following paragraphs then argue that the information provided in the Wunna Nyiyaparli People application is insufficient to support the assertions detailed in s. 190B(5). I infer that, in YMAC's submission, a failure to provide information which satisfies the condition of s. 190B(5) will lead an application to also fail at s. 190B(6).

YMAC also points to information which is said to contradict or undermine the case presented by the applicant. The documents relied upon in this regard are set out at the beginning of my reasons in relation to s. 190B(5). Primarily, it is argued that the material contradicts 'the allegations of [Ancestor 1 – name deleted] having any traditional status [as a Nyiyaparli person] or exclusive rights to speak for any area or that he had been initiated'—at [21]. Also referred to are:

- statements from members of the applicant for the wider Nyiyaparli claim, which dispute [Applicant 1 – name deleted]'s initiation under Western Desert law and custom; and
- previous affidavits from members of the Wunna Nyiyaparli People applicant, which are said to be inconsistent with the claim currently advanced due to their silence 'with respect to any ongoing connection to, or an exercise of rights on, the Roy Hill Station area by [Ancestor 1 – name deleted] after he left Roy Hill Station at the age of 18 years, or by his descendants'—at [25].

In relation to YMAC's submission regarding the supposed gaps in the factual basis material in the Wunna Nyiyaparli People application, I refer to my reasons regarding s. 190B(5) and to my conclusion that, when read with the applicant's additional information, the application meets the requirements of s. 190B(5).

With respect to the apparently adverse information provided by YMAC, I note that, unlike s. 190B(5), s. 190B(6) does require some 'weighing' of the factual assertions made by the applicant and that it 'may also require consideration of controverting evidence'—*Doepel* at [127]. Having said that, however, I am also mindful that s. 190B(6) requires only that the claimed rights and interests can be established 'prima facie'.

In *Doepel*, Mansfield J addressed the meaning of the term 'prima facie' with reference to the High Court's decision in *North Ganalanja Aboriginal Corporation v The State of Queensland* [1996] HCA 2 (*Ganalanja*). Although the case was decided under the registration regime in place before the 1998 amendments to the Act, his Honour's view was that there was 'no reason to consider the ordinary usage of "prima facie" there adopted is no longer appropriate'—at [134]. In *Ganalanja*, the High Court described the ordinary meaning of 'prima facie' as: 'At first sight; on the face of it; as appears at first sight without further investigation'—Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ at [22]. Following the reasons of McHugh J in *Ganalanja*, Mansfield J went on to clarify that 'if on its face a claim is arguable, *whether involving disputed questions of fact or disputed questions of law*, it should be accepted on a prima facie basis'—at [135] (emphasis added).

It is clear from Mansfield J's decision that in order for claimed rights and interest to be established, prima facie, the claim merely needs to be arguable. My view, therefore, is that 'controverting' material provided by a third party is only likely to prevent an otherwise arguable

claim from meeting the necessary standard if it consists of uncontroversial evidence which clearly establishes that the claim cannot be made out. I expect this could potentially be the case where, for example, the relevant state or territory government provides clear evidence of extinguishment and there is no information which suggests that ss. 47, 47A or 47B might apply.

The present situation is different. While YMAC has provided material which *may* cast some doubt upon some elements of the factual basis information submitted by the applicant, the inferences that YMAC has asked me to draw from its material are unambiguously disputed by the evidence submitted by the applicant's representative. In these circumstances, it is clear from *Doepel* that the task of the Registrar or her delegate at s. 190B(6) is to determine whether, on the material provided by the applicant, it is arguable that some of the claimed rights and interests exist. The reasons set out below, therefore, focus on whether the evidence supplied on the applicant's behalf is sufficient to establish the claimed rights and interests, prima facie.

The native title rights and interests claimed

As with s. 190B(5)(b) and (c), the reference to 'native title rights and interests' in s. 190B(6) must be understood in light of the definition of that term in s. 223(1)—see *Gudjala 2007* at [85] to [87]. Therefore, I have considered whether, prima facie, the individual rights and interests claimed:

- are possessed under traditional laws acknowledged, and traditional customs observed, by the Western Desert society, of which the claim group is said to be a part;
- are rights and interests in relation to the land and waters of the claim area; and
- have not been extinguished over the whole of the claim area.

In relation to the second requirement, I note that, according to Kirby J, the question of whether the rights and interests claimed are 'in relation to' land and waters is 'the critical threshold question' for determining whether a native title right can be established under the Act—*Western Australia v Ward* [2002] HCA 28 (*Ward (High Court)*) at [577]. I have, therefore, examined the claimed native title rights and interests set out in Attachment E against that threshold requirement, while remembering that '[t]he words "in relation to" are words of wide import'—*Northern Territory v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [93]. Having done so, I am satisfied that each of the rights and interests claimed is, prima facie, in relation to the land and waters of the claim area.

The third condition set out above is that the rights and interests claimed are not extinguished, prima facie, over the whole of the claim area. There is no information before me which might indicate that the non-exclusive rights and interests listed at paragraphs (a), (c), (e), (g), (h) and (i) of Attachment E have been extinguished over the entire area. The position is not necessarily as clear in relation to the rights and interests claimed at paragraphs (b), (d), (f) and (j). These involve the right to exclude others from the claim area. In *Ward (High Court)*, the majority of the High Court held that a non-exclusive pastoral lease would extinguish rights involving the control of access—at [192] to [194].

The claim area uses the boundaries of the Roy Hill pastoral lease (PL I957440) to define its borders. However, the map at Attachment C also appears to show certain reserves within the claim area. I also do not have any detailed information before me regarding the tenure of the entire claim area. Nor do I have any information from which I could conclude that ss. 47, 47A and

47B do not apply. At the same time, the applicant appears, from Attachment E, to suggest that in the applicant's view the rights claimed at paragraphs (b), (d), (f) and (j) can be established, at least in relation to some parts of the claim area. On the basis of the information before me, I am satisfied that that is arguable.

Below, I consider whether the individual rights and interests claimed are, prima facie, possessed under traditional laws acknowledged, and traditional customs observed, by the claim group. I have, again, interpreted the term 'traditional' in the sense described in *Yorta Yorta* and set out in the earlier discussion regarding s. 190B(5)(b). In addition, I note that the following reasons should be read together with my conclusions, and the relevant material, set out in relation to s. 190B(5). I have grouped certain rights and interests together where I consider that they are supported by the same or similar factual information.

Subject to the above qualifications [set out at paragraphs (i) to (v) of Attachment E], the rights and interests claimed in relation to the claim area, including land and waters, are:

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

(d) the rights to control the access of others to the area;

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

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

In *Ward (High Court)*, the majority of the High Court held that:

> It is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others. The expression of these rights and interests in these terms reflects not only the content of a right to be asked permission about how and by whom country may be used, but also the common law's concern to identify property relationships between people and places or things as rights of control over access to, and exploitation of, the place or thing—at [88].

In my opinion, the rights listed at paragraphs (b), (d), (f) and (j) of Attachment E are of the same nature as the right to possess, occupy, use and enjoy the claim area to the exclusion of all others.

In Attachment F, Nyiyaparli Elder, [Person 19 – name deleted], is quoted as saying that under Western Desert/Nyiyaparli law and custom: 'You can only speak for your land; not for [anyone else's] land'—at [15]. The right of the claim group specifically to speak for the claim area is then, in my view, supported by the following:

- In his affidavit, [Applicant 1 – name deleted] deposes that his father 'told my sisters and me that we could use the name "Wunnagnuthagnuthada" to identify ourselves as Nyiyaparli from Roy Hill. *He taught us that we had the right to speak for Roy Hill*'—at [1] (emphasis added).
- [Claim group member 6 – name deleted] states in his affidavit that his grandfather, [Ancestor 1 – name deleted], would take him out to Roy Hill and tell him that the area was 'all *our* country!'—at [3] (emphasis added).
- In his affidavit of 12 December 2011, [Person 20 – name deleted] deposes that, as a Western Desert person from a neighbouring group, he has always known that the 'traditional country' of [Ancestor 1 – name deleted] was Roy Hill.

The proposition that the claim area belongs, ultimately, to the claim group is reflected further in a series of statements made by [Applicant 1 - name deleted] to the applicant's representative, [Solicitor 2 – name deleted]. These statements were made in response to the prospect of YMAC's objection, on behalf of the claimants for the wider Nyiyaparli claim, to the registration of the current application. The statements are reproduced in [Solicitor 2 – name deleted]'s affidavit of 7 February 2012 and include the following:

- 'The only (Nyiyaparli) people who can claim roy hill [*sic*] are the (Nyiyaparli) people from there! ... We are well in our rights to claim for roy hill without objections from other tribes. That is a fact! All black people know that!'
- 'None of the other (Nyiyaparli) people claim to have come from roy hill so they cant [*sic*] oppose (our claim to) roy hill. (Not) even (those) on the (overlapping Nyiyaparli) claim'.
- '(N)o-one can claim someone elses [*sic*] land. Coffin people are the only family that can claim roy hill. No other (Nyiyaparli) people can claim for roy hill so ymac cant object on their behalf either'—at [10] (words in rounded brackets inserted by [Solicitor 2 – name deleted]).

In my view, the right to manage, conserve and look after the land, waters and resources of the claim area necessarily flows from the right to speak for claim area, which is evidenced by the material discussed above. In this regard, I note the view expressed in [Anthropologist 3 - name deleted]'s 1997 report that local subgroups maintain the right to exclude other members of the wider language group from their tracts of country so that they may ensure that their land can provide the necessary resources for their survival—submission of [Solicitor 2 – name deleted] at [20]/[Anthropologist 3 - name deleted] report at 12 and 45.

The above information, in my opinion, readily invites the inference that the claim group has the right to speak for, and to make decisions about the use of, the claim area under the traditional law and custom of the Western Desert. It is, therefore, arguable that the rights listed at paragraphs (b), (d), (f) and (j) of Attachment E can be established.

Outcome: established, prima facie.

(a) the right to live within the area;

(c) the right of access to the area;

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

At paragraph [20] of Attachment F, it is said that [Claim group member 8 – name deleted] presently lives and works within the claim area, and that she does this in accordance with Western Desert law and custom. I note that the persons who jointly comprise the applicant affirm the truth of the information contained in the Form 1 and its attachments. In addition, I note that the extracts from [Anthropologist 2 - name deleted]'s manuscript describe the 'Jigalong people' living in 'bush camps' up until the mid-1900s, while the majority were said, as at the mid-1960s, to have spent at least part of their life living in the desert—at [4] to [5]. Especially in light of my above conclusion regarding the claim group's right to speak for the application area, it is reasonable, in my view, to infer from this information in Attachment F that Western Desert law and custom also recognises the claim group's right to live in the application area.

In my opinion, it would also be safe to assume that a right to live within the claim area would likely include the right to access the area and to use and enjoy its resources. However, the application and the material provided by the applicant's representative also offers explicit support for these rights. [Anthropologist 3 - name deleted]'s report, for instance, contains statements to the effect that the traditional laws and customs of the Western Desert recognise the right of local subgroups to hunt and gather across their area of land. Specifically with respect to the claim group's rights, I note that [Claim group member 6 – name deleted] deposes that [Ancestor 1 – name deleted] taught him 'how to hunt the traditional way', and that this involved spending time camping and hunting around Roy Hill—at [2] to [3]. The affidavits of [Applicant 1 – name deleted] and [Claim group member 3 – name deleted] also contain similar statements in relation to claim group members' right to camp and hunt within the claim area—affidavit of [Applicant 1 – name deleted] at [3] to [6]; [Claim group member 3 – name deleted] at [5].

On the basis of the information outlined above, it is in my view arguable that Western Desert law and custom recognises the claim group's right to live in and access the claim area, and to use and enjoy its resources. I note that I have inferred that the right to hunt animals within the claim area is discussed by [Claim group member 6 – name deleted] and [Applicant 1 – name deleted], and [Claim group member 3 – name deleted], as an example of a broader right to gather and use other natural resources found in the claim area. This inference is supported, in my view, both by [Anthropologist 3 - name deleted]'s report and by [Applicant 1 – name deleted]'s reference to Western Desert/Nyiyaparli laws 'pursuant to which we [are] entitled to hunt, *and use the resources of*, our own country'—at [5] (emphasis added).

Outcome: established, prima facie.

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

I note that [Solicitor 2 – name deleted]'s submission refers to paragraph 2(a) of the 11 June 2010 affidavit of [Applicant 4 – name deleted], submitted by YMAC, as being relevant to the current application—at [48]. The affidavit relates to the previous Wunna Nyiyaparli claim which was brought over the entire area of Nyiyaparli country. At paragraph 2(a), [Applicant 4 – name deleted] deposes that '[o]nly elders of the Nyiyaparli people may make a decision on sacred places or places of special importance in Nyiyaparli country'. In his submission, [Solicitor 2 – name deleted] states:

> The notion of senior men having responsibility for significant sites—often sites of regional significance—is a common one, which is not inconsistent with the assertions made in the application regarding the nature of rights held in the application area; this responsibility of senior men for significant sites within a local territory may be regarded as similar to an easement which might be attached to a freehold title—at [48].

This submission appears to be consistent with the material supporting the claim group's superior right to speak for, and make decision about, the claim area. It is, therefore, arguable in my view that the ultimate right to make decisions regarding the protection of significant sites in the Roy Hill area lies with either the claim group's elders or the claim group as a whole. (I note that [Applicant 4 – name deleted] refers to herself, in her affidavit, as an elder who has participated in decision-making processes regarding significant sites. I therefore infer that [Solicitor 2 – name deleted]'s discussion of senior men applies equally to senior women.)

In addition to this information, paragraph [20] of Attachment F asserts that claim group members are, in accordance with their laws and customs, engaged in 'activities to protect sites of significance within the claim area'. The existence of such sites is supported by the affidavit of [Anthropologist 1 – name deleted], where he deposes that there are two (2) sites in the Roy Hill station area which are registered with the Western Australian Department of Indigenous Affairs. The categorisation of these sites indicates that one contains Nyiyaparli or Western Desert artefacts, while the other has a ceremonial and mythological significance. The fact that positive steps have been taken to protect these sites, in my view, supports an argument that the laws and customs of the Western Desert recognise the right of its members to maintain and protect significant sites that lie within their country. In light of my above conclusion regarding the right of Wunna Nyiyaparli to speak for the claim area, I can infer, in my view, that the right to maintain and protect significant sites at Roy Hill lies with them.

Outcome: established, prima facie.

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

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

A right to learn about and to pass on knowledge concerning laws and customs that relate to the claim area are touched on in a number of the claim group member affidavits. Although parts of his affidavit have already been discussed and excerpted above, I reproduce the following passage from the affidavit of [Applicant 1 – name deleted] by way of example:

> [My father] told my sisters and me that we could use the name 'Wunnagnuthagnuthada' to identify ourselves as Nyiyaparli from Roy Hill. He taught us that we had the right to speak for Roy Hill.
>
> ...
>
> On many occasions when my siblings and I were children, our father would take us back to Marble Bar to visit our grandparents, and dad would always take us through Roy Hill to show us country on these trips. He took us camping there, and taught us about the country and stories associated with the country. ...
>
> My father showed me places at Roy Hill where his father was raised. At night, we would light a fire; he explained that we were doing this so that when any of the old spirits from the area came close, they could see us, and know who we were. He also taught me how to hunt, according to Nyiyaparli ways.
>
> A few weeks after my own son had gone through the law, we went kangaroo shooting together at Roy Hill. We did this in accordance with Nyiyaparli laws which I had been taught, pursuant to where we were entitled to hunt, and use the resources of, our own country. I wanted my son to know his traditional country, so that he could speak for it.
>
> ... I have taught my sons to hunt in the same way that I was taught by my own father. Through my dealings with members of the wider Western Desert people, I am aware that these hunting practices continue to be transmitted from generation to generation of the wider Western Desert people—at [1] and [3] to [6].

In my opinion, this kind of information invites an inference that the traditional law and custom of the Western Desert gives it members the right to hand down traditional knowledge of country between generations.

Outcome: established, prima facie.

Subsection 190B(7)
Traditional physical connection

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

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

As with subsections 190B(5) and (6), the term 'traditional' in subsection 190B(7) must also be interpreted in line with the High Court's decision in *Yorta Yorta*—see the approach of Dowsett J in *Gudjala 2007* at [89]. Unlike s. 190B(5), s. 190B(7) requires that the Registrar or her delegate be satisfied of a particular fact or facts. As YMAC points out in its submissions, this demands some evidentiary material—in support of this proposition see *Doepel* at [18]. Having said that, however, Mansfield J has made it clear that the focus at s. 190B(7) is 'a confined one':

> It is not the same focus as that of the Court when it comes to hear and determine the application for determination of native title rights and interests. The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area. It can be seen, as with s. 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration—*Doepel* at [18].

In my above reasons regarding s. 190B(5)(b), I explained that, in my view, the claimant's factual basis is sufficient to support the assertion that there exist traditional laws and customs acknowledged and observed by the claim group that give rise to the claimed native title rights and interests. At s. 190B(6), I formed the view that each of the specific rights and interests claimed could be established, prima facie. In my view, it follows that, if the applicant has provided evidentiary material showing that a claim group member has a physical connection with the application area in accordance with those laws and customs, the application will meet the requirements of s. 190B(7).

Schedule M of the Form 1 identifies [Applicant 1 – name deleted] as a claim group member who has a physical connection with the application area as the result of exercising his rights under the traditional laws and customs of the Western Desert. More detail in this regard is contained in his affidavit, which has been cited at length above. In it, [Applicant 1 – name deleted] describes having been taught to hunt on the claim area in accordance with Nyiyaparli/Western Desert law

and custom. He also deposes that that body of law and custom recognises his right to hunt and generally use the resources of the claim area. According to his affidavit, [Applicant 1 – name deleted] continues to exercise these rights by, among other things, teaching his sons to hunt on the claim area.

This kind of evidentiary material is sufficient, in my view, to satisfy me that [Applicant 1 – name deleted] has a traditional physical connection with at least a part of the land covered by the application.

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

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

Section 61A provides:

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

(2) If :

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

(b) either:

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

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

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

(3) If:

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

(b) either:

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

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

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

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

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

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

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

Reasons for s. 61A(1)

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

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

There have been no determinations of native title in relation to the application area.

Reasons for s. 61A(2)

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

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

Schedule B contains a series of general exclusions at paragraph 2(b) to (d), which are to the effect that the claim area does not include any lands or waters that are covered by a previous exclusive possession act.

Reasons for s. 61A(3)

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

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

Attachment E contains a general exclusion to the effect that the application does not claim native title rights and interests that confer exclusive possession, occupation, use and enjoyment in areas where a previous non-exclusive possession act has been 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 (3) subconditions, as set out in the reasons below.

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

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

Attachment E contains a statement to the effect that the application does not claim the ownership of petroleum, minerals or gas wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia. I have no information before me which might indicate that this statement is incorrect.

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

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

The application does not cover any offshore places.

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

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

Paragraph 2(e) of Schedule B excludes from the claim area '[a]ny area in relation to which native title rights and interests have otherwise been wholly extinguished'.

[End of reasons]

Attachment A
Summary of registration test result

Application name	**Wunna Nyiyaparli People**
NNTT file no.	**WC12/1**
Federal Court of Australia file no.	**WAD22/2012**
Date of registration test decision	**30 March 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: Met
	s. 190C(4)(a)		N/A
	s. 190C(4)(b)		Met

Section 190B conditions

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

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

Attachment B
Documents and information considered

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

In addition to the information contained in the Wunna Nyiyaparli People Form 1 and its attachments, I have had regard to the following:

- Affidavits provided directly to the Registrar by the applicant's representative on 9 February 2012. These are, namely, the affidavits of:
    - [Applicant 3 – name deleted] (affirmed on 17 January 2012);
    - [Applicant 2 – name deleted] (affirmed on 21 November 2011);
    - [Person 21 – name deleted] (affirmed on 8 November 2011);
    - [Person 22 – name deleted] (affirmed on 8 November 2011);
    - [Applicant 1 – name deleted] (affirmed on 23 January 2012);
    - [Solicitor 2 – name deleted] (affirmed on 7 February 2012); and
    - [Person 20 – name deleted] (affirmed on 12 December 2011).
- The affidavit of [Claim group member 1 – name deleted] (affirmed on 22 February 2012), which was provided to the Registrar by the applicant's representative on 24 February 2012.
- Submissions made by Yamatji Marlpa Aboriginal Corporation (YMAC) on behalf of the claim group for the Nyiyaparli claimant application (WAD6280/1998; WC05/6) (dated 27 February 2012). These submissions were provided to the Registrar on 27 February 2012 and were accompanied by the following documents:
    - Signed statement of [Solicitor 2 – name deleted] (dated 23 February 2012).
    - Affidavit of [Person 19 – name deleted] (affirmed on 18 March 2010).
    - Affidavit of [Person 16 – name deleted] (affirmed on 18 March 2010).
    - Three (3) affidavits of [Applicant 3 – name deleted] (two (2) affirmed on 9 June 2010; one (1) affirmed on 23 August 2010).
    - Three (3) affidavits of [Applicant 4 – name deleted] (two (2) affirmed on 11 June 2010; one (1) affirmed on 26 August 2010).
    - Article by [Anthropologist 1 – name deleted], titled *The Coffin Family of Redcliffs Station, Pilbara, Western Australia* (2005) <[reference deletes]>.
    - Transcript of an interview conducted with [Ancestor 1 – name deleted], titled *Roy Hill Station 1903-1921: Red Cliff Station 1920's View of Aboriginal and White Society* (conducted by [Person 23 – name deleted], J.S. Battye Library Oral History Programme, July 1978).

- Signed statements of:
    - [Person 16 – name deleted] and [Person 17 – name deleted] (each respectively signed on 12 March 2012); and
    - [Person 19 – name deleted] and [Person 18 – name deleted] (each respectively signed on 13 March 2012).

  These were provided to the Registrar by YMAC on 13 March 2012.
- Fax signed by [Applicant 1 – name deleted], sent to the Case Manager with carriage of this matter on 19 March 2012 for consideration by the Registrar.
- Submissions prepared by the applicant's representative, [Solicitor 2 – name deleted] (dated 21 March 2012). These were provided to the Registrar on 21 March 2012 and were accompanied by the following documents:
    - Affidavit of [Claim group member 6 – name deleted] (affirmed on 10 March 2012).
    - Affidavit of [Applicant 2 – name deleted] (affirmed on 19 March 2012).
    - Affidavit of [Claim group member 3 – name deleted] (affirmed on 19 March 2012).
    - Affidavit of [Claim group member 7 – name deleted] (affirmed on 10 March 2012).
    - Affidavit of [Solicitor 2 – name deleted] (affirmed on 20 March 2012).
    - Affidavit of [Anthropologist 1 – name deleted] (affirmed on 20 March 2012).
    - Wiradjuri-Warrabinga (United Clans of North East Wiradjuri) (NSD457/2010; NC10/1), reconsideration decision dated 6 October 2010.
- Geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services, dated 2 February 2012 (GeoTrack: 2012/0189).
- Results of my own searches against the Register of Native Title Claims and the Tribunal's mapping database.

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